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ZIMASCO (PVT) LTD v MARIKANO 2014 (1) ZLR 1 (S)

Citation	2014 (1) ZLR 1 (S)
Case No	Judgment No. S-06-14
Court	Supreme Court, Harare
Judge	Garwe JA, Gowora JA and Omerjee AJA
Heard	30 October, 2013; *CAV*
Judgment	13 January 2014
Counsel	*AP de Bourbon SC*, for the appellant *S J Chihambakwe*, with him Ms *Nemaramba*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Court** – *High Court – jurisdiction – labour matter – review of – High Court generally having no jurisdiction*

Employment – Labour Court – jurisdiction – review – court having same review powers as High Court in respect of labour matters

D *Employment – termination – grounds – excessive sick leave taken – duty of employer to notify employee of intention to terminate employment – where employment contract contains specific procedures to terminate, such procedures must be followed – written contract embodying terms more favourable to employee than those set out in s 14(4) of Labour Act [Chapter 28:01] – more favourable terms to apply*

E *Practice and procedure – heads of argument – further heads – matter reserved for judgment – party entitled to apply to file further heads*

Headnote

For the purposes of s 89 of the Labour Act [*Chapter 28:01*], the Labour Court shall exercise the same powers of review as does the High Court F on other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. The powers of review exercisable by the High Court are to be found in ss 26 and 27 of the High Court Act [*Chapter 7:06*], but this does not mean that the High Court has review G powers in respect of labour matters. Having regard to r 256 of the High Court Rules 1971 (RGN 1047 of 1971), for a review to be the subject of a hearing, it must be brought by way of application. An application for review is not the type of application contemplated in s 89(1)(a) of the Labour Act [*Chapter 28:01*].

Once a judgment has been reserved, a party has no right to file further heads H of argument. It does, however, have the right to apply to do so. In such

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event the judicial officer must hear both sides and thereafter make a A decision whether or not to allow such further filing. Where an issue of law is involved, particularly one of jurisdiction, a court would be slow to refuse such further argument unless satisfied that it would not take the

matter any further or amounts to an abuse of process. A question of law can be raised at any time, even for the first time on appeal, as long B as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. The rationale for allowing issues of law to be raised at any time is to enable a court to have all the information, even at a very late stage, so that it is enabled to make a proper decision. If a court has no jurisdiction that would be the end of the matter and any determination made thereafter would be null and void. C

Where employment is terminated on the grounds of excessive sick leave in terms of s 14(4) of the Labour Act, the employer would be obliged, at the very least, to advise the employee of the fact that he has taken the sick leave contemplated in s 14(4) and that for that reason it is intended D to terminate his contract of employment in terms of that section on a date specified in such notice unless the employee returns to work before the expiration of the specified period. It would not be proper for an employer to invoke the provisions of s 14(4) and, without notice to the employee, proceed to terminate his contract of employment. The *audi alteram* principle would still need to be respected and failure to do so would render any such termination null and void. E

Where the contract of employment provides more favourable conditions than those in s 14, those conditions will take precedence over the periods provided for in s 14(4) and will need to be complied with before any termination is contemplated by the employer. F

Cases cited

Ahmid v *Mfg Industries (Pvt) Ltd* S-254-96

DHL Intl (Pvt) Ltd v Madzikande 2010 (1) ZLR 201 (H)

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

Mutukwa v National Diary Co-op Ltd 1996 (1) ZLR 348 (S)

Zimtrade v Makaya 2005 (1) ZLR 427 (H) G

Legislation considered

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

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

Labour Act [*Chapter 28:01*], ss 14(1), 14(4) and 89(1) H

Garwe JA

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

Case information

A P de Bourbon SC, for the appellant

S J Chihambakwe, with him Ms *Nemaramba,* for the respondent

Judgment

B**Garwe JA**: This is an appeal against the judgment of the Labour Court dismissing an application by the appellant to file supplementary heads of argument and setting aside the decision of the appellant to terminate the respondent's contract of employment with itself.

The facts of this case are largely common cause and are these. The respondent C was employed by the appellant as a Medical Officer in 1995. He rose through the ranks to become the Health Services Manager. In terms of his letter of appointment, the appellant's policies and procedures were incorporated into his employment contract. On a date that is unclear on the papers, but between February and March 2009, the respondent was involved in a serious road accident, whilst about the appellant's business. The respondent suffered D serious injuries to his spine as a result of which he was unable to attend to his official duties from 11 March 2009. The respondent was allowed to go on sick leave on full pay for a period of 90 days. At the expiration of that period, the respondent was still unable to resume his duties and took more sick leave. On 7 September 2009, the appellant's services director, a E Mr Zvaipa, wrote to the respondent directing him to furnish a copy of his

doctor's opinion, failure of which his remuneration and other benefits were to be suspended. Following further correspondence exchanged between the two, the respondent made it clear that he remained in the employ of the appellant until such time as his contract was lawfully terminated. On 18 September 2009 the appellant then wrote to the respondent advising that since he had F exceeded the maximum sick leave permissible in a single year, his contract of employment was being terminated forthwith in terms of s 14(4) of the Labour Act [*Chapter 28:01*] ("the Act").

Following this development, the respondent then filed an application for review with the Labour Court on 9 October 2009. In the application the G respondent alleged that the termination was unlawful as the appellant had not followed the procedural steps required at law or in terms of his contract of employment in terminating his employment on medical grounds. It appears that on the same date the respondent filed what purported to be a notice of appeal against the decision to dismiss him. It is apparent, however, that in both cases the respondent sought an order setting aside the decision to H terminate his contract of employment.

Garwe JA

The Labour Court treated the matter as an application for review. After A hearing submissions from both parties, the court then reserved its judgment on 15 March 2010. On 15 November 2010, eight months later, the appellant then filed an application for leave to file supplementary heads of argument. The supplementary heads of argument sought to raise the issue whether or not the Labour Court had jurisdiction to entertain an application for review B in the first instance. The application was opposed by way of a letter to the Registrar. No formal opposing papers were filed. The Labour Court dealt with the request as part of its judgment. The court was of the view that there should be finality in litigation and that to allow a party to file heads of argument after judgment had been reserved would defeat this principle. The court therefore dismissed the application to file supplementary heads C of argument. The court further reached the conclusion that an employer does not have the authority to summarily terminate an employee's contract of employment in terms of s 14(4) of the Act and that, regard being had to the purpose of the Act, namely the promotion of fair labour standards, the employer was under obligation to conform to the requirements of substantive and procedural fairness and that failure to give notice to an employee of an D intention to terminate a contract of employment in terms of s 14(4) of the Act is fatally irregular. The court further found that since the respondent's contract of employment embodied other terms applicable in the event of sickness, the appellant should have fully related to those terms and given the respondent the option either of early retirement or being medical boarded. E The court concluded that as this had not been done, there had been procedural irregularities and consequently set aside the decision to terminate the contract of employment of the respondent. It is against that order that the appellant has appealed to this court.

Both parties to this appeal are agreed that the appeal raises three issues for determination. These are: F

(a) whether or not the Labour Court had jurisdiction to entertain the respondent's application for review at first instance;

(b) whether the Labour Court erred as a matter of law in declining to consider the issue of jurisdiction raised in the application to allow the filing of supplementary heads of argument; G

(c) whether the Labour Court was correct in holding, as it did, that the right to termination in terms of s 14(4) was subject to procedure and that any irregularity in those procedures entitled the Labour Court to set aside the termination of the contract of employment; in particular whether the appellant was obliged to give the respondent the right to H

Garwe JA

A be heard before his contract was terminated and, secondly, whether the appellant was obliged, in terms of the contract of employment between the respondent and itself, to comply with medical boarding procedures or the availing of an option of early retirement before the contract of employment could be terminated.

B **The question of jurisdiction**

The appellant's submission on the question of jurisdiction is this. The Labour Court does not have unlimited jurisdiction over all labour matters and such jurisdiction it may have has been specifically provided for by law. There is no general right of application to the Labour Court because s 89(1)(a) of the C Act restricts the matter to "applications … in terms of this Act". In terms of the Act, disputes are required to be dealt with by a labour officer. This is the first instance when a hearing takes place once a dispute has been referred to such officer. It is only when the labour officer is unable to settle the dispute properly referred to him, or where he issues a certificate of no settlement and fails to refer the matter to compulsory arbitration or where the labour D officer refuses to issue a certificate of no settlement, that a party can apply to the Labour Court in terms of s 93(7) of the Act. Only in this way can a dispute such as the present come before the Labour Court – this being one of the instances of an application contemplated in s 89(1)(a) of the Act. The intention was never to give the Labour Court the power of review at first instance but rather to place it on the same footing as the Supreme Court. E The legislature has been very specific as to the nature of applications to be handled by the Labour Court.

The appellant further argues that the power of review in terms of s 89(1)(d) is confined to those instances where the High Court has the power of review in labour matters, and not to matters generally. If indeed the High Court has F no review jurisdiction in labour matters, then s 89(1)(d) confers no power of review on the Labour Court.

The appellant further takes the point that the legislature has established an elaborate chain of investigation and conciliation. The labour officer is the court of first instance and it is to him that the respondent should have G directed his complain.

For the above reasons the appellant submits that the Labour Court did not have jurisdiction to entertain the application for review at first instance.

The respondent, on the other hand, argues that the Labour Court has the same powers of review in respect of labour matters as would be exercisable H by the High Court in other matters.

2014 (1) ZLR p6

Garwe JA

For reasons that follow, I am not persuaded that the appellant is correct in A its interpretation of s 89 of the Act.

Section 89 of the Act provides, in relevant part, 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; and
>
> (b) …
>
> (c) …
>
> (d) …
>
> (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters." C

The powers of review exercisable by the High Court are to be found in ss 26 and 27 of the High Court Act [*Chapter 7:06*]. Those two sections provide:

> "26 Power to review proceedings and decisions
>
> Subject to this Act and any other law, the High Court shall have power, jurisdiction D and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe.
>
> 27 Grounds for review
>
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decisions may be brought on review before the High Court shall be –
>
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned; E
>
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned , as the case may be;
>
> (c) gross irregularity in the proceedings or the decision.
>
> (2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities." F

The above provisions are, in my view, clear and unambiguous. In respect of labour matters, the Labour Court shall exercise the same powers of review as does the High Court in other matters. The jurisdiction to exercise these powers of review is in addition, and not subject, to the power the court has to hear and determine applications in terms of the Act. In order for a review G to be the subject of a hearing, such review must be brought by way of application – see Order 33 r 256 of the High Court of Zimbabwe Rules 1971. Clearly an application for review is not the type of application contemplated in s 89(1)(a) of the Act.

The suggestion by Mr *de Bourbon* that the Labour Court has been given the same power of review as would be exercisable by the High Court in respect H

Garwe JA

A of labour matters is, in my considered view, incorrect and inconsistent with the provisions of the Act. I say this for two reasons. Firstly, the Act is clear that no court, other than the Labour Court, shall have jurisdiction in the first instance, to hear and determine any application, appeal or matter referred to in s 89(1) of the Act – see s 89(6) of the Act. In various decisions, the High Court has interpreted this provision to mean that the High Court has B no jurisdiction in respect of the matters referred to in s 89(1) of the Act. See, for instance, *Zimtrade* v *Makaya* 2005 (1) ZLR 427 (H) at 429 and *DHL International (Pvt) Ltd* v *Madzikande* 2010 (1) ZLR 201 (H) at 203-204. In the circumstances, the suggestion that the High Court would have any review powers in respect of labour matters generally would be untenable. C Secondly, it is clear that the interpretation given relies on a superficial reading of the wording of s 89(1)(d). The section should be understood to mean "the same powers of review in respect of labour matters as would be exercisable by the High Court" or alternatively "the same powers of review, as would be exercisable by the High Court, in respect of labour matters". Any other reading of the paragraph would clearly result in an absurdity.

D The suggestion that the powers of review enjoyed by the Labour Court are similar to those of the Supreme Court is equally incorrect. Section 25 of the Supreme Court Act [*Chapter 7:13*] provides:

> "25 Review powers
>
> (1) Subject to this section, the Supreme Court and every judge of the Supreme E 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 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 F decision is, not the subject of an appeal or application to the Supreme Court.
>
> (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court 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 G or remitted to the High Court for determination."

It is clear from the above section that whilst the Supreme Court may exercise the same review jurisdiction, power and authority as the High Court, no person has the right to institute any review in the first instance before the Supreme Court. In other words, the Supreme Court has the power of H review over matters coming before it for adjudication by way of appeal

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Garwe JA

or whenever it comes to the notice of the court that an irregularity has occurred A in any proceedings or in the making of a decision and it is felt that such an irregularity should not be allowed to stand.

The fact that provision has been made for disputes to be first referred to a labour officer is, in my view, irrelevant. Review proceedings are concerned with the manner in which a decision is taken and not its merits. If, for example, B a disciplinary authority had no jurisdiction to hear a particular matter, or was biased or its decision grossly unreasonable, the person aggrieved is empowered to approach the Labour Court and apply for the review of the proceedings. The fact that, instead of seeking a review, one can approach a labour officer in terms of s 93 of the Act does not and cannot

affect the review power of the Labour Court provided the requirements for such review are C met. A decision by a magistrate court can be the subject of not only review proceedings before the High Court but also appeal proceedings in the normal way. The fact that there is an elaborate appeal procedure would in no way suggest that the High Court has no review jurisdiction in the first instance.

In my view, the Labour Court does have review jurisdiction to deal, in the first instance, with matters involving issues of labour. D

The application to file supplementary heads of argument on the question of jurisdiction

It is common cause that after hearing submissions from the parties, the court *a quo* reserved judgment in this matter. This was on 15 March 2010. E Exactly eight months later, i.e. on 15 November 2010, the appellant then filed an application to file supplementary heads of argument in which the main issue raised was whether the Labour Court had jurisdiction to deal with the application for review. It is also common cause that the application was not set down for argument and that on 7 March 2011 the respondent's F legal practitioners wrote to the Registrar of the Labour Court opposing the application on the basis, firstly, that it was too late for the appellant to seek to file supplementary heads at a time when judgment was awaited and, secondly, that there was need for finality in litigation. The court *a quo* then handed down its judgment on 21 March 2011. In dismissing the application to file further heads of argument appellant, the court *a quo* remarked, G

> "In my view this belated application should be dismissed for the simple reason that labour disputes should be finalised expeditiously and to allow a party to file further pleadings after the reservation of judgment would defeat this principle. There must be finality to litigation …"

In his submissions, Mr *de Bourbon* accepted that, in general, once judgment has been reserved, the parties have no right to file any further arguments. H

Garwe JA

A However, the parties have the right to apply to file further heads of argument and where the argument relates to a legal matter, especially one of jurisdiction, a court should be slow to refuse to allow such further argument unless to do so would clearly interfere with the workings of the judicial officer concerned. Whilst the application was filed eight months after judgment had been B reserved, it was made four months before judgment was handed down and clearly the matter had not been handled with any degree of urgency.

In his submissions, the respondent argued that the appellant should have diligently submitted any further argument within a reasonable time and not eight months after judgment had been reserved.

I am inclined to agree with Mr *de Bourbon* that, in general, once judgment C has been reserved, the parties have no right to file further heads of argument. However, a party has the right to apply to file such heads of argument. When that happens, as it did in this case, it is incumbent upon the judicial officer seized with the matter to hear both sides and thereafter to make a decision on whether or not to allow such filing. In this case, this was not done and it D appears even the merits of the application were not considered. The court *a quo* merely considered the extent of the delay and the need for finality in litigation as sufficient grounds for the dismissal of the application. I have no doubt in my mind that in doing so the court *a quo* erred. As Mr *de Bourbon* correctly pointed out, where an issue of law, particularly one of jurisdiction, is raised, a court should be slow to refuse to allow such further argument E unless the court is satisfied that such further argument would not take the matter any further or that it amounts to an abuse of court process.

It is settled law that a question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. See *Ahmid* v *Manufacturing Industries (Pvt) Ltd* S-254-96 at p 17 F and *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157A.

Once the application to file further heads of argument was filed, the court *a quo* should have set the matter down and thereafter made a proper determination of the request. The court did not do so and proceeded to consider its judgment without so much as considering whether a valid point of law had been raised. G Only in its judgment did it then give its reason for ignoring the application, namely that it was belated and that there was need for finality in litigation. In my view the court erred in its approach to the application.

The rationale for allowing issues of law to be raised at any time is to enable a court to have all the information, even at a very late stage, so that it is enabled H to make a proper decision. The issue raised was a serious one. If a court has

Garwe JA

no jurisdiction that would be the end of the matter and any determination A made thereafter would be null and void.

That the court *a quo* should have allowed the filing of further heads of argument is buttressed by what has happened on appeal before this court. The issue of jurisdiction has been raised and argued by both parties, notwithstanding that the court *a quo* had dismissed the request to file supplementary heads on B this aspect. Indeed this is the first issue that this court has had to determine in this appeal.

On the facts, therefore, I consider that personal inconvenience to the court *a quo* was not sufficient ground to refuse to even hear the application. This is a case where the court *a quo* should have allowed the appellant to file supplementary heads of argument and allow the other side the opportunity C to respond before coming to a decision on the matter.

Whether the right to terminate in terms of s 14(4) of the Labour Act was subject to procedures

Two issues arise in this regard. These are, firstly, whether a termination in D terms of s 14(4) is subject to substantive and procedural fairness and, secondly, whether on the facts of this case the appellant complied with the provisions of s 14(1) of the Act and, if so, whether its invocation of the provisions of s 14(4) of the Act was in the circumstances proper.

Section 14 of the Act provides:

> "14 Sick leave E
>
> (1) Unless more favourable conditions have been provided for in any employment contract or in any enactment, sick leave shall be granted in terms of this section to an employee who is prevented from attending his duties because he is ill or injured or undergoes medical treatment which was not occasioned by his failure to take reasonable precautions.
>
> (2) During any one-year period of service of an employee an employer shall, F at the request of the employee supported by a certificate signed by a registered medical practitioner, grant up to ninety days' sick leave on full pay.
>
> (3) If, during any one-year period of service of an employee, the employee has used up the maximum period of sick leave on full pay, an employer shall, at the request of the employee supported by a certificate signed by a registered G medical practitioner, grant a further period of up to ninety days' sick leave on half pay where, in the opinion of the registered medical practitioner signing the certificate, it is probable that the employee will be able to resume duty after such further period of sick leave.
>
> (4) If, during any one-year period of service the period or aggregate periods of sick leave exceed –
>
> (a) ninety days' sick leave on full pay; or H

Garwe JA

> A (b) subject to subsection (3), one hundred and eighty days' sick leave on full and half pay;
>
> the employer may terminate the employment of the employee concerned.
>
> (5) An employee who so wishes may be granted accrued vacation leave instead of sick leave on half pay or without pay."

B It is the appellant's contention that s 14(4) gives the employer an absolute right to elect to terminate the employment of the employee if (a) the employee has taken more than 90 days' sick leave on full pay in any one year or (b) the employee has taken more than 180 days' sick leave on full pay and half pay in any one year period. The appellant further argues that the right to terminate is not subject to compliance with any particular procedures.

C The respondent, on the other hand, argues that s 14(4) of the Act does not give an employer an unfettered right to unilaterally and summarily dismiss an employee and that fair labour standards and the *audi alteram partem* rule still apply in this situation.

In determining this issue, the court *a quo* relied on the case of D*Mutukwa* v *National Diary Co-operative Ltd*1996 (1) ZLR 348 (S) which held, *inter alia*, that an employer was entitled to terminate the contract of employment on notice to the employee. The court was of the view that this principle was applicable to this case.

The reliance on the above case was clearly erroneous. I say so because s 14(b) E of the then Labour Relations Act [*Chapter 28:01*] provided that, unless more favourable conditions were provided in the contract, where an employee was unable for a period exceeding one month to fulfil the conditions of his employment, the employer was entitled to terminate the contract on due notice, in which event the employee was to be entitled to all benefits due to him up to the date of such termination. The requirement to give notice F was in terms of s 14(b) and was mandatory. It is common cause that s 14(b) was repealed by Act 17 of 2002 which substituted the section currently in existence and which is the subject of this appeal. The current provision makes no provision for the giving of notice. Considering the circumstances as a whole, I would agree with Mr *de Bourbon* that there was a clear legislative shift and change of policy regarding the termination of employment on the G grounds of excessive sick leave. Section 14(4) has no express conditions attached to it except the requirement as to the amount of sick leave which an employee can take in any one year before the right to terminate can be exercised by an employer.

However, since the decision to terminate an employment contract has far H reaching consequences, one should assume that before such a decision is taken

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Garwe JA

the employer would be obliged, at the very least, to advise the employee of A the fact that he has taken the sick leave contemplated in s 14(4) and that for that reason it is intended to terminate his contract of employment in terms of that section on a date specified in such notice, unless the employee returns to work before the expiration of the specified period. In my view, it would not be proper for an employer to invoke the provisions of s 14(4) of the B Act and without notice to the employee, proceed to terminate his contract of employment. In short, the *audi alteram* principle would still need to be respected and failure to do so would render any such termination null and void.

In the present case, however, it is apparent that there was correspondence between the appellant and the respondent in which the appellant made it clear C that it would invoke the provisions of s 14(4) of the Act. The respondent challenged the appellant's right to terminate his employment in terms of s 14(4). The appellant then terminated the employment with effect from 18 September 2009.

I turn to deal with s 14(1) of the Act. In an ordinary employment contract, the termination of employment, effected on 18 September 2009, would D have been the end of the matter. However s 14(1) is qualified by the words:

> "Unless more favourable conditions have been provided for in an employment contract… sick leave shall be granted in terms of this section …"

Clearly the intention on the part of the legislature was to give the employer and the employee the autonomy to agree on better terms and conditions than E are provided for in s 14.

In the present case it is common cause that the appellant's policy and procedure document was incorporated into the contract of employment of the respondent. The relevant portion of the Group Policy and Procedures, Referenced P+P No. 38, provides as follows: F

> "2 SICK LEAVE
>
> 2.1 All Employees:
>
> 2.1.1. 90 working days full pay in any one calendar year.
>
> 2.1.2. 90 working days half pay in any one calendar year.
>
> 2.1.3. During this period of half pay, full employee and Company contributions G to the Pension Schemes must be continued.

ZIMASCO GROUP POLICY AND PROCEDURES	DATE: 17.03.03

SUB: LEAVE WITHOUT PAY/CASUAL/	P&P NO.38 H

Garwe JA

A COMPASSIONATE/SICK/ACCIDENT	PAGE 2 OF 5
DISTRIBUTION: "E"	SUPERSEDES; 27.06.95

2.1.4 If, during the absence of an employee on sick leave at half pay, it is determined that he/she should be retired on the grounds of being B permanently disabled, from illness, immediate steps must be taken to secure early retirement or to have the employee medically boarded.

2.1.5. …

2.1.6. …

2.1.7. …

C 2.1.8. …

ZIMASCO GROUP POLICY AND PROCEDURES	DATE: 17.03.03
SUB: LEAVE WITHOUT PAY/CASUAL/	P&P NO.38
COMPASSIONATE/SICK/ACCIDENT	PAGE 3 OF 5
D DISTRIBUTION: "E"	SUPERSEDES; 27.06.95

3. SICK LEAVE NECESSITATED BY INJURY

3.1 Arising from Accident at Work

3.1.1. Those employees covered by workers Compensation Insurance

Full pay for period of absence, recovered from Workers E Compensation Department.

3.1.2. Those employees NOT covered by Workers Compensation Insurance

Full pay for the period of absence, provided that the cause of the accident which led to the injury is not attributable to the negligence of the employee.

F 3.2 Arising from Accident

The conditions laid down in sub-paragraph headed "sick leave, shall apply."

The words "unless more favourable conditions have been provided for in a contract of employment" are wide and unambiguous. In other words, where G more favourable conditions have been agreed to, those conditions will take precedence over the periods provided for in s 14(4) and will need to be complied with before any termination is contemplated by the employer.

Paragraph 2.1.4 in particular provides that if it is determined that an employee should be retired on the grounds of being permanently disabled, from H illness, immediate steps must be taken to secure early retirement or to have

Garwe JA

the employee medically boarded. This provision also applies to sick leave A necessitated by injury arising from an accident.

It is common cause in this case that the provisions of para 2.1.4. of the Group Policy and Procedures were not complied with. In the circumstances the appellant could not proceed as if that provision did not exist. It was a provision that the appellant itself had inserted into the Group Policy and Procedures B and which had been incorporated into the contract of employment. That provision certainly provided more favourable terms than would normally be the case. The appellant was therefore under obligation to look at the question of early retirement or medical boarding.

In the circumstances the decision by the appellant to terminate the appellant's contract of employment without reference to its own policy and procedures was irregular. C

The finding that there was an irregularity in the termination of the respondent's contract of employment cannot therefore be impugned.

In the result, the following order is made:

(1) The appeal is allowed only to the extent that para 3 of the order of the D court *a quo* dismissing the application to file supplementary heads of argument is deleted.

(2) The appellant shall pay the costs of appeal.

GOWORA JA and OMERJEE AJA concurred. E

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/S v ZUWA 2014 (1) ZLR 15 (H)

S v ZUWA 2014 (1) ZLR 15 (H)

Citation	2014 (1) ZLR 15 (H)
Case No	Judgment No. HH-10-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	15 January 2014
Judgment	15 January 2014
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C *Criminal procedure (sentence) – statutory offences – making false statement in affidavit – statute providing for fine or imprisonment or both – misdirection to impose sentence of imprisonment without considering fine first – trivial lie which was irrelevant to matter in respect of which affidavit made – imprisonment inappropriate*

Headnote

D The accused, a 38 year old single mother of five, was charged with lying under oath in contravention of the Justices of the Peace and Commissioners of Oath Act [*Chapter 7:09*]. The false statement was contained in an affidavit she had filed in support of an application for increased maintenance from E the father of one of her children. She said the increase was necessary because of the fees at the school to which she wanted to send the child, and that she was sending the child there because two of her other children were going to a comparable private school, which she named. In fact, they were attending a different private school.

Section 10(1) of the Act provides for a sentence of a fine not exceeding level 7, F or imprisonment for a period of up to two years, or both. The magistrate sentenced the accused to 15 months' imprisonment, of which six months were suspended for five years on condition of future good behaviour.

Held, that where a statute provides for a penalty of a fine or imprisonment, it is a misdirection on the part of the sentencing court to impose imprisonment G without giving serious consideration to a fine, particularly on a first offender. Other than saying that a fine would trivialise the offence – an offence which was trivial anyway – the trial court did not explain why it was departing from the sentencing policy propounded in numerous authorities. Even if one has regard to the circumstances of the offence, there is no way the matter qualified for the imposition of imprisonment. H The untruth about what school the other children were attending would

---

not have influenced the maintenance court at all, because consideration A of the application for variation hinged on the changed circumstances of the first child and the ability of the father to pay. A small fine or a wholly suspended sentence would have met the justice of the case.

Case referred to B

S v *Chawanda* 1996 (2) ZLR 8 (H)

Judgment

Mathonsi J: The accused person is a 38-year-old single mother of five who was arraigned before a magistrate at Harare facing two charges. On the first count, she was charged with forgery, in contravention of s 137 of C the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], it being alleged that in November 2013 at Harare Civil Court, she had forged a ZETSS application form. On the second count, she was charged with lying under oath in contravention of the Justices of the Peace and Commissioners of Oath Act [*Chapter 7:09*], it being alleged that on 29 October 2009 she had made a statement under oath which was false.

Following a full trial, the accused was, on 12 December 2013 found not guilty D and acquitted on the first count. She was, however, convicted on the second count for lying under oath and sentenced to 15 months' imprisonment of which six months were suspended for five years on condition of future good behaviour. This left her with an effective term of nine months.

Briefly, the facts are that the accused filed an application for variation of a E maintenance order in the maintenance court against one Lincoln Tafadzwa Ushamba, the father of one of her daughters by the name K, seeking an increase of the maintenance because the child, who previously was attending kindergarten at G School, Harare was, with effect from January 2014 due to commence primary education at H School. The school fees at H would be F much higher than at G and as such this constituted a change of circumstances warranting an upward variation of maintenance.

The application must have been opposed necessitating the filing, by the accused person, of an answering affidavit. In advancing her case to justify why it was necessary for K to attend H School, the accused stated in the answering affidavit that it was the school of her choice because her two

other G daughters, Z and C, were going to Gateway School which was comparable to H. She wanted K to enjoy comparable benefits at H.

It turned out, following spirited investigations by Ushamba, that the accused person did not have children at Gateway. She had lied. Instead, her two other daughters were going to B school. It is this little infraction which got the H

Mathonsi J

A accused person into trouble. As I have already stated, she was convicted and sentenced aforesaid.

Section 10(1) of the Justices of the Peace and Commissioners of Oath [*Chapter 7:09*] provides for a sentence of a fine not exceeding level 7 or imprisonment for a period of up to two years or both. In arriving at the effective sentence B of imprisonment of none months the trial magistrate reasoned thus:

> "Accused is a first offender to whom there is an emphatic general policy to the effect that wherever possible first offenders should not be sent to prison for fear of being contaminated by hardened and determined criminals. When one errs for the first time the chances of accused being reformed are higher than those of a readvist (*sic*).
>
> C "Imprisonment has various deleterious effects ranging from regulation of one's personal life to personal liberty.
>
> Accused is a female offender to whom imprisonment will bear more heavily than a male counterpart. Readivism (*sic)* is invariably, men. Accused is a family person to whom imprisonment will deprive her children of a breadwinner. However, this offence is on the increase and there is need for personal general deference D (*sic*). Accused falsely swore or took oath falsely by making false averment under oath and misled not only the commissioner of oaths but the maintenance court, in a bid to get increased varied quantum of maintenance to be paid to her child. This is a serious form of criminal behaviour as her lies affected the rights and obligation(s) of Lincoln Ushamba. The court cannot be made to make a false finding based on false facts. The filing of this false affidavit constitutes contempt of court. She was lucky not to be charged with contempt of court.
>
> E A fine will trivialise this reprehensible offence. A moderate term of imprisonment is called for."

Having said that, the magistrate went on to impose, not a moderate term of imprisonment, but an effective nine months' imprisonment.

It is clear that the trial magistrate paid lip service to the mitigating factors in F this matter while lending overdue weight on the aggravating ones. As I have said, the accused person is a 38 year old single mother with five children to fend for. She is a female first offender and, although the magistrate mentioned that such offenders should be kept out of prison, he went on to do the opposite without showing why he had to depart from the sentencing policy of keeping first offenders out of prison.

G In my view, it is insufficient to say that a female first offender should be imprisoned merely because the offence of lying under oath is on the increase, which itself is doubtful. It is also not clear why the court took the view that a fine or community service would trivialise the offence. Not only is that reasoning flawed in the extreme, it being unsupported by the facts, it also H betrays a closed mind. It is a misdirection.

Mathonsi J

Where a statute provides for a penalty of a fine or imprisonment, it is a A misdirection on the part of the sentencing court to impose imprisonment without giving serious consideration to a fine, particularly on a first offender: *S* v *Chawanda* 1996 (2) ZLR 8 (H) at 10C-G where Malaba J (as he then was) said:

> "The authority for the proposition that where a statute provided for a penalty of B a fine or imprisonment, it is a misdirection on the part of the *sentencing* court to impose imprisonment without giving serious consideration to the imposition of a fine, particularly on a first offender, is found in the case of *S* v *Muhenyere* HB-31-92 cited by the accused's legal practitioner. At p 3 of the judgement in *Muhenyere's* case *supra* Blackie J, with the concurrence of Cheda J, quoted with approval from the decisions in the cases of *S* v *Rutsvara* S-2-89 and *S* v *van Jaarsveld* HB-110-90. The learned judge said: C
>
> > 'It is trite that where the statute lays down a monetary penalty as well as a period of imprisonment the court must give consideration to the imposition of a fine. It would normally reserve

> imprisonment for bad cases … In statutory offences permitting the imposition of a fine, the normal sentence for a first offender is a fine unless the offence is particularly serious or prevalent or there would be serious consequences if the deterrent of imprisonment is not used.' " D

Other than saying that a fine would trivialise the offence, an offence, which in my view is trivial anyway, the court did not explain why it was departing from the sentencing policy propounded in the foregoing authorities. Even if one has regards to the circumstances of the offence, there is no way the matter qualifies for the imposition of imprisonment. E

The accused lied that her two daughters, Z & C, who were irrelevant in the application for a variation of the maintenance order given in favour of K, were attending school at Gateway when in fact they were at B. So what? This would not have swayed the maintenance court at all because consideration of an application for variation hinged on the changed circumstances of K and the ability of K's parents to pay. It is such an insignificant lie which may F not have affected the outcome.

Taking into account the totality of all the circumstances of this matter, a small fine or a wholly suspended sentence would have met the justice of the case. The accused has been in prison since 12 December 2013 and it is too late to undo that. In order to achieve closure, I am of the view that she G has suffered more than enough.

In the result, it is ordered that:

1. The conviction of the accused person is hereby confirmed.
2. The sentence is hereby set aside and in its place is substituted the following sentence: H

2014 (1) ZLR p19

Mathonsi J

> A "The accused is sentenced to 60 days' imprisonment of which 45 days' imprisonment is suspended for three years on condition the accused does not, during that period commit an offence involving dishonesty for which she is sentenced to imprisonment without the option of a fine."

3. As the accused has served more than the effective 15 days, she is entitled B to her immediate release.

Chatukuta J agrees.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/S v MAKONI 2014 (1) ZLR 20 (H)

S v MAKONI 2014 (1) ZLR 20 (H)

2014 (1) ZLR p20

Citation	2014 (1) ZLR 20 (H)
Case No	Judgment No. HH-11-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	15 January 2014
Judgment	15 January 2014
Counsel	Details not supplied
Case Type	Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure (sentence) – statutory offences – offence for which C mandatory minimum sentence provided unless special circumstances shown – need for court to make specific enquiry into whether such circumstances exist

Headnote

In our jurisdiction, the legislature regularly prescribes minimum sentences D for particular offences where it is of the view that deterrent punishment is called for because of the prevalence of the offence or its effect on society. By doing so, the legislature would be interfering with the normal sentencing discretion of the courts. In light of that, in order to balance the harshness of the sentence, the legislature usually adds a rider that the mandatory sentence does not have to be imposed where there are E "special reasons" or "special circumstances" which justify a lesser sentence. It is therefore imperative that magistrates understand clearly what special circumstances are, in respect of mandatory sentences, and that they also appreciate how they affect our sentencing jurisprudence. This is because they are enjoined to explain to unrepresented accused persons what special circumstances are, and that if the accused person is F able to show their existence, they will avoid the rigours of a mandatory minimum sentence. It would be disingenuous for the magistrate to say he inquired into special circumstances by merely asking the accused why he committed the offence. The court would not be entitled to impute the non-existence of special circumstances from the answer given to a question which was not inquiring into special circumstances. G

Case cited

S v *Rama* HB-52-11 H

2014 (1) ZLR p21

Mathonsi J

Legislation considered A

Road Traffic Act [*Chapter 13:11*], ss 6 & 88A

Judgment

Mathonsi J: The accused person was arraigned before a magistrate at Chitungwiza on 27 September 2013 on a charge of driving without a valid B driver's licence in contravention of s 6(1)(a) of the Road Traffic Act [*Chapter 13:11*] ("the Act"). He was convicted on his own plea of guilty and sentenced to 24 months' imprisonment. nothing was suspended.

The matter came before me for automatic review in terms of s 57(1) of the Magistrates Court Act [*Chapter 7:10*]. After going through the record I queried why there was no record of an inquiry into the existence or otherwise C of special circumstances as provided for in subs (5) of s 6 of the Act. I also queried why the accused had not been prohibited from driving commuter omnibuses for life if there were no special reasons, as provided for in subs (6) of s 6 of the Act, given that he had driven a commuter omnibus without a licence.

D Although my query was sent on 29 October 2013, it was not until 17 December 2013 that the trial magistrate responded and not until 9 January 2014 that the record was returned to me. This court has, in the past, bemoaned the inordinate delays in bringing matters up for review. It is also important that the trial magistrate responds timeously to queries raised by the reviewing judge.

E In response to my queries the magistrate stated:

> "I respectfully submit that I am of the view that I did inquire into the existence of special circumstances in a simple language that an unrepresented accused would understand. In this regard I refer to p 5 of the record of proceedings where I asked the accused why he drove the said motor vehicle without a licence. His

response was; 'The driver had gone for lunch.' The above response by the accused F automatically excludes the existence of special circumstances but only shows that the accused did it for monetary gain thereby placing the lives of those on board at risk, hence I respectfully submit that the sentence imposed is within the minimum mandatory sentence provided for by the statute.

I, however concede that I did not inquire into any special reasons as to why the accused should not have been prohibited from driving for life which is also mandatory. I, therefore humbly request that an order direct me to cause the G accused to be brought before me to make the inquiry."

The entire record of proceedings in this matter is captured on barely a page of the magistrates' hand written notes, which read:

"charge read and understood.

Plea – guilty s 271 (2)(b) 27 September 2013

H Facts read and understood/No variations to the facts.

2014 (1) ZLR p22

Mathonsi J

E/EA

Q: Do you admit that on 25/09/13 at about 1450 hours you drove a Nissan Caravan with registration: Ngirazi 2, along an unmarked road in Zengeza due east?

A: Yes

Q: Do you admit that you are not a holder of any valid driver's licence? B

A: Yes

Q: Why did you drive the vehicle without a licence?

A: The driver had gone for lunch.

Q: Any right to act in the manner that you did?

A: No.

Q: Any defence to offer. C

A: No.

You are found guilty as charged.

PP – No record."

Thereafter the court went on to record mitigation and sentenced the accused person aforesaid. D

Section 6(1) of the Act provides:

"Subject to this Act, no person shall drive a motor vehicle on a road unless he –

(a) is the holder of a valid licence issued to him in respect of motor vehicles of the class concerned; and

(b) complies with the conditions, if any, subject to which the licence referred E to in paragraph (a) was issued."

Subsection (5) of s 6 of the act provides:

"A person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment:

Provided that, if the motor vehicle he was driving in contravention of that F subsection was a commuter omnibus or a heavy vehicle, he shall be liable to imprisonment for a period not exceeding five years and not less than six months, unless he satisfies the court that –

(a) …

(b) …

(c) … G

or unless he satisfies the court, in terms of section 88A, that there are special reasons in the case why that penalty should not be imposed upon him."

Subsection (6) of s 6 of the Act provides:

"Subject to Part IX , a court convicting a person of an offence in terms of subsection (5) may prohibit him from driving for such period as the court thinks fit: H

2014 (1) ZLR p23

Mathonsi J

A Provided that, if the motor vehicle he was driving in contravention of subsection (1) was a commuter omnibus or a heavy vehicle, the court shall prohibit him for life from driving motor vehicles of the class to which commuter omnibuses or heavy vehicles, as the case may be, belong; unless he satisfies the court that …

(a) …

B (b) …

(c) …

or unless he satisfies the court, in terms of section 88A, that there are special reasons in the case why such a prohibition should not be imposed upon him."

Section 88A(1) of the Act provides:

"Notwithstanding any other provision of this Act, if a person who has been C convicted of an offence in terms of this Act for which a minimum penalty is prescribed satisfies the court that there are special reasons in the particular case why such a penalty should not be imposed upon him, the court may impose upon him any penalty within its jurisdiction:

Provided that the court shall record any factor or circumstance which it is satisfied is a special reason for the purposes of this section."

D Clearly, the proviso to subs (5) of s 6 of the Act prescribes that a convicted person shall receive the mandatory sentence unless he satisfies the court that special circumstances exist as to why the mandatory sentence should not be imposed. The Act therefore requires the trial court to inquire into the existence of special circumstances and, in terms of s 88A, the court is required to record those special circumstances, if satisfied of their existence. E In addition to that, subs (6) of s 6 of the Act requires a court convicting a person of an offence in terms of subs (5) of s 6 to prohibit him from driving commuter omnibuses for life unless there are special reasons.

The accused drove a commuter omnibus without a licence. The omnibus was carrying 18 passengers when he was intercepted by the police in Zengeza. F When he saw the police he took to his heels, abandoning the vehicle. He was subsequently arrested.

The court imposed the mandatory sentence without inquiring into the existence of special circumstances. It is disingenuous for the magistrate to say that he inquired into them by merely asking the accused why he drove without a licence. It is equally unfortunate that the magistrate thinks that he is entitled G to impute the non-existence of special circumstances from the answer given to a question which was not inquiring into special circumstances.

Over and above that, the court was required to inquire into the existence of special reasons why the accused should not be prohibited from driving commuter omnibuses for life. It did not, and did not even impose that H prohibition which is also mandatory. This was a serious misdirection.

2014 (1) ZLR p24

Mathonsi J

In our jurisdiction, the legislature regularly prescribes minimum sentences A for particular offences where it is of the view that deterrent punishment is called for because of the prevalence of the offence or its effect on society. By doing so, the legislature would be interfering with the normal sentencing discretion of the courts. In light of that, in order to balance the harshness of the sentence, the legislature usually adds a rider that the mandatory sentence B does not have to be imposed where there are "special reasons" or "special circumstances" which justify a less - or sentence. This, as stated by Professor G Feltoe in *Criminal Defender's Handbook* (2009) at p 164,

"is a legislative device whereby rigours of a particularly severe prescribed sentence may be avoided in exceptional cases; it is a sort of safety valve."

In my view, it is imperative that magistrates understand clearly what special C circumstances are in respect of mandatory sentences, and that they also appreciate how they affect our sentencing jurisprudence. This is because they are enjoined to explain to unrepresented accused persons what special circumstances are, and that if the accused person is able to show their existence they will avoid the rigours of a mandatory minimum sentence. D

The failure by a magistrate to explain to an unrepresented accused person this procedure leads to an unbearable injustice. I find myself in total agreement with the remarks of Cheda J in *S* v *Rama* HB-52-11 where at p 2 of the judgment he said:

"I agree with the respondent that the question of 'special circumstances' was E given cursory attention. The appellant should have been appraised of the looming mandatory sentence in the absence of 'special

circumstances.' It should have been further explained to him that the mandatory sentence, can be avoided if he can proffer any 'special circumstances' peculiar to him or the commission of the offence, which can excuse him from being sentenced to a mandatory sentence."

In the circumstances, the sentence imposed cannot be allowed to stand, F because the magistrate fell into grave error in respect of the procedure.

Accordingly, I order that:

1. The conviction of the accused person stands.
2. The entire sentence is set aside.
3. The matter is remitted to the trial magistrate for him to inquire into the G existence of special circumstances as to why the mandatory sentence provided for in s 6(5) of the Road Traffic Act [*Chapter 13:11*] should not be imposed and why the prohibition from driving provided for in s 6(6) of that Act, should not be imposed.

Mawadze J agrees. H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/NDLOVU v GUARDFORCE INVESTMENTS (PVT) LTD & ORS 2014 (1) ZLR 25 (H)

NDLOVU v GUARDFORCE INVESTMENTS (PVT) LTD & ORS 2014 (1) ZLR 25 (H)

2014 (1) ZLR p25

Citation	2014 (1) ZLR 25 (H)
Case No	Judgment No. HB-03-14
Court	High Court, Bulawayo
Judge	Makonese J
Heard	13 December, 2013; *CAV*
Judgment	16 January 2014
Counsel	Mr *Tsvangirai,* for the applicant *P Ncube*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Legal practitioner – conduct and ethics – duties to court and client – failure to adhere to time limits laid down in rules – need for credible explanation for failure before court should exercise discretion in favour D *of litigant – discretion of court to refuse application for rescission even if consequences thereof harmful to the litigant*

Headnote

Legal practitioners must always be aware that they operate within time limits and in terms of laid down procedures. In applications for rescission of E judgment, consequent upon a failure to act

timeously, it is the duty of the legal practitioner to give a credible and convincing explanation as to why he failed to act within the time limits. The time has come for legal practitioners to adhere to the time limits set in the Rules. The approach ought to be that the court may only excuse failure to act where the explanation given is credible. A litigant who chooses a legal F practitioner to act on his behalf expects the legal practitioner to adhere to time limits set in the rules. The court should decline to exercise its judicial discretion in favour of applicants where the explanation is not credible even where the fault of the legal practitioner will have adverse consequences upon a litigant.

Cases cited G

Beitbridge RDC v *Russell Construction* 1998 (2) ZLR 190 (S)

Masama v Borehole Drilling (Pvt) Ltd 1993 (1) ZLR 116 (S)

Ndebele v Ncube 1992 (1) ZLR 288 (S)

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

2014 (1) ZLR p26

Makonese J

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), r 236(3)(b)

Case information

Mr *Tsvangirai,* for the applicant

P Ncube, for the respondent B

Judgment

Makonese J: This is a chamber application in terms of r 236(3)(b) of the High Court Rules 1971. On 20 March 2013, the applicant obtained default judgment against the first respondent ordering it to effect a reversal of transfer in respect of a property known as subdivision B of Lot B Upper Rangemore (measuring 8.1191 hectares) within 30 days from the date of the order. In the event that the first respondent failed to effect the transfer within the stated 30 C day period, the third respondent was empowered to sign all relevant documents to enable transfer to be effected. The first respondent was not satisfied with the judgment and applied for its rescission on 3 May 2013. The applicant filed an opposing affidavit on 9 May 2013. The first respondent did not take further steps to have the matter finalised and after a period of two months the applicant took a decision to file a chamber application For dismissal For D want of prosecution in terms of r 236(3)(b) of the High Court Rules. The first respondent has filed a notice of opposition and opposing affidavit. The first respondent accepts that in terms of r 236(3)(b) of the High Court Rules, steps ought to have been taken by the first respondent to set down the application for rescission of judgment within one month of the notice of opposition E and opposing affidavit being filed. The first respondent's legal practitioner explains that it was his intention to brief counsel to attend to the matter, but did not have the time to complete the brief due to pressing commitments. He took a decision to seek the assistance of a professional assistance to handle the matter. The first respondent's legal practitioner states that he sent a text message to his legal secretary in the following terms: F

> "In the guardforce matter just in case the other side apply to dismiss the rescission application for want of prosecution ask Mr Collier to brief counsel to draw heads and file."

It would seem that the brief was not undertaken by the first respondent's legal practitioner, Mr Collier, who took leave on 8 July 2013. The first G respondent's explanation is that at all material times, its intention was to set the matter down for hearing, but due to pressure of work this was not done. It is apparent, however, that even after a lapse of eight months, no answering affidavit nor heads of argument had been filed.

The primary issue for determination by this court is simply whether the explanation given by the first respondent is candid and satisfactory. It is clear H

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Makonese J

A that there was negligence on the part of the first respondent in prosecuting its case. In *Beitbridge RDC* v *Russell Construction* 1998 (2) ZLR 190 (S), Sandura JA stated:

> "Whilst it is true that the fault was largely that of the former and present legal practitioners who failed to act and to take appropriate action to protect the appellant's interests, that fact, in my view, does not assist the appellant. This B court has, on a number of occasions, clearly stated that non-compliance with or a wilful disdain of the rules of the court by a party's legal practitioner should be treated as non-compliance or a wilful disdain by the party himself."

See also *S* v *McNab* 1986 (2) ZLR 280 (S) and *Masama* v *Borehole Drilling* 1993 (1) ZLR 116 (S). The excuse proffered by the first respondent's legal C practitioner is that he was too busy and delegated the matter to a junior legal practitioner by sending a text message to his legal secretary. This, in my view, is not a reasonable and satisfactory explanation. I take this approach for the reason that if legal practitioners were to claim that because they were too busy and so they failed to act on their matters the justice delivery system D would be severely compromised. Legal practitioners must always be aware that they operate within time limits and in terms of laid down procedures. The purpose of such time limits is for litigants to know when they are expected to act. Where the legal practitioner fails to act, he has a duty to the court to give a credible and convincing explanation why he failed to act timeously. It is clear that first respondent's legal practitioner, in delegating an important E matter to a junior legal practitioner, was taking a casual approach to the matter. He did not speak to the junior legal practitioner, but transmitted a text message to a secretary, who was then expected to relay the information to the junior lawyer. It is my firm view that the time has come for legal practitioners to adhere to the time limits set in the Rules. The approach ought F to be that the court may only excuse failure to act where the explanation given is credible. A litigant who choses a legal practitioner to act on their behalf expects the legal practitioner to adhere to time limits set in the rules. In the present matter the legal practitioner did not give due attention to the case, conscious of the risk he was exposing the first respondent to. The courts should decline to exercise judicial discretion where the explanation G proffered is not credible, even where the fault of the legal practitioner will have adverse consequences on a litigant.

In *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290 McNally JA stated:

> "The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt;* roughly translated, the law will help the H vigilant and not the sluggard."

Makonese J

In casu, in spite of the lengthy explanation by the first respondent's legal A counsel, I am not persuaded that a reasonable and credible explanation has been tendered to tilt the balance in favour of the first respondent.

I would, accordingly, grant the application for dismissal of first respondent's claims for want of prosecution. The first respondent is to bear the costs of suit. B

Dube-Tachiona and Tsvangirai, applicant's legal practitioners

Webb Low and Barry, respondent's legal practitioners

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Source:
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FRANCIS R FERNANDES & SONS v MUDZINGWA & ORS 2014 (1) ZLR 29 (H)

Citation 2014 (1) ZLR 29 (H)

Case No	Judgment No. HH-22-14
Court	High Court, Harare
Judge	Mafusire J
Heard	16 September 2013; *CAV*
Judgment	21 January 2014
Counsel	*E W W Morris,* for the applicant *L Ziro*, for the first & second respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – application – disputes of fact – procedure to adopt – when application procedure may be adopted despite existence of disputes of fact

Headnote

D The overriding consideration on the method of procedure to adopt in any given case is whether or not there is a likelihood of a real dispute of fact emerging from the papers which will be incapable of resolution on those papers. A dispute of fact must be real and not fanciful. It is not enough for a respondent just to make bare denials in the hope of creating E a dispute of fact. He must produce *positive* evidence to the contrary.

In motion court proceedings, where there is a genuine dispute of fact on the papers, the court can proceed in one of several ways:

(1) The court can take a robust view of the facts and resolve the dispute on the papers, if the facts stated by the applicant, together with the admitted facts in the respondent's affidavit, justify such an order;

F (2) The court can permit 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;

(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 G pleadings;

(4) The court can dismiss the application altogether if the applicant should have realised the dispute when launching the application.

Cases referred to

City Industries (Pvt) Ltd v *Muvambwi & Anor* HB-162-04

H*Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H)

Mafusire J

Peterson v *Cuthbert & Co Ltd* 1945 AD 420 A

Plascon-Evans Paints Ltd v *van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

R Bakers v *Ruto Bakeries* 1948 (2) SA 626 (T)

Room Hire Co (Pty) Ltd. v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) B

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)

Case information

E W W Morris, for the applicant

L Ziro, for the first & second respondents C

Judgment

Mafusire J: At the end of the hearing of this opposed application I granted the substantive orders sought by the applicant but denied it its costs. In the main the applicant sought the eviction of all the respondents from certain premises. The applicant also sought an order that the first and second respondents account for all the moneys received by them arising out D of their occupation or use of those premises. Further, the applicant sought the debatement of the account by an experienced chartered accountant. After such debatement the applicant asked that the respondents pay all such moneys as would have been found to be due by them. Finally, the applicant sought the costs of suit and of eviction against the first and second respondents only, E jointly and severally. But, as I have already indicated, I denied the applicant its costs and ordered that each party paid their own costs.

The circumstances giving rise to the claim were these. At all relevant times from the late 1950s the applicant was the registered owner of the premises in question, namely Lot 6A The Ranche in the District of Salisbury, held under deed of consolidated title and otherwise known as 80 Kaguvi Street, Harare F (hereafter referred to as "the property"). The applicant was a duly registered company. It had been incorporated in 1954. The founding directors had been an immigrant from India and his adult sons. The company had bought several properties in Harare, including the property. It had continued to exist and to operate businesses through successive directors drawn from the family until 1980 when the first and second respondents' father, one Shakespeare G Mudzingwa ("Shakespeare"), now deceased, had taken occupation of the property under some kind of agreement. Some of the directors had subsequently emigrated abroad.

In the founding affidavit, one of the surviving sons and director averred that Shakespeare had been an ex-employee of the applicant who had been left in H

Mafusire J

A charge of the property on a caretaker basis. However, this was challenged by the first and second respondents (hereafter referred to as "the respondents"). The applicant, in the answering affidavits by both the deponent to the founding affidavit and the other sons-cum directors who were based abroad, readily conceded the point. It was averred that Shakespeare had taken occupation B of the property as a tenant. He was said to have been running a drive shaft repair business from the property. Shakespeare had remained in occupation until 2005 when he had died. At the time of the hearing in September 2013 his estate had still not been wound up and there was no information on what steps, if any, had been, or were being taken, to wind it up.

At the time of the hearing the respondents were effectively in occupation. C It appears that at some stage they had converted the property to some kind of shopping mall. They had developed some nine shops which they were leasing. The applicant cited the unidentified tenants as respondents 3 to 11.

The respondents were brother and sister. They resisted the application. Their major ground of opposition was that in spite of the fact that the property was D still registered in the name of the applicant, their late father, Shakespeare had told their mother that he had bought it. They alleged that the "sale papers" had not been finalised as the applicant's directors had all emigrated abroad. They also alleged that those papers relating to the sale had been burnt in a fire that had allegedly occurred at the property. But they were adamant the property now belonged to Shakespeare's estate.

E The respondents gave no further details about the alleged sale or the alleged fire. When had the sale and the fire taken place? Who had been the parties to the alleged agreement of sale? Had the fire been reported? Were there any records for it? Where exactly had the alleged sale documents been stored? None of this was addressed.

F The respondents claimed that they were the beneficiaries of their father's estate and that as such they had an interest in the property. They claimed a long period of undisturbed occupation by their family since 1980 until 2011. There was an attempt to rely on the law of acquisitive prescription. However, the foundation for this type of claim was never properly established and the G argument was never properly developed. The major thrust of the respondents' argument, as I perceived it, was that there were material disputes of fact that were incapable of resolution on the papers. The respondents referred to the unreported judgment of Cheda J in *City Industries (Pvt) Ltd* v *Muvambwi & Anor* HB-162-04. That case was an urgent chamber application for eviction. It was dismissed for lack of urgency. It was also dismissed on the basis that H there had been disputes of facts that could not be resolved on the papers.

2014 (1) ZLR p32

Mafusire J

The respondents claimed that there were striking similarities between their A situation in this matter and the circumstances of the respondents in the *City Industries* case. I was referred to a passage on p 3 of the judgment by Cheda J. It reads as follows:

> "Applicant's lease agreement with the respondent is verbal, that on its own raises issues about *viva voce* evidence which cannot be resolved on papers. *In fact* B *it is one of the reasons why eviction proceedings should always be by way of action*. It is clear that the 1st respondent now denies the material facts of the verbal agreement.
>
> It will therefore be unfair for the first respondent to be deprived of his day in court on the mere say-so of the applicant. Where there is a possibility that the applicant may not have disclosed the whole truth it is only fair and just to have its averments tested by way of cross-examination in court" (emphasis by C respondents' counsel).

The respondents' counsel also relied on the oft-cited case of *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T). I was referred firstly to a passage in the judgment of Murray AJP (at p 1160) where the learned acting judge president made reference to *R Bakers* v D *Ruto Bakeries* 1948 (2) SA 626 (T) in which it was stated that the normal method of procedure was by way of action. It was said that under that procedure a defendant possessed procedural or tactical advantages such as cross-examination which are not available under the motion procedure. I was then referred to another passage on p 1163 which the respondents' counsel quoted extensively in his heads of argument. It reads: E

> "It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest instance is, of course, (a) when the respondent *denies all the material allegations* made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though averse to making an affidavit, would give evidence *viva voce* if F subpoenaed. There are however other cases to consider. The respondent may (b) *admit the applicant's affidavit evidence but allege other facts which the applicant disputes*. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, and that certain G facts upon which applicant and his deponents rely to prove the main facts are untrue. The absence of any positive evidence possessed by a respondent directly contradicting applicant's main allegations does not render a case such as this free of a real dispute of fact. Or (d) he may state that he can lead no evidence himself or by others to dispute the truth of applicant's statements, which are peculiarly within applicant's knowledge, but he puts applicant to the proof thereof by oral evidence subject to cross-examination" (emphasis by respondents' counsel). H

2014 (1) ZLR p33

Mafusire J

A With all due respect, I did not understand Cheda J in the *City Industries* case to be saying that whenever a lease agreement, or for that matter, any agreement, is verbal it always has to be proved by *viva voce* evidence or that all eviction proceedings should be by way of action. That obviously is not the position. I believe the learned judge was merely alluding to the problems of proof normally associated with verbal agreements as compared to written B ones. With regards evictions, it is common place nowadays to bring them by way of motion proceedings. It all depends on whether or not in any given case there is a likelihood of a material dispute of fact arising.

The respondents' counsel underlined certain sentences in the passage in the judgment of Murray AJP in the *Room Hire* case, evidently for emphasis. C Counsel, in his heads of argument, strongly urged

that the respondents' situation be regarded as being on all fours with those examples given in that case. Nothing could be further from the truth. Among other things, with regards to situation (a) in Murray AJP's example, it will be seen that the respondents were being selective in their quote. They highlighted only a portion of the statement and ignored the rest. What they ignored was, in D my view, even more important. In (a) the learned acting judge president did not stop at merely stating that the denial by a respondent of all the material allegations would be the one way a dispute of fact could arise. The learned acting judge president had gone on to state: "… *and* [the respondent] *produces or will produce positive evidence by deponents or witnesses to the contrary*" E (my emphasis).

Thus, it is not enough for a respondent just to make bare denials in the hope of creating a dispute of fact. He must produce *positive* evidence to the contrary. In the instant matter, the respondents did not even begin to do that. They were manifestly incapacitated. They never showed the capacity in which they were opposing the applicant's claim. In one instance they F claimed they were Shakespeare's beneficiaries, yet in another they admitted that Shakespeare's estate had still not been wound up. They did not even say whether Shakespeare had died testate or intestate. They relied on hearsay evidence to allege an agreement of sale. In their heads of argument their counsel relied on a non-existent affidavit by their mother, prompting the G applicant's counsel to accuse them of manufacturing evidence.

In my view, the law both in South Africa and in this country has moved beyond those examples stipulated in cases such as *R Bakers* and *Room Hire*. Certainly in this country, the application method of procedure has become predominant. The overriding consideration on the method of procedure to adopt in any given case is whether or not there is a likelihood of a real dispute H of fact emerging from the papers which will be incapable of resolution on

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those papers. At any rate, the ultimate conclusion by Murray AJP in the A*Room Hire* case was as follows (at p 1162 – 1163):

> "The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ B in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence."

In the above, the judge quoted with approval a passage in the judgment by Watermeyer CJ in *Peterson* v *Cuthbert & Co Ltd* 1945 AD 420 at 428, as follows: C

> "In every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue which cannot be satisfactorily determined without the aid of oral evidence; or if this is not done, the lessee, against whom ejectment is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor."

In my view, the modern trend in deciding on the appropriate method of D procedure to adopt in any given case is as set out in the passages above. 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 dispute of fact. See *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd*F1949 (3) SA 1155 (T) at 1165; *Soffiantini* v *Mould* 1956 (4) SA 150 (E) at 154; *Joosab & Ors* v *Shah*1972 (1) RLR 137G at 138G-H; *Lalla* v *Spafford NO & Ors* 1973 (2) RLR 241G at 243B; *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC)."

In motion court proceedings, where there is a genuine dispute of fact on the papers the court can proceed in one of several ways: G

(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 (supra*); *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 (supra*). H

2014 (1) ZLR p35

Mafusire J

A (2) The 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: B see *Masukusa's* case above,

(4) The 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).

C With regard to the robust approach, 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. In *Plascon-Evans* above Corbett JA stated as follows at pp 634H – 635B of the judgment:

> "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 a 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 882 D-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 F inherent credibility of the applicant's factual averment, it may proceed on the 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-H)."

The approach in *Plascon-Evans* was followed in *Savanhu's* case above. At G p 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: *Plascon-Evans*H*Paints Ltd* v *van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B"

2014 (1) ZLR p36

Mafusire J

In the present case there were no genuine disputes of fact to warrant any of A the four courses outlined above. The respondents simply lacked the capacity to say what they were saying in their affidavits. They themselves knew nothing about the alleged agreement of sale. There was nothing else other than their say-so that a reasonable court could have considered objectively as evidence of some agreement between the applicant and Shakespeare. What B the respondents were saying in their affidavits was plain hearsay evidence. It was inadmissible. During the hearing I kept on asking their counsel that even if I were to accept that there were genuine disputes of fact that could not be resolved on the papers and I referred the matter to trial, who on earth would the respondents call to prove the alleged agreement of sale of the property? They themselves were disqualified. They were relying on what C their mother had allegedly told them. Their mother was equally disqualified. She too would rely, according to their affidavits, on what Shakespeare had allegedly told her. Shakespeare was deceased. Under such circumstances I felt I could not deny the applicant relief.

There was an oblique reference in the respondents' papers to the question of D unjust enrichment. In response to the relief as set out in the applicant's draft order, para 12 of the second respondent's opposing affidavit read as follows:

> "12. *AD* RELIEF IN DRAFT ORDERS

> This is also opposed. It smacks off (*sic*) unjust enrichment as applicant through the current directors have (*sic*) not taken into account the investment we have put into the property nor the value thereof." E

Nothing further was said in the affidavits. There was no counter-claim or any other claim in relation to the alleged investment. Perhaps the respondents' counsel thought about it further in the course of time. In the heads of argument, and amidst other unrelated submissions, was the following:

> "That the respondents have effected massive developments at the property is F not in dispute. It is only in an action proceedings (*sic*) that the respondent, in the unlikely event that the court finds that there was no contract of sale, can rightly and properly raise a counter-claim for unjustified (*sic*) enrichment for the expenses it incurred over the past three decades in looking after the property. That would not be possible under the circumstances and justice can only be truly served by having this as a summonses (*sic*) matter."

Of course, the respondents did not oppose the application on the basis that G they had a counter - claim for unjust enrichment which they wished to raise. That was undoubtedly an afterthought.

In my view, the applicant was eminently entitled to its relief. The applicant was the undisputed owner of the property. In terms of the Deeds Registries Act, [*Chapter 20:05*] an owner of an immovable property is the *registered*H

Mafusire J

A owner. Registration of real rights in the deeds office is not a mere matter of form. In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) at 105H-106A 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 B real rights upon those in whose name the property is registered. See the definition of 'real right' in s 2 of the Act. The real right of ownership, or *jus in re propria*, is 'the sum total of all the possible rights in a thing' – see Wille's *Principles of South African Law* 8 ed p 255".

An owner of a property is entitled to the full enjoyment of the property C unless by agreement or operation of the law there has been a diminution of that right. Ownership is the real right that potentially confers the most or comprehensive control over a thing. This means that the right of ownership entitles the owner to do with his or her thing as he or she deems fit, subject to the limitations imposed by law; see Silberberg and Schoeman *The Law of Property* 5 ed p 91. The learned authors say at pp 92 - 93 that in principle an D owner has exclusive control over the thing that he or she owns. This means that he or she can enforce that control against the whole world. The owner's rights include the entitlement to use the thing (*ius utendi*); the entitlement to possess the thing (*ius possidendi*) and the entitlement to claim the thing from any unlawful possessor (*ius vindicandi*).

E Therefore, in this case, unless the respondents had established a superior right to deprive the applicant of its right to the full enjoyment of the property, which they have not, the applicant was plainly entitled to recover possession. That is why I granted the relief sought. However, on the question of costs I felt the circumstances of the case warranted that the applicant be deprived of F them. It had clearly been indifferent to its rights in relation to the property. For 32 years since 1980 it seems to have paid no regard to the property. The respondents' family, having been in continuous occupation for such a length of time, could not have been expected just to abandon that occupation on the applicant's mere say-so. In my view, the applicant's conduct invited the respondents' reaction. They opposed the claim. That was understandable. G Costs being in the discretion of the court, I exercised that discretion in favour of denying the applicant its costs and ordering that each party should bear its own costs.

The order that I granted at the end of the hearing read as follows:

1. The respondents shall forthwith vacate the property within seven days H of the date of service of this order by the Deputy Sheriff, failing which

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Mafusire J

the Deputy Sheriff shall immediately take all such steps as may be A necessary to evict the said respondents from the property.

2. First and second respondents shall account to applicant for all gross income or other moneys received arising out of their occupation or other use of the property in any manner

whatsoever.

3. There shall be a debatement of such account before a chartered accountant B of over 15 years' experience as such appointed by the Chairman for the time being of the Commercial Arbitration Centre at Harare, such accountant's usual fees for the exercise of his duties being fully remunerated by first and second respondents, jointly and severally: provided that should first and second respondent fail fully to reimburse the accountant, then the applicant shall do so and have the right immediately to recover its C reimbursement from the first and second respondent jointly and severally.
4. The first and second respondents shall thereafter, within seven days, pay all such moneys as are shown to be due to the applicant in terms of such debated account, failing which the Deputy Sheriff shall levy execution against the property of the first and second respondents, or upon either D of them, jointly and severally.
5. Each party shall bear their own costs.

Coghlan, Welsh & Guest, applicant's legal practitioners

W O M Simango & Associates, respondent's legal practitioners E

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/STUART v NATIONAL RAILWAYS OF ZIMBABWE 2014 (1) ZLR 39 (H)

STUART v NATIONAL RAILWAYS OF ZIMBABWE 2014 (1) ZLR 39 (H)

Citation	2014 (1) ZLR 39 (H)
Case No	Judgment No. HB-7-14
Court	High Court, Bulawayo
Judge	Ndou J
Heard	10 January 2014; *CAV*
Judgment	23 January 2014
Counsel	*V Majoko*, for the applicant *A Muchadehama,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – judgment – currency in which judgment may be expressed – local currency ceasing to be used – claim amended so as to express sum claimed in currency in actual use

Headnote

D The applicant issued summons against the respondent before the introduction of the multi-currency system in the country. He sought to amend his claim to express it in "the currency

currently in use in Zimbabwe and as particularized in his founding affidavit and annexures".

Held, that the amendment would be allowed. In February 2009, the Zimbabwe E dollar ceased to be used in trade when the Government introduced a system of multi-currency. The court could safely take judicial notice of this fact. It was not necessary to deal with the theoretical argument raised by the respondent that the Zimbabwe dollar was never demonetized, nor did it cease to be legal tender. The bottom line was that no one, including the respondent, was currently using the Zimbabwe dollar as means of trade. F The contention that the Zimbabwe dollar was in use was not premised on practical considerations. As far as the law was concerned, our courts have accepted the competency to grant judgment in foreign currency, long before the multi-currency regime was introduced in February 2009. To award the damages in Zimbabwe dollars, which had been rendered G valueless by the Government's action in February 2009, might deny the applicant, as plaintiff in the main matter, the redress that he sought. The applicant was not the author of the demise of the Zimbabwe dollar and it would not be in the interests of justice to punish him for that fact. There was no prejudice to the respondent that could not be cured by affording it the opportunity to challenge the evidence adduced by the applicant H on the rating of the Zimbabwe dollar *vis-à-vis* the United States dollar.

Ndou J

Cases referred to A

The "Despina R" (Owners, MV Eleftherotria v *Owners,* MV Despina R) [1979] 1 All ER 421 (HL)

Kwindima v *Mvundura* 2009 (1) ZLR 168 (H)

Lourenco v *Raja Dry Cleaners and Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 157 (S) B

Makwindi Oil Procurement (Pvt) Ltd v *Noczim* 1988 (2) ZLR 482 (S)

Samanyau & Ors v *Fleximail* 2011 (1) ZLR 527 (H)

UDC Ltd v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H)

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

ZFC v *Taylor* 1999 (1) ZLR 308 (H) C

Zimnat Ins Co Ltd v *Chawanda* 1990 (2) ZLR 143 (S)

Legislation considered

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

Case information

V Majoko, for the applicant D

A Muchadehama, for the respondent

Judgment

Ndou J: This is an opposed application. The applicant seeks an order in the following terms:

"It is ordered that: E

1. Leave be and is hereby granted to the plaintiff/applicant to amend his claim so that his claim sounds in the currency currently in use in Zimbabwe and as particularized in his founding affidavit and annexures.
2. Defendant/respondent pays costs of this application."

I do not deem it necessary, at this stage, to give the particulars of his founding F affidavit, save to point out all that he seeks is to alter his claim from Zimbabwe dollar, in use at the time of the issuance of the summons in the main matter under case number HC 1777/04, to United States dollars currently under use in the country. The background facts of this matter are the following. Under case number HC 1777/04, *supra,* the applicant sued the respondent for damages arising from alleged wrongful dismissal from employment and G harassment. At the time the applicant, who is the plaintiff in that case, filed his claim, the currency in use was the Zimbabwe dollar. In February

2009, it is common cause, the Zimbabwe dollar ceased to be used in trade. The Government introduced a system of multi-currency. The court can safely take judicial notice of this fact. It is not necessary for me to deal with the theoretical argument raised by the respondent that the Zimbabwe dollar H

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Ndou J

A was never demonetized nor did it cease to be legal tender. The bottom line is that no one, including the respondent, is currently using the Zimbabwe dollar as means of trade. The respondent's contention that the Zimbabwe dollar is in use is not premised on practical considerations. As far as the law is concerned, our courts have accepted the competency to grant judgment B in foreign currency, long before the multi-currency regime was introduced in February 2009. In *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe* 1998 (2) ZLR 482 (S) it was held:

> "Justice requires that a plaintiff should not suffer by reason of a devaluation of a currency between the due date on which the defendant should meet his obligation and the date of actual payment or the date of enforcement of the judgment."

C See also *The "Despina R" (Owners,* MV Eleftherotria v *Owners,* MV Despina R) [1979] 1 All ER 421 (HL); *Zimbabwe Express Services (Pvt) Ltd* v *Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S); *Kwindima* v *Mvundura* 2009 (1) ZLR 168 (H); *Samanyau & Ors* v *Fleximail* 2011 (1) ZLR 527 (H) and *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S).

D*In casu,* to award the damages in Zimbabwe dollars, which has been rendered valueless by the abovementioned decision of the Government in February 2009, might deny the applicant, as plaintiff in the main matter, the redress that he seeks. The applicant is not the author of the demise of the Zimbabwe dollar and it would not be in the interest of justice to punish him for that fact.

The fact that he prosecuted his claim with delay cannot be used at this stage E to deny him the amendment he seeks. I do not see any prejudice to the respondent that cannot be cured by affording it the opportunity to challenge the evidence adduced by the applicant on the rating of the Zimbabwe dollar *vis-à-vis* the United States dollar. The issue of delay can be dealt with via the determination of costs. It is trite law that our courts allow amendments quite liberally. This liberality is only affected where the amendments would cause F considerable inconvenience to the court or prejudice to a party or where there is no prospect of the point raised in the amendment succeeding or where the matters in the raised amendment are vague and embarrassing: *UDC Ltd* v *Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H); *ZFC* v *Taylor* 1999 (1) ZLR 308 (H) and *Lourenco* v *Raja Dry Cleaners and Steam Laundry (Pvt)*G*Ltd* 1984 (2) ZLR 157 (S). See also High Court Rules r 132.

In casu, the amendment is being sought after the plaintiff has already testified (*i.e*. in the main matter). The plaintiff's second witness has also testified and concluded her testimony. These witnesses can be recalled to deal with the issues raised in the amendment. The respondent can still cross-examine such witness on these issues. Frankly, I do not see why the respondent did H not consent to the amendment. There seems to be unnecessary belligerency

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2014 (1) ZLR p42

Ndou J

and acrimony between the parties. This is apparent from the language used A in their papers. Parties should not rely too much on procedural issues to the detriment of justice. In view of the foregoing, I do not find any legal impediment to the amendment sought which cannot be cured during the course of the main trial.

Accordingly, the application is granted, with costs being costs in the cause. B

Majoko & Majoko, applicant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners

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Source:
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ZIMPAPERS GROUP OF COMPANIES v KHUPE & ANOR 2014 (1) ZLR 43 (H)

Citation	2014 (1) ZLR 43 (H)
Case No	Judgment No. HB-9-14
Court	High Court, Bulawayo
Judge	Moyo J
Heard	1 November 2013; *CAV*
Judgment	23 January 2014
Counsel	*J Sibanda*, for the applicant *M Ncube* for the respondent
Case Type	Opposed matter
Annotations	No case annotations to date

Flynote

Court – High Court – jurisdiction – review – Labour Court decision – matter one which Labour Court could have dealt with – High Court having no jurisdiction

Employment – Labour Court – jurisdiction – review – court having review D *powers – High Court's powers of review over Labour Court – matter one which Labour Court could have dealt with – High Court having no jurisdiction*

Headnote

The applicant sought to bring a decision of the Labour Court on review E before the High Court, the grounds for review being (a) that there was a gross irregularity in the proceedings, in that the court entertained the matter when it had not been properly set down in terms of the law; and (b) that the court issued an order that was actually different from the original order sought, which order could only have been granted had new F proceedings been instituted. The first respondent raised a point *in limine* that the matter was not properly before the court, as the applicant should have made an application for rescission of the judgment in terms of s 92C of the Labour Act [*Chapter 28:01*] and that s 89 of the Act excluded the High Court's powers of review of matters in the Labour Court.

Held, that s 92C of the Labour Act provides for the rescission or alteration G by the Labour Court of its own decisions. The legislature has given the Labour Court the power to revisit all its decisions, including the void ones. The applicant therefore had a remedy in terms of s 92C, which covered the applicant's very own circumstances.

Held, further, that s 89 of the Act clearly gives the Labour Court review powers and took away from any other court the powers to determine or H hear matters provided for in that section, the power of review being one

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Moyo J

of them. Section 26 of the High Court Act [*Chapter 7:06*], which gave A the High Court power of review over all inferior courts, subjected those power to the provisions of any other law, meaning that if another law already provided otherwise, the High Court would not be in a position to exercise the same powers.

Cases cited B

Medical Invstms Ltd v *Pedzisayi* 2010 (1) ZLR 111 (H)

Moyo v *Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H)

Samudzimu v *Dairibord Hldgs Ltd* 2010 (2) ZLR 357 (H)

Tuso v *City of Harare* 2004 (1) ZLR 1 (H)C

Legislation considered

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

Labour Act [*Chapter 28:01*], ss 89 & 92C

Case information

J Sibanda for the applicant D

M Ncube for the respondent

Judgment

Moyo J: This is an application for review of the Labour Court's decision. The grounds for review are that:

(a) there was a gross irregularity in the proceedings, in that the court E entertained the matter when it had not been properly set down in terms of the law;

(b) the court issued an order that was actually different from the original order sought, which order could only have been granted had new proceedings been instituted. The relief sought, although not stated on the face of the F application for review as provided for by r 257, is stated in the draft order as that the decision of the Labour Court of 21 February 2013 be set aside and declared null and void.

The judgment subject to review in this application was apparently granted in default. The applicant alleges that the matter was not properly set down and it was not given notice of the proceedings of 21 February 2013. G

The first respondent's counsel raised a point *in limine* to the effect that this matter is not properly before this court, as the applicant should have made an application for rescission of the judgment in question in terms of s 92C of the Labour Act [*Chapter 20:01*] ("the Labour Act") and that s 89 of the Act excludes the High Court's powers of review of matters in the Labour Court. H

Moyo J

A The applicant's counsel contends that the inherent jurisdiction that the High Court has includes the review of matters from the Labour Court. Section 92C of the Labour Act provides for the rescission or alteration by the Labour court of its own decisions.

In subs (1) thereof it provides that:

> B "Subject to this section, the Labour Court may, on application, rescind or vary any determination or order –
>
> (a) which it made in the absence of the party against whom it was made; or
>
> (b) which the Labour Court is satisfied is void or was obtained by fraud or mistake common to the parties; or
>
> (c) in order to correct any patent error."

C The applicant's counsel contends that to apply for the rescission or alteration of the judgment at the Labour Court would be to clothe the initial illegal and void decision with legality. I hold a different view, for the legislature has provided in s 92C(b) of the Labour Act that the Labour Court

can rescind or vary any judgment that it is satisfied is void. The legislature has given D the Labour Court the power to revisit all its decisions, including the void ones. The applicant does have a remedy in terms of s 92C of the Labour Act which the legislature has specifically provided for litigants, including applicant's very own circumstances.

The applicant's counsel further contends that the High Court, with its inherent jurisdiction, is armed with the requisite powers to review the decisions of E the Labour Court on the grounds that he has given.

Section 89(1)(d1) of the Labour Act provides as follows:

> "The Labour Court *shall* exercise the following functions –
>
> (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters ..." (emphasis added)

F Section 89(6) of the Act provides as follows:

> "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).

Section 26 of the High Court Act [*Chapter 7:06*] ("the High Court Act") provides as follows:

> G "Subject to this Act and *any other law*, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of *all inferior* courts of justice, tribunals and administrative authorities within Zimbabwe" (emphasis added.)

Section 27(1)(a) of the High Court Act provides as follows:

> "Subject to this Act and *any other law,* the grounds on which any proceedings or H decisions may be brought on review before the High Court shall be –

> (a) *absence of jurisdiction on the part of the court*, tribunal or authority A concerned" (emphasis added).

Section 89 of the Labour Act clearly gives the Labour Court review powers and takes away, from any other court, the powers to determine or hear matters provided for in that section, powers of review being one of them. On the other hand, s 26 of the High Court Act also subjects the High Court powers B of review to the provisions of *any other law*, meaning that if another law already provides otherwise, the High Court would not be in a position to exercise the same powers.

Section 26 of the High Court Act also gives the High Court the power to review the decision of all *inferior courts.* I am in agreement with the findings C in the following cases: *Samudzimu* v *Dairiboard Holdings Ltd* 2010 (2) ZLR 357 (H), where Chiweshe JP found that the provisions of the Labour Act excluded the jurisdiction of the High Court in areas where the Labour Court has jurisdiction.

In *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H), Bhunu J had occasion to D consider the legal import of s 89(6) of the Labour Act and he held the view that the High Court could not exercise the powers given to the Labour Court in terms of s 89.

In *Moyo* v *Gwindingwi & Anor* 2011 (2) ZLR 368 (H) Mathonsi J alluded to the effect of s 89(6) of the Labour Act and stated that s 89(6) is clear and E unambiguous that "no court has jurisdiction over matters falling under the purview of the Labour Court". He further went on to state that the High Court does not possess the machinery to jealously guard its inherent jurisdiction where the legislature has specifically taken it away. I cannot agree more with this view. In *Medical Investments Ltd* v *Pedzisayi* 2010 (1) ZLR 111 (H), F Makarau JP (as she then was), found that the effect of s 89(6) of the Labour Act is that the Labour Court has jurisdiction in all matters where the cause of action and the remedy are provided for in the Labour Act. It is my considered view that the applicant should have proceeded either in terms of s 92C or s 89(1)(d)(1) of the Labour Act and not to approach this court with a matter that the Labour Court could clearly handle. Section 89(6) G of the Labour Act has stripped this court of its review powers in so far as all the matters provided for by s 89 of the Labour Act [*Chapter 20:01*] are concerned. I accordingly dismiss the application with costs.

Job Sibanda & Associates, applicant's legal practitioners

Phulu & Ncube, first respondent's legal practitioners H

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Source:
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TELECEL ZIMBABWE (PVT) LTD v ATTORNEY-GENERAL 2014 (1) ZLR 47 (S)

Citation	2014 (1) ZLR 47 (S)
Case No	Judgment No. S-1-14
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA and Patel JA
Heard	22 July 2013; *CAV*
Judgment	28 January 2014
Counsel	*I Mureriwa,* for the appellant *C Mutangadura,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Criminal procedure – private prosecution – who may prosecute – company which has suffered loss – may bring private prosecution – right not restricted to natural persons – Attorney-General's certificate of nolle prosequi – grounds on which such certificate may be withheld – not entitled to D *withhold certificate where applicant has shown a substantial and peculiar interest in the issue, and attendant criteria*

Headnote

The appellant, a private company, discovered a potentially massive fraud perpetrated against it by certain of its employees. The respondent later E withdrew the charges against all the four accused persons before plea, on the grounds that there was insufficient evidence. The appellant decided to mount a private prosecution. However, the respondent refused to issue a certificate of *nolle prosequi*, also on the grounds that there was insufficient evidence. The appellant then applied to the High Court on review for that decision to be set aside as being both unlawful and grossly F irrational. The High Court held that a company, as distinct from a private individual, had no *locus standi* to institute a private prosecution. In so doing, the court relied largely on a South African Appellate Division decision. That decision was based on the wording of the South African Criminal Procedure Act 1977, which gave the right to institute private G prosecutions to "private persons". The Appellate Division held that this phrase meant "natural persons". Accordingly, the court decided that it was not necessary to determine the further question as to the respondent's discretion to withhold his certificate.

Held, that, historically, the system of criminal procedure that prevailed in England was predominantly one of private prosecutions. No public H official was designated as a public prosecutor, either locally or nationally.

In essence, private citizens were responsible for preserving the peace A and maintaining law and order. The Prosecution of Offences Act 1879 first introduced the office of Director of Public Prosecutions. However, this Act did not fundamentally undermine private prosecutions, because public prosecutors enjoyed very limited authority. The successor Act of 1908 did not substantially increase the powers of public prosecutors. It B was only with the enactment of the Prosecution of Offences Act 1985 that England established an effective system of public prosecution through the Crown Prosecution Service. Even then, this Act continued to preserve a limited right of private prosecution.

In the Cape of Good Hope (whose legal system was adopted here), the Roman-Dutch law of criminal procedure and evidence remained in C force until the early 19th century. Following various alterations to the structure of the courts in the Cape, this adjectival law was radically anglicised in 1828 and 1830 to form the foundations of our modern law. As regards the institution of prosecutions, the British Government accepted that the conditions prevailing in the Cape did not permit the D unmodified adoption of the English system of private prosecution. The right of prosecution was vested in the Attorney-General but, where he declined to prosecute, a private individual might prosecute in respect of an injury to himself or to someone under his care. In principle, therefore, the law governing private prosecutions, both in Zimbabwe and in South Africa, does not originate in the Roman-Dutch law but is derived from E the English common law.

Held, further, that the right of private prosecution originates in the reparation of individual injuries and the vindication of individual as opposed to corporate rights. The interests that the right to prosecute is conceived to safeguard are manifold. They are certainly not confined to purely F pecuniary loss or the kind of injury that might ordinarily be sustained by corporate entities in the normal course of their business. Permission to prosecute in such circumstances was conceived as a kind of safety-valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating imponderable interests which cannot be expressed in monetary terms. The vindication is real: it G consoles the victim of the wrong; it protects the imponderable interests involved by the deterrent effect of punishment and it sets at naught the inroad into such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum.

Held, further, that although the South African Criminal Procedure Act and the Zimbabwean Criminal Procedure and Evidence Act [*Chapter 9:07*] have H

A similarities on the issue of private prosecutions, the most fundamental distinction between the two statutes was the usage of "private person" in the South African Act as contrasted with the references to "private party" in the CP&E Act. A "person", in law, meant "a human being (*natural person*) or body corporate or corporation (*artificial person*), B having rights or duties recognised by law". Again, in the legal context, the word "party" meant "each of two or more persons (or bodies of people) that constitute the two sides in an action at law, a contract, etc." While some of the phraseology employed in s 13 of the CP&E Act – in particular, the reference to "some injury which he individually has suffered" – strongly supported the proposition that the right to prosecute C is confined to natural as opposed to artificial persons, the references to "public bodies and persons" and "public body or person", in ss 14 and 16 respectively, suggest otherwise. The definition in s 12 of "private party" was plainly tautologous and unhelpful, but in s 2 of the Act and in s 3(3) of the Interpretation Act [*Chapter 1:01*] "person" includes companies.

Held, further, that it is a well-established principle of construction that a statute D is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. The English common law right of private prosecution was not confined to natural persons but extended as well to juristic and artificial entities. That common law right migrated to the Cape Colony and remained E intact until 10 June 1891, at which stage it became an integral part of our law (*cf* s 89 of the former Constitution). The provisions of Part III of the CP&E Act should be construed, insofar as is consistent with their language and context, so as to preserve the common law components of the right to prosecute rather than to diminish or extinguish them. In these provisions there was no clear or positive legislative intention to F alter pre-existing rights or to constrict the common law position relative to corporations. This interpretation was fortified by the reality that a company is in essence an association of persons and therefore should, albeit subject to its obvious physical limitations, enjoy the same rights and

privileges as the individual members comprising it, including G the right of prosecution. Accordingly, the right of private prosecution conferred by s 13 vests in natural as well as artificial persons, including private corporations.

Held, further, that the mere possession of the Attorney-General's certificate of *nolle prosequi* does not in itself confer an absolute right of private prosecution. The other requirements must still be met. If they are not, H the court will interdict the person proposing to prosecute privately. The

court may also, in the exercise of its inherent power to prevent abuse A of process, interdict a private prosecution pursuant to such certificate.

Held, further, that the exercise by the Attorney-General of his discretion *vis-à-vis* any intended private prosecution involves a two-stage process. The first stage is for him to decide whether or not to prosecute at the public instance. If he declines to do so, the next stage comes into play, B*i.e.* to decide whether or not to grant the requisite certificate. In so doing, he must take into account all the relevant factors prescribed in s 13 of the Act, namely, whether the private party in question "can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence". If he cannot show any such interest, the Attorney-General C is entitled to refuse to issue the necessary certificate. However, where the private party is able to demonstrate the required "substantial and peculiar interest" and attendant criteria, the Attorney-General is then bound to grant the certificate. At that stage, his obligation to do so becomes peremptory.

Held, further, that while the Attorney-General's decision not to prosecute D at the public instance was not reviewable, in deciding not to issue his certificate, he failed to exercise his statutory powers on a proper legal footing. Having declined to prosecute at the public instance, he should have considered whether or not the appellant satisfied the "substantial and peculiar interest" requirement of s 13 of the Act. He did not do so E but proceeded to decline his certificate *nolle prosequi* on the basis that there was insufficient evidence to prosecute. In so doing, he was guilty of an error of law by purporting to exercise a power which in law he did not possess.

Decision of Hlatshwayo J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd* v FA-G 2011 (2) ZLR 310 (H) reversed.

Cases referred to

A-G v *van der Merwe and Bornman* 1946 OPD 197

Barclays Zimbabwe Nominees (Pvt) Ltd v *Black* 1990 (4) SA 720 (A) G

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

Jones v *Whalley* [2007] 1 AC 63

Levy v *Benatar* 1987 (1) ZLR 120 (S)

National Assistance Bd v *Wilkinson* [1952] 2 QB 648; [1952] 2 All ER 255 (QB)

PF-ZAPU v *Min of Justice* 1985 (1) ZLR 305 (S) H

Patel JA

A*Phillips* v *Botha* 1999 (2) SA 555 (SCA)

R (Ewing) v *Davis* [2007] EWHC 1730 (Admin)

R (Gladstone plc) v *Manchester City Magistrates Court* [2005] 1 WLR 1987

R (Hunt) v *Criminal Cases Review Commission* [2001] QB 1108

B*R* v *Rollins* [2010] UK SC 39; [2010] 1 WLR 1922

R v *Rollins & McInerney* [2009] EWCA (Crim) 1941

Salisbury Bottling Co (Pvt) Ltd & Ors v *Central African Bottling Co. (Pvt) Ltd* 1957 R&N 17; 1958 (1) SA 750 (FS)

Singh v *Min of Justice & Constitutional Development & Another* [2006] ZAKZHC 20

C*Solomon* v *Magistrate, Pretoria & Another* 1950 (3) SA 603 (W)

Legislation considered

Administrative Justice Act [*Chapter10:28*], s 3(1)(a), & 4(2)(3)

Constitution of Zimbabwe 1980, s 89

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 2, 12 13, D 14(d), 16(1) & 18(1)

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

Interpretation Act [*Chapter 1:01*] ss 3(3) & 9(1)

Foreign Legislation:

United Kingdom

E Prosecution of Offences Act 1985 c 23, s 6

South Africa

Criminal Procedure Act No 51 of 1977, ss 7, 8(1), 10(2) &11(1)

Case information

I Mureriwa, for the appellant

C Mutangadura, with him *E Nyazamba*, for the respondent F

Judgment

Patel JA: This is a matter on appeal from a decision of the High Court handed down on 19 October 2011. It concerns the powers of the Attorney-General, the respondent, in the specific context of private prosecutions by corporate entities.

G The factual circumstances of this matter are common cause. In early 2010 four senior employees of the appellant were charged with a massive fraud of about US$1 700 000 perpetrated against the appellant. Because of the respondent's position that there was overwhelming evidence against the accused persons, all of them were initially denied bail. At a later stage, the charges against them were withdrawn before plea following a directive by the respondent H that there was insufficient evidence to prosecute. Consequently, the appellant

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Patel JA

sought a certificate *nolle prosequi* which was withheld and declined by the A respondent. The appellant then applied to the High Court on review for that decision to be set aside as being both unlawful and grossly irrational.

The High Court held that a private company, as distinct from a private individual, had no *locus standi* to institute a private prosecution. The learned judge *a quo* adopted and applied the position taken by the South African B Appellate Division in interpreting the equivalent statutory provisions in South Africa. He accordingly decided that it was not necessary to determine the further question as to the respondent's discretion to withhold his certificate.

The first issue on appeal is whether or not a private company is entitled to bring a private prosecution. The second issue, which is interrelated with the first, is whether the respondent has the discretion to issue or withhold his C certificate *nolle prosequi* where he declines to prosecute at the public instance.

Governing statutory provisions

Part III of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP&E Act) regulates the institution of private prosecutions. Section 13 confers the right to prosecute in the following terms: D

> "In all cases where the Attorney-General declines to prosecute for an alleged offence, any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury

which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it."

Persons other than those referred to in s 13 who are entitled to prosecute E are identified in s 14:

"The following shall possess the right of prosecution –

(a) a husband, in respect of offences committed against his wife;

(b) the legal guardians or curators of minors or mentally disordered or defective persons, in respect of offences committed against their wards; F

(c) the wife or children or, where there is no wife or child, any of the next-of-kin of any deceased person, in respect of any offence by which the death of such person is alleged to have been caused;

(d) public bodies and persons on whom the right is specially conferred by statute, in respect of particular offences."

Section 16 deals with the grant of certificates *nolle prosequi* by the G Attorney-General and their production for the purpose of criminal proceedings. It provides as follows:

"(1) Except as is provided by subsection (2), it shall not be competent for any private party to obtain the process of any court for summoning any party to answer any charge, unless such private party produces to the officer authorised by law to issue such process a certificate signed by the Attorney-General that he H

Patel J

A has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance, and in every case in which the Attorney-General declines to prosecute he shall, at the request of the party intending to prosecute, grant the certificate required.

(2) When the right of prosecution referred to in this Part is possessed under any statute by any public body or person in respect of particular offences, subsection B (1) shall not apply."

Origins of right of private prosecution

Before addressing the status of corporate entities in the prosecutorial context, it seems necessary to delineate the historical background to private prosecutions generally. As was recognised and restated in s 89 of the former C Lancaster House Constitution:

"Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in D Zimbabwe the force of law."

According to Dugard: *South African Criminal Law and Procedure – Vol IV Introduction to Criminal Procedure* (1977) at p 19, the Roman-Dutch law of criminal procedure and evidence remained in force at the Cape until the early 19th century. Following various alterations to the structure of the courts in the Cape, this adjectival law was radically anglicised by Ordinance No. 40 E (1828) and Ordinance No. 72 (1830) to form the foundations of our modern law (*ibid* at p 25). As regards the institution of prosecutions, the British Government accepted that the conditions prevailing in the Cape did not permit the unmodified adoption of the English system of private prosecution. Accordingly, the right of prosecution was vested in the Attorney-General but, where he declined to prosecute, a private individual might prosecute F in respect of an injury to himself or to someone under his care (*ibid* at p 25). In principle, therefore, the law governing private prosecutions, both in Zimbabwe and in South Africa, does not originate in the Roman-Dutch law but is derived from the English common law.

In England, during the 17th and 18th centuries, the system of criminal G procedure that prevailed was predominantly one of private prosecutions. No public official was designated as a public prosecutor, either locally or nationally, although the local justice of the peace sometimes assumed that role. In essence, private citizens were responsible for preserving the peace and maintaining law and order. Crimes were regarded as being committed not against the State but against a particular individual or family. Thus, the H prosecution of almost all criminal offences was usually initiated and conducted

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by the victim or his or her relative. The distinctive feature of the common A law was that it was not a privilege but the duty of the private citizen to preserve the peace and bring offenders to justice. Consequently, no authority was vested in the King to dictate if and when a private individual could institute criminal proceedings. With the passage of time, King's attorneys were appointed to intervene in matters of particular interest to the King or B to initiate and conduct prosecutions in his name. This led to the origin and evolution of the so-called law officers of the Crown, vested with the specific function of advising and litigating on behalf of the King.

The late 19th century saw the passage of the Prosecution of Offences Act 1879 which first introduced the office of Director of Public Prosecutions. However, this Act did not fundamentally undermine private prosecutions, C because public prosecutors enjoyed very limited authority. Again, the successor Act of 1908 did not substantially increase the powers of public prosecutors. It was only with the enactment of the Prosecution of Offences Act 1985 that England established an effective system of public prosecution through the Crown Prosecution Service. Even then, this Act continued to preserve a limited right of private prosecution. D

Right of private company to prosecute

The above historical synopsis demonstrates that the right of private prosecution originates in the reparation of individual injuries and the vindication of individual as opposed to corporate rights. The interests that the right to E prosecute is conceived to safeguard are manifold. They are certainly not confined to purely pecuniary loss or the kind of injury that might ordinarily be sustained by corporate entities in the normal course of their business. This rationale is aptly and eloquently captured by van den Heever AJP in *Attorney-General* v *van der Merwe and Bornman* 1946 OPD 197 at 201*:

> "Prosecution is not primarily designed to recover compensation. I do not think, F therefore, that the expression 'substantial and peculiar interest' was intended …. to convey only a pecuniary interest in respect of which the prosecutor may obtain compensation or restitution. The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies. G
>
> The interest the legislature had in mind may be pecuniary, but may also be such that it cannot sound in money – such imponderable interests, for example, as the chastity and reputation of a daughter or ward, the inviolability of one's person or the persons of those dear to us. Permission to prosecute in such circumstances was conceived as a kind of safety-valve. An action for damages may be futile against a man of straw and a private prosecution affords a way of vindicating H

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> A those imponderable interests other than the violent and crude one of shooting the offender. The vindication is real: it consoles the victim of the wrong; it protects the imponderable interests involved by the deterrent effect of punishment and it sets at naught the inroad into such inalienable rights by effecting ethical retribution. Finally it effects atonement, which is a social desideratum."

In *Salisbury Bottling Co (Pvt) Ltd & Ors* v *Central African Bottling Co (Pvt)*B*Ltd* 1958 (1) SA 750 (FS) all the parties involved were corporate entities. Our Federal Supreme Court canvassed the right of private prosecution under s 19 of the CP&E Act [*Chapter 28* of 1939] (the predecessor to s 13 of [*Chapter 9:07*] as an alternative remedy to the grant of damages or an interdict. In that context, the court did not draw any specific distinction as between C private individuals and companies. However, it did not consider or make any definitive ruling on the point presently under review.The authority relied upon and followed by the court below in rejecting the appellant's *locus standi* to prosecute is the South African case of *Barclays Zimbabwe Nominees (Pvt) Ltd* v *Black* 1990 (4) SA 720 (A). The court in that case held that the phrase "private person" in s 7(1)(a) of the Criminal Procedure Act No. 51 of 1977 D (the equivalent of s 13 in the CP&E Act), as read in the context of s 7 and the Act as a whole, should be interpreted as meaning only a natural person. Milne JA, delivering the unanimous decision of the Appellate Division, elaborated several reasons for arriving at that conclusion: the definitions of the word "private" in the *Oxford Dictionary* (2 ed) are indicative of natural E rather than artificial characteristics (at 722E-F and 723B-C); the reference to "some injury which he individually suffered" is peculiarly apposite in the case of natural persons (at 723C-G); s 8(1) of the 1977 Act (the equivalent of our s 14(d)) draws a clear distinction between natural persons and corporate bodies (at 725A-B); s 10(2) of the 1977 Act, which requires the

signature of the indictment, charge sheet or summons, specifically differentiates between F a private prosecutor and a corporate body (at 725C-E); and, lastly, the need to obviate any resort to self-help, as articulated in the *van der Merwe* case, *supra*, underscores the point that "a corporate body as such has no human passions and there can be no question of the company, as such, resorting to violence" (at 726F-G).

G Although, as was clearly recognised by the learned judge *a quo*, the South African and Zimbabwean statutes are broadly *in pari materia*, I think it necessary to highlight certain critical differences between them. First and foremost, s 7(1) of the South African Act confers the right to prosecute on "any private person … either in person or by a legal representative"; s 13 of the CP&E Act provides that "any private party … may prosecute". Secondly, H the right to prosecute under statute is exercisable in terms of s 8(1) of the

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South African Act by "any body upon which or person upon whom" such right A is expressly conferred; by virtue of s 14(d) of the CP&E Act it is exercisable by "public bodies and persons on whom" it is specially conferred. Thirdly, there is no equivalent in the CP&E Act of s 10(2) of the South African Act which requires the signature of the indictment, charge sheet or summons by the "prosecutor or his legal representative". Fourthly, s 11(1) of the South B African Act refers to the failure of "the private prosecutor" to appear on the day set down for trial; s 18(1) of the CP&E Act refers to such failure by "the prosecutor, being a private party".

Ultimately, the most fundamental distinction between the two statutes is the usage of "private person" in the South African Act as contrasted with the references to "private party" in the CP&E Act. The word "person", in its C principal sense, is defined in *The Shorter Oxford English Dictionary* (3 ed 1978) as "an individual human being; a man, woman, or child". However, in its legal sense, it is defined to mean "a human being (*natural person*) or body corporate or corporation (*artificial person*), having rights or duties recognised by law". Again, in the legal context, the word "party" is defined D as "each of two or more persons (or bodies of people) that constitute the two sides in an action at law, a contract, etc.". In my view, these definitions, coupled with the differences that I have highlighted as between the South African and Zimbabwean statutes, tend to diminish the persuasive authority of the Appellate Division's otherwise cogent reasoning in the *Barclays Zimbabwe Nominees* case. E

In England, as I have stated earlier, the Prosecution of Offences Act 1985 [*Chapter 23*] now provides the regulatory framework for a comprehensive system of public prosecution. Section 1 of this Act establishes the Crown Prosecution Service consisting of the Director of Public F Prosecutions, Crown Prosecutors and other subordinate staff. In terms of s 3, the Director of Public Prosecutions, acting under the superintendence of the Attorney-General, is charged with the duty of, *inter alia*, taking over the conduct of all criminal proceedings instituted on behalf of any police force, as well as instituting criminal proceedings in important or difficult cases or where it is otherwise appropriate to do so. In any event, s 6 explicitly preserves the right of private prosecution as follows: G

> "(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
>
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage." H

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A Prior to 1985, the importance of the private right to prosecute is illustrated by the reliance placed upon it by Lord Woolf CJ in *R (Hunt)* v *Criminal Cases Review Commission* [2001] QB 1108 at para 20:

> "Great importance has always been attached to the ability of an ordinary member of the public to prosecute in respect of breaches of the criminal law."

B The continuing survival of that right, to the extent provided for by s 6 of the 1985 Act, was vouchsafed by the House of Lords in *Jones* v *Whalley* [2007] 1 AC 63. Any judicial curtailment of the

right was not readily countenanced. As was observed by Mitting J in *R (Ewing)* v *Davis* [2007] EWHC 1730 (Admin) at para 23:

> "… if the right of private prosecution is to be taken away or subjected to limitation, C it is for Parliament to enact and not for the courts by decision to achieve."

The position of corporate entities in England is no different. That the right of private prosecution can be exercised by a corporate body was confirmed by the Divisional Court in *R (Gladstone plc)* v *Manchester City Magistrates Court* [2005] 1 WLR 1987.

D More recently, the correctness of that position was reaffirmed by the Court of Appeal and the Supreme Court in a case involving the Financial Service Authority (the FSA). The central issue in that case was whether the FSA had the power to prosecute offences other than those referred to in ss 401 and 402 of the Financial Services and Markets Act 2000. The FSA contended that as a body corporate with legal personality it had the common law power to E bring prosecutions in respect of other offences. The FSA is a company limited by guarantee, incorporated in June 1985. The Memorandum and Articles of Association of the FSA express its objects and powers in broad terms. The Act of 2000 did not create the FSA or turn it into a statutory corporation, but assumed its existence as a body corporate.

F The Court of Appeal (Criminal Division), in *R* v *Rollins and McInerney* [2009] EWCA (Crim) 1941 rejected the contention that ss 401 and 402 of the Act together created a complete regime of offences that the FSA could prosecute. It was held by Richards LJ at para 30:

> "For our part, we can see no reason why the general right of private prosecution should not be enjoyed by the FSA. The right is not excluded by FSMA 2000 G or any other statutory provision to which our attention has been drawn, and the powers conferred on the FSA by its Memorandum of Association are easily wide enough to cover the institution of criminal proceedings within the scope of its objects."

The court of appeal accordingly concluded that the FSA did have the power to prosecute offences beyond those referred to in ss 401 and 402 of the Act. H This decision was upheld on appeal to the Supreme Court in *R* v *Rollins; R*

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v *McInerney* [2010] UKSC 39. It was held that a corporation enjoyed the A same power to prosecute as did any individual under the common law right of private prosecution. Sir John Dyson SCJ, delivering the judgment of the court, enunciated this position as follows, at paras 8-9:

> "Every person has the right to bring a private prosecution: see, for example, *Gouriet* v *Union of Post Office Workers* [1978] AC 435 at 497H *per*B Lord Diplock. The right to bring private prosecutions has been expressly preserved by s 6 of the Prosecution of Offences Act 1985 … .
>
> Nothing in s 6(1) excludes bodies corporate from the definition of 'any person'. A corporation may therefore bring a prosecution provided that it is permitted to do so by the instrument that gives it the power to act. As Lord Mance noted in *Jones* v *Whalley* [2007] 1 AC 67 at para 38, private prosecutions 'may be initiated by private bodies such as high street stores, by charities such as NSPCC C and RSPCA, or by private individuals …' "

For these reasons, the broad prosecutorial right of the FSA was confirmed, at paras 11-14:

> "The general position, therefore, is that the FSA has always been able to bring any prosecution subject to statutory restrictions and conditions and provided D that it is permitted to do so by its memorandum and articles of association. Most statutes which create offences do not specify who may prosecute or on what conditions. Typically, they simply state that a person who is guilty of the offence in question shall be liable to a specified maximum penalty, it being assumed that anybody may bring the prosecution. …
>
> The general position before the enactment of FSMA was that the FSA had the E power of a private individual to prosecute provided that this fell within the scope of its objects and prosecution was not precluded or restricted by the terms of the relevant statute."

Turning to the relevant provisions of the CP&E Act, I would accept that some of the phraseology employed in s 13 of the Act, in particular the reference to "some injury which he individually has suffered", strongly supports the F proposition that the right to prosecute conferred by that provision is confined to natural as opposed to artificial persons. On the other hand, the references to "public bodies and persons" and "public body or person", in ss 14 and 16 respectively, suggest otherwise. The term "private party" itself, as used in Part III of the Act, is defined in s 12, in a fashion that is plainly tautologous and unhelpful, to mean: G

> "a person authorized by section *thirteen* or *fourteen* to prosecute any offence".

In the context of the Act as a whole, s 2 contemplates a broad definition of "person" in the following terms:

> " 'person' and 'owner' and other like terms, when used with reference to property or acts, include corporations of all kinds, and any other association of persons H

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> A capable of owning or holding property or doing acts and they also, when relating to property, include any department of the State".

A broader connotation of the words under review is further supported by s 3(3) of the Interpretation Act [*Chapter 1:01*] which provides that in every enactment:

> B " 'person' or 'party' includes –
>
> (a) any company incorporated or registered as such under an enactment; or
>
> (b) any body of persons, corporate or unincorporated; or
>
> (c) any local or other similar authority".

Also relevant for present purposes is s 9 of the Interpretation Act which C prescribes rules as to gender and number as follows:

> "(1) Unless the context otherwise requires, words importing female persons include male persons and juristic persons and words importing male persons include female persons and juristic persons.
>
> (2) Words in the singular include the plural and words in the plural include the singular."

D One of the paramount principles of statutory construction is that the law should not be subject to casual change. As was succinctly put by Lord Devlin in *National Assistance Board* v *Wilkinson* [1952] 2 All ER 255 (QB) at 260C:

> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that E point unmistakably to that conclusion".

Bennion *Statutory Interpretation* p 317 elaborates the principle against casual change as follows:

> "It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provision. In the case F of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.
>
> The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves G accepting that Parliament contravened the principle."

Having regard to the English authorities cited above, it is clear that the common law right of private prosecution was not confined to natural persons but extended as well to juristic and artificial entities. That common law right migrated to the Cape Colony through Ordinance No. 40 (1828) and Ordinance No.72 (1830) and remained intact until 10 June 1891, at which stage it became H an integral part of our law (*cf.* s 89 of the former Constitution). The critical

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question is whether the right of private prosecution, as embodied in statute, A has been modified by the CP&E Act (or its predecessors) so as to exclude private corporations from its ambit.

The governing rule of statutory interpretation dictates that the provisions of Part III of the CP&E Act should be construed, insofar as is consistent with their language and context, so as to preserve the common law components B of the right to prosecute rather than to diminish or extinguish them. I do not perceive in these provisions any clear or positive legislative intention to alter pre-existing rights or to constrict the common law position relative to corporations.

This interpretation is fortified by the reality that a company is in essence C an association of persons and therefore should, albeit subject to its obvious physical limitations, enjoy the same rights and privileges as the individual members comprising it, including the right of prosecution. The fact that it is devoid of human passions and has no personal interests to protect should not, in principle, detract from that right. Its interests may be of a purely material or pecuniary character,

but they constitute a proper basis for the D right to prosecute. This was clearly recognised *van der Merwe supra* (in the passage quoted earlier), and in *Levy* v *Benatar* 1987 (1) ZLR 120 (S) at 126F.

To answer the question posed above, it seems to me that a liberal and inclusive construction of s 13 of the CP&E Act accords not only with the definition of "person" and "party" in s 2 of that Act but also with the broad definition E of those terms in s 3(3) of the Interpretation Act. It also accords with the rule of interpretation prescribed by s 9(1) of the Interpretation Act, *viz.* that words importing male persons include female persons and juristic persons. Moreover, this construction is neither inconsistent with the context of s 13 nor does it lead to any absurdity. I accordingly take the view that the right of private prosecution conferred by that provision vests in natural as well F as artificial persons, including private corporations.

Attorney-General's discretion

The requirements for the issuance of a certificate *nolle prosequi* are crisply spelt out in s 13 of the CP&E Act. As was expounded by Gubbay JA in *Levy's* case (*supra*) at 125A-G: G

> "The private party concerned must show:
>
> (i) some substantial and peculiar interest,
>
> (ii) in the issue of the trial,
>
> (iii) arising out of some injury,
>
> (iv) which he individually has suffered, H

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> A (v) in consequence of the commission of the offence.
>
> …
>
> These five requirements are in addition to the obligation to obtain from the Attorney-General a certificate of *nolle prosequi*, for the practice has always been for the State jealously to guard its right to prosecute offenders. See Lansdown and B Campbell *South African Criminal Law and Procedure* Vol 5 at 120."

Moreover, as the learned authors cited in the above passage point out at p 121:

> "The mere possession of the Attorney-General's certificate does not in itself confer an absolute right of private prosecution. In the absence of such a right the court will interdict the person proposing to prosecute privately."

In other words, notwithstanding the possession of a certificate, the court may, C in the exercise of its inherent power to prevent abuse of process, interdict a private prosecution pursuant to such certificate. This inherent power to restrain a private prosecution was emphasised by Roper J in *Solomon* v *Magistrate, Pretoria & Another* 1950 (3) SA 603 (W) at 607F-H:

> "The court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings … and though this power is usually asserted in connection D with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution. In such a case as I have postulated, therefore, this court would in my opinion by virtue of its inherent power be entitled to set aside a criminal summons issued by its own officials or to interdict further proceedings upon it."

This broad principle was confirmed, but with some caution, by Hoexter JA E in *Phillips* v *Botha* 1999 (2) SA 555 (SCA) at 565G-I:

> "Where the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case. … The question is whether the private prosecution of the respondent was either instituted or thereafter conducted by the appellant for F some collateral and improper purpose, such as the extortion of money, rather than with the object of having criminal justice done to an offender."

In the more recent South African case of *Singh* v *Minister of Justice and Constitutional Development & Another* (5072/05) [2006] ZAKZHC 20, it was argued that the National Director of Public Prosecutions (the NDPP) G was obliged to issue to the applicant a certificate *nolle prosequi* once there had been a decision that he had declined to prosecute, and that it was not necessary for a private prosecutor to prove some substantial and peculiar interest in the issue of the trial. It was held, per Hollis AJ, that upon a proper construction of s 7 of Act No. 51 of 1977 the NDPP was not

obliged to do so unless the requirements of s 7(1)(a) had been met. It was necessary for H the applicant to provide a factual basis proving that he had some substantial

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and peculiar interest in the issue of the trial, arising out of some injury A which he has individually suffered in consequence of the commission of the alleged offence.

Bennion *op cit* at p 625, dealing specifically with rights in relation to law and legal proceedings, opines that:

> "One aspect of the principle against doubtful penalisation is that by the exercise B of state power the rights of a person in relation to law and legal proceedings should not be removed or impaired, except under clear authority of law."

In his ensuing commentary on the principle, the learned author makes the following observation, at p 626:

> "The right to bring, defend and conduct legal proceedings without unwarranted interference is a basic right of citizenship. … While the court has control, subject C to legal rules, of its own procedure, this does not authorize any ruling which abridges the basic right."
>
> The language of s 16(1) of the CP&E Act is categorically clear, *viz.* a private prosecutor must produce 'a certificate signed by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance'. Moreover, '*in every case* in which the D Attorney-General declines to prosecute *he shall*, at the request of the party intending to prosecute, *grant the certificate required*'".

In any event, in construing this provision, we must also have regard to the Attorney-General's constitutionally guaranteed independence and wide discretion in matters of criminal prosecution. Taking this into account, it E seems to me that the exercise of his discretion *vis-à-vis* any intended private prosecution involves a two-stage process. The first stage is for him to decide whether or not to prosecute at the public instance. If he declines to do so, the next stage comes into play, *i.e.* to decide whether or not to grant the requisite certificate. In so doing, he must take into account all the relevant factors prescribed in s 13 of the Act, to wit, whether the private party in question "can G show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence". If he cannot show any such interest, the Attorney-General is entitled to refuse to issue the necessary certificate. However, where the private party is able to demonstrate the required "substantial and peculiar interest" and attendant criteria, the Attorney-General is then bound to grant the certificate *nolle prosequi*. At that stage, his obligation to do so becomes peremptory and s 16(1) can no longer be construed as being merely permissive or directory.

This conclusion clearly does not impinge on the Attorney-General's principal discretion to prosecute or not to prosecute at the public instance. That decision is an incident of his constitutional primacy in the sphere of criminal H

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A prosecution and is generally not reviewable. Indeed, as is expressly recognized in s 20 of the CP&E Act, even after a private prosecution has commenced, he is entitled to apply for the proceedings to be stopped in order to institute or continue the prosecution at the public instance. However, once he has declined to prosecute and is met with a request for private prosecution by B a party that satisfies the "substantial and peculiar interest" requirement of s 13, he has no further discretion in the matter and is statutorily bound by s 16(1) to issue the requisite certificate.

Disposition

It follows from all of the foregoing that the appellant, *qua* private corporation, is entitled to institute a private prosecution in terms of s 13 of the Act. C However, this entitlement is subject to the issuance of a certificate *nolle prosequi* under s 16(1) upon the respondent being satisfied that the appellant meets the requirements of s 13.

According to the appellant's founding affidavit in the proceedings *a quo*, it has incurred a massive loss in the amount of US$1,700,000 arising from the D alleged fraudulent activities of its former

employees. The respondent takes issue with the evidence required to establish fraud but does not dispute the nature and extent of the prejudice suffered by the appellant. On the papers, therefore, the appellant has clearly demonstrated a substantial and peculiar interest in the issue of the intended prosecution and trial arising out of an injury which it has suffered by the commission of the alleged offence.

E The appellant also avers that, at the stage of bail proceedings, the evidence against the four accused persons was found to be so overwhelming as to entail the refusal of bail by the magistrates court. Three weeks later, charges against all four accused were withdrawn before plea on the ground of insufficient evidence. After a further three weeks, following the appellant's request to F mount a private prosecution, the respondent withheld and declined to issue his certificate *nolle prosequi*. The reasons stated for that decision, in the respondent's letter of 23 April 2010, were that "the evidence [in the police docket] does not establish a criminal offence against the four suspects" and that it would be "*contra bonos mores* for me to grant my certificate in this matter." However, nothing was stated in the letter as to his evaluation of the G nature and extent of the appellant's interest in the matter or the relationship between the alleged offence and the injury sustained by the appellant.

The appellant's grounds for seeking to review the respondent's decisions before the court *a quo* are essentially twofold, to wit, gross irrationality in his assessment of the evidence in the docket and misdirection at law in his application of s 16(1) of the Act. The *locus classicus* on judicial review in H England is the decision of the House of Lords in *Council for Civil Service*

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Unions v *Minister for the Civil Service* [1984] 3 All ER 935 (HL). Lord A Diplock, at 950-951, described the grounds of review as follows:

> "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members B of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By 'illegality' as a ground for judicial review I mean that the decision-maker 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. C
>
> By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd* v *Wednesbury 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 D 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. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes)* v *Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake E of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> 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 F 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. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

Lord Roskill, at 953-954, adverted favourably to the "new nomenclature" devised by Lord Diplock but adopted a slightly different approach which, G in essence, retains the same classification:

> "But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on H

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> A three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of B natural justice'."

In *PF-ZAPU* v *Minister of Justice* 1985 (1) ZLR 305 (S), the question that fell for resolution was whether the courts could test the validity of anything done by the President. Dumbutshena CJ, at 325-326, commended the decision C in the *CCSU* case as follows:

> "More recently the House of Lords laid down the grounds upon which administrative actions are subject to judicial review. These grounds appeal to me not only because they were pronounced by an eminent Law Lord, but also because they make clear the wide extent of the theatre of operation in which courts can test the validity of prerogative actions."

The learned Chief Justice then proceeded, at 327-328, to adopt and apply D the grounds of review expounded by the House of Lords:

> "I respectfully agree with Lord Diplock's three grounds on the reviewability of decisions taken under royal prerogative (in our case Executive prerogative), which clearly state the grounds upon which actions taken under executive prerogative can be attacked by the courts.
>
> E I have no doubt in my mind that the Electoral Act (Modification) Notice 1985 and Proclamation 2 of 1985 … are reviewable by the court on the grounds so ably stated by Lord Diplock."

Section 26 of the High Court Act [*Chapter 7:06*] declares the inherent power, jurisdiction and authority vested in the High Court to review all proceedings and decisions of all inferior courts, tribunals and administrative authorities F within Zimbabwe. In terms of s 28 of the Act, upon the review of any civil proceedings or decision, the High Court may, subject to any other law, set aside or correct the proceedings or decision.

The principles of judicial review enunciated by Lords Diplock and Roskill, and subsequently adopted by Dumbutshena CJ, are now codified in s 3(1)(a) G of the Administrative Justice Act [*Chapter 10:28*]. This provision enjoins every 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 to "act lawfully, reasonably and in a fair manner". Subsections (2) and (3) of s 4 restate and elaborate the inherent powers of the High Court to grant relief in respect of any reviewable irregularity. These H include the power to confirm or set aside the decision under review or refer

Patel J

the matter back to the administrative authority concerned for consideration A or reconsideration. Additionally, the High Court may give such directions as it may consider necessary or desirable to achieve and ensure compliance by the administrative authority with s 3 as well as the relevant law or empowering provision.

Dealing with the irrationality ground invoked by the appellant, I do not think B that the respondent's assessment of the evidence against the accused persons in question can properly be subjected to review. As I have already stated, that is a function that forms part of his constitutional prerogative and cannot ordinarily be questioned by the courts. Even if it were held to be reviewable, it cannot be said on the facts *in casu* that his decision is so irrational in its defiance of logic or accepted moral standards that no reasonable person in C his position who had applied his mind to the matter could have arrived at it.

On the other hand, turning to the legality of the respondent's decision not to issue his certificate, it is clear that he has failed to exercise his statutory powers on a proper legal footing. Having declined to prosecute at the public instance, he should have considered whether or not the appellant satisfied D the "substantial and peculiar interest" requirement of s 13 of the Act. He did not do so but proceeded to decline his certificate *nolle prosequi* on the basis that there was insufficient evidence to prosecute. He consequently failed to correctly understand and give effect to the requirements of s 16(1) which regulated his decision-making power. Put differently, by withholding E his certificate, he was guilty of an error of law by purporting to exercise a power which in law he

did not possess. He thereby contravened his duty to act lawfully in accordance with the peremptory injunction of s 16(1). This constitutes a manifest misdirection at law rendering his decision reviewable on the ground of illegality.

It follows that the court *a quo* should have found in favour of the appellant on F the first ground of review pleaded by it, *viz.* that the respondent misdirected himself at law in exercising his discretion under s 16(1) of [*Chapter 9:07*]. As I have already indicated, the High Court is endowed with wide powers of review, including the power to set aside and correct the decision under review or refer the matter back for reconsideration or give directions to G ensure compliance with the law. In the present matter, in light of the appellant having demonstrated its "substantial and peculiar interest in the issue of the trial" in terms of s 13, no useful purpose would be served by remitting the matter to the respondent for reconsideration. The best recourse in the circumstances of this case would be to grant the relief prayed for by the appellant in the High Court. H

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A In the result, the appeal is allowed with costs. The judgment of the court *a quo* is set aside and substituted with the following:

"1. The decision by the respondent to refuse to grant a certificate *nolle prosequi* to the applicant be and is hereby set aside.

2. The respondent is directed and ordered, within five days of the date B of this order, to issue a certificate to the applicant that he declines to prosecute the fraud charge at the public instance.

3. The respondent shall pay the costs of this application."

C ZIYAMBI JA and GARWE JA concurred.

Scanlen & Holderness, appellant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/ZIMPLASTICS (PVT) LTD v CORBETT 2014 (1) ZLR 68 (H)

ZIMPLASTICS (PVT) LTD v CORBETT 2014 (1) ZLR 68 (H)

2014 (1) ZLR p68

Citation	2014 (1) ZLR 68 (H)
Case No	Judgment No. HH-32-14
Court	High Court, Harare
Judge	Chigumba J
Heard	13 January 2014; *CAV*
Judgment	29 January 2014
Counsel	*C Warara*, for the applicant *R Makozho,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – condonation – application for condonation of failure to observe rules of court – requirements for such application – need for applicant to satisfy court that sufficient cause exists to excuse him from failure to observe rules of court

Practice and procedure – summary judgment – requirements – what plaintiff D *must aver and establish – what defendant must show to resist a claim for summary judgment*

Headnote

In an application for condonation of the failure to observe the rules of court, it is for the applicant to satisfy the court that there is sufficient cause to E excuse him from such failure. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts. In essence, it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice.

The purpose of the relief of summary judgment is to enable a plaintiff with F a clear case to obtain swift enforcement of its claim against a defendant who has no real defence against the claim. A plaintiff seeking summary judgment must bring himself squarely within the ambit of the High Court Rules 1971 (RNG 1047 of 1971). His claim must be clear and unassailable as it is set out in the summons and declaration and verified G in the founding affidavit. Summary judgment should usually not be granted when any real difficulty as to matters of law arises, although, however difficult the point of law is, once the court is satisfied that it is really unarguable, judgment will be granted. The plaintiff's claim in the pleadings must be unanswerable. The founding affidavit must confirm the facts of the case, confirm the cause of action and contain an averment that H

A the respondent has no *bona fide* defence and has entered appearance to defend solely for the purposes of delaying the finalization of the matter. For the defendant to resist the claim for summary judgment, he must establish that he has a good *prima facie* defence. Vague generalities and inconclusive allegations are not enough. While the defendant need not B deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence with sufficient clarity and completeness to enable the court to decide whether a *bona fide* defence exists. Such a defence exists if the defendant can show that there is a mere possibility of success, that he has a plausible case or that there is a real possibility that an injustice may be done if summary judgment C is granted.

Cases cited

Bank of Credit & Commerce Zimbabwe Ltd v *Jani Invstms (Pvt) Ltd* 1983 (2) ZLR 317 (H)

Beresford Land Plan (Pvt) Ltd v *Urquhart* 1975 (3) SA 615 (RA); D 1975 (1) RLR 260 (A)

CABS v *Ndahwi* 2010 (1) ZLR 91 (H)

Chindori-Chininga v *National Council for Negro Women* 2001 (2) ZLR 305 (H)

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

E*District Bank Limited* v *Hoosain & Ors* 1984 (4) SA 544 (C)

Hales v *Doverick Invstms (Pvt) Ltd* 1998 (2) ZLR 235 (H)

Jena v *Nechipote* 1986 ZLR 29 (S)

Kodzwa v *Sec for Health & Anor* 1999 (1) ZLR 313 (S)

Mandaza v *Mzilikazi Invstms (Pvt) Ltd* 2007 (1) ZLR 77 (H)

Mbayiwa v *Eastern Highlands Motel* S-139-86

F*Oak Hldgs (Pvt) Ltd* v *Chiadzwa* S-136-85

Rheeder v *Spence* 1977 (2) RLR 263 (G)

Shingadia v *Shingadia* 1966 RLR 285 (G)

Viking Woodwork (Pvt) Ltd v *Blue Bells Entprs (Pvt) Ltd* 1998 (2) ZLR 249 (S)

Legislation considered G

Civil Evidence Act [*Chapter 8:01*], s 27(3)(a)

High Court Rules 1971 (RGN 1047 0f 1971), rr 63, 64, 227(4) & 238(2a)

Case Information

C Warara, for the applicant

H*R Makozho*, for the respondent

Judgment

Chigumba J: On 4 September 2013, under case no. HC 6406/13, the A applicant obtained an order of this court, that case nos. HC 11294/11 and HC 4709/13 be consolidated and heard as one matter. The respondent had filed an application for summary judgment under case no. HC11294/11, to which the applicant had filed B opposing papers. The respondent had filed heads of argument on 25 June 2012. The applicant filed its heads of argument on 23 July 2013, 19 days after the stipulated period in terms of the rules of this court. Upon realizing its dilemma, the applicant made an application for upliftment of bar and condonation of late filing of heads of argument on 17 June 2013, under case no. HC4709/13. The respondent opposed the application for condonation. On 30 June 2013, the respondent set down its C application for summary judgment for hearing. The court ordered that the two matters be consolidated and heard as one. This court is now seized with the two applications. At the hearing of the matter, the court directed that the application for condonation be heard first, then proceeded to hear the application for summary judgment. The court indicated that, in determining the two applications, if it declined to grant condonation, the matter would D end there.

The application for upliftment of bar and condonation, case no. HC4709/13, was for the following relief:

1. the application for condonation of late filing of heads of argument and upliftment of bar be and is hereby granted; E
2. the bar operating against Zimplastics (Pvt) Ltd be and is hereby uplifted;
3. a copy of the heads of argument attached to the application for condonation of late filing of heads of argument be and is hereby placed before the court as forming part of the record under case no. HC 11294/11;
4. costs be in the cause. F

It was premised on a founding affidavit duly sworn to by Portia Makurumure, the legal practitioner of record for the applicant. She stated that she was authorized to depose to the affidavit, because the facts therein were within her personal knowledge to the best of her information and belief. She deposed to the fact that, on 24 June 2012, the respondent filed and served his heads of argument in the main application for summary judgment on G the applicant's legal practitioners of record's law firm. She stated that she received the respondent's heads of argument, and drafted the applicant's heads of argument, which she unfortunately misfiled before they could be typed by her secretary, in a different file, due to the fact that her firm was handling numerous other files pertaining to the same parties. Ms Makurumure stated that she only realized her mistake when she attempted to prepare a certificate H

Chigumba J

A of service, when she had to search through all the files only to "discover" that the heads of argument had not been typed, or filed, or served. She concedes her error, and accepts responsibility for the fact that her client's heads of argument were filed 19 days out of time. She avers that her explanation is not *mala fide* and that there was no willful disregard of or contempt of the B rules of this court.

Finally, the applicant avers that no prejudice would be suffered by the respondent if the bar operating against it were to be uplifted, and the late filing of heads of argument condoned. A further averment proffered on behalf of the applicant is that the application for summary judgment is a matter of extreme importance to it, because it would suffer great financial prejudice in C the sum of US$78 000 if it were to remain barred. The applicant has already filed and served the required heads of argument on the respondent, and they form part of the record of proceedings. The applicant invoked the proviso to r 238(2a) of the rules of this court, on the basis that the heads of argument were filed and served five days before the set down date. The applicant D averred that the application for summary judgment is not likely to succeed because it contains disputes of fact, which are only suitable of resolution by way of action. Some of those disputes are that the quantum of the applicant's indebtedness is not clear, and the question of whether the respondent had been authorized by the applicant's board of directors to advance monies to the applicant. It is alleged that these disputes are incapable of resolution on E the papers filed of record.

The respondent filed opposing papers on 25 June 2013. He raised a point *in limine*, that the application for condonation was a nullity because the averments contained in the founding affidavit were based on hearsay evidence. The respondent contended that the deponent to the founding affidavit was F not privy to what transpired during board meetings and was not present when the decision to loan and advance monies to the applicant was made. It was contended, on behalf of the respondent, that only a person who "… saw, heard or otherwise perceived the statement being made" could depose evidence of it. The respondent relied on s 27(3)(a) of the Civil Evidence Act [*Chapter 8:01*] as authority for this proposition. The applicant relied on G*Mandaza* v *Mzilikazi Investments (Pvt) Ltd* 2007 (1) ZLR 77 (H) as authority for the proposition that:

> "… generally … a legal practitioner should not depose to a founding affidavit on behalf of a client … but there is an exception to this general rule. If the facts are within the knowledge of a legal practitioner (he may swear to an affidavit on behalf of the client)".

H The applicant also relied on r 227(4) which provides as follows:

Chigumba J

> "(4) An affidavit filed with a written application – A
>
> (a) shall be made by the applicant or the respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein;".

With respect to counsel for the respondent, I do not find the hearsay argument persuasive in regard to the application for condonation of late filing of heads of argument where the deponent to the founding affidavit is the person who B can testify as to why she failed to file the heads of argument on time. The heads of argument were prepared by the legal practitioner at her law firm. She is the author of the applicant's misfortune. She is best placed to appraise the court of the reason why she was dilatory in filing the heads of argument on time. However, I accept that the submissions by counsel for the respondent are correct when it comes to matters that transpired in board meetings at C which the legal practitioner for the applicant was not present.

The court considered the submission made on behalf of the respondent that the explanation proffered on behalf of the applicant was not acceptable, and that it was inadequate because it failed to comply with the legal requirements of an application for condonation and that there must not only be an acceptable D explanation for failing to comply with the time limits, but also an acceptable explanation for failing to apply for condonation timeously. The respondent relied, as authority for this proposition, on *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251 where the Supreme Court stated that:

> "… What calls for some acceptable explanation, is not only the delay in noting E an appeal and in lodging the record timeously, but also the delay in seeking condonation".

It is my view that the *Viking Woodwork* case, sought to be relied on by the respondent, is distinguishable from the facts of this case for the reason that it dealt with a contravention of r 63 of the Rules of this court which sets F out a calendar month as the time within which one can apply for rescission of judgment. This is materially different from r 238(2a) whose proviso (ii) appears to give a the respondent a second bite of the cherry by stipulating that the respondent ought to file its heads of argument within ten days of the date of service of the applicant's heads on it, or failing that, at least five days before the date of hearing. The facts of *Viking Woodwork* are also materially

G different from those under consideration because in that case the delay in seeking condonation was for a more considerable period.

The factors which the court should consider in determining an application for condonation are clearly set out in Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at pp 897-898 as follows: H

2014 (1) ZLR p73

Chigumba J

> A "Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance … The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is B that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance C of unnecessary delay in the administration of justice."

See *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR 313 (S).

Rule 238(2a) of the High Court Rules 1971 provides that:

> "(2a) Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of D subrule (1):
>
> Provided that –
>
> (i) no period during which the court is on vacation shall be counted as part of the ten-day period;
>
> (ii) the respondent's heads of argument shall be filed at least five days before E the hearing."

The applicant averred that it filed its heads of argument 19 days after the respondent had served its own heads on it, but at least five days before the hearing date. The applicant falls squarely within the ambit of proviso (ii) to r 238(2a). I do not find the applicant's 19 day failure to comply with the rules of this court deliberate, wilful or *mala fide*. Similarly, the delay in F seeking condonation was not occasioned by malice, but by the correct belief that the applicant was exonerated by proviso (ii) to r 238(2a). There is no evidence of a deliberate flouting of the rules. The explanation proffered shows evidence of some carelessness, but I do not find it inadequate or insufficient. The respondent has not supplied the court with *prima facie* evidence of the G prejudice that it is likely to suffer if condonation is granted, which nature of prejudice would not be remedied by an appropriate order as to costs. For these reasons, the application for condonation of late filing of heads of argument is granted, with costs remaining in the cause.

The respondent vigorously denied that its application for summary judgment was bad at law, and that it was not likely to succeed, on the papers before H the court. Under case no. HC 11294/11, the respondent in the application

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2014 (1) ZLR p74

Chigumba J

for condonation that the court has disposed of above, Mr Corbett, was the A applicant, and Zimplastics (Pvt) Ltd (hereinafter referred to as Zimplastics) was the respondent. Mr Corbett deposed to the founding affidavit and stated that, on 26 August 2011, he had caused summons to be issued under case number HC 8359/11, against Zimplastics for payment of US$78 998.88, being an amount due and payable to him by the Zimplastics, in respect of monies B loaned and advanced to Zimplastics, at Zimplastics' special instance and request, which monies remained outstanding, together with interest thereon at the prescribed rate, collection commission and costs of suit.

Zimplastics entered appearance to defend the matter on 8 September 2011. The applicant, Mr Corbett, believing that Zimplastics did not have a *bona fide* defence to his claim, and that it had entered appearance to defend only C for purposes of delaying the proceedings and postponing the date of payment, applied for summary judgment. Mr Corbett averred in his founding affidavit that he had a clear and unassailable case against Zimplastics that Zimplastics had no *bona fide* defence, and that Zimplastics entered appearance to defend purely for purposes of delay. The applicant

stated that it loaned and advanced monies to the respondent during the period February 2009 to February 2011, in D various sums amounting to US$78 998.88, which sum became due and owing as at February 2011. According to Mr Corbett, Zimplastics acknowledged its indebtedness to him through the medium of a letter dated 12 July 2011. The applicant, Mr Corbett, sought the following order:

1. Summary judgment in case no. HC8359/11 is granted in favor of the E applicant and against the respondent in the sum of US$78 998.88, together with interest thereon at 5% *per annum* calculated from 28 February2011 to the date of payment.
2. The respondent shall pay collection commission on the said sum in terms of the Law Society Tariff.
3. The respondent shall pay costs of suit on the scale of legal practitioner F and client.

Zimplastics opposed the application for summary judgment in its opposing papers, dated 25 November 2011. The basis of the opposition was that the loans allegedly advanced to it were never approved by its board of directors, that Mr Corbett was the Zimplastics' managing director during the relevant G period and had an interest in the respondent in that capacity and therefore could not have advanced such monies to Zimplastics without authorization. Zimplastics averred that, as a public company listed on the Zimbabwe Stock Exchange at the time, it is improbable that Mr Corbett loaned monies to his employer, rather, the evidence shows that Mr Corbett was running a parallel business which he ran in competition with his employer. Zimplastics denied H

Chigumba J

A acknowledging indebtedness to Mr Corbett as claimed. Zimplastics averred that there are material disputes of facts as to whether the loans were sanctioned by the board of directors. According to Zimplastics, this constitutes a *bona fide* defence because if the monies were advanced illegally, the respondent would not be liable to repay.

B Mr Corbett countered Zimplastics's averments by stating that the loans were approved by a Mr C R Maradza in his capacity as Finance Manager of Zimplastics. He denied that the board of directors were ignorant of the loan, and stated that the board of directors was constantly changing, but Mr Maradza remained with Zimplastics for a long time. Mr Corbett denied that C there were any material disputes of fact which rendered this matter incapable of resolution on the papers filed of record. He attached minutes of board meetings to show that the board was aware of the fact that he was loaning the respondent monies.

The summary judgment procedure is set out in r 64 of the High Court Rules D 1971 as follows:

> "(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.
>
> (2) A court application in terms of subrule (1) shall be supported by an affidavit E made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action."

The purpose of the relief of summary judgment is to enable a plaintiff with a clear case to obtain swift enforcement of its claim against a defendant who has no real defence against the claim. See *Oak Holdings (Pvt) Ltd* v F*Chiadzwa* S-136-85.

The plaintiff seeking summary judgment must bring itself squarely within the ambit of r 64. See *Shingadia* v *Shingadia* 1966 RLR 285 (G) at 288I-289A, and *Bank of Credit & Commerce Zimbabwe Ltd* v *Jani Investments (Pvt) Ltd* 1983 (2) ZLR 317 (H) at 320F. In other words, the plaintiffs claim must be G clear and unassailable as it is set out in the summons and declaration, and verified in the founding affidavit.

> "Accordingly, summary judgment should not be granted when any real difficulty as to matters of law arises, but it has been held that, however difficult the point of law is, once the court is satisfied that it is really unarguable, judgment will be granted." *Shingadia* v *Shingadia* 1966 RLR 285 at 288A-B; 1966 (3) SA 24 (R)H at 25-26:

Chigumba J

This passage was cited with approval in *Rheeder* v *Spence* 1977 (2) RLR 263 A at 266G; 1978 (1) SA 1041 (R) at 1043. In *Chrismar (Pvt) Ltd* v *Stutchbury* 1973 (1) RLR 277 (G), Beck J said at 279D:

> "… it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law that this drastic relief will be afforded to a plaintiff"

The plaintiff's claim in the pleadings (summons, declaration, founding B affidavit) must be unanswerable. See *Central Africa Building Society* v *Ndahwi* 2010 (1) ZLR 91 (H). The founding affidavit must confirm the facts of the case and the confirm the cause of action and contain an averment that the respondent has no *bona fide* defence and had entered appearance to defend solely for purposes of delaying the finalization of the matter. See C*Chindori-Chininga* v *National Council for Negro Women* 2001 (2) ZLR 305 (H) and *Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) RLR 260 (A); 1975 (3) SA 615 (RA).

The respondent must establish that it has a good *prima facie* defence. See *Hales* v *Doverick Investment (Pvt) Ltd* 1998 (2) ZLR 235 (H). The respondent must not be content with vague generalities and conclusory allegations. See D*District Bank Ltd* v *Hoosain & Ors* 1984 (4) SA 544 (C). In *Mbayiwa* v *Eastern Highlands Motel* S-139-86 the court stated that:

> "While the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence with sufficient clarity and completeness to enable the court to decide a *bona fide* defence". E

In *Jena* v *Nechipote* 1986 ZLR 29 (S) at p 30D-E the court stated that:

> "All the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that 'there is a mere possibility of success'; 'he has a plausible case'; there is a real possibility that an injustice may be done if summary judgment is granted".

The question that the court must answer is this: is the claim by Mr Corbett, F for payment of USD$78 998.88 clear, unambiguous and watertight, both in fact and in law, and do any of the defences raised by Zimplastics, denying liability, have sufficient merit both in fact and in law, to defeat the claim? Put differently, did the applicant loan and advance the sum of US$78 998.88 to the respondent, and if so, did it do so with the approval of the board of directors of the respondent, entitling it to repayment? G

Mr Corbett, the applicant, attached a letter dated 12 July 2011 to the founding affidavit of the application for summary judgment. The letter is addressed to him, by the respondent, Zimplastics, and titled "Letter of final demand for outstanding payments". Item number 2 of the letter, titled"Zimplastics-Corbett Family $77 859.53" reads as follows: H

Chigumba J

> A "According to our ledger the figure stated is $78 998.88. Please find attached our statement loan schedule. Can you please reconcile so as we deal with the same figures on both sides. However the chairman of ZECO Holdings Board of directors Mr P Chiyangwa informed me that he will handle the outstanding loan. He insisted you contact him directly".

B The contents of the letter are clear, and unambiguous. The applicant demanded payment of $77 859.53 on 21 June 2011. The respondent pointed out in the letter of 12 July 2011, that according to its books, the loan amount was actually $78 998.88. This confirms the fact and the cause of action in regards to the amount due and payable. It is evidence attached to the founding affidavit which verifies the cause of action as stipulated in *CABS* v *Ndahwi,*C*Chindori Chininga* v *National Council Negro Women,* and *Beresford* v *Urqhart supra.* In regard to the respondent's defence that the loan was advanced without the prior approval of the respondent's board of directors, in my view there is no possibility of its success, even a slight one. See *Jena* v *Nechipote supra*.

In fact in my view, a miscarriage of justice will ensue if summary judgment D is not granted. In the minutes of the respondent's board meeting of 22 September 2010, well before Mr P Chiyangwa joined the board of diresctors of Zimplastics as chairman and pledged that he would settle the debt directly, Wekare and Savanhu, non executive chairman and vice chairman, ratified the loan agreement. At p 7 of those minutes a record of the discussion pertaining to the loan clarifies issues somewhat. The chairman states that the loan had E not been approved by the board. Mr Corbett agrees, and to recognize and mitigate the impropriety of that, he offers to forgo his claim for interest in the sum of $36 000, which would leave the capital loan amount at around $107 600. The last line of para 10 on p 7 of the minutes reads:

"Mr T Savanhu urged Zimplastics management to clear the loan as soon as possible".

F This was a direction by the board chairman after the loan had been negotiated down to $107 600, in recognition of the fact that the monies had been advanced without the approval of previous boards of directors. Clearly the lack of board approval was subsequently ratified by the decision of the board of directors to accept a reduction of the interest component in that board meeting of G 22 September 2010. Zimplastics then accepted liability for the balance, and its chairman directed that the loan be repaid expeditiously. To argue, now, in 2013, that the loan was unsanctioned and illegal is simply not correct, as a matter of fact or of law. By 12 July 2012, Zimplastics' own books showed that the loan amount was $78 998.88.

The court is satisfied that the applicant's claim for summary judgment is clear H and unassailable, and that none of the defences raised by the respondent, of

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Chigumba J

fact or law, have any possibility of succeeding and defeating the applicant's A claim. Accordingly it is ordered that:

Firstly:

1. The application for condonation of late filing of heads of argument and upliftment of bar be and is hereby granted.
2. The bar operating against Zimplastics (Pvt) Ltd be and is hereby uplifted. B
3. A copy of the heads of argument attached to the application for condonation of late filing of heads of argument be and is hereby placed before the court as forming part of the record under case number HC 11294/11.
4. Costs be costs in the cause.

Secondly: C

5. Summary judgment in case no. HC 8359/11 is granted in favor of the applicant and against the respondent in the sum of US$78 998.88, together with interest thereon at 5% per annum calculated from 28 February 2011 to the date of payment.
6. The respondent shall pay costs of suit. D

Warara & Associates, the applicant's legal practitioners

Sinyoro & Partners, the respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/MOYO v NKOMO (TSHOLOTSHO NORTH ELECTION PETITION) 2014 (1) ZLR 79 (H)

MOYO v NKOMO (TSHOLOTSHO NORTH ELECTION PETITION) 2014 (1) ZLR 79 (H)

Citation	2014 (1) ZLR 79 (H)
Case No	Judgment No. HB-8-14
Court	High Court, Bulawayo
Judge	Makonese J
Heard	14 January 2014; *CAV*
Judgment	31 January 2014

Counsel *T Hussein*, for the applicant
K Phulu, for the respondent

Case Type Election petition

Annotations No case annotations to date

Flynote

Election – election petition – form of petition – must comply strictly with statutory requirements – must state allegations with precision – petition D *containing vague and general allegations cannot be referred to trial*

Headnote

The law governing the manner and grounds on which an election may be set aside is to be founded in statute. The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer, or E limit those rights. Therefore, in deciding whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the election. They have to function within the framework of that law and cannot travel beyond it.

The express provisions of the law allow a petitioner to lodge a petition in terms of the laid down procedure. The procedure for the filing and F determination of electoral petitions is laid down by the Electoral Act and the Electoral Rules 1995. An election petition shall be generally in the form of a court application and shall state the grounds relied on to sustain the petition and the relief sought. Whilst it may be convenient for a petitioner to present a petition with brief grounds set out in what G the petitioner refers to as the "notice", accompanied by an affidavit and other supporting documents, this is not the format prescribed by statute. Even if such an affidavit could be accepted, the allegations in it must be precise. Vague and general allegations are not sufficient. Where the grounds upon which the petition is to be sustained are vague and imprecise, the court cannot cure such defect by referring the matter to H trial, as to do so would amount to a fishing expedition.

2014 (1) ZLR p80

Makonese J

Cases referred to A

Hove v *Gumbo (Mberengwa West Election Petition Appeal)* 2005 (2) ZLR 85(S).

Nath v *Singh & Ors* [1954] SCR 892

Sahu v *Singh & Anor* [1985] LRC 31 B

Legislation considered

Electoral Act [*Chapter 2:13*], ss 167 & 169

Electoral (Applications, Appeals and Petitions) Rules 1995 (SI 74A of 1995), s 21(e) & (g)

Case information

T Hussein for applicant C

K Phulu for respondent

Judgment

Makonese J: The applicant was a candidate for the National Assembly seat for Tsholotsho North constituency in Matabeleland North Province in the harmonised general elections held on 31 July 2013 as a nominee of D ZANU (PF). The respondent was declared winner of the National Assembly

election in respect of the said constituency. She stood in the election as a candidate for the MDC (T) party.

The applicant was not satisfied with the outcome of the election, and accordingly, on 1 August 2013, filed a petition in terms of s 167 of the Electoral Act [*Chapter 2:13*], hereinafter referred to as the "Act". The petition filed E by applicant is couched in the following terms:

> "BE PLEASED TO TAKE NOTICE THAT the Petitioner hereby petitions the Electoral Court for an Order in terms of the Draft annexed hereto on the grounds that:
>
> 1. The Petitioner was a candidate in the National Assembly Election for the Tsholotsho North Constituency on the 31st July 2013. F
> 2. That the 9th respondent was returned as the National Assembly member for Tsholotsho North in that election and this return was improper and irregular for the reasons detailed in the annexed affidavit.
> 3. The combination of electoral malpractices and irregularities highlighted in the annexed affidavit render the election null and void or voidable as the court may deem appropriate. G
>
> TAKE NOTICE FURTHER THAT, the accompanying affidavit and supporting documents are tendered in support of this application and should be read as specifically forming part of this notice."

The applicant prayed that this court grants him relief in the draft order, in the following terms: H

Makonese J

> A "1. The ninth respondent was not duly elected as the representative of Tsholotsho North Constituency as declared on 1 August 2013 by the first respondent.
> 2. That the said election be and is hereby set aside and that a bi-election be held within 90 days of this order.
> 3. That the voters roll for Ward 22 and 9 of Tsholotsho North Constituency be B rectified to reflect voters resident in these wards prior to the election referred to herein.
> 4. That the Registrar of this Honourable Court duly communicate this court's order to the Speaker of Parliament.
> 5. That the respondents jointly and severally pay the costs of this application."

C Pursuant to the filing and service of the electoral petition upon the nine respondents, the first to sixth respondents filed an exception to the petition on the grounds of mis-joinder in that the citation of the first to sixth respondents was contrary to the provisions of Part XXII and s 166 of the Electoral Act. The applicant subsequently withdrew all actions against the first to eighth respondents, leaving the ninth respondent, who is now the only respondent D in this action.

Both the applicant and the respondent filed fairly detailed heads of argument in support, and defence of the preliminary points raised by the respondent. The preliminary points were initially premised on six grounds but at the E commencement of the hearing of oral argument, the respondent's legal practitioner announced that there were only two grounds to be dealt with, conceding that the rest of the objections were not sustainable. The respondent argued that the applicant's petition is fatally defective and therefore a nullity in that it does not comply with the provisions of the Electoral Act [*Chapter 2:13*] and s 169 of the same Act and rr 21(e) and (g) of the Electoral (Applications, F Appeals and Petitions) Rules 1995 (SI 74A of 1995).

Further, the respondent avers that throughout the petition, the petitioner has not specifically alleged any electoral law infractions by either the respondent or its agents. In other words, the petitioner's gripe seems to be with the electoral body and or its officials, and as such, the petitioner's remedies lie G in an application for a review. The respondent contends that the petitioner has not brought out a complaint or cause against the respondent or her agents, and that if he has done so, this has been put across in a manner so lackadaisical and imprecise and so vague that the respondent does not know what she must answer to.

H I shall deal with the objections raised by the respondent in turn:

Makonese J

1. Failure to specify grounds relied upon A

It is the respondent's contention that in terms of r 21(e) of the Electoral (Applications, Appeals and Petitions) Rules 1995 (SI 74A of 1995), an election petition; "shall state the grounds relied on to sustain the petition." The respondent further avers that the applicant does not state *ex facie* the petition the grounds upon which he relies to sustain the petition, preferring B to improperly hide the same in the petitioner's affidavit for this court to fish and find therefrom. It is further contended on behalf of the respondent that the exact relief the petitioner seeks does not appear *ex facie* the petition, and such is left for the court to fish and find from the petitioner's founding affidavit and prayer. C

Mr *Phulu*, for the respondent, forcefully and passionately implored the court to find that the grounds upon which the applicant relies to sustain the petition must by law be found in the petition, and that the applicant's supporting affidavit merely supports the grounds raised in the petition itself, which petition must in terms of the Rules be in the form of an application. He further pointed out that the petition exhibits no grounds *ex-facie*, upon D which the petition is based, further, that the applicant has invented his own manner and method of presenting an election petition, outside the provisions of the statute.

Mr *Hussein*, for the applicant, strongly objected to the preliminary points raised by the respondent and indicated that he found the objections to be E strange in that whilst the petition notice does not contain some details, the petitioner's affidavit does so comprehensively. It was contended on behalf of the applicant that the respondent's approach was wrong and that the respondent was afflicted with some amount of confusion. The applicant argued that in terms of the Electoral Act the document to be used to complain about an undue election is a "petition." The Electoral Act, in the definitions section, F lists, "election petition" for definition but does not do so by what appears to be a drafting error. The applicant contended that by default, therefore, one would seek the definition of "petition" in the Interpretation Act [*Chapter 1:01*] s 15(2) which states:

> "Any reference in an enactment to a petition to a court shall be construed as a G reference to an application to court or to a judge, magistrate or other judicial officer of the court, made in accordance with the rules of the court."

The applicant's main argument to the objection is that the petition/application is merely a formal notice to an interested party that a petition has been filed, whereas the accompanying affidavits and order provide the details. The applicant urged the court to accept that the petitioner provided more H

Makonese J

A information in the petition than was required to, and that the petition complied with the rules of court.

In determining whether the failure to specify the grounds upon which the petition is found in the petition itself, it is necessary to review the provisions under r 21 of the Electoral (Applications, Appeals and Petitions) Rules. The B rule provides as follows:

> "Form of election petition
>
> An election petition shall be generally in the form of a court application and shall state …
>
> (e) the grounds relied on to sustain the petition …
>
> (g) the exact relief sought by the petitioner."

C The applicant goes further to indicate in his petition as follows:

> "TAKE FURTHER NOTICE that the accompanying affidavit and supporting documents are tendered in support of this application and should be read as specifically forming part of this notice."

The applicant contends, very strongly, that the supporting documents and D affidavits annexed to the petition satisfy the requirements of r 21(e) and (g) of Electoral Rules as cited above. Whilst one may easily be tempted to agree with the applicant it is necessary to closely examine the law. I am of the view that if it was the intention of the framers of the law to provide that the petition shall be accompanied by an affidavit and supporting documents E this would have been stated in clear and unambiguous terms.

The definition section of the Electoral Act provides as follows:

> "'election petition' means a petition referred to in section *one hundred and sixty-seven*."

The express provisions of the law allow a petitioner to lodge a petition in terms of the laid down procedure. The rules and regulations for the filing and F determination of electoral petitions is governed within the four corners of the Electoral Act and the Electoral Rules 1995. In this regard, I tend to agree with the respondent that the petitioner has sought to invent his own method of presenting the election petition, which is outside the provisions of statute. Whilst it may be convenient for the applicant to present a petition with brief G grounds set out in what the applicant refers to as the "notice", accompanied by an affidavit and other supporting documents, this does not become, in my view, the format prescribed by statute. In any event no reasonable and acceptable explanation has been proffered for the departure in the rules.

The law governing the manner and grounds on which an election may be set aside is to be found in statute and the court can do no more than relate H to the provisions of the Electoral Act and the Electoral Rules as they stand.

Makonese J

I find support in this approach in *Hove* v *Gumbo (Mberengwa West Election*A*Petition Appeal)* 2005 (2) ZLR 85(S). In that case, Malaba JA quoted with approval *Nath* v *Singh & Ors* [1954] SCR 892 at 895, where Mahajan CJ said:

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit but is a purely statutory proceeding unknown to the common law and B that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

The learned judge of appeal also referred to *Sahu* v *Singh & Anor* [1985] LRC 31, where Chandrachud CJ had this to say at p 39: C

> "The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statues which create, confer, or limit those rights. Therefore, for deciding the assertion whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the particular election. They have to function within the framework of that law and cannot travel beyond it." D

The applicant has sought to argue that the petition in its present form complies with the provisions of the Electoral Rules. To extend the argument further, the applicant contends that the petition is but a notice and the accompanying affidavit provides adequate detail narrating the grounds relied upon to sustain the petition. I have read the accompanying affidavit of the applicant and while E I agree that the affidavit is lengthy, a careful scrutiny of the document reveals that the content therein does not really disclose with any reasonable clarity the grounds upon which the election challenge is made. In the opening pages of the affidavit the applicant deals with what he refers to as wrongful denial of a recount "under confused and confusing circumstances." That aspect of the applicant's case falls away by virtue of the fact that the vote recount F was set aside by an order of the court, under case number EC 25/13. The court made an order to the effect that the recount was in violation of s 70(4) of the Electoral Act and therefore unlawful. The rest of the affidavit deals with extensive and general complaints of misplacement, misdirection and non-counting of votes and disenfranchisement of voters in certain wards in G the constituency. The applicant clearly misses the point and his petition does not comply with the express and peremptory provisions of r 21(e) and (g) of the Electoral Rules and it is on the basis of the non-compliance, which non-compliance the court may not condone, that the petition is held to be fatally defective, beyond cure or redemption and that I would uphold the respondent's point *in limine.* H

Makonese J

A **2. The grounds relied upon are vague and imprecise**

The other issue raised by the respondent is that the petitioner's grounds upon which the petition is sustained are so imprecise and vague that it is not clear what the respondent must answer to. The applicant's affidavit is quite voluminous but is thin on content. I have already indicated that the issue B of a refusal of recount was disposed of by virtue of the court order of this court. What then

remains in the petition are alleged infractions related to the counting of votes. The applicant alleges that there were various anomalies and inconsistencies that compromised the integrity of the election results. Some of the alleged anomalies involved instances where the applicant had only one polling agent present during the counting of votes. In a specific C instance the applicant refers to an affidavit sworn to by Jabulani Tsheza who was a polling agent in Ward 8, Tsholotsho North Constituency. The deponent complained that on 30 July 2013 he observed a white Nissan pick-up truck with a Methodist Church emblem on its doors. The vehicle was parked outside the polling station. Jabulani Tsheza deemed the presence of the vehicle as suspicious as the driver drove away without explaining why D he was at that polling station. In another sworn statement in support of the applicant's petition, one Kelvin Sibanda complained that he was based at Sandawana Primary School which was a collation centre. He observed a white pick-up truck with red Methodist Church stickers on its doors. The deponent did not get a satisfactory explanation for the presence of the truck E at the collation centre. The deponent goes further that he went to Ntulula Polling Station at Ntulula Primary School where he found cow horns in the polling station. When he approached the presiding officer about the cow horn, which resembled the ZAPU party emblem which used a bull as its symbol, he did not get a satisfactory response. Kelvin Sibanda concluded that the presence of the white Methodist pick-up truck and the cow horns F found in one of the classrooms was suspicious and could have compromised the election result.

I will not endeavour to analyze the various affidavits attached to the applicant's petition as this would simply be an exercise in futility. I found the detail in the applicant's affidavit and supporting affidavits to contain vague and G general complaints which do not state in precise terms the grounds relied upon to sustain the petition as contemplated under r 21(e) of the Electoral Rules.

I am of the firm view that where the grounds upon which the petition is to be sustained are vague and imprecise, the court cannot cure such defect by referring the matter to trial. To refer the matter to trial under such H circumstances amounts to a fishing expedition. The petitioner is required by

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the rules to state in clear and unambiguous terms the nature of his complaint. A The respondent in this instance will clearly be embarrassed because she does not know how to respond to these general and rambling accusations, which as it turns out, are not directed at her but to some unknown persons. The applicant's affidavit contains far too many broad and vague generalisations of irregularities which cannot give rise to triable issues. B

I would therefore sustain the respondent's second point *in limine* and find that the petitioner's grounds of complaint are vague and imprecise to the extent of non-compliance with the rules of the Electoral Court. The respondent asked for costs at the higher scale in their heads of argument but when the matter was argued there was no serious intent on the part of the respondent to recover costs on a punitive scale. I do not consider the arguments raised C on behalf of the applicant to be so outrageous so as to attract costs on the higher scale.

In the result, the respondent's preliminary points are sustained and I make the following order:

1. The electoral petition filed by the petitioner in this case is fatally defective D and of no force and effect for want of compliance with r 21(e) and (g) of the Electoral (Applications, Appeals and Petitions) Rules 1995.
2. The applicant's petition is hereby dismissed with costs.
3. The respondent Roseline Nkomo be and is hereby declared duly elected member of the National Assembly for the Tsholotsho North Constituency. E
4. The Registrar be and is hereby directed to proceed in terms of s 171(3) (a)(ii) of the Electoral Act [*Chapter 2:13*].

Hussein Ranchhod & Co, c/o J Sibanda & Associates, applicant's legal practitioners F

Phulu & Ncube, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/HOMODZA v CHITUNGWIZA MUNICIPALITY 2014 (1) ZLR 87 (H)

HOMODZA v CHITUNGWIZA MUNICIPALITY 2014 (1) ZLR 87 (H)

Citation	2014 (1) ZLR 87 (H)
Case No	Judgment No. HH-38-14
Court	High Court, Harare
Judge	Takuva J
Heard	1 November 2013; *CAV*
Judgment	12 February 2014
Counsel	*G Madzima*, for the applicant Ms *C Maphosa,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Court – High Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of terminated contract of employment – High Court having jurisdiction to determine matter arising from acknowledgment D *of debt*

Employment – Labour Court – jurisdiction – labour matter – what is – acknowledgment of debt arising out of terminated contract of employment – High Court having jurisdiction to determine matter arising from acknowledgment of debt

Headnote

E The applicant resigned from her employment with the respondent on medical grounds. She was advised in writing of what her terminal benefits were. Portion of those benefits was paid and the applicant then brought legal proceedings for the recovery of the balance. The respondent filed an appearance to defend and subsequently a special plea, to the effect that the F High Court had no jurisdiction to determine the matter, as issues relating to non-payment of terminal benefits and arrear salaries were specifically within the purview of the Labour Court, as these matters were provided for in the Labour Act [*Chapter 28:01*]. The applicant argued that that the High Court had inherent jurisdiction to deal with the matter, since the G Labour Act did not specifically preclude it from determining a claim for non-payment of terminal benefits properly quantified and acknowledged by the employer. Further, there was no employer/employee relationship or dispute that was provided in terms of the Labour Act, as the cause of action was clearly premised on a document, acknowledged by the respondent, reflecting the quantified amount owed to the applicant. This H document amounted to an acknowledgement of debt. By signing it, the

Takuva J

respondent signified its intention and willingness to be bound by the A terms of the document.

Held, that while the matter had its origins in labour law, these had been superseded by the acknowledgement of debt, which formed a separate cause of action based purely on the law of

contract. There was no labour dispute, other than the respondent's intransigence in refusing to pay the B amount owed. There was no provision in the Labour Act that would allow the applicant to approach the Labour Court directly seeking a similar remedy to that she was now seeking. Accordingly, the High Court had jurisdiction.

Cases cited C

Ashley v *Goodwin* HH-301-11

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

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

Mandoza NO v N M Bank Ltd HH-22-05

Moyo v *Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H) D

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

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

Tuso v City of Harare 2004 (1) ZLR 1 (H)

Zhakata v Mandozo NO & Anor 2004 (2) ZLR 335 (H)

Zimtrade v Makaya 2005 (1) ZLR 427 (H) E

Case information

G Madzima, for the applicant

Ms *C Maphosa,* for the respondent

Judgment

Takuva J: This is an apposed court application. The facts which are wholly common cause are as follows: The applicant was in the respondent's employ F for the past thirty-two and a half years. On 24 October 2012 she resigned on medical grounds. The resignation was accepted by the respondent on 29 October 2012. In a letter authored by the respondent's Human Resources Manager, dated 25 March 2013, the applicant was advised by the respondent that the total net of her terminal benefits amounts to US$45 147.03. The G respondent paid the applicant US$10 000, leaving a balance of US$35 147.03. The applicant also claimed US$2 698, being her October and November 2012 arrear salaries. The respondent failed to pay the balance outstanding, prompting the applicant's lawyers to send a letter of demand to the respondent on 3 April 2013. The respondent ignored that letter, leading to the current court application for debt recovery. H

Takuva J

A The respondent filed an appearance to defend and subsequently a special plea, the nub of which is that this court has no jurisdiction to determine this matter, in that issues relating to non-payment of terminal benefits and arrear salaries are specifically within the purview of the Labour Court, as these matters are provided for in the Labour Act [*Chapter 28:01*] ("the Labour B Act"). Reliance was placed on s 92 of the Constitution of Zimbabwe and s 89 of the Labour Act, which was quoted *in extensio*. The respondent also relied on the following cases:

(a) Zimtrade v *Makaya* 2005 (1) ZLR 427 (H).

(b) Tuso v *City of Harare* 2004 (1) ZLR 1 (H)

(c) Mandoza NO v *N M Bank Ltd* HH-22-05; and

D*(d) MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172

The applicant filed her heads of argument wherein she abandoned her claim with respect to arrear salaries but maintained her claim in respect of outstanding terminal benefits. The gist of the applicant's argument is that this court has inherent jurisdiction to deal with this matter since the Labour Act does not specifically preclude this court from determining a claim for non-payment of terminal benefits properly quantified and acknowledged by the employer. Further, it was submitted that, in the present matter, there is no employer/employee relationship or dispute that is provided in terms of the Labour Act, as the cause of action is clearly premised on a document, acknowledged

by the the respondent, reflecting the quantified amount owed to the applicant, E which document amounts to an acknowledgement of debt. By signing the document acknowledging the terminal benefits, the respondent signified its intention and willingness to be bound by the terms of the same in line with the *caveat subscriptor* rule.

The applicant relied on the following cases:

F (i) *DHL International Ltd* v *Madzikanda* 2010 (1) ZLR 201 (H) at 204B-D

(ii) *Moyo* v *Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H)

(iii) *Samudzimu* v *Dairiboard Holdings Ltd* 2010 (2) ZLR 357 (H)

(iv) *Ashley* v *Goodwin* HH-301-11

(v) *Sibanda & Anor* v *Chinemhute NO & Anor* HH-131-04.

G In my view, the issue of jurisdiction can be resolved by examining the nature of the case the applicant has presented before the court. While I agree that the matter's ancestors had labour law characteristics, that forebear died when the applicant resigned and a modern animal in the form of an acknowledgement of debt emerged. The applicant simply desires to recover a debt whose acknowledgment forms a separate cause of action, based purely on the law of H contract. If it is accepted that this court, by virtue of its inherent jurisdiction,

Takuva J

can do anything except that which is specifically prohibited by law, whereas A the Labour Court can only do those things that are specifically permitted by the Labout Act, the respondent's argument becomes fallacious.

Another way of demonstrating that this court has jurisdiction is to ask the question, what dispute is there for the Labour Court to determine *in casu*? The answer is there is none, except the respondent's intransigence in refusing to B pay the amount owed. Now, to the best of my knowledge, there is no provision in the Labour Act that allows the applicant to approach the Labour Court directly seeking a similar remedy to that which she is seeking in this court. The matter will have to go via a labour officer for conciliation, then to an arbitrator, if need be, and finally to the Labour Court on appeal. Assuming that both this court and the Labour Court have jurisdiction to determine C this matter, why should the applicant be required to go along the circuitous journey instead of the more direct route she has chosen?

For these reasons, I find that this court has jurisdiction to determine the matter. Consequently, the point *in limine* is hereby dismissed with costs on the higher scale. D

Kanyenze & Associates, plaintiff's legal practitioners

Matsikidze & Mucheche, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/CHIDAWU & ORS v SHAH & ORS 2014 (1) ZLR 91 (S)

CHIDAWU & ORS v SHAH & ORS 2014 (1) ZLR 91 (S)

Citation	2014 (1) ZLR 91 (S)
Case No	Judgment No. S-10-14
Court	Supreme Court, Harare
Judge	Chidyausiku CJ

Heard	2 December 2011
Judgment	2 December 2011 Reasons published 19 February 2014, at request of respondents
Counsel	*H Zhou*, for the applicant *L Uriri*, for the first respondent *T Mpofu,* for the second and third respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Appeal – interim relief pending appeal – relief sought not relating to a matter to be determined in the appeal – not competent to grant relief in respect of such an issue

Headnote

D The first applicant had pledged shares in a company as surety for a loan of money from the first respondent. The first applicant failed to repay the loan on due date, whereupon the first respondent indicated his intention to sell the pledged shares, which he held, so as to recoup the money loaned. The applicants then brought an action before the High Court E seeking to stop the sale and transfer of the shares to the prospective purchaser thereof, the second respondent alleging a *paratie executie*. This action was dismissed on the basis that the applicants' founding affidavit was fatally defective. The applicants then brought another application seeking that their earlier application be determined on the merits as a matter of urgency. The papers in this latter application did not touch upon F the prospective transfer of the pledged shares by the first respondent to the second respondent and this application was likewise dismissed. The appellants thereupon sought an urgent chamber application seeking the setting down of the earlier appeal as a matter of urgency and also an interdict stopping the transfer of the shares from the first respondent G to the second respondent. After hearing argument in chambers, it was:

Held, that the relief sought was incompetent. The pending appeal was concerned with procedural issues. The transfer of the shares was not an issue that fell for determination in the appeal. The notice of appeal related entirely to the issue of whether the court *a quo* should have heard the matter on an urgent basis or not. The court *a quo* did not make a H determination on the transfer of the shares, in which case there could be

Chidyausiku CJ

no appeal against a non-existent determination. It would be nonsensical A to grant an interdict pending the determination of an issue which the Supreme Court was not going to determine, namely the transfer of the shares.

Cases cited B

Changa v *Standard Finance Ltd* 1990 (2) ZLR 412 (S)

Findevco (Pty) Ltd v *Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (EC)

Osry v *Hirsch, Loubser and Co Ltd* 1922 CPD 531

Case information

H Zhou, for the applicants

L Uriri, for the first respondent C

T Mpofu, for the second and third respondents

Judgment

Chidyausiku CJ: This is an urgent chamber application in which the applicants seek the relief set out in the draft order. The draft order reads as follows:

> "1. The Registrar is hereby directed to set down case no. SC 293/11 for an D urgent hearing on the next available date.
>
> 2. The applicants shall file heads of argument within five days of being called upon to do so by the Registrar.
>
> 3. The first, second and third respondents shall thereafter file their heads of argument within five days of receiving the applicants' heads of argument. E
>
> 4. Pending the determination of the appeal under case no. SC 293/11, the fifth respondent be and is hereby interdicted from transferring the Pelhams Ltd amounting to 376 976 840 shares from the second, third and fourth applicants to the second respondent.
>
> 5. Costs shall be costs in the cause unless the application is opposed, in which case the party opposing shall meet the costs of this application." F

In essence, the applicants were seeking –

(a) the setting down of the appeal in case no. SC 293/11 on an urgent basis;

(b) an interdict stopping the transference of the shares in Pelhams Ltd to the second respondent pending the hearing of the appeal in case no. SC 293/11. G

The application was opposed. After submissions by counsel, I dismissed the application as I was satisfied that it was devoid of any merit. My reasoning for so concluding was made very clear during my interaction with counsel during their submissions. I accordingly assumed that written reasons for judgment were superfluous in this matter, as the parties were aware of my reasoning process. H

2014 (1) ZLR p93

Chidyausiku CJ

A The appeal in case no. SC 293/11 has since in due course been heard. The appeal was dismissed. See *Chidawu & Ors* v *Shah & Ors* 2013 (1) ZLR 260 (S).

In a letter to the Registrar of the Supreme Court dated 29 January 2014, the respondents' legal practitioners, Atherstone & Cook, have requested B my reasons for judgment in this application. I can only surmise that the respondents probably want the reasons for judgment for guidance as they were the successful parties in the application. Be that as it may, it is now trite that a litigant is entitled to reasons for judgment.

I have already stated that I dismissed the application without giving written C reasons for judgment. The following are they.

The facts of this matter are succinctly set out in the appeal judgment of Gowora JA in *Chidawu & Ors* v *Shah & Ors supra.* It serves no useful purpose to restate them in the same detail in this judgment. I will only paraphrase those facts set out in the judgment of Gowora JA to the extent necessary to provide a proper context in this judgment.

D The first applicant borrowed an amount of US$3 million from the first respondent. The terms and conditions of the loan agreement were reduced into a written agreement, signed by both parties. One of the material terms of the loan agreement provided that the first applicant should surrender to the first respondent Pelham Ltd shares totalling 380 000 000 in negotiable E form. The first applicant duly surrendered the shares to the first respondent in negotiable form. The first applicant was unable to repay the loan by due date. The first respondent called up the loan and by letter dated 11 March 2011 threatened to liquidate the security in his possession by selling the Pelhams Ltd shares. On 18 March 2011 Honey & Blanckenberg, on behalf of the first applicant, responded to the threat as follows:

> F "We act for the above named Oliver Chidawu who has instructed us to respond to your letter dated 11 March 2011.
>
> Your client's threat to start liquidating the security tendered by our client without instituting legal proceedings is a clear case of *paratie executie*. Accordingly, unless we receive written undertaking from either yourselves or Mr Shah (the first respondent) that he is not going to proceed with the intended sale

of our G client's security by Monday 21 March 2011, we are under instructions to lodge an urgent application with the courts for relief."

On 5 April 2011 the first respondent caused summons to be issued out of the High Court against all the applicants, seeking payment of the sum of US$2 700 000 plus interest. The applicants entered appearance to defend. Thereafter nothing happened until 13 October 2011, when Atherstone & H Cook addressed a letter to Honey & Blanckenberg in the following terms:

2014 (1) ZLR p94

Chidyausiku CJ

"We refer to previous correspondence addressed to you in this matter. As you A will recall, our client is holding 357 million Pelhams shares in negotiable form.

Your client owes an amount in excess of US$2 550 000 exclusive of collection commission. We are happy to advise that our client has found a buyer of the aforesaid Pelhams shares. Accordingly, we advise that if your client fails to pay the balance outstanding within 48 hours of receipt of this letter Messrs B Lyton Edwards Stockbrokers will be instructed by our client to sell the shares at a floor price of US$0.00711. In the event that the proceeds of the sale are not sufficient to cover the debt, our client reserves the right to proceed against yours in the usual manner."

The response from Honey & Blanckenberg was to the same effect as their previous letter of 18 March 2011. The letter threatened legal action if they C did not receive a written undertaking by 14 October 2011 to the effect that the proposed sale of the shares would not be proceeded with. There was no written undertaking given and on 20 October 2011 the applicants filed an urgent chamber application in the High Court to stop the sale of the shares. The sale of the shares was concluded on 25 October 2011, which was the scheduled date of the hearing of the chamber application. The urgent D chamber application to stop the sale and transfer of the shares was dismissed by Makoni J on the basis that the founding affidavit was fatally defective. Makoni J concluded that there was no valid application before her. On 8 November 2011 the applicants made another urgent chamber application to the High Court. Uchena J dismissed the urgent chamber application on E the ground that the papers supporting the application were fatally defective. The applicants noted an appeal against that determination. It is the appeal against that determination by Uchena J that this chamber application sought to have heard on an urgent basis.

As I have already indicated, the applicants sought – F

(a) to have the appeal against the judgment of Uchena J set down on an urgent basis; and

(b) an interdict against the transfer of the Pelhams shares from the applicants to the second respondent.

I dismissed the application to have the appeal heard on an urgent basis for G two reasons –

(a) in my view, the appeal had no prospects of success (the appeal has since been heard and dismissed); and

(b) the urgency arose from the desire to stop the transfer of the Pelhams Limited shares from the applicants to the second respondent. H

2014 (1) ZLR p95

Chidyausiku CJ

A In my view, it was not competent for me to grant the interim interdict sought by the applicants. Consequently the urgency fell away.

The interim interdict that the applicants sought is set out in para 4 of the draft order. The applicants wanted the transfer of the Pelhams Ltd shares to the second respondent to be interdicted pending the hearing of the appeal in case B no. SC 293/11. The request for this interdict is predicated on the proposition that the Supreme Court would determine the issue of the transference of shares when it heard the appeal. That proposition is fallacious, as I shall demonstrate later in this judgment.

The first applicant delivered the Pelhams Ltd shares to the first respondent in negotiable form as security for the loan he received. The inescapable C inference to be drawn from this is that the first applicant freely consented to the shares being sold or negotiated in the event of his failure to repay the loan. He failed to repay the loan and the shares were sold by the first respondent. The applicants want the transfer interdicted. The sale, as stated above, had already been concluded. What remained was the transfer of the D shares by the stockbroker to the purchaser.

The papers in this matter show that the loan agreement between the parties, voluntarily signed by the first applicant and the first respondent, was transparent. The parties were *ad idem* in respect of all the terms and conditions of the loan agreement. The loan agreement correctly reflects the contractual E intentions of the parties. There is no allegation or suggestion of any form of coercion or underhand dealings. The loan agreement appears to be a normal business transaction between businessmen of substance. For the first applicant to now seek the assistance of the law to renege on a contract, he openly and willingly entered into, smacks of duplicity and deceit. It sounds crooked.

Be that as it may, I am aware of the divergence of decided cases on the issue F of *paratie executie*. On the one hand, there is *Findevco (Pty) Ltd* v *Faceformat (Pty) Ltd* 2001 (1) SA 251, which is authority for the proposition that *paratie executie* is unlawful; while on the other hand *Osry* v *Hirsch, Loubser & Co Ltd* 1922 CPD 531 and *Changa* v *Standard Finance Ltd* 1990 (2) ZLR 412 are authorities to the contrary.

G In this regard I wish to observe in passing that clarity on the lawfulness or otherwise of *paratie executie* is on the way. On 5 March 2014 the full Bench of the Constitutional Court is set to hear the matter between *Glens Removal and Storage Zimbabwe (Pvt) Ltd* v *Patricia Mandala*. In that case the lawfulness and the constitutionality of *paratie executie* are issues that will fall for determination. Accordingly, the law on the issue of *paratie executie*H is set to be clarified by the highest court in land shortly.

2014 (1) ZLR p96

Chidyausiku CJ

However, more importantly, I dismissed the relief for an interdict because A it was not a competent relief. Paragraph 4 of the draft order reveals that the interim interdict was relief pending the hearing of the appeal in case no. SC 293/11. A perusal of the notice of appeal in that case reveals that the interdiction of the sale of the shares was not an issue to be determined in that appeal. The notice of appeal reads as follows: B

> "TAKE NOTICE that, leave to appeal not being required, the appellants hereby appeal against the whole judgment of the High Court (the Honourable Mr Justice UCHENA in Chambers) in case no. HC 11119/2011 which was given at Harare on 18 November 2011.
>
> FURTHER TAKE NOTICE that the appellants' grounds of appeal are as follows:
>
> 1. The learned Judge *a quo* misdirected himself by rejecting as invalid the C Certificate of Urgency duly signed by Tecla Mapota on the basis that some statements in it were similar to those in a Certificate of Urgency filed in case no. HC 10410/2011.
> 2. The learned Judge *a quo* misdirected himself by making a factual finding that Tecla Mapota did not apply her mind to the question of urgency on the basis of submissions made from the bar and in the absence of any evidence D to that effect.
> 3. The learned Judge *a quo* misdirected himself, in any event, by determining that the fact of common passages or statements being found in the two Certificates of Urgency invalidated Tecla Mapota's certificate.
> 4. The learned Judge *a quo* misdirected himself as to the legal effect of the E similarities between some statements and passages in Tecla Mapota's Certificate of Urgency and that of Sarudzayi Njerere.
> 5. The learned Judge *a quo* misdirected himself by ignoring that the similarities in some statements in the Certificates of Urgency were explicable by reference to the similarities in the facts and circumstances as set out in the affidavits in both HC 11119/2011 and HC 10410/2011.
> 6. The learned Judge *a quo* misdirected himself in coming to the conclusion F that there was an unexplained delay starting from March 2011, when the facts clearly showed that it was not necessary to institute proceedings then.
> 7. The learned Judge *a quo* misdirected himself by determining that the appellants should have instituted the urgent application to stop transfer of shares even before Justice Makoni had given her judgment in case no. HC 10410/2011. G
>
> WHEREFORE the appellants pray that the appeal may be allowed with costs and for the following relief to be granted:
>
> (a) the judgment of the court *a quo* be and is hereby set aside;
> (b) the matter be and is hereby remitted to the High Court for hearing on the merits; H

2014 (1) ZLR p97

Chidyausiku CJ

A (c) the costs of the appeal shall be paid by the first, second and third respondents jointly and severally the one paying the others to be absolved.

FURTHER TAKE NOTICE that the appellants hereby tender security for the respondents' costs in the appeal and undertake to pay the costs for the preparation of the record."

B Quite clearly, the Supreme Court in case no. SC 293/11 was seized with procedural issues. The transfer of the Pelhams Ltd shares was not an issue that fell for determination in the appeal. The notice of appeal relates entirely to the issue of whether the court *a quo* should have heard the matter on an urgent basis or not. The court *a quo* did not make a determination on the transference of the shares, in which case there could be no appeal against a C non-existent determination.

In the result I came to the conclusion that it was nonsensical to grant an interdict pending the determination of an issue which the Supreme Court was not going to determine, namely the determination of the transference of the shares. (*Chidawu & Ors* v *Shah & Ors* 2013 (1) ZLR 260 (S) did not address or determine the issue of the transference of the shares.)

D It was for these reasons that I dismissed the application.

Honey & Blanckenberg, applicants' legal practitioners

Atherstone & Cook, first respondent's legal practitioners

Mtetwa & NyambiraiI, second and third respondents' legal practitioners

E*Kantor & Immerman*, fourth respondent's legal practitioners

Dube, Manikai & Hwacha, fifth respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/ALAGONIA FARMING (PVT) LTD & ORS v NORTHERN TOBACCO (PVT) LTD & ORS 2014 (1) ZLR 98 (H)

ALAGONIA FARMING (PVT) LTD & ORS v NORTHERN TOBACCO (PVT) LTD & ORS 2014 (1) ZLR 98 (H)

Citation	2014 (1) ZLR 98 (H)
Case No	Judgment No. HH-72-14
Court	High Court, Harare
Judge	Hungwe J
Heard	19 February 2014
Judgment	19 February 2014
Counsel	*I Ndudzo*, for the applicant *T Magwaliba*, for the first respondent *A Chambati*, for the second respondent *F F Nyamayaro*, for the third respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Appeal – leave – application for – should be dealt with summarily – court not required to hear oral argument from both sides, nor to give reasoned judgment

Headnote

The applicant sought to have an order granting leave to appeal set aside D on the grounds that leave had been granted without the judge having given the other side an opportunity to be heard, either orally or through written submissions.

Held, that by their very nature, applications for leave to appeal ought to E be dealt with summarily. It is a procedure by which all superior courts world-wide regulate their case-flow. To require the court to listen to argument and give reasoned judgments in applications for leave to appeal which have no substance, or even to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that "leave" be obtained. Such matters can and should be F disposed of summarily. Courts of appeal in many democratic countries have a procedure for applications for leave to appeal. It is not customary for reasons to be furnished for the refusal of leave. In countries such as the United States of America and Canada, one of the reasons for requiring leave to appeal is to enable their courts of final instance to control their G dockets. In those jurisdictions, leave may be refused even where there are prospects of success on appeal. This rule of practice also prevails in our jurisdiction. Reliance on a breach of s 69(1) of the Constitution would be misplaced. In any event, the court was *functus officio*. The Supreme Court was now seized with the matter. H

2014 (1) ZLR p99

Hungwe J

Cases referred to A

Gondo & Anor v *Syfrets Merchant Bank Ltd* 1997 (1) ZLR 201 (H)

Mphahlele v *First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC)

R v *Hinse* [1995] 4 SCR 597; 130 DLR (4th) 54

Legislation considered B

Constitution of Zimbabwe 2013, s 69(1)

Case information

I Ndudzo, for the applicant

T Magwaliba, for the first respondent

A Chambati, for the second respondent

C*F F Nyamayaro,* for the third respondent

Judgment

Hungwe J: After hearing submissions by counsel, I dismissed the application and indicated that should my reasons for so dismissing it be required they would be furnished upon written request as I had briefly outlined them in court. These are they.

D The applicant, a company carrying on a farming business somewhere in the Hwedza area, approached this court seeking an order through the chamber book, in the following terms:

"It is ordered that:

1. The judgment granted by this honourable court on 18 December 2013 under case number HC 10802/13 be and is hereby set aside.
2. Execution of judgment made by this honourable court under E case number HC 10261/13 be and is hereby allowed pending determination of the appeal filed under case number SC 537/13.
3. Any party opposing this application to bear the costs of suit."

The events leading to the above order are set out in the heads of argument F drawn on behalf of the first respondent. These may be summarized as follows. A dispute arose between the first respondent and the applicant company, its co-directors who own the farm upon which the company farms tobacco. The dispute regarded certain terms and conditions as well as the size of the crop which the respondent had sponsored the company to grow. The second G respondent at some point indicated that it was not involved in the dispute. The first respondent then sought and obtained a preservatory order in terms of art 9 of the First Schedule to the Arbitration Act [*Chapter 7:15*] (the Model Law) before Tsanga J under case no. HC 9919/13 citing Alagonia Farm, Alester Ziyanga and Miriam Ziyanga. Alagonia Farm issued summons under HC 9928/13 seeking cancellation of the tobacco grower contract with H Northern Tobacco. Tsanga J granted the order. Bright Ziyanga, the second

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respondent, then filed an urgent application in HC 10261/13 seeking an order A staying Tsanga J's order. He also seeks the rescission of the judgment on the basis that, although the order affects him, he had not been cited in HC 9919/13. That application was placed before me. All the parties appeared at the hearing but only the second respondent and the first respondent actively urged the court to grant or dismiss the application. The rest adopted an B indifferent attitude. That application was granted in HC 10261/13. The first respondent was dissatisfied with the order granted in favour of the second respondent. It sought leave to appeal against the order in HC 10261/13. Upon perusal of the application and before the other parties had indicated their attitude to the application, I granted the order on its merits. It is that order which is now the subject of the present application. It must be noted that my C judgment in HC 10261/13 is now judgment no. HH-484-13 (*Ziyanga* v *Tian Ze Tobacco (Pvt) Ltd & Ors*). The application for leave was made under case number HC 10802/13. Upon the grant of leave, the first respondent noted an appeal against my judgment in HH-484-13. That appeal is now pending in the Supreme Court under case no. SC 537/14. The basis of the application is multi-pronged. Principally, the applicants' complaint is that D the first respondent adopted the wrong procedure in seeking the grant of leave to appeal. Second, the court procedure adopted by the court which in essence granted leave without affording the other parties to the dispute an opportunity to be heard infringed those parties' constitutional right to a fair hearing. Third, the order for costs was made against the same parties when E they had not been served or made aware of the set down of the application for leave in HC 10802/13.

The applicants made reference to r 449 of the High Court Rules 1971, but I assume this was in respect of their submissions in HC 9919/13 as certainly that rule is of no application in the present matter before me. The order granted F in HH-484-13 was not erroneously sought or erroneously granted: *Gondo & Anor* v *Syfrets Merchant Bank Ltd* 1997 (1) ZLR 201 (H). That submission, if it was directed at the order for costs against them in HC10802/13, makes sense. The order for costs in HC 10802/13 was certainly granted in error. It did not require an application in the present form in order for me to correct it. Had it been drawn to my attention, I would have unilaterally corrected G it by deleting all reference to costs in the order I made on 18 December 2013. However, that is the only limited success which this application can possibly enjoy. In any event, Mr *Magwaliba*, for the first respondent, informed the court that there was no intention to pursue that order for costs. I say this because I find no merit in the rights-based argument relating to the procedure I adopted in granting the application for leave without having H

A granted the other side an opportunity to be heard, either orally or through written submissions. By their very nature applications for leave ought to be dealt with summarily. It is a procedure by which all superior courts world-wide regulate their case-flow.

In the Constitutional Court of South Africa matter of *Mphahlele* v *The*B*First National Bank of S A Ltd* 1999 (2) SA 667 (CC) at 672 E Goldstone J remarked:

> "To require the Supreme Court of Appeal to listen to argument and give reasoned judgments in applications for leave to appeal which have no substance, or even to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that 'leave' be obtained. Such matters can C and should be disposed of summarily."

Courts of appeal in many democratic countries have a procedure for applications for leave to appeal. It is not customary for reasons to be furnished for the refusal of leave. In countries such as the United States of America and Canada, one of the reasons for requiring leave to appeal is to enable their courts of final instance to control their dockets. In those jurisdictions, D therefore, leave may be refused even where there are prospects of success on appeal.

As was stated by Lamer CJ in *R* v *Hinse* [1995] 4 SCR 597; 130 DLR (4th) 54 at 62:

> "The ability to grant or deny leave represents the sole means by which this court E is able to exert discretionary control over its docket. In order to ensure that this court enjoys complete flexibility in allocating its scarce judicial resources towards cases of true public importance, as a sound rule of practice, we generally to not convene oral hearings on applications for leave."

This rule of practice also prevails in our jurisdiction. Reliance on a breach of F s 69(1) of the Constitution is therefore, in my view, misplaced. In any event most of the arguments put forward by the applicants are good grounds for arguing against the merits of the appeal in the Supreme Court when the appeal proper is heard. This brings me to the stronger reason, in my respectful view, for dismissing this application. As already pointed out, this court's decision in HH-484-13 is now the subject of an appeal. Whether that appeal is not G properly before the Supreme Court cannot be a matter within the province of this court to decide. That appeal is presumed to be properly before that court. There is a presumption operating in favour of validity of due process. It is rebuttable in the appropriate jurisdiction. That jurisdiction cannot be found in this court. In a way this court is *functus officio* once the Registrar of a superior court has accepted due process, since that other court is deemed H to be seized with that matter. In short, I am not persuaded that this court can

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purport to interfere with its decision once it is subject of an appeal, besides A the accepted exceptions in terms of the rules of court conferring jurisdiction to adjudicate on applications for leave to execute pending appeal. This is not the thrust of the application before me. I am being asked to set aside my own judgment when that judgment is subject of an appeal. If I were to be big-headed and heed that ominous call, then the whole appeal procedure would be turned on its head! B

Even if I were wrong in concluding that this application must fail for this reason, there is another basis for dismissing this application, which reason touches upon the applicant's lack of *locus standi in judicio.* As pointed out above, the prime mover of the application in HH-484-13 was the second respondent. That application was granted on the basis that he had been C afforded an opportunity to be heard before a decision affecting his right to property was made. If opposition to an application for leave to appeal against the grant of leave were to be anticipated, it could only have been made by or on behalf of the second respondent. The present application was not launched on behalf of the winning party in HH-484-13 nor did he file an affidavit supporting the application. He has however filed heads of argument D in support of the applicant. He clearly is approbating and reprobating. This ought to be rightly viewed as collusive behavior between kith and kin to defeat the property right of the first respondent.

There is a further reason why this application should fail. The applicant seeks to clothe the application with a gown of an interim interdict yet there E is nothing interim in the order sought. In truth therefore the applicant urges this court to grant a final order when at best the applicant has probably proved only a *prima facie* case. The argument becomes even more convoluted when regard is had to the submissions in the heads as compared to the prayer.

In the end I dismissed the application with costs save for the remarks regarding the order for costs in HC 10802/13. F

Mutangamira & Associates, applicants' legal practitioners

Mawere & Sibanda, first respondent's legal practitioners

Chambati & Mataka, second respondent's legal practitioners

Nyamayaro Makanza & Bakasa, third respondent's legal practitioners G

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Source:
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GIYA v RIBI TIGER TRADING 2014 (1) ZLR 103 (H)

Citation	2014 (1) ZLR 103 (H)
Case No	Judgment No. HH-57-14
Court	High Court, Harare
Judge	Chigumba J
Heard	28 October 2013; *CAV*
Judgment	19 February 2014
Counsel	*A Gurira,* for the applicant *S Machingauta,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Arbitration – award – registration of – appeal pending – award may nonetheless be registered – remedies open to party seeking to avoid execution of award

D *Employment – arbitrator's award – registration of – appeal against award pending in Labour Court – award may nonetheless be registered – remedies open to party seeking to avoid execution of award*

Practice and procedure – affidavit – authorisation of deponent – company representative – failure to allege that deponent duly authorised to depose E *thereto – not necessarily fatal – parties all known to each other from previous dealings and from proceedings in main matter*

Headnote

An appeal to the Labour Court against the merits of the decision of an arbitrator does not suspend the operation of the decision appealed against: F s 92E of the Labour Act [*Chapter 28:01*]. However, there is a medley of interlocutory remedies that can be employed pending determination of an appeal. The Labour Court, may, pending the determination of the appeal, make interim orders that meet the justice of the case. Stay of execution pending appeal and suspension of the arbitral award are but some of the interim remedies that may be sought before the Labour G Court pending determination of an appeal.

It would also be open to the respondent argue that the registration of the arbitral award was contrary to public policy because the making of the award was induced or effected by fraud or corruption or there was a breach in the rules of natural justice in the making of the award: art 36(3) H of the First Schedule to the Arbitration Act [*Chapter 7:15*].

Chigumba J

Where the applicant objected to the respondent's opposing affidavit on the A grounds that no averment was made therein that the deponent was duly authorised to represent the respondent,

Held, that such an objection should be raised only in those instances where the deponent to the affidavit on behalf of a company is a total stranger. In this case the parties all knew each other from previous dealings, and B from proceedings in the main matter, and there could be no question of the deponent to the opposing papers being a stranger to respondent company, or to the applicants.

Cases referred to

Air Zimbabwe Corp & Ors v *ZRA* 2003 (2) ZLR 11 (H) C

Baudi v *Kenmark Builders (Pvt) Ltd* HH-4-12

DHL Intl Ltd v *Madzikanda* 2010 (1) ZLR 201 (H)

Greenland v *Zimbabwe Community Health International Research Project* HH-93-13

Madzivire Entprs (Pvt) Ltd v *Schweggman Family Trust* HB-2-07

Mall Cape (Pty) Ltd v *Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) D

Ndlovu v *Higher Learning Centre* HB-86-10

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

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

United Associates (Pvt) Ltd v *Est Ncube & Ors* HH-29-03 E

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, arts 19 & 36(1) & (3)

Case information

A Gurira, for the applicant

S Machingauta, for the respondent F

Judgment

Chigumba J: At the hearing of this matter, I granted the application for registration of an arbitral award with costs on an ordinary scale. I gave brief reasons for the judgment, being of the view that the law that governs the question of whether the noting of an appeal against an arbitral award suspends G the operation of the award is settled and that there was no evidence that respondent could successfully rely on to challenge the registration applied for. I have now been asked to provide detailed reasons for judgment. These are they.

The applicant sought the registration of a labour arbitral award handed down in compulsory arbitration proceedings on 23 November 2012, by Ms E H

Chigumba J

A Maganyani. In terms of s 98(14) and (15) of the Labour Act [*Chapter 28:01*], any party to whom an arbitral award relates may submit it for registration to a court of corresponding monetary jurisdiction. The applicant was awarded various sums of money totaling US$19 125, plus interest thereon at the prescribed sum calculated from the date of the arbitral award to the date of B payment in full.

In his founding affidavit he averred that as at the date of his application for registration of the arbitral award, 7 December 2012, the respondent had failed, refused or neglected to pay this sum. Registration of the arbitral award was sought for purposes of enforcement. The application was served on the respondent on 10 December 2012. The respondent filed a notice of C opposition on 19 December 2012. The grounds of opposition were, firstly, that the applicant was never its employee, but a mere contractor; secondly, that there was need for oral evidence from both parties; and thirdly that no quantification was done by both parties. The last reason for opposing the registration

of the arbitral award was that the respondent had since appealed to the Labour Court against the decision of the arbitrator, on points of law. D The details of the appeal were attached to the notice of opposition.

The applicant filed his answering affidavit on 16 April 2013. He attached copies of both parties' written submissions which had been submitted to the arbitrator, to counter the allegation by respondent that it had been denied an opportunity to be heard by the arbitrator. He denied having been a contract E worker, and reiterated that he fitted the statutory definition of employee, as set out in the Labour Act. He averred that the respondent had deliberately chosen not to attend the date of the hearing by the arbitrator, despite being notified of it. He reiterated that the arbitrator was asked to determine the matter on the basis of the papers filed of record when respondent failed to respond F to the notice of set down of the hearing. He alleged that the respondent's appeal to the Labour Court was fatally defective, being filed out of time, and alleged that the opposition to the registration of the arbitral award was an attempt by respondent to frustrate him and delay in paying him his dues.

At the hearing of the matter both parties abided by their heads of argument and had nothing of value to add. The applicant submitted that the issue that G the court ought to determine was whether the arbitral award made on 23 November 2012 can be registered as an order of this court for purposes of enforcement. I agree with that submission, and note that the issue is purely one of law. The applicant sought to raise a point *in limine* via its heads of argument that the deponent to the opposing affidavit was not duly authorized to represent the respondent. He relied on the following cases as authorities for H that proposition: *United Associates (Pvt) Ltd* v *Est Ncube & Ors* HH-29-03

Chigumba J

and *Madzivire Enterprises (Pvt) Ltd* v *Schweggman Family Trust* HB-2-07. A He submitted that the court proceed on the basis that there was no opposition before it. The respondent, in opposing the point *in limine*, submitted it was a duly registered company and that the deponent to the opposing affidavit was its managing director who was duly authorized to depose to the affidavit.

The respondent submitted that, while it is correct that an application stands B or falls on its founding affidavit, there are exceptions to that rule when it comes to the capacity of a company representative that was involved in the main matter and whom both parties know to be a duly authorized company representative from previous dealings. The respondent relied on *Air Zimbabwe Corporation & Ors* v *ZRA* 2003 (2) ZLR 11 (H) and on *Mall Cape (Pty) Ltd* v *Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) where the court stated that: C

> "… the best evidence that the proceedings have been properly authorized would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that form of proof as necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf". D

A perusal of the papers filed of record will show that the applicant's objection is not that the deponent to respondent's opposing affidavit is not known or is a stranger to the respondent. The objection appears to be that no averment was made in the opposing affidavit that the deponent was duly authorized to represent the respondent in the proceedings. In my view, such an objection E should be raised only in those instances where the deponent to the affidavit on behalf of a company is a total stranger. In this case I am satisfied that the parties all knew each other from previous dealings, and from proceedings in the main matter, and that, there can be no question of the deponent to the opposing papers being a stranger to respondent company, or to the applicants. The point *in limine* is dismissed on that basis. F

In regards to the merits of the matter, the applicant contended that an arbitral award which has not been set aside or in respect of which execution has not been stayed must be registered as a matter of course. He relied on *Greenland* v *Zimbabwe Community Health International Research Project* HH-93-13 as authority for that proposition where the court stated at p 3: G

> "Where an award is not stayed or suspended in terms of s 92E(3) of the Labour Act, the court will, as a matter of principle, register the award unless there are grounds as provided for in art 36 of the Model law contained in the Arbitration Act [*Chapter 7:15*].

Article 36 of the Model law, a schedule to the Arbitration Act provides the grounds on which challenges to the registration of arbitral awards may be H

2014 (1) ZLR p107

Chigumba J

A mounted. Article 35 provides that arbitral awards shall be recognized as binding and shall be enforced subject to its provisions and to the provisions of art 36."

The respondent challenged the registration of the arbitral award on the basis that it was denied an opportunity to be heard, which falls under art 36(1)(a)(ii) of the Model Law:

B "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, maybe refused only –

(a) at the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that –

(i) …

C (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or *was otherwise unable to present his case*; or …" (my emphasis)

And on art 36(3) which provides that:

"(3) For the avoidance of doubt and without limiting the generality of paragraph D (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if –

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

E In my view it was open to the respondent to argue that the registration of the arbitral award was contrary to public policy because there was a breach in the rules of natural justice in the making of the award (art 36(3)(b)). The respondent unfortunately did not make specific reference to art 36. The respondent contended that it was not afforded an opportunity to present F oral evidence on the quantification of the entitlements awarded, in clear breach of the rules of natural justice, rendering the decision making process unprocedural. This implies that respondent was invoking the provisions of art 36(1)(a)(ii).

It is trite that the onus of proving that inadequate notice of the hearing was G not given is on the respondent. The respondent is required to furnish the court with proof that it was not given adequate notice of the set down of the arbitration proceedings, resulting in an inability to present its case. The onus was on the respondent to furnish the court with proof that the arbitrator breached the rules of natural justice. In my view, the respondent failed to provide any such proof in its papers filed of record. There was no averment H made in the opposing affidavit that the arbitrator proceeded without affording

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2014 (1) ZLR p108

Chigumba J

respondent an opportunity to be heard. In para 3, Lei Peng Wang, the deponent A to the opposing affidavit, states that:

"The arbitrator erred in her finding; the quantification was not done by both parties, besides the fact that there is need for *viva voce* evidence from both sides…"

This is the only averment made which remotely resembles the allegation that the arbitrator proceeded contrary to the rules of natural justice. In my view, B this bald assertion is insufficient and does not even amount to *prima facie* evidence that the rules of natural justice were breached. No attempt is made to explain why the arbitrator proceeded on the basis of the parties' written submissions, or to refute the allegation that respondent failed to attend two scheduled hearings before the arbitrator and did not provide any explanation as to why they failed to attend. C

The applicant filed a statement of claim, a copy of which is attached to the papers filed of record, dated October 2011, and which contains a breakdown of its claim. On 12 October 2012, the respondent filed written submissions with the arbitrator. The applicant, then the claimant, filed his written submissions in August 2012. The applicant wrote a letter to the arbitrator D dated 11 October 2012 confirming that the arbitration had been determined on 28 September 2012, in default of appearance by the respondents. Paragraph 2 of that letter stated that:

> "I confirm that you have informed us that respondent's legal practitioner wrote a letter on the same day of hearing requesting for a postponement but it was received E by yourself after the day of the hearing. I therefore request you, honorable that this matter be determined on written submissions. This request is made in view of the fact that respondent has made requests to postpone the matter twice now and to avoid these postponements which I view as delaying tactics, if you may give them time to file their written submissions …"

The letter was copied to the respondent's legal practitioners of record, and F served on them, on 11 October 2012. The applicant wrote to the respondent and attached a copy of the arbitral award on 27 November 2012. The respondent appealed against the arbitral award on 15 January 2013.

The dilemma that arises in this case is that the respondent did not place any evidence before the court which it could rely on to determine the veracity G of its contention that it was denied an opportunity to be heard. The applicant averred that the respondent deliberately failed to attend two hearings set down before the arbitrator, resulting in the applicant and the arbitrator agreeing that the matter simply be disposed of on the basis of the papers filed of record.

This averment unfortunately was not denied by the respondent in its opposing papers. The respondent was not heard orally, but it had placed its written H

A submissions before the arbitrator. The applicant was also not heard orally, on the merits of the matter.

Article 19 of the Model law provides that:

> "ARTICLE 19
>
> *Determination of rules of procedure*
>
> B (1) Subject to the provisions of this Model Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Model Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine C the admissibility, relevance, materiality and weight of any evidence."

Based on the provisions of art 19, I find that it was entirely proper and permissible for the arbitrator and the applicant to agree on the procedure to be followed. The arbitrator was even at liberty to conduct the arbitration in such manner as she considered appropriate if the parties failed to agree on which procedure could be used (art 19(2)). The power conferred on the tribunal D included the power to "determine the admissibility, relevance, materiality and weight of any evidence." There is nothing in the papers filed of record which suggests that the arbitrator did not have these powers.

A reading of the arbitral award will show that the arbitration proceeded by way of written submissions. The reason why this happened is clearly endorsed E on p 2 thereof. The basis of the claim is clearly set out, as well as details of the entitlements and the calculation of dues. The arbitrator considered the question of whether the applicant was an employee of the respondent and if so, the extent of what he was entitled to. If the arbitrator erred in any way in these findings and calculations, the Labour Court will determine that on appeal. The High Court does not concern itself with the merits or otherwise of F the appeal, it will register the arbitration award unless, a defense in terms of arts 35 and 36 of the Model Law is pleaded and proved, or the arbitral award is suspended by the Labour Court, or stay of execution has been granted by the Labour Court. I have already found that the respondent is not entitled to invoke any of the provisions of arts 35 and 36 of the Model Law in order to G prevent the registration of the arbitral award.

Does the fact that an appeal has been noted against an arbitral award to the Labour Court preclude the High Court from registering the award for purposes of enforcement? Section 98(14) of the Labour Act provides for the registration of arbitral awards to any court of corresponding monetary jurisdiction, for purpose of enforcement. Section 92E, which governs appeals H to the Labour Court generally, provides:

> "92E Appeals to the Labour Court generally A

(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 interim determination in the matter as the justice of the case requires." B

It is trite, therefore, that an appeal to the Labour Court against the merits of a decision does not suspend the operation of the decision appealed against. See *Baudi* v *Kenmark Builders (Pvt) Ltd* HH-4-12*, Ndlovu* v *Higher Learning Centre* HB-86-10*, Net-One Cellular (Pvt) Ltd* v *Net-One Employees & Anor* 2005 (1) ZLR 275 (S) *, DHL International Ltd* v *Madzikanda* C 2010 (1) ZLR 201 (H) *, Samudzimu* v *Dairibord Holdings Ltd* 2010 (2) ZLR 357 (H). This is expressly provided for in s 92E of the Labour Act. There is a school of thought that adheres to the supposition that, an arbitral award being tantamount to an award by a tribunal, or an inferior court cannot be suspended by the noting of an appeal for the simple reason that, at common law, only decisions of superior courts, courts of inherent jurisdiction, are automatically, D suspended by the noting of appeal. The simplicity of this argument appeals to me. It would appear that the Labour Act, in s 92E, sought to reinforce that common law position. However, all is not lost, as the Labour Act provides a pressure valve, in the form of a medley of interlocutory remedies that can be employed pending determination of an appeal. E

Section 92E (3) provides that a Labour Court, may, pending the determination of the appeal, make interim orders that meet the justice of the case. Stay of execution pending appeal and suspension of the arbitral award are but two of the interim remedies that may be sought before the Labour Court pending determination of an appeal. The respondent has not availed itself to any of these remedies. Instead, it opted to impliedly cloak itself with two defences F against the registration of an arbitral award provided for in the Model law, in an attempt to prevent registration of the arbitral award. None of those defences are available to the respondent because of the paucity of evidence to sustain them. For these reasons, the following order is made:

1. The award made on 23 November 2012 by the arbitrator Ms E Maganyani, be and is hereby registered as an order of this court. G
2. The respondent shall pay costs of suit.

Nyamushaya, Kasuso & Rubaya, applicant's legal practitioners

Tavenhave & Machingauta, respondent's legal practitioners H

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Source:
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MAKONYE v RAMODIMOOSI & ORS 2014 (1) ZLR 111 (H)

Citation	2014 (1) ZLR 111 (H)
Case No	Judgment No. HH-62-14
Court	High Court, Harare
Judge	Chigumba J
Heard	28 October 2013; *CAV*
Judgment	19 February 2014
Counsel	*J Burombo,* for the applicant

LM Gwaunza, for the first respondent
L Rufa, for the second respondent
No appearance for the third respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Arbitration – award – setting aside of – grounds – party unable to present its case – arbitrator deciding to receive written rather than oral submissions – not a ground for setting aside award – conduct of proceedings – arbitrator's wide discretion – no requirement to receive D *oral submissions or evidence*

Headnote

In order to set aside an arbitral award on the basis that it is contrary to public policy, it must be shown that some fundamental principle of law or morality or justice is violated or that the decision is so defiant of logic E or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt. An award by the arbitrator is not contrary to public policy merely because it is wrong in law or in fact in reaching the conclusion arrived at.

The fact that the arbitrator, with the consent of the parties, decides to receive written, rather than oral, submissions does not mean that either of the F parties was not able to present its case. The arbitrator has a wide discretion as to how to conduct the proceedings. Article 24 of the Model Law (set out in the Schedule to the Arbitration Act) gives the arbitrator the power to override any agreement between the parties themselves in regard as to how the matter should proceed, and stipulates that the arbitral tribunal G shall decide whether to hold an oral hearing or whether the proceedings shall be conducted on the basis of documents or other materials. In essence, the conduct of the hearing is entirely at the tribunal's discretion. There is no onus on the tribunal to hear oral submissions. The onus on the tribunal relates to notification of the hearing, and an arbitrator has exclusive jurisdiction, contrary to the parties' wishes, to decide how to H collate evidence. There is no provision to compel the arbitrator to hear

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Chigumba J

oral evidence. What is required is for all the parties to be notified of the A hearing, to be given an opportunity to present their case as stipulated by the arbitrator, and to have sight of the submissions made by the other parties, if in writing.

Cases cited B

Chanakira & Anor v *Mapfumo & Anor* 2010 (2) ZLR 178 (H)

Husaikwevanhu & Ors v UZ-USF Collaborative Research Programme 2010 (2) ZLR 448 (H)

Muzenda v Kombayi & Anor 2008 (1) ZLR 366 (H)

ZESA v Maposa 1999 (2) ZLR 452 (S) C

Legislation considered

Arbitration Act [*Chapter 7:15],* Schedule, arts 19, 24 & 34

Case information

J Burombo, for the applicant

M Gwaunza, for the first respondent D

L Rufa, for the second respondent

No appearance for the third respondent

Judgment

Chigumba J: This is an application in terms of s 34 of the Model Law as set out in the First Schedule to the Arbitration Act [*Chapter* 7:15] for the setting aside of an arbitral award dated 23 February 2012, granted by the E third respondent. The second respondent was the applicant's estate agent. At the hearing of the matter, I dismissed the application with costs on a legal practitioner client scale, being of the view that the application was entirely devoid of merit. I have now been asked to provide detailed reasons for my judgment for purposes of appeal. These are they:

The arbitral award that is sought to be impugned reads as follows: F

> "IT IS ORDERED THAT:
>
> 1. The termination of the agreement of lease in respect of number 7 Westcott Road, Mount Pleasant, Harare, signed by the parties on 6 September 2011 is confirmed.
> 2. The respondent (applicant in the matter now under consideration) refunds G and pays to the claimant the sum of US$16 800 plus interest thereon from 1 November 2011 to the date of receipt of payment.
> 3. The costs of the arbitrator, amounting to US$2 000, and covered by a deposit paid by the claimant, be refunded to the claimant by the respondent."

The background giving rise to the dispute between the applicant and the first respondent involved the termination of a lease agreement entered into by the H

A parties on 6 September 2011. The parties had agreed that the first respondent would occupy the leased premises on 1 November 2011. The premises were under renovation, and the applicant gave an assurance that the renovations would be complete by the date of occupation. The first respondent paid a sum of US$16 800, being a deposit and six months' rent in advance, to B the applicant. Both parties submitted voluminous written statements to the arbitrator on 31 December 2011. The second respondent, the letting agent, also submitted a written statement to the arbitrator on 9 February 2012.

The arbitrator found that the rental amount had been assessed based on the size of the kitchen, which the applicant had promised to extend and make bigger, according to the first respondent's specifications. This is the reason C why the first respondent had agreed to pay six months' rent in advance. The applicant was unable to complete the renovations by the agreed date of occupation. The parties entered into further negotiations which broke down after the applicant demanded more money, which the first respondent refused to pay. On 1 November 2011, the date of occupation, the premises were still D under renovation. The first respondent terminated the lease agreement and claimed a refund of the US$16 800 that had been advanced. The arbitrator found that the applicant's inability to renovate the kitchen by the agreed date went to the root of the lease agreement, and confirmed that the lease agreement had been correctly terminated. He ordered that the applicant refund the monies advanced to him by the first respondent.

E The basis of the application to set aside the arbitral award is that the applicant was not given an opportunity to be heard by the arbitrator. He averred that he never agreed that the arbitrator could determine the matter on the papers filed by the parties. He averred further, that the third respondent only remitted US$12 800 to him, and that the first respondent had already been reimbursed US$3 840 by the second respondent. The applicant averred that the arbitral F award should be set aside on the basis that it had been awarded contrary to public policy in Zimbabwe, and in breach of the rules of natural justice.

The first respondent opposed the application on the basis that the applicant had given a mandate to the respondents to file a written report before the arbitrator in an electronic mail dated 7 January 2012. The first respondent G averred further, that the arbitrator had, in an electronic mail communication to all the parties dated 5 January 2012, asked the parties how they wished to proceed and the parties agreed to make written submissions to the arbitrator. The first respondent pointed out that the applicant, in the e-mail dated 7 January 2012 to the arbitrator, stated that:

> "… written submissions only are fine, more focused and cheaper financially and H time wise by me."

The first respondent admitted that the amount outstanding was US$12 800 and A averred that, when the arbitral award is registered, it will be registered in that sum. The first respondent reiterated that it was not fatal to an arbitral award if the parties agreed to forgo an oral hearing and mandated the arbitrator to make a determination on the basis of written submissions. The second respondent opposed the application and averred that it had no interest in the outcome B of the matter, but merely wished to protect itself against an adverse order as to costs. It averred that it was given a mandate to manage the applicant's property, number 7 Westcott Road, Mt Pleasant, in August 2011. Pursuant to that mandate, it secured the first respondent as a tenant for those premises. It further averred that a dispute arose between the parties which resulted in first respondent terminating the lease agreement and demanding a refund C of rentals and deposit paid in advance. The second respondent confirmed that both the applicant and first respondent requested that it submit a written report to the arbitrator. The second respondent maintained that it had been improperly joined to the proceedings.

With regard to the merits of the matter, the second respondent averred that it D failed to find any justification in the applicant's complaints against its report, which the applicant had specifically requested that it be submitted to the arbitrator. Copies of emails between the parties were attached to confirm the second respondent's version of events. The second respondent reiterated that the applicant's contention that it was not given an opportunity to be heard were entirely devoid of merit. E

The second respondent raised a point *in limine* that it had been improperly joined to the proceedings, and submitted that the court ought to use its powers in terms of Order 13, r 87(2)(a) of the High Court Rules 1971, to order that it cease to be a party. *Muzenda* v *Kombayi & Anor* HH-47-08 was cited in support of that submission. After applying the test of whether the second respondent has any real or substantial interest in the proceedings or F their outcome, the court finds that the second respondent was improperly cited as a party to the proceedings and orders that it ceases to be a party, and that the applicant ought to pay the second respondent's costs on a legal practitioner and client scale. This is because the second respondent was put to the unnecessary expense of having to defend itself. G

The question that the court must determine is whether the arbitral award handed down by the third respondent is contrary to public policy in Zimbabwe, as envisaged by art 34 of the Model Law, set out in the Second Schedule to the Arbitration Act [*Chapter* 7:15] ("the Model Law"). In other words, did the third respondent grant the arbitral award without proper consideration of the terms of the lease agreement between the parties, without affording H

Chigumba J

A applicant an opportunity to be heard, or with fraud and corruption? Article 34 of the Model Law provides:

> "Application for setting aside as exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this B article.
>
> (2) An arbitral award may be set aside by the *High Court* only if –
>
> (a) the party making the application furnishes proof that –
>
> (i) …
>
> (ii) the party making the application was not given proper notice of C the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) …
>
> (iv) …
>
> (b) the *High Court* finds that –
>
> D (i) …
>
> (ii) the award is in conflict with the public policy of *Zimbabwe*.

Article 19 of the Model Law provides:

> "Determination of rules of procedure
>
> (1) Subject to the provisions of this Model Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the E proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Model Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

F Article 24 of the Model law provides:

"Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials."

G The test to be applied to an arbitral award, in order to set it aside on the basis that it is contrary to public policy, is that:

"An arbitral decision can only be held to be contrary to public policy if some fundamental principle of law or morality or justice is violated or if it is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe H would be intolerably hurt".

2014 (1) ZLR p116

Chigumba J

See *Chanakira* v *Mapfumo & Anor* 2010 (2) ZLR 178 (H) and *Husaikwevanhu*A *& Ors* v *UZ-USF Collaborative Research Programme* 2010 (2) ZLR 448 (H) at 455-456, where Gowora J (as she then was) stated:

"The import of the defence under arts 34 and 36 is not to imbue the court before whom the award is to be registered or set aside with powers of appeal to determine the correctness of the decision of the arbitrator ... [An] award by B an arbitrator is not contrary to public policy merely because the arbitrator was wrong in law or in fact in reaching the conclusion that he arrived at arrived at … This court would only intervene and uphold the defence of public policy where it is established that the reasoning or conclusion in the award goes beyond mere faultiness or incorrectness and constitutes a palpable iniquity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception [*sic*] C of jutsice in Zimbabwe would be intolerably hurt by the award ... The courts in this country have construed the defense of public policy very restrictively so that the objective of finality to arbitration is achieved. It follows, therefore, that the grounds upon which an award may be set aside … are very narrow. "

See also *Pioneer Transport (Pvt) Ltd v Delta Corporation Ltd & Anor* 2012 (1) ZLR 58 (H).

Based on the provisions of art 19 of the Model Law, I find that it was D entirely proper and permissible for the arbitrator and the applicant and the first respondent to agree on the procedure to be followed. The arbitrator was even at liberty to conduct the arbitration in such manner as he considered appropriate, if the parties failed to agree on which procedure could be used (art 19(2)). The power conferred on the arbitral tribunal includes the power E to "determine the admissibility, relevance, materiality and weight of any evidence". There is nothing in the papers filed of record which suggests that the arbitrator did not have those powers. The evidence placed before this court, via copies of electronic mail communications between the parties, clearly shows that the applicant consented to the matter being determined on the basis of written submissions placed before the arbitrator. The applicant F is on record as celebrating the advantages of this course of action as being cheaper and less time consuming. To turn around now and ask this court to find that the arbitral award was made without affording the applicant an opportunity to be heard is downright dishonest and dishonorable.

Article 24 of the Model Law gives the arbitrator the power to override any G agreement between the parties themselves in regard to how the matter should proceed, and stipulates that the arbitral tribunal shall decide whether to hold an oral hearing or whether the proceedings shall be conducted on the basis of documents or other materials. In essence, the conduct of the hearing is entirely at the arbitral tribunal's discretion. There is no onus on the arbitral tribunal to hear oral submissions. The onus on the arbitral tribunal relates H

2014 (1) ZLR p117

Chigumba J

A to notification of the hearing, and an arbitrator has exclusive jurisdiction, contrary to the parties' wishes, to decide how to collate evidence. There is no provision to compel the arbitrator to hear oral evidence. What is required is for all the parties to be notified of the hearing, to be given an

opportunity to present their case as stipulated by the arbitrator, and to have sight of the B submissions made by the other parties, if in writing.

The second respondent was clearly implored by all the parties to submit a written report to the arbitrator. A careful reading of the parties' emails will confirm this. There is therefore no basis on which the applicant can aver that, despite advising the arbitrator that he preferred being heard verbally, his request was denied or ignored. In fact, the evidence before the court C is that the applicant submitted the most voluminous written submissions before the arbitrator.

The court has also been unable to find any evidence of fraud on the part of the arbitrator in determining the arbitral award. There is no evidence that the offence of fraud was committed, or reported to the police by the applicant. D Fraud is a criminal offence which involves an element of misrepresentation to deceive another to his prejudice. There is no evidence that the applicant was operating under any misrepresentation by the arbitrator, or of any prejudice which he may have suffered as a result of such misrepresentation.

According to *ZESA* v *Maposa* 1999 (2) ZLR 452 (S) at 464, art 34 of the E Model Law

> "… means that if, for example, if the arbitrator was fraudulently misled or bribed by a party, the award, however innocuous, would be contaminated in the process of making and contrary to public policy."

There is simply no evidence before the court that the third respondent misrepresented himself in order to deceive or cause prejudice to any of the F parties, or that he received a gift or benefitted in any way in reaching the decision that he made. The allegations of fraud and corruption against the third respondent, by the applicant, are clearly baseless and without foundation.

The court has been unable to find any evidence that the arbitrator misinterpreted the terms of the lease agreement between the parties. Clearly, the applicant G has been unjustly enriched by the deposit and rental in advance paid by the first respondent. On the termination of the lease agreement, it was just and equitable that the first respondent be re-imbursed US$16 800, in the absence of evidence of fraud, corruption, breach of public policy, breach of the rules of natural justice, as provided in art 34 of the Model Law. The test for contravening public policy, that "… some fundamental principle of H law or morality or justice is violated or if it is so defiant of logic or accepted

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Chigumba J

moral standards that the concept of justice in Zimbabwe would be intolerably A hurt", was not established. There was nothing immoral about the arbitral award that the applicant returns monies given to him pursuant to a lease agreement which was terminated before it commenced, due to failure on his part to complete renovations to the property by an agreed date. That award did not defy logic or intolerably hurt the concept of justice in Zimbabwe. B In fact, the opposite is true, the concept of justice in Zimbabwe would have been hurt by allowing the applicant to keep the US$16 800. The applicant would have been unjustly enriched at the expense of the first respondent, who was innocent of any wrongdoing which resulted in the termination of the lease agreement.

The applicant is not entitled to have the arbitral award set aside. Further, the C basis of the application before the court is so flimsy; it would appear that the application was conceived as a gimmick to frustrate the first respondent by delaying payment. It is for that reason that the court acceded to the application that costs be awarded on a higher scale, to discourage such conduct in future, and to mark its displeasure at the blatant abuse of court process. This application is entirely devoid of merit and is dismissed with costs on D the higher scale of legal practitioner and client. It is ordered that the second respondent ceases to be a party to these proceedings, and that the applicant pay the second respondent's costs on a legal practitioner and client scale.

Maja & Associates, applicant's legal practitioners E

Gwaunza & Mapota, first respondent's legal practitioners

Dzimba Jaravaza & Associates, second respondent's legal practitioners

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Source:
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MLAMBO v MUPFIGA 2014 (1) ZLR 119 (H)

Citation	2014 (1) ZLR 119 (H)
Case No	Judgment No. HH-65-14
Court	High Court, Harare
Judge	Mafusire J
Heard	22, 23 & 27 January 2014; *CAVi*
Judgment	19 February 2014
Counsel	*J R Tsivama,* for the plaintiff *T Moyo*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – duress and undue influence – threats unlawful or contra bonos mores – threat of criminal prosecution – whether such threat unlawful – unlawful if creditor exacts something to which not entitled

Headnote

D Duress or coercion, in jurisprudence, is where someone performs an act as a result of violence or threats of violence or some other pressure. In the law of contract, duress, or *metus*, relates to a situation where someone enters into an agreement as a result of threats. Such a contract is voidable at the instance of the aggrieved party. Consent which is a result of coercion is E not true consent. Where a party seeks to avoid a contract on the basis of duress he must establish five elements: (1) that the fear was a reasonable one; (2) that the fear was caused by the threat of some considerable evil to that party or his family or property; (3) that the threat was that of an imminent or inevitable evil; (4) that the threat or intimidation was unlawful or *contra bonos mores*; (5) that the moral pressure used caused F damage. These five elements are considered cumulatively.

A contract that is induced by threats of a criminal prosecution may be set aside. The signature on a liquid document that is procured by reason of such threats may render the document unenforceable. Such a threat may be illegitimate. It may be *contra bonos mores*. It may amount to G the crime of compounding. A person who is legally entitled to lay a criminal charge against another does no legal wrong in bringing the charge. However, it is *contra bonos mores* for him to resort to a criminal process, or to threaten to resort to it, in order to induce a promise for the payment of a private debt.

Compounding is an offence. It refers to an agreement to stifle a prosecution H in return for a reward. Such conduct stifles the proper administration

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of justice. In the context of contracts induced by threats, compounding A relates to the linking of one's right to recover one's private debt to the right to bringing a public prosecution for the crime committed by the debtor. The test in determining the validity of an acknowledgement of debt procured under a threat of a criminal prosecution is whether by such a threat the creditor exacted or extorted something to which he B was otherwise not entitled. Where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which was due, the creditor does not act *contra bonos mores* in using the threat of criminal prosecution to induce him to acknowledge his true liability. In these circumstances he is doing no more than exercise his legal rights. Where, however, the creditor does not know and probably cannot establish the amount of C the debtor's indebtedness, it is an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. Thus the threat of an arrest or of a criminal prosecution to induce a promise to pay that which was due is not *contra bonos mores*. It is the threat to D extort a promise to pay that which was not due or was unknown which is illegal. The argument that ought to be decisive is that although the debtor has worsened his position by signing the promissory note or IOU, he has not worsened it as much as if he had responded to the threat by paying what he owed in cash, and if he had done that he could have had no complaint._ E

It is often the case that an acknowledgment of debt induced by a threat of an arrest or a criminal prosecution gives the creditor a reward or an advantage to which he may otherwise not have been entitled. Some of the more obvious and common rewards or advantages may be: (1) the creditor removes or minimises the burden of proof on him, in that where previously he would have had to prove liability and quantum, he would F now merely have to produce the liquid document which often speaks for itself; (2) with regards to quantum in particular, where there was some doubt or dispute as regards the actual amount allegedly due, whether as capital or as interest and other charges, or both, the liquid document would settle all that, even together with the issue of the costs of suit; (3) G a typical acknowledgement of debt would have an acceleration clause where, among other things, in the event of a default the entire balance of the amount outstanding at the time of the default would become immediately due and payable; (4) the benefits of the legal exceptions such as *non causa debiti* would inevitably be renounced by the debtor; and (5) the liquid document would give the creditor the advantage H

Mafusire J

A of proceeding to recovery by way of procedures such as provisional sentences or summary judgment.

Cases referred to

Arend v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C)

B*Broodryk* v *Smuts NO* 1942 TPD 47

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

Gambiza v *Taziva* 2008 (2) ZLR 107 (H)

Machanick Steel & Fencing (Pty) Ltd v *Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W)

Matibiri v *Kumire* 2000 (1) ZLR 492 (H)

C*Matsika* v *Jumvea Zimbabwe Ltd & Anor* 2003 (1) ZLR 71 (H)

Middleton v *Carr* 1949 (2) SA 374 (A)

Moyo & Anor v *Intermarket Discount House Ltd* 2008 (1) ZLR 268 (S)

Robinson v *Randfontein Estates GM Co Ltd* 1925 AD 173

Schierhout v *Minister of Justice* 1926 AD 99

Case information

D*J R Tsivama*, for the plaintiff

T Moyo, for the defendant

Judgment

Mafusire J: This was a debt collection matter. In simple terms, and in outline form, the plaintiff claimed payment of an amount of US$95 000, E together with costs of suit on an attorney and client scale and interest on the capital amount at rates charged from time to time by Stanbic Bank of Zimbabwe. The claim was based on a set of liquid documents, being an acknowledgement of debt and a deed of pledge. The plaintiff also sought an order authorising him to sell two Mercedes Benz motor vehicles. These F vehicles were under his custody and control. The defendant, according to the plaintiff, and to the written deed, had pledged them as security for the debt. To avoid the liquid documents the defendant pleaded duress.

In the acknowledgement of debt the plaintiff was described as the creditor and the defendant the debtor. Clause 1 read as follows:

> "1. TAKAIDZA MUPFIGA of Harry Pitchanick (*sic*) Drive, Alexandra Park, G Harare acknowledges that he is truly, lawfully and unconditionally indebted to the Creditor, for (*sic*) the sum of US$95 000.00 (ninety thousand (sic) United States dollars) being the value of a motor vehicle namely a Land Cruiser 100 series which the debtor sold on behalf of the creditor and converted the proceeds of the sale to his own use."

Despite the difference between the amount in figures and that in words, it H was common cause that the correct sum was US$95 000.

Mafusire J

Both the acknowledgement of debt and the deed of pledge were standard A documents typical in the world of commerce. Among other things, in terms of the acknowledgement of debt, the debtor would repay the debt in instalments. There was the usual acceleration clause in the event of a breach. The debtor had renounced the benefit of some legal exceptions, including that of *non causa debiti* (no cause or reason for the debt). And in the event of legal B proceedings, the debtor would pay all the costs incurred by the plaintiff on an attorney and client scale, collection commission and any tracing charges.

In the deed of pledge the defendant pledged and delivered to the plaintiff, as security for the debt, the Mercedes Benz motor vehicles aforesaid. Repeating some of the clauses in the acknowledgement of debt such as the liberty to repay in instalments; the acceleration clause in the event of a default, and the issue C of costs on a higher scale, the deed of pledge, among other things, obliged the debtor to insure the vehicles. The defendant had also declared himself the legal owner of the vehicles. The relevant clause on that read like this:

> "4. I declare that I am the owner or legal holder of the pledged articles and that no other person has any interest in or right to the pledged articles. The pledged (sic) article is not subject to any right of retention or other limitation or encumbrance D and may be pledged and delivered by me without any limitation."

(a) The evidence

the story behind the acknowledgement of debt and the deed of pledge (hereafter referred to as "the claim documents"), as told by the plaintiff, was that he was the chief executive officer of a finance group called Tetrad; that E the defendant was someone known to him; that sometime in October 2007 he had arranged with the defendant for the latter to dispose of his Toyota Land Cruiser 100 series motor vehicle (hereafter referred to as "the Toyota 100 series") whose proceeds the defendant would use to procure an upgraded vehicle of the same make but with an Amazon specification to it (hereafter F referred to as "the replacement vehicle" or "the Toyota Amazon"); that in pursuance of that arrangement the defendant had sold the Toyota 100 series for the equivalent of US$105 000 but which amount, the defendant alleged, had subsequently depreciated to US$95 000 owing to a delay in payment; that in spite of the plaintiff acknowledging the depreciation of the sale proceeds the defendant had still failed to procure him the replacement vehicle and had G eventually disappeared from the scene altogether for some time.

The plaintiff further testified that after frantic efforts over a period of some two or so years during which, in desperation, he had been communicating with one Chamunorwa Tsvakai, the defendant's agent and the one actually commissioned to procure the Toyota Amazon (hereafter referred to as "Chamu"), he had finally located the defendant with the assistance of some H

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A private investigators or tracing agents. The plaintiff had reported the defendant to the police for theft by conversion. On 9 March 2010 the defendant had been arrested and charged with contravention of s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], namely, theft. The police had informed the plaintiff that the defendant had wanted to talk settlement. B The plaintiff had engaged his lawyer, one Tatenda Mawere ("Mr Mawere"). The claim documents had been prepared. The defendant had signed them. The signing had been done in Mr Mawere's office in the presence of the defendant's own lawyer, one Succeed Takundwa ("Mr Takundwa"). Mr Takundwa had been engaged at the instance of Mr Mawere. Mr Mawere had insisted on a lawyer representing the defendant specifically to remove C any suspicion of coercion.

Thereafter, the defendant had personally made arrangements for the delivery of the pledged vehicles to Tetrad's premises. At the defendant's request the plaintiff had offered drivers. There were now three vehicles, the Mercedes makes aforesaid, and a Jeep Grand Cherokee vehicle (hereafter referred to D as "the Jeep"). The Jeephad not been mentioned in the deed. But it had been part of the pledge. The defendant had assured the plaintiff that he owned the vehicles or that they were under his custody and control. There had been other vehicles. But the defendant had offered these three specifically.

The defendant had subsequently delivered to the plaintiff the registration E particulars for all the vehicles. At the time of the trial, almost fours later, both the vehicles and their registration particulars were still in the plaintiff's custody and control.

The plaintiff's evidence concluded. The defendant had never paid a single instalment. Mr Mawere had made a follow up. The defendant had pleaded for more time. But despite being given more time he had never paid. Mr F Mawere had issued summons. The defendant had pleaded duress. His defence was that he had been coerced by the police and Mr Mawere to sign the claim documents. He said he had been threatened with prolonged incarceration if he did not agree a settlement with the plaintiff and offer security for the debt. The defendant had counterclaimed for the cancellation of the claim G documents and for the return of the vehicles.

The plaintiff called Mr Mawere. He corroborated the plaintiff's testimony in all material respects. He gave some more details on some aspects. He had come to the police station where the defendant had been held. This had been at the request of the plaintiff. He had not negotiated any settlement terms with the defendant. The parties had already agreed between themselves. H His role had simply been to reduce the agreement to writing. Before he

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did, he had confirmed the essential terms with the defendant. To avoid any A suspicion of undue influence later on seeing that the defendant had been in police custody Mr Mawere had enquired from the defendant whether he knew of any lawyer that could assist him. The defendant had mentioned Mr Takundwa. Mr Mawere had immediately contacted Mr Takundwa on his mobile phone. He had apprised him of the matter. Mr Takundwa had agreed B to speak to the defendant. Mr Mawere had handed over the phone to the defendant. The two had talked. It had finally been agreed that they would all meet at Mr Mawere's offices on the following day.

On the following day, the claim documents had been executed in Mr Mawere's office. The defendant had been escorted to Mr Mawere's office by some police details. Mr Takundwa had initialled every page of the claim documents and C had signed as a witness on the signature page. Thereafter, the police had taken the defendant back to the station to facilitate his release from custody. The registration particulars for the Jeephad been submitted much later.

Mr Mawere went on to state that when the first instalment under the claim documents had not been paid on the due date or at any time thereafter the D defendant had called at his office and had asked for more time. It had been agreed to defer the payment date to the following month. But again the defendant had not paid. Sometime thereafter Mr Mawere had met the defendant by chance at some eating place in town. The subject of the plaintiff's debt had naturally come up. Again, the defendant had asked for more time. On E none of those occasions had the defendant ever indicated that he would be disowning the claim documents. He had never mentioned coercion or anything like that. When the defendant had not paid, Mr Mawere had issued summons.

After Mr Mawere's testimony the plaintiff closed his case. The defendant opened his. The essential aspects of his testimony were that at no time prior to the execution of the claim documents had he agreed to owing the plaintiff F US$95 000. Regarding the original arrangement, he had no more than offered to assist Tetrad, through the plaintiff, to upgrade the Toyota 100 series to the Toyota Amazon. He had been a mere fuel dealer. He had little knowledge about vehicles. He had merely introduced the plaintiff to Chamu. Chamu had been a car dealer. The plaintiff had then gone on to enter into an agreement G with Chamu and to deal with him directly without any furtherinvolvement of the defendant.

The defendant said he had sold the Toyota 100 series to a local buyer for ZW$230 billion. On the parallel market that amount had translated to US$105 000. However, there had been a delay by the buyer in making payment. Due to the spiralling inflation at that time, the purchase price H

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A had reduced to US$95 000 by the time the buyer had finally paid. On the plaintiff's instructions US$80 000 of the purchase price had been transferred to Chamu. The defendant would retain US$15 000. This would be invested in the defendant's fuel business in order to raise the cash for the import duty required to be paid when the replacement vehicle would eventually arrive.

B On Chamu's instructions the plaintiff had remitted the US$80 000 to an account domiciled in the United Kingdom belonging to Chamu's nominee. This had been done although the deposit could not immediately be traced. However, contrary to their agreement, the plaintiff was now dealing directly with Chamu. The old arrangement in terms of which the replacement vehicle had been specified as a Toyota Amazon had been abandoned. The plaintiff C had now agreed with Chamu to import a Toyota Land Cruiser, 200 series motor vehicle (hereafter referred to as "the Toyota 200 series") or an S-class Mercedes Benz.

The plaintiff and Chamu had had further dealings together. Among other things, the plaintiff had engaged Chamu to import some motor vehicles for D his family, including a Toyota Corolla for one of his children.

The defendant denied that Chamu had been his agent. He maintained that the plaintiff had entered into a separate agreement altogether with Chamu. He had not been a party to that agreement. He had just been kept abreast of developments by copies of their e-mail communication. His role had E remained that of simply having to provide the US$15 000 for the import duty required for the replacement vehicle, whenever it would eventually arrive.Chamu had in fact successfully imported the Toyota 200 series for the plaintiff. However, Chamuhad eventually sold it elsewhere to defray expenses when the plaintiff had failed or declined to pay the commission that Chamu had demanded.

F The defendant said that, contrary to the plaintiff's claim, he had never abandoned his usual residence in Harare. The police had arrested him from that residence. Initially, the plaintiff had reported a case of fraud against him. However, the defendant had convinced the police that there had been no fraud. He had produced documents from Chamu showing that G the replacement vehicle had been on its way. The police had released him. However, the plaintiff had subsequently reported another criminal case. It was now that of theft. He had been arrested. He had spent two nights in filthy, inhuman and degrading police cells. The police had threatened him with a longer and indefinite period of incarceration until Chamu was found. They would oppose any bail. However, if he agreed to settle with the plaintiff and H "securitise" the debt they would release him.

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Regarding the actual execution of the claim documents, the defendant said that A he had been arrested in the morning of 9 March 2010 and had been detained at Avondale police station. He had been subjected to intense interrogation by the police on the motor vehicle transaction with the plaintiff. It had been put to him by the police that he either "securitised" the transaction or he would rot in jail. Around 4.00 pm he had been informed that the plaintiff B had come to talk to him. However, he had later been told that the plaintiff would be coming back with his lawyer the following day. He had had to endure another night in the deplorable conditions of the police cells. The following day Mr Mawere had come together with the plaintiff. Mr Mawere had virtually repeated the police threats and had demanded security for the US$95 000 in the form of an

immovable property. The defendant had told C Mr Mawere that he had no immovable property or any other assets that he could pledge as security. The plaintiff had mentioned that the defendant operated a garage somewhere in town. It had then been agreed between Mr Mawere and the police that vehicles would be seized from that garage and pledged as security. The vehicles and their registration particulars had been seized on that day by the police and the plaintiff's agent. D

On enquiry from Mr Mawere whether he knew of any lawyer, the defendant had mentioned Mr Takundwa. Mr Mawere had spoken to Mr Takundwa on the phone and had handed the phone to him. Mr Takundwa had never asked anything about the transaction. He had suggested that they all met at Mr Mawere's office on the following day. E

At Mr Mawere's office on the following day Mr Takundwa had never spoken to the defendant separately. The defendant had been brought into the office under police custody. The police details had remained in attendance throughout the execution of the documents. Mr Takundwa had signed the claim documents merely as a witness and not as the defendant's lawyer. F

After the execution of the claim documents the defendant had been taken back to the police station and eventually released. He had disregarded the claim documents because he had signed them under duress.

In cross-examination, the defendant stated that he had sought legal advice from an attorney called Farai Mutamangira ("Mr Mutamangira"). Mr Mutamangira G had advised him to ignore the claim documents. On further questioning the defendant said that Mr Mutamangira had written a letter of complaint to the police general headquarters on the conduct of the police details involved. However, nothing had come of it. The letter was not produced at the trial.

The defendant emphasised that the only amount he had ever admitted to owing the plaintiff over that transaction had only been the US$15 000, being for H

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A the import duty for the replacement vehicle. The whole transaction had been for Tetrad, and not the plaintiff. The plaintiff had known that the defendant would be sourcing foreign currency on the illegal parallel market in order to consummate the deal. The plaintiff had been content to play along. That the plaintiff or Tetrad had got no vehicle had been the plaintiff's fault. He B had failed to pay Chamu's commission or the extra costs required for the replacement vehicle. Chamu had ended up selling the vehicle. The defendant was no longer in touch with Chamu. But he himself could not be held liable for the US$95 000 because the claim documents were unenforceable by reason of duress. Nor could he be held liable on the basis of the original agreement. The plaintiff had cancelled it and had entered into a new deal C with Chamu directly.

The defendant also stressed that he had not voluntarily surrendered the vehicles. The two Mercedes Benz vehicles belonged to his customers. He ran a motor vehicle repair business with someone else. The case had caused him enormous difficulties with the owners of those vehicles who were demanding D them back. The Jeep belonged to his former employers in South Africa. It had been in his garage for repairs. It was not even registered in Zimbabwe. It had been brought in on a temporary import permit, one of whose conditions forbade the sale, pledge or disposal of the vehicle in any way before the expiry of two years unless duty had been paid for it. Nonetheless the police, on plaintiff's instructions, had just seized those vehicles even before the E repairs to the Jeep had properly been completed.

The defendant called no witnesses. After his evidence he closed his case.

(b) The issues

The main point for determination is whether the claim documents are valid and enforceable or whether they are void by reason of duress. If the claim F documents are valid and not void, that should dispose of the whole issue of liability. However, if the claim documents are invalid, the next consideration is whether the plaintiff can nevertheless rely on the transaction or the agreement behind those documents.

I must point out that right at the onset of the trial, having seen that the G plaintiff's claim was wholly and solely predicated on the claim documents, I enquired from counsel whether in fact that was the case. Mr *Tsivama* was quite bullish. He confirmed that indeed the plaintiff's case would fall

or succeed on the basis of the claim documents. He said he was confident that the evidence would clearly establish that the defendant had signed the claim documents freely and voluntarily and that there would be no question of the H defence of duress succeeding. I could not help but feel what a gamble the

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plaintiff was taking. For he who makes himself a bed of roses must lie on A it. As Chatikobo J put it in *Matibiri* v *Kumire*2000 (1) ZLR 492 at 502A-B, when dismissing the plaintiff's case therein which had wrongly been based on the concept of a universal partnership:

> "It may well be that if the plaintiff had identified a suitable cause of action, she could have obtained some relief. She nailed her colours to the mast of the concept of a universal partnership, the existence of which has not been established." B

However, *in casu* it seems plaintiff subsequently reconsidered his position. In the closing submissions Mr *Tsivama* changed tack and stated as follows in clause 12:

> "12. In the event that this Honourable Court is still of the view that the defendant signed the acknowledgement of debt under duress it is the plaintiff's respectful C submission that the issue of the contract between the parties and which gave rise to the present claim was fully canvassed in evidence so as to enable this Honourable Court to make a finding on it."

I have to dwell on this point a little more and get it out of the way. In the event that I set aside the claim documents, can the plaintiff nevertheless D revert to the original transaction or agreement between the parties and claim a refund of the US$95 000? Can he do that when he has neither pleaded that contract nor sought to amend his pleadings in the light of the evidence adduced? I have come to the conclusion that in spite of his blowing hot and cold, it seems the plaintiff can. The courts are not made for the pleadings. Rather, it is the pleadings that are made for the courts. As Innes CJ put it in E*Robinson* v *Randfontein Estates GM Co Ltd*1925 AD 173 at p 198:

> "The object of pleading is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion, for pleadings are made for the court, not the court for the pleadings, and where a party has had every facility to place all the facts before the trial court and the investigation F into all 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."

In *Moyo & Another* v *Intermarket Discount House Ltd*2008 (1) ZLR 268 (S), the Supreme Court adopted the same approach. At p 272G-H Ziyambi JA stated as follows: G

> "As Mr *Andersen* submitted, it was clear on the record that there were no further facts requiring investigation and that the legality or otherwise of the acknowledgement of debt was fully canvassed in the court *a quo*. Indeed, there was no suggestion by the appellants that there were any further facts which required investigation. Thus the court *a quo* had before it all the facts which were necessary to determine the real issue which arose before it …" H

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A Essentially the same position had been adopted in the case of *Middleton* v *Carr*1949 (2) SA 374 (A). At p 272C-E in the *Moyo* case the learned judge of appeal quoted with approval the remarks of Schreiner JA at pp 385-6 in *Middleton* v *Carr*, *supra*,:
"… as has often been pointed out, where there has been full investigation of a B matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it had been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court."

C In this case, in the event that I find for the defendant on the issue of duress, there will be no injustice or prejudice if I proceed to consider the validity of the transaction behind the claim documents. This is so for a number of reasons. Firstly, the claim documents themselves, particularly the acknowledgement of debt, expressly alluded to that transaction. Secondly, the defendant's own pleadings dealt with that transaction. Thirdly, and most importantly, the D transaction was extensively canvassed and ventilated in evidence.

Furthermore, and at any rate, whether or not I find that the claim documents were voidable, it seems I still have to determine the validity of the transaction behind them because the defendant, in evidence, essentially said that that transaction was in violation of the exchange control regime in force at the E time. He said the plaintiff had known very well that in order for him to consummate or perform that transaction he had had to trade on the "black" market, euphemistically called the parallel market, for the necessary foreign currency. It is trite that courts do not enforce illegal contracts or contracts *in fraudem legis*. It would be contrary to public policy to do so.

F The nature of this case and the manner the issues were canvassed during trial inevitably requires me to first consider the transaction behind the claim documents before I consider their validity. The defendant said he had been absolved from the obligation to procure the replacement vehicle when the plaintiff had entered into a separate arrangement with Chamu and that at no stage prior to his arrest by the police on 9 March 2009 had he acknowledged G liability for any amount in excess of US$15 000.

(i) Whether the defendant was ever absolved from the responsibility to procure the replacement vehicle

The defendant's argument was that by causing his arrest, and coupled with the threats of a prolonged and indefinite incarceration by the police and by H Mr Mawere, the plaintiff had induced him to admit or to acknowledge owing

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a whopping US$95 000, thereby exacting or extorting a reward or benefit A to which the plaintiff was otherwise not entitled.

During the trial reference was made to some of the contemporaneous communication between and amongst the parties and Chamu. One such was a letter dated 16 January 2009 from Tetrad's attorneys at the time, Mambosasa, to the defendant. It was a kind of a confirmation of an agreement reached B between the parties, the attorneys and Chamu at a meeting that had been held on the previous day. During trial there was repeated reference to para 1 of the letter which I highlight. The letter read as follows:

> "RE: TETRAD AND YOURSELF & CHAMUNORWA TSVAKAI
>
> The above matter refers. We address you at the instance of Tetrad and confirm holding a meeting yesterday afternoon at Tetrad and in attendance were yourself, C Mr Chamunorwa Tsvakai, Mr Eugene Mlambo and the writer. Minutes of same are confirmed as follows:
>
> 1. You confirmed that you sold a Toyota Landcruiser 100 series on behalf of our client about a year ago and you remitted part of the proceeds to Mr Chamunorwa Tsvakai in order for him to purchase a Toyota landcruiser Amazon on behalf of our client. You remained with US$15 000 which you D were to invest for purposes of ensuring that the vehicle lands in Harare at no extra cost from our client.
> 2. *Your agent Mr Chamunorwa Tsvakai* confirmed that he managed to secure a Toyota Landcruiser 200 series from New Zealand and same as since been shipped to Durban, South Africa. A copy of the bill of lading *from your said agent* shows that the vehicle was dispatched from New Zealand on 22nd E December 2008 and the freight company in charge of the consignment is Access Freight of 401 Edwin Swales Drive, Rossburg 4094, Durban, South Africa.
> 3. *Your agent* further confirmed that any authorised representative of our client can verify the presence of the vehicle in Durban by 1100 hours on 16th January 2009. F
> 4. You confirmed that you are liable to pay customs duty to ZIMRA in respect of the vehicle in question albeit pointing out that you will be liquid about mid February 2009.
> 5. Mr Eugene Mlambo highlighted how the transaction has compromised his position with our client. *He also pointed out that client expects the car at no extra cost as agreed upon transacting***.**
>
> May you confirm the above as true and correct by affixing your signatures on G spaces provided hereunder" (my emphasis).

The defendant had signed the letter but Chamu had not. It was the argument on behalf of the defendant that his obligation had at no stage prior to his arrest been to the plaintiff but to Tetrad and that it was only after the involvement of the police that he had woken up owing the plaintiff. It was H

A also the defendant's argument that his agreement with the plaintiff or Tetrad had subsequently been cancelled and had been replaced by one between the plaintiff and Chamu, to which he himself was no longer a party.

The defendant's arguments are illusory. It was the plaintiff's evidence that Tetrad had ceded its claim in respect of the vehicle to the plaintiff. The B replacement vehicle was being procured for his use. It was the plaintiff who had a direct interest over it. That evidence was not challenged.

In my view, the letter of 16 January 2009 aforesaid was hardly confirmation that the extent of the defendant's liability at that stage was only US$15 000. Nor did that letter absolve him from his liability in respect of the entire proceeds C of the sale of the Toyota 100 series. The underlined portions show that Chamu had remained no more than the defendant's agent. The defendant's original obligation had remained. He had to procure the replacement vehicle. He would look for no further payment from the plaintiff either for the purchase price or for the import duty which, in all probability, would exceed the US$15 000 that he had retained.

D The evidence established that the defendant had linked Chamu with the plaintiff so that the plaintiff could supply the exact specifications of the replacement vehicle.That, in my view, did not terminate defendant's mandate.

Furthermore, that the plaintiff dealt with Chamu purely as the defendant's agent is plain from a seriesof the other letters written on behalf of Chamu by E his legal practitioners at the time, T H Chitapi & Associates ("Chitapi"). Little or no attention was paid to these letters during the trial. They unequivocally rebutted the notion that there had been a separate agreement between Chamu and the plaintiff. I highlight those letters.

In response to the letter of 16 January 2009 aforesaid, Chitapi had written to say Chamu had not signed that letter because he had taken it merely as one F for information purposes since "*… there is no privity of contract between him and your client, …*"

On 20 January 2009, Tetrad's attorneys had written back to Chitapi, *inter alia*, insisting that Chamu could not be absolved from the agreement between the plaintiff and the defendant who they described as Chamu's "*principal*". G Chitapi had responded on 13 March 2009 denying that Chamu had "*…ever expressly or impliedly* [*accepted*] *any liability … on the contract between Mupfiga and your said client***."**

Then on 11 May 2009 Chitapi had written directly to the defendant. He had demanded from the defendant payment of the various sums of money that Chamu had allegedly incurred in respect of the replacement vehicle. The H amounts were said to include the balance of the purchase price, port charges

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in South Africa, import duty and freight charges. The letter contained the A following: "*Further our client is constantly being engaged by Tetrad despite the fact that you and not our client are contracted to the Tetrad Group*" (my emphasis).

The letter ended by making a formal demand for payment from the defendant or else the vehicle, which was said to be held at the Durbanport in South B Africa, would be sold to defray expenses. And there was this: "*In such event our client reserves the right to either refund the funds you paid to him or source and allocate another unit to yourself***."** Of course, the funds referred to were the US$80 0000 from the proceeds of the plaintiff's Toyota 100 series.

There was no evidence that at any stage the defendant ever refuted the claim that Chamu had been his agent. Therefore it could only be to the defendant C that the plaintiff could legitimately look up to for a refund of his money.

Furthermore, and as stated earlier, at no stage prior to the defendant's arrest could it be said that the plaintiff had absolved the defendant from liability in respect of the entire proceeds from the disposal of the Toyota 100 series. E-mail exchanges between the parties from about September 2008 to January D 2009 showed that, contrary to the defendant's assertion, both he and the plaintiff had been of the same mind on that point.He had remained the person with the primary responsibility to deliver the replacement vehicle. The evidence established that the plaintiff may have been prepared to accept from Chamu alternative vehicles such as a Toyota 200 series or a

Mercedes Benz S-class vehicle. However, that had not detracted from the fact that it E was the defendant who had remained liable. A sample of some of the e-mails will help to illustrate the point:

- On 14 January 2009 the defendant wrote to the plaintiff essentially pleading for patience and understanding, given his parlous financial position. He proposed some quicker way to arrest the spiralling port F charges at Durban whilst he chased up payment from his other deals.
- The plaintiff responded by flatly turning down any suggestion that he or Tetrad could ever be expected to bail him out. This e-mail, on 14 January 2008, which was from the plaintiff to the defendant and copied to Chamu, was extensively highlighted by both parties during trial. It is necessary to reproduce it full: G

  "Taka,

  What you are suggesting is totally unworkable*. You are the last person to absolve yourself from this transaction.* Let me remind you that you are the one who is responsible for where we are. Over a year ago you are the one you (sic) undertook to sell the Tetrad Land Cruiser, not only did you sell the vehicle *but you also commissioned your brother Chamu to buy the replacement vehicle* which H

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A we agreed at the time would be a Toyota Amazon. I still remember at the time that you sold the Land Cruiser for over US$100 000. You then subsequently delayed sending these funds to your brother. Apart from that your brother still claims you never sent him all the US$85 000 that you say you sent him. I spoke to Chamu this morning, he still insists that you have not given him the agreed funds. To make matters worse your brother also abused the funds that you sent B which resulted in huge delays to the delivery of the vehicle. More than a year later Tetrad are no longer getting an Amazon but a Land Cruiser which was not the original agreement. Fine, let Tetrad accept a land Cruiser *but you cannot by any stretch of the imagination seat* (sic) *there and absolve yourself of your huge responsibility of ensuring this vehicle is cleared and delivered to Tetrad. Claiming you have no funds is not an acceptable excuse. You caused the delayscand you never ever fully accounted for all the funds from the sale of the original sale* (sic) *of the Land Cruiser***.** Life is not that simple. That apart Taka, you went off to South Africa in early December, I visited and called your office on numerous occasions leaving messages for you to call me. I also asked Chamu to pass on the same message. This is the first time I have heard from you which is through this e-mail, not even the decency to call me back" (my emphasis).

D• On the same day at 5:08 the defendant had responded. He explained the developments beginning with the disposal of the Toyota 100 series in Zimbabwean dollars, the conversion of the proceeds into foreign currency on the parallel market; the remittance of part of the proceeds to an account in the United Kingdom and his retention of the US$15 000 meant for duty. He implored that the replacement vehicle be moved to E avoid "*another looming complication*". He ended as follows: "*I am not absolving myself from the situation I just do have the desired solution*."

- Earlier on, that is on 15 September 2008, there had been an exchange of e-mails between the plaintiff and Chamu in which the plaintiff had evinced an intention to accept an S-class Mercedes Benz vehicle, if it F was now the one available as the replacement vehicle. The plaintiff had also indicated a willingness to clear the duty for this vehicle. Chamu had confirmed that such a vehicle had been available. However, apparently nothing had come of this development. On 23 September 2008 the plaintiff had gone back to the defendant complaining about his unwillingness to G resolve the matter.

It was from such communication that the defendant was claiming he had been absolved from his responsibility to deliver the replacement vehicle. Clearly he was not. I find that he and his agent, Chamu, had driven the plaintiff to the point of desperation. They had sent him on a wild goose chase. It is from that background that I have to analyse the validity of the claim documents H against the defence of duress.

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(ii) Whether the defendant signed the acknowledgement of debt A and deed of pledge under duress.

Duress or coercion, in jurisprudence, is where someone performs an act as a result of violence or threats of violence or some other pressure. In the law of contract, duress, or *metus*, relates to a situation where someone enters into an agreement as a result of threats. Such a contract is voidable at the B instance of the aggrieved party. Consent which is a result of coercion is not true

consent: see *Broodryk* v *Smuts NO* 1942 TPD 47 at p53 and *Arend* v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at p 305-306.

Where a party seeks to avoid a contract on the basis of duress he or she must establish five elements. These are: C

1. that the fear was a reasonable one.
2. that the fear was caused by the threat of some considerable evil to that party or his family or property.
3. that the threat was that of an imminent or inevitable evil.
4. that the threat or intimidation was unlawful or *contra bonos mores.*
5. that the moral pressure used caused damage. D

See *Arend'supra* at 306A-C and *Machanick Steel & Fencing (Pty) Ltd* v *Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265 (W). See also R H Christie *Business Law in Zimbabwe* 2 ed at p 83, and the cases referred to therein.

In my view, the five elements above are considered cumulatively. A contract that is induced by threats of a criminal prosecution may be set aside. The E signature on a liquid document that is procured by reason of such threats may render the document unenforceable. Such a threat may be illegitimate. It may be *contra bonos mores*. It may amount to the crime of compounding. A person who is legally entitled to lay a criminal charge against another does no legal wrong in bringing the charge. However, it is *contra bonos mores* for him to resort to a criminal process, or to threaten to resort to it in order F to induce a promise for the payment of a private debt; see the passages from Wessels *Law of Contract* 2ed s 186, quoted by Corbett J in *Arend supra* at 306-307. In *Arend's* case it was found that an acknowledgement of debt had been induced by an illegitimate threat of a criminal prosecution and was therefore unenforceable. G

Compounding is an offence. It refers to an agreement to stifle a prosecution in return for a reward. Such conduct stifles the proper administration of justice; see Farlam and Hathaway *Contract: Cases, Materials and Commentary* 3 ed p 364. In the context of contracts induced by threats, compounding relates to the linking of one's right to recover one's private debt to the right to bringing a public prosecution for the crime committed by the debtor. The test H

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A in determining the validity of an acknowledgement of debt procured under a threat of a criminal prosecution is whether by such a threat the creditor exacted or extorted something to which he was otherwise not entitled. In *Machanick Steel* Nestadt J noted the differences in approach among the various provincial courts in South Africa. I refer to a passage on p 273 of B his judgment which helps to shed some light on the problem:

> "A compromise approach seems to be that adopted in *Ilanga Wholesalers* v *Ebrahim& Ors* 1974 (2) SA 292 (D) in which it was held that where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which was due, the creditor does not act *contra bonos mores* in using the threat of criminal prosecution to induce him to acknowledge his true liability. In these C circumstances he is doing no more than exercise his legal rights. Where, however, the creditor does not know and probably cannot establish the amount of the debtor's indebtedness, it is an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. No doubt, even where the creditor does not know the exact amount stolen he is fully within his legal right D in threatening to prosecute the debtor, but to use the threat of such proceedings to extort an undertaking to pay an amount which he knows he cannot prove to be due in a court of law constitutes an abuse of his legal rights."

Thus the threat of an arrest or of a criminal prosecution to induce a promise to pay that which was due is not *contra bonos mores*. It is the threat to extort a promise to pay that which was not due or was unknown which is illegal. E Such an approach is one that commends to me. It is one I wish to adopt. It seems also to be the same approach recommended by Christie *op cit*. At p 83 he says:

> "Much less easy to decide is the question whether the signatory of a promissory note or IOU can resist a claim brought on it by proving that he was induced F to sign by a threat to prosecute him for theft (of the amount recorded in the document) if he did not sign. The question whether such a threat is unlawful is linked with the question whether it amounts to a compounding of the theft and whether it causes damage to the party threatened. The answer to these questions is not settled, *but the argument that ought to be decisive is that although the debtor has worsened his position by signing the promissory note or IOU he*

has not worsened it as much as if he had responded to the threat by paying what G he owed in cash, and if he had done that he could have had no complaint" (my emphasis).

It should be often the case that an acknowledgment of debt induced by a threat of an arrest or a criminal prosecution gives the creditor a reward or an advantage to which he may otherwise not have been entitled. Some of H the more obvious and common rewards or advantages may be:

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1. that the creditor removes or minimises the burden of proof on him in A that where he would have had to prove liability and quantum he would now merely have to produce the liquid document which often speaks for itself.
2. that with regards to quantum in particular, where there was some doubt or dispute as regards the actual amount allegedly due, whether as capital B or as interest and other charges, or both, the liquid document would settle all that, even together with the issue of the costs of suit.
3. that a typical acknowledgement of debt would have an acceleration clause where, among other things, in the event of a default the entire balance of the amount outstanding at the time of the default would become immediately due and payable. C
4. that the benefits of the legal exceptions such as *non causa debiti* would inevitably be renounced by the debtor.
5. that the liquid document would give the creditor the advantage of proceeding to recovery by way of summary procedures such as provisional sentences or summary judgment applications. D

The above list is by no means exhaustive.

In the present matter, even though the defendant vehemently denied that he had at one time disappeared from the scene, the evidence did not bear him out. He had secured a job in South Africa where he had worked for some E period. The Jeep was said to belong to his employers from there. I find that he had indeed disappeared for some time. The significance of this detail is that given the manifest breach of his mandate, the plaintiff had been within his rights to have reported him to the police for theft. In terms of s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], theft covers the failure to account for trust money. It covers the use of trust money for a F purpose other than that to which it was supposed to have been used. It covers the conversion of trust money to one's own use. The proceeds from the sale of the Toyota 100 series were undoubtedly trust money. Therefore, by reporting the defendant for theft, the plaintiff was no more than exercising his rights.

In my view, there was no illegitimate pressure that was exerted on the G defendant to induce him to sign the claim documents. The police did not hold him in custody for any period longer than that permitted by law. In cross-examination, the defendant conceded that the alleged threat by the police to hold him indefinitely had been no more than their warning to him that they would oppose bail unless Chamu was accounted for. I find nothing *contra bonos mores*. It is something commonplace. Where an accomplice H

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A suspect is still unaccounted for it is normal for the police to oppose bail for the suspect already in custody.

The onus to prove duress in the execution of the claim documents lay on the defendant. He failed to discharge it. I reject his version of events. It was implausible. What I find to be more probable is that he had offered to settle B with the plaintiff in order to remove himself quickly from the inhuman and degrading conditions of the police cells. He knew he had never executed his mandate to the plaintiff. He knew he owed the plaintiff a replacement vehicle, or at the very least, a refund of the proceeds of the Toyota 100 series. These amounted to US$95 000. From his own evidence, the kind of replacement vehicle that his agent claimed he had procured would cost more C than the US$95 000. With freight and port charges, as well as the import duty, the amount would be phenomenal. Yet the plaintiff seemed willing to settle for just the US$95 000. So for the defendant it

would be a bargain. He had snatched at it. Given his circumstances, it made more sense to settle with the plaintiff for US$95 000 and hopefully get the plaintiff to withdraw D the charges.

The defendant has sought to demonise Mr Mawere as a legal practitioner. But I find Mr Mawere's version of events more consonant with the probabilities. Undoubtedly, the only reasona second lawyer had featured on the scene on 10 March 2010 was because Mr Mawere had insisted so that the defendant's E own interests would be protected. This much was common cause. It was also common cause that the second lawyer had been in the person of Mr Takundwa as proposed by the defendant, not Mr Mawere. That Mr Takundwa, a lawyer more senior to Mr Mawere, would go on to append his signature on the claim documents without having first apprised himself of the situation and without having advised the defendant of his rights is most improbable. That would F go against some of the most basic and elementary tenets of legal practice.

Whilst Mr Takundwa may not have been a compellable witness at the instance of the plaintiff, he certainly was a compellable witness for the defendant. The attorney and client privilege was for his protection. But he could have waived it and called Mr Takundwa to contradict Mr Mawere's version and G that of the plaintiff. In fact, if Mr Takundwa was not acting for him, as the defendant insisted, then there was no attorney and client privilege in the first place. All the more reason why the defendant ought to have called or have subpoenaed Mr Takundwa. He did not. It is not difficult to see why. Mr Takundwa was hardly likely to confirm the defendant's version that he had merely appended his signature to the claim documents without as much as H having appraised himself of the situation, without having properly advised

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the defendant and without having obtained his mandate to protect his interests A in his capacity as a lawyer.

Mr Mawere testified that when the defendant had failed to pay the first instalment on due date he had asked for more time. He also testified that when again the defendant had failed to pay even by the extended date they had met by chance at some eating place at which the defendant had acknowledge B his obligations in terms of the claim documents and had promised to pay. None of this was challenged.

I do not believe the police or the plaintiff seized, or caused to be seized the motor vehicles. The Jeep may not have been part of the pledged vehicles. However, that does not detract from the fact that the defendant had, in my C view, voluntarily delivered it together with the rest. It is implausible in my view that the police and/or the plaintiff would have known where the registration particulars of those vehicles were being kept. It could only be the defendant or someone under instruction from him who would have delivered the registration particulars.

If it is true that Mr Mutamangira had written a letter of complaint against D the police, such a letter would have been material evidence in favour of the defendant. But neither was such a letter produced in evidence nor Mr Mutamangira called to testify. Related to this, is the absence of any other effort taken by the defendant to challenge the claim documents or to take steps to set them aside at the earliest opportunity prior to the plaintiff taking E action for the recovery of the debt.

In all the circumstances, I find that the defendant signed the claim documents freely and voluntarily. That should dispose of the matter. However, there is a third aspect still to be considered. The defendant has argued that the agreement behind the claim documents is unenforceable by reason of a breach of the foreign currency regulations. F

(iii) Whether the agreement between the parties was vitiated by illegality

Section 4 of the Exchange Control Regulations 1996 (SI 109/96) (hereafter referred to as "the regulations") prohibits anyone in Zimbabwe, without G exchange control authority, from buying, selling, borrowing, lending or exchanging any foreign currency other than to an authorised dealer. The section also prohibits Zimbabwean residents, without exchange control authority, from buying or borrowing outside Zimbabwe any foreign currency so as to create a debt payable in or from Zimbabwe. It also prohibits Zimbabwean residents, without exchange control authority, from lending or selling foreign H

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A currency, which originated from Zimbabwe or from exchanging any foreign currency if the result is to create a debt payable in or from Zimbabwe.

Section 4 also regulates the manner in which people may deal in foreign currency. However, among other things, free funds or lawful transactions with money in a foreign currency account are exempt from the various B proscriptions.

Section 10 of the regulations prohibits, among other things, anyone in Zimbabwe, without exchange control authority, from paying or crediting a foreign resident or paying or crediting a Zimbabwean resident on behalf of a foreign resident. However, this prohibition does not apply to a payment C lawfully made from moneys held in a foreign currency account.

Section 11 of the regulations, among other things, prohibits Zimbabwean residents, unless authorised by an exchange control authority, from making any payment outside Zimbabwe, or incurring any obligation to make a payment outside Zimbabwe. But again, free funds or moneys held in a D foreign currency account are exempt.

The defendant argued that the parties' agreement in this matter violated the law. These events happened prior to the adoption of the multi-currency system in Zimbabwe in February 2009. The defendant singled out s 4(1), the one relating to the buying, selling, borrowing or lending of foreign currency E without permission, and said it was the law that was violated. He argued that transacting in foreign currency was not per se forbidden but that it is certain conduct in dealing in foreign currency that is prohibited.

An agreement that is contrary to the law, or one resulting in conduct which the law forbids, is contrary to public policy. It is unenforceable. See*Schierhout* v *Minister of Justice* 1926 AD 99, *Dube* v *Khumalo* 1986 (2) ZLR 103 (S), F*Matsika* v *Jumvea Zimbabwe Ltd & Anor* 2003 (1) ZLR 71 (H) and *Gambiza* v *Taziva* 2008 (2) ZLR 107 (H). In *Schierhout's* case Innes CJ said at 109:

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

The defendant alleged that the plaintiff instructed him to source foreign currency on the parallel market and that this was illegal. He alleged that it was the plaintiff who instructed him to dispose of the Toyota 100 series to raise money for the replacement vehicle. He said the plaintiff knew that the H old vehicle had been sold in Zimbabwean dollars and that the replacement

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vehicle could only be purchased in foreign currency. This, according to him, A was in breach of s 4(a)(i) of the regulations.

Even though the defendant singled out s 4(1)(a)(i) of the regulations I have to consider all the relevant sections, particularly those set out above, and see if, in the light of the evidence, the parties or one or either of them, breached the law. The law says that where the parties are *in pari delicto*, that is, equally B at fault, the loss stays where it falls: see *Dube's* case at 109D-F, a passage quoted with approval by Gowora J, as she then was, in *Gambiza's supra* at 113D-G. In full, the maxim is expressed thus: *in pari delicto potior est conditioni possidentis*. This means "where parties are equally in the wrong, he who is in possession will prevail". However, seeing that a grave injustice C may be caused by a rigid application of the rule, the courts use their discretion to tamper with it in order to avoid an unjust enrichment for the one party and to do justice between man and man.

In my view, the *in pari delicto* rule is irrelevant in this matter. There was no evidence that the parties entered into an illegal contract or one whose performance would be illegal. None of the parties explained in what respect D the defendant was going to gain from their deal. All that the evidence established was that the defendant had offered to dispose of the plaintiff's old vehicle and to procure a replacement. Nothing was said in evidence as to where or in what currency the old vehicle would be disposed of, or from where or in what currency the replacement vehicle would be procured. The E parties' transaction was not to buy, sell, borrow or lend foreign currency. Even if it was, but which it was not, all that would be required to make the transaction legitimate would be to secure exchange control authority or to use free funds or moneys in a foreign currency account. Not unexpectedly, the evidence did not at all concern itself with these aspects. They were simply

irrelevant. How the defendant would perform his mandate had undoubtedly F been left to his endeavours. That the defendant had sold the vehicle in local currency which, to the knowledge of the plaintiff, had to be converted to foreign currency at the parallel market, did not make the plaintiff a party to that transaction.

In the premises, I find that the arrangement between the parties was not G vitiated by illegality.

(iv) Defendant's counterclaim

The defendant counterclaimed for the cancellation of the claim documents and for the release of all the vehicles. This was on the basis that the claim documents were invalid by reason of duress. I have just ruled them valid. H

2014 (1) ZLR p141

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A None of the vehicles was registered in the name of the defendant. The two Mercedes-Benz vehicles had Zimbabwean registrations. The Jeep had a South African registration. Amongst the defendant's bundle of exhibits was correspondence from an entity based in South Africa claiming ownership of the Jeep. The vehicle had not been part of the deed of pledge. There was no B claim in respect of it in the plaintiff's summons and particulars of claim. Even though I have accepted the plaintiff's version of events and have rejected that of the defendant in relation to the delivery of the vehicles to the plaintiff, I am not satisfied that it had ever been intended that the Jeep would be part of the pledged assets. Accordingly, it must be released back to the defendant.

C With regards to the Mercedes-Benz vehicles, I am satisfied that they had properly been pledged and delivered. In law, one does not have to be the owner of the goods that one may sell or pledge. All that the seller or pledgor needs do is to guarantee the transfer of ownership or delivery of possession of those goods: see Christie *supra* at p 149.In my view, the warranty against D eviction that is implied in a contract of sale is also implied in a pledge. Furthermore, Zimbabwean vehicle registration books carry a warning that reads: "*WARNING: This registration book is not proof of legal ownership".*

In the circumstances I find that the defendant could legitimately pledge the two Mercedes-Benz vehicles.

E **(c) Disposition**

Judgment is hereby entered for the plaintiff against the defendant. Save for the claim in respect of the Jeep Grand Cherokee motor vehicle, the defendant's claim in reconvention is hereby dismissed. The following orders are made:

1. The defendant shall pay the plaintiff the sum of US$95 000 together with F interest thereon at the rate charged from time to time by Stanbic Bank Zimbabwe Ltd reckoned from 10 April 2010 to the date of payment in full.
2. The following motor vehicles are hereby declared executable:

2.1 Mercedes-Benz S280, registration number AAG 8369, engine number G 10494422002897, chassis number WDB1400282A174158,

2.2 Mercedes-Benz E200, registration number AAW 1601, engine number 11195732340615, chassis number WDB2100482B464459,

3. The defendant shall pay the plaintiff's costs of suit on an attorney and client scale and collection commission in terms of the Law Society of H Zimbabwe by-laws.

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4. The plaintiff shall return to the defendant the Jeep Grand Cherokee A motor vehicle, licence number PSK673 GP, engine number 4Y113324, chassis number 1J8G868A94Y113324.

Sawyer & Mkushi, legal practitioners for the plaintiff

Mamuka Moyo Attorneys, legal practitioners for the defendant B

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ZIMBABWE POSTS (PVT) LTD v CHIZURA 2014 (1) ZLR 143 (H)

Citation	2014 (1) ZLR 143 (H)
Case No	Judgment No. HH-63-14
Court	High Court, Harare
Judge	Chigumba J
Heard	25 November 2013; *CAV*
Judgment	19 February 2014
Counsel	*C Kwaramba,* for the applicant *B Peresu,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C *Employment – suspension from duty without pay or benefits – accommodation provided as part of terms of contract of employment – contract not yet terminated – employee entitled to retain possession of accommodation until contract terminated*

Headnote

D The applicant sought the eviction of the respondent from the house he had been occupying in terms of his contract of employment. The respondent had been suspended from duty without pay or benefits. After protracted proceedings, the issue of whether the respondent's contract of employment E should be terminated was still undetermined and was waiting to be decided by an arbitrator. The issue for determination in the current proceedings was whether an employee, whose contract of employment has not been set aside, can be evicted from a house occupied in terms of that contract, whilst he is on suspension from employment without pay or benefits. It was common cause that the applicant was the registered F owner of the property in question. What the court had to determine was whether the respondent could retain possession of the *res* on the basis that his contractual rights, which had not yet been determined, were not suspended when he was suspended from employment without pay or benefits. If he had a claim of right, then he could resist an application for vindication of the property.

G*Held*, that until 1999, the labour regulations provided that where an employee had been suspended from employment pending determination of misconduct hearings, all benefits were lost until a labour relations officer decided whether to terminate the contract of employment. That is no longer the law. Accommodation is not one of those benefits that is capable of suspension, because it is a benefit that goes to the root of

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the contract of employment. It is either there, or it falls away when the A contract falls away. It constitutes a claim of right by the respondent, capable of defeating the *actio rei vindicatio*. Once the fate of the contract of employment is determined, the parties are at liberty to re-assess their attendant rights. If the contract of employment is terminated, the respondent will no longer have a claim of right, and the applicant will meet the full requirements of the *actio rei vindicatio*. B

Cases referred to

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

Chisipite School Trust Pvt Ltd v *Clarke* 1999 (2) ZLR 324 (S)

Graham v *Ridley* 1931 TPD 476 C

Jolly v *Shannon & Anor* 1998 (1) ZLR 78 (H)

Masudi v *Jera* HH-67-07

Stanbic Finance Zimbabwe Ltd v *Chivhungwa* 1999 (1) ZLR 263 (H)

Legislation considered

Labour Act [*Chapter 28:01*], s 12(6) D

Case information

C Kwaramba, for the applicant

B Peresu, for the respondent

Judgment

Chigumba J: At the hearing of this application E I dismissed the application with costs. I gave brief oral reasons for the dismissal. I have now been asked to provide detailed reasons in writing.

These are they:

"The applicant applied for an order in the following terms: it is ordered that:

1. The respondent and all those claiming occupation through him vacate F stand number 35 Hospital Road, New Town, Kwekwe within seven days of this order, failing which the Messenger of Court or his lawful deputy is authorized and directed to evict the respondent and all those claiming occupation through him.
2. The respondent shall pay the costs of this application."

The facts which gave rise to the applicant's cause of action are that the G respondent was employed by the applicant. He was suspended without pay or benefits on 13 January 2004. Thereafter, he was charged in terms of the applicant's code of conduct. A date was set for the hearing. The union representatives who should have been part of the disciplinary committee failed and refused to attend the hearing. There was no quorum, and a hearing could not be properly constituted. The matter was referred to the Ministry of H

Chigumba J

A Public Service, Labour and Social Welfare in terms of the Labour Act. The matter was subsequently referred to compulsory arbitration; the arbitrator ordered the dismissal of the respondent on 9 March 2005.

The respondent appealed against his dismissal to the Labor Court on 22 March 2005. The appeal was decided in the respondent's favour, and the B Labour Court referred the matter back to arbitration. The matter is currently waiting to be determined by an arbitrator. The applicant accepts that what this means is that the issue of the dismissal is still to be decided and that the respondent is still under suspension without pay and benefits.

However, the applicant averred that it is a company policy that certain classes C of employees are provided with accommodation during the tenure of their employment and that entitlement to company accommodation is based on the existence of the contract of employment. The applicant's

submission is that the respondent lost the right to enjoy any employment benefit when he was suspended "without pay or benefit".

The respondent opposed the application for his eviction from the applicant's D house. He averred that the arbitration proceedings in which his contract of employment was terminated were subsequently set aside by the Labour Court. He averred that his occupation of the house in question is based on the existence of a contract of employment. He denied that his right to occupy the house was suspended when he was suspended without pay or benefits. E His suspension did not result in him losing his right to occupy the house because the suspension did not terminate the contract of employment. That issue is still pending determination by an arbitrator. He averred that essential benefits cannot be withheld during suspension from employment. Lastly, the respondent submitted that it is only when his contract of employment, which conferred on him the right to live in the house, has been lawfully terminated, F that he can be evicted from the house in question. In other words, he averred that, on the date of termination of the contract of employment, when he ceases to be an employee of the applicant, he will no longer be entitled to any benefits which flowed from the contract.

The applicant submitted that the crux of the matter is whether an employee G who is on suspension without pay or benefits can continue to enjoy such benefits. With respect, the applicant is asking the wrong question; that is why its conclusion is incorrect. The correct question for determination is whether an employee whose contract of employment has not been set aside can be evicted from a house occupied in terms of that contract, whilst he is on suspension from employment without pay or benefits. In essence, the H relief that the applicant is seeking constitutes an application for *rei vindicatio.*

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

In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20 it is stated that:

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

This case derived its *ratio decidendi* from the case of *Graham* v *Ridley* 1931 TPD 476, where the principle was stated as follows:

> "It may be difficult to define comprehensively but there can be little doubt that one of its incidence is the right of exclusive possession of the res without the necessary corollaly that the owner may claim his property wherever found from C whomsoever holding it. It is inherent in the nature of ownership that possession should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner."

In this case it is common cause that the applicant is the registered owner of the property in question. What the court needs to determine is whether the D respondent can withhold possession of the *res* on the basis that its contractual rights, which have not yet been determined, were not suspended when he was suspended from employment without pay or benefits.

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

> "Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action in *rem*, is only available to owners of the property in issue, which at the time of the commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner."

Does the respondent have a right to retain possession of the property until F such time as his contract of employment is expressly terminated? A claim of right is one of the exceptions to the rule that possession of a *res* ought to be with the owner of the *res*, in the normal course of things. In *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 263 (H), Malaba J (as he then was), applied the principle of the *rei vindicatio* in respect of a motor vehicle owned by the plaintiff and leased to a buyer under a suspensive G 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 in such a case must allege and prove that he is the owner of a clearly identifiable H

2014 (1) ZLR p147

Chigumba J

A 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 B time of the commencement of the legal proceedings."

At the time that this application was made, did the respondent make any averment which constitutes sufficient proof of a right to retention of the applicant's company house? If the respondent was entitled to company accommodation in terms of the contract of employment, does that constitute a right to remain in the property until such time as the contract is terminated, C or is the right of retention suspended together with the respondent's pay and other benefits, on the date of suspension? The applicant sought to rely on *Chisipite School Trust (Pvt) Ltd* v *Clarke* 1999 (2) ZLR 324 (S) at 328C, where the court held:

"…Pending the removal of the suspension, the respondent was not entitled to D the continued enjoyment of the benefits comprising the free occupation of the headmistress' house and the use of the motor vehicle … Whether the acts of misconduct relied upon are ultimately proved and so result in the termination of her contract of employment, was an issue awaiting decision by a labour relations officer; and until made the enjoyment of all benefits remained lost to the respondent".

E It is crystal clear that the applicant is being facetious in this approach; because a further reading of the court's finding will show that the court went on to say at 328E that:

"… I consider that the learned judge would have erred had he not accepted the legality, *under the Regulations*, of the temporary suspension and its consequences, as this court is now obliged to do" (my emphasis).

F The findings in that case were based on an interpretation of the Labour Regulations that were in existence at the time, in 1998-1999, which have since been overtaken by amendments to the Labour Act. It would appear that, in 1999, the Labour Regulations provided that where an employee had been suspended from employment, pending determination of misconduct G hearings, all benefits were lost until a labour relations officer decided whether to terminate the contract of employment. That is no longer the law. Section 12(6) of the Labour Act [*Chapter 28:01*] now provides:

" Whenever an employee has been provided with accommodation directly or indirectly by his employer, the employee shall not be required to vacate the accommodation before the expiry of a period of one month after the period of H notice specified in terms of subsections (4) or (5).

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It has been submitted by counsel for the respondent, which submission has A found favour with me, that even though s 12(6) relates to termination of employment by way of notice, it applies with equal force to an employment contract that has not yet been terminated. In fact, s 12(6) is silent on what ought to happen to accommodation provided directly or indirectly, where the contract of employment has been suspended, not terminated. This in my B view suggests that this is not a benefit that is subject to suspension for any reason. It is conferred by the contract of employment, and it is terminated when the contract of employment is terminated.

Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe* (Zimbabwe Labour Centre and Institute of Commerce, Harare, 2006) states at p 187 that:

"Not all types of benefits may be suspended. Only those types of 'benefits' that C do not result in the *de facto* termination of the employment relationship may be suspended … this means that the benefits that relate to the sustenance of life like accommodation and food cannot be suspended as would otherwise have been the case under common law dismissal.."

According to Silberberg *The Law of Property* (Butterworths, Durban, 1975) at pp 192-193: D

"If the owner … concedes … that the latter originally obtained possession of the disputed *res* in terms of a contract (such as a load, lease or hire-purchase agreement) he must at least allege and establish that such contract has expired by effluxion of time or that he was entitled to cancel it, and has in fact terminated it".

The applicant has conceded that the respondent obtained possession of the E house in question in terms of his contract of employment. The applicant has conceded, further, that the contract of

employment has not been terminated, or suspended. The respondent's pay and other benefits were suspended. Accommodation is not one of those benefits that is capable of suspension, because it is a benefit that goes to the root of the contract of employment. It is either there, or it falls away when the contract falls away. It constitutes a F claim of right by the respondent, capable of defeating the *actio rei vindicatio*. Once the fate of the contract of employment is determined, the parties are at liberty to re-assess their attendant rights. Once the contract of employment is terminated, the respondent will no longer have a claim of right, and the applicant will meet the full requirements of the *actio rei vindicatio*. G

In my view, the applicant has not placed any evidence before the court that the respondent's contract of employment has been terminated. It follows that the respondent is still vested with a contractual right to accommodation which is enforceable against the applicant. The application for vindication cannot succeed in the face of the respondent's contractual rights, which are still extant. The application is dismissed with costs for these reasons. H

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Honey & Blanckenburg, applicant's legal practitioners

Mbidzo Muchadehama & Makoni, respondent's legal practitioners

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ZIMBABWE POSTS (PVT) LTD v COMMUNICATION & ALLIED WORKERS' UNION OF ZIMBABWE 2014 (1) ZLR 150 (H)

2014 (1) ZLR p150

Citation	2014 (1) ZLR 150 (H)
Case No	Judgment No. HH-60-14
Court	High Court, Harare
Judge	Mutema J
Heard	14 November 2013; *CAV*
Judgment	19 February 2014
Counsel	*T Mpofu,* for the applicant *S Njerere,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Arbitration – award – setting aside of – grounds – award in conflict with public policy – what must be shown – effect of award in wage negotiation case would be to drive employer into insolvency – such an award in conflict with public policy D

Headnote

The applicant was the employer of members of the respondent union. The parties engaged each other in negotiating wage and salary adjustments. The negotiations yielded no positive results and a deadlock was declared. The parties then agreed to submit the dispute for arbitration. A senior E legal practitioner was appointed as arbitrator. After hearing submissions, he made an award in which a modest increment was granted to the employees. He did so in spite of also finding that the applicant was operating at a loss and would continue to do so even in the foreseeable future. He agreed that applicant had no ability to pay as it was in a F precarious financial position and that any adjustment would simply contribute to the already existing deficit and funding gap.

The applicant sought to have the award set aside on the grounds that it was contrary to the public policy of Zimbabwe. It argued that the arbitrator, despite his findings about the applicant's financial position, made an award which was certain to drive the applicant into insolvency. Such an award would be contrary to public policy. G

Held, that art 34(5)(a) and (b) of the Model Law (set out in the First Schedule to the Arbitration Act [*Chapter 7:15*]) spells out two instances when an award is in conflict with the public policy of Zimbabwe, but also makes it clear that the two instances are not exhaustive. The determination of other instances as falling under the category of being contrary to the H

A public policy of Zimbabwe is a question of value judgment, for the words "public policy" are a wide and vague concept. Examples from decided cases included situations where the substantive effect of the award, after a consideration of the merits of the dispute endorsed immorality or crime and where there has been a violation of fundamental principles of B the forum state's legal order, hurting intolerably the feeling of justice.

Held, further, that the approach to be adopted is to construe the public policy defence restrictively in order to preserve and recognize the basic objective of finality in all arbitrations. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an award C goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold D it. The substantive effect of the arbitral award upon the applicant – never mind that the awarded increments were not substantial – would be to drive it into insolvency, with the inevitable consequence of liquidation with massive loss of jobs for all its employees and mass suffering for their dependants. All these affected people would be rendered destitute, with little or no prospects of getting alternative employment in a tight E job market, starvation and school dropouts for their children. Certainly this would constitute a palpable inequity and the conception of justice in Zimbabwe would be intolerably hurt by this substantive effect of the award. That the award would be viewed as being in conflict with the public policy of Zimbabwe would be beyond cavil.

Cases referred to F

TelOne (Pvt) Ltd v *Communications and Allied Services Workers' Union of Zimbabwe* 2007 (2) ZLR 262 (H)

ZESA v *Maposa* 1999 (2) ZLR 452 (S)

Legislation considered G

Arbitration Act [*Chapter 7:15*], First Schedule, art 34(2)(b)(ii) & (5)

Case information

T Mpofu, for the applicant

H*S Njerere*, for the respondent

Judgment

Mutema J: The applicant is the employer of members of the respondent A union. In early 2009 the parties engaged each other in negotiating wage and salary adjustments. The respondent was advocating for a minimum wage of US$490 per month on behalf of each of its members. The applicant argued that it could not afford to pay any adjustment above that which was already being paid. These negotiations yielded an agreement that wages would be B pegged at US$100 while other benefits including transport and housing would be $50 for each employee for April 2009 only. Subsequent negotiations yielded no positive results and a deadlock was declared at NEC level. The parties then agreed to submit the dispute for arbitration.

The Commercial Arbitration Centre chose Mr Mordecai Mahlangu to be the arbitrator. Following submissions by the parties he handed down his award C on 23 February 2012. That award is reasoned and couched in these words:

> "The determination of this matter requires something of the wisdom of Solomon in that there are two competing and patently legitimate interests to be reconciled. While it is clear to me that the US$490 which has been sought by the claimant on behalf of its lowest paid members is not easily afforded, it is equally clear to me that I cannot with a clear conscience simply leave matters as they are in D respect of the period between May and December 2009 …
>
> For the period between 1 May and 31 August 2009, the salary of the lowest earning employee of the respondent company should receive an adjustment of US$25 in respect of each month and for the period between 1 September 2009 and 31 December 2009 a further US$25 should be effected. The effect of this on the lowest earning employee of the respondent is that in total the back pay E payable to him or her will be US$300. In doing this I realize that further financial strain will be added to respondent company but believe that this is necessary in fairness to the claimant."

The applicant was dissatisfied with the outcome of the arbitration, hence this application seeking the setting aside of the arbitral award. The application is being made in terms of art 34(2)(b)(ii) of the Model Law whose relevant provision provides: F

> "(2) An arbitral award may be set aside by the High Court only if –
>
> (a) …
>
> (b) the High Court finds that –
>
> (i) …
>
> (ii) the award is in conflict with the public policy of Zimbabwe." G

The gravamen for challenging the content of the award is predicated upon the premise that recognition of the award either in its present form or its substantive effect would be contrary to the public policy of Zimbabwe. The award, so the argument went, plunges the apple cart over the cliff; it has the effect of killing the goose that lays the golden egg. The arbitrator found H

Mutema J

A that the applicant was operating at a loss and would continue to do so even in the foreseeable future. He agreed that the applicant had no ability to pay as it was in a precarious financial position and any adjustment will simply contribute to the already existing deficit and funding gap. But in spite of all these findings, he went ahead and made an award which was certain to drive B the applicant into insolvency. The overall effect of the award is therefore contrary to public policy of Zimbabwe.

The respondent argued to the contrary, submitting that it is for the applicant to show that some fundamental principle of law or morality or justice was violated. The arbitrator's reasoning cannot be faulted. The respondent had claimed a minimum salary of $490 but the award was much less, with the C arbitrator reasoning:

> "It seems to me that a fair and sensible compromise is to grant claimant an adjustment in recognition of the plight of its members, but for this to be in such an amount that it does not break the back of respondent company and drive it to complete insolvency."

D This reasoning does not constitute a palpable inequity. That inability to pay or comply with the award makes the award contrary to public policy is both erroneous and mischievous. If applicant is unable to pay its debts it must go into liquidation or judicial management.

When, then, is an award in conflict with the public policy of Zimbabwe? E Article 34(5)(a) and (b) of the Model Law spells out instances when an award is in conflict with the public policy of Zimbabwe, *viz.* if:

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the F making of the award.

The foregoing provision, however, clearly states that the two instances are not exhaustive, hence should not be taken as "limiting the generality of paragraph (2)(b)(ii) of this article." What this boils down to, therefore, is that the determination of other instances as falling under the category of being contrary to the public policy of Zimbabwe is a question of value judgment, G for the words "public policy" are a wide and vague concept.

Below are some of the instances where an award has been or could be held to be in conflict with the public policy of a country:

- where the substantive effect of the award, after a consideration of the merits of the dispute, endorsed immorality or crime: *ZESA* v *Maposa*H1999 (2) ZLR 452 (S) at 465;

2014 (1) ZLR p154

Mutema J

- where there has been a violation of fundamental principles of the forum A state's legal order, hurting intolerably the feeling of justice: *Leopold Lazarus Ltd (UK)* v *Chrome Resources SA* reported in (1979) 4 *Yearbook of Commercial Arbitration* 311 at 312 quoted with approval in the *ZESA* v *Maposa* case *supra* at 465;

The list, I must say, is also not exhaustive. As Gubbay CJ stated in *ZESA*B v *Maposa supra* at 466, the difficulty is not with the formulation of an appropriate and acceptable test but with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe. The court went on to hold that the approach to be adopted is to construe the public policy defence restrictively in order to preserve and C recognize the basic objective of finality in all arbitrations. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous D in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

In *TelOne (Pvt) Ltd* v *Communications and Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 (H) the award was held to be contrary to E the public policy of Zimbabwe on the basis that its effect would be to drive corporations into insolvency, thereby destroying the economic fabric of the nation. The respondent contended that that case is distinguishable from the current one on the ground that, in the former, facts before the court showed that the wage bill would result in 130% of TelOne's income being committed to salaries and wages, which is not the scenario in the latter. F

While that may be so, I remain unpersuaded by the respondent's contention. The facts which were common ground were that applicant was in the red in 2009 by US$2 000 000. Its shareholder, the Government, was not prepared to bail it out as it also had no money and could not even afford to pay its own employees (civil servants) a minimum wage of more than US$150 per month. G The applicant's staff costs contributed 52 per cent of overall expenditure and consumed 67 per cent of total revenue. This precarious financial position of the applicant was not expected to improve in the foreseeable future. The arbitrator found the foregoing as a fact. The applicant is a quasi-public entity. It would be too simplistic and too onerous on the part of its shareholder to argue that the shareholder (which on its part was also broke) should bail it H

2014 (1) ZLR p155

Mutema J

A out, *a fortiori* to argue, as the respondent did, that if the applicant is unable to pay its debts then it should go for liquidation. Such a result is untenable and too ghastly to contemplate as it would result in dire consequences for the very employees who are seeking wage increment as well as for their families.

On the common cause facts, I am thoroughly persuaded that, even applying B the public policy defence restrictively, the substantive effect of the arbitral award upon the applicant – never mind that the awarded increments are not substantial – would be to drive it into insolvency, with the inevitable consequence of liquidation with massive loss of jobs for all its employees and mass suffering for their dependants. All these affected people will be rendered destitute with little or no prospects of getting alternative employment C in a tight job market, together with starvation and school dropouts for their children. Certainly this will constitute a palpable inequity and the conception of justice in Zimbabwe would be intolerably hurt by this substantive effect of the award. That the award will be viewed as being in conflict with the public policy of Zimbabwe would be beyond cavil.

D In the event, the arbitral award made by the arbitrator on 23 February 2010 be and is hereby set aside with costs.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/MANYONI v NDLOVU & ANOR 2014 (1) ZLR 156 (H)

MANYONI v NDLOVU & ANOR 2014 (1) ZLR 156 (H)

Citation	2014 (1) ZLR 156 (H)
Case No	Judgment No. HB-40-14
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	5 and 7 February 2014; *CAV*
Judgment	20 February 2014
Counsel	Applicant in person *R Basera*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Police – discipline – offences – disobedience to lawful written order – need for order to be extant when alleged disobedience occurred – conduct complained of subsequently becoming proscribed in written orders – no offence committed D

Headnote

The applicant, a member of the police force, had been charged before a single officer with contravening para 11 of the Schedule to the Police Act [*Chapter 11:10*], it being alleged that he had disobeyed a written order. He had, in 2010, enrolled in a course of higher education without having sought the authority of his superiors. The requirement to seek authority E had been published in a written order, issued in 2012, requiring members of the force to seek authority before enrolling in educational courses.

Held, that the lawful order which is disobeyed or refused or neglected to be carried out must be in existence at the time a member is alleged to have contravene of the paragraph, which makes no reference at all to future lawful orders, written or otherwise. The proceedings would be set aside F and no further proceedings should be brought out on the same facts.

Legislation considered

Police Act [*Chapter 11:10*]*, S*chedule, para 11

Case information

Applicant in person G

R Basera, for the respondents

Judgment

Kamocha J: The charge that the applicant was facing was framed like this:

"CHARGE SHEET

The State versus FORCE NUMBER 054381 C/D J. RANK SERGEANT H

Kamocha J

A (hereinafter called the accused) appointed on 27/03/03 …

The accused is ordered to appear before the court of an officer/board of officers at place DHQ WEST on the 24/12/12 at (time) 0800 hrs firstly to answer the charges of contravening paragraph 11 of the Schedule to the Police Act [*Chapter 11:10*] 'without good and sufficient cause, disobeying or refusing or committing or neglecting to carry out any order written or otherwise'.

B In that upon (or about) in September 2010 and at (or near) ZRP ENTUMBANE

The accused being a member of the force did wrongfully and unlawfully enrolled (*sic*) with the United College of Education in September 2010 for a Diploma in Education thereby disobeying provisions of Propol Bulawayo Radio number CRC 649/12 DATED 11/04/12 which stipulate that anyone seeking to pursue academic studies must have a clean record of service, amounting to 10 years C and as well submit an application well in advance when seeking authority."

The charge sheet was personally served on the applicant on 21 December 2012 by chief inspector Taduwa. The applicant indicated that he would conduct his own case. The summary of the State case read thus:

"Charge: contravening section 11 of the Schedule to the Police Act [*Chapter*D*11:10*] Without good and sufficient cause, disobeying or refusing or omitting or neglecting to carry out any order written or otherwise.

FACTS

(1) The accused is a serving member of the Police Force at ZRP Entumbane. Accused is subject to Police disciplinary code.

(2) On the date unknown but in the month of September, 2010, the accused E enrolled with the United College of Education for a Diploma in Education without having followed the provisions of Propol Bulawayo Radio CRC 649/12 dated 11/04/12.

(3) The accused must not have been acted (*sic*) in the manner he did."

The applicant attended the trial on the appointed date and time. When the State closed its case he applied for a discharge but the trial court was not F prepared to entertain the application and attempted to force him to present his defence case. He alleged that the presiding officer even threatened to assault him physically if he insisted with his application for a discharge at that stage.

That prompted him to file an *ex parte* application on a certificate of urgency to stop those proceedings and he was granted a provisional order G in case number HC 578/13.

The applicant is now seeking an order in the following terms in his amended draft:

"It is ordered

(1) That the proceedings of 9 January 2013 be and are hereby set aside.

(2) That after the setting aside of proceedings, no other proceedings on the H same charge shall be instituted against the applicant."

2014 (1) ZLR p158

Kamocha J

The applicant's complaint hinges on the charges that were preferred against A him. He drew attention of the court to the charge sheet, which alleged that he disobeyed the provisions of Propol Bulawayo Radio number CRC 649/12 dated 11 April 2012, which stipulates that anyone seeking to pursue academic studies must have a clean record of service, amounting to 10 years' service, and as well submit an application well in advance when seeking authority. B

The applicant enrolled with the United College of Education in September 2010. The said Propol Bulawayo Radio signal number CRC 649/12 was only formulated two years after he enrolled with the teacher training college, and was published on 11 April 2012. It is very difficult to understand how the applicant could have been charged with disobeying provisions of the Propol Bulawayo radio signal number CRC 649/12 which did not exist at the time he enrolled. C

The applicant has alleged that the presiding officer had been instructed to convict at all costs. He therefore did not apply his mind to the case before him and was biased against the applicant. He based his allegations on the fact that a colleague of his, Sergeant Christopher Mabhunu, who appeared before an impartial presiding officer, Superintendent Pilate Moyo, facing D similar charges was acquitted at the end of the State case. In acquitting him the presiding officer stated that:

"(a) The radio signal had nothing to do with Sergeant Mabhunu since it was published after he had enrolled with the college.

(b) There was no such a charge in the Police Force." E

Paragraph 11 of the Schedule to the Police Act [*Chapter 11:10*], which the applicant was alleged to have contravened, provides as follows:

"(11) Without good and sufficient cause, disobeying or refusing or committing or neglecting to carry out any lawful order, written or otherwise."

Quite clearly, the lawful order which is disobeyed or refused or neglected to be F carried out must be in existence at the time an officer is alleged to contravene the paragraph. In fact the lawful order must be written or otherwise at the time it is disobeyed or refused to be carried out without good and sufficient cause. The paragraph makes no reference at all to future lawful orders, written or otherwise.

The applicant was entirely correct when he submitted that there was no such G provision at all in the Police Act when he enrolled at the United College of Education. He was also not aware of any standing order to that effect. In any event, the charge sheet does not allege that he contravened any standing rule or order. It alleged that he contravened para 11 of the Schedule to the Police Act. There is no such standing rule in the Police Act and it was not produced in court. H

2014 (1) ZLR p159

Kamocha J

A It was submitted by the respondents that the charge preferred against the applicant was correct, because he had violated standing rules. The evidence led in court had clearly showed how the offence had been committed. It was further submitted that the applicant had refused to be put on his defence on the basis that the synopsis had quoted a signal dated 2012, a period of two B years after he had commenced his teacher training course. The respondents concluded by claiming that the signal was just a reminder and that was clearly stated in the evidence which was led in court.

These submissions are faulty. Firstly, it would have been improper and irregular to charge the applicant with contravening para11 of the Schedule to the Police Act but then lead evidence relating to the contravention of standing rules at C the trial. When Mr *Basera*, who appeared for the respondents, was asked to produce the record of proceedings showing where it was clearly stated

that the signal was just a reminder and the evidence showing how the offence was committed, he conceded that he was unable to do so. He even said he did not have such record.

D The applicant averred that he had written a letter on 10 July 2010 through his officer-in-charge seeking permission to enrol with the United College of Education for a teacher training course commencing on 7 September, 2010 to June 2013. When officers seek to communicate with the Officer Commanding Province by letter, they write through their officer-in-charge, who transmits the letter to the Officer Commanding Province. The applicant received no E response to his request. His letter is filed of record.

The applicant argued that he had good and sufficient cause to enrol for teacher training because he had been suspended from work without salary. He had to prepare for his future. He contended that during the entire period of his teacher training course, he never absented himself from duty without official F leave and was at school only when he was not at work. He, therefore, did not prejudice his employer in any way.

This court holds that there was no evidence to show that the applicant was absent from work without official leave thereby prejudicing the Police Force.

Further, it is held that the charge preferred against the applicant was patently G wrong and so was the synopsis of evidence and did not disclose any offence.

Furthermore, it is held that the presiding officer, Superintendent Ndlovu, was partial when handling the applicant's case.

In the result, I would grant the order sought in terms of the amended draft.

H*Civil Division, Attorney-General's Officer,* respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/RITENOTE PRINTERS (PVT) LTD & ANOR v ADAM AND CO (PVT) LTD & ORS 2014 (1) ZLR 160 (H)

RITENOTE PRINTERS (PVT) LTD & ANOR v ADAM AND CO (PVT) LTD & ORS 2014 (1) ZLR 160 (H)

Citation	2014 (1) ZLR 160 (H)
Case No	Judgment No. HH-83-14
Court	High Court, Harare
Judge	Chigumba J
Heard	19 February 2014; *CAV*
Judgment	20 February 2014
Counsel	*D Mehta,* for the first and second plaintiffs *E Samukange,* for the first, second and third defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Company – legal persona distinct from its shareholders – corporate veil – lifting of – in a proper case the corporate veil can be lifted mero motu by the court

Practice and procedure – exception – when must be filed D *– must be filed and disposed of before pleading to the merits – may not be combined with plea to the merits*

Headnote

While a registered company is a legal *persona* it its own right which is distinct E from its shareholders, in a proper case, depending on the merits thereof, the corporate veil can be pierced, *mero motu* by the court.

When an action was brought against it for damages arising out an allegedly unlawful eviction, the defendant entered appearance to defend, and subsequently filed a combined exception and plea.

Held, that the exception was not properly before the court. Under r 137 of F the High Court Rules 1971, there are four alternatives to pleading to the merits: a plea in bar; an exception; an application to strike out; or an application for a further and better statement of the nature of the claim or for further and better particulars. Those alternatives cannot be combined with a plea to the merits. Once the defendant had filed G its exception, it had ten days within which to engage the plaintiffs and agree to set the exception down for hearing by using the application procedure provided by r 223. If the parties failed to set the exception down for hearing by consent, then the defendant had a further four days to itself set the exception down for hearing. If neither course is followed, after a further four days, the defendant must plead over to merits. After H

Chigumba J

A pleading over to merits, the special plea, exception or application may not be set down for hearing before the trial.

Held, further, that an exception therefore can only be properly filed before the excipient pleads to the merits of the matter. It is an alternative to pleading to the merits. Once the excipient pleads before filing the exception, he B is in fact telling the other party that its declaration discloses a cause of action and is neither vague nor embarrassing. After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action.

Cases cited C

Benson & Simpson v *Robinson* 1917 WLD 126

Bulawayo Patternmakers (Pvt) Ltd v *Motor & Agri Eqpt (Pvt) Ltd* HB-32-98

Dadoo Ltd & Ors v *Krugersdorp Municipal Council* 1920 AD 530

Deputy Sheriff v *Trinpac Invstms (Pvt) Ltd & Anor* 2011 (1) ZLR 548 (H)

D*Erasmus* v *Slomonitz (1)* 1938 TPD 238

Haskell v *Lebedina* 1930 WLD 296

Kali v *Incorporated General Ins (Pvt) Ltd* 1976 (2) SA 179 (D)

Pietpotgietersrust White Lime Co v *Sand & Co* 1916 TPD 687

Tobacco Sales Producers (Pvt) Ltd v *Eternity Star Invstms* 2006 (2) ZLR 293 (H) E

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

US v *Milwaukee Refrigerator Transit Co* 42 Fed 247 255 (1905)

Legislation considered

F High Court Rules 1971 (RGN 1047 of 1971), rr 87(2), 88, 137(1) and 138

Companies Act [*Chapter 24:03*], s 318

Case information

D Mehta, for the first and second plaintiffs

E Samukange, for the first, second and third defendants

Judgment

G**Chigumba J**: The plaintiffs issued summons against the three defendants on 20 August 2012 seeking payment of:

(a) US$230 000 being losses suffered as a result of failure by plaintiffs to trade owing to wrongful eviction.

(b) US$25 000 being damages for *injuria.*

H (c) US$50 000 being damages for permanent chronic depression.

2014 (1) ZLR p162

Chigumba J

(d) US$450 000 being the difference between the value of the business and A the price at which it was sold.

(e) US$4 000 000 being the amount the second plaintiff would have made but for the chronic depression he has suffered as a result of wrongful eviction.

(f) US$12 060 plus US$15.00 per day reckoned from the date of summons B to the date of payment, being storage charges incurred by goods attached by the messenger of court at the defendants' unlawful instance.

(g) Interest on the sums set out above at the prescribed rate from the date of summons to the date of payment.

(h) Costs of suit. C

The plaintiffs averred, in the declaration, that, on 1 November 2010, defendants unlawfully, wrongfully, and intentionally procured the first plaintiff's eviction from premises known as number 147 Mbuya Nehanda Road, Harare and from Winston House, 109 Leopold Takawira Street, Harare. The first plaintiff carried on its printing, photocopying and related business from those premises which belong to the first defendant. The plaintiffs averred further, that as a D result of the aforesaid eviction, they suffered losses by reason of failure to trade from those premises 147 Mbuya Nehanda Road for the period ranging from 1 November 2010 to date, and from Winston House from 1 November 2010 to 29 June 2011. The plaintiffs' claim was founded on *injuria,* and on consequent damages arising therefrom, such as loss of business, and chronic depression arising as a result of the defendants' conduct. E

On 24 September 2012, the defendants entered appearance to defend themselves in this matter, and filed a combined exception and plea on 30 January 2013. The exception was based on the fact that para (s) 5, 6, 7 and 8 of the plaintiffs' summons allegedly failed to disclose a cause of action, and that it was not specifically pleaded that, at the material time, defendants acted F in an unreasonable manner. It was averred that the plaintiffs ought to have specifically pleaded that the defendants foresaw the possibility of harm being occasioned to the plaintiffs by their action of evicting them. The defendants denied acting unreasonably and averred that they had been issued with a valid and competent eviction order before the magistrate's court, and were entitled to act on it. G

The defendants' plea on the merits was to deny that they caused any harm to the plaintiffs either intentionally or negligently, to deny being at fault in any way in causing the plaintiffs' eviction, and to aver that they acted reasonably at all times. Intention to cause *injuria* was denied, knowledge of the second plaintiff's depression was denied, illegal conduct was denied, H

2014 (1) ZLR p163

Chigumba J

A and the defendants prayed for dismissal of the action together with costs on a higher scale. The plaintiffs replicated to the exception on 13 February 2013, and reiterated that they clearly pleaded fault on the part of the defendants. The plaintiffs prayed for the dismissal of the defendants' exception, together with costs, on a higher scale.

B At the pre-trial conference, on 24 September 2013, a joint pre-trial conference minute was filed of record, in terms of which the following issues were referred to trial:

1. whether or not the plaintiffs' summons and declaration disclosed a cause of action at law?
2. C whether or not the second and third defendants have been erroneously joined to the present matter?
3. whether or not the defendants acted negligently, unlawfully and wrongfully in evicting the first plaintiff?
4. whether the plaintiffs sufficiently set up a cause of action warranting the D dismissal of the exception to which the defendants have pleaded over?

At the hearing of the matter, counsel for the defendants moved for the "exception" to be upheld, and for the dismissal of the plaintiffs' claim on the basis that the summons and the declaration did not disclose a cause of action. Counsel for the plaintiffs opposed this application, and counterclaimed that the second and third defendant had been erroneously joined to the proceedings. E I will deal with the second issue for trial first, because in my view it can be disposed of more easily than the first issue for trial, that of the exception.

In considering whether or not second and third defendants have been erroneously joined to these proceedings, the court had regard to the reason for their citation in the declaration to the summons. On p 3 of the declaration, F the plaintiffs state that:

> "First defendant is A Adam & Company, a corporate body established in terms of the laws of the republic … second and third defendants are … adult Zimbabweans who control the activities of the first defendant and through whose agency it acts".

Rule 87(2) of the High Court Rules 1971 provides as follows:

> G "87. Misjoinder or nonjoinder of parties
>
> (1)…
>
> (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application –
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease H to be a party;

> (b) …" A

It was submitted on behalf of the plaintiffs, that it is trite law, that "…a court will not pierce the corporate veil of a company because as a registered company, it is a legal *persona* in its own right and endowed with its own legal *persona*, which is distinct from its shareholders". See *Salomon* v *Salomon* & *Co Ltd* [1897] AC 22 (HL), *Dadoo Ltd & Ors* v *Krugersdorp Municipal Council*B1920 AD 530 at 550. The plaintiffs submitted, however, that there are exceptions to this principle, which are based and grounded in policy considerations, that, when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. See *US* v *Milwaukee Refridgerator Transit Co* 42 Fed 247 (1905) at 255. C

It was submitted, further, that when the corporation is the mere alter ego or business conduit of a person, it may be disregarded, and that where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity would have to be balanced against policy considerations which arise in favour of piercing the corporate veil. The plaintiffs relied on D*Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548 at 548G-549C as authority for this proposition.

It is my considered view that, whilst counsel for the plaintiffs correctly cited this case as authority for the proposition that in proper cases, depending on the merits of each case, the corporate veil can be pierced, *mero motu*E by the court, this case does not advance the plaintiff's case any further. It is of persuasive import, being a judgment of my brother judge. However the case, in my view, turned on its perculiar facts and it cannot be said that the corporate veil should be pierced willy-nilly at the court's instance in every case. The question for determination is whether the second and third defendants were properly joined to the proceedings. The court must consider F the question of joinder, or misjoinder, not, in my view, that of the piercing of the corporate veil which is being raised for the first time, and was not pleaded. The declaration merely identifies the second and third defendants as the agents through which the first defendant acts.

The *Trinpac Investments* case, upon which the plaintiff seeks to rely, in G my view, is distinguishable from the one under consideration on the facts. It concerned an interpleader action, whereas in this case the matter under consideration is one of damages. It concerned a multiplicity of companies, under an umbrella company, where the issue for consideration was the legal ownership of property which had been attached in execution and where one company claimed that it owned the property, but it was a subsidiary of H

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A the umbrella company, and failing to pierce the corporate veil would have resulted in an injustice to the judgment creditor, by allowing the veil to remain in place, the attachment in execution could not stand. The alleged act of wrongdoing in this case, that is the eviction, in my view cannot be equated to the wrongful acts of the umbrella of a group of companies with many B subsidiaries whose corporate veils could be pierced in order to prevent an injustice from being done. That is not so in this case, where the wrongdoing attributed to second and third defendants is merely that they are officers of the first defendant. In the *Trinpac Investment* case, the court found that the control exercised by the holding company over its subsidiaries justified the treatment of the group as a single economic entity. In deciding whether it C was necessary to apply for upliftment of the corporate veil, the court found that, in the circumstances of the case before it, such application was not necessary as the conclusion would be the same.

That is not so in this case before me. Each case depends on its merits and on the facts. There is no evidence that second and third defendants exercised the D same level of control over the first defendant. There is no evidence that, out of all the officers of first defendant, the second and third defendants caused the eviction of the first plaintiff. I accept the submission made by counsel for the defendant, that in order for the corporate veil to be uplifted, in the circumstances of this case, an application for piercing the veil ought to be made and considered. It was not up to the plaintiffs to merely include the E second and third defendants as parties to the proceedings in the absence of a sufficient legal basis to do so. This imputes personal liability to them, for the first defendant's actions. No justification for imputing personal liability was proffered in the summons or in the declaration. Accordingly, in terms of r 87(2)(a), I order that the second and third defendants cease to be parties to these proceedings. Costs shall remain in the cause. The plaintiff may F have recourse against those defendants in terms of s 318 of the Companies Act [*Chapter 24:03*], or may make a proper application for piercing of the corporate veil. The summons shall be amended accordingly, as provided by r 88.

Before considering the merits of the exception filed by the defendants, now G the first defendant only after the removal of the second and third defendants as parties to the proceedings, the court considered whether or not the exception was properly before it. Rule 137 of the High Court Rules 1971 provides as follows:

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

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> (a) take a plea in bar or in abatement where the matter is one of substance which A does not involve going into the merits of the case and which, if allowed, will dispose of the case;
>
> (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defense as the case may be;
>
> (c) apply to strike out any paragraphs of the pleading which should properly be struck out; B
>
> (d) apply for a further and better statement of the nature of the claim or defence or for further and batter particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.
>
> (2) A plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis*, and a copy thereof filed with the registrar. In the C case of an application for particulars, a copy of the reply received to it shall also be filed."

The first thing to note is that r 137 is entitled "alternatives to pleading on the merits". It becomes immediately clear that defendant's plea and exception, filed of record on 30 January 2013 is not

properly before the court. There are four alternatives to pleading to the merits: a plea in bar (r 137(1)(a)); exception D (r 137(1)(b)); an application to strike out (r 137(1)(c)); or an application for a further and better statement (r 137(1)(d)). My reading of r 137 is that, if it provides alternatives to pleading to the merits, those alternatives cannot be combined with a plea to the merits, as the defendant purported to do on 30 January 2013. The defendant ought to have simply proceeded in terms of E r 137(1)(b) and filed an exception to the summons and declaration.

This view is further supported by r 138, which provides as follows:

> "138. Procedure on filing special plea, exception or application to strike out
>
> When a special plea, exception or application to strike out has been filed –
>
> (a) the parties may consent within ten days of the filing to such special plea, F exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
>
> (b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223;
>
> (c) failing such consent and such application, the party pleading specially, G excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial."

My reading of r 138 is that, after the defendant had filed its exception on 30 January 2013, it had ten days, until 13 February 2013, within which to engage the plaintiffs and agree to set the exception down for hearing by using H

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A the application procedure provided by Order 32 of the rules of this court. If the parties failed to set the exception down for hearing by consent by 13 February 2013, then the defendant had a further 4 days, up to 19 February 2013, to itself set the exception down for hearing using the provisions of r 138(c), which stipulates that where the exception has not been set down either by consent, or solely by the defendant, a further four days is added B to the 14 days that will have elapsed since the exception was filed, within which the defendant must plead over to merits – by 25 February 2013, in this case. After pleading over to merits, r 138(c) stipulates that "…the special plea, exception or application *shall not* be set down for hearing before trial" (my underlining for emphasis).

C It is trite that the object of a summons or a declaration is to inform the defendant of the cause of action and the facts upon which the claim is based. See Herbstein & van Winsen *Civil Practise of the Superior courts of South Africa* 4 ed p 395, *Haskell* v *Lebedina* 1930 WLD 296, *Erasmus* v *Slomonitz* 1938 TPD 236, *Pietpotgietersrust White Lime Co* v *Sand & Co* 1916 TPD 687, *Bulawayo Patternmakers (Pvt) Ltd* v *Motor & Agri Equipment (Pvt) Ltd* HB- D 32-98. In order to uphold an exception such as the one raised by the defendant, the court must consider whether the plaintiffs' "claims as formulated in the summons and the declaration are set out clearly, concisely, both in fact and in law". If the claims are not clear or concise in fact and or in law, the exception must be upheld. In other words, if the averments contained in the plaintiffs summons and declaration disclose:

E (a) sufficient particularity;

(b) are not contradictory and mutually destructive;

(c) a cause of action particularly a delictual claim for damages;

(d) are appropriate in law;

F then the exception ought to be dismissed and the matter proceed to trial. See *Benson* v *Robinson* 1917 WLD 126, *Kali* v *Incorporated General Insurance (Pty) Ltd* 1976 (2) SA 179 (D).

According to Herbstein & van Winsen Civil practice of the Superior Courts in South Africa 2 ed at pp 314-315:

> "The true object of an exception is either, if possible, to settle the case or at G least a part of it, in a cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception".

It has been held in *Tobacco Sales Producers (Pvt) Ltd* v *Eternity Star Investments* 2006 (2) ZLR 293 (H) at 296 by Kudya J that:

"… an exception can only be properly filed before the excipient pleads to the merits of the matter … it is an alternative to pleading to the H merits. Once the

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excipient pleads before filing the exception he is in fact telling the other party that A its declaration discloses a cause of action and is neither vague nor embarrassing … after the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action".

I associate myself fully with these findings of my brother and find them not only persuasive, but instructive in the simplicity with which they explain B the correlation between an exception, and a plea to the merits.

It follows that there is no exception before the court. The defendant purported to except and plead at the same time which is impermissible in terms of r 138(c), and incongruous, as one cannot except to a summons and declaration on the basis that no cause of action is disclosed, then in the same breath, plead to the merits. By pleading to the merits, the defendant implied that C the summons and declaration had sufficient particulars to enable it to plead. Rule 138 clearly stipulates the time period within which an exception ought to be set down for hearing. Once those time periods elapse, the opportunity to have the exception determined is lost. By 25 February 2013, the ship had sailed. The defendant no longer had the alternative of having the exception set D down for hearing before trial. Once the defendant pleaded to the merits, it no longer was at liberty to seek to have the summons and declaration amended on the basis that no cause of action was disclosed. Pleading to the merits implies that the summons and declaration contain sufficient particularity to inform the defendant of the case it has to answer. There is therefore no need to determine the so called exception; the defendant neutralized that alternative E by electing to plead to the merits. The exception is dismissed on the basis that the time within which it ought to have been determined has lapsed, and that it was rendered baseless by the defendant's plea to the merits. It is ordered that the first and second defendants be removed as parties to these proceedings. Costs will remain in the cause.

Hamunakwadi, Nyandoro & Nyambuya, plaintiffs' legal practitioners F

Venturas & Samukange, defendants' legal practitioners

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SHUMBAYAONDA v MINISTRY OF JUSTICE & ANOR 2014 (1) ZLR 169 (S)

Citation	2014 (1) ZLR 169 (S)
Case No	Judgment No. S-11-14
Court	Supreme Court, Harare
Judge	Garwe JA, Ziyambi JA & Hlatshwayo JA
Heard	4 February 2014; *CAV*
Judgment	25 February 2014
Counsel	*T Mpofu,* for the appellant *C Garisenhea,* for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Employment – suspension from duty – suspension pending holding of disciplinary proceedings – public servant – suspension not a pre-requisite to holding of such proceedings – termination of suspension – does not prevent disciplinary proceedings from being held – extension of period D *of suspension – suspension may only be extended if period of suspension has not expired*

Public service – disciplinary proceedings – suspension from duty pending holding of disciplinary proceedings – suspension not a pre-requisite to holding of such proceedings – termination of suspension – does not prevent disciplinary proceedings from being held – extension of period E *of suspension – suspension may only be extended if period of suspension has not expired*

Headnote

The appellant was a public prosecutor at a magistrates court. Disciplinary proceedings were brought against him, alleging that he had solicited and F received a bribe. He was suspended from duty by the Public Service Commission pending disciplinary proceedings being held. The suspension was for a period of three months. By the end of the three month period, the allegation of misconduct had not been heard or determined. Well after the initial period of suspension had expired, the Public Service G Commission, purporting to act in terms of s 49(3)(b)(ii) of the Public Service Regulations (SI 1 of 2000), extended the order of suspension for a further period of three months but back-dated the commencement of such extension to the day after the first period expired. The disciplinary hearing eventually took place, following which the appellant was found guilty and dismissed from the Public Service. Dissatisfied with the H decision of the disciplinary committee, the appellant filed an application

for review with the Labour Court. The Labour Court set aside the A disciplinary proceedings and directed that the matter be heard *de novo* before a different committee within 30 days or such extended period as may, on good cause shown, be granted, failing which the appellant was to be reinstated without loss of salary and benefits. On appeal, the issues were whether, after the appellant's suspension had lapsed, B it was competent for the respondents to continue with the disciplinary proceedings and whether, in remitting the matter for a rehearing, the Labour Court erred in granting relief that had not been sought by either party and in respect of which neither party had been heard.

Held, that suspension is not a prerequisite to the holding of disciplinary proceedings and a disciplinary hearing does not have to take place C during the period of suspension. The fact that a suspension has expired cannot prevent the holding of disciplinary proceedings. The Regulations clearly empowered the disciplinary authority to not only prefer charges of misconduct but also to decide whether a suspension order should be made, the two being separate though related exercises. The Regulations prescribed different procedures for preferring charges and suspension D from duty.

Held, further, that whilst an order of suspension can only be imposed on a member who is suspected of having committed a misconduct, it is not a requirement that such suspension must be imposed in all cases. Indeed, s 48 provides that the disciplinary committee *may*, not must, suspend a E member from service. The powers to suspend are not without limitation. A suspension is only warranted in a situation where the continued presence at the workplace of a member is undesirable for the reasons given in s 48(1) of the Regulations. An order of suspension in the ordinary course results in the member not being entitled to his salary and prevented from attending at his workplace. It is an order that can have dire implications F for the employee. It is for this reason that s 49 obliges the disciplinary authority to determine any allegations of misconduct levelled against a suspended employee within three months from the date of its imposition and, where that does not happen, the order of suspension automatically

falls away unless a directive is given by the Commission that it be extended for a further specified period. G

Held, further, that the corollary to this is that it is quite competent for a disciplinary authority to prefer charges of misconduct against a member without simultaneously suspending such member from work. In other words, a charge of misconduct stands on its own, although a suspension may be imposed taking into account the circumstances surrounding the H

A allegation of misconduct. The contention that once a suspension falls away the entire proceedings also fall away could not possibly be correct. When the order of suspension falls away, only the suspension falls away, and not the charge that may have given rise to the order of suspension.

Held, further, that the suspension had expired and the attempt to extend it by B the Commission was null and void as it was executed well after the initial order of suspension had terminated. At that stage the suspension had been terminated by operation of law. There was therefore no suspension that the Commission could have extended.

Held, further, that the order by the court *a quo* that the entire proceedings be set aside was therefore irregular. The disciplinary authority had the C power to continue hearing the matter, notwithstanding the fact that the suspension had terminated. The order remitting the matter for a hearing *de novo* was improper and must also be set aside.

Cases referred to

Air Zimbabwe (Pvt) Ltd v *Mnensa & Anor* S-89-04

D*Mugwebi* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S)

Legislation considered

Public Service Regulations 2000 (SI 1 of 2000), ss 44, 45, 46, 48 & 49

Case information

T Mpofu, for the appellant

E*C Garisenhea,* for the respondent

Judgment

Garwe JA: This is an appeal against the decision of the Labour Court setting aside disciplinary proceedings conducted by a committee constituted by the respondents and directing that the matter be heard *de novo* before a F different committee within 30 days or such extended period as may, on good cause shown, be granted, failing which the appellant was to be reinstated without loss of salary and benefits.

The facts of this case are as follows. The appellant was employed by the respondent Ministry as a public prosecutor, stationed at Chinhoyi. Following G a police trap, the appellant was found with a marked US$200 note which had allegedly been handed to him by certain accused persons so that he could withdraw a criminal charge levelled against them. Following this development, the appellant was suspended from duty from 20 July 2010 in terms of the Public Service Regulations (SI 1 of 2000) ("the Regulations"). The suspension was for a period of three months, that is, until 20 October 2010. By 20 October H 2010 the allegation of misconduct levelled against

the appellant had not been heard or determined. On 30 November 2010, A well after the initial period of suspension had expired, the Public Service Commission, purporting to act in terms of s 49(3)(b)(ii) of the Regulations, extended the order of suspension for a further period of three months but back-dated the commencement of such extension to 21 October 2010. This decision was communicated to the appellant on 8 December 2010. The B disciplinary hearing eventually took place on 13 January 2011 following which the appellant was found guilty of soliciting for a bribe and

getting a bribe and dismissed from the Public Service. Dissatisfied with the decision of the disciplinary committee the appellant filed an application for review.

In his submissions before the court *a quo* the appellant raised three issues. The first was that at the time the hearing took place the suspension order had C lapsed and the attempt by the Public Service Commission to extend the order after it had expired did not validate such order. Therefore the proceedings that followed the irregular extension were a nullity. The second issue was that he had been denied the right to legal representation during the disciplinary hearing and thirdly that continuing with the proceedings in the absence of the appellant's counsel constituted bias. The appellant accordingly urged the D court to set aside the proceedings and not remit the matter.

In very terse heads of argument filed in the court *a quo*, the respondents denied that the proceedings were invalid or that the appellant's rights to legal representation had been violated. The respondents also denied the suggestion that the disciplinary committee had exhibited bias towards the appellant. E

In its judgment, the court *a quo* noted with some concern the lackadaisical attitude on the part of law officers from the Attorney-General's Office in general and their failure, in this particular case, to file meaningful heads of argument dealing with the issues raised by the appellant in his heads of argument. The court therefore found that there had been no explanation by the respondents on how "something that was already dead was resuscitated". F The court also found that the full facts on the issue of legal representation had not been provided and that it was therefore unclear whether the appellant had been at fault. Lastly, the court found the claim of bias to have been "misplaced", based, as it was, on the allegation that the disciplinary committee had denied the appellant his request for a postponement so that G his counsel could be in attendance. The court, whilst not making a definitive finding on the propriety or otherwise of the disciplinary proceedings, was of the view that the appellant could not avoid his dues because of the error of other employees, and relying on the decision of this court in *Air Zimbabwe (Pvt) Ltd* v *Mnensa & Anor* S-89-04, ordered that the proceedings (not just the suspension) be set aside and that a trial *de novo* takes place before a H

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A different committee constituted by the respondents. It is against that order that the appellant now appeals to this court.

Although in his notice of appeal, the appellant raised three grounds of appeal, in his heads of argument and oral submissions before us, Mr *Mpofu* confined himself to two issues. These are, firstly, whether, after the appellant's B suspension had lapsed, it was competent for the respondents to continue with the disciplinary proceedings and secondly whether, in relying on the decision in *Air Zimbabwe (Pvt) Ltd* v *Mnensa & Anor supra* and thereafter remitting the matter for a rehearing, the court *a quo* erred in granting relief that had not been sought by either party and in respect of which neither party had been heard. Accordingly, this appeal will be confined to these two issues.

C I turn to deal firstly with the order of suspension and whether the disciplinary proceedings that followed were a nullity.

The relevant provisions are to be found in ss 44, 45, 46, 48 and 49 of the Regulations. The sections provide, in the relevant portions, as follows:

> "**44. Procedure before and immediately following allegation ofD misconduct**.
>
> (1) Where a member is suspected of misconduct, the disciplinary authority shall conduct or cause to be conducted such investigations as may be necessary.
>
> (2) If, on completion of the investigations referred to in subsection (1), it is found that an allegation of misconduct should be preferred against the member, the disciplinary authority shall, within a reasonable time after the completion E of the investigation –
>
> (a) inform the member, in writing, of the nature of the allegation against him, and call upon him to submit a written reply to the allegation within fourteen days;
>
> (b) where, possible, furnish to the member copies of any material documentary evidence, if any, relating to the allegation of misconduct, or afford the F member an opportunity of having sight of any such evidence.
>
> (3) …

(4) …

(5) …

45. Hearings before disciplinary committee

G (1) Within seven days of receiving the documents referred to in paragraph (d) of subsection (3) or paragraph (d) of subsection (4) of section 44, the disciplinary committee shall give not less than seven days' notice to the member concerned of the time, date and place of the hearing of the allegation of misconduct against him.

(2) The hearing shall be conducted without the need to observe the rules of H procedure and evidence ordinarily applicable in criminal or civil proceedings,

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provided, however, that the member concerned is afforded the opportunity to A respond to every allegation of misconduct and that substantial justice is done.

(3) …

(4) …

(5) …

(6) At the conclusion of the hearing or as soon thereafter as possible, the chairman B of the disciplinary committee shall submit to the disciplinary authority –

(a) a notification in writing of its findings and recommendations thereon, including a recommendation as to the penalty to be imposed upon the member where it finds the member guilty of misconduct; and

(b) the record of the evidence led at the hearing.

46. Determination of allegation of misconduct C

(1) on receiving the documents referred to in subsection (6) of section 45 the disciplinary authority may –

(a) …

(b) proceed to determine whether or not the member concerned is guilty of misconduct as alleged. D

(2) …

(3) Where the disciplinary authority determines that a member is guilty of misconduct, the disciplinary authority shall –

(a) proceed to determine the penalty to be imposed upon the member; and

(b) notify the member … of its determination and the penalty imposed upon E the member; and

(c) take such consequential measures as may be necessary in the circumstances.

(4) …

47. Member convicted of a criminal offence

… F

48. Imposition of suspension order

(1) A disciplinary authority may at any time, by written notice, suspend from service a member who is suspected of misconduct or is subject to criminal investigation or prosecution if his continued attendance at work or continued performance of his duties or service, as the case may be, would – G

(a) be conducive to unbecoming or indecorous behaviour or further instances of misconduct; or

(b) seriously impair the proper administration of functioning of the Ministry or department concerned; or

(c) occasion prejudice to any moneys or property likely to be handled by the member in the course of his work; or H

Garwe J

A (d) enable the member to hinder or interfere with any investigation or evidence relating to any alleged misconduct; or

(e) be undesirable in the public interest or likely to lead to a loss of public confidence in the Public Service.

(2) Where a suspension order is imposed upon a member –

(a) the order shall specify the reasons for such order, the period of suspension B and, where possible, the nature of the allegations against the member;

(b) disciplinary procedures shall be instituted forthwith in terms of section 44 if they have not already been instituted.

(3) …

(4) …

49. Effect and cancellation of suspension order

(1) Where a member is suspended from service, he shall –

(a) not attend at his place of work or carry out any duty unless directed to do so by the disciplinary authority, in which case he shall carry out such duties as directed.

(b) not be entitled to his salary in respect of the period of suspension unless ordered to carry out other duties, in which case he shall continue to receive his salary.

(2) …

(3) A suspension order –

(a) may be cancelled at any time by the disciplinary authority;

(b) shall be deemed to be cancelled –

(i) where the member is found not guilty of misconduct; or

(ii) after three months from the date of its imposition if the allegations has not been determined, unless the Commission directs that the order remain in force for such period as it shall specify by written notice to the member.

(4) …"

It is apparent, from the above provisions, that the law has prescribed different procedures for preferring charges and suspension from duty. Whilst an order of suspension can only be imposed on a member who is suspected of having committed a misconduct, it is not a requirement that such suspension must be imposed in all cases. Indeed s 48 itself provides that the disciplinary committee may, not must, suspend a member from service. Even then the powers to suspend are not without limitation. A suspension is only warranted in a situation where the continued presence at the workplace of a member is undesirable for the reasons given in s 48(1) of the Regulations. The corollary to this is that it is quite competent for a disciplinary authority to prefer charges of misconduct against a member without simultaneously suspending such

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member from work. In other words a charge of misconduct stands on its own although a suspension may be imposed taking into account the circumstances surrounding the allegation of misconduct. In the circumstances the submission by Mr *Mpofu* that once a suspension falls away the entire proceedings also fall away cannot possibly be correct.

Section 49(3) of the Regulations must therefore be understood in this light. An order of suspension in the ordinary course results in the member not being entitled to his salary and prevented from attending at his workplace. It is an order that can have dire implications for the employee. It is for this reason that s 49 obliges the disciplinary authority to determine any allegations of misconduct levelled against a suspended employee within three (3) months from the date of its imposition and, where that does not happen, the order of suspension automatically falls away unless a directive is given by the Commission that it be extended for a further specified period. When the order of suspension falls away, only the suspension falls away, and not the charge that may have given rise to the order of suspension. Clearly the intention of Parliament was not to invalidate the charge giving rise to the suspension but rather the suspension itself. Had the intention been otherwise, s 49(3) would not have referred to a suspension order only but the entire disciplinary proceedings.

It follows from the above that the submission by Mr *Mpofu* that the proceedings in their entirety were deemed to have been cancelled after a period of three months from the date of suspension cannot be correct. To the contrary, I am inclined to accept the submission by the respondents that a suspension is not a prerequisite to the holding of disciplinary proceedings and that a disciplinary hearing does not have to take place during the period of suspension. I further accept the respondents' submission that the fact that a suspension has expired cannot prevent the holding of disciplinary proceedings. In this case it is clear that the suspension had expired and that the attempt to extend it by the Commission was null and void as it was executed well after the initial order of suspension had terminated. At that stage the suspension had been terminated by operation of law. There was therefore no suspension that the Commission could have extended on 30 November 2010.

The fact that the Regulations do not provide any time limits within which G an allegation of misconduct must be determined does not mean the State has an unlimited time frame to conclude disciplinary hearings. Any right the State would have to prefer charges of misconduct is subject to s 69 of the new Constitution which provides that every person has the right to a fair, speedy and public hearing within a reasonable time. H

2014 (1) ZLR p177

Garwe J

A The case of *Mugwebi* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S), heavily relied upon by Mr *Mpofu,* is clearly not applicable to the facts of this case. In the *Mugwebi* case it was held that the suspension of the employee and the subsequent proceedings were null and void. There were two reasons for that finding. In the first instance the employee had been suspended by a marketing B manager and not a designated officer in clear breach of the provisions of the code of conduct which stipulated that only the designated officer had the power to suspend an employee. Secondly, in the event that the offence warranted dismissal, the designated officer was required to suspend the employee with or without pay, pending his decision on the matter. In other words, once the designated officer preferred a charge warranting dismissal C if proved, he had no discretion but to suspend the employee and thereafter to give a decision within 14 days of receipt of such case.

The facts of this case are different. The Regulations clearly empower the disciplinary authority to not only prefer charges of misconduct but also decide whether a suspension order should be made, the two being separate D though related exercises.

The order by the court *a quo* that the entire proceedings be set aside was therefore irregular. It was the suspension that was in issue and the court should have confined itself to setting aside only the suspension. It set aside the disciplinary proceedings in circumstances where it was not empowered to do so. In the exercise of the review powers of this court, the decision of E the court *a quo* must be corrected to make it clear that it was the order of suspension which terminated by operation of s 49(3) of the Regulations.

The second issue that arises in this appeal is whether, in the light of the above finding, the order remitting the matter for a rehearing should stand. In this regard it is important to note that the proceedings continued, at the F conclusion of which the appellant was found guilty of misconduct and was dismissed. Having found, as this court has done, that the disciplinary authority had the power to continue hearing the matter notwithstanding the fact that the suspension had terminated, and the decision on the merits not being an issue before this court, it follows that, in these circumstances, the order remitting the matter for a hearing *de novo* was improper and must also G be set aside. The question whether the court *a quo* should have heard the parties on the issue of remittal consequently no longer arises.

On the issue of costs, Mr *Mpofu* advised the court that he is appearing *pro amico* for the appellant and that, in the event the appellant succeeds on appeal, no order of costs is sought. The respondents, on the other hand, have prayed H that the appeal be dismissed with costs. As neither party has been more

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2014 (1) ZLR p178

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successful than the other, it seems to me that the most appropriate order in A the circumstances would be that there be no order as to costs.

In the result, the following order is made;

1. The judgment of the court *a quo* is set aside and in its place the following is substituted:
   "1. The order of suspension imposed by the Commission on 30 November 2010 B is hereby set aside.
   2. For the avoidance of doubt the order of suspension imposed on the applicant on 20 July 2010 terminated on 20 October 2010.
   3. The application for review is otherwise dismissed with costs."
2. There will be no order as to costs. C

ZIYAMBI JA and HLATSHWAYO JA concurred

Mushonga, Mutsvairo and Associates, appellant's legal practitioners

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

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/CHAERUKA v MINISTER OF LANDS & ANOR 2014 (1) ZLR 179 (H)

CHAERUKA v MINISTER OF LANDS & ANOR 2014 (1) ZLR 179 (H)

Citation	2014 (1) ZLR 179 (H)
Case No	Judgment No. HH-75-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	19 February 2014; *CAV*
Judgment	26 February 2014
Counsel	*D Ochieng,* for the applicant *Ms K Warinda,* for the first respondent *T Mpofu*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administrative law – Administrative Justice Act [Chapter 10:28] – applicability – contract between individual and the State – contract providing that State could cancel contract for reasons set out in the contract – not necessary to apply rules of administrative justice if State intends to D *exercise right to cancel*

Land – acquisition – offer letter – nature of letter – constitutes contract between State and recipient – cancellation or withdrawal of offer letter – lawful if done in accordance with offer letter

Headnote

E The applicant had been given an "offer letter" in respect of a farm which had been compulsorily acquitted by the State. The farm had previously been owned by a company of which the second respondent was a director. The applicant cultivated only about one hectare of the farm's 498 hectares and about eight months after he received the offer letter he was verbally notified by the then Vice-President that his offer letter was to be withdrawn F and the farm re-allocated to the second respondent, who was also at the meeting. The second respondent was, nearly three years later, given an offer letter in respect of the farm. The applicant sought an order setting aside the withdrawal of his offer letter. He maintained that there was no provision in the contract entitling the Minister to terminate it. In addition, he argued that the withdrawal of the offer letter was in violation of s 3 G of the Administrative Justice Act [*Chapter 10:28*] which enjoins the Minister to act lawfully, reasonably and in a fair manner. Specifically, he argued, the Minister should have given him notice of the intention to terminate, giving him adequate time to make representations.

Clause 7 of the offer letter stated that "The Minister reserves the right H to withdraw or change this offer letter if he deems it necessary, or if

you are found in breach of any of the set conditions. In the event of a A withdrawal or change of this offer, no compensation arising from this offer shall be claimable or payable whatsoever." Among the conditions referred to was one to the effect that the recipient of land was required to undertake and initiate development on the farm in accordance with the five year development plan submitted, and another that the offer may B be cancelled or withdrawn for breach of any of the conditions set out.

Held, that for the applicant to enforce a contract arising out of an offer letter, he had to bring himself within the provisions of that contract. If he accepted the offer letter, he accepted it on the basis of its terms, including the clause which gave the Minister unfettered power to cancel or withdraw the land as a result of a breach or "if he deems it necessary". C The Minister was entitled to withdraw the offer letter if he deemed that to be necessary or where the applicant was in breach of the terms of the offer letter, which he was, because of the under-utilisation of the land. The Government policy on land reform was not recreational, neither was it designed to accord beneficiaries some pastime. It was meant to benefit those willing and able to utilise land. One could not be allowed D to hold on to large tracts of land simply to baby sit an inflated ego. If a beneficiary was not using the land, that was a breach of the conditions upon which that land was offered. It should therefore be withdrawn and given to more deserving candidates. For the applicant to utilise less than a hectare, while leaving the remaining 497 hectares fallow, was E scandalous. It entitled the first respondent to withdraw the offer as he did.

Held, further, that once it was accepted that an offer letter gave rise to a valid contract binding on the parties, the court was applying contract law and could not, at the same time, apply administrative law rules. The contract was the covenant governing the relationship of the parties. By appending their signatures to the written contract, the parties accepted that their F relationship was to be governed by that contract and nothing else. The applicant could therefore not seek refuge outside the four corners of that written contract. The contract binding on the parties gave the Minister unfettered power to withdraw the offer letter. The applicant could not, therefore, seek to defeat the imperatives of a contract he entered into, by importing rules of administrative law alien to the contract of the parties. G When the State concludes a contract, it is bound by its terms and not by rules of administrative law which apply when it is exercising state power over the subject.

Held, further, that in any event, the applicant was notified of the intention to withdraw the offer letter and had ample time to make representations. H

Mathonsi J

Cases referred to A

Acting Min of Industry and Technology & Anor v *Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S)

Masunda v *Min of State for Lands & Anor* 2006 (2) ZLR 72 (H)

Munyaka v *Masakwa & Anor* HH-341-12

Case information

B*D Ochieng*, for the applicant

Ms *K Warinda*, for the first respondent

T Mpofu, for the second respondent

Judgment

Mathonsi J: The applicant was, by offer letter dated 20 March 2007, C offered the whole of Lot 5 of Lot 1 of Mazonwe, Mutare in Manicaland Province, measuring 498.00 hectares, otherwise known as Mapetu Farm, by the first respondent, who is the acquiring authority. The said farm was previously

held by a company known as O W Thwaites (Pvt) Ltd, in which the second respondent was a director, under Deed of Transfer No. 5576/92.

The offer letter in question was withdrawn following a directive issued by D the late Vice-President Joseph Msika, who was then the chairperson of the National Lands Committee. It was also observed that, although the applicant had taken up the offered land, he was badly under-utilising it, as he was practicing horticulture on a small piece of land less than a hectare, leaving the rest of the farm lying idle.

E The applicant's loss became the second respondent's gain, as she was issued with an offer letter by the first respondent, dated 8 November 2010, in terms of which she was allocated the same farm, much to the chagrin of the applicant who has now launched this application seeking the following order:

> "WHEREUPON after perusal of documents filed of record and having counsel (*sic*) it is hereby declared that:
>
> F 1. First respondent's decision to cancel applicant's Offer Letter is unlawful and is accordingly of no force or effect.
>
> 2. Second respondent's Offer Letter is consequently null and void".

The applicant's approach to this court was not before he had embarked on a tryst with the chairperson of ZANU PF seeking his intervention and declaring G in a letter dated 19 January 2011, that:

> "There has been a negative turn of events since November 2010, when I received a letter of withdrawal of my land offer letter from the current Minister of Lands. The farm has been re-offered to the previous white owner (Heather Guild) see annexure B and C. I have since responded to the revocation of my land offer to the Minister of Lands on the 22nd November 2010, who by now has not made H any correspondence in that regard (see annexure D). I have made a professional

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Mathonsi J

> and political stance Cde Chairman, that I will not move from the farm to give A way for the reversal of the agrarian reform. In this regard I am growing impatient every day as events are turning chaotic with the white man destroying my crops … I am therefore appealing to you Cde Chairman to invoke your political clout in assisting me to address this chaos. In my view your office and that of the Provincial Governor are my bedrock for a political solution to this matter".

The chairman may not have invoked his political clout because the political B solution the applicant craved came to naught forcing him to change direction and approach this court for a legal solution aforesaid.

In his founding affidavit, the applicant surprisingly lay claim to a farm known as "Lot 5 of Lot 1 of Burma Valley situate in the district of Mutare" which is certainly not the farm previously allocated to him and now allocated to C the second respondent. He stated that he seeks from this court a declaratur that the purported withdrawal of his offer letter by the Minister is unlawful, null and void and that the allocation of the farm to the second respondent is also null and void by reason that an offer letter, once accepted, becomes a binding contract which cannot be unilaterally terminated without notice or a material breach. D

The applicant maintained that the termination of the contract was without notice to him. In his view, there is no provision in the contract entitling the Minister to terminate it. In addition, the applicant argued that the withdrawal of his offer letter was in violation of s 3 of the Administrative Justice Act [*Chapter 10:28*] which enjoins the Minister to act lawfully, reasonably and E in a fair manner. Specifically, the Minister should have given him notice of the intention to terminate giving him adequate time to make representations.

Having said that he was not given notice, it is surprising that the applicant accepts in para 9 of his answering affidavit that the letter from the late Vice-President was read out to him in November 2007 and that the letter of F withdrawal was only delivered to him three years later in November 2010.

The respondents have opposed the application. In his opposing affidavit, the first respondent stated that he acted in terms of clause 7 of the offer letter constituting the contract between the parties which reserves to him the right to withdraw or change the offer letter if he deems it necessary. It became necessary to withdraw the offer given to the applicant after the chairman G of the National Lands Committee directed that the second respondent be allowed to farm on that land, and that the

applicant's offer be withdrawn. In addition, there was scarcely any farming activity taking place on the farm as the applicant was content with practising horticulture on less than a hectare of the 498 hectare farm, a clear sign of under-utilisation. H

Mathonsi J

A According to the first respondent, adequate notice was given to the applicant of the intention to withdraw the offer letter when the Vice-President's letter of 8 November 2007 was read out to him at that time, a fact which the applicant concedes. He therefore had three years to make representations.

The second respondent also confirmed in her opposing affidavit that a B meeting was held at the Governor's office on 13 November 2007 which was attended by the applicant and herself, at which the Governor read out the letter authored by Vice-President Msika to the effect that the applicant's offer letter was to be withdrawn and that she instead be allowed to farm the area.

Mr *Ochieng,* who appeared for the applicant, presented the applicant's case from two fronts, namely, contract and administrative justice. In respect of C contract, he submitted that once an offer letter is accepted, it constitutes a binding contract. While conceding that clause 7 of the offer letter entitles the first respondent to withdraw the offer letter, he insisted that it must be read with clause 4 thereof which reads:

> "You are requested to indicate on the attached form whether you accept this offer D or not, within 30 days of receipt of this offer".

Clause 7 reads:

> "The Minister reserves the right to withdraw or change this offer letter if he deems it necessary, or if you are found in breach of any of the set conditions. In the event of a withdrawal or change of this offer, no compensation arising from this offer shall be claimable or payable whatsoever".

E Attached to the offer letter forming the contract between the parties are "Conditions Applying to the offer of Land under the Zimbabwe Land Reform and Resettlement Programme (Phase II, Model A) Scheme". In terms of clause 1(b) thereof, the recipient of land is required to undertake and initiate development on the farm in accordance with the five year development plan submitted. Clause 3 reiterates that the offer may be cancelled or withdrawn F for breach of any of the conditions set out.

To the extent that the applicant seeks to enforce a contract arising out of an offer letter, he must certainly bring himself within the provisions of that contract. I agree with Mr *Mpofu* for the second defendant that if the applicant accepts the offer letter, he accepts it on the basis of its terms, including clause 7, G which gives the Minister unfettered power to cancel or withdraw the land as a result of a breach or "if he deems it necessary": *Munyaka* v *Masakwa & Anor* HH-341-12 at p 2.

The relationship between the parties is governed by a binding contract which gives the first respondent unfettered authority to withdraw the land from H the applicant if he deems it necessary or where there is a breach. Acting in

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Mathonsi J

terms of that authority, the first respondent withdrew the offer letter, as he A was entitled to do. Mr *Ochieng*'s view that the first respondent's right to withdraw only subsists within the period of 30 days after the recipient got the offer letter is clearly a wrong interpretation of the offer letter. Clause 7 makes it clear that such withdrawal can be made at any time if deemed necessary or where there is a breach. To hold otherwise would, in my view, amount to raving with the mob about the unattired Royal's beautiful attire. B

I conclude therefore that the first respondent was entitled to withdraw the offer letter of the applicant if he deemed that to be necessary or where the applicant was in breach of the terms of the offer letter. I have made reference to the conditions attaching to the offer of land under the land reform programme which required the applicant to undertake development according to a five C year plan. The applicant has not disputed that he was under-utilising the land. In fact he boldly stated in para 3 of this answering affidavit to first respondent's opposing affidavit that:

> "The scale of one's farming operations *viz* the size of land does not provide a basis for the 'lawful' withdrawal of an offer letter".

This is where the applicant has gone astray. The Government policy on land D reform is not recreational, neither is it designed to accord beneficiaries some pastime. It is meant to benefit those willing and able to utilise land. One cannot be allowed to hold on to large tracts of land one is not using simply to baby sit an inflated ego. If a beneficiary is not using the land, that is a breach of the conditions upon which that land is offered. It should therefore E be withdrawn and given to more deserving candidates. For the applicant to utilise less than a hectare, while leaving the remaining 497 hectares fallow, was scandalous. It entitled the first respondent to withdraw the offer, as he did.

I now turn to deal with the second leg of the applicant's case relating to administrative justice. In his heads of argument the applicant relied on F*Masunda* v *Minister of State for Lands & Anor* 2006 (2) ZLR 72 (H) in which this court set aside the Minister's decision to withdraw an offer letter issued to a beneficiary of the land reform programme and allocated the same farm to someone else on the grounds that the party whose offer letter was withdrawn had not been given an opportunity to be heard, in violation of the *audi alteram partem* rule. The court ruled that once an offer letter was G accepted within the stipulated time and in the prescribed manner, a contractual agreement was created which could not be withdrawn. At pp 77G-78A the court pronounced:

> "Secondly, it is a very basic administrative procedure that before one takes a decision that adversely affects the other, the affected individual must be given an opportunity to be heard. As correctly argued by the applicant this is a very H

> A basic tenet of the rules of natural justice. In administrative law, this concept is referred to as the *audi alteram partem* rule. It is part of our law".

In *Munyaka* v *Masakwa & Anor supra*, I left the question of whether to follow that reasoning or not open because I was of the view that that case was distinguishable from the *Munyaka* case, in that the applicant had not challenged the Minister's decision to withdraw the offer letter, whereas B*Masunda* had challenged it. *In casu* the applicant is challenging the Minister's decision to withdraw the offer letter.

Mr *Mpofu*, for the second respondent, urged me to depart from *Masunda*'s case on the basis that it was wrongly decided, because once the court accepted that an offer letter gave rise to a valid contract binding on the parties, it C was certainly applying contract law and could not, at the same time, apply administrative law rules. Significantly, Mr *Ochieng* did not advance any argument in support of the reasoning in *Masunda*'s case, electing instead to anchor his case on s 3 of the Administrative Justice Act [*Chapter 10:28*] as an alternative to the argument on contract law.

D With due respect to Bere J, by accepting that the acceptance of an offer letter gave rise to a binding contract, the court was in fact accepting the contract as the covenant governing the relationship of the parties. Put in another way, by appending their signatures to the written contract, the parties were accepting that their relationship was to be governed by that contract and nothing else. The applicant can therefore not seek refuge outside the four E corners of that written contract. The contract binding on the parties gave the Minister unfettered power to withdraw the offer letter. The applicant cannot, therefore, seek to defeat the imperatives of a contract he entered into with his eyes very wide open by importing rules of administrative law alien to the contract of the parties. In saying so, I am mindful of the fact that the State is capable of concluding binding contracts: *Acting Minister of Industry and Technology* F*& Anor* v *Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S).

I agree with Mr *Mpofu* that when the State concludes a contract, it is bound by its terms and not by rules of administrative law which apply when it is exercising State power over the subject.

I am fortified in that view by the fact that although the State has been issuing G uniform offer letters, raising the presumption that the offer letter in *Masunda* was similar to the one *in casu*, the court in that case did not address the implications of clause 7 of the offer letter.

I conclude therefore that the provisions of s 3 of the Administrative Justice Act do not come into effect because the parties are governed by the terms H of the offer letter creating a contract between them.

Mathonsi J

Even if I am wrong in that conclusion, I am of the view that the Act in question A would not rescue the applicant because, as submitted by Ms *Warinda* for the first respondent, the applicant was given adequate notice of the intended withdrawal of his offer letter. He himself admits having received that notice through the Governor. For Mr *Ochieng* to demand that the notice should have been in writing and addressed to the applicant is to worry about the form B and not the substance. There is nothing requiring the notice of an intention to act to be in writing. What is clear is that the applicant was notified three years earlier and had ample time to make representations. His argument that the notice should have been given by the first respondent and not by the Vice-President or the Governor cannot be taken seriously. It ignores the fact that Government operates following certain procedures and through various offices which complement each other. C

Mr *Mpofu* urged me to award costs on a punitive scale in light of the applicant's disdain of the provisions of the law having elected to pursue a political solution taking advantage of the chairman of ZANU PF's political clout on a legal dispute. In addition, right up to the time this matter was argued, the applicant remained rooted at the farm even as he had no lawful D authority to do so. In so doing he dirtied his hands. His conduct deserves the court's censure.

The time has come to remind citizens of this country that these courts are there to dispense justice in a country which prides itself with its strict adherence to the rule of law. To side step the due process of law in favour of something extra legal, and in the process bring the administration of justice E to disrepute, will be penalised with punitive costs.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

G N Mlotshwa & Co, applicant's legal practitioners F

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

Honey & Blanckenberg, second respondent's legal practitioners

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Source:
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KATSAMBA v KATSAMBA 2014 (1) ZLR 187 (H)

Citation	2014 (1) ZLR 187 (H)
Case No	Judgment No. HH-77-14
Court	High Court, Harare
Judge	Tsanga J
Heard	3 February 2014; *CAV*
Judgment	26 February 2014
Counsel	*E L Mvere,* for the plaintiff No appearance for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family law – child – divorce of parents – division of property and other consequences of divorce – effect on children – need for court to ensure that the best interests of the children are taken fully into account – constitutional imperatives to so ensure

D *Family law – husband and wife – divorce – division of property following divorce – effect of such division on children – need for court to ensure that the best interests of the children are taken fully into account – constitutional imperatives to so ensure*

Headnote

E The primary issue in this divorce action was the disposal of the matrimonial home. The husband had left the home, while the wife remained there with their two minor children. The husband wished to dispose of the house immediately, with the parties sharing 50-50, while the wife sought to delay the disposal of the house until the youngest of the children reached the age of majority, or became self-supporting.

F*Held,* that the approach to division of property on divorce in s 7(4) of the Matrimonial Causes Act [*Chapter 5:*13] is essentially evaluative. The considerations to be taken into account are both adult and child centred. Among the check list of factors to be examined by the court in exercising its evaluative discretion, are issues such as income earning capacity, financial needs, obligations and responsibilities, as they are likely to G affect each spouse and child for the foreseeable future. Section 7(4)(b), on future financial obligations and responsibilities, especially aims at ensuring that arrangements take into account the children's future needs before a divorce is finalised.

Held, further, that child rearing and caring duties and responsibilities continue H to be experienced differently by men and women in the face of rather

laboured progress towards dismantling stereotypical gender roles. On A divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. Thus, where a wife, as in this case, has performed the child rearing and caring role, relying largely on financial support from her husband, the reality of continuing such obligations post B separation, without adequate support, can be particularly detrimental for the physical and mental wellbeing of the spouse and the children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing, education and health care are met. In addition to time and emotional devotion that these responsibilities require, the C bottom line is that they need an assured source of income. Whilst an immediate partnership approach in the division of the matrimonial home especially as pressed for by the plaintiff, with each spouse getting 50% of the value of the house, may appear just and equitable as between the spouses, the very nature of the obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater D disadvantage compared to the husband.

Held, further, that the best interests of the child as a principle permeates our laws as they relate to children. Our new Constitution specifically incorporates children's rights within the thematic framework of the three pillars of protection, provision and participation that characterises the E UN Convention on Children's Rights, to which Zimbabwe is a party. Devoting separate provisions to children's rights is a clear indication of the role that the observation of children's rights is expected to have in building a just society. Section 81(1), (2) and (3) of the Constitution is an example of a protective provision within our Constitution, This F section is an inherent part of the Declaration of Rights and is binding and non-negotiable in every respect. Moreover, in terms of s 44 of the Constitution, the duty to respect fundamental rights rests not just on the State and its institutions but on every individual person as well. It is the duty of parents, as much as the State, to ensure that children have adequate education, health care, nutrition and shelter. In terms of s 81(3), G what is in the interests of the children is clearly not entirely in the private domain of the parents. Where there is cause for the court to intercede, it will. The non-payment of maintenance and the clear difficulties that the defendant had encountered in terms of enforcing the maintenance order required the court to exercise its discretion with regard to what would H

Tsanga J

A be in the best interests of the children, and whether the best interests of the children would lie in delaying the sale of the house.

In addition to the fundamental rights contained in the Declaration of Rights, s 19(1) and (2) of the Constitution, which falls under National Objectives, is also another protective provision in terms of children's rights. Thus the legal system, in addition to other mechanisms, is to be utilised in B the realisation of National Objectives. In particular the State, through the courts, is required to interpret laws and policies taking into account these National Objectives.

Financial arrangements and needs cannot be looked at outside existing circumstances and challenges that have already manifested themselves. C Given the difficulties the defendant had encountered in getting the plaintiff to pay maintenance, the sale of the house at this point would make the children's position extremely insecure. It is the role of the courts to minimise eventualities such as increased risks of poverty from inadequate post-divorce support arrangements that can often be brought to bear upon children as a result of their parents' divorce. The D sale should thus be delayed as prayed for.

Cases cited

Bannatyre v *Bannatyre* 2003 (2) SA 363 (CC)

Burger v *Burger* 2006 (4) SA 414 (D)

E*Mazorodze* v *Mazorodze* HH-245-11

Ncube v *Ncube* 1993 (1) ZLR 39 (S)

PL v *YL* 2013 (6) SA 29 (ECP)

Takafuma v *Takafuma* 1994 (2) ZLR 103 (S)

Legislation considered

F Constitution of Zimbabwe 2013, ss 8, 19, 26 & 81

Matrimonial Causes Act [*Chapter 5:13*], s 7

Case information

E L Mvere, for the plaintiff

No appearance for the defendant

Judgment

G**Tsanga J**: This is a divorce action in which the dispute for resolution before the court in finalising the divorce revolves around a single crucial asset – the matrimonial home. It is not that the parties are averse to sharing. They are not. Figuratively speaking, the court does not have to "bang any heads together" for the parties to see sense in sharing. It is not even the H percentage allocation which is at stake since both parties have come before

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the court embracing the spirit of *"hunhu/ubuntu",* at least within reasonable A measure. This is exemplified by their agreement even amidst ventilations and robust challenges of each one's contribution, that they should each have a fifty percent share of the value of this asset.

Be that as it may, what shapes the dispute before me is the question of timing in the disposal of this asset. The plaintiff, the husband in this matter, B presses for an immediate sale and sharing of proceeds from the disposal of the matrimonial home. His reasons relate to his immediate personal and changed circumstances that have stemmed from the irretrievable breakdown of the marriage. On the other hand, the defendant, the wife and custodial parent and hence the primary caretaker of the couple's two minor children, insists on suspending the sale until the children reach the age of 18 or are C self-supporting, whichever is sooner. Her reasoning and interests are relational to the

children rather than personal. As a mother and primary caretaker, her principal concern is that the sale would leave the children homeless and without a reliable source of income for their support. This is against the reality that the plaintiff has failed to abide by an existing maintenance order despite her vigorous efforts at its enforcement. She has thus resorted D to making ends meet by letting out two of the five rooms in the matrimonial home to tenants.

The major issue for trial is thus whether the sale should be staved off with the intention that the defendant and the children remain occupying the house until the children turn 18. Ultimately the dispute also boils down to E the question of what constitutes justice in family settings where a divorced couple is likely to maintain very different roles and responsibilities in looking after the children. The defendant had initially sought maintenance for herself as another trial issue but had abandoned this aspect at the time of the trial.

The facts F

The parties contracted a civil marriage under the Marriage Act [*Chapter* 5:11] in 1999. Two children were born of their marriage. Firstly, Bliss Munashe Katsamba, born on 12 July 1999, who is 14 years' old. Secondly, Tinashe Tyrod Katsamba, born on 16 August 2005, who is aged 9 at present.

The parties' marriage certificate records the bridegroom's name as Jeremiah G Mutsamba. He explained that, on obtaining his national identity card, his name was recorded as Katsamba instead of Mutsamba. He has since then been using the name Katsamba. The marriage certificate was indeed endorsed by the Registrar General of Marriages to read Jeremiah Katsamba in 2007.

Both parties agree that the marriage has irretrievably broken down. In his evidence in chief, the plaintiff stated that the parties have not been living H

Tsanga J

A together for the last four years. In happier times, the parties acquired the property in question, known as stand 9047 Nyamahuru, in Dangamvura Township in Mutare. This property was acquired as a vacant stand. Using proceeds from his employment at BP Service Station, he said he managed to erect a five roomed house, largely from his own contributions, as his wife was B not in paid employment. The plaintiff handed in his agreement of sale with the City of Mutare from whom he purchased the stand in question. He was nonetheless clear that he sought a 50-50 allotment of any sale proceeds from the immovable property. He also explained that since their separation, the defendant has been living in the matrimonial home with the minor children. He confirmed that tenants have been sharing the house and that his wife has C been receiving the proceeds.

With regard to selling the house when the younger child turns 18, he stated that this would be to his prejudice. This would be so since his intention is to build another house so as to have somewhere to stay, particularly in his doting years. This was an eventuality which he saw as looming in the D not too distant future. He feared that he would be too old to embark on the endeavour of building another house, were he to wait until the younger of their two children attains the age of 18. Worse still, he worried that he might be dead by the time this eventuality comes to pass. Compounding the need for an immediate sale, he put forward the further argument that he is not employed and needs some income. He highlighted that he does part-time E jobs as a driver.

The defendant's cross-examination of the plaintiff challenged his depiction of her as a housewife who sat on her laurels during the marriage. She brought out her work as a cross-border trader, an activity which she said the plaintiff frowned upon and stopped her from pursuing after the marriage. Equally F significant was her emphasis of how her domestic work kept the cogs of the family machinery running. Given the agreement by both parties regarding parity of proceeds, these ventilations by both parties were perhaps necessary for each to off load, but did not alter this aspect of their consensus.

The defendant also challenged the plaintiff on his claim of being largely G unemployed. She stated that he has a car which he uses as a taxi, which was bought during the subsistence of the marriage. The defendant's explanation was that he no longer owned that car as it was on a rent to buy and was repossessed when he failed to meet the payment targets. However, since no firm evidence was placed before the court to confirm the plaintiff's assertion that this vehicle was repossessed, I shall assume he does have the car which H he uses as a taxi as his means of support.

Tsanga J

The issue of maintenance was also raised in cross-examination amidst A objections by the plaintiff's counsel that this was an issue that the parties had already agreed will be governed by the existing maintenance order. I will return to this issue at some length. The plaintiff conceded that he is not paying maintenance, claiming the defendant's hostile attitude whenever he gives the children groceries as one of the reasons for not doing so. His claim was that he will be protecting the children from being assaulted. B

In her own evidence, the defendant emphasised that if the house is sold the children will have no means of survival, given that the plaintiff is in breach of the maintenance order. She informed the court that from the time he left the family in November 2010 to the time she officially claimed maintenance in the magistrates court in February 2012, the plaintiff had not provided C support for the children's upkeep. He paid briefly in 2012, but throughout the whole of 2013 and up to the time of the trial in January 2014 he has not paid. The maintenance order given by the magistrates court is for $50 per month for both children.

She informed the court that she struggles with unpaid electricity bills, with D school needs and general upkeep of the children. She also highlighted her endeavours to augment her income by working on farms and as a domestic worker. She said that she uses the money from the two lodgers to pay school fees for the children. She emphasised that as the plaintiff has already shown his unwillingness to pay maintenance, undue hardship would ensue for the children because she would not be able to pay rent whilst at the same time E using her proceeds to support the children. Her stance was that she would be better off receiving the money from rentals and remaining in the house with the two children. Given the difficulties she has encountered in enforcing the maintenance order, she indicated that she was even willing for it to be cancelled since it is serving no useful purpose. Regarding enforcement, her account was that, whilst warrants of arrest have been issued against the F plaintiff, he has never been arrested. She expressed little faith that the sale of the house would change the plaintiff into a "maintenance abiding" parent, given his nonchalant attitude thus far. She also revealed that the plaintiff has since met someone else with whom he is living in the low density suburb of Greenside, and that he has already fathered another child. Her assessment G was that the plaintiff cannot be that poor if he is residing in a low density suburb, and also if he can afford a lawyer when she herself had come to court as a self-actor because she genuinely cannot afford to engage counsel.

In his closing arguments, Mr *Mvere*, counsel for the plaintiff, emphasised that the defendant should follow the procedures for enforcing the maintenance given and that there are repercussions for failure to pay. He also stressed H

Tsanga J

A the fact that if the property is sold she will receive her half share. He further contended that she can pay $100 a month for alternative accommodation. The plaintiff, he reasoned, would be able to meet his arrear maintenance from the proceeds of the sale of the house, since his liquidity situation would greatly improve were the sale to be effected. The essence of his argument was that there are remedies for the fears that the defendant has raised.

B The defendant, on the other hand, closed her arguments by re-emphasising the difficulty of going after the plaintiff for maintenance and the significance of her remaining in the house in the interests of her children. She also stressed that the house is a small, simple house in the high density suburbs, not likely to fetch much in the sense of meaningfully financially empowering either C of them. She stressed that she would not even be able to build an informal structure, given the reality of the financial burdens she is already faced with. Moreover, her share would go towards the upkeep of the children whilst his would go towards the support of his new family.

The applicable laws and principles

D The division of property on divorce is governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Section 7(4) is pertinent to the issues raised in this matter and states as follows:

> "(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case including

(a) *the income earning capacity, assets and other financial resources* which *each spouse and child* has or is likely to have in the foreseeable future;

(b) *the financial needs, obligations and responsibilities* which *each spouse and child* is likely to have in the foreseeable future;

(c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;

(d) the age and physical and mental condition of each spouse or child;

(e) …

(f) …

and in so doing the court shall endeavour, as far as is reasonable and practicable and, having regard to their conduct , is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses" (emphasis added).

The approach to division of property on divorce in the Matrimonial Causes Act is essentially evaluative. The considerations to be taken into account are both adult and child centred. Among the check list of factors to be examined by the court in exercising its evaluative discretion, are issues such as income earning capacity, financial needs, obligations and responsibilities, as they

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are likely to affect each spouse and child for the foreseeable future. Section 7(4)(b), on future financial obligations and responsibilities, especially aims at ensuring that arrangements take into account the children's future needs before a divorce is finalised.

Child rearing and caring duties and responsibilities continue to be experienced differently by men and women, in the face of rather laboured progress towards dismantling stereotypical gendered roles. On divorce, more often than not, the parties to a marriage are left in the very same personal situation in terms of the roles and responsibilities that the marriage assigned to them. Thus, where a wife, as in this case, has performed the child rearing and caring role, relying largely on financial support from her husband, the reality of continuing such obligations post separation, without adequate support, can be particularly detrimental for the physical and mental well-being of the spouse and the children. The responsibilities that a divorced custodial parent can expect to face in relation to the children primarily include ensuring that their needs for shelter, food, clothing, education and health care are met. In addition to time and emotional devotion that these responsibilities require, the bottom line is that they need an assured source of income.

Whilst an immediate partnership approach in the division of the matrimonial home, especially as pressed for by the plaintiff, with each spouse getting 50% of the value of the house, may appear just and equitable between the divorcing spouses, the very nature of the obligations and responsibilities that the custodial parent is likely to face may in fact place her at a greater disadvantage compared to the husband. This is more so where she has to factor in accommodation, an indispensable need for the custodial parent. The house in question is a high density house and whatever it is likely to fetch will indeed undoubtedly be modest. The plaintiff would not be able to acquire another house from her half share. Even if she uses the proceeds for rentals, currently shouldering, as she does, the overall responsibilities for all the children's needs in the real world, will mean that proceeds would soon be dissipated.

In terms of income earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future, the plaintiff has indicated that he relies on part-time driving jobs. Since he has stopped paying maintenance, the assumption is that whatever he makes is now going towards supporting his new family. In the defendant's case, income from lodgers is her primary source of income. Whilst she sometimes works as a domestic worker and also does seasonal work on farms, these are fields of employment largely dominated by women and they traditionally

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attract less than optimum wages. The children are currently aged 14 and 9 and are still far from being self-supporting.

Turning to the financial needs, obligations and responsibilities which each spouse and child is likely to have in the foreseeable future, both parties have already experienced major shifts in their living arrangements. The reality is B that one more home has been created but certainly not without its challenges for the family left behind. For the plaintiff, the reorganising of the living arrangements resulting from his leaving the matrimonial home has clearly left him unable to support two households, as evidenced by his neglect to pay child support for his two children.

C Whilst the needs of children are factored into divorce proceedings, particularly by way of custody and maintenance arrangements, they are not essentially the decisive factor in terms of how property is shared. Much tends to centre on how property was acquired, who owns what and what can be termed as joint property. All the while, the court uses its evaluative discretion on how much equity to give a spouse or whether to transfer an asset from one spouse D to another. See *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S); *Ncube* v *Ncube* 1993 (1) ZLR 39 (S). In this case, since the parties are agreed on equity, the formulae in those cases is not what is at stake and needs no application.

Custodial parents do often raise the issue of prioritising children's needs rather than selling the matrimonial home. In *Mazorodze* v *Mazorodze* HH- E 245-11 (unreported), for example, the defendant's position as custodial parent was that the disposal of the property be delayed until the youngest child attained the age of 18. The court's view was that the maintenance order granted at $300 would sufficiently cater for the needs of the children with respect to accommodation and other needs. To augment this would be the F proceeds from the sale of the house. In ordering the sale of the house, the court also reasoned that this was a proper case of a clean break and a way of ensuring that the parties did not remain yoked for many years, given the circumstances peculiar to their divorce.

The best interests of the child, as a principle, permeates our laws as they relate G to children. Our new Constitution specifically incorporates children's rights within the thematic framework of the three pillars of protection, provision and participation that characterises the UN Convention on Children's Rights, to which Zimbabwe is a party. Devoting separate provisions on children rights is a clear indication of the role that the observation of children's rights is H expected to have in building a just society.

2014 (1) ZLR p196

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Section 81(1), (2) and (3) of the Constitution is an example of a protective A provisions within our Constitution. It states as follows in the relevant provisions:

> "81(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –
>
> (a) … B
>
> (b) …
>
> (c) …
>
> (d) to family or parental care, or to appropriate care when removed from the family environment;
>
> (e) … C
>
> (f) to education, health care services, nutrition and shelter;
>
> (g) …
>
> (2) A child's best interests are paramount in every matter concerning the child.
>
> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as upper Guardian." D

This section is an inherent part of the Declaration of Rights in the Constitution and is binding and non-negotiable in every respect. Moreover, in terms of s 44 of the Constitution, the duty to respect fundamental rights rests not just on the state and its institutions but on every person as well. It is the duty of parents as much as the state to ensure that children have adequate education, health care, nutrition and shelter. E

In terms of s 81(3) what is in the interests of the children is clearly not entirely in the private domain of the parents. Where there is cause for the court to intervene, it will. The non-payment of maintenance and the clear difficulties that the defendant has encountered in terms of enforcing the maintenance order under the Maintenance Act [*Chapter 5:09*] requires this F court to exercise its discretion with regard to what would be in the best interests of the children. Therefore, whilst recognising that the parties have a maintenance order, it is perfectly within the rights of this court,

as upper guardian in granting this divorce, to assess whether the best interests of the children lie in delaying the sale of the house.

In addition to the fundamental rights contained in the Declaration of Rights, G s 19(1) and (2) of the Constitution, which falls under National Objectives, is also another protective provision in terms of children's rights. It is couched as follows:

> "(1) The State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount. H

Tsanga J

> A (2) The State must adopt reasonable policies and measures, within limits of resources available to it, to ensure that children –
>
> (a) enjoy family or parental care or appropriate care when removed from their family environment
>
> (b) *have shelter, basic nutrition, health care and social services*
>
> (c) *are protected from maltreatment , neglect or any form of abuse*
>
> B (d) *have access to appropriate education and training"* (my emphasis).

In Chapter 2 of the Constitution, which deals with National Objectives, s 26(d) which deals with marriage and its dissolution provides as follows:

> "The State must take appropriate measures to ensure that –
>
> (a) …
>
> C (b) …
>
> (c) …
>
> (d) in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses."

Section 8 of the Constitution states that the purpose of the National D Objectives in Chapter 4 is to guide the State and all institutions and agencies of Government in formulating and *implementing laws and policy decisions* that will lead to the establishment of a just society in which people enjoy fulfilling lives. Thus the legal system, in addition to other mechanisms, is involved in the realisation of the National Objectives. In particular the State, through the courts, is required to interpret laws and policies taking E into account the National Objectives.

It is the duty of the court to ensure that the interests of the children are adequately protected before finalising a divorce order. The court cannot simply shy away from the maintenance issue on the basis that an order exists particularly when that order is not being followed. The general practice of F the courts, which is to ensure that the welfare of the children is adequately dealt with even where there is a consent order, is elaborated fully in *PL* v *YL* 2013 (6) SA 28 (ECG).

In the South African case of *Bannatyne* v *Bannatyne* 2003 (2) SA 363 (CC) for example, Mokgoro J, at p 377, aptly makes the following observations G concerning the non-payment of maintenance where such has been ordered by the courts –

> "Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure, for vulnerable children and disempowered women, their small but life sustaining legal entitlements. If court orders are H habitually evaded and defied with relative impunity, the justice system is

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> discredited and the constitutional promise of human dignity and equality is A seriously compromised for the most dependent on the law".

In yet another example, in *Burger* v *Burger* 2006 (4) SA 414, Ntshangase J addressed the issue of whether the proceeds from the sale of a house that were partly due to a spouse who had defaulted on paying maintenance could be attached. He observed that children's maintenance rights needed to be B secured and their rights to nutrition, shelter and basic health care services are basic constitutional rights. He granted an order restraining payment by the holder of the funds to the father until the children became self-supporting.

Financial arrangements and needs cannot be looked at outside existing circumstances and challenges that have already manifested themselves. In my view, given the difficulties the

defendant has encountered in getting the C plaintiff to pay maintenance, the sale of the house at this point would make the children's position extremely insecure. Most likely they are already experiencing considerable stress at the thought of likely having no place to stay. But more significantly, in my view, the amount of $50 month awarded for the two children evidently took into account that the children already had shelter. The application was made in 2012 at a time when the plaintiff had D already moved out of the house. The defendant was already making ends meet through letting part of the house to tenants. The standard of living of the family had already been radically altered by the separation of the spouses at the time the maintenance claim was made. The defendant's desire to delay the sale of the house is to enable her to continue providing shelter through an arrangement that was already in place at the time that the maintenance order E was granted. In my view, it is the duty of the court to facilitate rather than hamper this process of ensuring stability in the children's lives through an already existing arrangement, made in full knowledge of the circumstances by the court below.

Apart from the plaintiff's assertion that $100 a month can be used by the F defendant to meet accommodation costs were the house to be sold, no particulars for the children's proposed residence have been provided by him. It is the role of the courts to minimise eventualities such as increased risks of poverty from inadequate post-divorce support arrangements that can often be brought to bear upon children as a result of their parents' divorce. G

Both the plaintiff and the defendant are aged 40 and therefore are still in the prime of their lives. The plaintiff's fear that he will be too old to benefit from the sale of the property were he to wait until the younger child turns 18 is not a persuasive argument. He will only be 49, a respectable midlife point and hardly in his dotage by any standards. He will at that time have done what could have been reasonably expected of a loving and caring parent, H

Tsanga J

A in terms of prioritising children's needs as well as their best interests. His actions will also have helped to shape his children's sense of justice and moral development in ways that may come to influence how the children behave in the future. He will still have a minor child who will benefit from his "savings" from the delayed sale of this crucial asset which can only but increase in value.

B Accordingly, it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the two minor children, B and T, is awarded to the defendant, with the plaintiff having reasonable access as agreed to by the parties.
3. The maintenance order granted by the magistrates court remains binding C on the parties subject to any variations that may be made by the magistrates courturt from time to time.
4. The sale of the matrimonial property known as Stand 9047 Nyamahuru, in Dangamvura Township in Mutare, which is registered in the plaintiff's name, shall be delayed until the younger of the two minor children, namely D T, reaches the age of 18 years or becomes self-supporting, whichever is the sooner.
5. When the property is sold at the relevant time, the net proceeds shall be shared on a ratio of 50% for the plaintiff and 50% for the defendant.
6. The immovable property shall be valued by a registered estate agent E after the younger of the two minor children, reaches the age of 18 years or becomes self-supporting, whichever is the sooner.
7. In the event that the parties fail to agree on an estate agent at the relevant time as articulated in para 6, the Registrar shall appoint an estate agent from the list of valuers to conduct an evaluation of the property upon request by either party.

F 8. The cost of evaluation at the relevant time shall be shared equally between the parties.

9. The immovable property, at the relevant time, shall be sold at the best advantage at most within 60 days of the valuation and the net proceeds shall be shared in terms of para 5 of this order.

G 10. Each party to bear its own costs of suit.

Mutungura & Partners, plaintiff's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/HUGHBER PETROLEUM (PVT) LTD & ANOR v BRENT OIL AFRICA (PTY) LTD 2014 (1) ZLR 200 (H)

HUGHBER PETROLEUM (PVT) LTD & ANOR v BRENT OIL AFRICA (PTY) LTD 2014 (1) ZLR 200 (H)

Citation	2014 (1) ZLR 200 (H)
Case No	Judgment No. HH-78-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	20 February 2014; *CAV*
Judgment	26 February 2014
Counsel	First applicant in default *Second applicant*, in person *A B C Chinake*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Legal practitioner – conduct and ethics – tardy and chaotic conduct of practice – such conduct not acceptable to courts – costs de bonis propriis may be appropriate

Practice and procedure – affidavit – attestation – legal practitioner – affidavits D *must not be sworn before someone with an interest therein – legal practitioner has interest in any matter in which he is professionally involved – not entitled to attest affidavit of client*

Practice and procedure – postponement – application for – discretion of court in granting a postponement – duties of applicant – when appropriate to E *grant such an application*

Headnote

No justice of the peace or commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest. A legal practitioner, even if acting *pro amico* or *pro Deo*, has an interest in any matter in which he F is professionally involved. The reason for the rule is, historically, that it is the duty of a commissioner of oaths, before he administers the oath, to satisfy himself that the witness thoroughly understands what he is about to swear to and this duty is not likely to be effectively discharged by the person who prepared the affidavit, who may well explain it in the sense he himself attached to it. Any purported affidavit executed in G contravention of this rule is invalid.

The courts will never accept legal practitioners who elect to conduct their practices tardily and in a chaotic manner to extend such tardiness and chaos to the doorsteps of the court. Courts of law have a duty, not only to conduct their affairs in a dignified and transparent manner in dispensing justice, but also to protect their integrity against the machinations of the H

Mathonsi J

A bad elements in the profession. Legal practitioners who take the court for granted in this manner run the risk of having costs granted against them *de bonis propriis* in order to discourage egregious departures from proper standards of professional behaviour.

The court has a discretion, which should be exercised judiciously, to grant or refuse an application for a postponement where the reason for a party's B non-preparedness has been fully explained and the inability to proceed is not due to delaying tactics. However, an application for a postponement must be made timeously as soon as the circumstances justifying it become known. It must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage. Considerations of prejudice will ordinarily constitute the dominant component of the C total structure in terms of which the discretion of the court be exercised.

Cases cited

Manyika v *Manyika* 1983 (2) ZLR 198 (H)

Chafanza v Edgars Stores Ltd & Anor 2005 (1) ZLR 299 (H)

D*Viking Woodwork (Pvt) Ltd v Blue Bells Entprs (Pvt) Ltd* 1998 (2) ZLR 249 (S)

Sai Entprs (Pvt) Ltd v Girdle Entprs (Pvt) Ltd 2009 (1) ZLR 352 (H)

Ncube v CBZ Bank Ltd HB-99-11

Myburgh Tpt v Botha 1991 (3) SA 310 (NSC)

E*Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 63 (1), 227(4) and 230

F Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*], ss 8 and 11

Justices of the Peace and Commissioners of Oaths (General) Regulations 1993 (SI 183 of 1998), s 2(1)

Case information

First applicant in default

Second applicant in person

G*A B C Chinake,* for the respondent

Judgment

Mathonsi J: This rescission of judgment application embodies everything that legal practitioners should not do in the practice of law and typifies egregious departures from proper behaviour which is taking root in the legal profession and should be discouraged at all costs. In fact the matter should H present a perfect case study for an ethics class.

2014 (1) ZLR p202

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The respondent sued the two applicants herein in HC 1292/12 for a sum of A US$677 366 in respect of diesel fuel they had allegedly appropriated. The summons was served on the applicants on 6 February 2012 but they did not enter appearance until the *dies induciae* expired. The expiration of the *dies* did not stop the applicants, through their then legal practitioners, Musarira Law Chambers, from purporting to enter appearance on 21 February 2012, out of time. Interestingly, the document purports that appearance was entered on B 8 February 2012 when it is dated 21 February 2012. They were represented by Anesu Vhusani Bangidza, who later deposed to an affidavit in support of the application for rescission of judgment.

Notwithstanding the applicants' belated and indeed ill-conceived effort, given the automatic bar firmly gripping them, judgment was entered against C them in default on 1 May 2012. In pursuance of that judgment, a writ of execution was issued and the applicants' property attached in execution

on 11 June 2012, meaning that the applicants then became aware of the default judgment. Despite such knowledge, the applicants did not file an application for rescission until 29 August 2012 when they purported to file one clearly outside the one month period provided for in r 63(1) of the High Court Rules, D 1971. When they did so, they had not sought condonation for the late filing of the application.

As if the late filing of the application was not bad enough, as it meant that the application was improperly before the court, the so-called application was not in Form 29 as required by r 230 of this court's rules which provides: E

> "The court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
>
> Provided that where a court application is not to be served on any person it shall be in Form No. 29B with appropriate modifications."

This particular court application had to be served on the respondent as required F by the rules. It had to be in Form 29 which gives notice to the respondent and the requisite *dies induciae* for filing opposition. The applicants invented their own form of the application in violation of the rules and no amount of protestation given in writing by the respondent's counsel could move them. That non-compliance remains to this day: *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR 101 (H). G

More importantly, although r 230 as read with r 227(4) requires a court application to be supported by affidavit, this application is supported by an "affidavit" commissioned by the applicants' then legal practitioner Anesu Vhusani Bangidza, who had purported to enter appearance on behalf of the applicant. The ubiquitous Bangidza also deposed to a supporting affidavit H

Mathonsi J

A expressing surprise at how default judgment was entered when he had entered the appearance in the appearance book. Never mind that it was out of time and that although he did so and even signed the appearance on 21 February 2012, he dishonestly entered the date on the body of the appearance as 8 February 2012. So much for professional etiquette and ethical conduct.

B As to how a legal practitioner could administer an oath of a client is an unfathomable mystery. Section 8 of the Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*] provides:

> "A justice of the peace or commissioner of oaths, may within the area for which he has been appointed, administer an oath to any person:
>
> Provided that he shall not administer an oath in respect of any matter in relation C to which he is, in terms of any regulation made under s 11 prohibited from administering an oath".

Section 11 empowers the Minister to make regulations prescribing the circumstances under which such prohibition applies, which regulations are the Justices of the Peace and Commissioners of Oath (General) Regulations D (SI 183 of 1998) s 2(1) of which provides:

> "No justice of the peace or commissioner of oath shall attest any affidavit relating to a matter in which he has any interest".

That a legal practitioner has an interest in a matter involving a client is pretty obvious.

E I associate myself fully with the pronouncement made in *Manyika* v *Manyika* 1983 (2) ZLR 198 (H) that:

> "The 'interest' that excludes a commissioner of oaths from attesting an affidavit is some participation in those proceedings as to advantage or responsibility. A legal practitioner, even if acting *pro amico* or *pro deo*, has an interest in any matter in which he is professionally involved. The reason for the rule is, historically, that it is the duty of a commissioner of oaths, before he administers the oath, to satisfy F himself that the witness thoroughly understands what he is about to swear to and this duty is not likely to be effectively discharged by the person who prepared the affidavit, who may well explain it in the sense he himself attached to it".

See also *Chafanza* v *Edgars Stores Ltd & Anor* 2005 (1) ZLR 299 (H)

Mr Bangidza may not be the one who prepared the affidavit in support of G this application, the applicants having divested themselves of his services following the appearance to defend debacle, in deference to Chinogwenya & Zhangazha and later M C Mukome. He, however, remained with a vested interest in the matter, if for nothing but that he is the one who entered appearance out of

time. He would certainly want to influence the outcome to clear his name, especially as he has learnt nothing from that experience, H believing, as he does, that he did nothing wrong.

2014 (1) ZLR p204

Mathonsi J

There can be no doubt that the founding affidavit of the second applicant A is invalid as it was not properly attested by a commissioner of oaths. This, coupled with the fact that the application itself is not in the form prescribed by the rules, means that there is no application at all. I have not been asked to condone any departure from the rules. Even if I was inclined to do so in the exercise of my discretion, I would find it hard to do so given that such discretion should be exercised judiciously. The application is incurably B defective.

I must, however, point out that even the defective application was filed out of time, the heads of argument were also filed out of time, meaning that the applicants' counsel was barred. As the second applicant appeared in person, the issue of the bar relating to the untimely heads of argument fell away. C I, however, cannot overlook it as it illustrates the unbelievable tardiness, the dilatoriness, the disdain and indeed the contemptuous manner in which all the legal practitioners who have cared to represent the applicants, have approached this matter.

I have already stated that the appearance to defend was filed out of time D and no attempt was made to give an explanation for the delay. Instead, the legal practitioner involved, with no trace of regret, doggedly maintained that there was nothing wrong.

In addition, although the applicants were aware of the default judgement on 12 June 2012, and even rendered a payment plan, this application was only filed on 29 August 2012, well outside the one month period prescribed E by the rules. No application for condonation was made meaning that right up to the date of hearing the applicants expected to be heard on the merits of an application filed out of time without seeking condonation. It has been repeatedly stated that an applicant who intends to bring a rescission of judgement application out of time must first seek condonation for the delay. F

Without an application for condonation, no indulgence can be extended to such an applicant: *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises Ltd* 1998 (2) ZLR 249 (S); *Sai Enterprises (Pvt) Ltd* v *Girdle Enterprises (Pvt) Ltd* 2009 (1) ZLR 352 (H); *Ncube* v *CBZ Bank Ltd & Ors* HB-99-11 at p 4.

At the hearing of this matter, the applicants' counsel did not bother to G attend court. Instead, he sent the second respondent and an inappropriately dressed representative of the first respondent with a letter, dated the same date addressed to the respondent's legal practitioners and copied to my clerk which reads in relevant part thus:

> "RE : HUGHBER PETROLEUM (PVT) LTD & ANOR V BRENT OIL:CASE NO. HC 1292/12 H

2014 (1) ZLR p205

Mathonsi J

> A Reference is to the above subject. Kindly be advised that our Mr Chekai who is handling the matter is attending to a family emergency in his rural home in Chibi, which emergency was occasioned by flooding of the Tokwe Mukosi river. We kindly request that the matter be postponed to 6 March or any day thereafter to enable him to attend. We thank you in advance."

Now, this can be nothing but holding the court in contempt. Kantor & B Immerman are not the court and certainly do not postpone matters. It is the court that does. The law firm of M C Mukome did not have the courtesy or indeed the integrity to send a legal practitioner to attend court and seek a postponement, if indeed there was a valid reason for that. Instead they sent their client to do that with a letter suggesting that a postponement was C always there for the taking, not even the asking. Even the story about a legal practitioner attending to floods in rural Chibi sounds as fictitious as it is dishonest. Mr *Chinake,* for the respondent, submitted that he had been handed the letter by the applicants in court. In addition to that, this matter was postponed on a previous date, 12 September 2013, to enable the applicants' counsel to file an application for condonation of the late filing of heads of D argument. Such application was not filed.

These courts will never accept legal practitioners who elect to conduct their practices tardily and in a chaotic manner to extend such tardiness and chaos to the doorsteps of the court. Courts of law have a duty, not only to conduct their affairs in a dignified and transparent manner in dispensing justice, but E also to protect their integrity against the machinations of the bad elements in the

profession. Legal practitioners who take the court for granted in this manner run the risk of having costs granted against them *de bonis propiis* in order to discourage egregious departures from proper standards of professional behaviour. The law firm of M C Mukome is fortunate that Mr *Chinake* did F not press for such costs, electing to seek punitive costs only against the applicants. I do not see the reason why such costs should not be granted.

The unrepresented second respondent sought a postponement as decreed by his counsel. Now, the court has a discretion, which should be exercised judiciously, to grant or refuse an application for a postponement. The court would be slow to refuse a postponement where the reason for a party's G non-preparedness has been fully explained and the inability to proceed is not due to delaying tactics. However, as stated in *Myburgh Transport* v *Botha* 1991 (3) SA 310 (NSC) at 315C-D, an application for a postponement must be made timeously as soon as the circumstances justifying it become known. It must always be *bona fide* and not used simply as a tactical manoeuvre for H the purposes of obtaining an advantage. Considerations of prejudice will

Mathonsi J

ordinarily constitute the dominant component of the total structure in terms A of which the discretion of the court will be exercised.

I refused the application because it lacked *bona fides* and was clearly a *ruse* to delay proceedings by an extremely contemptuous legal practitioner. Over and above that, as demonstrated above, the application suffered a still birth. The second respondent did make submissions on the merits, which did not B help the applicants' case at all. In the light of the foregoing, and the fact that the respondent has been subjected to wasteful court proceedings, brought on spurious grounds in order to stave off the day of reckoning, costs will be awarded on a punitive scale.

In the result, the application is hereby dismissed with costs on the legal practitioner and client scale. C

M C Mukome, applicants' legal practitioners

Kantor & Immerman, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/MUKAMBIRWA & ORS v GOSPEL OF GOD CHURCH INTERNATIONAL 1932 2014 (1) ZLR 207 (S)

MUKAMBIRWA & ORS v GOSPEL OF GOD CHURCH INTERNATIONAL 1932 2014 (1) ZLR 207 (S)

Citation	2014 (1) ZLR 207 (S)
Case No	Judgment No. S-8-14
Court	Supreme Court, Harare
Judge	Gowora JA, Garwe J & Omerjee JA
Heard	29 October 2012; *CAV*
Judgment	27 February 2014
Counsel	*T Magwaliba,* for the appellants *E Samkange*, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Court – contempt – committal for – what party seeking committal must show – need for order to have been served personally on party in respect of whom committal sought

D *Practice and procedure – application – counter-application – how counter-application should be filed – failure to comply with required format for counter-application – counter-application invalid*

Headnote

The crime of contempt of court is committed intentionally and in relation E to administration of justice in the courts. The object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such an order may render the other party without a suitable, or any, remedy, and at the same time constitute disrespect for the court which granted F the order. Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do; that knowing what the order dictates, the individuals concerned deliberately G and consciously disobeyed the order. In addition to that, the court must be satisfied that, not only was the order not complied with, but also that the non-compliance on the part of the defaulting party was wilful and *mala fide*. An applicant seeking such an order must set out clearly in his application such grounds as will enable the court to conclude that the onus of proving the contempt resting upon the applicant has been H discharged. The applicant must also prove that the respondent has failed

to comply with the order. Before seeking to enforce an order through A contempt proceedings, it is necessary to prove that the judgment or order which is alleged to have been disobeyed has been properly served. The applicant must also show that the order with which the respondent has failed to comply has either been served upon him personally or has come to his personal notice. The general rule is that no judgment or court order will be enforced by process of contempt unless a copy of B the order has been served personally on the person required to do or abstain from doing the act in question.

Applications, both chamber and court applications, are provided for under Order 32 of the High Court Rules 1971. The format for an application is set out in r 227, which provides that every written application, notice C of opposition and supporting and answering affidavit shall contain the documents specified therein and the form that it shall be in. Rule 229A, on the other hand, specifies how a respondent, in addition to filing a notice of opposition and opposing affidavit, may file a counter-application, and the rule provides how this should be done. Where a respondent wishes to file a counter-application in addition to filing an D opposing affidavit, the rules require that a separate application be filed in the requisite form. Subrule (2), which provides for the format to be followed in filing a counter-application, is peremptory in its terms and in the absence of compliance with the form required there can be no valid counter-application. This rule is, like other procedural rules, subject to E the overriding discretion of the court. In the exercise of such discretion, the court would obviously only sanction a departure from the general rule on good cause shown. Further, and in any event, in terms of r 229A, both applications must be heard together unless an order for the hearing of the counter-application has been granted by a judge. The rules require that good cause be shown for an order for the counter-application to F be heard separately from the main application. Good cause can only be established upon application to a judge or the court.

Cases referred to

Coffee, Tea & Chocolate Co Ltd v *Cape Trading Co* 1930 CPD 82

Haddow v *Haddow* 1974 (1) RLR 5 (G) G

Lindsay v *Lindsay (2)* 1995 (1) ZLR 296 (S)

Mangwiza v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (S)

Mobil Oil (Pvt) Ltd v Travel Forum (Pvt) Ltd 1990 (1) ZLR 67 (H)

Moyo v *Macheka* S-55-05

Sheelite King Mining Co (Pvt) Ltd v *Mahachi* 1998 (1) ZLR 173 (H) H

Gowora JA

A*SOS Kinderdorf International* v *Effie Lentin Architects* 1993 (2) SA 481 (Nm)

Whata v *Whata* 1994 (2) ZLR 277 (S)

Legislation considered

B High Court Rules 1971 (RGN 1047 of 1971), rr 39(1), 227, 229A(2)(a) & 449(1)

Case information

T Magwaliba, for the appellants

E Samkange, for the respondent

Judgment

C**Gowora JA**: The respondent in this case, the Gospel of God Church International 1932 (hereinafter referred to as "the Church") was founded by one Johane Marange in 1932. Since it was founded the Church has spread to a large portion of the continent. Its headquarters are located in Zimbabwe. The founder is buried at Marange, wherein a shrine in his memory has been established. The Church has also over the years acquired considerable D assets, both movable and immovable. The very existence of the shrine and the assets has produced strife between the followers of the Church which has seen countless disputes between competing factions and interests being filed for adjudication by these courts.

The present appeal is concerned with a dispute surrounding regalia associated E with the Church as well as other property belonging to the Church, and who should legally possess such items. The background to this appeal is as follows. On 8 September 2009, the Church, under case no. HC 4101/09, filed a court application for certain relief, the particulars of which do not appear from the record. The appellants, to whom the application was addressed, then filed a notice of opposition to which an opposing affidavit was attached. F Incorporated in the notice of opposition was a counter-application, and notwithstanding the absence of a formal application for a counter-application, in the opposing affidavit the appellants made reference to such counter-application and attached a draft order to the opposing affidavit. The Church, for reasons that are not germane to the resolution of this dispute, did not file G an answering affidavit.

Sometime in October 2009 officers of the Church discovered that the "counter-application" referred to in the opposing affidavit filed under case no. HC 4010/09 had been granted by the High Court on 28 October 2009 in motion court. It is common cause that the Church had not been served with a notice of set down. As a consequence, the Church, under case no. HC H 5403/09 filed a court application for the rescission of the default judgment

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in question. The High Court ordered that the default judgment granted on A 28 October 2009 under case no. HC 4101/09 be set aside.

Following upon the default judgment under case no. HC 4101/09, which was concerned with relief under the counter-application, the appellants sought compliance with the order from the Church and those of its members whom they considered to be bound by the order. The Church, however, did B not comply with the default order and chose instead to have the judgment rescinded, resulting in the appellants instituting an application for contempt under case no. HC 976/10. Even though the order

under the counter-application had been obtained against the Church only, the appellants, under case no. HC 976/10 sought an order of contempt against the Church, Zebron Pedzisai Nengomasha, Era Tapera, Jacob Machiha, Sara Muungani, Sesi C Catherine and Masawi Mhizha. The order also sought for the committal of the named respondents to prison for contempt. The allegations against the respondents, including the Church, were that they had failed or refused to comply with the order issued in default against the Church and granted in the counter-application. D

Both applications, for rescission and for contempt of court, were placed before one judge who then caused them to be set down for hearing at the same time. As a consequence, the learned judge granted the application for rescission and set aside the order granted under the counter-application. The application for an order for contempt was dismissed. The terms of the composite order issued by the court are as follows: E

> "For the avoidance of doubt the order of the court in HC 5403/09 is as follows:
>
> 1. That the order granted by this court on 28 October in HC 4101/09 be and is hereby set aside.
> 2. That the applicant is granted leave to file the answering affidavit to the application in HC 4101/09 within seven (7) days of this order. F
> 3. That the respondents shall pay the applicant's costs.
>
> The order of the court in HC 976/10 is as follows:
>
> It is ordered that the application be and is hereby dismissed with costs."

It is against the above order that the appellants have appealed to this court. The grounds on which the appeal is premised are the following: G

That the court *a quo* erred and misdirected itself in:

1. Granting the respondent audience when the respondent was in clear contempt of court.
2. Treating the application in question as an application made in terms of r 449 of the High Court Rules. H

Gowora JA

A 3. Ruling that the default judgment was erroneously granted in circumstances where the judge had condoned non-compliance of the rules.

Whether the court should have denied audience to the respondents due to dirty hands

It was contended by the appellants that a court should deny audience to a B party that is in contempt of court. It was further argued on behalf of the appellants that the Church had not complied with the default judgment granted under case no. HC 4101/09 and that consequently the Church should have complied with the judgment before seeking its rescission. The contention by the appellants is that the respondent and its agents were aware of the judgment as an application for its rescission was filed. The appellants C submitted further that the Church and its human agents had a duty, at law, to abide by the order notwithstanding their views about the nature of the order and the application for rescission which was pending before the court. It was argued further that the Church was not entitled to simply ignore the order or refuse to abide by it on the premise that the order was invalid.

D The order granted under case no. HC 4101/09 was in the following terms:

1. The respondents (appellants in this case) be and are hereby declared to have a right to peacefully visit and worship at the shrine.
2. Sister Dazi Dhliwayo be and is hereby declared the lawful president.
3. All church members who recognize Era Tapera as president, including E Zeburon Pedzisai Nengomasha be and are hereby ordered not to unlawfully prohibit the respondents and other church members from visiting at the shrine.

All the applicant's purported officer bearers listed in the application be and are hereby ordered to maintain peace towards the respondents.

F 4. Each party to meet its own costs.

The crime of contempt of court is committed intentionally and in relation to administration of justice in the courts. This was captured in lucid terms by Ziyambi JA in *Moyo* v *Macheka* S-55-05 at p 7 of the judgment, quoting with approval Goldin J in *Haddow* v *Haddow* 1974 (1) RLR 5 (G), at 8A-C thus;

> "The object of proceedings for contempt is to punish disobedience so as to enforce an order of court and in particular an order *ad factum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may render the other party without a suitable or any remedy, and at the same time constitute disrespect for the court which granted the order."

See also *Whata* v *Whata* 1994 (2) ZLR 277 (S), *Sheelite King Mining Company (Pvt) Ltd* v *Mahachi* 1998 (1) ZLR 173 (H).

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Before holding a party to be in contempt of a court order, a court must be satisfied that there is a court order which is extant, that the order has been served on the individuals concerned and that the individuals in question know what it requires them to do or not do, that knowing what the order dictates, the individuals concerned deliberately and consciously disobeyed the order.

In addition to the above, the court must be satisfied that, not only was the order not complied with but also that the non-compliance on the part of the defaulting party was wilful and *mala fide*. In *Lindsay* v *Lindsay (2)* 1995 (1) ZLR 296 (S) Gubbay CJ said at 299A-C:

> "The finding was *res judicata*. In none of the subsequent proceedings was any new or different circumstances revealed; nor could they have been. I entertain no doubt that Garwe J was correct in concluding that the appellant remained bound by the order and had failed to comply with it.
>
> Once it was established that the order had not been met, which of course was common cause, wilfulness and *mala fides* on the part of the appellant was properly inferred, with the onus upon him to rebut the inference on a balance of probabilities. See *Haddow* v *Haddow* 1974 (1) RLR 5 (G) at 6; *Gold* v *Gold* 1975 (4) SA 237 (D) at 239F-G. It may be, as indicated by Baker AJ (as he then was) in *Consolidated Fish Distributors (Pty) Ltd* v *Zive & Ors* 1968 (2) SA 517 (C) at 521A-522A that wilfulness and *mala fides* are identical in direct contempt cases, whereas *mala fides* is an essential element in "constructive contempt". However that may be, I agree with the learned judge that the appellant failed completely to discharge the requisite onus."

An applicant seeking such an order must set out clearly in his application such grounds as will enable the court to conclude that the onus resting upon the applicant of proving the contempt has been discharged. The applicant must also prove that the respondent has failed to comply with the order. It is trite that before seeking to enforce an order through contempt proceedings, it is necessary to prove that the judgment or order which is alleged to have been disobeyed has been properly served. The applicant must also show that the order with which the respondent has failed to comply has either been served upon him personally or has come to his personal notice. The general rule is that no judgment or court order will be enforced by process of contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

In considering whether or not the appellants can rightly contend that the Church's officers were guilty of contempt of court, it is necessary to have regard to the order issued in favour of the appellants. Paragraph 1 of the order grants the appellants a right to worship at the church and does not appear to require discussion. Paragraph 2 is a declaratur in favour of one of the widows of the founder and requires no further comment. Paragraph 3 is

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an interdict which appears to be directed at all members of the respondent who belong to a particular faction of the respondent. The last two paragraphs also require no comment.

The learned judge in the court *a quo* found, rightly so in my view, that in the main application, the Church was the only applicant and therefore it could be the only respondent in the counter-application. The learned judge said:

> "… Thus the parties cited as respondents in HC 976/10 were not parties to the proceedings in HC 4101/09. As they were not parties to the matter in HC 4101/09 there would be no justification for them being cited as respondents in the application for contempt of court. If there is any justification for so citing them it would still be necessary for them to each be personally served with the order and the application. With the exception of the second respondent who was served with the court application for contempt of court on 19 February 2010, there is no such evidence of personal service on the rest of the respondents. Notably, service on the second respondent was effected at 19534 Unit E, Seke, Chitungwiza. The return of service

by the Deputy Sheriff who proceeded to serve the order in HC 4101/09 at Gandanzara states that the order was 'served D on the ground'.

In the circumstances, the order having been apparently left or placed on the ground there was no service on any specific person. Neither is there any evidence that the respondents or any of them prevented the Deputy Sheriff from effecting service. The three people who are named as and said to have been among the group of people that prevented the Deputy Sheriff from effecting service are E not parties in this matter …

… There is also no evidence to the effect that the second respondent was party to the conduct alleged to constitute the contempt complained of by the applicants. There is no evidence that he was at the shrine at Gandanzara on 3 February 2010 when the applicants allege they were prevented from entering the shrine. He is not named in the applicants' affidavits as having been part of the group that F prevented the applicants from entering the shrine. It is of note that the application for contempt of court was not served on any of the respondents."

The court *a quo* correctly found that the appellants had not established that an order had been granted against all the respondents against whom the order of contempt was sought, with the exception of the Church. The appellants did not show that the order had been served against any of the respondents, G and further, that having been served with the order any of the respondents wilfully disobeyed it. The only proof of service filed in relation to the order was that service had been effected on the ground. This does not constitute service for an order for contempt, especially where an order for commitment follows upon a finding of guilt. For such an order the rules of the High Court H require personal service in peremptory terms:r 39 (1).

Gowora JA

Further to this, the Church cannot be subject to an order or committal. A Consequently, in the circumstances of the case, the court could not find that any of the parties cited was guilty of contempt of court.

In my view, the learned judge was justified in dismissing the application for an order of contempt.

Whether the judge in the court *a quo* erred in invoking r 449 of B the Rules of the High Court

Applications, both chamber and court applications, are provided for under Order 32 of the High Court Rules 1971. The format for an application is set out in r 227, which provides that every written application, notice of opposition and supporting and answering affidavit shall contain the documents specified C therein and the form that it shall be in. Rule 229A on the other hand specifies how a respondent, in addition to filing a notice of opposition and opposing affidavit, may file a counter-application, and the rule provides:

(1) Where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents, a counter-application against the applicant in the form, *mutatis mutandis*, of a court application or a D chamber application, whichever is appropriate.

(2) This order shall apply, *mutatis mutandis*, to a counter-application under subrule (1) as though it were a court application or a chamber application, as the case may be, and subject to subrules (3) and (4), it shall be dealt with at the same time as the principle application unless the court or a E judge orders otherwise.

(3) If, in any application in which the respondent files a counter-application under subrule (1), the application is stayed, discontinued or dismissed, the counter application may nevertheless be proceeded with.

(4) The court or a judge may for good cause shown order an application or F counter-application filed under subrule (1) to be heard separately.

The appellants had properly filed a notice of opposition to which they attached an opposing affidavit after being served with a court application instituted on behalf of the Church. Instead of filing a counter-application in the prescribed form, they made reference to a counter-application in the opposing affidavit. Consequently there was no founding affidavit to the counter-application as G it was in the opposing affidavit that they sought to make out a case for the relief sought in terms of a draft order attached to the opposing affidavit.

Where a respondent wishes to file a counter-application in addition to filing an opposing affidavit, the rules require that a separate application be filed in the requisite form. Subrule (2), which provides for the format to be followed H

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Gowora JA

A in filing a counter-application, is peremptory in its terms and in the absence of compliance with the form required there was no counter-application before the learned judge who granted the default judgment in favour of the appellants. The High Court found, correctly in my view, that there was no valid counter-application filed by the appellants.

B In *Coffee, Tea & Chocolate Co Ltd* v *Cape Trading Co* 1930 CPD 82 Gardiner JP set out clearly that in an application the cause of action is made out in the founding affidavit. He said the following:

> "A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in in support of the affidavit filed upon the notice of motion. The result of this practice is either C that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now these affidavits of Barnes, Turnbull, Lee, Gardner and Lang should in my opinion properly have been put in in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put in at this stage."

This *dictum* was reiterated by Reynolds J in *Mobil Oil (Pvt) Ltd* v *Travel*D*Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70C-E where the learned judge said:

> "It is a well-established general rule of practice that new matter should not be permitted to be raised in an answering affidavit: the cause of action must be fully set out in the founding affidavit. This has been the settled practice of our courts at least since the matter was adverted to in *Coffee, Tea and Chocolate Co Ltd* v *Cape Trading Co*, *Ltd* 1930 CPD 81 at 82. As remarked by Samatta J, E however, in *Mitton* v *Alcock NO & Ors* HH 21-87, at p 7 of the cyclostyled judgment: "It is, like other procedural rules, subject to the overriding discretion of the Court." In the exercise of such discretion, the court would, obviously only sanction a departure from the general rule on good cause shown."

See also the remarks of Sandura JA in *Mangwiza* v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (S) at 492E-G.

F Further, and in any event, in terms of r 229A both applications must be heard together unless an order for the hearing of the counter-application has been granted by a judge. The rules require that good cause be shown for an order for the counter-application to be heard separately from the main application. (r 229A (4)). It follows that good cause can only be established upon application to a judge or the court, and in this case it is common cause G that no application was filed by any of the parties to the dispute for an order for the counter-application to be heard separately.

As a consequence, I can only conclude that the learned judge who granted the order sought in the counter-application was not empowered in terms of the rules to hear the counter- application separately in the absence of an H order authorising such a procedure.

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Gowora JA

The counter-application was clearly defective for want of form and the learned A judge in the application for rescission was correct in her finding that the counter-application did not meet or satisfy the requirements stipulated by the rules. Further to this, as correctly found by the learned judge, if the counter-application had been dealt with at the same time as the main application, in all probability the shortcomings of the counter-application would have been brought to the attention of the court and the defective counter-application B might not have been granted.

In considering the application for rescission, it is common cause that the learned judge invoked the provisions of r 449 in rescinding the judgment and thus dealt with the order as one made in error. It is correct, as contended by the appellants, that the Church had not premised its application on the C grounds of an alleged error, but rather as an application for rescission of a judgment granted in default, as provided under r 63. The learned judge did not in her judgment make reference to r 63. She referred to r 449. Rule 449, under which the court determined the application for rescission, reads:

> "(1) The court or a judge may, in addition to any other power it or he may have, D*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) … E

(2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that the parties whose interests may be affected have had notice of the order proposed."

The High Court is a superior court with inherent jurisdiction to protect and regulate its own process and to develop the common law, taking into account F the interests of justice. In the exercise of this inherent power, the High Court promulgates rules of court designed to expedite and facilitate the conduct of court business of the court. In terms of r 449(1) the court has the power to correct, vary or rescind a judgment, either on its own motion or upon the application of a party affected by the judgment in issue. G

The founding affidavit in support of the application for rescission clearly adverted to the grounds that the Church had not been in default, but the heads of argument filed on its behalf took the point that the judgment had been erroneously sought, and further that the judgment had been granted in error. This was a point of law, and in my view, the learned judge in the court *a quo* was entitled to consider the application based on the submissions in the heads H

Gowora JA

A of argument notwithstanding that the premise upon which the application for rescission was based differed to what was being argued.

Under the rules the judge is empowered to invoke r 449 *mero motu*, or upon application, and in the event that the Church had not done so, the court could have on its own volition dealt with the matter under r 449. In view of the B inherent powers of the High Court it is open to the court to correct any of its orders which exhibit patent errors. The inherent power of the High Court was affirmed by Levy J in *SOS Kinderdorf International* v *Effie Lentin Architects* 1993(2) SA 481 at 492 as follows:

"Under the common law the courts of Holland were, generally speaking, empowered C to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the courts. This discretion extended beyond and was not limited to the grounds provided in Rules of Court 31 and 42 (1)…"

Clearly, the High Court has the power to deal with the application for D rescission in the manner that it did, and the submissions by the appellants which suggest that the powers of the court are curtailed when dealing with questions relating to rescission of judgment, are without any foundation. In the absence of an express or clear statement to the contrary, a court will not assume that its powers are curtailed.

E **Whether the High Court erred in ruling that the default judgment was erroneously granted when non compliance with the rules had been condoned when the judgment was granted**

It remains to decide the contention by the appellants that the learned judge erred in rescinding the default judgment in circumstances where the judge F who granted the initial order had condoned the departure from the rules. It is common cause that the order was granted in motion court and the papers do not suggest that an application for condonation was sought for the failure to adhere to the rules before the order was granted. It is also pertinent to note that in the court *a quo* the appellants did not argue that the failure to G file a counter-application in the prescribed form had been condoned by the judge who granted the initial order. This was argued for the first on appeal and counsel conceded as much.

I find myself in agreement that the order under HC 4101/09 was granted in error. It could not stand scrutiny and the order rescinding it was correct and H justified in the circumstances.

Gowora JA

Conclusion A

The respondents have argued that in view of the obvious error attaching to the judgment the appeal before this court has no merit and is a clear abuse of court process. I agree.

The notice of appeal in this matter cites only one respondent. The proceedings in the High Court comprised of two separate cases which were heard B together. The appellants and the Church were the parties in the one. The other application included as respondents persons not named in the notice of appeal and yet the notice of appeal attacks the judgment on issues arising from the two matters.

Turning to the proceedings in the court *a quo*, not only was the counter-application defective for want of form, the application for contempt was C beset by a host of defects which were pointed out by the learned judge of the High Court and which clearly militated against the success of the order for contempt being granted by the court. The appellants have, in their approach of the main application, the counter-application and the court application for contempt, displayed a clear disdain for the rules of this court. The appellants were fortunate that an order of costs on the higher scale was not prayed for D in the court below. In my view, the appeal is devoid of merit and fails in every respect.

Accordingly the appeal is dismissed with costs.

GARWE JA and OMERJEE AJA concurred. E

Magwaliba & Kwirira, appellants' legal practitioners

Venturas & Samukange, respondent's legal practitioners

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SIBANDA v CHIKUMBA & ANOR 2014 (1) ZLR 219 (H)

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Citation	2014 (1) ZLR 219 (H)
Case No	Judgment No. HH-92-14
Court	High Court, Harare
Judge	Chigumba J
Heard	6 February 2014; *CAV*
Judgment	27 February 2014
Counsel	*Plaintiff,* in person *Ms P Takawadii*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure – absolution from the instance – meaning – effect of grant of absolution – not equivalent to finding in favour of defendant – not a bar to re-institution by plaintiff of action

Headnote

D After a party has closed its case, the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance. The term "absolution from the instance" is used to describe the finding that may be made at either of two distinct phases of the trial. In E both cases, it means that the evidence is insufficient for a finding to be made against the defendant. At the close of the plaintiff's case, when both parties have had opportunity to present whatever they consider to be relevant, the defendant will be absolved from the instance, if upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. It is not a bar to the plaintiff re-instituting F the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution is the proper order when, after all the evidence, the plaintiff has failed to discharge the normal burden of proof. Absolution from the instance, in effect, brings the proceedings G to an end at that stage because there is no prospect that the plaintiff's claim might succeed, and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim. Its other use is an extension to civil actions of the rules for withdrawing a case. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, H the defendant is entitled to absolution.

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Cases referred to

Delta Beverages v *Rutsito* 2013 (2) ZLR 298 (S)

Gascoyne v *Paul & Hunter* 1917 TPD 170

Machewane v *Road Accident Fund* 2005 (6) SA 72 (T)

Mining Industry Pension Fund v *DAB Marketing (Pvt) Ltd* S-10-11

United Air Charters v *Jarman* 1994 (2) ZLR 341 (S) B

Case information

Plaintiff in person

Ms *P Takawadii*, for the defendants

Judgment

Chigumba J: The plaintiff issued summons against the defendants, on 11 September 2012, claiming: C

(a) payment of the sum of US$3 700, being the cost of repairs to his Toyota Sprinter motor vehicle registration number AAQ 5021 negligently damaged by the first defendant on 17 December 2011 who was at the time driving a Toyota Land Cruiser registration number AAX 3378 which vehicle at the material time was insured by the second defendant in terms of Part IV of the Road Traffic Act [*Chapter 13:11*]; D

(b) payment of consequential damages in the sum of US$9 750, being the cost of hiring a replacement vehicle during the period 18 December 2011 to 30 June 2012 while plaintiff's vehicle was being repaired;

(c) interest on the sum of US$13 450 at the prescribed rate from the date of summons to date of final payment; E

(d) costs of suit.

In his declaration, the plaintiff averred that a road accident occurred along Alpes Road, Harare, on 17 December 2011, between his vehicle and that belonging to the first defendant. He averred further, that the accident was caused solely by the first defendant's negligence, based on the fact that she F was driving at excessive speed, she made a right turn in the face of oncoming traffic when it was dangerous to do so, she failed to keep a proper lookout, she drove too fast given the

prevailing traffic conditions, she failed to apply brakes to her vehicle timeously or at all, she was driving without due care and attention, and she failed to keep her vehicle under proper control. The plaintiff alleged that defendant paid an admission of guilt fine. G

The plaintiff averred that, as a result of the accident, his motor vehicle sustained damage to the gear box, radiator, bonnet, headlamps and the windscreen. He averred further that the vehicle was repaired by H & J panel beaters, of Bluffhill, Harare, at the second defendant's instance. When he took delivery of the vehicle, the plaintiff was not satisfied with the repairs done to his H

Chigumba J

A vehicle. He then procured quotations for sums in excess of US$3 700 from different panel beaters, with a view to restoring his vehicle to the condition it had been in, prior to the accident with the first defendant. He obtained a report from the Automobile Association of Zimbabwe, which confirmed that the repairs done to his motor vehicle were not satisfactory. The plaintiff alleged that the second defendant subsequently advised him to surrender his B vehicle in return for an amount of US$3 500 which it claimed was the market value of the plaintiff's vehicle. The plaintiff disputed this, and insisted that the value of his vehicle was US$6 300.

The plaintiff averred that he expected his loss to be mitigated by June 2012, and because he was deprived of his car he rented a vehicle at US$50 per day C from 18 December 2011 to 30 June 2012, when his vehicle was satisfactorily repaired. The defendants filed their plea to the plaintiff's claim on 18 October 2012. The first defendant admitted to driving without due care and attention but denied any form of negligence. The defendants put plaintiff to the proof of the damages allegedly incurred. The defendants averred that, on 20 January D 2012, the plaintiff signed a satisfaction note on completion of the repairs, after signing a release form on 19 January 2012, in which he authorized the second defendant to pay directly to the panel beaters for the cost of repairs. The defendants averred, further, that on 19 January 2012, the plaintiff signed a release form in which he released the defendants from any further actions or suit emanating from the accident. On the issue of inadequate repairs to E the plaintiff's vehicle, the defendants averred that the plaintiff's concerns had been noted, but due to the fact that his vehicle had sustained damage from a previous accident, he was asked to contribute to the repairs of his vehicle. The defendants denied that plaintiff's motor vehicle was valued at US$6 300 and put him to the proof thereof.

F In his replication to the defendants' plea dated 11 December 2012, the plaintiff denied each and every allegation of fact and of law and put the defendants to the proof thereof, and joined issue with the defendants. At the pre-trial conference, on 4 September 2013, the matter was referred to trial on the following issues:

G 1. whether or not the plaintiff is entitled to disbursement, the same claim having been settled, and if so, in what amount;

2. whether or not the plaintiff was entitled to hire a vehicle and if so the quantum of the hire charges.

Admissions were made by both parties:

H 1. The defendant admitted liability for the accident.

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2. The plaintiff admitted that his vehicle had been involved in another A accident prior to the accident in question.

At the hearing of the matter, the plaintiff, a self actor, testified and told the court that:

> "his vehicle was taken to the panel beaters for repairs on the day of the accident, 17 December 2012, at the first defendant's instance, and a promise was made to B him, that the vehicle would be repaired the same day. He told the first defendant that he needed his vehicle as a matter of urgency because he intended to travel, and she promised him that, because she knew the manager at H & J Panel Beaters, the vehicle would be repaired that very day. He arranged for cover quotations to be done with the assistance of the manager at the panel-beaters".

The plaintiff then referred to copies of the quotations which he wanted to show the court. Counsel for the defendants objected to the production of C the quotations, on the basis that they had not been discovered in terms of the rules, and that the defendants were hearing of the quotations for

the first time. The court sustained the defendants' objection, after referring to the schedule of documents discovered and explaining to the plaintiff, who was not legally represented, the reason why it could not admit his quotations into D evidence. The plaintiff continued to testify. He told the court that:

> "After the cover quotations were done the vehicle was assessed by Mr Chiunda, an assessor, who wrote a report indicating that plaintiff's vehicle was valued at US$5 000."

The report was not tendered into evidence. E

The plaintiff told the court that, two days after the accident, his vehicle had not been repaired, and that, on contacting the first defendant she referred him to the second defendant, the insurer of her vehicle. The plaintiff asked the court if he was allowed to show it text messages exchanged between him and the first defendant at the material time. He applied to have a printout of his phone admitted into evidence. The printout was admitted as exhibit 1. F It was dated Friday 23 December 2011, 11:07 pm, from the first defendant to the plaintiff, and it read as follows:

> "I have no input on that one, Mr Sibanda. Everything to do with your car is with the insurers and JMC"

The plaintiff told the court that he was aggrieved by the first defendant's G attitude because she had previously assured him that his vehicle would be repaired in one day. He proceeded to hire a motor vehicle to use, and in his words, "... with the first defendant's knowledge and consent". The plaintiff told the court that his vehicle took a month to be repaired, and consequently extended the car hire period because he needed a car to go to his rural home that Christmas. After that, he signed some papers at second H

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A defendant's offices which were allegedly explained to him as documents to enable him to collect his motor vehicle from the panel beaters. He testified that he signed the documents provisionally, because he had not yet seen the car, and to demonstrate this, he alleged that the documents he signed were not witnessed, and therefore invalid, because he told the second defendant that he would come back after he got his vehicle for the witnessing of the B documents.

The plaintiff collected his vehicle on 20 January 2013, and signed a release note at the panel-beaters. He took a ten minute video of the release process. Next morning, on his way to work, he discovered that the gearbox on his vehicle was not functioning properly, the windscreen wipers were not working, C and that the vehicle had a lot of other defects. Around 22 January 2013, the plaintiff brought his complaints to the second defendant, where he was told that the panel beaters had already been paid, on his instructions when he signed the form authorizing the defendant to pay. The plaintiff's letter of complaint to the second defendant, dated 23 January 2012, was admitted into evidence as exhibit 2. In the letter, he asked the second defendant to delay D payment to H & J panel beaters until the matter was resolved.

The second defendant promised to have the vehicle assessed, and Mr Chiunda assessed the vehicle but gave his report to the second defendant. The second defendant then indicated that the vehicle was a write off, and offered US$3 500 in full and final settlement. The plaintiff alleged that he refused this offer E because he had valuation reports which showed that his vehicle was valued at US$6 300. No application was made to tender that alleged valuation reports into evidence. In the spirit of assisting an unrepresented litigant, the court asked the plaintiff whether he wished to tender the valuation reports its evidence. The plaintiff replied that the reports had not been discovered. The F plaintiff admitted that his vehicle had been damaged in a previous accident.

Under cross-examination, the plaintiff told the court that his level of education was O-level and that he is a self employed freelancer who analyses chemicals for a living. On being asked to provide proof that he communicated to the first defendant his intention to hire a vehicle to use at her expense, he replied that he had no proof, their communication was verbal. He denied G that it a luxury on his part to hire the vehicle, and averred that a vehicle was essential to his business. The plaintiff admitted that his vehicle went to the panel beaters at 3 pm on the day of the accident. On being questioned as to how the first defendant could assure him that the vehicle would be repaired the same day, given the lateness of the hour, he told the court that although the damage to his vehicle was extensive, it was feasible that repairs could H take a short period of time.

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He admitted signing the form that authorized the second defendant to release A payment to the panel beaters on 19 January 2013, but stated that the signature was provisional because it was not witnessed. He admitted that he had signed a clearance note in which he acknowledged receiving his vehicle in good condition order and repaired to his complete satisfaction, but stated that the form was subject to his findings after checking the vehicle. He reiterated that his vehicle was valued at US$6 300. Finally, he told the court that, to B mitigate his loss, he hired the cheapest vehicle that was available at the time. He admitted that his letter of complaint, dated 23 January 2013, came three days after he authorized the second defendant to pay the panel beaters on 20 January 2013.

The plaintiff then closed his case. The defendants applied for absolution from C the instance on the basis that plaintiff had failed to prove a *prima facie* case, and that the plaintiff had failed to prove his entitlement to payment of hire charges of a replacement vehicle, and that, after the second defendant had paid for the repairs, there was no continuing legal liability on it to advance more money to the plaintiff for further repairs or for any other reason.

The issues for determination at trial were whether the plaintiff was entitled D to a further disbursement after the second defendant had paid for the repairs to his vehicle, and if so, in what sum, and whether the plaintiff was entitled to hire a vehicle, and if so whether he ought to be reimbursed for the cost of the car hire. The onus was on the plaintiff to prove his claim on all the trial issues, by adducing sufficient evidence to meet the standard of proof in E civil cases, proof on a balance of probabilities. The question that the court must ask itself, in an application for absolution from the instance, in the circumstances of this case is this: Did the plaintiff place sufficient evidence before the court to show that he was entitled to be paid more money by the defendants after the cost of repairs to his vehicle were paid in full. Secondly, was the plaintiff entitled to hire a vehicle for his use from the date when he F expected his vehicle to be repaired to the date when it was repaired?

After a party has closed its case, the defendant, before commencing his own case, may apply for the dismissal of the plaintiff's claim. Should the court accede to this, the judgment will be one of absolution from the instance. See Herbstein & van Winsen *Civil practice of the Supreme Court of South*G*Africa* 4 ed p 841. The term "absolution from the instance" is used to describe the finding that may be made at either of two distinct phases of the trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant. At the close of the plaintiff's case, when both parties have had opportunity to present whatever they consider to be relevant, the defendant will be "absolved from the instance", if upon an evaluation of the H

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A evidence as a whole, the plaintiff's burden of proof has not been discharged. See Schwikkard van der Merwe *Principles of Evidence* 3 ed p 578.

In *Machewane* v *Road Accident Fund* 2005 (6) SA 72 (T), absolution from the instance was defined as follows:

> "It means that the plaintiff has not proved her case against the defendant. It is not B a bar to the plaintiff re-instituting the action (provided the claim has not by then prescribed) and in that respect it is to be distinguished from a positive finding that no claim exists against the defendant. Absolution is the proper order when after all the evidence the plaintiff has failed to discharge the normal burden of proof. Absolution from the instance, in effect brings the proceedings to an end at that stage because there is no prospect that the plaintiff's claim might succeed, and in those circumstances the defendant should be spared the trouble and expense C of continuing to mount a defence to a hopeless claim."

In L H Hoffmann & D T Zeffertt *The South African law of Evidence* 4 ed p 507, it is stated that:

> "A decree of absolution from the instance is derived from Dutch law … It is the appropriate order when after all the evidence the plaintiff has not discharged the ordinary burden of proof. Its procedural advantage is that it enables the D plaintiff to bring another action on the same facts, a privilege which is denied to the defendant if he fails in an action in which the burden of proof is on him. Its other use is an extension to civil actions of the rules for withdrawing a case. If at the end of the plaintiff's case there is not sufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution"

In *Gascoyne* v *Paul & Hunter* 1917 TPD 170 at 173 the court stated that:

> E "The question therefore is, at the close of the case…was there a *prima facie* case against the defendant… in other words, and was there such evidence before the court upon which a reasonable man might, not

should give judgment against Hunter?"

In *United Air Charters* v *Jarman* 1994 (2) ZLR 341 (S) at 343 it was held that:

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 Svc Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco* v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E."

G In more recent times, in this jurisdiction, in *Delta Beverages* v *Rutsito* 2013 (2) ZLR 298 (S), an appeal against a High Court judgment dismissing with costs an application for absolution from the instance, the respondent sued the appellant for damages in the sum of US$20 051and costs of suit, on the basis that he had consumed a contaminated Coca-Cola beverage and that H further inspection of the bottle had revealed a "rusting iron nail and brackish

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foreign substances". The appellant was the manufacturer of the beverage A in question and the question for determination by the court *a quo* was "whether the appellant owed the respondent a duty of care to ensure that the product is safe, clean, healthy and fit for human consumption", alternatively, "whether the appellant had negligently allowed the production and selling of contaminated Coke". The court was satisfied that

"the respondent did not prove any damage such as would have founded a cause of B action under our law of delict. Clearly, whatever distress or anxiety or nervous shock he may have experienced was transitory … 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."

At p 308D, on the alternative claim based on negligence the court said:

"I am satisfied that, for the additional reason that negligence was not proved C and a causal link shown between the beverage in question and the appellant, absolution should have been granted."

See also *Mining Industry Pension Fund* v *DAB Marketing (Pvt) Ltd* S-10-11.

Could this court find for the plaintiff on the basis of the evidence which he led? The test established in terms of the numerous decided cases necessitates D an analysis of the evidence led by the plaintiff before he closed his case, and a determination of whether, on the basis of that evidence, the court, could give judgment in favor of the plaintiff. In other words, was the evidence enough? Was it sufficient? Did it support the plaintiff's averments with sufficient clarity and particularity? The degree of proof required is 'proof on a preponderance of probability'. E

The plaintiff told the court that his level of education was O-level. From his testimony and his responses under cross examination, the court surmised that he was well aware of the legal implication of the documents that he signed on 19 and 20 January 2013 at the second defendant's offices. He authorized the second defendant to pay the panel beaters for the repairs He F took delivery of his vehicle and indemnified the second defendants against any further claims. The plaintiff's averments that the documents were not witnessed therefore invalid were not believed by the court. The plaintiff reads and understands English very well. He is so proficient in English that he conducted his own case before the court. He could have endorsed on the documents that he was signing conditionally. He chose not to, because the G defence he is raising is an afterthought. The plaintiff signed release forms and indemnity forms before the second defendant with full knowledge of the implications.

The plaintiff's evidence that first defendant promised him that his vehicle would be repaired within a day after the accident was not believed by the H

A court. He testified that the vehicle made it to the panel-beaters by 3 o'clock on the day of the accident. It is difficult to believe, and not supported by the evidence, that the first defendant intended that plaintiff would have his vehicle, fully repaired by 3 pm the next day after the accident. The plaintiff admitted that the damage to the vehicle was extensive. A reasonable man on the Mabvuku commuter omnibus would surely not believe that such an B extensively damaged vehicle would be repaired within twenty four hours.

The tragedy in this matter is that the plaintiff's conduct of his own trial was a farce, and an exercise in futility. He clearly had no idea about the rules of evidence, otherwise he would have tendered the necessary documentary evidence required to buttress his case, especially considering that he did not C intend to call any witnesses other than himself. He testified that the vehicle was assessed, but in the absence of the assessment report, the court was unable to independently verify his claim as to the value of his vehicle. The assessment report, as well as the report allegedly done by the Automobile Association of Zimbabwe, were not discovered in terms of the rules. The plaintiff was hamstrung by his ignorance of the High Court Rules. He failed D to place the relevant evidence before the court, which was in his possession, but which he had not discovered in terms of the Rules.

By 23December 2011, according to exh 1, the first defendant had advised the plaintiff that the matter was being handled by the second defendant, her insurers. There is insufficient evidence before the court to support the E plaintiff's averment that he hired a vehicle to use, with the first defendant's knowledge and consent. In any event, it was not up to the first defendant to consent to such an arrangement once the second defendant became seized with the matter. The first defendant was insured against accident and damage. She referred the plaintiff's claim to her insurers who were processing it. No evidence was led that the plaintiff approached the second defendant and F advised that if his car was not repaired immediately, he would hire a vehicle to use for business and to take his children to school. No evidence was led that the second defendant authorized the plaintiff to hire a vehicle for his use whilst his accident damaged vehicle was being repaired. Unfortunately, no evidence was placed before the court to support the plaintiff's claim about his vehicle being valued at US$6 300. Independent verification of G this averment would have enabled the court to assess whether the second defendant's offer to pay the plaintiff US$ 3 500 and write off the vehicle was fair and reasonable in the circumstances.

There is insufficient evidence generally, on a balance of probabilities to establish a *prima facie* case in favour of the plaintiff, and against the H defendants. The plaintiff failed to discharge the onus on him to prove his

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case. It follows that absolution from the instance is granted in favour of the A two defendants. The plaintiff shall pay the defendants' costs.

P Takawadii & Associates, defendants' legal practitioners

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SCAPELOX TRADING (PVT) LTD v MASHANGWA FAMILY TRUST & ORS 2014 (1) ZLR 229 (H)

Citation	2014 (1) ZLR 229 (H)
Case No	Judgment No. HH-91-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	26 February 2014; *CAV*
Judgment	5 March 2014

Counsel *T Nyamasoka,* for the applicant
T Govere, for the first, second and third respondents
Fourth and fifth respondents in default

Case Type Opposed application

Annotations No case annotations to date

Flynote

Immovable property – transfer – conveyancer – representative and agent of seller – purchaser not entitled to nominate conveyancer

Legal practitioner – fees – tariff of fees set by Law Society – obligation of practitioners to adhere to tariff – undercutting unlawful and dishonourable

Headnote

The applicant sold a property to the first respondent. As the seller, it nominated the conveyancer, a firm of legal practitioners. Part of the purchase price was to be paid immediately. The conveyancer would retain the title deed until the conveyancing was complete. When the conveyancer rendered an account for the transfer and conveyancing fees, the second and third respondents, representing the first respondent, went to the conveyancer's firm and forcibly removed the title deed, making it clear that a conveyancer of their choice would do the conveyancing for a lower fee. The applicant sought an order for the return of the title deed and ancillary relief.

Held, that a conveyancer represents the seller and as such, the practice in this jurisdiction is that the seller chooses a conveyancer of his choice to transfer the property from the seller to the purchaser. It is for this simple reason that it is the seller who gives a power of attorney to the conveyancer to pass transfer to the purchaser. The preamble to a deed of transfer generally states that the property has been sold and that the conveyancer, as the attorney of the seller, transfers the property to the new owner, the purchaser. If the purchaser could choose the conveyancer, the conveyancer could not transfer the property from the seller, not being an attorney of the seller.

2014 (1) ZLR p230

Held, further, that undercutting in conveyancing has become a thorny problem in this jurisdiction. Quite often legal practitioners find themselves having to undercut in conveyancing fees because of the cut-throat competitive nature of this country's conveyancing practice, usually pitting established law firms, who have enjoyed a monopoly in that field, against small and upcoming firms. The latter firms usually fall into the temptation of accepting to undertake transfers at far less than the tariff prescribed by the Law Society of Zimbabwe, in order to attract clients. This is a shameful practice which has no place in our legal system. The legal profession in this country is self-regulating, meaning that legal practitioners regulate themselves through the Law Society of Zimbabwe, which is established in terms of the Legal Practitioners Act [*Chapter 27:07*]. In exercising its regulating authority, the Society is enjoined by s 53 of the Act to represent the views of the legal profession, maintain its integrity and status and "to define and enforce correct and uniform practice." As well as fixing the hourly rate of fees to be charged by legal practitioners, the Society also sets the conveyancing tariff to be uniformly followed by conveyancers undertaking transfers. The tariff relevant to this matter was published in the Law Society of Zimbabwe (Conveyancing Fees) By-laws 2013. It is the tariff that was employed by the applicant's conveyancers to determine the transfer fees to be paid by the respondents in this matter. It is clear, from the criminal manner in which the second and third respondents conducted themselves when they seized the title deed from the conveyancer, that another law firm had promised them service at a fee far less than that offered by the applicant's chosen firm in terms of the tariff. Such conduct by legal practitioners is called undercutting. It is unlawful, because when the Society sets a conveyancing tariff, it is acting in accordance with the power

given to it by the Act and the regulations F made under it. There must be uniform application of conveyancing fees. Anything else is unlawful and represents dishonourable and unworthy conduct by a legal practitioner, which should be punishable. Members of the legal profession who have elected to sacrifice the values of the noble profession for pieces of silver are bringing the name of the profession into disrepute. G

Held, further, that the first three respondents would be ordered to return the title deed. The relevant State authorities would be ordered not to effect any transfer or other related matters other than through the applicant's chosen conveyancer. H

2014 (1) ZLR p231

Mathonsi J

Cases cited A

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

Printing & Numerical Registering Co v Sampson (1875) LR 19 Eq 462

Legislation considered

B Legal Practitioners Act [*Chapter 27:01*], s 53

Case information

T Nyamasoka, for the applicant

T Govere, for the first, second and third respondents

Fourth and fifth respondents in default

Judgment

C**Mathonsi J**: Undercutting is what this dispute is all about, a dispute pitting two established law firms against each other. They are suddenly at each other's throats over conveyencing instructions carrying a very healthy tab in conveyancing fees. It is a battle where no prisoners have been taken but which exhibits much confusion of mind, premised as it is on the selfish interests of lawyers rather than those of their clients. In our law, undercutting, D just like "naked short selling", is not only obscene but also unlawful.

The applicant sold its house ("the property") to the first respondent, duly represented by the second and third respondents, for $700 000, in terms of a written agreement signed on 17 April 2012. The purchase price was to be paid in terms of the following clause of the agreement:-

E "The purchase price of $700 000 (seven hundred thousand dollars) will be paid in the following manner:-

(a) $300 000 (three hundred thousand dollars) will be paid into Homelux Real Estate Trust Account on signature of the agreement of sale by both parties and will be released to the seller upon the seller surrendering Deed of Transfer No 6402/2003 to the conveyancer and signing all transfer documents with F the conveyancer.

(b) $400 000 (four hundred thousand dollars) will be paid in cash to Atherstone and Cook Legal Practitioners Trust Account within 30 days from the last date of signature of this agreement of sale and will be released to the seller on transfer."

The purchaser duly paid the initial $300 000 to the estate agent, and the seller G released the title deed to Atherstone and Cook, the conveyancer appointed in terms of the same written agreement, who were tasked with the responsibility of undertaking the conveyencing.

The payment terms in respect of the balance of the purchase price were eventually varied, in recognition of the purchaser's failure to comply, by H virtue of an addendum and acknowledgement of the debt signed on 26 January

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2014 (1) ZLR p232

Mathonsi J

2013. Trouble started when, on 9 May 2013, Atherstone and Cook rendered a A*pro forma* invoice for transfer fees totalling US$51 585, incorporating stamp duty due to the fourth respondent, the

Registrar of Deeds, and conveyencing fees computed in terms of the Law Society of Zimbabwe (Conveyancing Fees) By-Laws 2013 (SI 24 of 2013).

The purchaser may have made advances seeking terms of payment as the B conveyancer relented, by e-mail of 20 August 2013, giving the purchaser time to pay the transfer fees. Instead of effecting payment, the purchaser secured a better deal from another conveyancer, who obviously agreed to attend to the transfer at a lesser fee or on more favourable terms, or both. No sooner had the purchaser been given time to pay than the conveyancer was dispossessed of the title deed to the property on 21 August 2013. C

Abigail Jaricha, a director and company secretary of the applicant, in her founding affidavit to this application, tells of how, on 20 August 2013, the second and third respondents had visited the offices of Atherstone & Cook demanding the title deed to the property. They refused to leave until Jaricha managed to calm them down by showing them the original and then giving D them a copy of the title deed the following morning.

The second and third respondents again came to the conveyancer's office the following day in the company of a man that they allegedly posted at the foyer. Jaricha says that the second and third respondents and the third man in their company cornered her, manhandled her and forcibly seized the title E deed from her, in the process causing her and her colleague to sustain injuries. An act of robbery indeed. Before making good their escape, they threatened them, insisting that they were well connected and that the law firm should not try to do anything as they had the offices surrounded by 40 people. That way they were dispossessed of the title deed, with the third respondent making it clear that a conveyancer of their choice would do the transfer. F

It is that alleged act of banditry which has caused the applicant to approach this court, seeking an order for the return of the title deed and ancillary relief. The application is opposed by the second and third respondents on the basis that there are disputes of fact relating to how they came to be in possession of the title deed. They maintain that Atherstone & Cook voluntarily G surrendered the title deed to them. The second and third respondents go on to argue that the applicant's attempt to bar another law firm from attending to the transfer is contrary to public policy, given that not only has it been paid the purchase price, thereby losing the right to choose a conveyancer, but also the relationship between them, the applicant and its conveyancer "has H

A irretrievably broken down and there is no reasonable prospect of restoration as a normal relationship." One would think it is a marriage.

They go on to state that undue influence, duress and misrepresentation were brought to bear upon them, before they signed the sale agreement appointing Atherstone & Cook. Such duress or undue influence is not particularised B and Mr *Govere,* who appeared for the respondents, submitted that they were only relying on misrepresentation. He stated that the misrepresentation is not contained in the agreement but was made orally, that is, that once the purchase price was paid, the purchaser would be allowed to choose a conveyancer of its choice.

Nothing more really needs to be said about that claim, because it is incoherent C and standing on its head. If indeed, the seller represented that to them, then why would the parties still sign an agreement in which the conveyancer was given as Atherstone & Cook?

I am unable to discern any dispute of fact in this matter. Clearly, the respondents have the applicant's title deed without its consent. In light of D the clear provisions of the sale agreement relating to conveyencing, it is highly unlikely, if not well nigh impossible, that the conveyancer would have voluntarily parted with the title deed, especially given the obvious pecuniary interest she had in attending to the transfer. All this lends credence to the story that the respondents used violence to divest the conveyancer of the title deed. I am persuaded that an act of banditry was committed in the process.

E This matter has been allowed to come this far partly as a result of greed of legal practitioners, who would like to undertake a lucrative conveyencing exercise, and mainly as a result of a lamentable and indeed unfortunate misunderstanding of basic conveyencing rules. It is trite that a conveyancer represents the seller and, as such, the practice in this jurisdiction is that the seller chooses a conveyancer of his choice to transfer the property from the F seller to the purchaser.

It is for this simple reason that it is the seller who gives a power of attorney to the conveyancer to pass transfer to the purchaser. The preamble to a deed of transfer generally states that the property has been sold and that the conveyancer, as the attorney of the seller, does transfer the property to the G new owner, the purchaser. If the purchaser could choose the conveyancer, how would such conveyancer transfer the property from the seller without being an attorney of the seller?

The second and third respondents exhibited a dangerous trait by forcibly seizing the title deed the way they did, in a clear display of lawlessness, H but theirs was always a doomed cause, probably fuelled by ignorance of

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Mathonsi J

conveyencing rules. Just how they hoped to benefit from such action when A it is the seller who has to transfer the property, eludes me. It is a fruit of poor legal advice.

That should also put paid to the respondents' counterclaim, in which they seek to compel the applicant to release US$34 500 to their legal practitioners as capital gains tax, even before the fourth respondent has assessed it, and B their legal practitioners are not the conveyancer. They also crave an order compelling the applicant to sign transfer documents and other extraneous relief. It is an application founded on no recognisable legal basis and is thoroughly devoid of merit. This court cannot make a contract for the parties. The contract the parties entered into, apart from the inherent right of a seller of immovable property to appoint a conveyancer, provides that C the conveyencing would be attended to by Atherstone & Cook.

The point is made by Jessel MR in *Printing and Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 462 at 465 that public policy demands that –

> "Men of full age and competent understanding should have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily D should be held sacred and should be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

See also *Delta Operations (Pvt) Ltd* v *Origen Corporation (Pvt)Ltd* 2007 (2) ZLR 81 (S) at 86F-H. E

I now turn to deal with the issue of undercutting in conveyencing which has become thorny in this jurisdiction. Quite often legal practitioners find themselves having to undercut in conveyencing fees because of the cut-throat competitive nature of this country's conveyencing practice, usually pitting established law firms who have enjoyed monopoly in that field against small and upcoming firms. The latter firms usually fall into the temptation F of accepting to undertake transfers at far less than the tariff prescribed by the Law Society, in order to attract clients. It is a shameful practice which has no place in our legal system.

The legal profession in this country is self-regulating, meaning that, instead of G the State coming in to regulate the activities of legal practitioners, they regulate themselves through the Law Society of Zimbabwe, which is established in terms of the Legal Practitioners Act [*Chapter* 27:01]. In exercising its regulating authority, the Society is enjoined, by s 53 of the Act, to represent the views of the legal profession, maintain its integrity and status as well as "to define and enforce correct and uniform practices." H

Mathonsi J

A In that regard, over and above fixing the scale of legal practitioner-and-client hourly rate of fees to be charged by legal practitioners practising in this country, the Society also sets the conveyencing tariff to be uniformly followed by conveyancers undertaking transfers. The tariff relevant to this matter was published in SI 24 of 2013. It is the tariff that was employed by the applicant's conveyancer to determine transfer fees to be paid by the B respondents in this matter. It is clear, from the criminal manner with which the second and third respondents conducted themselves when they seized the title deed from the conveyancer, that another law firm had promised them service at far less than that offered by Atherstone & Cook in terms of the tariff. It is such conduct by legal practitioners which is called under-cutting. It C is unlawful because, when the Society sets a conveyencing tariff, it is acting in accordance with power given to it by the Act and the regulations made under it. There must be uniform application of conveyencing fees. Anything

else is unlawful and represents dishonourable and unworthy conduct by a legal practitioner, which should be punishable.

Such conduct by members of the Law Society may lead to the State taking D away the self-regulating power of the legal profession in order to protect the transacting public against such malpractices. For that reason, it must be condemned in the strongest terms and suppressed by all means possible. In my view, those members of the legal profession who have elected to sacrifice the values of the noble profession for pieces of silver must hang their heads E in shame, as they are bringing the name of the profession into disrepute.

There may be a big number of those undercutting, but that does not render it lawful. Legal practitioners must be able to draw a distinction between right and wrong. It is wrong to undercut and it shall always be. As stated by Martin Luther King (Jr);

> F "We have accepted an attitude that right and wrong are merely relative. Most people can't stand up for their convictions, because the majority of people might not be doing it, so it must be wrong. And since everybody's doing it, it must be right … So it's a sort of numerical interpretation of what's right. … Some things are right and some things are wrong. Eternally so, absolutely so. It's wrong to hate. It always has been wrong and it always will be wrong. It's wrong in America, it's wrong in Germany, it's wrong in Russia, it's wrong in G China. It was wrong in 200 BC and it's wrong in 1954 AD."

Members of the public seeking legal assistance rely on their legal advisors to determine what is right and what is wrong. It is no good for those advisors, with their eyes firmly fixed on a big legal fee, to take leave of their senses. They should uphold the ethics of the profession at all times, instead of advising H their clients to commit a crime. Such behaviour should be condemned and

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the Law Society should come down hard on such offenders in the name of A the profession.

The applicant has made a good case for the relief sought, while the respondents' counter-application is without merit.

Accordingly it is ordered that:

1. The first, second, and third respondents' counterclaim is dismissed with B costs on a legal practitioner and client scale.
2. The first, second, and third respondents, and all persons claiming title through them, are directed to return forthwith, i.e. by close of business same day they receive a copy of this order, to Atherstone & Cook Conveyancing Department, the original title deed No. 6402/2003 dated September 2003. C
3. The fourth respondent is authorised to issue a capital gains tax clearance certificate only upon request or application by the applicant through Atherstone & Cook as D the applicant's conveyancer;
4. The fifth respondent is authorised to register the transfer of title from the applicant to the first respondent only from Atherstone & Cook as the conveyancer for transfer of the property.
5. The Sheriff or his lawful deputy, be and is hereby authorised to take custody and possession of the original title deed No. 6402/2003 and deliver it to the offices of Atherstone & Cook if the provisions of clause 2 above are not complied with; E
6. The first, second, and third respondents shall bear the costs of this application jointly and severally, on a legal practitioner and client scale.

Atherstone & Cook, applicant's legal practitioners

Govere Law Chambers, first, second and third respondents' legal practitioners F

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Source:

MURONZEREI v PETROLTRADE (PVT) LTD 2014 (1) ZLR 237 (H)

Citation	2014 (1) ZLR 237 (H)
Case No	Judgment No. HH-95-14
Court	High Court, Harare
Judge	Mtshiya J
Heard	1 October 2013; *CAV*
Judgment	5 March 2014
Counsel	*C Mucheche,* for the applicant *J Mutonono,* for the respondent
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Employment – arbitration – award – registration of with High Court – what court must consider before registering award – no enquiry into merits – Labour Court's powers to suspend execution ending appeal

Headnote

The respondent opposed the registration of an arbitral award, granted in a labour matter, on the grounds that an appeal had been noted and an D application for suspension of execution of the award was still pending before the Labour Court.

Held, that in an application for registration of an award, the court does not inquire into the merits or otherwise of the award. That is the province of the Labour Court upon an application or appeal being made to that court. Registration of an award is only done for enforcement purposes because E the labour structures have no enforcement mechanism. The registration of an award in terms of the Labour Act is a matter of course as long as the award remains enforceable or unsatisfied. The focus should be on whether or not the order or award before the court is lawful, sounds in money, and is still valid and competent. If the award meets these requirements, there is nothing that can militate against its registration. F Section 92B(4) of the Labour Act [*Chapter 28:01*] gives the Labour Court control of its orders even when they have been registered with the High Court. It can alter or amend it despite registration.

Cases referred to

G*Baudi* v *Kenmark Builders (Pvt) Ltd* HH-4-12

Muneka & Ors v *Manica Bus Co* 2013 (1) ZLR 81 (H)

Ndlovu v *Higher Learning Centre* HB-86-10

Legislation considered

H Labour Act [*Chapter 28:01*], s 92B(4)

Mtshiya J

Case information

C Mucheche, for the applicant

J Mutonono, for the respondent

Judgment

Mtshiya J: On 1 October 2013 I heard an opposed application for the registration of an arbitral award whereupon I granted the following order:-

> "1. The Arbitral Award dated 5 September 2012 and quantified on 10 September 2012 by Arbitrator Dangarembizi be and is hereby registered as an order of this Court.
>
> 2. The Respondent shall pay costs of suit".

There was an error in the order. The actual date of quantification was 10 December 2012 and not 10 September 2012.

Upon granting the order, I indicated that reasons for the order could be given upon request. I never received any request from either of the parties until on 10 February 2014, through a minute from the Registrar dated 29 January 2014, I was advised that reasons were required in order to enable the respondent to prosecute an appeal it had already filed in the Supreme Court. I now give here below my reason, as requested.

On 5 September 2012, an arbitral award was granted in favour of the applicant. The award read as follows:

> "WHEREFORE, after carefully analysing the facts and the law, I make the following award:
>
> That the dismissal of the Claimant was unfair and that the Claimant is hereby reinstated to his former position without loss of salary and benefits from the date of the illegal dismissal
>
> That if reinstatement is no longer an option, the Claimant should be paid damages to be agreed by the parties within two weeks of receipt of this award and failing that either party could approach the arbitrator for quantification."

The above award was subsequently quantified on 10 December 2012. The quantified award read as follows:-

> "WHEREFORE, after carefully analysing the facts and the law I make the following award.
>
> That the Respondent pay a total amount of US$17 042.31 being back pay & benefits and damages in lie of reinstatement.
>
> The above amount to be paid on or before 10 January 2013".

The above quantification, which makes the award sound in money, makes the award registrable and hence the application. The application therefore relates to the award of 5 September 2012 as quantified on 10 December 2012.

In opposing the registration of the award the respondent stated that:

Mtshiya J

> "This application has been made prematurely. The award states that the payment should be made on or before 10 January 2013. The application was thus made pre-maturely.
>
> Further and in any event Respondent has appealed against the Arbitral Award and the appeal is still pending. Applicant should wait until such a time the appeal has been determined so that Respondent is protected from suffering irreparable harm in the event of succeeding on appeal"

We are now past 10 January 2013 and the award has not been complied with. However, in support of the above position the respondent, in its heads of argument, submitted, in part, as follows:

> "2. It is humbly submitted that although the Labour Act provides for registration of arbitral awards, the court has the discretion to decline to register the award depending on the circumstances of each case. It cannot have been the intention of the legislature that the court rubber stamps an arbitral award.
>
> 3. If an arbitral award is registered in terms of the Act the end result is a civil judgment of the court which would have registered the award.
>
> This, of necessity means that where an award is glaringly and or grossly wrong at law, the court cannot turn a blind eye on the shortcomings of the award and register same on the strength of the

provisions of the Labour Act. That would be contrary to public policy. The court is at all times enjoined to observe tenets of fairness and the doing of justice between parties.

4. *In casu,* it is humbly submitted that the award, which has been appealed is flawed and is most likely going to be set aside on appeal.

E 5. The Honourable Arbitrator did not apply his mind to the fact that in labour matters, once an employee has been convicted of acts of misconduct, the issue of what punishment to impose is clearly a discretional one.

See

(i) *Malimanjani* v *CABS* 2007 (2) ZLR 77 (S)

(ii) *Toyota Zimbabwe* v *Posi* 2008 (1) ZLR 173 (S)

F (iii) *Mukono* v *Minister of Health and Anor* S-99-90

6. Further, the Respondent has since applied to the Labour Court for stay of execution and the application is still pending.

In Baudi v Kenmark Builders (Pvt) Ltd HH-14-12, Patel J held that:

'Section 93E(2) enables the Labour Court to suspend or stay an arbitral award G upon an 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 apply for registration and enforcement of the award.'

It is humbly submitted that the above shows that an arbitral award may not be registered where there is a pending application for stay of execution as *in casu*."

As a counter to the above submissions, the applicant also cited *Baudi, supra,*H wherein Patel J, as he then was, made the following observation:

2014 (1) ZLR p240

Mtshiya J

"Parliament has obviously applied its mind to the delays inherent in the appeal A process and considered the policy implications of the general common law rule which automatically suspends a decision 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 enforcement may entail. In this context, it would be very difficult to hold that what is specifically provided for and allowed by statute should be regarded as contrary to public policy any such approach would simply operate B to frustrate and defeat the clear intention of Parliament".

Furthermore and to reinforce the above enunciation of law, the applicant cited *Ndlovu* v *Higher Learning Centre* HB-86-10 where Mathonsi J said the following:

"None of the reasons for opposing the application for registration are sustainable. C It is common cause that there is an arbitral award in existence, which ward was made in terms of the law. That award has not been set aside ...

The respondent cannot seek to challenge an arbitral award in opposing papers filed in 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 award. This is the province of the Labour Court upon an application or appeal being D made to that court.

Registration of an award is only done for enforcement purposes because the labour structures have no enforcement mechanism. Upon registration the arbitral award has an effect of a civil judgment of the appropriate court. This is in terms of s 98(15) of the Labour Act".

I fully agree with the positions taken by the judges in the cases cited above E and also add that as long as the award is lawful and competent, its registration, in my view, becomes a matter of course.

In *Muneka & Ors* v *Manica Bus Co* 2013 (1) ZLR 81 (H), where similar facts were placed before me, I reasoned as follows:

"I do not believe that in providing for registration for enforcement purposes, F the legislature envisaged a procedure where the applicant would be denied the registration of a certified award as we normally witness. My view is that the other party is at liberty to oppose the process of execution or enforcement on any legal or reasonable grounds.

Furthermore, the other party can also seek interim relief in terms of s 92E(3) of the Labour Act which provides as follows: G

'Pending the determination of a appeal the Labour Court may make such interim determination in the matter as the justice of the case requires'.

In *Standard Chartered Bank of Zimbabwe* v *Maganhu* 2005 (1) ZLR 43 (S) at 50E-F Malaba JA, as he then was, said:

> 'The object of an interim determination made under s 97(4) of the Act is to give a party in whose favour the determination appealed against was made H

Mtshiya J

> A an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation imposed by the determination which he would otherwise not have because of the appeal. (Section 97(4) was repealed by s 34 of Act 7 of 2005 but provision was retained under s 92E(3).'
>
> The above clearly indicates that upon an award being made, both parties have B equal choices.
>
> The registration of an award in terms of the Labour Act is, in my view, is a matter of course as long as the award remains enforceable or unsatisfied. *In casu*, what is before the court is not a review process but a mere application for the registration of an award, which process, I believe, can be done through a register in the High Court with a certificate of registration being granted to the C beneficiary of the award."

I have not as yet found any other interpretation of the law which can persuade me to change from the above reasoning. The focus, in my view, should be on whether or not the order or award before the court is lawful, sounds in money and is still valid and competent.

D If the order or award meets these requirements, I see nothing that can militate against its registration.

Section 92B(4) of the Labour Act [*Chapter 28:01*] gives the Labour Court control of its orders even when they have been registered with this court. It can alter or amend it despite registration. The same applies to an arbitral award. The registration exercise is, in my view, an administrative act which E applies to all lawful and competent awards and orders.

Given the foregoing, I registered the award and ordered costs against the respondent.

The above are my reasons for the order I granted on 1 October 2013.

F*Matsikidze & Mucheche,* applicant's legal practitioners

Chadyiwa & Associates, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/S v DZOTIZEI 2014 (1) ZLR 242 (H)

S v DZOTIZEI 2014 (1) ZLR 242 (H)

Citation	2014 (1) ZLR 242 (H)
Case No	Judgment No. HH-126-14
Court	High Court, Harare
Judge	Tsanga J
Heard	6 March 2014
Judgment	6 March 2014
Counsel	Details not suppllied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal law – statutory offences – tampering with electrical apparatus C *resulting in supply being cut off – Electricity Act [Chapter 13:19] – s 60A(3)(a) – reconnecting domestic electricity supply after it had been cut off – not an offence under the subsection*

Criminal procedure (sentence) – general principles – factors affecting – age of accused – persons aged over 70 – State's duty of care towards the D *elderly – need to ensure that elderly not unduly penalised for offences arising out of economic hardships*

Headnote

The accused, a man of over 70 years of age, was convicted of contravening s 60A(3)(a) of the Electricity Act [*Chapter 13:19*] (tampering with E any apparatus for generating, transmitting, distributing or supplying electricity with the result that any supply of electricity is interrupted or cut off) and sentenced to the mandatory minimum sentence of ten years' imprisonment. He had re-connected his electricity supply after it had been cut off for non-payment of his bill. He was also convicted of F unlawfully abstracting electricity, in contravention of s 60A(1) of the Act for which he received a wholly suspended sentence of 24 months.

Held, that the charge under s 60A(3)(a) was inapplicable. By no stretch of the imagination could it be said that the accused's action resulted in any interruption or cut-off of electricity as envisaged by the subsection. The legislature clearly had in mind such conduct as stealing oil from G transformers and stealing cables, which have indeed often resulted in massive black outs and cut offs and serious damage to apparatus. The situation where ordinary residents illegally abstract and divert electricity by switching themselves back on or self-connecting is adequately covered by s 60A(1)(a) and (b). H

2014 (1) ZLR p243

Tsanga J

A*Held,* further, that it is imperative that the age of the accused is always accurately captured. It is a vital fact which has a material bearing in most situations. Inaccuracy creates unnecessary confusion on review when a judge is faced with contradictory data. If the accused was a 71 year old pensioner living in a context where assistance from the State B for old people is so limited as to be virtually non-existent, then even a suspended sentence of 24 months on count 2 was manifestly excessive. Under s 82 of the Constitution, the State owes some duty of care to persons over the age of 70. In this instance the criminal court, a vital part of the State machinery, can at least play a protective role by ensuring that the elderly are not unduly harshly penalised for electricity self-reconnection C offences. The court cannot purport to act in complete oblivion of the real circumstances that some of the disadvantaged elderly find themselves in or with complete disregard to the different facets of possible interventions by the State in promoting rights of the elderly. Where needy elderly people are involved in cases of self-reconnections, one role that the criminal courts can play is to ensure that nominal, rather than punitive, sentences D are imposed, if they must, only by way of discouraging wanton breaking of the law. The sentence on the second count should be reduced to one of three months' imprisonment, wholly suspended.

Legislation considered

E Constitution of Zimbabwe 2013, s 82

Electricity Act [*Chapter 13:19*], s 60A(1)(a) & (b), (3)(a) & (b)

Judgment

Tsanga J: The accused was convicted of one count (count 1) of "tampering with electricity apparatus" as defined in s 60A(3)(a) of the Electricity Act [*Chapter 13:19*]. He received a mandatory ten years' imprisonment for this F count.

He was further convicted on another count (count 2) of "unlawfully abstracting electricity" as defined in s 60A(1)(b) of the same Act. With regard to this count, he received the following sentence:

> "24 months' imprisonment wholly suspended for 5 years on condition accused G does not, during that period, commit an offence involving the use of electric current which has been unlawfully abstracted, for which he will be sentenced to imprisonment without the option of a fine."

The facts leading to his conviction under these provisions were that on 22 October 2013, an official from the Zimbabwe Electricity Transmission and Distribution Company, (hereinafter referred to as ZETDC) had disconnected H the power supply at the accused's residence. This was for an unpaid bill of

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Tsanga J

$3635.97. He was warned not to reconnect the supply before payment of his A bill. A meter reading was taken. Following the disconnection, the accused reported to ZETDC to argue his case. He was advised to pay the bill first or make a payment plan before he could be reconnected. He reconnected himself on 23 October without so doing, and started using the electricity thus described as "unlawfully abstracted". When the ZETDC officially visited B his house again a few days later, he was issued a ticket with a penalty of US$282.00. He stated he was not going to pay, preferring instead his day in court. His decision was particularly motivated by his argument that as far as he knew, the Zimbabwe Electricity Supply Authority (ZESA) had following the elections, expunged these debts which had remained unpaid by many due to economic hardships. He was nonetheless arrested, leading C to his trial, conviction, and sentence.

Regarding count 1, "tampering with electricity apparatus" for which the accused received a ten year sentence, the magistrate admitted in his judgment that the sentence is excessive. However, in his reasons for sentence, he lamented that his hands were tied since the punishment to be meted out under the applicable provision is mandatory. He had found no special circumstances D that could exonerate the accused.

Section 60A(3)(a) & (b) of the Electricity Act [*Chapter 13:19*] reads as follows:

> "(3) Any person who, without lawful excuse, the proof whereof shall lie on him or her –
>
> (a) tampers with any apparatus for generating, transmitting, distributing or E supplying electricity *with the result that any supply of electricity is interrupted or cut off:*or
>
> (b) cuts damages or destroys or interferes with any with any apparatus for generating, transmitting, distributing or supplying electricity;
>
> shall be guilty of an offence, and if there are no special circumstances peculiar to the case as provided for ~~in~~ subsection (4) shall be liable to imprisonment for a period of not less than ten years." F

In my view, the accused's conviction under s 60A(3)(a) of the above Act is problematic as the charge should never have been preferred in light of a studious reading the section. I have deliberately emphasised the words in s 60A(3)(a) because by no stretch of even the wildest of imaginations, can G it be said that the accused's action resulted in any interruption or cut-off of electricity as envisaged by this section. The charge deliberately omits this relevant aspect of the provision. I cannot see how this charge can stand when improper scaffolding was used to build the case against the accused.

The full import of the severity of punishment that is indeed intended by s 60A(3) lies in appreciating the range of offences involving tampering H

Tsanga J

A with electricity that violators are prone to committing. Underhand self-reconnections are merely one of them. More insidious offences include stealing oil from transformers and stealing cable wires which have indeed often resulted in massive black outs and cut offs and serious damage to apparatus. It is common knowledge that in the past some residential areas had to go for months without electricity following theft or interference with B transformers. Laws are certainly not formulated in a vacuum. My view is that the reference in s 60A(3)(a) to an act of tampering with an

electricity apparatus ultimately resulting in electricity being interrupted or cut off is informed by these kinds of offences. The mandatory sentence must be placed in such contexts.

C Furthermore, in my opinion the provision is also inapplicable to the facts in question, because the situation where ordinary residents illegally abstract and divert electricity by switching themselves back on or self-connecting is adequately canvassed by s 60A(1)(a) and (b). Section 60A(1)(a) & (b) reads as follows:

> "(1) Any person who, without lawful excuse, the proof whereof shall lie on him or D her –
>
> (a) abstracts or diverts any electric current to be abstracted or diverted; or
>
> (b) uses any electric current, knowing it to have been unlawfully abstracted or diverted;
>
> shall be guilty of an offence and liable to a fine not exceeding level fourteen E or imprisonment for a period not exceeding five years or both such fine and imprisonment."

Switching the meter back on again is what enabled the accused to abstract electricity and to thus use it knowing it to have been unlawfully abstracted. Section 60A (1)(a) & (b) clearly stands fully on its own for those who commit the offence of unlawfully abstracting, diverting, and using electricity through F self-reconnecting, for example. To then prefer against such an offender a separate and additional count under s 60A(3)(a) of supposedly tampering with electricity, is a punitive, improper and inapplicable case of splitting of charges. The relevant officer who framed the charge against the accused must have been clearly aware that the "glove did not fit" when he omitted G the rest of the provision relating to interrupting or cutting off power supply.

On the other hand, the conviction on count 2 in terms of s 60A (1)(b) for which he received a suspended sentence was proper. Applying this provision to the facts, he did use electricity knowing it to have been unlawfully abstracted. He was switched off by the relevant authorities and he duly switched himself back on again. That he did use electricity after he had been switched off is H confirmed by the meter reading which had gone up from the time and date

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that he was switched off. However, the sentence of 24 months that he received A for so doing, albeit suspended, was excessive.

In commenting on the excessiveness of the sentence with respect to count 1, the magistrate observed that the harshness was compounded by the fact that the accused is a first offender aged 71 years. As he emphasised, the accused had led a blemish-free life for 70 years. What is unexplained however, is that the charge sheet describes him as 55 years' old. Needless to say, it is B imperative that the age of the accused is always accurately captured. It is a vital fact which has a material bearing in most situations. Inaccuracy creates unnecessary confusion on review when a judge is faced with contradictory data of this kind. This is more so when the contradictions go without comment in the judgement from the presiding magistrate. If indeed he is a 71 year old C pensioner living in a context where assistance from the State for old people is so limited as to be virtually non-existent, then even a suspended sentence of 24 months on count 2 is manifestly excessive.

I say this for the following reasons. Among those who have fallen foul of the provision are elderly people to whom constitutionally, the State owes some duty of care. This is with regard to s 82 of the Constitution of Zimbabwe 2013 D which states as follows:

> "People over the age of *seventy* have the right –
>
> (a) to receive reasonable care and assistance from their families and the State:
>
> (b) to receive health care and medical assistance from the State: and
>
> (c) *to receive financial support by way of social security and welfare:*E
>
> and the State must take reasonable legislative and other measures, *within limits of the resources available to it*, to achieve the progressive realisation of this right" (my emphasis).

Granted, not all old people fall within the same cohort regarding their inability to meet the costs of social amenities like water and electricity. However, the reality is that there many pensioners, especially in the country's urban areas, F who are unable to afford these expenses. This is for a variety of reasons such as the economic squeeze and the fact that their pensions were wiped out by inflation.

Nevertheless, poverty is not a defence to this crime. Also, it can be validly argued that the role of criminal law is to condemn criminal behaviour as G opposed to advancing social welfare goals through active fulfilment, in the manner that is envisaged by the section. However, the State's role in relation to socio-economic rights is at three different levels. At one level the State's duty is to *respect* such rights, meaning that the State is obliged to refrain from interference with human rights. This could be by way of removing legislative protections or programmes that advance such rights. Secondly, the State is H

Tsanga J

A expected to *protect* against violation of such rights whether by individuals or by enterprises. Thirdly, the State is expected to *fulfil* its obligations by taking adequate steps towards progressive realisation of the rights within the framework of available resources.

In reality, there may be obvious limits to what can be provided by the State B in financial terms in light of its limited and severely strained resources, but obviously the extent to which this would be held to be so is yet to be fully tested in our context by the Constitutional Court. In terms of s167 of the Constitution, it is the Constitutional Court which determines whether Parliament or the President has failed to *fulfil* a constitutional obligation. Nonetheless, the fact remains that there is also an obligation on the part of the State to *protect* the C vulnerable aged. In this instance the criminal court, a vital part of the State machinery, can at least play a protective role by ensuring that the elderly are not unduly harshly penalised for electricity self-reconnection offences. The court cannot purport to act in complete oblivion of the real circumstances that some of the disadvantaged elderly find themselves in or with complete disregard to the different facets of possible interventions by the State in promoting the D rights of the elderly.

In my view, where needy elderly people are involved in cases of self-reconnections, one role that the criminal courts can play is to ensure that nominal, rather than punitive sentences are imposed, if they must, only by way of discouraging wanton breaking of the law. Such action may not equate to the E State honouring its obligation to fulfil the rights of the elderly as envisaged by s 82 but it would at least provide some protective measure. To impose harsh penalties against the elderly who cannot afford would be tantamount to passing the buck for the State's economic failures. Granted, the law and the courts are only a part of the picture. In the long run the problem of self-reconnections that results in people falling foul of this provision will only be F reduced within the context of a viable economic recovery that impacts on all groups. But, where they can, criminal courts too should play their role towards protecting the elderly.

Having regard to the totality of the above, the conviction and sentence under count 1 is wholly set aside for reasons I have explained.

G The conviction under 2 is altered to read.

> "Three months' imprisonment wholly suspended for 5 years on condition accused does not during that period commit an offence involving the use of electric current which has been unlawfully abstracted, for which he will be sentenced to imprisonment without the option of a fine."

H MUSAKWA J concurred.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/CITY OF GWERU v MBALUKA 2014 (1) ZLR 248 (H)

CITY OF GWERU v MBALUKA 2014 (1) ZLR 248 (H)

Citation 2014 (1) ZLR 248 (H)

Case No Judgment No. HH-93-14

Court	High Court, Harare
Judge	Chigumba J
Heard	3 February 2014; *CAV*
Judgment	12 March 2014
Counsel	*F Chimwamurombe,* for the plaintiff *A Hlabano*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Evidence – civil case – onus – proof on balance of probabilities – meaning – when onus is discharged

Headnote

In a civil case, the standard of proof is never anything other than proof on a D balance of probabilities. The reason for the difference in onus between civil and criminal cases is that, in civil cases, the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. The degree of proof required by the civil standard is easier to express in words than the criminal standard, E because it involves a comparative rather than a quantitative test. If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. What is being weighed in the balance is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case. The preponderance of probability in favour of the party bearing F the onus must be strong. It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to shift the onus onto the other side to rebut it.

Cases referred to G

Miller v *Min of Pensions* [1947] 2 All ER 372 (KB)

Selamolele v *Makhado* 1988 (2) SA 372 (V)

West Road Estates Ltd v *New Zealand Ins Co Ltd* 1925 AD 245

ZESA v *Dera* 1998 (1) ZLR 500 (S) H

Chigumba J

Case information

A*F Chimwamurombe*, for the plaintiff

A Hlabano, for the defendant

Judgment

Chigumba J: The plaintiff issued summons against the defendant on 25 September 2010 claiming:

B (a) Payment of US$38 168.70.

(b) Interest thereon at the prescribed rate of 5 per cent per annum calculated from November 2009 to date of full payment

(c) Costs of suit.

In its declaration, the plaintiff averred that the defendant had been in its C employ from 25 November 2009, as a cashier, and that, between the period June 2009 to November 2009 she received an amount of US$244 654.07 from the plaintiff's clients. It was averred further, that defendant banked an amount of US$206 485.37 and converted the balance of US$38 167.70 to her own use, thereby defrauding the plaintiff of that amount. The defendant entered appearance to defend herself in the matter, on 11 October 2010. On D 9 December 2010, the defendant filed her plea, in which she denied ever receiving an amount of US$244 654.07 from the plaintiff's clients, and denied that she banked US$206 485.37 on the basis that she was not responsible for banking. The defendant denied having converted US$38 168.70 to her own use, and prayed for the dismissal of the plaintiff's claim.

At the pre-trial conference, on 4 March 2013, the following issue was E referred to trial:

"whether or not the defendant is responsible for the shortfall of US$38 168.70 or any lesser amount".

The parties agreed that there was a shortfall of US$38 168.70 which had been unearthed by an audit covering the period June and November 2009. F The plaintiff opened its case by calling Mr Justice Donald Beta as a witness. He told the court that he is the plaintiff's internal auditor with a degree in business studies obtained from the University of Zimbabwe, as well as a certificate from the Institute of Chartered Certified Accountants, from the United Kingdom. He testified that his duties with the plaintiff included system reviews, checking efficiency and effectiveness in the use of resources, G compliance auditing, and special investigations.

Mr Beta told the court that he compiled an audit report for the period November-December 2009 to January-February 2010. The audit report was admitted into evidence as exhibit one. The objectives of the investigation on irregularities by the revenue hall cashiers was to confirm suspicions raised by H the senior accountant revenue that some cashiers were not banking amounts

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receipted intact, to establish the extent of the anomalies, and to identify the A causes of the anomalies. He referred to p 3 of the report, at para 3.3:

"The audit observed that the fraud was permitted to pervade over many months mostly because supervision of cashiers was very poor and sometimes non-existent. No-one was supervising the manual receipt books against the computer receipts. Initially, manual receipts were only used when the machines were down. However, later on the manual receipts were mainly being used for sundry B income (e.g. weekend flea market, burial fees, building fees). These were the monies targeted for embezzlement as there were no accounts linked to them and therefore not traceable since no client would later come with any queries once payment had been made and receipted. Audit observed that sometimes the manual receipts were used even when electricity was available. The lax in supervision made the fraudsters more daring".

Mr Beta took the court through the audit report, beginning with the procedures C used in carrying out the audit. He told the court that the audit traced and collected all manual receipt books issued to revenue hall cashiers for the period January 2009 to 20 November 2009. It scrutinized all the receipts from receipt books obtained from revenue hall cashiers, and collected their registers for the same period. It traced all manual receipts to the daily pre-lists D and receipt updates for each cashier. The audit compared the pre-list banked total with totals on banking forms. It compared license receipt books against cash-up forms and returns to central vehicle registry. The audit recalculated deposit slips totals and checked against cashing-up forms, and interviewed the senior revenue accountant, computer manager, accounting assistant services, accounting assistant vendors, clerical assistant, and a cashier, Mrs E T Nkwenze. Audit observed that three cashiers in the town revenue hall, P Chikwava, Madzamba and the defendant, had irregular banking from June 2009 to November 2009.

Mr Beta stated that the irregularities seem to have started during working periods when there was no electricity and clients' payments were receipted F using manual receipt books. The approved banking procedure was that all manual receipts be re-receipted into the computer whenever power became available such that the manual receipt date and the date entered into the computer would be the same. When the audit compared the manual receipts and the computer output (as in receipts

pre-lists and validation and the receipts update) it found that some manual receipts were not appearing in computed G information but no overbanks were declared to cover the missing receipts. In table A of the audit report, p 2, the witness broke down the receipts that were not captured in the computer by the defendant, in monetary form as follows:

June 2009	2 122.50
July	4 108.50 H

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A August	5 010.00
September	7 782.70
October	10 717.00
November	8 428.00
TOTAL	38 168.70

B The plaintiff's internal auditor, Mr Beta, explained to the court that a pre-list shows the total sum of receipts attributed to a single cashier on any given day, and that, it is generated from entries made into the computer by the cashier, based on receipt numbers. He produced a schedule of all the receipts attributable to the defendant for the period June to November 2009, as exhibit number 2, a cash up form for machine 77 used by the defendant on 11 June 2009 C as exhibit number 3, a cash deposit slip with FBC bank as exhibit 4 and 5, a pre-list as exhibit 6, and 7, some manual receipts as exhibits 8 and 9, cash up forms as exhibit 10.

The witness told the court that every cashier is allocated a specific machine number and a secret password known only to themselves that enables them to access any machine electronically allocated to them o any given day. D He said that at the end of each business day, the cashiers would add up all the cash receipted and create a cashing up form which they submit to the supervisor. They fill in deposit slips for banking of the receipted cash the following morning. The supervisor, who has a different password for the machines, comes and produces an audit roll from each cashier's machine. E This is a computer printout of all the receipts entered into the computer according to receipt number and name of the client, and amount receipted. He was able to show the court that exhibit 3, cash up form, was filled in by the defendant on 11 June 2009, that the defendant was using machine 77 that day, and that she receipted a total of US$755.60 from combis, town vendors and K-buses.

F From exhibit 4 and 5, Mr Beta was able to show that the defendant filled in cash deposit slips for FBC bank in the sum of US$755.00 cash, and US$6.00 in copper coins, for banking the next day, 12 June 2009. The pre-list from machine 77 used by the defendant that day confirms that, on 11 June 2009, she receipted a total of US$755.60. The audit roll, exhibit 6, confirms the G same facts, and it has the same machine number and the defendant's name on it. The witness referred to exhibit 8, copies of manual receipts written by the defendant on 11 June 2009, receipt numbers 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11 and 12. He referred to receipt number 621107, which shows that defendant received US4.50 from E Mpesi, and to receipt number 621101 which shows that another US4.50 was received from F Kadayi. The H defendant's signature appears on both receipts. According to the witness,

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these two receipts do not appear on defendant's pre-list for 11 June 2009, A which suggests that the manual receipts were not subsequently entered into the computer when it was back online, and that the money was not banked on 12 June 2009, and not accounted for. The witness told the court that those two receipts are not part of the US$755.60 that was submitted for banking by the defendant.

The witness referred to exhibit number 2, the schedule of receipts compiled B by the audit, which shows each and every manual receipt that was not entered into the machine by the defendant, and not submitted for banking, resulting in loss of revenue, as demonstrated by the manual receipts of 11 June 2009. The schedule covers the period in question, and the total number of manual receipts not entered into the machine and not banked, make up the total sum C that the defendant allegedly converted to her own use, and failed to account for to the plaintiff. The court found this witness to be credible and believable. His evidence was accepted by the court. He gave his evidence in a balanced and calm manner. Under cross-examination, he admitted that supervisors were supposed to cross check the manual receipts as against pre-lists and audit rolls, but stressed that the audit report found that the supervisors had failed D to discharge this function competently, giving rise to the loophole exploited by the defendant to misappropriate plaintiff's money. He also admitted that the cashiers were subject to spot checks. Finally, he reiterated that the audit had recommended disciplinary action against the supervisors concerned.

The plaintiff called its second witness, Mr Leonard Tendai Nhari, a forensic E scientist and a private consultant, a holder of a BSc Honours and a Master of Science degree, a former government chief forensic scientist from 1980-1999, a former independent consultant for the Commonwealth Fund for technical cooperation in the United Kingdom attached to the government of Namibia, a forensic science advisor to the government of Namibia. His qualifications were not disputed by the defendant. The court accepted him as an expert F witness. He testified and told the court that, his job entails forensic science investigations including handwriting and signature comparisons. He said that he did not know the defendant, and had never met her prior to or subsequent to compiling his report, SL04/13, which he entered into evidence and was admitted as exhibit 12. The report was compiled on Sunday 2 February 2014.

Mr. Nhari told the court that he received two receipt books from the plaintiff's G legal practitioners for analysis, on 20 January 2014, numbers 651801-651900 and 621101-621500. He found common authoring of all thirty two receipts, and in his expert opinion they were all authored by one person. He stated that handwriting differs from person to person and that each person's strokes with a pen were unique. He referred to receipt 501 and stated that H

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A the stroke of the pen on the word Dube shows that the author uses a down stroke when writing the letter "d", and separately constructs the letter "u" and "e". He observed that the author's construction of the letter "f" slants at the top then goes down to form a loop. On receipt number 506 he analysed the word "mandityira". He observed that the "t" and the "y" are joined, as well as the letter "e" and "l". He differentiated two other authors of receipts B placed before him and identified all the receipts authored by the defendant.

Under cross examination, Mr Nhari remained steadfast in his conclusions regarding the receipts that he pinpointed as having been authored by the defendant. He stated that the character of an individual can be revealed in the way they formulate letters in writing words, for example a lazy person, C or an overachiever, can be pinpointed by analyzing their writing style. The witness admitted that signatures can be imitated through practice, and did not rule out the possibility that the defendant's signature could have been imitated by a fraudster. However, he stated that he identified the defendant's signature on more than twenty receipts, and that imitating a signature perfectly twenty times was impossible, no matter how much practice a fraudster D has. The court found the witness honest and believable. He is obviously an expert in his field, and his integrity shone through because he did not seek to conceal basic truths in favour of the plaintiff, such, as that signatures can be easily imitated. On the whole, the court believed his testimony, and was satisfied by his scientific method of analyzing handwriting, and the conclusions drawn there from.

E The plaintiff's third witness was Ms Mercy Saungweme who works for plaintiff as its senior accountant in the Revenue Hall, and who worked closely with the defendant. She told the court that her duties included managing all of the plaintiff's revenue, to train and supervise subordinates under the revenue department. She tendered into evidence a document signed by the F defendant, dated 4 April 2005, which showed that the defendant joined the plaintiff's revenue department as a senior clerical assistant-cashier. Her duties included: collection and receipting of cash and cheques daily, signing cashier's register while on duty, counting day's takings, balancing the cashier's summary, completing and signing cashier's daily summary, preparing and ensuring that the day's collections is banked intact before G handing the bag to the supervisor, assist in sorting and checking of municipal services statements monthly.

Ms Saungwemwe tendered a document entitled "acknowledgement and undertaking" also signed by the defendant on 4 April 2009 and witnessed. The import of the document appears to be that defendant acknowledged H that she had received instruction, at the plaintiff's behest, and through its

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information technology department, on the opening and accessing of the A plaintiff's computers, on the creation of a secret password, and undertook not to divulge her secret password to anyone, which would constitute an act of misconduct. A manual of procedure for the revenue hall was introduced into evidence, also signed by the defendant on 4 April 2005. She explained to the court that manual receipts were designed to be used only when the B machines were down due to power outages or other machine failure. She stated that defendant misappropriated the plaintiff's money by receipting it using manual receipts, then failing to enter the manual receipts into the computer, excluding them from the pre-list which meant that the audit roll also excluded those receipts, failing to submit the funds collected from the manual receipts for banking, and converting the funds to her own use. C

She testified that when cashiers fill in deposit slips they fill in the next day's date for banking first thing in the morning, and that, the cash receipted together with the banking slip is put in the safe in a sealed bag overnight, transmitted to the bank the following morning under armed guard, and that each cashier receives their bag secured with a lock, from the bank, with the D deposit slips inside, which they submit to the supervisor after checking that the banking was done correctly. Ms Saungweme accused the defendant, Precious Chikwava, and Concilia Madzamba (all previously under her supervision in the revenue hall) of having hatched a plot to misappropriate the plaintiff's funds by exploiting a loophole in the manual receipt system. She told the court that she personally went through each and every receipt E listed on exhibit 2 with the defendant but defendant failed to account for the money. She denied that the defendant had reported to her, or advised her, that other supervisors frequently requested that she give them cash after receipting and before banking, and that such requests were made via flimsy pieces of paper, and honored by all the cashiers. She said this would have resulted in a shortfall when banking was done, and detected. F

Under cross-examination, the witness admitted that it was her job to cross check that the cashiers were performing their duties well, and that the system had loopholes which had since been corrected after the audit report that was tendered into evidence. She admitted that the supervisors failed to do their G job by not crosschecking manual receipts against the pre-list, and the cash in hand. She denied that receipt books were willy-nilly allocated to different cashiers at any time. The court found this witness to be brutally honest especially in the admission of her own shortcomings in the performance of her own duties. Her evidence was accepted by the court. At this point, the plaintiff closed its case. H

A The defendant gave evidence on her own behalf, and told the court that she was employed by the plaintiff as a contract worker in 2005 and as a permanent worker in 2006. She stated that her duties included receipting cash and cheques received from plaintiff's clients and ratepayers, and balancing the books at the end of each day together with the supervisor. She stated that, after writing up a cash up form, and filling in bank deposit slips for banking B the following morning, she would see the supervisor, who would enter a password and print the audit roll. The supervisor would count the cash on hand and compare with the deposit slip. If an error was detected, they would both count the

cash again and if the cash receipted did not match the total for banking, the cashier was asked to make up the shortfall immediately. C The defendant told the court that it was impossible to start work the next day if one's books had not been balanced the previous day. She confirmed that the supervisors were not cross checking receipts, especially manual receipts. She stated that during the period in question, numerous requests were written on flimsy pieces of papers to the cashiers by the supervisors, to pay them various amounts in cash, from the receipted money, prior to D banking. The defendant denied causing a shortfall of US$38 167.70. She said the supervisor always checked her work as well doing spot checks at any time of the working day.

The defendant denied stealing the money in question, and insisted that the supervisor always crosschecked and countersigned the paperwork that she E submitted, a sign that everything was in order. She told the court that the manual receipt books were never allocated individually to a single cashier. Instead, books were allocated indiscriminately on any given day. She denied that she failed to capture the manual receipts listed on exh 2 and insisted that those manual receipts did not have machine numbers so they could not be hers. The defendant denied signing the manual receipts on exhibit 2 F and reiterated that her signature was forged. She did not say by whom. She stated that manual receipt books were divorced from machine numbers and said that she had no idea why the manual receipts listed on exhibit 2 were being attributed to her machine. The defendant disputed the findings of the plaintiff's second witness, the handwriting expert, and insisted that he ought to have collected a sample of her signature from her, to use as a specimen, G in the comparison and analysis that he did.

Finally, the defendant told the court that around 20 November 2011, she resigned from the plaintiff's employ and that no handover-takeover accounting procedures were followed. Under cross examination, the defendant was asked to comment on the section of the audit report that condemned the lack of H adequate supervision of the cashiers in the revenue hall. She replied that the

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audit report is lying. She told the court that the funds allegedly requested by A supervisors on flimsy pieces of paper would not have been receipted prior to being handed over.

Ms Precious Chikwava testified on behalf of the defendant. She told the court that she worked for the plaintiff as a cashier during the period 2007 to 2009. Her testimony regarding the day to day duties of the revenue hall was B similar to that of the defendant. She confirmed that manual receipts were used when there was a power outage or when the machines were down for other reasons. She confirmed that the manual receipt books were distributed to the cashiers by the supervisors. She confirmed the procedure adopted at the end of each day, counting the cash on hand, writing a cash up form, filling in deposit slips, calling the supervisor to cross check and countersign all C the documents, and waiting for the supervisor to produce an audit roll, then locking the cash and deposit slips in her bag, locking the bag and placing it in the strong room ready for banking the next morning.

On manual receipts, the witness told the court that the manual receipts would be entered into the computer when the machine became operational, and the D receipts would then appear on the pre-lists. She confirmed that it was the supervisor's job to cross check the manual receipts against the entries on the pre-list from the machine and to assist in the correction of errors. Under cross examination, Ms Chikwava confirmed that she was one of the three cashiers being charged with fraud by the plaintiff in the criminal courts, but denied that the allegations had any substance to them. She denied that E the defendant was her fellow conspirator, and reiterated that the allegations against the defendant had not been proved. She supported the defendant's contention that receipt books were not treated as security items by their supervisor. She stated that it was quite possible for anyone to access receipt books allocated to the defendant on any day and forge defendants signature on the manual receipt. On being asked how it was physically possible to F move the receipt books between the cashier's booths in the revenue hall, which were partitioned off and secured, the witness reiterated that it just happened. At this juncture, the defendant closed her case.

In a civil case, the standard of proof is never anything other than proof on a balance of probabilities. The reason for the difference in onus between civil G and criminal cases is that, in civil cases, the dispute is between individuals, where both sides are equally interested parties. The

primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. See *ZESA* v *Dera* 1998 (1) ZLR 500 (S). In applying this test to the facts of the case before me, the question to be determined is whether defendant is liable to the plaintiff, for the shortfall of US$38 168.70 or H

2014 (1) ZLR p257

Chigumba J

A any lesser amount? Has the plaintiff, on a balance of probabilities, shown that it is more likely than not that defendant converted the sum of US$38 168.70, which was receipted during the course of her duties as plaintiff's cashier but never banked?

The degree of proof required by the civil standard is easier to express in B words than the criminal standard, because it involves a comparative rather than a quantitative test. The civil standard has been formulated by Denning J (as he then was) in *Miller* v *Minister of Pensions* [1947] 2 All ER 372 (KB) at 374 as follows:

> "It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it C more probable than not', the burden is discharged, but if the probabilities are equal it is not."

What is being weighed in the "balance" is not quantities of evidence but the probabilities arising from that evidence and all the circumstances of the case. See *Selamolele* v *Makhado* 1988 (2) SA 372 (V) at 375D-E. The preponderance of probability in favour of the party bearing the onus must D be strong.

In *West Road Estates Ltd* v *New Zealand Insurance Company Ltd* 1925 AD 245 at 263 the court said:

> "It is not a mere conjecture or slight probability that will suffice. The probability must be of sufficient force to raise a reasonable presumption in favor of the E party who relies on it. It must be of sufficient weight to show the onus on the other side to rebut it"

From the evidence of the plaintiff's witnesses, the defendant had a duty to enter manual receipts into the computer at the first available opportunity after a power outage or machine downtime. The defendant herself confirmed this procedure, as did her witness Precious Chikwava. So the probabilities are F that, if and when this was not done, it was calculated to avoid accounting for all the monies receipted manually and not entered into the computer. It is also more probable than not, that the intention to prejudice the plaintiff of the manually receipted money which was not entered into the computer and not banked was formulated and implemented by a cashier. I say so because the duty to enter the manual receipts into the computer was that G of the cashier. The duty to prepare bank deposit slips, secure the cash for banking overnight, cross check that proper banking was done, fell on the cashier, since the cashier had the only key to the bag where cash is locked before banking.

I find it more probable than not, that a supervisor, who did not know a cashier's H password, and could not access a cashier's machine except to print an audit

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2014 (1) ZLR p258

Chigumba J

roll, had little opportunity to manipulate the cashiers' machine by deleting A manual receipts already entered into it, or to cancelling bank deposit slips prepared by a cashier. The evidence shows that the supervisor would cross check the information entered by the cashier. The evidence does not show that the supervisor had opportunity to control the information entered into the machine by a cashier. In fact it is more probable that the audit report which recommended that supervisors be disciplined for failure to perform their duties B was correct. I find that it is reasonable to conclude, as the plaintiff's auditor did, that the defendant exploited the loophole in the plaintiff's operating systems in receipting money using manual receipts. It is not mere conjecture to say that the defendant must account for all the money receipted on the manual receipts but not banked. There is a reasonable presumption raised by C the plaintiff's evidence that, the defendant converted the money to her own use. The plaintiff's evidence holds sufficient weight to discharge the onus on the plaintiff of proving its case. It is reasonably probable that defendant converted the money to her own use. Having established that the plaintiff successfully made a *prima facie* case against defendant, the court will turn to consider the defences proffered on behalf of the defendant. D

The court formulated the impression that the defendant failed totally to provide reasonable or plausible explanations for most of the questions put to her under cross examination. Her demeanour, for want of a better word, was insolent. She was sulky in her attitude, and had to be constantly admonished by the court and directed to answer questions during cross examination. E She was fidgety in the witness stand, reluctant to make eye contact, and her attitude when answering questions was defiant. All in all, the court found the defendant an incredible and exasperating witness who was frequently untruthful, and mostly contradictory in her answers. Her various defences seemed improbable: for instance, her averment that the handwriting expert ought to have obtained a sample from her before compiling his report is not F based on any knowledge of the scientific methods of handwriting analysis.

The defendant appeared to be flying by the seat of her pants. She failed to pinpoint anyone by name who could possibly have forged her signature 32 times as alleged. This means that, on a balance of probabilities, it is more likely than not, that she signed all 32 receipts as alleged by the plaintiff, and buttressed by the expert evidence. She baldly said that she did not know G anything about those 32 receipts, and the court finds that highly improbable. What are the chances of some unknown, unnamed person who worked in plaintiff's revenue hall at the material time, setting up defendant not once, but 32 times, to take the fall for receipting those monies on manual receipts and failing to enter them into the machine and bank them? H

Chigumba J

A The chance of that happening in my view, is slim to zero. Once the court accepts that defendant authored all the receipts attributed to her machines the question that arises is what happened to the funds, which were not banked, totalling US$38 168.70? The defendant denied being responsible for banking, but all the documents which she signed on 4 April 2005 when B she joined plaintiff's employ, show that this was one of her key result areas. Her supervisor's testimony, that banking deposit slips would be filled in by each cashier and filed in the strongroom in a locked bag, to which only the defendant had a key, was believed by the court. It seems probable that these checks and balances existed in the plaintiff's accounting systems. The defendant admitted that the bank had the only other key to the locked bags, C and would lock up deposit slips after banking, where after each cashier, back at plaintiff's offices, would unlock their bag, retrieve the deposit slip, check it for banking errors, then submit it to the supervisor.

The defendant admitted that she was responsible for counting the cash on hand, filling in a cash up form, compiling a pre-list, filling in a deposit slip, D and then calling the supervisor to check. I find that it is more probable than not, that the defendant was responsible for the accuracy and the frequency and the efficiency of the banking. This is the conclusion that is supported by the evidence. It was her signature on the cash up form and on the deposit slip, and on the receipt. Just because the supervisor was supposed to check her work for accuracy does not make the responsibility for banking a joint E responsibility. If the supervisor was meant to be jointly responsible, a key to the locked bag that went to the bank would have allocated to the supervisor.

It follows that if the court finds that the defendant received the monies listed on the manual receipts, but deliberately and intentionally failed to subsequently enter the receipts into the machine, or submit the funds for banking, which F fell under her sole purview, then the defendant is liable to the plaintiff and must account for the missing funds. Nothing that was submitted in her defence constitutes a probable or likely explanation for not banking those funds after receipting them. The irresistible inference is that the defendant converted those monies to her own use, to plaintiff's detriment.

G One facet of this case which gave me pause, and cause for concern was the defendant's butter wouldn't melt in my mouth attitude to the misappropriation of public funds at a time when our country is struggling to pull itself out of its current economic quagmire, literally by the bootstraps. Spare a thought for all those innocent ratepayers struggling to do their civic duty on limited means, and faithfully meet their rate payments. The defendant's conduct, in H misappropriating these public funds, shows a degree of moral bankruptcy

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Chigumba J

and is highly reprehensible. Judgment is accordingly granted in favor of the A plaintiff, as against the defendant, and it is hereby ordered that:

1. Defendant pays to the plaintiff the sum of US$38 168.70
2. Interest thereon at the prescribed rate calculated from November 2009 to the date of payment in full.
3. Costs of suit. B

Danziger & Partners, plaintiffs' legal practitioners

Gundu & Dube, defendant's legal practitioners

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NEZANDONYI v NEZANDONYI 2014 (1) ZLR 261 (H)

Citation	2014 (1) ZLR 261 (H)
Case No	Judgment No. HH-115-14
Court	High Court, Harare
Judge	Tsanga J
Heard	7 and 14 January 2014; *CAV*
Judgment	12 March 2014
Counsel	*T Katehwe,* for the plaintiff Defendant in person
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C *Family law – husband and wife – divorce – division of property following – factors to consider – requirements of Constitution and relevant international instruments – need for such to guide court in exercise of its discretion*

Headnote

D When a court makes an order with regard to the division of property following divorce, in addition to the exhortations of s 7(4)(e) of the Matrimonial Causes Act [*Chapter 5:13*], it is also vital to be guided by the new Constitution and international instruments that speak to women's E standing in marriage and family life. This is especially necessary in light of the often less than equal role with which unpaid work in the home is often accorded. Settling such disputes in light of an understanding of constitutional and human rights values is likely to result in a more equitable outcome for both parties.

*S*ection 56(3) of the Constitution clearly prohibits the treatment of any person F in a discriminatory matter on grounds such as culture, sex, gender or economic or social status, among others. Pitting the breadwinner's role against that of the homemaker is gender discrimination, given the difficulty of placing a monetary value on domestic contributions. To accord a wife a lesser standing in the allocation of property on divorce G because she was "merely a housewife" would offend the letter and spirit of the Constitution in terms of non-discrimination. It would amount to discriminating against the wife on account of her social and economic status. Furthermore, given that in most instances it is women who find themselves, as a result of gender roles, saddled with unpaid work in the home, regarding women's gender-driven role as inferior would also H amount to discrimination. Section 26(c) of the Constitution articulates

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that the State should take measures to ensure that there is *equality of*A*rights* and *obligations* of spouses *during marriage* and at its *dissolution*.

In addition to these provisions, Zimbabwe is also party to several international instruments that are of relevance in articulating standards to be exercised in granting a divorce. These yardsticks essentially embody the values of equality or equity. Article 169(c) of the Convention on The Elimination of All Forms of Discrimination against Women, for example, accords B women the same rights and responsibilities during marriage and at its dissolution. Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa similarly states that on separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from marriage. Zimbabwe is a party to both these instruments. Although, C in terms of s 327(2)(b) of the Constitution, international treaties do not automatically form part of Zimbabwean law unless incorporated into law through an Act of Parliament (subject to some exceptions), s 327(6) clearly imposes a duty on the courts, in interpreting legislation, to be guided by international instruments to which Zimbabwe is a party. The D values of equality and equity that are enshrined in the international instruments referred to are therefore essential guiding beams for the court in the exercise of its discretion that is accorded by s 7(4) of the Matrimonial Causes Act.

Cases cited E

Gonye v *Gonye* 2009 (1) ZLR 232 (S)

Ncube v Ncube 1993 (1) ZLR 39 (S)

Shenje v Shenje 2001 (2) ZLR 160 (H)

Takafuma v Takafuma 1994 (2) ZLR 103 (S) F

Tangirai v Tangirai HH-65-13

Usayi v Usayi 2003 (1) ZLR 684 (S)

Legislation considered

Constitution of Zimbabwe 2013, ss 56 & 327

Matrimonial Causes Act [*Chapter 5:13*], s7 F

Case information

T Katehwe, for the plaintiff

Defendant in person

Judgment

Tsanga J: While marriage constitutes a joining of lives and a sincere intention to partner, it is in reality a fluid rather than a solid contract. While H

Tsanga J

A vows are made for better or for worse; for richer and for poorer; in sickness and in health, these vows are frequently broken when idealism is put to the test by human realities. The spirit of oneness has often all but evaporated at the time of divorce, especially when it comes to sharing earthly possessions that may have been so accumulated during happier times. It thereupon becomes B the duty of the courts to strike a fair balance between competing claims.

The facts

The parties in the present case entered into a marriage contract in terms of the Marriage Act [*Chapter 5:11*] in June 1994. They were no offspring from their union, a reality which in our cultural context sadly makes for less than a happy union, let alone one that can withstand the test of time. Whilst C the parties have come to court conceding that it is best for each to go their separate ways due to the irretrievable breakdown of the marriage, there is less consensus as they release each other to new beginnings, regarding which immovable property should go with who. There is equally no agreement as to who contributed what to some of the acquisitions. The movable acquisitions D have been allotted by consensus and are not subject to dispute. The plaintiff, who is the husband, takes with him a 2 plate stove, a wardrobe and a kitchen unit. The defendant, who is the wife, takes with her a 14 inch television, a 4 piece lounge suite, the kitchen utensils and a bed.

To be resolved by this court is the allocation of two stands described as Stand 22241 Unit L in Seke, Chitungwiza (Unit L Stand) and Stand 666 in Dema E Growth Point (Dema Stand). The plaintiff's prayer is that he be awarded the Unit L Stand, which is partly developed, and for his wife to be allotted the Dema Stand, presently a vacant stand. The defendant, on the other hand, insists that she be granted the Unit L Stand while the plaintiff is accorded the Dema stand. Each claims that the Unit L Stand came into their possession as F a result of distinct efforts on their part which the other challenges.

The plaintiff argues that his contribution to the marriage should be given greater recognition in the division of the immovable property because, as breadwinner, he contributed more compared to the wife's domestic role. The defendant contests the plaintiff's narrative of the acquisition of the property. Shes urges the court to assess her collective work as wife, community political G activist and cross-border trader and how these merge together to defy the depiction of a hapless housewife who sat at home "doing nothing".

The plaintiff, a policeman by profession, told the court in his evidence, that he met his wife in 1993. They registered their marriage in 1994 and lived together as husband and wife. Problems started in 2002 when they started H having disputes. He left the matrimonial home in 2007. The plaintiff's evidence

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was that he acquired the Unit L Stand in 2002, using proceeds from money A he received under the War Victims Compensation Act [*Chapter 11:16*] for injuries he sustained during the war. The evidence he produced in court, in the form of two letters, shows that he received a total of Z$49 563.73 paid out in 1996. In 2002 he paid Z$50 000 to Chitungwiza Municipality towards the servicing of the Unit L Stand. In 2004 he entered into a lease agreement with Chitungwiza Municipality in terms of which he had an option to purchase B the stand. He stated that during this time his wife was "just a housewife who did household chores and looked after the family".

As regards the Dema Stand, he told the court that he acquired this when he joined a co-operative at his workplace in 1998 called Civapol. He said he has been making contributions from his monthly salary to the co-operative C for this stand. A small balance remains to be paid. Again he emphasised that, when this property was also acquired, his wife was "sitting at home" to use his phrase. He indicated that he would like to retain the Unit L Stand because it is of emotional value, since he bought it with proceeds from the war victim's compensation. He further pointed out that it is his wish that his wife takes the Dema Stand. He stated that there is a balance of $800 D still to be paid, which they should both contribute to. Regarding the Unit L Stand, he said that whilst he has an agreement with the City Council as right-holder, he has not been given title deeds yet because of the on-going dispute. He produced a certificate of occupation granted in 2011, which is in his name. It permits him to reside there with the defendant and his child. E

In her cross-examination of the plaintiff, the defendant averred that the money received as compensation was used by the plaintiff to build a rural home. The plaintiff disputed that they own a rural home. His version was that they built a structure at his parent's homestead, which is being used by his parents, and does not belong to them. He argued that it is almost 12 years F since the defendant went to the rural home so she could not possibly know what has taken place. The defendant, on the other hand, remained resolute that the money received in 1996 was used to build a house in the rural areas.

I found the defendant's assertion on this account more credible than the plaintiff's. It is common knowledge that by 2003 Zimbabwe was in the throes G of hyperinflation, even if inflation had yet to reach the skies. It is unlikely that the plaintiff would have received money in 1996 and simply sat on it, in a highly inflationary environment, until 2002 as he would have the court believe. Furthermore, by 2002 the amount paid was only sufficient to meet the servicing fee as his own evidence suggests. He therefore cannot claim, in all sincerity, that subsequent developments were done using money from H

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A his compensation. It was, moreover, a lease agreement which could not have had the sentimental value that he claims.

The defendant further disputed the plaintiff's evidence that she contributed nothing. She said that she used to make and sell peanut butter and she also travelled to Mozambique on business. As regards acquisition of the Unit L B Stand, she brought out in her cross-examination that the stand was acquired by her as an outcome of her work as a political commissar for her political party. She said that she was awarded the stand after having successfully campaigned for one Brighton Chirongwe during the 2000 elections. Whilst confirming his wife's work as a political commissar, the plaintiff's response was that his wife was not allocated the Unit L Stand but another stand by a C co-operative called Bazuka Co-op, which she failed to pay for. The defendant did not agree.

In her own evidence, she reiterated that she had been allocated the Unit L Stand under the circumstances that have been described. She stated that it would have been very difficult for her husband, as a policeman, to be actively involved in political campaigning in the manner that she did. She also said D that it was a common understanding with those contesting in elections that they would reward those who had campaigned for them should they win. The candidate she campaigned for honoured his promise by helping those who campaigned for him to acquire stands. She stated thats while the initial intention had been to allocate her a stand in Unit M, members of her E community had felt that this would impact on her ability to co-ordinate her political work in her area. She said that the stand had been registered in the plaintiff's name because she had honoured him as head of the house, since he was her husband. She further highlighted that she did not have divorce in mind when she did so. This, she stated, was more so as she had also allowed him to take on another wife, since she herself was childless. Also he had F argued that his father has two wives. She had thus given him free rein to go forth and multiply. She said that she was at peace with his decision as he wanted more children. He already had one child when they married. When she therefore put the stand in his name, her expectation was that this would, if anything, consolidate their marriage. She had given him due recognition as head of the house. She had permitted an additional wife, despite the fact G that his registered marriage only permits one wife. Her expectation was that he could not have been a happier man under these circumstances. He was clearly not, as he left her in 2007.

Unsavoury as politics of patronage may be in resource allocation and acquisition, her version of how she came to be allocated the stand is credible. H Furthermore, her rendition of how and why it came to be registered in his

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name accords with the sacrificial wife who puts others interests before her A own. In our context, where *roora/lobola* exchanges hands, male headship in the home is assumed and indeed often demanded. She also revealed that she would travel to Mozambique with women's groups on business. She said that they were given repayable loans, and that it was part of this that she had used towards the purchase of the stand, as well as for bricks and metal roofing sheets. The court

was able to ascertain from her passport that she B had indeed made trips to Mozambique. This is not to say that the plaintiff contributed nothing. Each appears to have played a role within the spirit of collective endeavours by a married couple.

She described the Dema Stand as the one that the plaintiff had "sweated for", to use her own words. She expressed her deep unhappiness at the fact C that, now that he has another wife and child, he sees fit to throw her out in order to bring his new family into the house. She was vehement that she had put in a lot of hard work in developing the Unit L Stand. She objected to the plaintiff's actions in now seeking an easy route for his new family, by having her leave this property. In addition, she challenged that $800 remains D owing on the Dema Stand and stated that she had confirmed that only a balance of $200 is still owing. While she alleged that he had another stand, no evidence was produced to the court in this regard. In cross-examination the defendant was challenged on the billions that she said she had paid in 2003, as the currency was not yet in billions at that time. Her explanation E was that she had not brought the receipts with her. The receipts which she ultimately produced showed some payments towards "Civapol Co-operative". Neither the plaintiff nor the defendant was able to produce, to the court, any receipts for building materials in constructing the home. Notably, however, the defendant's claim that she had purchased bricks and roofing materials was not challenged by the plaintiff. F

The applicable laws

Several aspects of s 7 of the Matrimonial Causes Act are pertinent to the analysis of the facts of this case. Section 7(1)(a), for example, provides as follows with regards to the possibility of transferring an asset from one spouse to another: G

> "Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to –
>
> (a) the division, apportionment or distribution of assets of the spouses, including an order that any asset be transferred from one spouse to the other ,,,". H

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A Therefore the fact that an asset is in the name of one spouse only is not in itself a hindrance to the court in terms of transferring that asset to another spouse. In *casu* both stands are in the plaintiff's name. In terms of this section, there is nothing that stops the court from transferring one to the other spouse where this seems most equitable. See, for example, *Ncube* v *Ncube* 1993 (1) ZLR 39 (S).

B Also of relevance to the facts is s 7(3)(c) which is couched as follows:

> "(3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during marriage –
>
> C (a) by way of inheritance; or
>
> (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
>
> (c) in any manner and which have particular sentimental value to the spouse concerned."

D This provision is of relevance in the light of the plaintiff's assertion of the sentimental value of Unit L Stand. However, as I stated in the factual exposé, the chances of the Unit L Stand having been purchased from the proceeds from the war victims compensation were unlikely, in light of the evidence that the proceeds went to the construction of a rural home. As such, I will not accord the Unit L Stand the protective sheath permitted by s 7(3)(c).

E Section 7(4)(e) is also pertinent in that it allows the court among other factors to have regard to the "direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties. Granted this is only one among other factors that have to be holistically considered. Others include F such as income earning capacity, financial needs, age, physical and mental condition, value of any pensions and gratuities and duration of marriage that have to be evaluated by the court in making its order. Emphasis is on needs as well as contributions. See *Shenje* v *Shenje* 2001 (2) ZLR 160 (H) at 163.

Counsel for plaintiff, Mr *Katehwe,* correctly referred the court to cases G such as *Gonye* v *Gonye* 2009 (1) ZLR 232 (S) at 236H-237B regarding the exercise of the court's discretion, and to

Usayi v *Usayi* 2003 (1) ZLR 684 (S) and *Tangirai* v *Tangirai* HH-65-13 with respect to taking cognisance of contributions through domestic work.

Given the plaintiff's strong emphasis on the superior value of his contributions compared to those of a domestic nature, in addition to the exhortations of H s 7(4)(e) of the Matrimonial Causes Act, I am of the view that it is also vital

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to be guided by the new Constitution and international instruments that speak A to women's standing in marriage and family life. This is especially necessary in light of the often less than equal role with which unpaid work in the home is often accorded. Settling such disputes in light of an understanding of constitutional and human rights values is likely to result in a more equitable outcome for both parties. B

Section 56(3) of the Constitution clearly prohibits the treatment of any person in a discriminatory matter on grounds such as culture, sex, gender and economic or social status, among others. Pitting the breadwinner's role against that of the homemaker is a gender-given difficulty of placing a monetary value on domestic contributions. To accord the defendant a lesser standing in the allocation of property on divorce, because she was, as C described by the plaintiff, "merely a housewife" would, in my view, offend the letter and spirit of the Constitution in terms of non-discrimination. It would amount to discriminating against the defendant on account of her social and economic status. Furthermore, given that in most instances it is women who find themselves, as a result of gender roles, saddled with unpaid D work in the home, regarding women's gendered roles as inferior would also amount to discrimination. I am buoyed further in this view by s 26(c) of the Constitution which articulates that the State should take measures to ensure that there is *equality of rights* and *obligations* of spouses *during marriage* and at its *dissolution*.

In addition to these provisions, Zimbabwe is also party to several international E instruments that are of relevance in articulating standards to be exercised in granting a divorce. These yardsticks essentially embody the values of equality or equity. Article 16(9)(c) of the Convention on The Elimination of All Forms of Discrimination Against Women, for example, accords women the same rights and responsibilities during marriage and at its dissolution. F Article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa similarly states that, on separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from marriage. Zimbabwe is party to both these instruments.

In terms of s 327(2)(b) of our Constitution, international treaties do not G automatically form part of Zimbabwe law unless incorporated into law through an Act of Parliament, subject to some exceptions. Nonetheless, s 327(6) clearly imposes a duty on the courts to be guided by international instruments to which Zimbabwe is a party in interpreting legislation.

Section 327(6) provides – H

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> A "(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

The values of equality and equity that are enshrined in these instruments are therefore essential guiding beams for the court in the exercise of its discretion B that is accorded by s 7(4), in particular, of the Matrimonial Causes Act.

The defendant is currently the one staying in the Unit L Stand. She is thus enjoying access and control, while the plaintiff, who moved out in 2007, has lease rights with the Municipality. He also has the Dema Stand allotted to him through his co-operative at work. Since neither of the parties were able C to produce evidence as to who actually contributed what to the building of the Unit L Stand, I choose to regard their efforts as having been symbiotic with regard to this matrimonial property. The weight of evidence, however, leans in favour of the defendant, who has remained on the premises for the last seven years since their separation. In my opinion, it would make more

sense for ownership of this property to be transferred to her, albeit with a D certain percentage going to the plaintiff. It would also make further sense for the plaintiff to remain in possession of Dema Stand. Guided by the principles in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S), that suggest initial parcelling out in terms of "his", "hers" and "theirs" before balancing any equation, I will allocate the Dema Stand to the plaintiff as his property, given the very specific work-related circumstances pertaining to its acquisition. I will E treat the Unit L Stand as joint matrimonial property, taking into account the evidence led by both parties.

In light of the allocation to the defendant of Stand 666 Dema as his, the remaining question is what would be an appropriate share to be allocated to each from the property which is "theirs". Of concern is an outcome that F would ideally place the parties in the position that they would have been had a normal marriage relationship continued. In my view, taking into account that it is the defendant who has been in the house over the last seven years, Stand 22241 Unit L is best allocated to the defendant in the share of 60 percent to her and 40 percent to the plaintiff. Section 7(1) of the Matrimonial G Causes Act permits the court to transfer an asset from one spouse to another where equity demands.

It is therefore ordered as follows:

(a) A decree of divorce be and is hereby granted.

(b) The movable assets be shared in accordance with the agreement reached H by the parties prior to trial.

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(c) The plaintiff is awarded Stand 666, Dema. In addition, he is awarded a A 40 % share of Stand 22241 Unit L Seke.

(d) The defendant is awarded a 60% share of Stand 22241 Unit L Seke.

(e) The Registrar shall appoint an estate agent for valuation of Stand 22241 Unit L Seke within 30 days of this order.

(f) Both parties shall contribute equally to the valuation. B

(g) The estate agent shall produce a report of his/her valuation within 14 days of the date of his appointment.

(h) The defendant is given the option to buy out the plaintiff of his 40 percent share within a period of 12 months from the granting of this order. Failing this, the property is to be sold to best advantage on the C open market with the parties sharing the net proceeds in proportion to the shares awarded to them.

(i) The plaintiff shall ensure that the lease which he currently holds in terms of his agreement with Chitungwiza Municipality, with agreement to purchase to Stand 22241 Unit L Seke, is transferred to the defendant in terms of this order, simultaneous to the release of his 40 percent share D value.

(j) Each party pays his or her own costs.

Tadiwa and Associates, plaintiff's legal practitioners E

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MUNYUKWI v TSANGA 2014 (1) ZLR 271 (H)

2014 (1) ZLR p271

Citation 2014 (1) ZLR 271 (H)

Case No Judgment No. HH-113-14

Court	High Court, Harare
Judge	Chigumba J
Heard	13 February 2013; *CAV*
Judgment	12 March 2014
Counsel	*Z T Chadambuka,* for the plaintiff *D Sheshe*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Delict – actio injuriarum – malicious institution of legal proceedings – elements – making report to police – when making report might constitute malicious institution of proceedings – merely placing information or facts before police not sufficient – not necessary that police or parent D *Ministry be cited as parties*

Headnote

To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

(a) the defendant set the law in motion, instigated or instituted the E proceedings; and

(b) the defendant acted without reasonable or probable cause, and

(c) the defendant acted with malice; and

(d) the prosecution had failed.

In so far as setting the law in motion, however, the mere placing of information or facts before the police, as a result of which proceedings are instituted, F is insufficient to sustain a cause of action. The plaintiff must allege and prove that the defendant actually instigated or instituted them the proceedings. The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. The test is whether the defendant did more than tell the police the facts and leave them to act on their own judgment. Inherent in the concept of "setting G the law in motion" or "instigating or instituting the proceedings", is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible H for the prosecution. 'The principle is that where the defendant acts in

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such a way that a reasonable person would conclude that he is acting A clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, the defendant is responsible for the prosecution. Similarly, an informer who makes a statement to the police which is wilfully false in a material respect instigates a prosecution and may be personally liable.

The plaintiff must allege and prove that the defendant instituted the proceedings B without reasonable or probable cause, which means an honest belief, founded on reasonable grounds, that the institution of proceedings is justified. The concept involves an objective and a subjective element.

This cause of action cannot be used to prejudge the reasonableness of the proceedings that form the subject of the complaint, so the plaintiff must allege and prove that the proceedings were terminated in his favour. C

Cases cited

Beckenstrater v *Roltcher & Theunissen* 1955 (1) SA 129 (A)

Lederman v *Moharal Invstms (Pty) Ltd* 1969 (1) SA 190 (A)

Min for Justice & Constitutional Development v *Moleko* [2008] 3 All SA 47 (SCA) D

Min of Safety &Security v *Seymour* [2007] 1 All SA 558 (SCA)

Moaki v *Reckitt & Coleman Africa Ltd* 1968 (3) SA 98 (A)

Munyai v *Chikurira & Anor* 1992 (1) ZLR 145 (H)

Prinsloo & Anor v *Newman* 1975 (1) SA 481 (A) E

Rudolph v *Min of Safety & Security & Anor* 2007 (3) SA 271 (T)

Stambolie v *Commr of Police* 1989 (3) ZLR 287 (S)

Thompson v *Min of Police* 1971 (1) SA 371 (E)

van der Merwe v *Strydom* 1967 (3) SA 460 (A)

Case information

Z T Chadambuka, for the plaintiff F

D Sheshe, for the defendant

Judgment

Chigumba J: The plaintiff issued summons against the defendant on 21 January 2013, seeking payment of the sum of US$50 000, being damages for *contumelia*, deprivation of freedom and discomfort suffered, interest on G such damages as may be awarded from the date of the judgment to the date of payment in full, and costs of suit. In the declaration, the plaintiff averred that, on or about 29 June 2012, at Harare, the defendant wrongfully and maliciously set the law in motion by laying a false charge of theft of trust property against the plaintiff and her superior at Gabriel Real Estate with the Criminal Investigations Department Fraud Squad, in Harare. It was averred H

A further that the defendant by gave them false information to the effect that the plaintiff and Mr Gabriel had stolen trust property belonging to the defendant.

It was averred further that, when laying this charge and giving this information, the defendant had no reasonable or probable cause for so doing, and that she did not have any reasonable belief in the truth of the information given. B The plaintiff averred that, as a result of the defendant's conduct, she was summoned to the police station and interrogated and charged with theft of trust property. Subsequently, the office of the attorney general declined to prosecute her on the basis that no criminal offence had been committed. The plaintiff alleged that she suffered embarrassment and humiliation, deprivation of freedom and discomfort, and claimed damages.

C The defendant filed her plea to the plaintiff's claim on 5 March 2013. She raised what was referred to as a point *in limine* that the plaintiff had sued the wrong person: she should have sued the Zimbabwe Republic Police and its responsible ministry, the Ministry of Home Affairs. The defendant denied that she acted wrongfully and denied that she ever laid a charge against the D plaintiff. She admitted to approaching the police and to making a report that the plaintiff and her employer Gabriel Real Estate were refusing to refund her money which she paid into their trust account as a deposit, in anticipation of entering into an agreement of sale to purchase an immovable property, which sale subsequently failed to happen. The defendant averred that she took legal advice to the effect that she should report the refusal to refund E her monies to the police, and denied that reporting the matter to the police was malicious. The defendant averred further, that the power to lay charges against the plaintiff reposed in the police and not in her hands.

According to the joint pre-trial conference minute, filed of record on 24 June 2013, the following issues were referred to trial:

F 1. Whether the plaintiff is pursuing action against the wrong person?

2. Whether, in laying the charge of theft of trust property against the plaintiff, defendant acted wrongfully and unlawfully?
3. What is the quantum of damages, if any, suffered by the plaintiff?

At the hearing of the matter, the court directed that the first issue for trial, G that of whether or not the plaintiff was pursuing action against the wrong defendant, be deferred for address at the close of the plaintiff's case. The court advised the parties that the issue was one of law, not fact, and that accordingly, would be addressed at the close of the plaintiff's ,case, because it would have a bearing on whether or not the defendant ought to be put to H her defence, at that stage.

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The plaintiff, Rosemary Makanyara Munyukwi, testified and told the court A that she was employed by Gabriel Real Estate in the residential letting department where it leases properties belonging to their clients. She stated that she has worked in this capacity for a long time, and that, from 2009 to 2012, she doubled as a residential sales agent, due to staff shortage. She met the defendant when the defendant became a tenant in one of the properties managed by Gabriel Real Estate. The plaintiff stated that the defendant B requested that she advise her of any residential properties that came up for sale. The defendant subsequently put in an offer to buy one of the properties being sold by Gabriel Real Estate. It was agreed that the defendant would pay a deposit and would pay off the purchase price by way of monthly installments in a deed of sale arrangement. C

The plaintiff told the court that the arrangement was later altered, after the defendant advised that she had secured a loan of US$150 000 with the Commercial Bank of Zimbabwe. The parties entered into an agreement, which was admitted into evidence. According to the agreement of sale, the property, Stand 136 Avondale Township, otherwise known as number 17 D Aberdeen Road, belonging to Eileen Joyce Bird, was sold to the defendant on the basis of the special condition that the sum of US$150 000 was to be paid in full within 14 days of 15 December 2011, the date of signature of the agreement of sale. The purchase price was to be held in trust by Gabriel Real Estate pending registration of transfer. It was also agreed that the purchaser would not be entitled to vacant possession of the property prior to 30 April 2012 because the property was encumbered by a lease agreement. E

Under general conditions of the agreement of sale, the parties agreed that the agent's commission on the sale would be paid by the seller, who would nominate the conveyancing attorneys. The cost of transfer, including conveyancing fees and stamp duty, would be paid by the purchaser (the F defendant) The agreement contained a breach clause to the effect that any party who committed a material breach and failed to remedy it within seven days of written notice to do so, risked a cancellation of the agreement, a claim for damages and or punitive interest charges on the purchase price. The defendant told the court that, according to her understanding of the agreement between the defendant and Ms Bird, the purchase price was to G be paid in full, and a deposit of US$10 000 was to be deposited into the Gabriel Real Estate Trust Account. The plaintiff told the court that despite numerous interventions on the defendant's behalf, and numerous extensions of time within which to pay the purchase price, the defendant failed to raise the US$150 000 required, resulting in a cancellation of the agreement of sale. At the time that the agreement of sale was cancelled, the plaintiff told the H

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A court that she was no longer involved in residential sales and had gone back to dealing exclusively with residential lettings. A Mr Baudi of Gabriel Real Estate was alleged to be dealing with residential sales, and with defendant's case. The plaintiff told the court that she was not privy to what transpired when the agreement of sale was cancelled, but she was aware that defendant B was refusing to acknowledge the cancellation, because the defendant was insisting that she deal directly with the plaintiff, as opposed to Mr Baudi.

The plaintiff told the court that when the defendant approached her and requested that she be refunded the US$10 000 deposit that she had paid into the trust account, she advised defendant to approach Scanlen & Holderness, the seller's conveyancers, and get an indication of the conveyancing costs, C which would be deducted from the deposit together with the agent's fees. The plaintiff testified that the defendant refused to go to the conveyancers and insisted on seeing Mr

Gabriel, who confirmed that the defendant would only be refunded part of the deposit after deduction of costs. Thereafter, the plaintiff told the court that the defendant threatened her that she would get her full deposit refunded under any circumstances, even if it meant that D Gabriel Real Estate would be closed. The plaintiff told the court that, an hour after this altercation with the defendant, Mr Chinyama, a legal practitioner telephoned her and asked her to explain why the defendant was not getting a refund of the US$10 000 that she paid into trust, in full. She told Mr Chinyama to put his questions to her in writing. The plaintiff told the court that Mr Chinyama told her over the telephone that she would explain herself E to the police when they arrested her.

The plaintiff testified that one week went by, then, on Friday 29 June, she received a telephone call from a gentleman who advised her that he wanted to speak to her because she was stealing money from people. He introduced himself as Assistant Inspector Mafunda from the Criminal Investigations F Department. The plaintiff stated that, on contacting her lawyer, she was told not to avail herself to avoid being arrested on a Friday, which would mean being detained over the weekend. She described her feelings of insecurity, and fear of being detained over the weekend, and how she went home, locked all doors and went into hiding for that weekend, switching off her mobile phone to avoid talking to Assistant Inspector Mafunda. The plaintiff told G the court that, the following Monday, she parked at Speciss College near her office to avoid being arrested, then later went into the office using the back door. She saw three men waiting in the reception area. At 10:45, she and Mr Gabriel decided to go and surrender themselves to the police, in the company of their lawyer.

H The plaintiff described how the presence of the three men at the reception

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area made her feel in front of her subordinates, the junior staff under her A supervision. At the police station, the plaintiff testified that Assistant Inspector Mafunda introduced her and Mr Gabriel as follows:

> "These are the people who are stealing people's monies and running away after taking two commissions".

She told the court that this was humiliating to her. They were subsequently charged with theft of trust property, fingerprinted, and had statements B recorded by the police. They were detained until 3pm. The plaintiff was visibly emotional in the witness stand as she described the humiliation that she went through at the police station. She told the court that they were insulted the whole day and detained like prisoners, not allowed to stretch their legs. Eventually, Mr Gabriel gave defendant a full refund of the US$10 000 under duress, according to the plaintiff. The following morning at the C Attorney General's office, they were advised that the matter was not civil in nature. The plaintiff told the court that she reported the incident to the police internal investigations section whose letter after its investigations was admitted into evidence.

The letter was dated 27 July 2012 and addressed to the plaintiff. It was entitled D "complaint against police by yourself". It reads as follows:

> "Investigations into your complaint have been completed and we came out with the following findings…
>
> Your case has since been referred to the office of the Attorney-General for recommendations.
>
> Internal corrective measures have been taken against our members. E
>
> You are therefore advised to wait for the Attorney General's recommendations.
>
> The police acted above board".

According to exhibit 3, prosecution of the defendant was declined and the parties were advised to find a remedy through civil justice. The case was reported to Harare Central Police Station, DR 24/07/12 and CR Number 1298/06/12.

The plaintiff also tendered into evidence, a letter from Chinyama & Partners F addressed to her legal practitioners, dated 3 July 2012, para 2 of which reads as follows:

> "Our client is mainly interested in getting her money back…".

She told the court that the whole experience adversely affected her relationships G with her family, with her work colleagues, and with her clients in the letting department whom she feels now regard her with suspicion and no longer respect her. She lost her integrity. During cross-examination, the plaintiff said that she has known the defendant for three years, and denied that the property in

question was sold for US$140 000. She stated that she was not present when the agreement of sale was signed. She insisted that the defendant gave H

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A false information to the police that she had taken trust money and converted it to her own use when she had no access to the trust account, and defendant knew this. She denied that the defendant had given the US$10 000 directly to her, and insisted that it was receipted and deposited into the Gabriel Real Estate trust account, to the defendant's knowledge. She stated that she did not take issue with the police because it was the defendant who caused the B police to pursue her by laying false allegations against her.

The plaintiff then closed her case. The court directed that the parties submit written addresses on the first issue for trial: whether the plaintiff is pursuing action against the wrong person. The court noted that the plaintiff was cited as Enita Tsanga in terms of the summons, and Enita Matasva on the C agreement of sale. The parties were asked to address the question of whether the citation in terms of the summons was correct, and whether, as a matter of law, plaintiff ought to have sued the Zimbabwe Republic Police and the Ministry of Home Affairs, as well as the defendant, in order to succeed in a claim of this nature.

The cause of action in an action for a claim of damages caused by malicious D criminal or civil proceedings is the *actio injuriarum.* The plaintiff bears the onus in respect of all the elements of the delict, including that of *animus injuriandi.* See Harms *Amler's Precedents of Pleadings* 7 ed pp 273-274, *van der Merwe* v *Strydom* 1967 (3) SA 460 (A), *Beckenstrater* v *Rottcher and Theunissen* 1955 (1) SA 129 (A), *Rudolph* v *Minister of Safety & Security*E [2007] 3 All SA 271 (T). To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

(a) the defendant set the law in motion, instigated or instituted the proceedings;

(b) the defendant acted without reasonable or probable cause;

(c) the defendant acted with malice, or *animo iniuriandi*; and

(d) the prosecution has failed. See *Minister for Justice and Constitutional*F*Development* v *Moleko* [2008] 3 All SA 47 (SCA).

The court accepted the explanation given by the defendant, that Enita Tsanga and Enita Matasvi are one person.

1. Setting the law in motion

The plaintiff must allege and prove that the defendant instituted the G proceedings, that the defendant actually instigated or instituted them. The mere placing of information or facts before the police, as a result of which proceedings are instituted, is insufficient. See *Lederman* v *Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A). The test is whether the defendant did more than tell the detective the facts and leave him to act on his own H judgment. At p 197 of *Lederman supra*, the court stated that:

Chigumba J

> "Inherent in the concept 'set the law in motion', 'instigate or institute the A proceedings', is the causing of a certain result, i.e. a prosecution, which involves the vexed question of causality. This is especially a problem where, as in most instances, the necessary formal steps to set the law in motion have been taken by the police and it is sought to hold someone else responsible for the prosecution. Amerasinghe *Aspects of the Actio Injuriarum in Roman-Dutch Law* recognises that 'the problem is essentially one of causation' and suggests (at p 20): B
>
> > 'The principle is that where a person acts in such a way that a reasonable person would conclude that he' (i.e. the defendant) 'is acting clearly with a specific view to a prosecution of the plaintiff and such prosecution is the direct consequence of that action, that person is responsible for the prosecution.'"

On the other hand, an informer who makes a statement to the police which C is willfully false in a material respect "instigates" a prosecution and may be personally liable. See *Prinsloo* v *Newman* 1975 (1) SA 481 (A) 492.

The plaintiff testified that the defendant threatened her with arrest, that she threatened to close down the offices of the estate agent Gabriel Real Estate because she was connected to important people who had influence, that she swore that she would get a full refund of her US$10 000 deposit by D any means necessary. She also told the court that the defendant's lawyer, Mr Chinyama, threatened her with arrest if the deposit was not refunded in full. Yet there was no direct evidence led, of what exactly the defendant said when she reported the matter to the police. There is no evidence that the defendant did more than tell the police the facts and leave them to act E on their own judgment. There is no evidence before the court, other than the allegations of threats from the defendant and her legal practitioner, that the defendant "caused" the prosecution of the plaintiff, by doing something over and above narrating the facts of her complaint against the plaintiff and leaving the police to determine whether prosecution was warranted. The fact that the Attorney-General later declined to prosecute the plaintiff on F the basis that the matter was not criminal in nature but, rather, civil, does not advance the plaintiff's case. I say so because, after investigating the plaintiff's complaint about the conduct of the arresting and investigating officer, the police exonerated their members from wrongdoing and stated that they "acted above board". This suggests that there was nothing untoward about the conduct of the police in prosecuting the plaintiff. G

There is no evidence that defendant made a false statement in a material respect, which would constitute instigation, for purposes of fulfilling the requirement of having "instigated" the plaintiff's prosecution. It was the police who preferred the charge of theft of trust property against the plaintiff. The court would need more evidence that it was defendant who influenced H

Chigumba J

A the police to prefer that charge, based on what she told them. Such evidence was simply not adduced. The plaintiff's own perceptions of what the defendant may or may not have told the police is not enough. It would have been prudent to secure the testimony of someone who was present when the report to the police was made, to establish whether the defendant did more than report the facts and leave the police to exercise their discretion B on whether to arrest the plaintiff and which charge to prefer against her. As things stand, the plaintiff's testimony on this aspect is speculative, and not based on any actual knowledge of whether the police were induced in any way by the defendant to act against the plaintiff when there was no evidence of wrongdoing on her part.

C 2. Lack of reasonable or probable cause

The plaintiff must allege and prove that the defendant instituted the proceedings without reasonable or probable cause, a phrase which means "an honest belief founded on reasonable grounds that the institution of proceedings is justified". The concept involves an objective and a subjective element. See *Beckenstrater* v *Theunisen* 1955 (1) SA 146 (A.)

D The evidence before the court is that the agreement of sale, entered into between the defendant and Eileen Joyce Bird, on 15 December 2011, does not mention a deposit of US$10 000 being due and owing from the defendant. The agreement is silent and merely refers to the sale being for cash in the sum of US$150 000. The plaintiff testified that, at the time that the agreement E of sale was concluded between the parties, she was no longer dealing with property sales, and was not privy to the discussions between the parties or to their agreement. She cannot tell whether the parties agreed that the deposit would be refunded in full. She was not privy to whether the parties agreed that the deposit would be repaid less costs and charges, in the event that the sale fell through. She has no way of knowing whether the defendant was F entitled to insist that she be refunded the US$10 000 in full. According to the agreement of sale, the agent's commission was to be paid by the seller (clause 1 of the general conditions). The defendant, as the purchaser, was liable to pay for the cost of transfer, including conveyancing fees. The agreement is silent as to what ought to happen in the event that transfer fails to occur, but G conveyancing fees have been paid for. Was it reasonable for the defendant to expect to be refunded her deposit in full, in light of the cancellation of the agreement of sale? The answer to that question would depend on what the parties had agreed, and in light of the fact that the agreement of sale is silent on that aspect, I find that it is more probable than not, that the defendant's insistence on being refunded in full was based on a reasonable expectation, H emanating from what was agreed by the parties.

Chigumba J

It follows from my conclusion that it cannot be said that the defendant lacked A probable cause to report the matter to the police as she did. The plaintiff cannot testify as to what was agreed by the parties when they entered into the agreement of sale. The plaintiff did not place evidence before the court, pertaining to the statement of complaint made by the defendant in her report to the police. How then can it be established that the defendant lacked probable cause to make the statement of complaint that she did to the police? It cannot, B and from the evidence before the court, it was not, in my view.

3. Malice and *animus injuriandi*

In the context of *animus injuriandi* "malice" means *animus injuriandi* and is not a separate element of the delict. See *Moaki* v *Reckitt & Coleman (Africa) Ltd* 1968 (3) SA 98 (A). C

4. Termination of proceedings

This cause of action cannot be used to prejudge the reasonableness of the proceedings that form the subject of the complaint, so the plaintiff must allege and prove that the proceedings were terminated in her favour. See *Thompson* v *Minister of Police* 1971 (1) SA 371 (E) In this case, it is common cause D that the proceedings were terminated when the Attorney General declined to prosecute the plaintiff.

5. Damages

Courts may award substantial damages for *contumelia*. See *Minister of Safety & Security* v *Semour* [2007] 1 All SA 558 (SCA). E

Disposition

The court accepts that, as a matter of law, malicious institution of legal proceedings, as a cause of action, differs from unlawful arrest and detention. See *Munyai* v *Chikurira* 1992 (1) ZLR 145 (H) at 148-150, *Stambolie* v *Commisioner of Police* 1989 (3) ZLR 287 (S) at 301E-G, McKerron *The*F*Law of Delict* 6 ed p 244. The requirements or elements are different, and it is not necessary, for the purposes of a cause of action founded on malicious institution of legal proceedings, that the police be cited as parties to the proceedings, or the parent Ministry of Home Affairs. The cause of action is applicable to malicious institution of civi G l proceedings, and is not confined to malicious institution of criminal proceedings.

It is the court's view that the defendant did not do anything more than merely place information or facts before the police, as a result of which proceedings are instituted. There is no evidence of any action on her part, which may be deemed to constitute "causation" of the plaintiff's prosecution. That is "causation" in the sense of something more than the ordinary relaying of H

Chigumba J

A facts in making a complaint in a criminal matter. The boastful threats that defendant allegedly made to the plaintiff, and the alleged threats of her legal practitioner to the plaintiff, may go towards showing a degree of malice that was present in the parties' dealings with each other, but I find that the court would have needed more evidence pertaining to how exactly the defendant induced the police to prosecute the plaintiff, in the absence of probable B cause to do so.

I find that it was more probable than not, that the parties did not discuss the possibility of the defendant's deposit not being refundable in full, at the time that the agreement of sale was entered into. If they had, then they would have included their agreement in the sale document. No explanation has been C given as to why the agreement of sale does not mention the cash deposit paid into Gabriel Real Estate's trust account by the defendant. The plaintiff has no knowledge of what was agreed by the parties to the sale. How then can she know whether it was reasonable for the defendant to expect a full refund of the US$10 000 deposit? The court cannot say that the defendant lacked reasonable cause to report to the police that her deposit, which had been D placed in trust, had been stolen. There is insufficient evidence to enable the court to assess the reasonableness or lack of it, of the defendant's allegation that her money had been stolen. There is no evidence before the court, that the report made by the defendant to the police contained false or inaccurate information calculated to cause the prosecution of the plaintiff when such prosecution was not warranted.

E The plaintiff did not manage to establish a prima facie case against the defendant. Two of the elements of the cause of action were not established. The evidence led was insufficient. The plaintiff did not discharge the onus on her to raise a presumption of probabilities in her favour, on a prima facie basis, which is a lower standard of proof than proof on a preponderance of F probabilities.

Due to the insufficiency of the evidence before the court on the two elements of the cause of action, that is the causation of the plaintiff's prosecution, and the reasonableness of the defendant's report to the police, it follows that defendant is entitled to be absolved from the instance, and the plaintiff G ordered to pay her costs.

Gill, Godlonton & Gerrans, the plaintiff's legal practitioners

Chadyiwa & Associates, the defendant's legal practitioners

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Source:
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MVUDUDU v ZIMBABWE BROADCASTING HOLDINGS 2014 (1) ZLR 282 (H)

Citation	2014 (1) ZLR 282 (H)
Case No	Judgment No. HH-122-14
Court	High Court, Harare
Judge	Makoni J
Heard	15 November 2013; *CAV*
Judgment	12 March 2014
Counsel	*C Kwaramba,* for the applicant Ms *F Mahere*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Arbitration – award – registration of – appeal pending in respect of C *award – applicant entitled to have rest of award registered*

Headnote

The applicant was employed by the respondent. A dispute between them had been referred to arbitration, and the arbitrator found in the applicant's D favour. She appealed against part of the award relating to quantification of the benefits payable, but sought to register the part of the award which related to salary, against which she was not appealing. The respondent argued that she could not do this, as it would amount to approbation and reprobation, as well as being a breach of the "once and for all" rule.. E

Held, that the applicant had not appealed against that part of the award relating to salary, nor had the respondent cross-appealed against it. The amount awarded by the arbitrator therefore stood and was therefore not subject to the universal common law that an appeal suspends the decision appealed against. The principle of the "once and for all" rule that the respondent sought to rely on in countering the applicant's argument did not apply in F this situation. The rationale behind the rule is to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation. Here, there was a quantified and certified award which the respondent had not appealed against, neither had it settled it. There was no cogent reason why it should not be registered. G

Cases referred to

Evins v *Shield Insurance Co. Ltd* 1980 (2) SA 814 (A)

Mvududu v *ARDA* 2011 (2) ZLR 440 (H)

Phiri & Ors v *Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S)

S v *Marutsi* 1990 (2) ZLR 370 (S) H

Makoni J

Case information

A*C Kwaramba*, for the applicant

Ms *F Mahere*, for the respondent

Judgment

Makoni J: The applicant approached the court seeking an order to register an arbitral award in terms of s 98(14) of the Labour Act [*Chapter 28:01*] (the Act).

B The brief background to the matter is that the applicant was employed by the respondent. A dispute arose which culminated in the applicant lodging a complaint of unfair labour practice with the Ministry of Labour. The issue was referred for compulsory arbitration. On 16 March 2006 the applicant obtained an award in her favour. The award was later quantified on 13 October C 2010. It is this award, as quantified, that she seeks to register.

The applicant appealed, in part, against the decision of the arbitrator on the ground that he had awarded her 40 months' salary as opposed to 43 months. At the time of the hearing of this matter the appeal was still pending. On 6 December and in HC8932/10, the respondent filed an application seeking D the setting aside of the arbitral award. This application was later withdrawn.

The application is opposed by the respondent.

The applicant avers that she was a party to arbitration proceedings, the award related to her and the copy she is presenting for registration has been duly certified. Hence the award should be registered.

E The respondent challenges the application on the basis that it is incompetent in that it seeks to register part of the relief that was appealed against by the applicant and is still the subject of an inquiry. The applicant cannot approbate and reprobate by seeking to rely on an award for registration while in the same breath seeking to impugn the same by way of appeal.

F The respondent half-heartedly challenged the application on basis that the award was contrary to public policy. I say so because the respondent withdrew the application it had made seeking the setting aside of the arbitral award. Secondly, although such averments were made in the notice of opposition, the issue was not persisted with in the heads of argument or in the submissions made in court.

G It is not in dispute that the applicant's case meets the criteria as set out in *Mvududu* v *ARDA* 2011 (2) ZLR 440 (H). On p 449 Bhunu J stated

> "In order to qualify for registration all that an applicant has to do is to satisfy the court that:
>
> (a) he is a party to the arbitral proceedings
>
> H (b) the award relates to him

Makoni J

(c) the copy he is presenting for registration has been duly certified by the A arbitrator in terms of subs (13)

(d)

Once the applicant has satisfied the above three requirements he is entitled as of right to register the arbitral award in terms of s 98(14)(a) read with subs (13)."

It is also not in dispute that the applicant seeks to register part of award and B that she has appealed the other part which is still the subject of an inquiry. The issue then is whether it is competent for the applicant to seek registration of part of the award whilst she appeals against the other part.

Mr *Kwaramba*, for the applicant, submitted that the applicant was not approbating and reprobating as suggested by the respondent in its Heads of Argument; the applicant seeks to register the award relating to her salary. In C the Labour Court, the applicant is appealing against the benefits element of the award. He referred to the *Mvududu* case *supra* in support of his contention.

He further submitted that the 'once and for all' argument advanced by the respondent was mainly applicable to damages claims which are sought especially in aquillian actions such as traffic accidents actions. D

Ms *Mahere*, for the respondent, submitted that it is incompetent to seek the registration of an award with a view to issuing a writ in respect of a matter that is still pending in another forum. Furthermore the proceedings pending before the Labour Court are between the same parties as the parties in this matter. The applicant cannot be allowed to approbate and reprobate a step E taken in the proceedings. She can only do one or the other not both. She relied on the authority of *S* v *Marutsi* 1990 (2) ZLR 370 (S) at 374.

She further submitted that the pending proceedings are based on the same cause of action and in respect of the same subject matter. The fact that the award in the present proceedings relates to the applicant's salary while the F pending award related to quantification of the benefits is neither here nor there, as both arise from the same cause of action. The applicant cannot approach a court multiple times in order to seek relief in respect of the same cause of action. This principle is known as the once and for all rule. She concluded by saying that the application for registration is not yet ripe for consideration and is improperly before the court. G

There are two parts to the award in issue. One relates to salary and the other to benefits. The applicant has accepted the part relating to the salary. The respondent has also accepted it as it has not cross-appealed against it. As for the benefits element, the applicant has appealed for a higher award than that granted by the arbitrator. As Bhunu J reasoned in *Mvududu (supra)* at 454: H

Makoni J

A "That conduct does not in my view amount to an appeal against or rejection of the lesser amount granted by the arbitrator. It stands to reason that an appeal for more does not without more constitute a rejection of the lesser amount already given."

He went further and quoted from *Phiri & Ors* v *Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S) where the Supreme Court pointed out that where B a litigant has only appealed against a portion of the judgment the suspension (of the decision appealed against) only applies to that portion of the judgment appealed against. It does not extend to portions not appealed against.

In casu the award is in four parts and the relevant parts are para 1 and para 2. C Paragraph 1 relates to salary. The applicant has not appealed against this aspect. Neither has the respondent cross-appealed against it. The respondent has not settled that part of the award. Paragraph 2 related to benefits. The applicant has appealed praying for the quantum of damages to be increased. The respondent has not cross-appealed against granting of the award. The amount by the arbitrator therefore stands and is therefore not subject to the D universal common law that an appeal suspends the decision appealed against.

The principle of the "once and for all" rule that the respondent seeks to rely on in countering the applicant's argument does not, in my view, apply to the circumstances of this matter. According to

he seminal text Visser and Potgieter *Law of Damages* (Juta and Co, 1993) at p 121, the rule is defined as

> E "in claims for compensation or satisfaction arising out of delict breach of contract or other cause, the plaintiff must claim damages for all damage already sustained or expected in future in so far as it is based on a single cause of action."

The rationale behind the rule is to prevent a multiplicity of actions based on a single cause of action and to ensure that there is an end to litigation.

F The rule applies mainly to damages claims especially in aquillian actions. The position regarding where the rule is applicable, was made clear by Corbett JA (as he then was) in *Evins* v *Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835 when he stated

> "the 'one and for all' rule applies especially to common law actions for damages G in delict though it has always been applied to claims for breach of contract … Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action."

In casu, the application claim is for an unfair labour practice. In any event, if the rule were to apply, it would be at the initial stages when instituting H proceedings. *In casu*, there is a quantified and certified award which the

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Makoni J

respondent has not appealed against neither has it settled it. There is no A cogent reason why it should not be registered.

In the result, I will make the following order:

(1) The arbitral award handed down in the applicant's favour on 16 March 2006 and quantified on 13 October 2010 by arbitrator Lawrence M Gabilo be and is hereby registered as an order of this court. B

(2) The respondent be ordered to pay costs of suit.

Mbidzo& Muchadehama, applicant's legal practitioners

Chizodza Chineunye, respondent's legal practitioner C

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Source:
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S v MUNOTENGWA & ORS 2014 (1) ZLR 287 (H)

Citation	2014 (1) ZLR 287 (H)
Case No	Judgment No. HH-134-14
Court	High Court, Harare
Judge	Muremba J
Heard	12 March 2014
Judgment	12 March 2014
Counsel	Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

C *Constitutional law – Constitution of Zimbabwe 2013 – fundamental human rights – freedom from arbitrary eviction (s 74) – effect on eviction following conviction for unlawfully occupying gazetted land – requirement for court to take all relevant factors into account – need to balance out opposing claims*

D *Land – gazetted land – occupation – eviction following conviction for unlawfully occupying gazetted land – no time limit specified in legislation – requirement for court to take all factors into account when ordering eviction – such factors including Constitutional requirements to protect persons from being evicted from homes – eviction order giving accused* E *time to harvest crops and relocate*

Headnote

The accused were unlawfully occupying farming land which had been allocated to another person. They were charged with and convicted of contravening s 3(4) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. The magistrate sentenced them to a period of F imprisonment, suspended on condition that they vacate the farm by a stipulated date, "failure of which the State is hereby granted eviction order against the accused and all those claiming occupation through them. Accused to foot the cost of such eviction". The scrutinising regional magistrate queried the form of the sentence.

G*Held*, that the effect of s 3(4) and (5) is that, upon convicting an accused, the court should impose a sentence in terms of s 3(4). The sentence can be a fine, community service or imprisonment. Over and above the sentence imposed in terms of s 3(4), the court is mandated in terms of s 3(5) to evict the accused from the land. The reason is to stop the perpetuation of the criminal offence. So the eviction order is in addition H to the sentence imposed in terms of s 3(4). It should not be combined.

2014 (1) ZLR p288

Muremba J

Section 3(5) does not stipulate the time limit within which the eviction A order should be effected. This means that the time limit should vary from case to case. By not stipulating a time limit, the legislature gave the trial court a discretion to consider the surrounding circumstances of each case. This discretion should be exercised judiciously taking all factors into serious consideration.

Held, further that s 74 of the Constitution, which provides for freedom from B arbitrary eviction, requires a court to consider all relevant circumstances before ordering the eviction of a person from his him. Even if the accused stand convicted of breaching the law, the law still regards them as persons in need of considerate treatment within the parameters allowed by the law. The court retains the power to regulate when, where C and how its judgment may be carried into execution. It has the task of ensuring that justice and equity prevail in relation to all concerned and to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in the particular case. These would include the interests of the accused person (who should be allowed to harvest their crops D and relocate themselves) and the holder of the offer letter, who would eventually take up unimpeded occupation of the land.

Cases referred to

Chirinda v *van der Merwe* HH-51-13

CFU v *Min of Lands* 2010 (2) ZLR 576 (S) E

Occupiers of Erf 101, 102, 104, and 112 Shorts Retreat, Pietermaritzburg v *Daisy Dear Invstms (Pty) Ltd & Ors* [2009] 4 All SA 410 (SCA)

Port Elizabeth Municipality v *Various Occupiers* 2005 (1) SA 217 (CC)

Tswelopele Non-Profit Organization & Ors v *City of Tshwane Metropolitan Municipality* [2007] SCA 70; 2007 (6) SA 511 (SCA) F

Legislation considered

Constitution of Zimbabwe 2013, s 74

Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*], s 3(4) & (5)

Judgment

Muremba J: On 9 December 2013 the accused persons were convicted on G their own pleas of guilty to the charge of contravening s 3(4) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*].

The facts are that in 2000, the State acquired Morning Star farm. In 2010, the accused persons illegally occupied the said farm. In March 2013, one H

Muremba J

A Tendai Ruth Bare was allocated the farm in terms of an offer letter which was issued to her. On 18 September 2013, the Zvimba District lands officer and the district administrator visited the farm and advised the accused persons to vacate, but they refused. On 25 October 2013, a report was made to the police leading to the arrest of the accused persons.

B Each accused was sentenced as follows:

> "10 months' imprisonment wholly suspended on condition accused vacates Morning Star farm by 30 August 2014. Failure of which the State is hereby granted eviction order against the accused and all those claiming occupation through them. Accused to foot the cost of such eviction".

The accused were duly convicted and the convictions are hereby confirmed. C However, the scrutinizing regional magistrate raised a query with the trial magistrate with regards to the sentence before referring the matter for review. The query was as follows:-

> "The scrutinizing regional magistrate has taken note of the reasons given by the trial magistrate in arriving at his decision of sentence. The trial magistrate gave D a detailed and well researched reasons for such. The regional magistrate quite agrees with his decision regarding the conviction and sentence. The only issue which needs attention is whether in suspending the eviction for more than 6 months without the parties consenting to such is proper. I say so because the eviction part becomes a civil judgment in a criminal trial. Is it not correct that once it is taken in that context ordinary eviction rules should apply, unless statute states otherwise.
>
> E From a moral point of view the magistrate was quite right but from legal point of view is it not that they were supposed to be given the stipulated notice (48 hours) to vacate and any other arrangement was going to be between the parties.
>
> May the trial magistrate comment on that aspect of notice given of more than 6 months *vis-à-vis* the legal requirement."

F I am in total agreement with the regional magistrate's observations that the trial magistrate's reasons for sentence were well researched and detailed. They make very interesting reading, as they provide some crucial insights into how the lower courts are making use of the new Constitution. As such a reproduction of the trial magistrate's reasoning is apt as a prelude to its G assessment. The reasons were as follows:

> "The accused persons have been arraigned before the court facing allegations of contravening s 3(4) of the Gazetted Lands (Consequential Provisions) Act. It forbids persons to occupy, use or hold gazetted lands without lawful authority. The accused person pleaded guilty to the charge. They are all first offenders although they have been in commission of the offence since about 2007 when H they unlawfully took occupation of the land.

Muremba J

> The law provides that whoever is convicted on this charge should, over and A above any other sentence a court may impose; the court shall order the eviction of that person from the land so occupied.
>
> This flows from the fact that if such an accused is allowed to remain on the land, the court would have legalized their otherwise unlawful conduct and would have usurped land allocation powers of the executive.

Further, land being is a valuable resource (*sic*). It needs orderly distribution to persons by some central B authority. It means that people should not be allowed to assume self-allocation of land. It is therefore beyond doubt that the court has no discretion over the granting of an eviction order following the conviction of an unlawful occupier.

However a clear reading of the relevant provisions shows that the court is not given any period within which it must effect that order of eviction. To me this means that the court was left with discretion in order to allow it to do justice on a case by case basis; the only limitation being that such discretion must be C exercised judiciously, taking all the factors into serious consideration. Section 3(5) of the Act recites:

> '(5) A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates.'

The factors inherent in this matter are the following, D

1. The accused persons assert, which assertion was not challenged by the State, that they were 'allocated' the said plots by ZANU (PF) chairman of their area in 2007.
2. That they have among them children who are enrolled at a nearby school in various forms and grades.
3. That they have planted soya beans, maize and tobacco in such fields as they E believed were using lawfully.
4. That they had established on this unlawful and mistaken belief homes in the area concerned for the past six years.
5. That they are persons of apparently limited means such that whatever effort they have used to establish their crops must be all what they had and if they are not allowed to harvest the crops they are obviously condemned to perpetual destitution. F

Whilst the court is seized with the above factors, it must not lose sight of the fact that there is a lawful beneficiary who was allocated the land who needs to utilize it as well and that the executive has also a right to allocate land lawfully as per its constitutional functions to people it deem deserving.

Taking these conflicting factors into account the court must then decide when the order of eviction can be effective. G

The State addressed the court to the effect that the land was allocated to the beneficiary in 2013 March. It means it was offered to that beneficiary about 10 months ago. There have been no recorded efforts brought to the attention of the court that the beneficiary failed to take up the land because of the resistance by the accused person. Upon lawfully allocating the land to the beneficiary, it was incumbent upon the State to give vacant possession of the land to the beneficiary. H

Muremba J

A So if their prosecution was mounted reasonably soon after the allocation of the land to the beneficiary the accused persons may have been given time to vacate to about soon after harvesting their crops in the fields then; that is to about August 2013. In any case it stated by the State that the accused persons took up the land unlawfully in 2007 since the offence was committed thereabout. They could have been prosecuted a long time ago. When this is viewed against the timing B of the prosecution of the accused persons, there is a clarion call to at least not to rush the eviction of the accused persons without giving them adequate time to prepare for relocation. That time can only be reasonable if it is such that as would allow the accused persons to harvest the crops they have established, relocate their children to other schools and establish new homes. They need resources to re-establish new homes. They are communal farmers and those resources are most likely to be in the crops.

C One's home, regardless of how and where it was established is now a constitutionally protected right. The lawmakers enacted s 74 of the Constitution of Zimbabwe 2013 to the effect that whoever is to evict anyone from a place they call home, has to do so on the basis of a court order. Section 74 recites as follows:

> '74 Freedom from arbitrary eviction
>
> No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant D circumstances'.

It is clear that any court which is approached by anybody, the State included, must consider all relevant factors when it is being persuaded to cause the eviction of persons from their homes. The South African Supreme Court of Appeal had occasion to advert to the import of a similar provision in the recent case of *Tswelopele Non-Profit Organization & Ors* v *City of Tshwane Metropolitan Municipality*E [2007] SCA 70; 2007 (6) SA 511 (SCA).

I am mindful of the fact that in this authority the South African court was dealing with a situation where the respondents had demolished homes belonging to the applicants without a court order. I find however the sentiments of the court applicable to a situation as the one I am seized with. Despite the applicants

having been squatters, which is essentially the same as the accused persons in F this case, the court ordered that their destroyed homes be restored to them and stated that it was imperative that alternative accommodation must have been arranged before eviction was proceeded with. The court (*per* Cameron JA) held as follows:

> 'In *Government of the Republic of South Africa* v *Grootboom* 2000 (1) SA 46 (CC) para 99 the Constitutional Court held that the Constitution G requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realize the right of access to adequate housing in s 26(2) of the Bill of Rights – and that the program must include reasonable measures "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations"'.

It is clear the accused persons before the court as they stand have no access to H land. They are likely to end up without a roof over their heads and are in crisis

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Muremba J

situation no better than the squatters that approached the South African Court. A Even if they stand convicted of breaching the law, the law still regards them as persons in need of considerate treatment within the parameters allowed by the law. The High Court has reiterated that an accused does no loose his right to be a person by merely being convicted of an offence. The fact of their conviction must not be allowed to lead to their sub-human treatment. Justice is tempered with mercy. Allowing the accused persons to harvest their crops would meet the justice of the case. B

I am persuaded by this view because it seems with respect the beneficiary has not been in a hurry to take up his land for the past 10 months. A further year may not heavily inconvenience him to the extent of warranting destruction of the accused persons' homes and disentitling them to the crops they have established without according them reasonable time. C

Assuming that the beneficiary was not getting assistance through prosecution process, he could have easily resorted to the law as authoritatively set out by the Supreme Court in *Commercial Farmers Union* v *Minister of Lands* 2010 (2) ZLR 576 (S). In that case the Supreme Court stated that beneficiaries can on the authority of their offer letters approach the court for the eviction of any one who will be holding onto their land against the law. This is the very approach used in *Chirinda* v *van der Merwe* HH-51-13 where the Judge President entered in favour D of an offer letter holder an order evicting a farmer who was unlawfully holding onto the piece of land the applicant had been offered, claiming to be waiting for the finalization of a criminal trial in which the farmer was being prosecuted.

It is after considering all these factors that I find it appropriate to sentence the accused persons to a wholly suspended prison term, coupled with an order for eviction if they do not vacate the land by 30 August 2014. It is, by all standards, E enough time by which they would have winded up their operations and find where to relocate.

Further the accused are warned that if they are to be evicted, they shall meet the cost of such exercise."

In response to the query raised by the regional magistrate F the trial magistrate said:

"May the record of proceedings be placed before the regional magistrate for Mashonaland West with my response to the above referenced scrutiny minute.

I have read the above reference scrutiny minute and hereby respond as follows to the issues raised.

The accused persons were convicted and sentenced on their pleas of guilty to the G offence. Over and above the sentence imposed I issued an eviction order granting the state the right to evict the accused persons from the land effective 30 August 2014. The regional magistrate has respectfully taken issue with the period of suspension of the eviction order. It has expressed that the decision to peg the date of eviction has been set on the basis of morals rather than legal reasoning. Further it has been indicated by the regional magistrate that the position of the H

Muremba J

A law is that the law's stipulated notice (48 hours) should have been given which could only be extended by consent between the parties.

With respect, I tried to search through the Magistrates Court Act [*Chapter 7:10*] to find out if this statute contains any provision to the effect suggested by the regional magistrate without success. I further had regard to the Magistrate Court Civil Rules (SI 290 0f 1980). In this particular statue I managed to read Order B 26 r 4A. I also had reference to the High Court Rules Order 40 r 326A. These two provisions are worded to the same effect, that it is the messenger of court or the sheriff who is enjoined to give notice which is not less than 48 hours for any intended eviction.

Order 26 r 1(7) of the SI 290 of 1980 also stipulates the no execution shall be issued for any judgment unless at the lapse of a day after such judgment has been given except when such judgment has been entered by consent or default. C I therefore respectfully read this provision to be the only one where execution can be by arrangement between the parties only in respect of judgment entered by consent for obvious reasons; the parties will be in agreement.

I submit that s 74 of the Constitution is very clear. However I believe our Superior Courts have not yet gotten any opportunity to interpret and apply most of the new provisions in this constitution. It is for this reason that I got guidance D from the South African jurisdiction where, since 1996, a similar provision has existed. The courts and legislature have addressed the provision. In that country, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 was enacted and extensively applied by the courts. Section 26 of the Constitution of the Republic of South Africa is similarly worded with s 74 of the Zimbabwean Constitution. The Namibian Constitution has also similar E provision. It is the application of this provision in the two jurisdictions which I felt had adequate persuasive force in the absence of local authorities. It is therefore clear that the factors I considered are pronounced in judicial authorities and as such cannot be properly viewed as moral principles. I however submit myself to any directions which may be given on this approach.

Whilst I accept that there may be 'ordinary eviction rules' which may be F stipulating the notice as such, I respectfully submit that these may not be so powerful to override the spirit of the Constitution which formed the cornerstone of my decision to suspend the operation of the eviction to 30 August 2014. Again I am prepared to embrace any tuition which may be brought in view of my position and the law on this subject.

Over and above the premise given in the reasons for sentence I was of the opinion that in the absence of any limitations placed by the Gazetted Lands G (Consequential Provisions) Act the court was to retain its power to regulate when, where and how its judgment may be carried into execution. I felt that in such a situation the court has the task to ensure that justice and equity prevailed in relation to all concerned as was held in *Port Elizabeth Municipality* v *Various Occupiers* 2005 (1) SA 217 (CC) and that I had to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the H interests involved and the specific factors relevant in this particular case. This

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includes the interest of the accused persons (who will be allowed to harvest their A crops and relocate themselves) and the lawful offeree who would eventually take up unimpeded occupation of his lawfully offered land, a principle set out in *Occupiers of Erf 101, 102, 104, and 112 Shorts Retreat, Pietermaritzburg* v *Daisy Dear Investments (Pty) Ltd and Others* [2009] 4 All SA 410 (SCA).

I would however respectfully stand guided and tutored on the said 'ordinary eviction rules' which I seem to miss as well as the provision that stipulates the B 48 hours' notice.

I hope sincerely that my response would not cloud the issues at hand and that out of whatever mistake and/or misdirection that may have been committed I would come out corrected for future purposes".

After this correspondence between the regional magistrate and the trial magistrate the regional magistrate referred the matter for review seeking, C "guidance regarding the aspect of period of the sentence *vis-à-vis* the conditions. Also the effect of a civil judgment in a criminal trial whether the ordinary rules should not apply".

In dealing with the query that was raised by the regional magistrate, I will first deal with the sentence that was imposed by the trial magistrate. D

Section 3(4) and 3(5) of the said Act reads:

"(4) Any person, other than a person referred to in subsection (2), who contravenes subsection (1), shall be guilty of an offence and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(5) A court which has convicted a person of an offence in terms of subsection E (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates."

What these two sections mean is that upon convicting an accused, the court should impose a sentence in terms of s 3(4). This should be a punishment to the accused for committing the criminal offence. The sentence can be F a fine, community service or imprisonment. Over and above the sentence imposed in terms of s 3(4) the court is mandated to evict the accused from the land in question in terms of s 3(5). The reason is to stop the perpetuation of the criminal offence. So the eviction order is in addition to the sentence imposed in terms of s 3(4).

The trial magistrate articulated this quite well in his reasons for sentence G but he missed the point upon sentencing the accused persons. He went on to combine s 3(4) and 3(5) (imprisonment and the eviction order) together resulting in an absurd, confusing and improper sentence.

> "10 months' imprisonment wholly suspended on condition accused vacates Morning Star farm by 30 August 2014. Failure of which the State is hereby H

Muremba J

> A granted eviction order against the accused and all those claiming occupation through them. Accused to foot the cost of such eviction".

From this sentence it is not clear what will happen on 30 August 2014 if the accused persons fail to vacate the said farm. Will they be imprisoned for ten months; will they be evicted from the farm or will they be imprisoned and evicted at the same time? I am of the view that it was not the intention of the B legislature to create such confusion. I hold the view that in sentencing the accused person the courts ought to treat ss 3(4) and 3(5) separately.

I quite agree with the trial magistrate that s 3(5) does not stipulate the time limit within which the eviction order should be effected. This means that the time limit should vary from case to case. As correctly put by the trial C magistrate, by not stipulating the time limit, the legislature gave the trial court the discretion to consider the surrounding circumstances of each case. This discretion should be exercised judiciously, taking all factors into serious consideration. It is therefore not correct to say that the accused persons should have been ordered to vacate the said farm within 48 hours from the date they were sentenced. In any case, there is no authority at law which D says eviction orders have time limits of 48 hours. As correctly put by the trial magistrate, it is the notice of eviction by the sheriff which has the time limit of at least 48 hours. See High Court Rules 1971 r 326 A.

In casu the trial magistrate ordered that the accused persons should vacate the said farm by 30 August 2014. The reasons for sentence speak for themselves E as to why and how the trial magistrate arrived at the date of 30 August 2014. I find the reasons well researched, detailed and justified. The trial magistrate exercised his discretion judiciously without any misdirection.

I am in agreement with the regional magistrate that the eviction order is a civil judgment in a criminal matter. What it means is that, if the accused persons do not vacate the said farm by 30 August 2014, the complainant can F approach the civil court for enforcement of the eviction order.

In the result, I set aside the sentence that was imposed by the trial magistrate and substitute it as follows:

> "Each accused: 10 months' imprisonment wholly suspended for 5 years on condition the accused does not commit an offence involving illegal G settlement on any land and for which upon conviction the accused is sentenced to imprisonment without the option of a fine.
>
> It be and is hereby ordered that the accused and all those claiming ownership through the accused vacate Morning Star Farm on or before 30 August 2014."

H Muremba J and Mawadze J agree.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/S v DLAMINI & ORS 2014 (1) ZLR 296 (S)

S v DLAMINI & ORS 2014 (1) ZLR 296 (S)

Citation 2014 (1) ZLR 296 (S)

Case No Judgment No. CC-1-14

Court	Supreme Court, Harare
Judge	Malaba DCJ, Chidyausiku CJ, Ziyambi JA, Garwe JA & Cheda AJA
Heard	15 September 2011; *CAV*
Judgment	17 March 2014
Counsel	*T Bhatasara and A Muchadehama,* for the applicants *C Mutangadura and M Dube*, for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – referral of matter to Supreme Court – referral can only be of matter pending, not a matter which has been determined – objection to being placed on remand on grounds that breaches of Declaration of Rights disclosed – no request made to refer alleged breaches to Supreme D *Court – applicants placed on remand on grounds that reasonable suspicion shown that applicants committed alleged offences – referral by High Court during subsequent trial – not competent*

Headnote

The applicants had been abducted from their homes by security agents, kept E incommunicado and tortured before they were taken to the magistrates court to be placed on remand on allegations of committing various security-related offences. They challenged the application by the State to have them placed on remand. They raised, at that stage, the question of their detention as a violation of their fundamental right to personal liberty, but they did not request the magistrate to refer any such question to the F Supreme Court for determination. The magistrate placed the applicants on remand, on the grounds that there was a reasonable suspicion that they had committed the offences with which they were charged. At their subsequent trial, the High Court referred, for determination under s 24(2) of the Constitution, the questions of alleged violations of the fundamental rights of the applicants guaranteed under ss 13(1) (right to G personal liberty); 15(1) (right not to be subjected to torture or to inhuman or degrading treatment) and 18(1) (right to the protection of the law).

Held, that the referral was incompetent. If the applicants were of the view that the decision to place them on remand was a violation of their fundamental right to the protection of the law, they could, before the H

A decision to remand them was made, have requested that the question of violation of their right to personal liberty be referred to the Supreme Court for determination in terms of s 24(2) of the Constitution. If that request had been refused on the ground that the raising of the question was frivolous and vexatious, they could, as an exceptional remedy, B have applied to the Supreme Court for redress in terms of s 24(1) of the Constitution. The Supreme Court would then have decided whether the decision to place the applicants on remand was a violation of their right to the protection of the law under s 18(1) of the Constitution. The applicants did not invoke the provisions of s 24(2) of the Constitution at the time they ought to have done. They accepted the legality of the C decision to place them on remand.

Held, further, that *prima facie*, in finding that there was reasonable suspicion that the applicants committed the offences with which they were charged, the magistrate did not violate the applicants' right to personal liberty. This was confirmed on review by the High Court, which held that the D decision of the magistrate to place the applicants on remand was based on a proper application of the principles and finding on the facts that there was a reasonable suspicion that

the applicants had committed the offences of which they were charged. Once the decision to remand the applicants was made on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged, E and that position still prevailed at the time they appeared in the High Court for trial, the prosecution could not be stopped on the basis that they had been tortured or subjected to inhuman or degrading treatment.

Held, further, that there was no legal basis on which the trial judge could refer the questions of contraventions of ss 13(1), 15(1) and 18(1) of F the Constitution to the Supreme Court for determination, because the question of the existence of a reasonable suspicion of the applicants having committed the offences with which they were charged had already been determined, justifying their arraignment before the High Court. The High Court could not turn the proceedings before it into an inquiry into the correctness or otherwise of the decision of the magistrates G court to place the applicants on remand. It could not seek to have the correctness of that decision impugned through the procedure under s 24(2) of the Constitution, because the Supreme Court would no longer be exercising original jurisdiction in the circumstances. The court would not be determining the question of violation of the right to personal H liberty, but reviewing the decision of the magistrates court.

Malaba DCJ

Held, further, that section 24(2) of the Constitution clearly precludes a A situation where the question is referred to the Supreme Court in respect of a matter which is no longer necessary for resolution by the lower court in the determination of the dispute before it.

Cases referred to B

Muchero & Anor v *A-G* 2000 (2) ZLR 286 (S)

Mukoko v *Commr-Gen of Police & Ors* 2009 (1) ZLR 21 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 24

Case information

T Bhatasara and A Muchadehama, for the applicants C

C Mutangadura and M Dube, for the respondent

Judgment

Malaba DCJ: This is a referral by the High Court for determination under s 24(2) of the Constitution of questions of alleged violations of the D fundamental rights of the applicants guaranteed under ss 13(1) (right to personal liberty); 15(1) (right not to be subjected to torture or to inhuman or degrading treatment) and 18(1) (right to the protection of the law).

The applicants seek the following relief:

1. a declaration that their rights, in terms of ss 13(1), 15(1) and 18(1) of the Constitution, have been violated; E
2. an order for a permanent stay of the criminal proceedings before the High Court;
3. an order for *mandamus* directing the Attorney General to act in terms of s 76 (4a) of the Constitution and investigate the alleged offences committed against the applicants; F
4. a special order as to costs.

At the inception of the hearing before this court, Mr *Mutangadura*, who appeared for the respondent, raised four points *in limine*. The most important point, the determination of which disposes of the matter, is that the referral to the Supreme Court by the High Court, of the questions of the alleged G violations of the rights of the applicants at the stage of the proceedings in which it was done is prohibited by s 24(3) of the Constitution. The point *in limine* is properly taken as the referral was incompetent.

The facts are as follows. It was alleged by the applicants, at their initial remand hearing before the magistrates court, that they were abducted from various H

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A places in Harare, Norton and Masvingo, between 25 November 2008 and 13 December 2008 by members of the State security agency. The applicants alleged that they were taken to a secret detention centre, which they later found out to be Goromonzi Prison, where they were kept incommunicado until 22 December 2008. They were allegedly denied access to families, legal counsel and medical treatment for injuries sustained as a result of torture B inflicted by the abductors.

For the purposes of this judgment, the following are the facts which appear from the affidavits of all the applicants:

1. The *modus operandi* used in the alleged abductions is that each applicant had hands handcuffed behind his back, was blindfolded and then driven C around to disorientate them. They were all detained at Goromonzi Prison.
2. The applicants were released from illegal detention on 22 December 2008 into the custody of the police and detained at various police stations.
3. The alleged abductors tried to conceal the location of their detention centre.
4. D Statements were recorded from the applicants on 22 and 23 December 2008 in the absence of their legal representatives.
5. All the applicants were blindfolded when handed over to police stations on 22 December 2008 and when taken to record statements on 22 and 23 December 2008, in a bid to prevent them from seeing their abductors.

E On 29 December 2008 the applicants were taken to Rotten Row magistrates court for initial remand. They were each charged with insurgency, banditry, sabotage or terrorism in contravention of s 23(1)(a)(i) and (ii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Code"), alternatively malicious damage to property in contravention of s 140 of F the Criminal Code. Medical affidavits from two doctors who examined the applicants while in custody were produced to the court *a quo*. The reports were to the effect that the applicants had evidence of healed bodily injuries consistent with torture. They also exhibited clinical symptoms of psychological trauma.

G The magistrate ordered an investigation into the allegations of abduction and torture. Senior Assistant Commissioner Nyathi tendered his report to the court on 21 January 2009. On the same day, the then Minister of State Security in the President's office, deposed to an affidavit in terms of s 296 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. He declined to disclose the places where the applicants had been detained and identities H of State security agents involved in the investigation of the allegations

Malaba DCJ

against the applicants. The Minister denied that State security agents were A involved in the alleged abduction, torture or illegal detention of the applicants admitting only that they were involved in investigating them for the alleged commission of the offences with which they were charged.

It is common cause that the applicants challenged the application by the State to have them placed on remand. They raised at that stage the question of B their detention as a violation of their fundamental right to personal liberty. They did not request the magistrate to refer any such question to the Supreme Court for determination. The magistrate granted the application by the State and placed the applicants on remand on the ground that there was a reasonable suspicion that they had committed the offences with which they were charged. If the applicants were of the view that the decision to place C them on remand was a violation of their fundamental right to the protection of the law they could as an exceptional remedy have made that allegation in an application to the Supreme Court for redress in terms of s 24(1) of the Constitution had they requested before the decision to remand them was made that the question of violation of their right to personal liberty be referred to D the Supreme Court for determination and that request had been refused on the ground that the raising of the question was frivolous and vexatious. The Supreme Court would then have decided whether the decision to place the applicants on remand was a violation of their right to the protection of the law under s 18(1) of the Constitution. They did not invoke the provisions of s 24(2) of the Constitution at the time they ought to have done. The applicants E accepted the legality of the

decision to place them on remand on the basis of which they were arraigned before the High Court in July 2009.

Prima facie, in finding that there was reasonable suspicion that the applicants committed the offences with which they were charged, the magistrate did not violate the applicants' right to personal liberty. On 25 February 2009 F the High Court held in cases HC 42/09 and HC 147/09 on review that the decision of the magistrate to place the applicants on remand was based on a proper application of the principle and finding on the facts that there was a reasonable suspicion that the applicants had committed the offences of which they were charged. G

It is clear that s 24(2) of the Constitution was designed to enable the Supreme Court to adjudicate and consider the question whether there has been or there is likely to be a contravention of the Declaration of Rights, as a court of first instance exercising original jurisdiction.

Section 24(2) provides that: H

Malaba DCJ

> A "(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

Mr *Mutangadura* argued that what was required of the applicants was the B raising of a question of a contravention of the Declaration of Rights and a request that the presiding magistrate refer the question to the Supreme Court for determination. In this case, the question was raised before the magistrate at the initial remand without a request that it be referred to the Supreme Court for determination.

C Once the decision to remand the applicants was made on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged, and that position still prevailed at the time they appeared in the High Court for trial, the prosecution could not be stopped on the basis that they had been tortured or subjected to inhuman or degrading treatment.

There was no legal basis on which the trial judge could refer the questions D of contraventions of ss 13(1), 15(1) and 18(1) of the Constitution to the Supreme Court for determination under s 24(2) because the question of the existence of a reasonable suspicion of the applicants having committed the offences with which they were charged had already been determined justifying their arraignment before the High Court. The High Court could not turn the E proceedings before it into an inquiry into the correctness or otherwise of the decision of the magistrates court to place the applicants on remand. It could not seek to have the correctness of that decision impugned through the procedure under s 24(2) of the Constitution because the Supreme Court would no longer be exercising original jurisdiction in the circumstances. The court would not be determining the question of violation of the right to F personal liberty but reviewing the decision of the magistrates court.

Section 24(3) provides that:

> "(3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that G question shall lie to the Supreme Court under subsection (1)."

The procedure adopted by the High Court in this case had the effect of interrupting the criminal proceedings before determination which in a criminal case is when the accused is convicted and the final sentence delivered. The decision on the question whether there was a reasonable suspicion of the H applicants having committed the offences they were charged with to justify

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Malaba DCJ

placing them on remand had been made by a court of competent jurisdiction A and, in the absence of a request that the question whether placing them on remand was likely to violate their right to personal liberty be referred to it for determination, the Supreme Court could not be prevailed upon to exercise its original jurisdiction on the question of the contravention of ss 13(1) and 15(1) of the Constitution.

The case of *Muchero & Anor v Attorney General* 2000 (2) ZLR 286 (S) is B apposite. The facts were that the applicants, who were on bail on allegations of fraud and corruption, challenged the right of the State to continue to remand them for trial and applied for their removal from remand on the grounds that no reasonable suspicion existed that they had committed an offence, as required by s 13(2)(e) of the Constitution. Having heard evidence, C the magistrate refused the application. The applicants' counsel requested that the question of whether s 13(2)(e) of the Constitution had been contravened be referred to the Supreme Court under s 24(2) of the Constitution. The matter was referred to the Supreme Court.

The headnote reads:

> "The referral was incompetent. It should have been requested before the magistrate D rendered a decision. Once he had made a decision, the matter could only be dealt with by way of appeal or review".

In this case there was no request for a referral of the question that placing the applicants on remand was likely to violate their right to personal liberty protected by s 13(1) of the Constitution before the decision was made by E the magistrate to remand them on the ground that there was a reasonable suspicion of their having committed the offences with which they were charged. The magistrate made the decision to remand the applicants for trial notwithstanding the question of the alleged violation of their right to personal liberty having been raised because there was no request for a referral. The question was therefore not referred and the decision of the magistrate on F review was found to have been consistent with the factors the court was required to consider under s 13(2)(e) of the Constitution. Section 24(3) of the Constitution applied to the proceedings.

In *Mukoko* v *Commr-Gen of Police & Ors* 2009 (1) ZLR 21 (S) at 22F-G Chidyausiku CJ said:

> "Section 24 of the Constitution is peremptory. This court has no discretion to G condone a departure from compliance with s 24 of the Constitution. Consequently failure to comply with the procedure set out in s 24 of the Constitution is fatal to any court application made in terms thereof."

The learned Chief Justice went on to say at 23G-24A H

2014 (1) ZLR p303

Malaba DCJ

> A"Thus, when a matter is before the High Court or any court subordinate to the High Court, such as the magistrates court in this case, the question of the contravention of the guaranteed right should be referred to the Supreme Court by the court *mero motu* or at the instance of any one of the parties to the proceedings."

Section 24(2) of the Constitution clearly precludes a situation where the question is referred to the Supreme Court in respect of a matter which is B no longer necessary for resolution by the lower court in the determination of the dispute before it. If that were to be permitted it would mean that the Supreme Court would not be rendering a decision on the question as a court of first instance in the exercise of original jurisdiction. It was no longer necessary for the High Court to place the applicants on remand and C*ipso facto* to consider whether or not placing them on remand was likely to violate their right to personal liberty, the decision to place the applicants on remand having already been made by the magistrates court. The applicants were before the High Court for trial on the basis of the decision that there was a reasonable suspicion of their having committed the offences with which they were charged.

D Accordingly, the matter is struck off the roll with no order as to costs.

CHIDYAUSIKU CJ, ZIYAMBI JA, GARWE JA, CHEDA AJA concurred.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners

E*Attorney-General's Office*, respondent's legal practitioner

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/EARTHMOVING AND CONSTRUCTION COMPANY (PVT) LTD v GURUPIRA & ORS 2014 (1) ZLR 304 (H)

EARTHMOVING AND CONSTRUCTION COMPANY (PVT) LTD v GURUPIRA & ORS 2014 (1) ZLR 304 (H)

Citation	2014 (1) ZLR 304 (H)
Case No	Judgment No. HH-128-14
Court	High Court, Harare
Judge	Mafusire J
Heard	10 and 11 February 2014; *CAV*
Judgment	19 March 2014
Counsel	*A P de Bourbon SC,* for the plaintiff *O O Takaindisa,* for the first & second defendants No appearance for the third, fourth and fifth respondent
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure – judgment – rescission – application – disputes of fact – discretion of court to refer such disputes for trial where they cannot be resolved on the papers. D

Headnote

Even though, in terms of r 63 and r 449 of the High Court Rules 1971, rescission of judgment is by way of an application, these rules do not take away the court's unfettered discretion to refer such an application to trial where it is faced with serious disputes of facts which it is not capable of resolution on the papers. It may well be desirable to err on E the side of caution, so that where such an application gets bogged down in such disputes of fact as to render the court incapable of determining whether or not the applicant has shown "good and sufficient cause" (as r 63 requires), rescission should be granted so as to enable the matter to be canvassed more fully at the trial of the main matter. However, that does not detract from the discretion that the court always has to refer F that particular application to trial for the determination through *viva voce* evidence of whether good and sufficient cause. At any rate, under r 449, "good and sufficient cause" is not a requirement for rescission.

An application for rescission of judgment, whether made under r 63 or under r 449, is, in the words of r 226(1), an application "… made for whatever G purpose in terms of these rules…" It is in the nature of an application under r 226(1)(a) that where a dispute of fact arises which is incapable of resolution on the papers the court can proceed in one of four ways: (a) it can take a robust view of the facts and resolve the dispute on the papers; (b) it can permit or require any person to give oral evidence in terms of r 229B if it is in the interests of justice to hear such evidence; H

Mafusire J

A (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. A court application in terms of r 63 is no different from the court application whose procedure B is outlined in r 226. In the exercise of its discretion, the court can refer such an application to trial.

In order to show good and sufficient cause under r 63 of the High Court Rules for rescission, an applicant has to give a reasonable explanation for the default, the *bona fides* of the application for rescission of judgment and the prospects of success on the merits. These aspects are considered C cumulatively and not individually.

Cases cited

Govha v *Ashanti Goldfields Zimbabwe Ltd & Anor* HH-48-12

Grantully (Pvt) Ltd & Anor v *UDC Limited* 2000 (1) ZLR 361

Masukusa v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H)

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

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

Mufundisi v *Rusere* 2008 (2) ZLR 264 (H)

Plascon-Evans Paints Ltd v *van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

Roland & Anor v *McDonnell* 1986 (2) ZLR 216 (S)

E*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)

Songore v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S)

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

F*van Niekerk* v *van Niekerk & Ors* 1999 (1) ZLR 421 (S)

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

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

Legislation considered

G Companies Act [*Chapter 24:03*], s 183(1)(b)

High Court Rules 1971 (RGN 1047 of 1971), ss 3, 63, 226 & 449

Case information

A P de Bourbon SC, for the plaintiff

O O Takaindisa, for the first & second defendants

H No appearance for the third, fourth and fifth defendants

Mafusire J

Judgment

Mafusire J: A company is a person. It is a juristic person, or, in legal A parlance, a legal *persona*, but all the same a person. It has an identity separate from that of its members. It can own property independently of, and separately from, its members. Thus a company's assets are not the members' assets. These cardinal principles seem to have been purposefully ignored or inadvertently overlooked in this matter. The result has been prolonged litigation for over five years. B

The facts were largely common cause. The plaintiff was a duly registered private company. At all relevant times prior to 16 June 2008 its major asset was an immovable property, Stand 12896 Salisbury Township, measuring 3 066 m2 , held under deed of transfer no. 39/76 and otherwise known as 98 Churchill Avenue, Gunhill, Harare (hereafter referred to as "the property"). C Its principal officer, in the sense of being the majority shareholder and director, was the third defendant (hereafter referred to as "Sandra Muir").

On 21 May 2008 this court, Mtshiya J, granted a default judgment in HC 1393/08. This followed an application by the first and second defendants herein, who therein were the first and second respondents respectively. D Hereafter I shall refer to the first and second defendants as "Mr and

Mrs Gurupira" or "the Gurupiras". The default judgment effectively directed the plaintiff herein, the first respondent therein, to transfer the property to the Gurupiras. Sandra Muir, second respondent therein, was ordered to sign the necessary papers within 10 days of the order, failing which the Sheriff, who is the fourth defendant herein, or the deputy sheriff who is the fifth defendant E herein and was also the fifth respondent therein, would sign the transfer papers in place of Sandra Muir. The order by Mtshiya J read as follows:

"IT IS ORDERED THAT

1. The first respondent [the plaintiff herein] is hereby interdicted from F transferring the property known as No 98 Churchill Avenue, Harare, also known as a certain piece of land situate in District of Salisbury Township Lands measuring 3066 square metres under Deed of Transfer 39/76 to anyone except the first and second applicants.
2. The property in paragraph 1 above be transferred to Asswell Africa Gurupira and Jean Jane Gurupira and the second respondent [Sandra Muir] is directed to sign all the necessary documents to finalise the transfer within 10 days G of the Order.
3. Should the second respondent fail or refuse to sign the necessary documents to effect transfer the fourth or fifth respondent [sheriff and deputy sheriff respectively] are hereby directed to sign all the necessary documents to effect the transfer by the third respondent [registrar of deeds] to first and second applicants. H

Mafusire J

A 4. The first and second respondents shall bear all the costs of this application on attorney-client scale jointly and severally one paying the other to be absolved."

The order was granted in default of appearance by the plaintiff and Sandra Muir. Through their erstwhile lawyers, Manase and Manase, the Gurupiras said they had served their application in HC 1393/08 in a letter-box at the B property.

Following that default judgment, the property was transferred to the Gurupiras on 16 June 2008 under deed of transfer no 4778/2008. The then deputy sheriff for Harare had signed the transfer papers. Manase and Manase had been the conveyancers. After that, Manase and Manase had applied for, C and had obtained *ex parte,* an order of eviction from the magistrate's court.

Meanwhile, the plaintiff had changed hands. One John Legget had become the majority shareholder. This had followed a series of agreements with Sandra Muir. She, on her part, had by then emigrated to Israel. One Diniwe Chinyani ("Diniwe") had been staying at the property. She had been Sandra D Muir's employee of 10 years and more. With the change of ownership of the plaintiff, Diniwe's continued stay on the property as an employee of the plaintiff had been through an arrangement with John Legget.

As the messenger of court was executing the *ex parte* order of eviction from the magistrates court Diniwe raised alarm. It did not help. She and her E family were evicted. After that the Gurupiras took occupation and moved in.

The plaintiff, through John Legget, filed an urgent chamber application for rescission of judgment. However, the matter was adjudged to be not urgent. The plaintiff then filed an ordinary court application for rescission of judgment. It also sought the reversal of the transfer of the property from the Gurupiras back to the plaintiff. Finally, it also sought the eviction of the F Gurupiras. The application was filed under the reference no HC 4211/08.

The application was said to have been brought in terms of both r 63 and r 449. The Gurupiras, through Manase and Manase, opposed the application. The matter came before Patel J, as he then was. The learned judge felt that there were serious and irreconcilable disputes of facts. On 24 September 2009 he G referred the matter to trial. The application would stand as a summons. The parties would file further pleadings in accordance with the rules of court. That was done. The trial came before me on 10 February 2014.

At the commencement of the trial Mr *Takaendesa*, for Mr and Mrs Gurupira, took an objection *in limine*. He submitted that the trial should not proceed. He said it was a novel procedure to seek rescission by way of a trial action. By H law and by practice, rescission of judgment was always via the application

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Mafusire J

procedure. It had been a mistake by the court for it to have referred the A matter to trial. It seemed both the parties and the court had overlooked that point. The order by Patel J referring the matter to trial was a nullity. The trial was hanging on nothing. You cannot put something on nothing and expect it to stay there. It will collapse. Inevitably, reference was made to the oft quoted case of *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 B (PC) at p 1172. It being a legal point, Mr and Mrs Gurupira could raise it at any stage of the proceedings. In this regard reference was made to the case of *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S). In terms of r 449 the court could correct its own mistake and dismiss the claim for rescission without going into the trial.

Mr *Takaendesa* further submitted that the moment the court had decided that C rescission would be determined by way of a trial action, itself an unusual procedure, the Gurupiras had been placed at a disadvantage. They stood to lose all the benefits that the order of Mtshiya J had bestowed on them.

Although Mr *Takaendesa's* arguments did not come out with that much clarity, I think I have summarised them as accurately as possible. D

Mr *de Bourbon*, for the plaintiff, opposed the application. He submitted that there was nothing novel or contrary to law or to practice for an application for rescission to be referred to trial if a dispute of fact emerges that is incapable of resolution on the papers. Until the rescission was granted, the Gurupiras did not lose the benefits accruing to them in terms of the order of Mtshiya J. E It was, in fact, wrong for a litigant to persist on clinging onto a judgment that had been snatched in circumstances where the other party had clearly intended to defend. Reference was made to *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400 (S) ("the *Zimbank* case") and *Mufundisi* v *Rusere* 2008 (2) ZLR 264 (H).

After a brief adjournment to consider the objection I came back to dismiss F it. Rule 63 reads as follows:

> "63. Court may set aside judgment given in default
>
> (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 G aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

Rule 449 reads: H

Mafusire J

> A "449. Correction, variation and rescission of judgments and orders
>
> (1) The court or a judge may, in addition to any power it or he may have, *mero metu* or upon 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 (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
>
> (c) that was granted as the result of a mistake common to the parties.
>
> (2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed."

C Even though in terms of rr 63 and 449 rescission of judgment is by way of an application – and the plaintiff had in fact done just that – these rules do not, in my view, take away the court's unfettered discretion to refer such an application to trial where it is faced with serious D disputes of facts which it is not capable of resolving on the papers. It may well be desirable to err on the side of caution that where such an application gets bogged down on such disputes of fact as to render the court incapable of determining whether or not the applicant has shown "good and sufficient cause" as r 63 requires, rescission should be granted so as to enable the matter to be canvassed more fully at the trial of the main matter. However, that does not, in my view, detract from the discretion that the court always has to refer that particular E application to trial for the determination of "good and sufficient cause" through *viva voce* evidence. At any rate, under r 449 "good and sufficient cause" is not a requirement: see *Grantully (Pvt) Ltd & Anor* v *UDC (Pvt) Limited* 2000 (1) ZLR 361 at p 365G.

Furthermore, and in my view, the "court application" that is referred to in r 63 is the same "court application" as defined in Order 1 r 3. In r 3 it is F defined as follows:

> "'court application' means an application to the court in terms of paragraph (a) of subrule (1) of rule 226".

Paragraph (a) of subrule (1) of r 226 reads:

> "226. Nature of applications
>
> G (1) Subject to this rule, *all applications made for whatever purpose in terms of these rules* or any other law, other than applications made orally during the course of a hearing, shall be made –
>
> (a) as a court application, that is to say, in writing to the court on notice to all interested parties" (my emphasis).

Thus, given the clear wording of r 226(1)(a) there can be no doubt that an H application for rescission of judgment, whether made under r 63 or under

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Mafusire J

r 449, is an application "… made for whatever purpose in terms of these A rules…" It is in the nature of an application under rule 226(1) (a) that where a dispute of fact arises which is incapable of resolution on the papers the court can proceed in one of four 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); B*Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (SC); *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) at 1165; or
2. The court can permit or require any person to give oral evidence in terms of r 229B if it is in the interests of justice to hear such evidence; or C
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; or
4. The 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); D*Plascon-Evans Paints Ltd* v *van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Therefore, in my view, a court application in terms of r 63 is no different from the court application whose procedure is outlined in r 226. In the exercise of its discretion, the court can refer such an application to trial.

With regards to prejudice, I failed to appreciate Mr *Takendesa's* point. Until E rescission was granted I did not understand how the Gurupiras could be said to have lost the benefits of the order by Mtshiya J.

After the disposal of the point *in limine*, the trial began in earnest.

[The court then considered the oral evidence of the witnesses and thereafter continued thus:] F

The order by Mtshiya J directed that the property be transferred to the Gurupiras. Clearly that relief was sought erroneously. Clearly it was granted erroneously. Clearly it was granted in the absence of the plaintiff. There had been no proper service of the papers. Therefore under r 449 the order was liable to be set aside. G

I am also satisfied that under r 63 the plaintiff has established good and sufficient cause why the order should be set aside. In order to show good and sufficient cause under r 63 the applicant has to give a reasonable explanation for the default, the *bona fides* of the application for rescission of judgment and the prospects of success on the merits: see *Roland & Anor* v *McDonnell* 1986 (2) ZLR 216 (S); *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S); H

Mafusire J

A*Stockil* v *Griffiths* 1992 (1) ZLR 172 (S) and *Govha* v *Ashanti Goldfields Zimbabwe Ltd & Anor* HH-48-12. These aspects are considered cumulatively and not individually: *Stockil's* case at 173D-F.

I have already considered that the plaintiff was not in wilful default. Regarding the *bona fides* of the application for rescission, it is quite clear that the plaintiff, B without due process, was deprived of its only major asset. Section 183(1)(b) of the Companies Act [*Chapter 24:03*] prohibits the disposal of the whole or the greater part of the assets of a company without the approval of the company in a general meeting. This was not done in this case. The property was just about the only asset of significance owned by the plaintiff. The evidence placed before me showed that the Gurupiras never took transfer C of the shares of the plaintiff. All that they were ever interested in was the property even though their agreement was for the purchase of the shares in the company, not the purchase of its assets.

The evidence also showed that by the time that the Gurupiras took transfer, John Legget had already become the majority shareholder and the managing D director of the plaintiff. Thus transfer of the property to the Gurupiras was a nullity. The plaintiff did not sanction it.

Regarding the prospects of success, I have decided to leave this aspect for determination at the hearing of the main matter E under HC 1393/08. Procedurally, once I set aside the order by Mtshiya J, as I must, the application under HC 1393/08 becomes alive again even though I have already heard *viva voce* evidence on it. In the end, this court shall have to pronounce the fate of the plaintiff and the fate of the assets owned by it. In my view, and without in any way being prescriptive or pre-emptive, some of the issues to be determined in the main application include the question of whether or not there had been a double sale in the true sense, whether or not the F Gurupiras breached the agreement of sale with Sandra Muir by failing to pay the purchase price either timeously or in full and whether or not that agreement had automatically lapsed.

There is one final aspect of this matter. When the application was referred to trial and the parties were directed to file further pleadings with the G application taking the place of the summons, the Gurupiras, through Manase and Manase, had purported to join Legget to the matter and had gone on to claim a substantive relief against both him and the plaintiff. It was pleaded that the sale and transfer of the shares in the plaintiff by Sandra Muir to John Legget had been a nullity. The counterclaim was for the reversal of that transfer of the shares. At the trial however, Mr *Takaendesa* wisely abandoned H the counterclaim. John Legget had not been a party to the action. He had

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not been joined properly. His name had just been inserted in the citation as A second defendant. Such crass conduct and wanton disregard of the rules by Manase and Manase properly ought to have attracted a penal order of costs at the very least. However, no such order was asked for. But it was a correct decision by Mr *Takaendesa* to have abandoned the counterclaim.

Disposition B

In the circumstances this matter is disposed of as follows:

1. The default judgment granted by this court on 21 May 2008 in HC 1393/08 is hereby set aside.
2. The registrar of deeds is hereby ordered and directed to cancel deed of transfer no 4778/08 over certain piece of land situate in the district of C Salisbury, called Stand 12896 Salisbury Township of Salisbury Township Lands, measuring 3 066m2, dated 16 June 2008 in the name of Asswell Africa Gurupira and Jean Jane Rudo Gurupira and to restore the prior deed of transfer no 39/76.
3. The following residual issues shall be determined in the main application in HC 1393/08: D

3.1 whether or not the agreement of sale between the first and second defendants, namely Asswell Africa Gurupira, of the one part, and the third defendant, namely Sandra Maureen Muir, of the other part, was duly performed,

3.2 whether or not the transfer of shares in the plaintiff company, namely E Earthmoving & Construction Company (Private) Limited, by the third defendant to one John Legget, should be set aside,

3.3 whether or not the first and second defendants should vacate the premises situate on the property more fully described in paragraph 2 above and which is also known as 98 Churchill Avenue, Gunhill, Harare. F

4. The plaintiff shall file its notice of opposition or other such papers in HC 1393/08 within ten (10) days of the date of this order and thereafter the filing of any further documents shall be in accordance with the rules.
5. The costs of the application and of the trial in HC 4211/08, and the G costs of the application in HC 6660/07 shall all be borne by the first and second defendants jointly and severally, the one paying the other to be absolved.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Sawyer & Mkushi, first and second defendants' legal practitioners

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S v CHAUKE 2014 (1) ZLR 313 (H)

Citation	2014 (1) ZLR 313 (H)
Case No	Judgment No. HH-163-14
Court	High Court, Harare
Judge	Tagu J
Heard	19 March 2014
Judgment	19 March 2014
Counsel	*S Masokovere,* for the applicant *T Bhunu*, for the respondent
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C *Criminal procedure (sentence) – suspended sentence – sentence suspended on condition of payment of restitution – appeal noted – need for accused to apply for restitution to be suspended pending appeal – failure to pay restitution – options open to court*

Headnote

D The accused was convicted of theft and sentenced to a term of imprisonment, wholly suspended on condition that he repaid the sum stolen by a stipulated date. He noted an appeal against the conviction. He failed to pay restitution as required and was brought before the magistrate. It was argued on behalf of the accused that he was not in wilful default because E he had noted an appeal to the High Court and thought that the payment of restitution had been automatically suspended. The magistrate held that the accused should have approached the court and make an application to have the court order set aside pending appeal. He ordered that the accused should serve the sentence that had been suspended. A few weeks after the accused had started serving

his sentence, his counsel filed a F court application for postponement of the sentence and suspension of the payment of restitution in terms of s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The magistrate acceded to this request, extended the time for repayment for just over six months and ordered the accused's liberation. On review at the instigation of the complainant:

Held, that in terms of s 358(7) of the Act, the magistrate had two options G when the accused was brought before him, not having complied with the conditions of suspension: the first was to commit the accused to undergo the sentence which was passed at the end of the trial; the second was to further suspend the sentence for a period not exceeding five years. The magistrate chose the first option. Having done so, he became *functus officio*. H The application for further postponement was not proper. It

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Tagu J

should have been made at the time of the hearing of the default or A soon thereafter when the magistrate made his intentions known that he wanted to send him to prison. The decision made was tantamount to the magistrate reviewing his earlier order. The order he subsequently made was therefore incompetent. However, because the matter was the subject of an appeal, it was competent for the High Court, in the exercise of its review powers, to order that the order for restitution be suspended until B the appeal was determined.

Legislation considered

Criminal Procedure and evidence Act [*Chapter 9:07*], s 358(1), (2)(b), (5), (6) & (7)

High Court Act [*Chapter 7:06*], s 29(2)(b), proviso (vi) C

Case information

S Masokovere, for the applicant

T Bhunu, for the respondent

Judgment

Tagu J: On 30 August 2013 the accused was convicted after a contested D trial of theft as defined in s 113(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], being theft of trust property. He was sentenced to three years' imprisonment which was wholly suspended on condition that the accused pays restitution to the complainant in the sum of $ 54 466.73 on or before 26 September 2013.

On 31 August 2013 the accused noted an appeal to the High Court against E his conviction. He failed to pay the restitution by 26 September 2013. On 7 October 2013 he was then arrested for defaulting on payment of restitution and appeared before a magistrate on a default enquiry. Through his defence counsel Mr *Bhunu* he argued that he was not in wilful default because he had noted an appeal to the High Court and thought that the payment of restitution F had been automatically suspended. He relied on s 63 of the Magistrates Court Act [*Chapter 7:10*] which he said did not cater for restitutions.

The prosecutor did not make any meaningful submissions. The prosecutor merely said:

> "I leave it to the court to decide." G

The court then proceeded to make the following ruling:

> "It is unfortunate that the defence has misled itself in believing that by virtue of noting an appeal it is automatic that the accused is relieved of his duty to pay up. That position is wrong at law. The correct position is that on the 26 /09/13 the accused should have approached the court and made an application to have the court order set aside pending appeal. It is on that basis that failure to do so H

Tagu J

A left the accused in wilful default. Having found that the accused was in wilful default I will proceed to cancel the warrant of arrest and move further and order that accused (a) Start to serve the three years' imprisonment."

The accused was then taken to Mutimurefu Prison where he started serving. Three weeks later on 21 October 2013 defence counsel filed a court application B for postponement of the sentence imposed on 7 October 2013 and suspension of payment of restitution in terms of s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The application was opposed by the State. The court however, ruled in favour of the accused. The court's reasoning was as follows:

> "The accused has applied that I suspend the penalty imposed as an alternative in terms of s 358(2) of the [Criminal Procedure and Evidence Act]. The applicant C has implored the court that he is not employed but a pensioner who is not gainfully employed. He also alludes to the fact that he has appealed against this court's conviction, hence if the penalty is executed it would be of academic purposes.
>
> I hasten to remark that the conviction by the court is proper and I see no prospects of success on appeal. I would only concede that due to the circumstances of the accused in so far as his financial position is concerned I feel he needs time to D redress his ills. I therefore order that:
>
> The 3 years' imprisonment imposed upon the accused on 7/10/13 are hereby suspended on condition the accused restitutes the complainant his share in the sum of $ 54 466.73 which share is 70 per cent, on or before 30/04/14 by 4pm, through the clerk of court Masvingo."

E Following this court order a warrant of liberation was issued and the accused was released from Mutimurefu Prison on 23 October 2013.

On 6 November 2013 the complainant wrote a letter of complaint to the Masvingo provincial magistrate questioning the basis for the liberation of the accused and requested that this matter be referred to this court for review.

In his letter the provincial magistrate said, among other things:

> F " … Faced with this, and having made my own research I have decided to seek guidance by way of review. I stand guided if I have adopted the wrong procedure.
>
> If correct, the questions that arise in this case are, firstly: does s 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allow the release of an already serving convict as took place in this case; put differently, does suspension of a sentence include release of an already serving prisoner?
>
> G The second question is whether or not the trial magistrate became *functus officio* when he sent the person to serve a hitherto previously suspended sentence?

I seek the [*sic*] Lordship's guidance."

Section 358 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] gives the court powers to postpone or suspend a sentence. It also gives the H court power to cause an arrest of a person who breaches any condition of

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postponement or suspension. It further empowers the court to further suspend A or postpone a previously postponed or suspended sentence and/or to refuse to further suspend or postpone the sentence. I will quote the relevant sections.

Section 358 states:

> "(1) In this section:
>
> 'postponement' means … B
>
> 'suspension' means the suspension of the operation of the whole or part of a sentence under paragraph (b) of subsection (2) or of a warrant under paragraph (c) of that subsection, and includes any further such suspension granted in terms of paragraph (a) of subsection (7).
>
> (2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may – C
>
> (a) …
>
> (b) pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or
>
> (c) … D
>
> (d) …
>
> (3) …
>
> (4) …
>
> (5) Subject to section 55 of the Magistrates Court Act (*Chapter 7.10*) and of subsections (12) and (13), if a magistrate has reason to believe, whether from information on oath or otherwise, that a condition of any

postponement or E suspension made in terms of paragraph (a), (b) or (c) of subsection (2) has been contravened or that the offender has failed to pay a fine or any instalment thereof on a date fixed in terms of paragraph (c) of subsection (2) , he may, whether before or after the expiration of the period of postponement or suspension, order the offender to be brought –

(a) … F

(b) where the postponement or suspension was made by a magistrates court, before a magistrates court or the High Court;

for the purposes of subsection (7).

(6) The magistrate may, if necessary for the purpose of an order in terms of subsection (5), order the offender to be arrested without warrant and, unless the offender is admitted to bail in terms of Part IX, to be detained in prison. G

(7) When the offender is brought before the court in accordance with an order made in terms of subsection (5), the court may commit him to undergo the sentence which may then be or has been lawfully passed or, in its discretion, the reasons whereof shall be recorded, on good cause shown by the offender –

(a) grant a further postponement or suspension, as the case may be, for a further period not exceeding five years where the original postponement or H

Tagu J

A suspension was in terms of paragraph (a) or (b) of subsection (2) or one year where the original suspension was in terms of paragraph (c) of subsection (2), subject to such conditions as might have been imposed at the time of the original postponement or suspension …"

In casu, the magistrate suspended the original sentence in terms of s 358(2)(b) of the Act on 30 August 2013. The accused breached s 358(5) of the Act B by not paying restitution on or before 26 September 2013. The accused was then purportedly arrested in terms of s 358(6) of the Act. The accused was subsequently brought before the magistrate in terms of s 358(7) on 7 October 2013. On 7 October 2013 the magistrate had two options. The first option was to commit the accused to undergo the sentence which was lawfully C passed on 30 August 2013. The second option was to further suspend the sentence for a period not exceeding five years. The magistrate opted, after hearing submissions, to go for the first option and ordered the accused to go to prison for three years.

In my view, there was nothing untoward that the magistrate did. It was his D discretion, which he exercised judicially, given his earlier analysis that the noting of an appeal did not automatically suspend the paying of restitution unless the accused had earlier applied for its suspension pending appeal. Further, a serving prisoner who has a portion of his sentence suspended on condition of restitution can, in my view, still appear before a magistrate and apply for further postponement or suspension of his sentence if by the due E date he has not paid at all or not paid in full. A magistrate can still excise his discretion in terms of s 358. If he does not come to court to apply for extension, the magistrate may cause him to be brought to court to explain or show cause why he should not be ordered to serve the suspended prison term for failure to pay restitution by the due date.

F In the present case, it is my view that the application that was made three weeks later was not proper. The application should have been made at the time of the hearing of the default or soon thereafter, when the magistrate made his intensions known that he wanted to send him to prison. To me, the decision made by the magistrate on 21 October 2013 was tantamount to the magistrate reviewing his order of 7 October 2013. By that time he was now G*functus officio*. The order he subsequently made was therefore incompetent.

However, I am cognisant of the fact that the accused has filed an appeal to the High Court which is still pending. The order granted by the magistrate should therefore be tied to the outcome of the appeal. The accused is now out of custody pending payment of restitution as well as the outcome of his H appeal. The question now is: what does the interest of justice demand? Is

Tagu J

it in the interest of justice to send the accused back to prison at this stage? A In my view it is not in the interest of justice to do so.

While I consider that what the magistrate did was not proper, as a reviewing judge I have wide powers on review to make an appropriate order in terms of s 29 of the High Court Act [*Chapter 7:06*]. In particular I will be guided by the provisions of s 29(2)(b) proviso (vi). The provisions are fashioned in this way: B

"29 Powers on review of criminal proceedings

(1) …

(2) If on review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings –

(a) … C

(b) are not in accordance with real and substantial justice, it may, subject to this section –

…

(vi) make such order relative to the suspension of the execution of any sentence against the convicted person or the admission of such person to bail or generally any matter or thing connected with such person or D the proceedings in regard to him as the High Court thinks calculated to promote the ends of real and substantial justice …"

I therefore order that if the accused has not yet paid the restitution of $54 466.73 the execution of the order made on 21 October 2013 be, and is hereby further suspended until the outcome of the appeal. E

Mawadze J agrees.

Attorney General's Office, applicant's legal practitioners

Messrs Muzenda & Partners, respondent's legal practitioners F

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Source:
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ZIMBABWE TEXTILE WORKERS' UNION v DAVID WHITEHEAD TEXTILES LTD & ORS 2014 (1) ZLR 319 (H)

Citation	2014 (1) ZLR 319 (H)
Case No	Judgment No. HH-170-14
Court	High Court, Harare
Judge	Makoni J
Heard	27 February 2014; *CAV*
Judgment	19 March 2014
Counsel	*N Ruzenge,* for the applicant *G Mlotshwa*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – judicial management – purpose of – when should be ordered – principles – directors of company placed under provisional judicial management – no locus standi to represent company – return day of D *order for provisional judicial management – options open to court – may refer matter to opposed court roll*

Headnote

Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes E involved and their objectives. In the Companies Act [*Chapter 24:03*] there are separate provisions relating to judicial management and liquidation. The provisions relating to liquidation do not provide for a return date, as is the position with provisional judicial management in terms of s 305(1). The provisional judicial manager, in terms of s 303(a), assumes the management of the company upon the granting of F the judicial management order. There is no such corresponding provision in relation to liquidation. Further, the matters and reports to which a court shall have consideration to on the return date in terms of s 305(1) do not include anything required from the directors of the company. The directors would have no *locus standi* to appear on behalf of the company on the return day.

G In terms of s 305(1), on the return day fixed in the provisional judicial management order, the court has three options open to it: it may grant a final judicial management order; it may discharge the provisional judicial management order; or it make any other that it thinks just. The last option would include referring the matter to the opposed roll where H it could be properly ventilated and determined.

2014 (1) ZLR p320

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Generally, a company should not be permitted to be dissipated by winding A up and dissolution because it has suffered a setback with regard to the repayment of its debts or the performance of its obligations, which, if it were to be given time, it would be able to surmount and become successful. The procedure of judicial management is intended to be a means for affording it such time. Judicial management should not be B instituted or continued merely on the basis that, while it subsists, the company's assets may be sold more advantageously than they would be in winding-up: judicial management is not intended to be an alternative method of liquidation. Judicial management is a special dispensation which can be granted to a company only in exceptional cases. It implies that there be a temporary reconciliation of conflicting interests – those C of the company in being unable, despite its difficulties, to continue its operations in the ordinary course and those of its creditors in not being prevented from enforcing their rights, including the way of winding-up. It is because of these conflicting interests that the Act requires the court to be satisfied both that there is a reasonable probability that, were there to be judicial management, the company would be able to D achieve the goals envisaged by s 300(a) (that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern) and that it is just and equitable to afford it the opportunity to attempt to do so. As such, judicial management cannot be instituted merely on the ground that it would E improve the efficiency of the company's management or increase the profitability of its operation.

Cases referred to

ABSA Bank Ltd v *Rhebokskloof (Pty) Ltd & Ors* 1993 (4) SA 436 (C)

Alpha Bank Bpk en Andere v *Registrateur van Banke en Andere*F1996 (1) SA 330 (A)

Boka Invstms (Pvt) Ltd v *Third Line Trading (Pvt) Ltd & Ors* 2013 (1) ZLR 321 (H)

Intl Capital Corp (Pvt) Ltd v *Clairson (Pvt) Ltd* 2002 (1) ZLR 565 (H)

Ex p *Lion Tpt Co (Pvt) Ltd* 1954 SR 135 G

Mzwimbi & Ors v *RBZ & Ors* 2005 (2) ZLR 132 (S)

Wolhuter Steel (Welkom) (Pty) Ltd v *Jatu Construction (Pty) Ltd (in provisional liquidation)* 1983 (3) SA 815 (O)

Legislation considered

Companies Act [*Chapter 24:03*], ss 303(a), 305(1) & (2) H

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A High Court Rules 1971 (RGN 1047 of 1971), r 247(3) & (4)

Case information

N Ruzenge, for the applicant

G Mlotshwa, for the respondents

Judgment

B**Makoni J**: This is an application for the confirmation of a provisional order granted on 1 December 2010 for the placement of the respondent companies under judicial management. Between that date and 17 July 2013 a lot happened which culminated in an order by consent of all the parties involved, extending the return date for confirmation or discharge of the provisional order to 17 July 2013. A notice to that effect was advertised in the *Government Gazette*C and *The Herald*, the relevant part of which read as follows:

> **"**Any interested person who wishes to oppose the confirmation of the provisional judicial management order of the companies shall file a notice of opposition with the Registrar of the High Court within ten days from the date of this advert … and shall serve a copy of the notice on the applicant. He shall then appear before the High Court at Harare at the hearing of the matter on the 17th day of D July 2013 to show cause why the companies should not be placed under judicial management"

On the return date, the matter was postponed to 24 July 2013 on which date it was referred to the opposed roll to be set down for hearing in terms of the rules of this court. The parties are not agreed as to exactly what happened on the return date.

E The matter was set down for hearing on 23 January 2014 on the opposed roll. On that date Mr *Ruzengwe* appeared for applicant whilst C Nhemwa and Associates and G N Mlotswa and Company appeared, both purporting to represent the companies. The legal practitioners appeared before me in chambers and two issues arose:

F (a) whether C Nhemwa and associates have any authority to represent the companies on the return date.

(b) whether this court can exercise its jurisdiction in the absence of a return date.

I directed that the parties file heads of argument addressing the above two G issues.

Issue number 1

Mr *Nhemwa* submitted that the directors of the companies have the *locus standi* instead of the provisional judicial manager (PJM) to represent the companies on the return date. He further submitted that on the granting of a H provisional judicial management order, directors of a company are stripped

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of their power and the PJM assumes all the powers of a company. However, A the directors retain some residual powers to prosecute the matter placing their company under final provisional judicial management. He referred to a number of South African and English cases, one of which is *ABSA Bank Ltd* v *Rhebokskloof (Pty) Ltd & Ors* 1993 (4) SA 436 (C). In that matter it was held that the South African law position was stated in the matter of *Wolhuter Steel (Welkom) (Pty) Ltd* v *Jatu Construction (Pty) Ltd (in provisional*B*liquidation)* 1983 (3) SA 815 (O) where the court held:

> "To hold that after the granting of a provisional liquidation order the directors of a company which has been provisionally liquidated by virtue of such order have lost their *locus standi in judicio* to oppose the granting of a final order would fly in the face of the very object and purpose of the rule *nisi* and it would therefore be quite wrong to emasculate such object and purpose by a finding that the C directors have lost their residual power to show cause why the company should not be wound up or for that matter to anticipate the return date of the rule *nisi.* It would be quite ludicrous to hold that a director of a company or a

> company acting through its directors, is not an interested party, when it comes to deciding whether it or they have the right to be heard on the return day of the rule *nisi."*

Mr *Nhemwa* also referred to two cases in our jurisdiction: *Mzwimbi & Ors* v *Reserve Bank of Zimbabwe & Ors* 2005 (1) ZLR 132 (S) at 139 and Ex p *Lion Transport Company (Pvt) Ltd* 1954 SR 135. He submitted that the position of our law is exactly the same with the English and South African law. He concluded by saying that the directors of a company under provisional judicial management have an interest in the affairs of the company. The placement of a company under final judicial management may affect their personal status, especially their personal liabilities in terms of company law. To deny them an opportunity to be heard is contrary to the tenets of the principal of natural justice especially the *audi alteram partem* rule.

On the other hand, Mr *Mlotshwa* submitted that the authorities cited by Mr *Nhemwa* relate only to those instances where the directors of a company wish to oppose the confirmation of a provisional liquidation order. No single authority was cited relating to the position in relation to provisional judicial management. He referred to *Alpha Bank Bpk en Andere* v *Registrateur van Banke en Andere* 1996 (1) SA 330 (A), which is authority for the contrary proposition to the effect that the directors of a company under provisional judicial management have no residual powers whatsoever.

He further submitted that there are separate provisions in the Companies Act [*Chapter 24:03*] ("the Act") dealing with provisional liquidation, provisional judicial management and final judicial management. Provisional liquidation and provisional judicial management are two distinct processes. In terms of s 303(a) of the Act a PJM assumes the management of the company. There

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Chigumba J

is no such corresponding provision in relation to provisional liquidation. Further, the matters and reports to which a court shall have consideration to on the return date in terms of s 305(1) of the Act do not include anything required from the directors of the company. He conclude by submitting that there is no legal or logical basis upon which C Nhemwa and Company can claim any right or insist to represent the respondent companies.

In reply, Mr *Nhemwa* conceded that the cases he cited related to provisional liquidation but argued that the same principles apply to judicial management. He further submitted that the question of residual powers is not provided for statutorily but is a common law position.

In *Boka Investments (Pvt) Ltd* v *Third Line Trading (Pvt) Ltd and Ors* 2013 (1) ZLR 321 (H), Patel J (as he then was) made a very pertinent observation when he stated:

> "Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes involved and their objectives."

This is borne out by the Companies Act where there are separate provisions relating to judicial management and liquidation. The provisions relating to liquidation do not provide for a return date as is the position with provisional judicial management in terms of s 305(1). The PJM, in terms of s 303(a), assumes the management of the company upon the granting of the judicial management order. There is no such corresponding provision in relation to liquidation.

I would agree with the submissions by Mr *Mlothwa* that it would be misleading to cite cases relating to liquidation in relating to the process of judicial management. There is no authority that has been cited by Mr *Nhemwa* to support the contention that directors of a company under provisional judicial management have residual powers which enable them to oppose or consent to the placement of a company under judicial management or otherwise.

There is clear authority to the contrary in *Alpha Bank Bpk supra* where it was held that:

> "The question whether the board of directors had retained residual powers of control after the placement under curatorship could best be answered by asking whether the board of directors had such powers before placement under curatorship. This question had to be answered in the negative; shareholders control a company; the board manages it. What the placement under curatorship brought about was to transfer the management of the bank to the curator, so that no residual powers of control could thereafter have vested in the board …"

Chigumba J

Analogous to this position are the provisions of s 303 of the Act which provide A that upon a company being placed under provisional judicial management, the provisional judicial management assumes management of the company.

In my view, s 305(1) is the determining provision. It clearly spells out matters and reports to which the court shall give consideration to on the return date of the provisional judicial management order. It does not include anything B required from the directors of the company.

From the above, it is clear that the directors as represented by Mr *Nhemwa* have no *locus standi* to appear in court at this stage of the process of provisional judicial management.

In terms of s 305(1)(b) of the Act the court shall, *inter alia*, consider the report C of the provisional judicial management made in term s of s 303. Therefore the provisional judicial management, as represented by Mr *Mlotshwa* has *locus standi* to appear on the return date.

Issue Number 2

Mr *Mlotshwa* submitted that it was not competent for this court to deal with D any of the matters set out in s 305 of the Act, in particular the confirmation of a provisional order, in the absence of a valid and existing return date. The return date lapsed on 14 July 2013 and was not extended. Such an extension can be effected in terms of s 305(2) of the Act. Such proceedings would be irregular, particularly in those instances where those creditors who have not proved their claims are not afforded the opportunity to do so in terms of E s 305(1)(c) of the Act on the return date.

Mr *Ruzengwe* and Mr *Nhemwa*'s common position is that the setting down of sequestration or winding up of companies is done in terms of Companies Act and r 247(3) of the High Court Rules. They submitted that the return date was advertised and all interested parties given an opportunity to present their positions. No party can file papers after the return date other than those F already before the court.

As I have already stated, the parties are not agreed on exactly what transpired on the return date, which resulted in the matter being returned to the opposed roll. The return date was not specifically extended.

I believe the starting point is the Companies Act itself. Section 305 provides: G

> "**Return day of provisional judicial management order**
>
> (1) On the return day fixed in the provisional judicial management order, or on the day which the court or a judge may have extended it, the court, after considering –
>
> (a) the opinion and wishes of the creditors and members of the company; and H

Chigumba J

> A (b) the report of the provisional judicial manager prepared in terms of section three hundred and three; and
>
> (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and the nature of their claims; and
>
> (d) the report of the Master; and
>
> B (e) the report of the Registrar;
>
> may grant a final judicial management order if it appears to the court that there is a reasonable possibility that the company concerned, if placed under judicial management, will be enabled to become a successful concern and that it is just and equitable to grant such an order, or it may discharge the provisional judicial management order or *make any other order that it thinks just*" (my emphasis).

C In terms of the emphasised part, the court, on the return date, may make any other order it thinks just. *In casu* the court, seeing that the matter was now opposed, referred the matter to the opposed roll where it would be properly ventilated and determined. Thereafter, r 247(3) and (4) comes into operation. Subrule (4) provides:

> "Rules 238 and 240 shall apply, *mutatis mutandis*, to the hearing of a matter D consequence upon the issue of a provisional order referred to in subrule (3)."

Mr *Mlotshwa's* concerns are addressed by the provisions of r 247(3). The provisional order issued by the court must specify the date and place at which the court will hear argument on confirmation of

the order. It must also specify the manner in which it will be published and the persons on whom E the copies of the order are to be served. *In casu*, the provisional order was advertised and it had a clause which invited persons who wished to oppose the confirmation of the provisional judicial management order to file notices of opposition with the Registrar and to appear before the court on the return date. Those who filed their papers by or appeared in court on 17 September 2013 will be notified of the set down dates. As a result, there will be no F prejudice to any of the interested parties.

The other approach to the issue is that adopted by Patel J in *Boka supra*. He considered the circumstances of the matter before him and concluded:

> "To take the view that the failure to extend the return date of the provisional order should not be regarded as being fatal to its continuing validity. Accordingly, to G deem it appropriate to exercise my discretion under r 4C to condone that failure and to proceed with this matter on the basis that the provisional order remains in full force until it is confirmed or discharged."

In casu I have considered that the companies have remained under provisional judicial management for 36 months now. The provisional judicial manager has issued his reports, and the members and creditors have held their meetings H and expressed their wishes. The Master has also compiled his report. As

was stated in *Boka supra* this court should be less inclined to interfere, at A a late stage, in the judicial management of the respondent companies and hold that the general balance of convenience is overwhelmingly in favour of treating the provisional order as having remained operational up to the time of hearing. It is in the interests of all parties concerned to know where they stand. I will therefore deem that the provisional order remain in full force.

Whether the provisional order should be confirmed or B discharged

The requirements for confirmation or discharge of a provisional judicial order are set out in s 305 of the Act. For a court to arrive at a decision it must consider:

> "(a) the opinion and wishes of the creditors and members of the company C
>
> (b) the report of the provisional judicial manager ...
>
> (c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and the nature of their claims;
>
> (d) the report of the Master;
>
> (e) the report of the Registrar of Companies." D

After considering the above, the court may confirm the order –

> "if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management, will be enabled to become a successful concern and that it is just equitable to grant such an order ..."

The purpose of judicial management was clearly spelt out in E*International Capital Corporation (Pvt) Ltd* v *Clairson (Pvt) Ltd* 2002 (1) ZLR 565 (H) at 570B-F:

> "Generally, a company should not be permitted to be dissipated by winding up and dissolution because it has suffered a set back with regard to the repayment of its debts or the performance of its obligations, which if it were to be given time, it would be able to surmount and become successful … The procedure F of judicial management is intended to be a means for affording it such time. Judicial management should not be instituted or continued merely on the basis that while it subsists the company's assets maybe sold more advantageously than they would be in winding-up: judicial management is not intended to be an alternative method of liquidation: see *Millman NO* v *Swartland Huis Meubileerders (Edms) Bpk* 1972 (1) SA 741 (C) at 744-45 and *Tenowitz* v *Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) at 684 and *Henochsberg on*G*the Companies Act* vol 1 5 ed by P M Meskin, p 923.
>
> Judicial management is a special dispensation which can be granted to a company only in exceptional cases – see *Silverman* v *Doorhoek Mines Ltd* 1935 TPD 349 at 353; *Bahnenn* v *Fritzmore Exploration (Pty) Ltd* 1963 (2) SA 249 (T) at 250-251; *Ladybrand Hotel (Pty) Ltd* v *Segal & Nor* 1975 (2) SA 357 (O) at 359. Judicial management implies that there be a temporary reconciliation of H

Chigumba J

A conflicting interests – those of the company in being unable despite its difficulties to continue its operations in the ordinary course and those of its creditors in not being prevented from enforcing their rights, including the way of winding-up. It is because of these conflicting interests that the Act requires the court to be satisfied both that there is a reasonable probability were that there to be judicial management the company would be able to achieve the goals envisaged by B s 300(a) and that it is just and equitable to afford it the opportunity to attempt to do so. As such, judicial management cannot be instituted merely on the ground that it would improve the efficiency of the company's management or increase the profitability of its operation – see *Henochsberg on the Company Act supra* at p 924 and *Makuvha & Ors* v *Lukoto Bus Service (Pty) Ltd & Ors* 1987 SA 376 (VSC) at 397."

The issue therefore is whether if the company is placed under final judicial C management it will be enabled to become a successful concern and whether it will be just and equitable to do so. The arrive at the appropriate decision I considered the reports by the PJM, the Master and the submissions made by the applicant who is one of the creditors

The PJM report

D The companies have been in difficulties since 2001. In 2006 they were placed under provisional judicial management and later final judicial management until June 2008, when an investor Elgate (Pvt) Ltd offered to invest US$5.4 million. Eighteen months later, the companies were placed under provisional judicial management again.

E The PJM's opinion is that the respondent companies are hopelessly insolvent. His basis for saying so is that the Master had provisionally accepted claims worth US$13 871 678.56. To this amount is to be added a recent claim by Agribank, secured by a mortgage bond, in the amount of US$5.8 million. The total liabilities of the company will amount to US$19 671 678.56. The debt might rise to US$20 million when costs of judicial management are F factored in including those of the Master.

The huge debt figure always the combined assets valued at $5 979 219.

The biggest creditor to the companies is Parrogate Zimbabwe (Pvt) Ltd whose claim is for $3 000 000. Although the amount is subject of pending liquidation, the amount is secured by a bond of US$3 million over the assets G of the companies i.e. their immovable property.

The companies do not therefore have free immovable assets.

There is no single shareholder who is prepared to support the judicial management by proposing injection of capital into the companies. There is no indication, in the turn around proposed by Aurifin, of an investor or H financial institution ready or willing to provide the working capital. In any

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event, such capital will not be forthcoming because the companies' assets A are encumbered and in some the instances to financial institutions.

He also commented on the unfavourable conditions in the textile industries due to competition from cheaper imports ageing equipment which requires replacement and. He concluded by saying that the only prospect for creditors getting paid is for the companies to be placed under provisional liquidation, B where outside of the secured creditors, a potential investor might be willing to make a palatable offer to the unsecured creditors.

Master's report

Various creditors and members meetings were held where the PJM would C present reports. The final meeting was held on 17 April 2013 where the PJM's reports were discussed to conclusion. The PJM presented his position per his report above. The issue was put to vote. A total of 13 creditors whose total claims amount to US$6 million voted for final judicial management. Their reasons for doing so were

(i) workers wanted to save their jobs and the communities they lived in. D

(ii) unsecured creditors felt that they might not get anything upon liquidation due to ranking of creditors.

(iii) they had hope in the turn around strategy presented by Aufin Pvt ltd.

Creditors whose total claims were $5 536 758 voted for liquidation; their E reasons were:

(i) there was no hope that an investor will be found.

(ii) the ageing equipment which needed replacement

(iii) they had waited for too long for payment and they could accept whatever F comes from liquidation.

The members who were present voted for final judicial management.

Their reasons were that

(i) there were prospects of a turn around contained in the Aurifin report.

(ii) there will be proper management. G

(iii) there would be a conducive environment for investors after the 2013 harmonised elections.

According to the PJM's report, a total of 135 creditors claims amounting to $13 871 078 were provisionally accepted. H

Chigumba J

A **The applicant's position**

After the meeting of the 17 March 2013 where the PJM had recommended liquidation, the members and the creditors sought an independent opinion from Aurifin.

The members and some of the creditors also believed that the PJM had B grossly undervalued the companies' immovable properties to paint a picture of insolvency and cause liquidation of the companies. They filed an evaluation report of the Chegutu property which was done before the placement of the companies under the provisional judicial management. The value was placed at US$13.2 million.

C It was the applicant's opinion that the companies can be turned around as illustrated by the following.

(i) the PJM was able to enter into a toll manufacturing contract with Kithra Enterprises (Pvt) Ltd which was producing army wear.

(ii) the respondent companies supplied uniforms to the police and prison D services.

(iii) the respondent were major producers of hosiery material especially school socks which were imported.

The applicant commended that the companies were the major producers of yarn, both for the local and the export market. Their demise affects not only E the shareholders and creditors but the collapse of all downstream and upstream industries such as cotton production, ginning, textile and clothing industries.

The towns of Kadoma and Chegutu have borne the brunt of the closure of the companies. All aspects of development have been affected since revenues from the companies, their workforce and downstream industries have dried up.

F The Aurifin report was of the view that it is possible to revive the fortunes of companies. It puts forward the following measures

(i) shareholding restructuring

(ii) implementation of scheme of arrangements.

(iii) capital raising

G (iv) Production.

Long term, the companies can then consider identifying institutional investors and re listing on the Zimbabwe Stock Exchange.

It concluded by saying that on a balance of probabilities, the continuation of judicial management could result in the restoration of normalcy as opposed H to liquidation

Chigumba J

Analysis A

The PJM report paints a dim picture about the respondent companies situation. According to his report the companies have debts of just under US$20 million against assets valued at US $979 219, the immovable properties are encumbered. The biggest creditor is Parrogate (Pvt) Ltd with a claim for US$3 million. B

The Master's report reflects that creditors who are owed the larger amount voted for final judicial management. Amongst these creditors are the workers of the companies who are owed about 42% of the total creditors claim, in respect of salary arrears and proposed retrenchment packages. These workers are members of the applicant. They are prepared to enter into payment arrangements with the companies if the companies are placed C under judicial management.

Of those creditors who voted for liquidation, the bulk of the amount is claimed by Parrogate Pvt Ltd. This amount is the subject of court proceedings as it is disputed. If this amount is subtracted from the total of those who voted for liquidation, only an amount of US$2 536 755 will remain as claims of those D who voted against judicial management compared to total claiming of about US$6 500 who voted in favour of final judicial management.

There is an amount of US$5.4 million which is owned to Agribank. The claim had not been accepted at the time the Master's report was filed. From the papers filed on record, it appears an amicable solution is likely to be revealed in respect of this amount. E

There is also the issue of Elgate Investments (Pvt) Ltd. This entity was meant to inject an amount of US$5.4 million as investment in the companies. The PJM was still investigating whether this amount was injected. It appears only US$1 million was injected. There is litigation to compel Elgate to produce proof that it paid the amount in full. F

The PJM in his report dated 2 February 2011 put the value of the respondent's companies immovable properties in Harare, Kadoma, Chegutu and Gweru at US$4.2 million dollars. The applicant puts this value in issue. They described it as undervaluation. In support of their contention, they produced a valuation report on the Chegutu property which put the value at US$13.2 G million. What comes out from all the above is that the Provisional judicial manager's report contains some discrepancies which are not explained. I will deal with them hereunder.

1. If a property was valued at US$13.2 million dollars just before the placement of the companies under judicial management how can all the H

Chigumba J

A immovable properties, with one located in Harare be valued at US$4.2 million

2. If one were to subtract the amount being claimed by Parrogate and that is owed to the workers in sum of $4 816 187.25 it would leave an amount of $3 787 259. The total remaining amount includes amounts owed to B such institutions as ZESA, NSSA and ZRA. Could the companies not be able to be turned around and pay this amount?
3. The issue of Agribank's claim was not properly ventilated. It appears from the papers that the debt to Agribank is owed by FSI and the respondent's companies guaranteed the date. There are indications from FSI that it is in some discussions with the bank which might result in the security C being released.

On the other hand there are some sound turn around strategies put forward by Aurifin. These will prevent the company from being dissipated by winding up and dissolution. My view is that the respondent's companies should be given time to pursue the proposals put forward by Aurifin and the applicants. D They will be able to surmount the current difficulties and become a successful concern again.

The creditors who voted for the placement of the companies under judicial management, proposed that Knowledge Hofisi of Aurifin Capital (Pvt) Ltd be appointed the judicial manager. I would agree with their proposal since he is E the one who came up with the turn around strategy. The provisional judicial manager does not believe in final judicial management but in liquidation. It is therefore in the best interest of all concerned that Knowledge Hofisi be appointed the final judicial manager.

In the result I make the following order;

F (1) First, second, third, fourth, fifth and sixthrespondents are hereby placed under final judicial management.

(2) Subject to the provisions of s 305 of the Companies Act [*Chapter 24:03*], the Master shall appoint Knowledge Hofisi of Aurifin Capital (Pvt) Ltd as final judicial manager with the powers and duties set out in s 306 and G s 307 of the Act and subject to the supervision of this court.

(3) From the date of that appointment and upon completion of the bond of security in accordance with s 274 of the Companies Act, the final judicial manager shall forthwith take over the management of the first, second, third, fourth, fifth and sixthrespondent companies and shall prepare and H submit reports in accordance with s 306(i) of the Act.

2014 (1) ZLR p332

Chigumba J

(4) The final judicial manager shall have the powers set out in sub paragraph A (a) to (m) of s 306 of the Companies Act and, without the consent of the creditors or the shareholders, may raise money on the security of the first, second, third, fourth, fifth and sixthrespondent companies' assets, or with the consent of the creditors and shareholders dispose of part of the assets of the respondent companies to raise working capital or to enter into a scheme of arrangement of resuscitate the respondent B companies.

(5) All actions and applications and the execution of all writs, summonses and other process against the first, second, third, fourth, fifth and sixthrespondent companies shall be stayed and not proceed without the leave of this court. C

(6) The final judicial manager shall, in terms of s 308 of the Companies Act, be entitled, from the assets of the respondent companies, to the payment of remuneration at a rate to be determined by the Master of the High Court and to reimbursements for all out of pocket expenses incurred in the course of his duties.

(7) The provisional judicial manager, Winsley Militala of Petwin Executor D and Trust Company (Pvt) Ltd, shall hand over all matters and shall account to the final judicial manager and is hereby discharged in terms of s 305(2)(a) of the Companies Act.

(8) The final judicial manager shall pay both applicants' and respondents' costs of these proceedings out of the assets of the companies. E

Mapombere, Musakana & Ruzengwe, applicants' legal practitioners

G N Mlotshwa & Associates, respondents' legal practitioners

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2014 (1) ZLR p333

Citation	2014 (1) ZLR 333 (S)
Case No	Judgment No. S-23-14
Court	Supreme Court, Harare
Judge	Malaba DCJ, in chambers
Heard	15 February 2012; *CAV*
Judgment	20 March 2014

Counsel *E Nyazamba,* for the applicant
Mrs *B Mtetwa*, for the respondents

Case Type Application for condonation

Annotations No case annotations to date

Flynote

C *Appeal – criminal matter – appeal from magistrates court – appeal by Attorney-General against decision to discharge accused at close of prosecution case – such appeal requiring leave of judge of the High Court – judge refusing leave – no appeal lying to Supreme Court against judge's refusal*

Headnote

D The respondents were charged in the magistrates court with contempt of court. They had been discharged at the end of the prosecution case, the magistrate finding that the respondents could not be found, by a reasonable court, to have had the intention to impair the dignity, reputation E or authority of the judge towards whom they were alleged to have shown contempt, and that there was no evidence that the respondents committed the offence charged or any offence of which they might be convicted thereon, and returned a verdict of not guilty. Eight months after the magistrate's decision was given, the applicant applied to the High Court, in terms of s 198(4)(b) of the Criminal Procedure and Evidence Act F [*Chapter 9:07*] ("the CP&E Act"), for leave to appeal against the magistrate's decision to discharge the respondents. The section gives the Attorney General a conditional right to appeal to the High Court, if he is dissatisfied with a decision of a magistrate, finding an accused not guilty of an offence charged at the close of the case for the prosecution. G He must first obtain leave to appeal from a judge of that court. Leave may be granted or refused. The effect of the restriction is that a right of appeal is not available, unless leave to appeal is granted. A judge of the High Court refused leave to appeal, on the grounds that there were no prospects of success on appeal. Eleven months after the decision by the judge, the Attorney-General made what he called an application for H condonation and extension of time within which to appeal against the

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decision of the judge. He argued that the jurisdiction for entertaining the A application was to be found under r 19(1) of the Supreme Court Rules 1964. The respondents argued that the rule applied to cases in which the High Court would have exercised jurisdiction and a right to appeal to the Supreme Court lay with the leave of a judge of that court or, if refused, with the leave of a judge of the Supreme Court. B

Held, that r 19(1) falls under Part IV of the Rules, r 16 of which provides that that Part applies to "criminal appeals from the High Court". Rule 19(1) is limited to the application for leave to appeal in respect of appeals from decisions of the High Court in criminal matters, where that court would have been exercising its own jurisdiction. The right to appeal in respect to which leave must be applied for, is given to the person convicted of C a criminal offence by the High Court. Refusal of leave to appeal to the High Court cannot be said to be a decision in a criminal matter before the High Court. The refusal of leave has the effect of preventing the proceedings coming into existence in the High Court.

Held, further, that giving a right to appeal from a decision of a judge of the D High Court refusing leave to appeal to that court from a decision of a magistrates court made in terms of s 198(3) of the CP&E Act would defeat the whole object of giving a judge of the High Court the power to decide, on the merits, whether to grant or refuse leave to appeal to that court. When a right to appeal is given, subject to the condition that leave to appeal be granted, the intention of the legislature is that some E tribunal must have the power to decide whether the right to appeal should be given or not. The object is to protect the process of the appellate court from frivolous

and unnecessary appeals by means of an exercise of a screening power. A right to appeal, may be given by statute or conditionally as a result of a grant of leave to appeal. Where the granting F of leave is the chosen method of acquiring a right to appeal unless leave is granted, the right does not arise. Under s 198(4)(b), the legislature gave the power to consent to or refuse the right to appeal against a decision of the magistrates court under s 198(3) to a judge of the High Court. No other tribunal has that power. The matter was entrusted and intended to be entrusted to his discretion. It is for the judge of the High G Court alone to look at the merits of the application for leave to appeal to that court and decide, in the proper exercise of his discretion to grant or refuse leave to appeal. The clear intention of the legislature, which the Supreme Court must respect, is that the decision of a judge of the High Court refusing leave to appeal to that court in the exercise of jurisdiction H

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A must be final. No enactment provides for an appeal against a decision of a tribunal entrusted with the power to grant or refuse leave to appeal.

Held, further, that it is a principle in our legal system that no right of appeal lies to an ultimate court of appeal against a decision of an intermediate court of appeal refusing leave to appeal to it, in the exercise of its jurisdiction on the merits. The object of giving the tribunal power to B grant or refuse leave to appeal is to enable it to control what it should hear and, *ipso facto,* prevent frivolous and unnecessary appeals that would taint the process of the intermediate appellate court. That object would be defeated if the Supreme Court would also enter the question of whether, on the merits, the case was fit for appeal to the intermediate C appellate court. The intention is that there should be one decision to grant or refuse leave in respect of one right of appeal. If a refusal to give leave to appeal is appealable, so too must be the granting of leave, which would result in absurdity.

Held, further, that the application would be struck off the roll.

Cases cited D

Aden Refinery Co Ltd v *Ugland Management Co Ltd* [1986] 3 WLR 949

A-G v *Bvuma & Anor* 1987 (2) ZLR 96 (S)

A-G v *Mzizi* 1991 (2) ZLR 321 (S)

A-G v *Tarwirei* 1997 (2) ZLR 75 (S)

E*Canadian Utilities Ltd* v *Deputy MNR for Customs & Excise* (1964) 41 DLR (2d) 429

Ernewein v *MEI (*1980) 103 DLR (3d) 1

Lane v *Esdaile* [1891] AC 210

Morgan v *Saskatchewan* (1991) 82 DLR (4th) 443

Richards v *Richards* [1989] 3 WLR 748

S v *Tsvangirai* 2003 (2) ZLR 88 (H) F

Legislation considered

Criminal Procedure & Evidence Act [*Chapter 9:07*], ss 12 & 198

Supreme Court Rules 1964 (RGN 380 of 1964), r 19

Case information

G*E Nyazamba*, for the applicant

Mrs *B Mtetwa,* for the respondents

Judgment

Malaba DCJ: This matter was placed before me in chambers as an application for condonation and extension of time within which to appeal from H a decision of a judge of the High Court. The

decision refused leave to appeal

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to that court from a decision of a magistrate discharging the respondents of A a criminal charge at the close of the case for the prosecution. The question arose as to whether there was any provision granting the Attorney-General the right to appeal. The decision on the question raised is that there is no statutory provision giving a right of appeal from a decision of an intermediate court of appeal like the High Court refusing leave to appeal to it from a decision of a subordinate tribunal. The decision on the question was by a single judge B sitting in chambers. It became necessary to enter into the question for the purposes of determining whether or not the proceeding in chambers was a proper application for condonation and extension of time within which to appeal as claimed by the Attorney-General. The question whether there is a right to appeal should ordinarily be decided by the Supreme Court constituted by a minimum of three judges. C

On 14 December 2009, a magistrate, acting in terms of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the CP&E Act"), found the respondents not guilty of the crime of contempt of court in contravention of s 182(1) of the Criminal Law (Codification and Reform) Act D [*Chapter 9:23*] with which they had been charged. The magistrate had found, at the close of the case for the prosecution, that there was no evidence on which a reasonable court acting carefully, might properly convict the respondents of the offence charged or any other offence of which they might be convicted on the same charge. The allegations against the respondents were that they acted in common purpose, and unlawfully caused three accused persons to E be released on bail with knowledge of an order of a judge of the High Court prohibiting the release of the accused. It was alleged that each or both of them intentionally impaired the dignity, reputation or authority of the court.

The first respondent is the legal practitioner who represented the three accused persons in an application for bail before a judge of the High Court. F Bail was granted on 9 April 2009. The representative of the Attorney-General invoked the provisions of s 121(3) of the Criminal Procedure & Evidence Act by notifying the judge, immediately after the decision admitting the accused persons to bail that he wished to appeal to a judge of the Supreme Court against the decision. G

Section 121(3) of the CP&E Act provides that once the notification of the wish to appeal is given to the judge, immediately after the decision admitting an accused to bail, the decision is suspended for a period of seven days. The Attorney-General or his representative is required to obtain leave to appeal from a judge of the High Court or, if a judge of that court refuses to grant leave, from a judge of the Supreme Court, within the period of seven days. If H

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A leave to appeal is granted and the notice of appeal filed within the seven days, the person admitted to bail remains in custody until the appeal is determined.

It is important to appreciate the fact that, under s 121(a) of the CP&E Act, the Attorney-General or his representative, is not obliged to exercise the right to appeal within seven days of the decision admitting an accused person to B bail being suspended. He or she should do so if he or she wants to benefit from the effect of the suspension in terms of s 121(3).

The Attorney-General applied to a judge of the High Court for leave to appeal on 14 April 2009. The application was on a certificate of urgency, because he appreciated that the appeal to a judge of the Supreme Court had to be lodged within seven days of the decision admitting the accused persons C to bail. No explanation was given for the decision not to apply for leave to appeal soon after invocation of the provisions of s 121(3) of the CP&E Act on 9 April 2009. The judge, who was not the judge who admitted the accused persons to bail, granted leave to appeal on 17 April 2009. The first respondent went to the Supreme Court that day and verified that no notice D of appeal had been filed.

Acting on the basis that leave to appeal had been granted after the expiry of seven days and that no notice of appeal had been filed at the Supreme Court, the first respondent approached the office of the Registrar of the High Court asking that orders admitting the accused persons to bail be prepared. E The second respondent was the clerk to the judge who granted leave to appeal. She got

the orders which had already been signed and handed them to the first respondent. On the authority of the orders, bail was paid at the magistrates court on behalf of the accused persons. They were released from custody on 17 April 2009.

F At the trial of the respondents, the State witnesses accepted the respondents' contention that the seven days expired on 16 April 2009. The prosecution had alleged in the charge that the order granting leave to appeal specifically directed that the order by which the accused persons were admitted to bail was to be suspended until the appeal was determined. The copy of the judgment showed that the learned judge simply confined himself to granting G leave to appeal.

The learned judge must have been aware of the fact that his powers were limited to granting leave to appeal only. The question whether or not the accused persons remained in custody pending determination of the appeal was pre-determined by the legislature in terms of s 121(3)(b) of the CP&E H Act. The learned judge must have understood that he could not alter that

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legal position by leave to appeal granted at any time after the expiry of the A seven days prescribed under s 121(1)(a).

A judge who grants leave to appeal timeously does not have to order that the accused person should remain in custody until the appeal is determined. He or she does not have to order that the decision admitting an accused person to bail is suspended by the granting of leave to appeal. The law itself makes B provision for the imposition of that disability on the accused person under s 121(3) of the CP&E Act.

The magistrate was alive to the fact that contempt of court is a specific intent offence. She was aware of the fact that s 121 of the CP&E Act, required leave to appeal to be granted within seven days after the date the accused is admitted to bail. She took into account the concession by the State witness, C who is a prosecutor, that the period of seven days expired on 16 April 2009 without leave to appeal having been granted. She also took into account the fact that a wrong interpretation of the law could not justify a finding of intention to impair the dignity, reputation or authority of the court.

The magistrate found, on the facts, that in waiting until the expiry of the D period of seven days and acting to have the accused persons released from custody on bail on 17 April 2009, the respondents could not be found, by a reasonable court acting carefully on the evidence, to have had the intention to impair the dignity, reputation or authority of the judge who granted leave to appeal on 17 April. There was, according to her, no evidence to prove intention as an essential element of the offence. She made the pertinent E observation of the fact that what was in issue, was whether or not the time limits prescribed by the relevant statute had been complied with, for the State to have benefitted from the effect of s 121(3) of the CP&E Act. The magistrate even made the finding that the notice of appeal to a judge of the Supreme Court had not been filed. F

Applying to the facts the principles of law enunciated in the cases of *A-G* v *Bvuma & Anor* 1987 (2) ZLR 96 (S), *A-G* v *Mzizi* 1991 (2) ZLR 321 (S), *A-G* v *Tarwirei* 1997 (2) ZLR 75 (S) and *S* v *Tsvangirai & Ors* 2003 (2) ZLR 88 (H), the magistrate concluded, at the close of the case for the prosecution, that there was no evidence that the respondents committed the offence charged or any offence of which they might be convicted thereon G and returned a verdict of not guilty.

Section 198(4)(b) of the CP&E Act gives the Attorney-General a conditional right to appeal to the High Court, if he is dissatisfied with a decision of a magistrate finding an accused not guilty of an offence charged at the close of the case for the prosecution. He or she must first obtain leave to appeal H

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A from a judge of that court. Leave may be granted or refused. The effect of the restriction is that a right of appeal is not available, unless leave to appeal is granted.

The application for leave to appeal was made to a judge of the High Court eight months after the decision of the magistrates court. On 28 October 2010 B the judge of the High Court refused leave

to appeal, on the ground that there were no prospects of success on appeal. The Attorney-General was not immediately perturbed by the decision.

Eleven months after the decision by the learned judge denying leave to appeal, the laggardly representative of the Attorney-General made what is C called an application for condonation and extension of time within which to appeal against the decision of the judge. Mr *Nyazamba,* for the applicant, suggested that the jurisdiction for entertaining the application was to be found under r 19(1) of the Supreme Court Rules 1964 ("the Rules"). Mrs *Mtetwa,* for the respondents, argued that the rule applied to cases in which the High Court would have exercised jurisdiction and a right to appeal to D the Supreme Court lay with leave of a judge of that court or, if refused, with leave of a judge of the Supreme Court.

Rule 19(1) provides:

> "(1) A person who has been refused leave to appeal by a judge of the High Court may, within ten days of the date when leave to appeal was refused, or within E fifteen days of conviction, whichever is the later date, apply to a judge for leave to appeal."

Rule 19(1) falls under Part IV of the Rules, which provides under r 16, that the provisions of that Part shall apply to "criminal appeals from the High Court". Rule 16 limits the application of r 19(1) to the application for leave F to appeal in respect of appeals from decisions of the High Court in criminal matters, where that court would have been exercising its own jurisdiction. Rule 19(1) is clearly concerned with refusal of leave to appeal against a conviction by the High Court. The right to appeal in respect to which leave must be applied for, is given to the person convicted of a criminal offence by the High Court. Refusal of leave to appeal to the High Court cannot be G said to be a decision in a criminal matter before the High Court. The refusal of leave has the effect of preventing the proceeding coming into existence in the High Court.

Rule 19(1) of the Rules cannot provide justification for the purported application for condonation and extension of time within which to appeal H against the refusal by a judge of the High Court to grant leave to the Attorney-

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General to appeal to that court, against a decision of a magistrates court in A terms of s 198(3) of the CP&E Act.

It is necessary to consider the meaning of the provisions of s 198(4)(b) of the CP&E Act, and to take into account the purpose of the section. The consideration leaves no doubt that, giving a right to appeal from a decision of a judge of the High Court refusing leave to appeal to that court from a B decision of a magistrates court made in terms of s 198(3), would defeat the whole object of giving a judge of the High Court the power to decide on the merits whether to grant or refuse leave to appeal to that court.

When a right to appeal is given, subject to the condition that leave to appeal be granted, it is clear that the intention of the legislature is that some tribunal must have the power to decide whether the right to appeal should be given or C not. The object is to protect the process of the appellate court from frivolous and unnecessary appeals by means of an exercise of a screening power. A right to appeal may be given by statute or conditionally as a result of a grant of leave to appeal. Where the granting of leave is the chosen method of acquiring a right to appeal, unless leave is granted, the right does not arise. D

The legislature gave, in terms of s 198(4)(b) of the CP&E Act, the power to consent to or to refuse the right to appeal against a decision of the magistrates court under s 198(3), to a judge of the High Court. No other tribunal has that power. The matter was entrusted, and intended to be entrusted, to his or her discretion. It is for the judge of the High Court alone, in the exercise of his or her jurisdiction, to look at the merits of the application for leave E to appeal to that court and to decide, in the proper exercise of discretion, to grant or refuse leave to appeal. In this case, the decision refusing leave was well within the judge's discretion and the reason that the appeal lacked all merit was a wholly proper basis for the decision.

Once a decision has been made in terms of a provision to that effect refusing F leave to appeal to a court, that should end the matter, and there is no appeal from that decision. The clear intention of the legislature, which the Supreme Court must respect, is that the decision of a judge of the High Court refusing leave to appeal to that court must be final. No legislative enactment provides for an

appeal against a decision of a tribunal entrusted with the power to grant or refuse leave to appeal. G

What is ordinarily provided for, is an application for leave to appeal to the court that has the jurisdiction to hear and determine the appeal where leave is refused by the court against whose decision the appeal is to lie. It is always a judge of the court to which the appeal lies who has the last say on the matter. In this case, it was a judge of the High Court who had the first H

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A and last say on the issue of leave to appeal. An application is not an appeal. It is a principle in our legal system that no right of appeal lies to an ultimate court of appeal against a decision of an intermediate court of appeal refusing leave to appeal to it in the exercise of its jurisdiction on the merits.

The rationale for not providing for a right of appeal against refusal of leave B to appeal is obvious. The object of giving the tribunal power to grant or refuse leave to appeal, is to enable it to control what the court should hear, and *ipso facto* prevent frivolous and unnecessary appeals that would taint the process of the intermediate appellate court. That object would be defeated if the Supreme Court could also enter the question whether, on the merits, the case was fit for appeal to the intermediate appellate court. The introduction C of the "filter" requiring leave would be pointless. There would, in fact, be two appeals in every case in which, in the ordinary course of things there would be one.

The intention is that there should be one decision to grant or refuse leave in respect of one right of appeal. If a right to appeal against the refusal of leave D were given, there would be nothing to stop a party against whom leave to appeal has been granted also appealing against the decision granting leave. This would be the case because there is no provision in any enactment to the effect that no appeal would lie from a decision of a judge of the High Court granting leave to appeal. The Supreme Court would find itself having to E entertain again the same question, whether the intermediate court of appeal should have granted or refused leave to appeal. That would reduce the provisions of s 198(4) of the CP&E Act to an absurdity. It is considerations of judicial comity which should operate in this aspect.

The principles to be applied in the determination of the question whether F an appeal lies against a decision of an intermediate court of appeal refusing leave to appeal to it, were enunciated by Lord Halsbury LC as far back as 1891 in *Lane* v *Esdaile* [1891] AC 210 at 211-2. The decision has been hailed as the "foundation stone" (to borrow the words of Bayda CJS in *Morgan* v *Saskatchewan* (1991) 82 DLR (4th) 443 at 445a) for these principles. The application of the principles has the effect of eliminating a potential source G of delay in the finalization of litigation. The decision has been followed in other English common law jurisdictions.

The principles were expressly adopted by the Supreme Court of Canada in *Canadian Utilities Ltd* v *Deputy MNR for Customs & Excise* (1964) 41 DLR (2d) 429 and *Ernewein* v *MEI* (1980) 103 DLR (3d) 1. The judgments of the H English Court of Appeal in *Aden Refinery Co Ltd* v *Ugland Management Co*

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Ltd [1986] 3 WLR 949 and *Richards* v *Richards* [1989] 3 WLR 748 confirm A that the principles enunciated in *Lane's case supra* are still the law in England.

In the *Canadian Utilities* case *supra* Cartwright J at p 435 said:

> "It appears to me to have been consistently held in our courts and in the courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision B of that tribunal to refuse leave, provided that the tribunal has not mistakenly declined jurisdiction but has reached a decision on the merits of the application."

In the *Ernewein* case *supra* Laskin CJC, writing for the majority, said at p 6:

> "The scheme of appellate review by intermediate appellate courts, whose decisions in turn are appealable here, distinguishes between cases where the appeal to them is as of right and where the appeal cannot come on to be heard unless leave to C appeal is previously obtained. In the one set of cases, the intermediate appellate court cannot refuse to hear the appeals but, in the other set, it is empowered to screen out those cases which it decides not to hear on any of the issues sought to be brought forward for

> hearing on the merits. In my view, an ultimate appellate court like the Supreme Court of Canada should respect this differentiation prescribed for courts below, and should recognize that the legislative policy which supports the differentiation is to leave it to the intermediate appellate D court to decide, where leave to appeal is a precondition of an appeal to it on the merits, whether it will entertain it. If it decides that it will not, that should end the matter so far as any further appeal here is concerned, unless there is more commanding language than is found in ss 31(3) and 41(1) to warrant this court's interference with what is a discretionary determination to refuse to allow an appeal to proceed." E

At p 8 the learned Chief Justice of Canada makes the observation that:

> "The logic of Lord Halsbury's observation that if a refusal to give leave to appeal is appealable so must be the granting of leave is unassailable. Indeed, what it points out is an obliteration of the distinction in the operation of an intermediate appellate court between cases which it chooses to hear on the merits and those in which it either refuses to grant leave or those in which, leave having been F granted, an appeal is sought to be taken further from the refusal or grant, as the case may be."

In the *Richards* case *supra* at p 753 Lord Donaldson of Lymington MR said:

> "In my judgment, what *Lane* v *Esdaile* decided, and all that it decided, was that where it is provided that an appeal shall lie by leave of a particular court or courts, neither the grant nor the refusal of leave is an appealable decision." G

In In re *Housing of the Working Classes Act, 1890,* ex parte *Stevenson* (1892) 1 QB 609 at p 611 Lord Esher MR said:

> "Wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given." H

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A Applying the above-mentioned principles in the determination of the question raised by this application, it is clear that there is no legislative enactment which gives the Attorney-General a right of appeal to the Supreme Court from the refusal, by a judge of the High Court, of leave to appeal to that court from a decision of a magistrate finding an accused not guilty of a criminal offence at the close of the case for the prosecution. The effect of a B refusal by a judge of the High Court of leave to appeal to that court renders the decision by the magistrates court final. There was no legal basis for the purported application for condonation and extension of time within which to appeal. A party cannot seek condonation for non-compliance with a rule that does not exist or one that the party is under no duty to obey by reason of his or her peculiar circumstances. There cannot be an extension of time within C which to appeal where there is no right to appeal. It is a principle of law that procedures should be used for the purposes for which they were created.

The matter is struck off the roll with costs.

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

D*Mtetwa & Nyambirai*, respondent's legal practitioners

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MATIPANO v GOLD DRIVEN INVESTMENTS (PVT) LTD 2014 (1) ZLR 344 (S)

Citation 2014 (1) ZLR 344 (S)

Case No Judgment No. S-19-14

Court Supreme Court, Harare

Judge	Malaba DCJ, Ziyambi JA and Gowora JA
Heard	29 November 2012; *CAV*
Judgment	24 March 2014
Counsel	Mrs *J B Wood,* for the appellant *C Muchenga*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Enrichment – unjust enrichment – fees payable to deputy sheriff – fees demanded in excess of applicable tariff – payer entitled to recover excess – allegation that payment made voluntarily – payment made under colour of office – parties not on equal footing – payer entitled to recover D

Practice and procedure – parties – locus standi – judgment debtor – writ of execution – deputy sheriff's commission – liability of judgment debtor to pay such commission – locus standi of judgment debtor to claim refund of excess commission wrongfully paid

Practice and procedure – sale in execution – fees due to deputy sheriff – E *applicable tariff – tariff in force at time of relevant transaction governs fees due – by whom fees payable – owner of goods attached – fees payable by such person, not by judgment creditor – excessive commission paid as a result by judgment debtor – payment wrongfully made colore officii – illegality of payment – judgment debtor entitled to claim refund of the excess paid by him to the deputy sheriff* F

Words and phrases – "cause of action" – meaning of – means the entire set of facts which gives rise to an enforceable claim

Words and phrases – "colore officii" – colour of office – meaning of when it arises in the context of a claim for a refund of monies illegally taken by a public official from a member of the public G

Headnote

"The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration H

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A in order to disclose a clause of action. Such a cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently is sometimes loosely spoken of as the cause of action" (*dicta per* Watermeyer J in *Abrahamse and Sons* v *SAR&H* 1933 CPD 626 at 637 followed.)

"Extortion by colour of office occurs when a public officer demands, and is B paid money that he is not entitled to, or more than he is entitled, for the performance of his public duty. Examples of such exactions are over tolls paid to keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound-keepers etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was C not due" (*dicta per* Windeyer J in *Mason* v *New South Wales* (1959) 102 CLR 108 at 140 applied.)

The appellant was the deputy sheriff for Harare. In that capacity he had been instructed by lawyers, acting for a bank, to attach a quantity of tobacco from the respondent, who had been indebted to the bank and against whom a High Court order of provisional sentence had been D obtained. Consequent upon his attachment of the tobacco, the appellant had conducted a sale in execution, which sale, however, had failed to satisfy the judgment debt in entirety. The appellant thereupon proceeded to attach more tobacco from the respondent's premises. However, before this further sale in execution could take place, the bank and the E respondent agreed that this further stock

should be sold by private treaty. The appellant was notified accordingly and the sale in execution was cancelled. Subsequently the appellant demanded payment of commission from the respondent, which he claimed was due to him in terms of the High Court (Fees and Allowances) Rules 2009 (SI 35 of 2009). When this sum remained unpaid, the appellant threatened to sell the tobacco F in his possession and the respondent, faced with his threat, thereupon paid him. Subsequently, and submitting that the appellant had been wrong in assessing his commission in terms of SI 35 of 2009, rather than in terms of SI 57 of 2011 which replaced it, the respondent brought an application before the High Court seeking an order that it be repaid the excess of the amount due to the appellant in terms of SI 57 of 2011. G The respondent was successful and it was against this order of the High Court that the appellant duly noted an appeal.

On appeal, the appellant submitted, *inter alia*, that the court *a quo* had no jurisdiction to determine which of the two fees and allowances rules contained the relevant tariff. That, he argued, was the function of the sheriff H in terms of r 457(3) of the High Court Rules 1971. He also submitted

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that the respondent did not have *locus standi* to reclaim the money, if it A was due. If anyone had such a right, so he argued, it was the bank, the applicant in the original provisional sentence proceedings. The applicant further submitted that, the fact that the fees were in excess of the tariff did not *per se* render it unlawful so as to give rise to a claim for a refund.

Held, that once it was accepted that the issue before the court *a quo* was to do with the applicable tariff to be applied in the calculation of the B commission, then it stood to reason that the issue was one of law and firmly within the purview of the High Court. The Sheriff was not empowered to decide issues relating to the applicable law that the deputy sheriff is entitled to rely on in levying fees and charges. What r 457 provided for was for the Sheriff to determine the accuracy or otherwise of charges C raised by his deputy. He could not, and was not empowered to, determine the applicable statutory instrument. That was an issue which is solely within the purview of a court.

Held, further, that in these circumstances the respondent did have *locus standi* to approach the court for relief. Any fees due and arising from the execution were due and payable to the appellant by the judgment D debtor, and that was the respondent.

Held, further, that the court *a quo* was correct in finding the appellant had been wrong in assessing his commission in terms of SI 35 of 2009 rather than in terms of SI 57 of 2011 which replaced it. That being the case, it was also correct in making an order for the refund of the excess E of the fees paid to the appellant by the respondent. The payment was not a voluntary payment. It had been paid to the appellant in a public position in the performance of a duty he was bound to perform for less than the sum demanded and as such had been demanded *colore officii*.

Held, further, that there is a general right to restitution of monies paid following upon an *ultra vires* and illegal demand, and so a right to the F recovery of interest thereon. Once it is established that the monies were paid under an *ultra vires* law, then the payer has a right to recover. Such payments would constitute illegal payments and on that basis they can be recovered.

Held, further, that r 327 does create an entitlement by the deputy sheriff to G payment of fees based on the mere attachment of goods, whether movable or immovable. The rule seeks to protect the payment of fees to the deputy sheriff for any work done in connection with the writ. It does not set out the manner in which the deputy sheriff is obliged to levy and calculate his fees. The applicable law in calculating the commission is the tariff of fees set out in the High Court (Fees and Allowances) (Amendment) H

A Rules. The fee accrues after the occurrence of any of the following events: on a sale in execution, payment by the debtor upon presentation of the writ, or withdrawal or suspension of the writ by the judgment creditor. In this case the writ was withdrawn by the judgment creditor which event triggered the calculation of the fees due. This occurred after the replacement rules came into effect, and those rules therefore governed B the amount of the fees.

Held, further, that the payment to the appellant, in excess of the sum lawfully due to him, was illegal and the appeal, as a consequence, must be dismissed with costs.

Cases cited C

Abrahamse & Sons v *SA Railways and Harbours* 1933 CPD 626

Dew v *Parsons* (1819) 2 B & Ald 562; 106 ER 471

Ellis NO v *Commr of Taxes* 1994 (1) ZLR 423 (S)

Guwa & Anor v *Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 380

D*Maskell* v *Horner* [1915] 3 KB 106: [1914-15] All ER 595

Mason v *New South Wales* (1959) 102 CLR 108

NRZ v *Coghlan, Welsh & Guest* 1984 (2) ZLR 224 (H)

Nepean Hydro Electric Commission v *Ontario Hydro* (1982) 132 DLR (3d) 193

Pymor Investments (Pvt) Ltd v *Frank Pantony (Pvt) Ltd* 1996 (2) ZLR 357 (H) E

South of Scotland Electricity Board v *British Oxygen Co Ltd (No. 2)* [1959] 2 All ER 225

Woolwich Building Society v *Inland Revenue Commissioners* (No. 2) [1992] 3 All ER 737

Legislation considered F

High Court Act [*Chapter 7:06*], ss 13 and 14

High Court Rules 1971 (RGN 1047 of 1971), rr 327 and 457 (3)

Case information

Mrs *J B Wood*, for the appellant

G*C Muchenga,* for the respondent

Judgment

Gowora JA: On 9 March 2011 the High Court granted an order of provisional sentence in the sum of USD 2 322 089.52 against the respondent in favour of Metropolitan Bank Zimbabwe (Pvt) Ltd. The respondent, who H was cited as the defendant, was in default of entry of appearance to defend.

Chigumba J

Pursuant to that judgment, the judgment creditor caused a writ to be issued A on 14 April 2011 for the payment of the debt.

David Tendayi Matipano, the appellant, was the Deputy Sheriff for Harare. Acting on instructions from the lawyers of the judgment creditor, on 14 April 2011 the Deputy Sheriff attached 634 600 tonnes of tobacco at the premises of the respondent. On 29 April 2011 the Deputy Sheriff conducted B a sale in execution of the tobacco stocks. However, the proceeds of the sale were insufficient to settle the judgment debt. Consequently, on 3 May 2011 the Deputy Sheriff attached more tobacco stocks in a bid to raise the sum of USD 2 322 089.52. A sale by public auction of the attached stocks was scheduled for 20 May 2011. Prior to the scheduled date of the sale, the respondent and the judgment creditor agreed that the stocks were to be sold C by private treaty in order to realise a better price. On 30 May 2011 a sale by private treaty of the stocks was concluded by the respondent and the buyer and payment was effected.

On 19 May, in anticipation of the successful conclusion of the sale, the judgment creditor instructed the Deputy Sheriff to cancel the sale scheduled D for 20 May 2011 and the sale was cancelled. Subsequently, in June 2011 the Deputy Sheriff, in letters addressed to the respondent's legal practitioners, demanded payment of commission in the sum of USD226 297.25. The respondent queried the amount being demanded for commission. When the amount remained unpaid the Deputy Sheriff gave instructions to an auctioneer to sell tobacco stocks in its possession for recovery of the alleged E commission. The respondent then paid.

On 3 February 2012 the respondent instituted an application in the High Court against the Deputy Sheriff in which it demanded a partial refund of the sum paid as commission. On 27 June 2012 the High Court issued an order in favour of the respondent in the following terms: F

"1. It is declared that the commission levied by the respondent in case No HC 1201/11 in respect of goods attached on 3 May 2011 under High Court (Fees and Allowances) Rules SI 35/2009 is unlawful.

2. The respondent is ordered to levy his commission on writ of execution against movable property dated 13 April 2011 in respect of goods attached G on 3 May 2011 issued in case No HC 1201/11 in terms of clause 8(1)(c) of the High Court(Fees and Allowances) Rules SI 57/2011.

3. It is ordered that the respondent shall refund the applicant all sums of money paid in excess of the amounts due to him under clause 8(1)(c) of the High Court(Fees and Allowances) Rules SI 57/2011.

4. The respondent shall pay the applicant's costs." H

Chigumba J

A It is against this order that the Deputy Sheriff now appeals. The grounds of appeal are as follows:

1. The learned judge erred in finding, in effect, that the court had jurisdiction to determine that the fees the appellant should have been allowed by the Sheriff even though the Sheriff had himself not been asked to determine B them.

2. The learned judge erred in failing to find that the respondent's application was not properly before the court and more particularly erred –

   (a) in finding, in effect, that the Sheriff was not empowered to interpret the tariff of fees which he is empowered to administer;

C (b) in finding that the respondent had the right to approach the court even though he had failed to require the judgment creditor to have a bill of costs taxed and

   (c) in finding, in effect, that the respondent had *locus standi* to seek a declaratory order relating to the fee the appellant could charge the judgment creditor.

D 3. The learned judge erred in finding that the respondent's papers disclosed a cause of action and, in particular, erred –

   (a) in finding, in effect, that the mere fact that a sum paid is said to have been not wholly due gives rise to an enforceable claim;

   (b) in finding that the respondent's cause of action was the unjust E enrichment of the appellant when no averment to that effect was contained in its papers;

   (c) in failing to find that the payment made by the respondent was a voluntary one and, accordingly, that any overpayment made would not have been refundable;

F (d) in finding that the High Court decisions cited by the appellant pertaining to the making of payments under protest contradict the decision of this Honourable Court also cited by the appellant;

   (e) in finding that a fee raised in excess of that specified in the tariff is *per se* unlawful;

G (f) in any event, in finding that the unlawfulness of a sum charged gives rise to a claim for a refund.

4. The learned judge erred in any event in finding that –

   (a) the issue to be determined was the choice of law under which the appellant was entitled to charge a fee instead of the date at which H the fee was to be calculated;

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   (b) the fee payable to the appellant was incurred at the date of cancellation A of the sale, instead of the date of attachment, of the respondent's tobacco;

   Alternatively, erred in failing to find that the appellant was entitled to charge a fee on the proceeds of the sale by private treaty as well as on cancellation of the sale of the remaining tobacco (*sic*). B

It was contended, firstly, that the matter was not properly before the High Court because it is not the forum in which disputes concerning the quantum of a fee payable to a Deputy Sheriff are decided in the first instance. It was suggested that the respondent should have insisted on a

taxation of the fees due to the Deputy Sheriff before paying or, alternatively, that the respondent should have paid under protest and sought taxation. Having failed to do either, C it was argued that the respondent had been left without remedy.

The respondent contends that the money was not due and further that since the legislation under which the commission was levied had been repealed then the demand under the repealed legislation is unlawful and wrongful and, in the circumstances, is a legal nullity. D

Was the Sheriff empowered to determine the question as to the appropriate tariff and as a consequence did the High Court lack jurisdiction to determine the dispute?

It is common cause that at the time that the Deputy Sheriff attached the respondent's tobacco stocks he was entitled to raise his charges under SI 35 E of 2009. However when the judgment creditor stopped the sale in execution scheduled for 20 May 2011, SI 35 of 2009 had been repealed by SI 57 of 2011, which came into effect on 13 May 2011. Central to the dispute was the percentage utilised by the Deputy Sheriff to calculate his commission for work rendered. It is common cause that when SI 57 of 2011 came into force F and repealed SI 35 of 2009 it effectively reduced the percentage rates that the appellant could charge as commission. Hence the dispute between the parties translated into which of the two statutory instruments was applicable at the time that the Deputy Sheriff sought to raise charges for his commission and, as correctly stated by the learned judge in the court *a quo,* the dispute raised a question of law and not fact. G

I do not accept that this is a case where the interpretation of the applicability of r 457(3) comes into question. For the contention that the jurisdiction of the High Court does not extend to the determination of disputes relating to fees charged by a Deputy Sheriff, reliance is placed on the provisions of r 457 of the Rules of the High Court 1971. The rule states: H

Chigumba J

A "(3) Necessary charges and allowances for all work necessarily done for which no provision is contained in such tariff, and every question arising under and relative to the tariff, shall be determined by the Sheriff."

The submission by the Deputy Sheriff that the High Court had no jurisdiction to determine the dispute because of the wording of r 457(3) is devoid of merit. B The Rules are made under the High Court Act and my reading of the rule in question does not lead me to conclude that the jurisdiction of the court has been ousted. Contrary to what was argued on behalf of the Deputy Sheriff, what was before the learned judge in the court *a quo* was the applicable statutory instrument.

Once it is accepted that the issue before the court *a quo* was to do with the C applicable tariff to be applied in the calculation of the commission, then it stands to reason that the issue was one of law and firmly within the purview of the High Court. The High Court was undoubtedly seized with jurisdiction.

In my view, the Sheriff, contrary to the submissions proffered on behalf of the Deputy Sheriff, is not empowered to decide issues relating to the D applicable law that the Deputy Sheriff is entitled to rely on in levying fees and charges. What r 457 provides for is for the Sheriff to determine the accuracy or otherwise of charges raised by his deputy. He cannot, and is not empowered to, determine the applicable statutory instrument. That is an issue which is solely within the purview of a court.

E In any case, the respondent had sought a declaratur, and the High Court is empowered to issue a declaration as to the rights of parties. Sections 13 and 14 of the High Court Act [*Chapter 7:06*] provide in relevant part:

> **"13 Original civil jurisdiction**
>
> Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.
>
> F**14 High Court may determine future or contingent rights**
>
> The High Court may, in its discretion, at the instance of any interested person, 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 Deputy Sheriff did not argue that the High Court does not have original G jurisdiction to issue a declaratur, and to the extent that the powers of the High Court have not been impugned in that

respect, I hold that the respondent established a cause of action which was then confirmed in the order that was issued in favour of the respondent. In respect of the jurisdiction of the High Court, it is trite that the High Court is a superior court with inherent H jurisdiction. In *Guwa & Anor* v *Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 380

Chigumba J

Garwe JA described the powers and functions of the High A Court as follows:

> "The High Court, however, is different from the Supreme Court in that it has, in terms of the High Court Act [*Chapter 7:06*] full original civil and criminal jurisdiction over all persons and over all matters within Zimbabwe, subject only to limitations placed either by the Act itself or by any other law. In terms of s 14 of the High Court Act, the High Court may inquire into and determine B any existing, future or contingent right or obligation, including the granting of a declaratur."

Did the respondent have the *locus standi* to approach the court for the determination of the correct fee to be charged or was the judgment creditor the correct party to approach the court for relief? C

The court is unable to accept the contention that the respondent lacked *locus standi* to seek a declaratory order with regard to the correct tariff on which the Deputy Sheriff's fees were chargeable, and that it was the judgment creditor that was entitled to challenge the fees payable. Charges relating to execution are due and payable by the party whose property is subject to execution and D the submission that the Deputy Sheriff is only accountable to the judgment creditor is, in my view, totally without justification and legally unsound.

Although the execution was instructed by the judgment creditor, any fees due from and arising out of execution are claimed from the judgment debtor. It is also indisputable that despite the suggestion that the respondent lacked the E necessary *locus standi* to sue for a refund, the commission in question was paid by the respondent and not the judgment creditor. The Deputy Sheriff never sought payment of the costs of execution from the judgment creditor. The respondent had an interest in the recovery of fees paid by it in excess of what was lawfully due and payable.

Did the respondent establish a cause of action for unjustified F enrichment, and did the mere payment of a sum said not to be wholly due give rise to an enforceable claim?

It is contended on behalf of the Deputy Sheriff that, even if the High Court had been correct in its finding that the matter was properly before it, it erred in finding that the papers disclosed a cause of action. The appellant submitted G that the only basis upon which a refund could found a cause of action of action was unjust enrichment and only the judgment creditor had the *locus standi* to claim on that basis. It was argued further that the onus was on the respondent to prove unjust enrichment and there is no such averment anywhere in the papers before the High Court. Even if it was accepted that H

Chigumba J

A the sum was not wholly due, so it is argued, the appellant could not have been unjustly enriched if the money was paid voluntarily.

The respondent has refuted suggestions by the Deputy Sheriff that the papers do not establish a cause of action and points to the averments in the founding and replying affidavits where the dispute over the commission due to the B Deputy Sheriff is chronicled and the position taken by the respondent as to the illegal nature of the demand is set out. The respondent maintains that the Deputy Sheriff had used the wrong law in calculating his commission and that the monies paid to him were not legally justifiable and therefore that the respondent was entitled to a refund.

The High Court found that the respondent had established a cause of action C on the papers. In *Abrahamse & Sons* v *SA Railways & Harbours* 1933 CPD 626 it was stated at 637:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of D

> action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently is sometimes loosely spoken of as the cause of action."

From the facts set out in the founding and replying affidavits the respondent was able to state that that the fee charged was not wholly due. The Deputy E Sheriff, in my view, understood the claim as it was presented that he had been unjustly enriched at the expense of the respondent. As was stated by the learned judge in the court *a quo*:

> "…the applicant averred that the respondent used the wrong piece of legislation to claim commission purportedly due to it. The cause of action was the unjust enrichment of the respondent by the payment of a claim that it was not legally F entitled to receive."

The issue before the court *a quo* was whether the payment of a sum which is not wholly due gives rise to an enforceable claim. In *Dew* v *Parsons* (1819) 2 B & Ald 562; 106 ER 471, an attorney was held entitled to set off against a claim by a Sheriff the excess amount, which he had paid to the Sheriff, for G the issue of warrants over what the Sheriff was legally entitled to charge. At issue was whether the Sheriff was entitled to retain sums which he had no legal right to demand, but the sums were demanded in return for the rendering of a service, namely the issuing of warrants. The decision was rationalised on the basis that the payments were exacted *colore officii*, a concept which emerged more clearly in later cases. This concept was thus described by H Windeyer J in *Mason* v *New South Wales* (1959) 102 CLR 108 at 140:

Chigumba J

> "Extortion by colour of office occurs when a public officer demands, and is paid A money that he is not entitled to, or more than he is entitled to, for the performance of his public duty. Examples of such exactions are over tolls paid to the keepers of toll-bridges and turnpikes, excessive fees demanded by sheriffs, pound keepers, & etc. The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due."

Was the payment by the respondent made voluntarily and as B such was the court correct in finding that a refund was due from such payment?

The learned judge in the court *a quo* was clearly alive to the fact that the refund to the respondent could only follow a declaration as to the correct law under which the Deputy Sheriff was entitled to levy his fee, and as a C consequence the lawfulness or otherwise of the demand for payment of commission.

If one party has the power to say to another, what you require will not be done except upon the conditions that I choose to impose, that party should not be allowed to contend that the parties acted on an equal footing. Such a situation does not fall within the category of payments made voluntarily. D

> "If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress but in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress." E

(*per* Lord Reading CJ in *Maskell* v *Horner* [1915] 3 KB 106 at 118, [1914-15] All ER Rep 595).

This type of payment was distinguished from one made under threat of a suit, as the payer under those circumstances has the opportunity to defend the suit. In *South of Scotland Electricity Board* v *British Oxygen Co Ltd (No 2)* [1959] 2 All ER 225 (HL) at 240, Lord Merriman said; F

> "It is sufficient to say that, in *Maskell* v *Horner* ([1915] 3 KB 106 at 119, [1914-15] All ER Rep 595 at 598), Lord Reading CJ, referring to these authorities, and in particular to the advice given by Willes J, in *Great Western Ry Co* v *Sutton* (1869) LR 4 HL 226 at 249) where that learned judge said that he had 'always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, G or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received' said, that such claims made in this form of action are treated as matters of ordinary practice and beyond discussion."

The court *a quo* made a finding that the cause of action of the respondent's claim was the unjustified enrichment of the Deputy Sheriff by the payment H

Chigumba J

A of a claim to which he was not entitled. To this end, it was contended that the Deputy Sheriff could not have been unjustly enriched if the payment was voluntary. In deciding this issue the court had occasion to consider the principles set out in the following authorities: *National Railways of Zimbabwe* v *Coghlan, Welsh & Guest* 1984 (2) ZLR 224 (H), *Pymor Investments (Pvt) Ltd*B v *Frank Pantony (Pvt)* Ltd 1996 (2) ZLR 357 (H) and *Ellis NO* v *Commissioner of Taxes* 1994 (1) ZLR 423 (S). Commenting on the cited authorities, the learned judge in the court *a quo* had this to say:

> "The above decisions contradict the view adopted by the Supreme Court in *Ellis NO* v *Commissioner of Taxes* 1994 (1) ZLR 423 (S) at 439B-H where Gubbay CJ stated:
>
> C 'I strongly support the opinion of Lord Goff supra at 760h that:
>
> > "In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should *prima facie* be enough to require its repayment."'
>
> Put differently, recovery is grounded on the unlawfulness and nullity of the D demand and not on any mistaken belief of the payer."

The Deputy Sheriff suggested before us that the respondent had not paid under protest and further that the court *a quo* did not make a finding that it had done so. It was further argued that the respondent had not proffered evidence to the effect that payment was made and accepted on condition E that if found not to be due, it would be recovered.

The learned judge in the court *a quo* was alive to the fact that the respondent had not pleaded duress or mistake as regards payment of the commission. Nevertheless, he found that due to the illegality of the demand by the Deputy Sheriff the payment could not stand.

F The principle that the authorities establish is that payments not lawfully due cannot be recovered. It is accepted now that money which a party has been wrongfully made to pay, whether under compulsion, or in circumstances in which he is unable to resist the imposition, may be recovered. Money paid as a result of actual or threatened duress to the person, or actual or threatened seizure of a person's goods, is recoverable. See *Maskell* v *Horner* [1915] 3 KB 106, G [1914-15] All RE Rep 595. The concept of duress has been widened to include economic duress. Money paid to a person in a public or quasi-public position to obtain the performance by him of a duty he is bound to perform for nothing or for less than the sum demanded is recoverable to the extent that he is not entitled to it. Such payments are often referred to as having H been demanded *colore officii.*

Chigumba J

Is a fee raised in excess of what is specified in the tariff *per s***e** A **unlawful and does such unlawfulness give rise to a claim for a refund of such payment?**

The last issue for consideration is whether the court erred in ordering a refund in favour of the respondent. The Deputy Sheriff argued that the fact that the sum claimed was not wholly due would not have necessarily rendered the B claim unlawful. The respondent disputes this contention and submits that the demand for commission under repealed legislation was unlawful and that, as a consequence, both the demand and the payment created neither rights nor obligations on either of the parties.

The Deputy Sheriff sought to argue that the High Court erred in relying upon the judgment in *Ellis supra* as it was not authority for the proposition C that the appellant's claim was a nullity. It was submitted that the learned Chief Justice in the case of *Ellis* referred to a "limited restitutionary right".

The Deputy Sheriff cannot be correct in his reading of the judgment. It is clear that the rationale of the remedy as found by the learned Chief Justice is the illegality of the demand. He stated as follows at 431: D

> "Although Lord Browne-Wilkonson agreed with Lord Goff's reasons, the emphasis of his speech was not so obviously dependant on the special position of governmental or public bodies. He underscored rather the fact that money paid under an *ultra vires* demand is paid without consideration and that the relative positions of the State and the citizen are unequal, even in the case of a major financial institution like Woolwich. He explained at 781e: E

> '… money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity. There is in my view a close analogy to the right to recover money paid under a contract the consideration of which has wholly failed.'

And continued at 782c-d:

> 'The money was demanded and paid for tax, yet no tax was due; there was F a payment for no consideration. The money was demanded by the state from the citizen and the inequalities of the parties' respective positions is manifest … there are, therefore, in my judgment sound reasons by way of analogy for establishing the law in the sense in which Lord Goff proposes.'

With much deference the want of consideration factor seems to me to mask the somewhat true rationale of the relief-which was the nullity of the demand that flowed from its *ultra vires* or unlawful nature." G

Even though the Deputy Sheriff seeks to place a narrow interpretation on dictum in the *Ellis* judgment and restrict it to those situations where a taxpayer would have paid a tax under an invalid law, I do not understand the judgment of the learned Chief Justice to advocate such a narrow application of the principle. It cannot be a correct interpretation of the principle to confine a H

Chigumba J

A right of recovery only to those cases where a taxpayer is compelled to pay tax under an unconstitutional law. I am further fortified in this view by the remarks of Lord Goff in *Woolwich Building Society* v *Inland Revenue Commissioners (No. 2)* [1992] 3 All ER 737 (HL) at 761e-762d as follows:

> "… I agree that there appears to be a widely held view that some limit has to B be placed on the recovery of taxes paid pursuant to an *ultra vires* demand. I would go further and accept that the armoury of common law defences, such as those which prevent recovery of money paid under a binding compromise or to avoid a threat of litigation, may be either inapposite or inadequate for the purpose; because it is possible to envisage, especially in modern taxation law which tends to be excessively complex, circumstances in which some very substantial sum of money may be held to have been exacted *ultra vires* from a C very large number of taxpayers.
>
> … At this stage of the argument, I find it helpful to turn to recent developments in Canada. First, in a notable dissenting judgment (with which Laskin CJC concurred) in *Nepean Hydro Electric Commission* v *Ontario Hydro* (1982) 132 DLR (3d) 193 Dickson J subjected the rule against recovery of money paid under a mistake to the law to a devastating analysis and concluded that the rule should be rejected. His preferred solution was that, as in cases of mistake of D fact, money paid under a mistake of law should be recoverable if it would be unjust for the recipient to retain it."

It cannot be disputed that these are the principles that Gubbay CJ considered and applied in *Ellis NO* v *Commissioner of Taxes supra* at 435 wherein he stated:

> E "To my mind, the view that there is a general right to restitution of monies paid following upon an *ultra vires* and illegal demand, and so a right to the recovery of interest thereon, is both attractive and compelling. For such a principal payment would have been made either in consequence of a perceived presumption on the part of the payer of the constitutional validity of the demand and the holding out of such legality by the Legislature, or on account of the prospect of the payer being subjected to penal interest were his opinion of the illegality of the demand F ultimately ruled to be incorrect. It matters not which it be, since payments made under unconstitutional legislation cannot be deemed voluntary. In short, an *ultra vires* demand alone by a government body provides ground for restitution. It operates outside the field of mistake and focuses on the position of government as payee rather than on the circumstances of the payer."

G I therefore would find that on the *dictum* in *Ellis's* case these courts have departed from the age old principle that monies paid under a mistake of law cannot be recovered. Once it is established that the monies were paid under an *ultra vires* law, then the payer has a right to recover. Such payments would constitute illegal payments and on that basis they can be recovered and the court *a quo* was correct in making an order for the refund of the excess on H the fees paid to the appellant by the respondent.

Chigumba J

Whether the fee to be charged by the deputy sheriff is A calculated as at the date of attachment or the date of sale or cancellation thereof?

It was contended on behalf of the Deputy Sheriff that, in terms of para 8(1)(c) of the tariff, a fee is earned by a Deputy Sheriff by the attachment of the goods and not by the withdrawal of the writ by the judgment creditor. This B submission is premised on the provisions of the High Court Rules 1971, Order 40 r 327 of which provides as follows:

> "**327. Writ may be withdrawn or suspended**
>
> (1) A writ of execution may, on payment of the fees incurred, be withdrawn or suspended at any time by notice to the sheriff or his deputy by the party who has sued out such writ." C

Contrary to the assertion by the Deputy Sheriff, I do not read in that provision an entitlement by the Deputy Sheriff to payment of fees based on the mere attachment of goods, whether movable or immovable. Rather, Order 40 is concerned generally with the process of attachment and r 327 permits the withdrawal or suspension of a writ at any time and seeks to protect the D payment of fees to the Deputy Sheriff for any work done in connection with the writ. It does not set out the manner in which the Deputy Sheriff is obliged to levy and calculate his fees. The inescapable conclusion is that the applicable law in calculating the commission is the tariff of fees set out in the High Court (Fees and Allowances) (Amendment) Rules. E

In order to resolve the dispute as to which is the relevant tariff, it is necessary to have regard to the specific provisions of the tariff. Section 8 of the tariff provides in relevant part:

> "(1) in respect of execution –
>
> (a) when a writ is paid on presentation, ten *per centum* of the amount of the writ, with a minimum of … F
>
> (b) when a writ is withdrawn by the judgment creditor, or the judgment debtor's estate is placed under sequestration or liquidation before any movable property has been attached, a fee of USD10.00;
>
> (c) when a writ is withdrawn or suspended by the judgment creditor, or the judgment debtor's estate is placed under sequestration or liquidation G after movable property has been attached but before sale, ten *per centum* of the value of the property attached, but such value shall not exceed the amount directed to be recovered;
>
> (d) when a writ is paid by the judgment debtor to the deputy sheriff after movable property has been attached but before sale, ten *per centum* of the amount so paid; H

> A (e) after sale in execution ten *per centum* of the net amount recovered, or if the Deputy Sheriff acted as auctioneer, ten *per centum* of that amount.
>
> (2) No fee shall be allowed on the value of movable property attached but subsequently claimed by a person other than the judgment debtor and released in consequence to that claim, unless the property was attached at the express B direction of the judgment creditor."

The High Court held that s 8(1) lists all the situations in which the Deputy Sheriff is entitled to claim his commission. The learned judge also found that the fee accrues on the date on which the event listed in the section occurs. The fee does not accrue through the attachment, which is a process comprising various events. He was correct. The fee accrues after the occurrence of C any of the following events; on a sale in execution, payment by the debtor upon presentation of the writ, or withdrawal or suspension of the writ by the judgment creditor. In this case the writ was withdrawn by the judgment creditor which event triggered the calculation of the fees due to the Deputy Sheriff. As the withdrawal of the writ was effected after the repeal of SI 35/09 by SI 57/2011 it stands to reason that the fees had to be calculated in terms D of the provisions of SI 57/2011 which governed that event.

I find the contention by the Deputy Sheriff that the fee accrued as a result of the attachment legally unsustainable. The learned judge found that the Deputy Sheriff had levied fees under the wrong statutory instrument and determined that the respondent was entitled to a refund. The order granted E was a declaration that the commission levied by the appellant was unlawful.

Disposition

The appeal has no merit. It is therefore dismissed with costs.

F MALABA DCJ and ZIYAMBI JA concurred.

Dhlakama B Attorneys, appellant's legal practitioners

Musemburi & Muchenga, respondents' legal practitioners

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SIKONA FARM (PVT) LTD & ANOR v CAREY FARM (PVT) LTD & ANOR 2014 (1) ZLR 360 (H)
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Judge	Chigumba J
Heard	24 March 2014
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Counsel	*M E Motsi,* for the first and second applicant *W T Manase*, for the first respondent *A Mambosasa,* for the second respondent
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Annotations	No case annotations to date

Flynote

Appeal – leave – when required – interlocutory order – rationale for requiring leave to appeal against such order – distinction between such orders and ruling which are not appealable

Legal practitioner – conduct and ethics – practitioner appearing after D *withdrawal of agency – not a ground for appeal by other party against any judgment arising from proceedings – courses open to dissatisfied party*

Headnote

An interlocutory order is one granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute E between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect. In an application for leave to appeal against such an interlocutory order, the court must consider the distinction between "rulings" (such as one of the admissibility of evidence or on which party should begin) and simple interlocutory F orders, and consider the rationale behind the restriction of the right of appeal. History shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. Apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying G and obstructionist tactics. Desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense might be excessive, H

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A while if none of them were, the injustice resulting from wrong orders might be intolerable.

Where a legal practitioner who had no right to be heard has been heard, deliberately and intentionally and in contravention of Order 2 r 5 of the High Court Rules 1971 (which deals with change of legal practitioner B by a party), the remedy is to report the legal practitioner to the Law Society for violations of the Legal Practitioners Act [*Chapter 27:07*], and of the rules of ethics, and or to cause disciplinary proceedings to be instituted. The legal practitioner's lack of right of audience, after audience has already been given, cannot be used in an appeal as a ground for overturning any judgment arising from those proceedings, unless the C complaint emanated from the client which was wrongly represented.

Cases referred to

Jesse v *Chioza* 1996 (1) ZLR 341 (S)

Mwatsaka v *ICL Zimbabwe* 1998 (1) ZLR 1 (H)

D*Pretoria Garrison Institutes* v *Danish Variety Products* 1948 (1) SA 839 (A)

Tobacco Sales Producers (Pvt) Ltd v *Eternity Star Invstms* 2006 (2) ZLR 293 (H)

Legislation considered

E High Court Act [*Chapter 7:06*], s 43

High Court Rules 1971 (RGN 1047 of 1971), rr 137, 138, 263 to 269

Case information

M E Motsi, for the first and second applicants

W T Manase, for the first respondent

F*A Mambosasa*, for the second respondent

Judgment

Chigumba J: The applicants filed a chamber application for leave to appeal to the Supreme Court, on 6 February 2014, in which the following order is sought:

G IT IS ORDERED

1. The applicants be and are hereby granted leave to appeal to the Supreme Court against the order granted on 24 January 2014.
2. That applicants file their appeal within ten days of the date of this order.

H 3. The first respondent pays costs of suit should it oppose.

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The chamber application was supported by a founding affidavit which was A deposed to by Mr. Anthony John Lane Manning, the managing director of the first applicant, who averred that the first respondent filed an application for rescission of default judgment on 27 November 2013 under case number HC 10178/13. The first applicant averred further, that this application was purportedly filed on behalf of the first respondent Carey Farm, by Messrs B Manase & Manase, who were not the first respondent's legal practitioners of record at the time. The applicants opposed the application for rescission of judgment on 12 December 2013. It is alleged that, on 18 December 2013, the first respondent attempted to smuggle its application for rescission of judgment onto the unopposed roll, where it was struck off, and referred to the opposed roll, because it was opposed. C

The applicants averred that on 20 December 2013 the first respondent filed a chamber application in terms of Order 32 rr 226(2) and 233 of the rules of this court, seeking to strike out the notice of opposition under case number HC10178/13. The applicants allege that they opposed the chamber application of 20 December 2013, and that they filed a notice of opposition D to it, of record on 17 January 2014 in which they raised the following points:

(a) Mambosasa Legal Practitioners were still to renounce agency as attorneys of record for the first respondent Carey Farm, and Manase and Manase had not assumed agency, and ought to comply with Order 2 r 5 of the rules of this court.

(b) An application to strike out should be in terms of Order 21 r 138 of the E rules of this court

(c) Mambosasa Legal Practitioners were still part of the record of case number HC9801/12.

(d) The first respondent's legal recourse should be against the second respondent and Mambosasa Legal Practitioners. F

The applicants allege that they were surprised to be served with the order granted in chambers by myself on 24 January 2014, which order was served on them on 29 January 2014. The applicants aver that it is their wish to appeal against that judgment in its entirety, for the reason that another court, furnished with the same facts, would have come to a different conclusion, G and that the applicants' appeal has bright prospects of success. The applicants aver that they will suffer prejudice if leave to appeal is not granted. The proposed grounds of appeal are that:

1. The learned judge erred in granting an ordinary chamber application filed in terms of Order 32 seeking to strike out a notice of opposition H

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A when it should have been filed in terms of Order 21 r 138 of the High Court Rules 1971.

2. The learned judge erred in granting an application by Manase & Manase who are yet to assume agency and ignored the fact that Mambosasa Legal Practitioners have not renounced agency as required by Order 2 r 5 of the High Court Rules 1971.

B 3. The learned judge erred in failing to realize that the first respondent's legal recourse if any lies against the second respondent and Mambosasa Legal Practitioners.

The applicants attached to their papers a notice of entry of appearance to defend, filed of record by Mambosasa Legal Practitioners, dated 11 September C 2012, in which notice is given that the first and second defendant, the first and second respondent herein, had entered appearance to defend the action under case number HC 9801/12, and that their address for service was care of their undersigned legal practitioners, Mambosasa Legal Practitioners. The applicants also attached an exception filed by the respondents, on 28 December 2012, D in which Mambosasa Legal Practitioners were the respondent's legal practitioners of record.

The first respondent opposed the application for leave to appeal on 10 February 2014, through the auspices of Manase and Manase, by filing an affidavit deposed to by Edmore Edward Sithole, who stated in para 3 thereof that:

> E "First respondent has always insisted that it is represented by Messrs Manase & Manase and has *NEVER*instructed Messrs Mambosasa legal practitioners".

The first respondent denied that it ever authorized Mambosasa Legal Practitioners to represent it, and that accordingly there was no need for renunciation or assumption of agency. The first respondent averred further F that any act done by an agent who had no authority from the principal to so act is void *ab initio.* The first respondent averred that Mambosasa Legal Practitioners erroneously assumed agency on its behalf and that accordingly, any acts purportedly done on its behalf by Mambosasa Legal Practitioners in this matter are void *ab initio.* The first respondent attached a notice of withdrawal dated 28 November 2013, in which Mambosasa Legal Practitioners G withdrew the exception filed of record, on the basis that, as legal practitioners of the first defendant, Mr Newton Madzika, they erroneously and wrongly filed the exception on behalf of the second defendant (first respondent herein), and that they "…erroneously assumed agency on behalf of the second defendant". In the notice, the first defendant, Mr. Newton Madzika, H undertook to bear the wasted costs of the exception.

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In regard to the merits of the application for leave to appeal, the first respondent A submitted that the application had no prospects of success, because the applicant had not shown how the court misdirected itself when it exercised its discretion and granted the relief sought in terms of Order 32. The first respondent submitted that the appeal is frivolous and vexatious, and has no prospect of success. The first respondent denied that the dismissal of the application would prejudice the

applicants in any way. The applicants B filed an answering affidavit, in which they insisted that Mambosasa Legal Practitioners are the first respondent's legal practitioners of record, and insisted that the first respondent ought to have proceeded in terms of Order 21 r 138 of the rules of this court which provides as follows:

> **"138. Procedure on filing special plea, exception or application toCstrike out**
>
> When a special plea, exception or application to strike out has been filed –
>
> (a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
>
> (b) failing consent either party may within a further period of four days set the D matter down for hearing in accordance with sub rule (2) of rule 223;
>
> (c) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.
>
> Order 21 r137, where it relates to applications to strike out, stipulates that: E
>
> **"137. Alternatives to pleading to merits: forms**
>
> (1) A party may –
>
> (a) …
>
> (b) …
>
> (c) apply to strike out any paragraphs of the pleading which should properly F be struck out; …"

In my view, Order 21 is designed to provide alternatives to pleading to merits in action proceedings, and the application to strike out referred to in Order 21 r 137(1)(c) refers to an application to strike out offending paragraphs of a summons or a declaration. According to Herbstein & van Winsen *Civil Practice of the Superior Courts in South Africa* 2 ed at pp 314-315: G

> "The true object of an exception is either, if possible to settle the case, or at least a part of it, in cheap and easy fashion or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception".

It has been held in *Tobacco Sales Producers (Pvt) Ltd* v *Eternity Star Investments* 2006 (2) ZLR 293 (H) at 296C that: H

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> A "… an exception can only be properly filed before the excipient pleads to the merits of the matter … it is an alternative to pleading to the merits. Once the excipient pleads before filing the exception, he is in fact telling the other party that its declaration discloses a cause of action and is neither vague nor embarrassing … After the defendant has pleaded, it becomes difficult to ask the plaintiff to remove the vague and embarrassing averments. It also becomes difficult to except to the cause of action".

B Rule 223 of the rules of this court provides that applications in which no notice of opposition have been filed may be set down for determination on the unopposed roll. It does not provide for the striking out of opposing papers that are in contravention of the rules. This supports my firmly held view that the first respondent properly proceeded to apply in terms of Order 32, which C provides, in the application procedure, for the striking out of the applicant's defective opposing papers, in an application for rescission of judgment.

Application for leave to appeal to the Supreme Court is provided for by s 43 of the High Court Act [*Chapter 7:06*] as read with Order 34 rr 263-269 of the rules of this court. The relevant part of s 43, i.e. s 43(2)(d), provides that:

> D**"43 Right of appeal from High Court in civil cases**
>
> (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
>
> (2) No appeal shall lie –
>
> (a) ...
>
> E (b) …
>
> (c) ...
>
> (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases ..."

F Herbstein & van Winsen in *Civil Practice of the Supreme Court of South Africa* 4 ed p 877 define an interlocutory order as:

> "An order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either G purely interlocutory or an interlocutory order having final or definitive effect."

In *Mwatsaka* v *ICL Zimbabwe* 1998 (1) ZLR 1 (H) at 4A Devittie J referred to *Jesse* v *Chioza* 1996 (1) ZLR 341 (S) *,* where it was held that;

> "… a 'ruling' is not appealable even with leave."

In an application for leave to appeal such as in the circumstances of this H case, the court must consider the distinction between "rulings'' and "simple

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interlocutory orders", and consider the rationale behind the restriction of A the right of appeal. Devittie J in the *Mwatsaka* case went on to say at 4C:

> " ... in *Pretoria Garrison Institutes* v *Danish Variety Products* 1948 (1) SA 839 (A) at 867 ... [Schreiner JA] discussed the rationale of the rule requiring leave in appeals against interlocutory judgments. He said:
>
> 'Where a hierarchy of courts exists it is perhaps natural to regard what we are B accustomed to call the right of appeal from any order whatsoever made by a lower court as, to some extent, a refusal of justice. Under an ideal system, it might be expected that whatever error an inferior court has committed will be promptly corrected by a higher court, and so on, until the highest tribunal in the pyramid has pronounced on the matter. But history shows that it has generally been thought advisable to limit appeals in certain respects. C
>
> A wholly unrestricted right of appeal from every judicial pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics. This latter consideration has, I imagine, been the predominant one in leading legislators to try to restrain the bringing of appeals from orders of a preparatory or D procedural character arising in the course of a legal battle. The chief object has naturally been to bring about a just and expeditious decision of a major substantive dispute between the parties. …But desirable as it would be to ensure that all such orders are properly made, it has been widely felt, in different ages and countries, that a line between appealable and non-appealable orders of this preparatory or procedural character ought to be drawn somewhere, for if they were all appealable, the delay and expense E might be excessive, while if they were none of them appealable the injustice resulting from wrong orders might be intolerable.'"

Order 34 r 263 provides that application for leave to appeal may be made only in special circumstances, where the appeal is intended to be made against an interlocutory order. Clearly, the applicants do not dispute that the order F granted on 24 January 2014 is interlocutory, that is why leave to appeal is being sought. The application for leave to appeal however is defective for failing to make the essential averments required in regard to the special circumstances that ought to exist before such an application is made, and consideration of which should influence the court to accede to the application G for leave to appeal. It is my view that, had the applicants submitted and made averments that the matter proceeded by way of chamber application, in which their side was not placed before the court for consideration, that averment would have qualified as a special circumstance entitling the applicants to challenge the order granted on 24 January 2014, on appeal, despite the fact that it was an interlocutory order. Unfortunately, no such averment was made. H

A When regard is had to the proposed grounds of appeal, the first ground can be disposed of by the finding that Order 21 relates to the action procedure, and is designed as an alternative to pleading to merits where summons has been issued, so it was proper for the first respondent to resort to Order 32, which governs the application procedure, in seeking the relief that was granted to it by the court. The second and the third grounds of appeal relate B to the question of who the correct legal practitioners of record are for the first respondent, between Mambosasa Legal Practitioners and Manase and Manase. In my view this issue does not raise points of law, but of fact. Clearly Mambosasa Legal Practitioners indicated that they erroneously and wrongly entered appearance to defend on behalf of the first respondent, and withdrew the purported notice, with the second

respondent herein tendering wasted C costs. The withdrawal of the exception, and of the appearance to defend wrongly filed on the first respondent's behalf, was filed properly in terms of the rules of this court, and no suggestion has been made that the withdrawal is defective, or contrary to the rules. The first respondent has deposed to an affidavit that it never instructed Mambosasa Legal Practitioners to represent D it. All this evidence is before me, in this application. How then can it be found that the applicant is likely to succeed on the last two grounds of appeal, when the evidence is clear that, as a matter of fact, the first respondent never instructed Mambosasa Legal Practitioners to represent it, and Mambosasa Legal Practitioners themselves have in effect confessed that they were not instructed to act on behalf of the first respondent?

E The effect of failing to assume or renounce agency when the rules of this court require one to do so, is to bring into question the issue of the right to be heard on behalf of your alleged client. Where a legal practitioner who had no right to be heard has been heard, deliberately and intentionally in contravention of Order 2 r 5, the remedy is to report the legal practitioner to F the Law Society for violations of the Legal Practitioners Act [*Chapter27:07*], and of the rules of ethics, and/or to cause disciplinary proceedings to be instituted. The legal practitioner's lack of right of audience, after audience has already been given, cannot be used as a sword in an appeal, as a ground for overturning judgment, unless the complaint emanated from the client which was wrongly represented, which is not the case *in casu*.

G In my view, none of the grounds of appeal have any merit. The point of law is ill conceived. The points of facts have been shown to be factually incorrect. In my view the order of 24 January 2014, being interlocutory and procedural and not definitive of the rights of the parties, ought not to proceed on appeal, for a resolution of the appeal will not bring the parties H any closer to a resolution of the dispute in the main mater The application for

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leave to appeal must fail for this reason and because it is defective, it does A not contain any averments on special circumstances as required in terms of Order 34 r 263, and it has absolutely no prospects of success on the merits.

M E Motsi & Associates, applicants' legal practitioners

Manase & Manase, first respondent's legal practitioners B

Mambosasa Legal Practitioners, second respondent legal practitioners

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Source:
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MAPINGURE v MINISTER OF HOME AFFAIRS & ORS 2014 (1) ZLR 369 (S)

Citation	2014 (1) ZLR 369 (S)
Case No	Judgment No. S-22-14
Court	High Court, Harare
Judge	Garwe JA, Gowora JA & Patel JA
Heard	28 May 2013; *CAV*
Judgment	25 March 2014

Counsel *I Mureriwa, P Mungwari and F Traquino*, for the appellant
T Mpofu and C Saruwaka, for the respondents

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Damages – delictual – assessment – loss resulting from unwanted pregnancy – losses for which compensation payable

Delict – actio legis Aquiliae – liability – omissions – when omissions or failure to act may give rise to liability – police – when duty to protect and assist arises – victim of rape – duty to assist victim to prevent pregnancy arising from rape – negligence – professional negligence – medical practitioner – when may be held liable – failure without good reason to administer drug to prevent pregnancy following rape – practitioner liable for consequent pregnancy

Human rights – rights of women – elimination of violence against women – international instruments to which Zimbabwe a party – application of – police failing to assist victim of rape – use of such instruments in deciding whether police under a duty to act

Statutes – Termination of Pregnancy Act [Chapter 15:10] – pregnancy resulting from unlawful intercourse – procedure to be followed by woman concerned – need for her to initiate proceedings by lodging complaint – subsequent roles of prosecutor, police and magistrate

Headnote

The appellant was raped by robbers at her home. She immediately lodged a report with the police and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a doctor. She repeated her request, but the doctor only treated her for an injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer and that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She went to the police station the following day and was

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advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. Three days after the rape, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already elapsed. Eventually, a month after the rape, the appellant's pregnancy was formally confirmed.

Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She told the prosecutor that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. Four months after the rape, acting on the direction of the police, she returned to the prosecutor's office and was advised that she required a pregnancy termination order. The prosecutor then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate nearly six months after the rape, but the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. Eventually, after the full term of her pregnancy, the appellant gave birth to her child.

The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18. The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to expedite its termination. The particulars of negligence were itemised. Her claim was dismissed.

The questions for determination on appeal were whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament; and if they were, whether the appellant suffered any actionable harm as a result of such negligence and, if so,

whether the respondents were liable to the appellant in damages for pain and suffering and for the maintenance of her child.

Held, that, in respect of the doctor, the principles of Aquilian liability for G medical negligence can be summarised thus: *culpa* arises if (a) a reasonable person in the position of the defendant (i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal consequence by which that harm occurred; (iii) would have taken steps to guard against it; and (b) the defendant failed to take those steps. H

2014 (1) ZLR p371

A*Held*, further, with respect to the liability of the police, in the context of their prescribed functions and duties, there is no general legal duty on a person to prevent harm to another, even if such person could easily prevent such harm, and even if one could expect, on purely moral grounds, that such person act positively to prevent damage. However, in certain circumstances, there is a legal duty on a person to prevent B harm to another. If he fails to comply with that duty, there is an unlawful omission which can give rise to a claim for damages. An omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be C regarded as unlawful and that the loss suffered be compensated by the person who failed to act positively. When determining unlawfulness, one is not concerned, in any given case of an omission, with the customary "negligence" of the *bonus paterfamilias*, but with the question whether, all facts considered, there was a legal duty to act reasonably. Just as a duty to rescue can sometimes D be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal duty or not. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect him to have taken positive measures to prevent the harm. In applying the concept of the legal convictions of the community E the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges. The duty of the police to act cannot F be confined to their statutorily prescribed functions. In any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters unrelated to the detection or prevention of crime. Consequently, where such a legal duty is found to exist, and harm that is foreseeable eventuates from the failure to prevent it, the victim of that harm may be entitled G to pursue and obtain appropriate compensation through a claim for damages, having regard in every case to considerations of public policy.

Held, further, that it is proper and necessary for national courts, as part of the judicial process, to have regard to the country's international obligations, whether or not they have been incorporated into domestic law. By H the same token, it is perfectly proper in the construction of municipal

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2014 (1) ZLR p372

statutes to take into account the prevailing international human rights A jurisprudence. In the present context, relevant international instruments include the Convention on the Elimination of All Forms of Discrimination against Women 1979, ratified by Zimbabwe on 13 May 1991; article 4 of the United Nations Declaration on the Elimination of Violence against Women 1993, which provides that women who are subjected to violence "should be provided with access to the mechanisms of justice B and … just and effective remedies for the harm that they have suffered" as well as information on "their rights in seeking redress through such mechanisms"; and articles 4 and 14 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003.

Held, further, that notwithstanding what might be accepted as the ordinary C functions of the police, the inaction of the police in this case could not be treated in isolation. It had to be seen in conjunction with the conduct of the doctor who treated the appellant after she was raped. The doctor declined to administer the preventive medication requested by the appellant without a police report. When a police officer eventually accompanied the appellant to the hospital, the doctor again refused to D administer the drug because 72 hours had already elapsed since the occurrence of the sexual intercourse. There was nothing in the record to show why the doctor

insisted on a police report or why he regarded the period of 72 hours as being critical. The only recourse available to the appellant, at the relevant time and in the prevailing circumstances, E was the medication that could and should have been administered by the doctor himself.

Held, further, that there was a professional relationship between the appellant and the doctor. His duties required him to attend to all the physical injuries arising from the sexual assault inflicted upon her. Consequently, he was under a special duty to be careful and accurate in everything that he did F and said pertaining to his relationship with her. He should have exercised that level of skill and diligence possessed and exercised at the time by the members of his profession. A reasonable person in his position would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that G drug, would probably result in her falling pregnant. He should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.

Held, further, that the situation before the police was that of a victim of sexual violence requiring their urgent assistance. They were called upon either H

A to compile a report on the assault or to accompany the appellant to the doctor within a specified period. The circumstances were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease. Their inaction amounted to unlawful conduct by reason of their omission to act positively in B the circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.

Held, further, that although the originating cause of the appellant's pregnancy was the rape, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the C appellant would not have fallen pregnant. The police and the doctor failed in their duties. These unlawful omissions took place within the course and scope of their employment with the first and second respondents respectively, who must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy.

D*Held*, further, that in terms of ss 4 and 5 of the Termination of Pregnancy Act [*Chapter 15:10*] permission for the termination of pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. E The issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities. The critical question was whether the responsibility for instituting proceedings in F the magistrates court lies with the relevant authorities or the victim of the alleged unlawful intercourse. On a correct reading of the Act and the case law, the victim of the alleged rape must depose to an affidavit or make a statement under oath *in addition* to being present for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate G to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her pregnancy resulted therefrom. However, the applicant's affidavit or statement under oath is essential and required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary. H It is the responsibility of the victim of the alleged rape to institute

proceedings for the issuance of a magisterial certificate allowing the A termination of her pregnancy. The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant reports and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5(4), while that of the superintendent of the designated institution is to B authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy.

Held, further, that even on the broadest interpretation of the Act, taken as a whole, it is not within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a C pregnancy. It was for the appellant to have sought that advice *aliunde*, as soon as possible after she became aware of her pregnancy. The prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate. D

Held, further, that with regard to the claim for damages for pain and suffering and maintenance, having regard to the broad principles of delictual liability, there was no conceptual limitation to allowing a claim in general damages for foreseeable harm that eventuates from an unwanted pregnancy. Such a pregnancy could, depending on the circumstances of its occurrence, constitute actionable harm. Accordingly, the appellant was E entitled to proven general damages arising from the failure to prevent her pregnancy. Similarly, there could be no objection in principle to a claim for delictual damages flowing from an unwanted pregnancy. This would apply not only to the costs of confinement and the physical pain of delivery but also to the expense of maintaining the child until it becomes F self-supporting. However, because the responsibility for taking steps to terminate her pregnancy fell squarely upon the appellant's shoulders and the capacity to do so also lay within her hands, the respondents could not be called to account for any subsequent pain and suffering endured by the appellant, whether arising from her continued pregnancy or the G delivery of her child or the period thereafter. The appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy. The matter would be remitted to the trial court for assessment of the damages to which the appellant was entitled. H

Patel JA

A*Editor's note:* the judgment appealed against was *Mapingure* v *Min of Home Affairs & Ors* 2012 (2) ZLR 472 (H), a judgment of Bere J, delivered 12 December 2012.

Cases referred to

Administrator Natal v *Edouard* 1990 (3) SA 581 (A)

B*King* v *Dykes* 1971 (2) RLR 151 (A)

Mukheiber v *Raath & Anor* 1999 (3) SA 1065 (SCA)

Min of Police v *Ewels* 1975 (3) SA 590 (A)

Min of Law and Order v *Kadir* 1995 (1) SA 303 (A)

Min of Police v *Skosana* 1977 (1) SA 31 (A)

Ex p *Miss X* 1993 (1) ZLR 233 (H)

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

S v *A Juvenile* 1989 (2) ZLR 61 (S); 1990 (4) SA 151 (ZS)

van Eeden v *Min of Safety & Security* 2003 (1) SA 389 (SCA)

Legislation considered D

Zimbabwean legislation:

Constitution of Zimbabwe 2013, s 327(2)(b)

Termination of Pregnancy Act [*Chapter 15:10*], ss 2(1), 4 & 5

International instruments

Convention on the Elimination of All Forms of Discrimination against E Women 1979, art 16

Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003, arts 4 & 14

United Nations Declaration on the Elimination of Violence against Women 1993, art 4

Case information

F*I Mureriwa, P Mungwari and F Traquino*, for the appellant

T Mpofu and C Saruwaka, for the respondents

Judgment

Patel JA: This is an appeal against the decision of the High Court in Case No. HC 4551/07, handed down on 12 December 2012, dismissing an G application for default judgment against the respondents. The latter, having failed to file their plea, were barred in the proceedings before the court a quo. The appellant's claim, as amended, was for damages in the sum of US$10 000 for physical and mental pain and US$41 904 for maintenance in respect of her minor child. Her claim as against all three respondents was H dismissed with no order as to costs.

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The facts A

Most of the facts *in casu* are common cause. On 4 April 2006, the appellant was attacked and raped by robbers at her home in Chegutu. She immediately lodged a report with the police in Chegutu and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended B to by a Dr Kazembe. She repeated her request, but the doctor only treated her injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer. He further indicated that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She duly went to the police station the following day and was advised that the officer who dealt with her case was not available. She C then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. On 7 April 2006, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already elapsed. Eventually, on 5 May 2006, the appellant's pregnancy was formally confirmed. D

Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She indicated that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. In July 2006, acting on the direction of the police, she returned to the prosecution office and was advised that she required a E pregnancy termination order. The prosecutor in question then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate on 30 September 2006. By that stage, the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. Eventually, after the full term of her pregnancy, the F appellant gave birth to her child on 24 December 2006.

Grounds of appeal

As I have already indicated, the learned judge *a quo* dismissed the appellant's claim in its entirety. He found that the appellant's misfortune was the result G of her own ignorance as to the correct procedure to follow. In particular, it was incumbent on her to initiate the process for the termination of her pregnancy by way of affidavit or oath before a magistrate. He further held that it was not the mandate of the officials involved to advise the appellant on questions of procedure. Consequently, the respondents were not directly or vicariously liable to the appellant. H

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A The appellant's grounds of appeal against this decision are fairly extensive. The court *a quo* is stated to have erred in the following respects:

(i) applying the provisions of the Termination of Pregnancy Act in relation to the failure to prevent her pregnancy immediately after she was raped;

(ii) holding that the negligence of the police in relation to the prevention and B termination of the appellant's pregnancy was not material;

(iii) finding that the duties of the officials in question did not include the giving of proper guidance on the procedure to be followed;

(iv) finding that the appellant had not complied with the relevant provisions of the Act;

(v) not finding that the "authorities" referred to in the Act meant the employees of the respondents;

(vi) not holding that the police and prosecutors were enjoined by the Act to submit the requisite documents to the magistrate; and

(vii) holding that the liability of the respondents did not extend to extra-statutory duties founded on the public's expectation of their official standing.

In essence, the issues arising for determination from these wide-ranging grounds of appeal are twofold. The first is whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament. The second, assuming an affirmative answer to the first, is whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents are liable to the appellant in damages for pain and suffering and for the maintenance of her child.

Medical negligence

The principles of Aquilian liability for medical negligence were extensively canvassed by the South African Appellate Division and Supreme Court of Appeal in *Administrator Natal* v *Edouard* 1990 (3) SA 581 (A) and *Mukheiber* v *Raath & Anor* 1999 (3) SA 1065 (SCA). Both cases arose in the specific context of unwanted pregnancies.

In *Edouard's* case, the respondent sued the appellant for damages in a Local Division, for breach of a contract concluded between the respondent's wife and a provincial hospital, arising from its failure to perform a tubal ligation to render her sterile during the course of a caesarean section. After his wife gave birth to another child a year later, the respondent claimed contractual damages for the cost of supporting and maintaining the child and general damages for the discomfort, pain and suffering and loss of amenities of life suffered by his wife. The court *a quo* upheld the claim for maintenance and

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support of the child but held that a breach of contract did not give rise to a claim for non-patrimonial damages. On appeal, it was contended for the appellant that to allow the pregnancy claim would be to transfer the legal obligation of supporting a child from the parents to a doctor or hospital and this ran counter to public policy which demanded that there be no interference with the sanctity accorded by law to the relationship between parent and child. This contention was rejected by van Heerden JA, at 592H-593E, on the basis that:

> "The judgment in favour of the respondent … in no way relieved the respondent [or his wife] from the obligation to support [the child]. At most it enabled the respondent to fulfil that obligation. There can thus be no question that the obligation has in law been transferred from the respondent to the appellant …
>
> In the result, I am of the view that the respondent's pregnancy claim was rightly allowed by the court *a quo*. I should make it clear, however, that my conclusion is intended to pertain only to a case where, as here, a sterilisation procedure was performed for socio-economic reasons … different considerations may apply where sterilisation was sought for some other reason."

As regards the claim for pain and suffering, it was held that only patrimonial loss could be recovered in contract. There was no sufficient reason of policy or convenience for importing into the law an extension of liability for breach of contract so that intangible loss may be recovered *ex contractu*, as this would lead to incongruous results.

In the *Mukheiber* case, the claim against the doctor was not contractual but delictual. The respondents, husband and wife, relying on a misrepresentation by the appellant, a gynaecologist, that he had sterilised the wife, had desisted from contraception. Consequently, a child was conceived and born. The respondents claimed compensation from the appellant under two heads of pure economic loss, for the costs of confinement of the wife and for the maintenance of the child until it became self-supporting. As regards the existence of a legal duty of care, it was held by Olivier JA at 1076F:

"The relationship between Mrs Raath (and her husband) and Dr Mukheiber and the nature of his duties towards them amounted, in my view, to a special duty on his part to be careful and accurate in everything that he did and said pertaining to such relationship." G

The test for professional negligence was expounded by the learned Judge of Appeal, at 1077D-I, as follows:

"For the purposes of liability *culpa* arises if –

(a) a reasonable person in the position of the defendant –

(i) would have foreseen harm of the general kind that actually occurred; H

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A (ii) would have foreseen the general kind of causal consequence by which that harm occurred;

(iii) would have taken steps to guard against it; and

(b) the defendant failed to take those steps.

In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person and the court must consider the general level of skill B and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs (*van Wyk* v *Lewis* 1924 AD 438 at 444). Dr Mukheiber did not dispute that, if it was found that he had made the representation under discussion, his action was negligent. Applying the tests set out above, it is clear that Dr Mukheiber should reasonably have foreseen the possibility of his representation causing damage to the Raaths and C should have taken reasonable steps to guard against such occurrence, and that he failed to take such steps."

As regards the extent of the expert's liability *vis-à-vis* considerations of public policy, it was held, at 1081H- 1082B:

"As far as the confinement cost is concerned, there can be no defence: such costs were reasonably foreseeable and there is no reason to limit them. The problem D arises in connection with the maintenance claim. The cost of maintaining the child Jonathan is a direct consequence of the misrepresentation. It was foreseeable by a gynaecologist in Dr Mukheiber's position. In principle he is, by virtue of considerations of public policy, not protected against such a claim, as pointed out above. But the claim cannot be unlimited. His liability can be no greater than that which rests on the parents to maintain the child according to their means E and station in life, and lapses when the child is reasonably able to support itself.

In the result, I am of the view that considerations of public policy do not militate against holding Dr Mukhaiber liable for compensating the Raaths for the damages claimed by them."

Liability of the police

F With respect to the liability of the police, in the context of their prescribed functions and duties, the South African case of *Minister of Police* v *Ewels* 1975 (3) SA 590 (A) is particularly instructive. The respondent in that case, an ordinary citizen, had been assaulted by an off-duty police sergeant in a police station. In an action for damages, the appellant had excepted to the respondent's claim on the ground that the Police Act No. 7 of 1958 placed G no legal duty on the policemen to protect the appellant, nor created any civil liability, and that the conduct of the policemen was not such as to have created a legal duty to protect the respondent. The court *a quo* dismissed the exception and its decision was upheld on appeal to the Appellate Division.

As regards the statutory functions of the police, Rumpff CJ took the view, H at 596, that:

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"If the purpose of the Legislator, as reflected in this Act, is taken into account, A it cannot in my opinion be said that the non-compliance by a policeman of the provisions of s 5 necessarily creates a civil liability … Despite this, the statutory duty which appears from s 5 is a factor which ought to be taken into account in the factual circumstances of this case …"

In the context of liability for omissions in general, the learned Chief Justice expounded the governing principles, at 596-597, as follows: B

"It would appear that the question of an omission, as delictual unlawful conduct, has reached a measure of clarity, cf. … The premise is accepted that there is no general legal duty on a person to prevent harm to another, even if such person could easily prevent such harm, and even if one could expect, on purely moral

grounds, that such person act positively to prevent damage. It is also however accepted that in certain circumstances there is a legal duty on a person to C prevent harm to another. If he fails to comply with that duty, there is an unlawful omission which can give rise to a claim for damages … It appears that the stage has been reached where an omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful and that the loss suffered be compensated by D the person who failed to act positively. When determining unlawfulness, one is not concerned, in any given case of an omission, with the customary 'negligence' of the *bonus paterfamilias*, but with the question whether, all facts considered, there was a legal duty to act reasonably…

Just as a duty to rescue can sometimes be a legal duty, so a duty to protect may be a legal duty, and it would depend on all the facts whether such duty is a legal E duty or not. Clearly it is impossible to determine in general when such a legal duty would arise."

With specific reference to the preventive functions of the police, it was held at 597:

"As regards crime, the policeman is not only a deterrent and a detective but also F a protector. Plaintiff was assaulted in a police station under the control of the police and in the sight of a number of policemen, for whom it was possible, even easy, jointly, to prevent or stop the attack on plaintiff…

When all the circumstances are considered, I think that the duty of the policemen to assist the plaintiff was a legal duty, and that, because it was an omission which took place in the course of duty of the policemen, defendant is liable."

In upholding the decision of the lower court dismissing the exception, it G was observed, at 597-598:

"According to the pleadings the policemen were negligent, and in the context of the cause of action this must be understood as an allegation that they ought to have foreseen that their inaction would cause damage to plaintiff and that they failed, by reasonable action, to prevent the damage. The cause of action H

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A therefore contains the allegations of an unlawful omission and fault, and the exception was correctly dismissed."

In *Minister of Police* v *Skosana* 1977 (1) SA 31 (A) the Appellate Division grappled with the question of causation in a situation where a drunken driver, who had been injured in a motor accident, died whilst under police B custody due to the failure to timeously procure medical attention for him. The deceased would probably have survived had he been taken for treatment timeously. It was held, by a 3-2 majority, that the police had failed in their duty towards the deceased and were liable to his widow and minor children for damages resulting from his death. Corbett JA, delivering the majority judgment, set out the governing principles, at 34E-35D:

C "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to… the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue, or whether, as it is said, the harm is too remote. This is basically D a juridical problem in which considerations of legal policy may play a part …

The test is thus whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred. The test is otherwise known as that of the *causa (conditio) sine qua non* and I agree with my brother Viljoen that generally speaking … no act, condition or omission can be regarded as a cause in fact unless it passes this test."

E Applying this test, the majority concluded that the respondent had established negligent delay in furnishing the deceased with medical aid and treatment and that, as a matter of probability, the deceased would have survived but for the negligence of the police.

In *Minister of Law and Order* v *Kadir* 1995 (1) SA 303 (A) the Appellate F Division adopted a more restrictive approach to the claim before it. The police attending to a traffic accident failed to record the particulars of the driver who caused the accident. The result of this failure was that the person who had been injured in the accident was unable to locate the driver and sue him. It was held that the police did not owe the injured party a legal duty to G record information relating to the identity of the driver or his vehicle and, therefore, the injured party was not entitled to sue the police. Hefer JA, at 321H-322B, distinguished the facts of *Ewels'* case as being vastly different and reasoned as follows:

"Viewing the matter objectively society will take account of the fact that the functions of the police relate in terms of the Act to criminal matters and H were not designed for the purpose of assisting civil litigants. Members of the

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community will realise that services are rendered by the police in connection A with road accidents in the course of what was described in *Dease* v *Minister of Justice* 1962 (3) SA 215 (T) at 218B-C as 'exceptional duties falling outside the meaning of the term 'police duties' as ordinarily understood,' and that these duties, largely self-imposed, may well be terminated or curtailed if the courts penalise less than perfect performance. Bearing this in mind society will baulk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty. B

In my view the facts alleged in the particulars of claim do not *prima facie* support the existence of a legal duty towards the plaintiff. The exception should have been allowed."

In *van Eeden* v *Minister of Safety and Security* 2003 (1) SA 389 (SCA) the Supreme Court of Appeal evaluated the concept of the legal convictions of the community in light of the constitutional imperatives of the State as C embodied in the Bill of Rights. The State was held liable for a rape committed by a known dangerous criminal and serial rapist who had escaped through an unlocked gate from police cells where he was being held for an identification parade. Vivier ADP enunciated the common law position, at paras. 9-12:

"Our common law employs the element of wrongfulness (in addition to D the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect E of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of public policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered … F

In applying the concept of the legal convictions of the community the court is not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges … G

The approach of our courts to the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one …

The concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the Constitution. The Constitution is the supreme law of this country, and no law, conduct, norms or values that are inconsistent with it can have legal validity, which has the effect H

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A of making the Constitution a system of objective, normative values for legal purposes … The Constitution cannot, however, be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will lose its status as an agent in shaping and improving the law of delict to deal with new challenges."

Having regard to the constitutional right to freedom and security of the B person, as including the right to be free from all forms of violence from either public or private sources, it was held, at para. 24:

"In all the circumstances of the present case I have come to the conclusion that the police owed the appellant a duty to act positively to prevent Mohamed's escape. The existence of such a duty accords with what I would perceive to be the legal convictions of the community and there are no considerations of C public policy militating against the imposition of such a duty. To sum up, I have reached this conclusion mainly in view of the State's constitutional imperatives to which I have referred, the fact that the police had control over Mohamed who was known to be a dangerous criminal and who was likely to commit further sexual offences against women should he escape, and the fact that measures to prevent his escape could reasonably and practically have been required and D taken by the police."

In Zimbabwe, in the leading case of *King* v *Dykes* 1971 (2) RLR 151 (A), the factual situation involved the failure of a farmer to take reasonable steps to fight and prevent the spread of a fire which had spread onto his land from an adjoining farm. Our Appellate Division reserved to itself the power to create E additional legal duties to act positively in cases falling outside the scope of the recognised categories of negligence. As was explained by Macdonald ACJ at 154C-D:

> "In border line cases the real problem with which a court is faced in the final analysis is to whether an undoubted moral duty existing in the particular circumstances should be translated into a legal duty. It is the intractability of this problem, F arising more particularly in cases involving omission, which encourages courts to seek refuge in rules of thumb. Such a refuge, however, is illusory and in the end causes a great deal more mischief to the law than good."

The preferable approach to be taken was articulated by the learned Acting Chief Justice, at 157D-F, as follows:

> "Whether a moral duty exists will not, in the majority of cases, be difficult to G decide. The problem, as indicated above, is always to decide whether the moral duty should be translated into a legal duty. The resolution of this problem is not an exact science, on the contrary, the court, after assessing all the relevant factors, must of necessity come to what is essentially a value judgment in order to do justice between the parties. It is beyond the wit of man to devise sets of rules for different situations, the application of which will provide a satisfactory H answer with mathematical certainty."

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Commenting on this decision in comparison with the *Ewels* and *Kadir* cases, A*supra*, Prof G Feltoe in *A Guide to the Zimbabwean Law of Delict* (2012) at p 45 opines that:

> "There appears to be little difference between the test applied in South Africa and that applied in Zimbabwe to decide whether a new legal duty should be recognised because the final decision will obviously revolve around policy considerations such as social utility, practicality of enforcing a new duty, and B the likely impact upon the [defendant's] activities of such a duty".
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> In summation, the underlying rationale of all of the decided cases *vis-à-vis* the role of the police is that their duty to act cannot be confined to their statutorily prescribed functions. In the specific circumstances of any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters C unrelated to the detection or prevention of crime. Consequently, where such a legal duty is found to exist, and harm that is foreseeable eventuates from the failure to prevent it, the victim of that harm may be entitled to pursue and obtain appropriate compensation through a claim for damages, having regard in every case to considerations of public policy. D

The international dimension

A further aspect that arises for consideration in the present context is the normative role of international instruments that specifically address the rights of women. In strict constitutional terms, the prescriptions of such instruments cannot operate to override or modify domestic law unless and until they E are internalised and transformed into rules of domestic law. (This principle of the common law was expressly codified in s 111B(1)(b) of the former Constitution and is now reaffirmed in s 327(2)(b) of the new Constitution). Nevertheless, it is proper and necessary for national courts, as part of the judicial process, to have regard to the country's international obligations, whether or not they have been incorporated into domestic law. By the same F token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence. As was observed by Dumbutshena CJ in *S* v *A Juvenile* 1989 (2) ZLR 61 (S) at 72; 1990 (4) SA 151 (ZS) at 155G-I:

> "An added advantage is that the courts of this country are free to import into the G interpretation of s 15(1) interpretations of similar provisions in International and Regional Human Rights Instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched." H

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A This approach was positively endorsed and adopted by Gubbay CJ in *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 63-64; 1995 (2) SA 182 (ZS) at 189G-190I. The

learned Chief Justice, eschewing "the austerity of tabulated legalism", made extensive reference to decisions of the United Nations Human Rights Committee and the European Court of Human Rights in the process of purposively interpreting and applying B provisions embodied in our Declaration of Rights.

For present purposes, there are several internationally recognised norms that have a direct bearing on the issues at hand. Firstly, there is the Convention on the Elimination of All Forms of Discrimination against Women 1979, which was ratified by Zimbabwe on 13 May 1991. Article 16 of the Convention C requires States Parties to eliminate discrimination against women in all matters relating to marriage and family relations. In particular, para (e) of Article 16.1 guarantees "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

D Again, Article 4 of the United Nations Declaration on the Elimination of Violence against Women 1993, calls upon States to pursue a policy of eliminating violence against women. To this end, women who are subjected to violence "should be provided with access to the mechanisms of justice and … just and effective remedies for the harm that they have suffered" as well as information on "their rights in seeking redress through such mechanisms" E (para (d)). Furthermore, States should ensure that female victims of violence "have specialised assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services" (para (g)).

Also relevant are various provisions of the Protocol to the African Charter F on Human and Peoples Rights on the Rights of Women in Africa 2003. Article 4 of the Protocol enjoins States Parties to take appropriate and effective measures to "establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women" (para (f)). Of special relevance is art 14 pertaining to health and reproductive rights. Article 14.1 obligates States Parties to respect and G promote the rights of women "to control their fertility … to decide whether to have children, the number of children and the spacing of children [and] … to choose any method of contraception". Equally significantly, in terms of art 14.2(c), States Parties must take all appropriate measures to "protect the reproductive rights of women by authorising medical abortion in cases H of sexual assault, rape, incest …".

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I note that many of the above-mentioned requirements are already recognised A in the laws and administrative practices of Zimbabwe, though they may not have been specifically domesticated. In any event, as I have intimated earlier, it is both proper and instructive to have regard to them as embodying norms of great persuasive value in the interpretation and application of our statutes and the common law.

Negligence in respect of prevention of pregnancy B

In terms of the appellant's declaration, the negligence of the respondents' employees in relation to their failure to prevent the appellant's pregnancy is stated as follows. Firstly, the police failed to attend timeously in taking the appellant to the doctor for her pregnancy to be prevented. Secondly, the doctor himself failed to terminate the pregnancy when it could have been C reasonably prevented. The magistrate and prosecutors are not implicated in this aspect of the appellant's claim.

As a general rule, the mandate of the police is to prevent the commission of crimes and to bring to book the perpetrators of crime. Their functions in cases involving rape do not ordinarily extend to the prevention of potential D pregnancy or the provision of assistance in that process. Indeed, the declaration does not aver the existence of any specific common law or statutory duty in that regard. This is an aspect that is only raised in the appellant's heads of argument. Be that as it may, I do not think that this omission is fatal to the appellant's cause of action. In my view, the averments of negligence as framed in the declaration suffice to import, by necessary implication, the E requisite averment of breach of duty (*cf.* the approach taken in *Ewels'* case, *supra*, at 597 -598).

Notwithstanding what might be accepted as the ordinary functions of the police, the inaction of the police in this case cannot be treated in isolation. It must be seen in conjunction with the conduct of the doctor who treated the F appellant after she was raped. It is common cause that the doctor declined to administer the preventive medication requested by the appellant without a police report.

Subsequently, after the appellant made numerous trips to the police station, a police officer eventually accompanied her to the hospital. At that stage, the doctor again refused to administer the drug because 72 G hours had already elapsed since the occurrence of the sexual intercourse. In all of these respects, there is nothing in the record to show why the doctor insisted on a police report or why he regarded the period of 72 hours as being critical. It may well be that the established hospital procedure or practice necessitated that insistence. However, there is no plea filed of record or any other evidence to explain or support the position adopted by the doctor. H

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A Another aspect that is absent from the record, but which was alluded to by counsel for the respondents at the hearing of the appeal, is the availability of the preventive drug off the counter upon request from any licensed chemist. (I understand that this drug is pharmaceutically identified as "livonorgesterol" and sold under the trade names Pregnon and Prostino). Again, it is not at all clear whether this was a viable option without a medical prescription and, if B it was, why the doctor did not advise the appellant to proceed accordingly. Consequently, in the absence of any evidence to the contrary in the record, we find that the only recourse available to the appellant, at the relevant time and in the prevailing circumstances, was the medication that could and should have been administered by the doctor himself.

C It cannot be disputed that there was a professional relationship between the appellant and the doctor. The nature of his duties required that he attend to all the physical injuries arising from the sexual assault inflicted upon her. Consequently, as was postulated in *Mukheiber's* case, *supra*, the doctor was under a special duty to be careful and accurate in everything that he did and said pertaining to his relationship with the appellant. It behoved him to D exercise that level of skill and diligence possessed and exercised at the time by the members of his profession. In my view, a reasonable person in the position of the doctor would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that drug, would probably result in her falling pregnant. E Being in that position, he should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.

On their part, the police failed to compile the requisite report or to accompany the appellant to the doctor despite several spirited efforts by her to obtain F their assistance. The evidence before the court *a quo* indicates that the police were very alive to the appellant's predicament but neglected to comply with her entreaties for various administrative reasons that are not entirely clear. The situation before them was that of a victim of sexual violence requiring their urgent assistance. They were called upon either to compile a report on the assault or to accompany the appellant to the doctor within a specified G period. Having regard to the principles articulated in the *Ewels* and *van Eeden* cases, *supra*, it seems to me that the circumstances *in casu* were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease, and there is no clear H evidence to indicate why they did not. In my view, their inaction amounted

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to unlawful conduct by reason of their omission to act positively in the A circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.

Insofar as concerns the requisite causal *nexus*, the factual circumstances of the present case are not dissimilar to those in *Skosana's* case, *supra*. In that case, the deceased, who had been injured in an earlier motor accident, would B probably have survived but for the negligent delay of the police in procuring medical attention for him. *In casu*, although the originating cause of the appellant's pregnancy was the rape inflicted upon her, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the appellant would not have fallen pregnant.

In summation, I am satisfied that the police failed in their duty to assist C the appellant timeously in having her pregnancy prevented by the doctor. Again, the doctor himself failed to carry out his professional duty to avert the pregnancy when it could have been reasonably prevented. There can be no doubt that these unlawful omissions took place within the course and scope of their

employment with the first and second respondents respectively. D Accordingly, the first and second respondents must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy.

Negligence in respect of termination of pregnancy

The negligence of the respondents' employees in relation to the E non-termination of the appellant's pregnancy is pleaded as follows. Firstly, the police failed to attend at the hospital within a reasonable time or to take reasonable steps to ensure that the pregnancy was terminated. Secondly, the matron failed to take reasonable steps to terminate the pregnancy. Lastly, the prosecutors and the magistrate failed to attend timeously to or to take reasonable steps necessary for the issuance of a certificate for the pregnancy F to be terminated.

The provisions governing the lawful termination of pregnancies are contained in the Termination of Pregnancy Act [*Chapter 15:10*]. According to its long title, it was enacted in 1978 as:

> "An act to change the law relating to abortion by defining the circumstances in G which a pregnancy may be terminated and to provide for matters incidental to or connected with the foregoing."

In terms of the definition of "Minister" and "Secretary" in s 2(1) of the Act, as read with SI 66 of 2010, the administration of the Act is assigned to the Minister of Health and Child Welfare., *i.e.* the second respondent. There is H

Patel JA

A nothing specifically stated in the Act pertaining to the administrative roles of the first and third respondents.

The circumstances in which pregnancy may be lawfully terminated are enumerated in s 4 as follows:

> "Subject to this Act, a pregnancy may be terminated –
>
> B (a) where the continuation of the pregnancy so endangers the life of the woman concerned or so constitutes a serious threat of permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health, as the case may be; or
>
> (b) where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently be C seriously handicapped; or
>
> (c) where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse."

The term "unlawful intercourse" (as substituted by s 282 of Act 23 of 2004) is defined in s 2(1) to mean:

> D "rape, other than rape within a marriage, and sexual intercourse within a prohibited degree of relationship, other then sexual intercourse with a person referred to in paragraphs (i) or (j) of subsection (1) of section 75 of the Criminal Law Code."

Section 5 spells out the conditions under which pregnancy may be terminated. It provides in its relevant portions that:

> "(1) Subject to section *seven*, a pregnancy may only be terminated by a medical E practitioner in a designated institution with the permission in writing of the superintendent thereof.
>
> (2) …
>
> (3) In the case of the termination of a pregnancy on the grounds referred to in paragraph (c) of section *four*, the superintendent shall give the permission referred to in subsection (1) on the production to him of the appropriate certificate in F terms of subsection (4).
>
> (4) A pregnancy may only be terminated on the grounds referred to in paragraph (c) of section *four* by a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that –
>
> G (a) he has satisfied himself –
>
> (i) that a complaint relating to the alleged unlawful intercourse in question has been lodged with the authorities; and
>
> (ii) after an examination of any relevant documents submitted to him by the authorities and after such interrogation of the woman concerned or any other person as he may consider necessary, that, on a balance H of probabilities, unlawful intercourse with the woman concerned has

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taken place and there is a reasonable possibility that the pregnancy A is the result of such intercourse; and

(iii) in the case of the alleged incest, that the woman concerned is related within the prohibited degree to the person with whom she is alleged to have had incest; and

(b) in the case of alleged rape or incest, the woman concerned has alleged in an affidavit submitted to the magistrate or in a statement made under oath to B the magistrate that the pregnancy could be the result of that rape or incest, as the case may be.

(5) …

(6) …"

It is clear from these provisions that permission for the termination of C pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. As is evident from s 5(4)(a)(i) and (ii), the issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" D is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities. For present purposes, the critical question to be answered is whether the responsibility for instituting proceedings in the Magistrates Court lies with the relevant authorities or the victim of the alleged unlawful intercourse. E

Mr *Mureriwa* for the appellant submits that it is the police who should have presented the relevant documents to the magistrate, in terms of s 5(4)(a), and that any further affidavit by the appellant under s 5(4)(b) was unnecessary. The latter provision, so he contends, is confined to instances of intra-marital rape, where a simpler procedure is prescribed. Therefore, the learned judge *a quo* misapplied s 5 of the Act in finding that an affidavit from the appellant F was a prerequisite for the issuance of a magisterial certificate. In support of his argument Mr *Mureriwa* relies on Ex p *Miss X* 1993 (1) ZLR 233 (H).

As I read this case, it clearly does not support any of Mr *Mureriwa's* contentions. On the contrary, as is evident from its facts, at 235F-236G, it was Miss X herself who made an application for a certificate in terms of s 5(4) of the G Act, pursuant to which the Provincial Magistrate in question recorded her full sworn statement. In any event, what can be usefully gleaned from the case is the standard of proof required to secure a certificate. As was observed by Chidyausiku J (as he then was) at 239F-G:

"In an application for termination of pregnancy, the stringent requirements of proof before a complainant's evidence can be accepted for the purpose of H

Patel JA

A conviction do not apply. All that was required of the magistrate in this case was to be satisfied that the complainant probably did not consent to the alleged intercourse and that there was a reasonable possibility that the pregnancy arose from that intercourse."

Turning to the question at hand, it is abundantly clear that subparas (a) and (b) of s 5(4) are framed conjunctively and not disjunctively. Accordingly, B their provisions and requirements must be construed as being conjunctive and cumulative rather than in the alternative. What they envisage is a single application and not two distinct processes applicable to different circumstances. The reference to "rape or incest" in subpara (b), as opposed to "unlawful intercourse", may well be a drafting anomaly. However, it C follows immediately after the reference in subpara (a)(iii) to "incest" only, and appears to have been inserted so as to make it clear that the applicant's evidence by way of affidavit or under oath is necessary in the case of both rape and incest.

What all of this means is that the victim of the alleged rape must depose to an affidavit or make a statement under oath in addition to being present D for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her pregnancy resulted therefrom. However, the applicant's affidavit or statement under oath is essential and E required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary.

It follows from the foregoing that it is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy in terms of s 5(4). What then is the F role of the other participants in the overall process? The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant report and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5(4), while that of the superintendent of the designated institution is to authorise G its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy. It may also be necessary, where appropriate, for these functionaries to give accurate information and advice, within the purview of their respective functions, to enable the victim to terminate her pregnancy. But that, in my view, is as far as one can take the responsibilities and duties H of the relevant authorities.

Patel JA

In taking this view, I have not disregarded the various international instruments A discussed earlier. Amongst other things, they enjoin the relevant authorities to ensure that the perpetrators of sexual violence are brought to book and that the victims are given access to appropriate mechanisms of justice in enforcing their claims against their assailants. They also call upon the authorities to assist any such victim so as to enable her to effectively protect and control her biological integrity. In legislative terms, this would involve the enactment of B an enabling legal framework for the termination of pregnancy in appropriate circumstances. In practical terms, it would also entail availing the necessary information and affording the requisite facilities, to the extent that this is possible, in accordance with the prevailing material and financial means of the State. However, I do not think that the obligations of the authorities can be extended to any legal duty to initiate and institute court proceedings C within that framework *on behalf of* the victim.

Reverting to the appellant's claim as pleaded, the police certainly cannot be held accountable for failing to accompany her to the hospital or to take other reasonable steps to ensure that her pregnancy was terminated. Their function in this regard was confined to producing such report or other document D as may have been required to establish that the appellant had been raped. Again, it cannot possibly be said that the matron at the hospital failed to take reasonable steps to terminate the pregnancy. When presented with the magisterial certificate, she took the professional view, the correctness of which is not disputed, that it was no longer physically safe for the appellant's E pregnancy to be terminated. As for the prosecutors and the magistrate, it appears that they may have given the appellant incorrect advice on the procedure to be followed for terminating her pregnancy. However, there is insufficient evidence on record to show what precisely transpired in the interaction between the appellant and these functionaries.

In any event, it is necessary in dealing with this aspect to consider the designated F functions of a prosecutor and magistrate in proceedings under s 5(4) of the Act. The prosecutor has no specific role to play other than to furnish such documents as the magistrate may direct. The mandate of the magistrate is to consider and determine any application for termination of pregnancy that is placed before the court. In my view, the circumspect approach adopted in G*Kadir's* case, *supra*, commends itself for application in the present context. Even on the broadest interpretation of the Act, taken as a whole, I do not think that it is within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. To accept that position would be tantamount to opening the floodgates to a veritable deluge of claims founded on the perceived failure to act reasonably H

Patel JA

A in relation to matters clearly beyond the bounds of their official competence. Moreover, I am inclined to believe that the convictions of the community and considerations of public policy would militate unequivocally against the imputation of liability in the present context.

Accordingly, on the facts of this case, I take the view that the duty of the B prosecutors and magistrate to act reasonably in the performance of their functions did not extend to the giving of legal advice, whether accurate or otherwise, to the appellant. It was for her to have sought that advice *aliunde*, preferably from a lawyer in private or paralegal practice, as soon as possible after she became aware of her pregnancy in May 2006. It follows C that the prosecutors and magistrate

cannot be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate. It also follows that it was the appellant's own failure to institute the necessary application that resulted in the inability to have her pregnancy timeously terminated. Consequently, her claim founded on the failure to terminate her pregnancy must fail as against all three respondents.

D Having arrived at this conclusion, I think it necessary to comment on the formulation of the statutory provision under consideration. It is apparent from the foregoing that s 5(4) of the Act is ineptly framed and lacks sufficient clarity as to what exactly a victim of rape or other unlawful intercourse is required to do when confronted with an unwanted pregnancy. The subsection E obviously needs to be amended. In particular, it is necessary to specifically identify the "authorities" that are referred to in the provision and to delineate their obligations with adequate precision. It is also necessary to systematically spell out the procedural steps that the complainant herself must follow in order to obtain the requisite magisterial certificate to terminate her pregnancy. This is especially so in the present context, where it is more likely than not F that the complainant will be legally unrepresented.

The need to clarify the provision is abundantly self-evident from the facts of the instant appeal and the circumstances of the appellant. Moreover, it is a matter that calls for general attention by virtue of the international obligations of the State that I have alluded to earlier, *viz.* to afford assistance to rape G victims to enable them to effectively protect and control their biological integrity. From a practical perspective, there is also the obligation to avail the necessary information to ensure the appropriate level of public awareness of the legislative and procedural measures in place.

In my view, these are matters that should be brought to the specific attention H of the second respondent, as the Minister responsible for the administration

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of the Act, and the third respondent, in his capacity as the Minister charged A with the passage of amending legislation through Parliament.

Damages for pain and suffering and maintenance

As I have already concluded, the police and the doctor were negligent in that they failed in their duty of care towards the appellant in having her pregnancy prevented. Consequently, the first and second respondents are vicariously B liable in damages for any actionable harm sustained by the appellant.

Having regard to the broad principles of delictual liability, and in light of the decisions in the *Edouard* and *Mukheiber* cases, *supra*, I do not perceive any conceptual limitation to allowing a claim in general damages for foreseeable harm that eventuates from an unwanted pregnancy. Although the present C claim is without precedent in this jurisdiction, its novelty does not involve any impermissible extension of Aquilian liability. In short, an unwanted pregnancy can, depending on the circumstances of its occurrence, constitute actionable harm. Accordingly, the appellant is entitled to proven general damages arising from the failure to prevent her pregnancy. D

As regards the claim for maintenance, such a claim is ordinarily predicated on a relationship between the parties of such kind as to create a legal duty to support between them, *viz.* husband and wife, parent and child, grandparent and grandchild, and immediate collaterals. The liability of a third party outside any such familial relationship is traditionally confined to one who deprives a dependant of support by wrongfully causing the death or incapacitation E of the person supporting the claimant. See Boberg *The Law of Persons and the Family* (1977) at pp 249-250 and 302-303. However, as was clearly recognised in *Mukheiber's* case, *supra*, there can be no objection in principle to a claim for delictual damages flowing from an unwanted pregnancy. This would apply not only to the costs of confinement and the physical pain of F delivery but also to the expense of maintaining the child until it becomes self-supporting.

In para 2 of her affidavit of evidence, dated 6 April 2010, the appellant sets out her claim for US$10 000 as general damages arising from her pregnancy. She avers that she went through physical and mental pain, anguish and stress. G More particularly, she had to endure a pregnancy, which was the result of rape, for nine months, followed by the labour pains of delivery. She was stressed throughout that period and is now stressed with the reality of having a child who is the product of

that rape. In para 3 of the same affidavit, the appellant elaborates her claim for US$41 904 as damages representing the reasonable costs of maintaining her child until he attains the age of majority H

Patel JA

A or becomes self-supporting. The claim covers food and clothing as well as medical and educational expenses.

The respondents' heads of argument do not attempt to controvert the appellant's averments as to the physical and mental anguish that she endured as a result of her unwanted pregnancy. Nor do they suggest that this harm was not foreseeable. Again, at the hearing of the appeal, Mr *Mpofu* did not B proffer any submissions to counter the appellant's claim on the ground of unforeseeable harm.

In the instant case, it cannot be doubted that the appellant did suffer harm as a result of the failure to prevent her pregnancy. Moreover, on the facts before us, there is nothing to indicate that this harm was not reasonably C foreseeable. It was manifestly clear, to both the police and the doctor, that the appellant was vehemently averse to falling pregnant. Consequently, they must have foreseen that, if she were to fall pregnant, she would inevitably undergo the mental anguish of an unwanted pregnancy. To this extent, the appellant's claim is factually and legally sustainable as having resulted from D the negligence of the police and the doctor.

However, the chain of causation in this case cannot be extended beyond the period of one month after the appellant was raped, *i.e.* when her pregnancy was confirmed. As I have already concluded, the responsibility for taking steps to terminate her pregnancy fell squarely upon the appellant's shoulders and, by the same token, the capacity to do so also lay within her hands. On E that basis, the respondents cannot be called to account for any subsequent pain and suffering endured by the appellant, whether arising from her continued pregnancy or the delivery of her child or the period thereafter. The same must obviously also apply to any patrimonial damage incurred or to be incurred consequent upon the birth of the child. All of that angst and F expense was of the appellant's own making and cannot be attributed to any negligence on the part of the respondents' employees. In short, the causal chain was broken by the appellant's own failure to institute the necessary proceedings to terminate her pregnancy. It follows that the appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy.

G What remains is to quantify the appellant's entitlement to damages. This task is rendered somewhat difficult by the appellant's failure to identify any comparative awards in similar cases. Nevertheless, this omission should not preclude the computation of such damages as might be deemed just and equitable on the facts *in casu*, commensurate with the indisputable anguish H and stress that the appellant was subjected to during the period alluded to

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Patel JA

above. In any event, this is a matter for determination by the court *a quo* after A due inquiry into the appellant's personal, social and economic circumstances.

As for costs, the appellant has partially succeeded in this appeal and on her original claim in the court below, and then only as against the first and second respondents and not against the third respondent. For that reason and having regard to the relatively novel nature of her claim, we take the view that there should be no order as to costs. B

Disposition

In the result, this court makes the following order:

1. The appeal is partially allowed to the extent that the dismissal of the appellant's claim for damages for pain and suffering, arising from the failure to prevent her pregnancy, be and is hereby set aside. C
2. The claim for damages for pain and suffering is remitted to the court *a quo* for the grant of default judgment, in such amount as the court may assess and determine after due inquiry,

together with the question of costs.

3. For the avoidance of doubt, the dismissal of the appellant's claim for D damages for the maintenance of her minor child is hereby confirmed and upheld.
4. There shall be no order as to costs.

GARWE JA and GOWORA JA concurred. E

Scanlen & Holderness, appellant's legal practitioners

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

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MAGODORA & ORS v CARE INTERNATIONAL ZIMBABWE 2014 (1) ZLR 397 (S)

Citation	2014 (1) ZLR 397 (S)
Case No	Judgment No. S-24-14
Court	Supreme Court, Harare
Judge	Malaba DCJ, Patel JA and Guvava JA
Heard	29 October 2013; *CAV*
Judgment	25 March 2014
Counsel	*M Gwisai*, for the appellants *A Mugandiwa*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C *Appeal – court's powers on appeal – relief sought on appeal different from relief sought in lower court – lower court having power to grant relief sought – appeal court having no jurisdiction to entertain or determine matter*

D *Employment – contract – termination – fixed term contract – legitimate expectation of renewal of contract – when arises – need for employee to have legitimate expectation and for employer to engage another person – contract providing that employee should have no legitimate expectation of further employment – employee bound by such term*

Headnote

E The appellants were engaged by the respondent on fixed contracts of nine months' duration. Before the expiry of the last such contract, the respondent purported to terminate the appellants' contracts of employment three months early. The appellants were to be paid one month's pay in F lieu of notice. The contracts required the application of retrenchment procedures in the event of premature termination. After taking legal advice, the respondent reconsidered its position and accepted that the early termination may have been unlawful. It cancelled the termination and reinstated the contracts of employment with full pay up to the date the fixed term contracts

would have expired without being renewed. G The matter was then referred to arbitration. The arbitrator held that the appellants had not been retrenched and that the respondent was entitled to act as it did. On appeal to the Labour Court, the arbitrator's decision was upheld. The contracts expressly provided that there would be no legitimate expectation of further employment beyond the stipulated H date of termination.

2014 (1) ZLR p398

On appeal to the Supreme Court, the appellants sought an order declaring A them to have been unfairly dismissed and deeming them to be permanent employees on contracts without limit of time and without loss of salary and benefits, reckoned from the time of dismissal. Alternatively, they should be deemed to have been re-employed for a further period of nine months from the date of dismissal, on the same terms of employment and without loss of salary and benefits. At the hearing of the appeal, the B additional claim for the payment of retrenchment packages, in the event of reinstatement not being possible, was abandoned on the basis that such relief was not competent as it was inconsistent with the primary relief sought. It was argued that the repeated renewals of the appellants' contracts changed their status to that of permanent employees. They had C a legitimate expectation of permanency or renewal of their contracts on similar terms.

Held, that the legitimate expectation provisions of s 12B(3) of the Labour Act [*Chapter 28*:01] only apply where another employee is engaged in place of the employee whose fixed term contract is terminated. The plain meaning of the provision is that the employee on a contract of fixed D duration must have had a legitimate expectation of being re-engaged upon its termination *and* that he was supplanted by another person who was engaged in his stead. These requirements are patently conjunctive, and the mere existence of an expectation without the concomitant engagement of another employee is not enough. In this case, no one else was employed and the appellants' jobs had effectively been abolished. E

Held, further, that the express provisions of the contract indisputably undermined and rendered untenable the appellants' contention of having been unfairly dismissed. They were bound by the express terms that they had agreed to and could not then complain, notwithstanding those terms, that they had a legitimate expectation of being re-engaged. It is F not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. G

Held, further, that the terms of reference before the arbitrator primarily revolved around the question of retrenchment and the relief sought was that the matter be referred to the Retrenchment Board. The grounds of appeal to the Labour Court were also centred on retrenchment, challenging the arbitrator's decision for having declined the application H

2014 (1) ZLR p399

Patel JA

A of retrenchment procedures. On appeal to the Supreme Court, the relief that the appellants sought was completely different from what they sought hitherto. They were effectively inviting the court to sit as a court of first instance and to adjudicate a matter that was not ventilated before, or determined by, the Labour Court. It would be highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first B instance and to pronounce on issues which were properly cognisable in a court of first instance but had not been canvassed before that court. The merits of the primary relief sought by the appellants were never debated or considered by the court *a quo* and, consequently, they could not be entertained or determined by the Supreme Court.

Cases cited C

ANZ Grindlay Bank (Zim) (Pvt) Ltd v *Hungwe* 1994 (2) ZLR 1 (S)

First National Bank of SA Ltd v Transvaal Rugby Union & Anor 1997 (3) SA 851 (W)

Mabhena v PG Industries 2002 (2) ZLR 63 (H)

D*Machaya & Ors v Circle Cement (Pvt) Ltd & Anor* HH-115-03

SA Mutual Aid Soc v Cape Town Chamber of Commerce 1962 (1) 598 (A)

Total Marketing Zimbabwe (Pvt) Ltd v Polylamp Invstms (Pvt) Ltd 2007 (2) ZLR 60 (S)

Wells v SA Alumerite Co 1927 AD 69

E*UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S)

Legislation considered

Constitution of Zimbabwe 2013, ss 326 & 327

F Labour Act [*Chapter 28:01*], s 12B

Supreme Court Act [*Chapter 7:13*], ss 21 and 22

Case information

M Gwisai, for the appellants

A Mugandiwa, for the respondent

Judgment

G**Patel JA**: The appellants in this matter were engaged by the respondent on fixed contracts of nine months' duration. The last such contract was fixed from 1 October 2006 to 30 June 2007. By letter dated 27 March 2007, the respondent purported to terminate the appellants' contracts of employment before their scheduled date of expiry. The contracts were to terminate on 31 H March 2007 and the appellants were to be paid one month's pay in lieu of

notice. Clause 21 of the contracts required the application of retrenchment A procedures in the event of premature termination.

Subsequently, after taking legal advice, the respondent reconsidered its position and accepted that the early termination may have been unlawful. By letter dated 25 May 2007 from its lawyers, it cancelled the termination and reinstated the contracts of employment with full pay up to 30 June 2007, at which date the fixed term contracts would expire without being renewed. B

The matter was then referred to arbitration. The arbitrator held that the appellants had not been retrenched and that the respondent was entitled to act as it did. On appeal to the Labour Court, the arbitrator's decision was upheld. The court found that, even if the contracts had been prematurely terminated, the appellants were only entitled to their pay for the duration of C their fixed term contracts, that is up to 30 June 2007, and that they were not entitled to any further payment.

The appellants now appeal against that decision. In their revised grounds of appeal, they seek an order declaring them to have been unfairly dismissed. They also seek an order deeming them to be permanent employees on contracts D without limit of time and without loss of salary and benefits, reckoned from the time of dismissal. In the alternative, they should be deemed to have been re-employed for a further period of nine months from the date of dismissal, on the same terms of employment and without loss of salary and benefits. At the hearing of the appeal, the additional claim for the payment of retrenchment packages, in the event of reinstatement not being possible, was abandoned E on the basis that such relief was not competent as it was inconsistent with the primary relief sought.

Unfair dismissal and legitimate expectation

Section 12B of the Labour Act [*Chapter 28:01*] regulates dismissal from employment. It provides as follows: F

"(1) Every employee has the right not to be unfairly dismissed.

(2) An employee is unfairly dismissed –

(a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or

(b) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9). G

(3) An employee is deemed to have been unfairly dismissed –

(a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee; or

(b) if, on termination of an employment contract of fixed duration, the employee – H

Patel JA

A (i) had a legitimate expectation of being re-engaged; and

(ii) another person was engaged instead of the employee.

(4) In any proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature or gravity of any misconduct on the part of the dismissed employee, consider whether B any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee."

Mr *Gwisai,* for the appellants, submitted that the real reasons for the termination of the appellants' contracts were the impact of budgetary constraints and the C consequent need to restructure the respondent's operations. This appears from the notices of termination sent to the appellants on 27 March 2007. Because this premature termination was a disguised retrenchment, it constituted unfair dismissal contrary to s 12B(1), as read with ss 2A(1) and 2A(2), of the Labour Act. Reliance is placed, in this regard, on the decisions in *Mabhena* v *PG Industries* HH-115-02 and *Machaya & Ors* v *Circle Cement (Pvt) Ltd & Anor*D HH-115-03.

Mr *Gwisai* further submitted that the repeated renewals of the appellants' contracts changed their status to that of permanent employees. They had a legitimate expectation of permanency or renewal of their contracts on similar terms. This is so, despite the express provision in their contracts stating that E there would be no legitimate expectation of further employment beyond the stipulated date of termination. He relies for this proposition on various decisions of the Zimbabwe and South Africa Labour Courts and contends that the seemingly contrary decision of this court in *UZ-UCSF Collaborative Research Programme in Women's Health* v *Shamuyarira* 2010 (1) ZLR 127 (S) is distinguishable in this respect. Moreover, he argues that s 12B(3)(b) of F the Labour Act is not exhaustive in its application of the doctrine of legitimate expectation and must be applied in conjunction with the protection against unfair dismissal afforded by s 12B(1).

Mr *Mugandiwa,* for the respondent, submitted that the respondent did not violate the appellants' right not to be unfairly dismissed under s 12B(1) of G the Labour Act by terminating their fixed term contracts with effect from the stipulated date of their expiry. He further submitted that the legitimate expectation provisions of s 12B(3) only apply where another employee is engaged in place of the employee whose fixed term contract is terminated. In the instant case, no one else was employed and the appellants' jobs have effectively been abolished. In any event, the express provision of each of H the appellants' contracts was that there was no legitimate expectation of

Patel JA

renewal or extension. A

I see no reason to disagree with Mr *Mugandiwa's* submissions. Having purported to terminate prematurely the appellants' contracts in March 2007, the respondent realised that it had acted unlawfully. It then remedied its breach in May 2007 by cancelling the earlier termination and reinstating the appellants with full pay up to 30 June 2007. By so doing, the respondent did not terminate the contracts of employment, but simply allowed them to lapse B by effluxion of time without further extension or renewal. The question of compliance with retrenchment procedures and the payment of retrenchment packages, in terms of clause 21 of the contracts, would only have come into play had the respondent persisted with its premature termination. In this regard, the cases dealing with disguised retrenchment that are relied upon by Mr *Gwisai* are clearly

distinguishable. They do not support his argument C because they are concerned with the termination of periodic contracts of indefinite duration as opposed to fixed term contracts.

Although the appellants were not called back to work, they were paid the salary and benefits that were due to them until the expiry of their fixed term contracts. The respondent was clearly entitled to do so by virtue of the D express duration of the contracts of employment and cannot therefore be said to have acted in breach of contract. In my view, the appellants were duly compensated, without having worked for three months, and cannot claim to have been unlawfully dismissed within the contemplation of s 12B(1) of the Labour Act. E

I now turn to the argument that the continual renewal of fixed-term contracts over a period of time creates a legitimate expectation of re-employment or permanent employment. This position, in its essence, was rejected by this court in the *Shamuyarira* case *supra*, the material facts of which are virtually identical to those in the present matter. My reading of s 12B(3)(b) of the Labour Act does not give me any ground for departing from that decision. F The plain meaning of that provision is that the employee on a contract of fixed duration must have had a legitimate expectation of being re-engaged upon its termination and that he was supplanted by another person who was engaged in his stead. These requirements are patently conjunctive and the mere existence of an expectation without the concomitant engagement of G another employee does not suffice. I do not think that the court is at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognisable where it is inconsistent with an H

Patel JA

A Act of Parliament. See s 111B of the former Constitution and ss 326 and 327 of the current Constitution.

Apart from the clear wording of s 12B(3)(b), the court cannot avoid the explicit provisions of the contracts *in casu*. The opening paragraph of each of the contracts stipulates that "*This contract shall in no way whatsoever*B*lead to a legitimate expectation of further employment beyond the contract's date of termination*." This, in itself, as was recognised by Ziyambi JA in the *Shamuyarira* case *supra*, indisputably undermines and renders untenable the appellants' contention of having been unfairly dismissed. They are surely bound by the express terms that they have agreed to and cannot then complain, notwithstanding those terms, that they had a legitimate expectation C of being re-engaged.

In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells*D v *South African Alumenite Company* 1927 AD 69 at 73; Christie *The Law of Contract in South Africa* 3 ed at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Anor* 1997 (3) SA 851 (W) at 864E-H.

E In the premises, none of the arguments proffered on behalf of the appellants grounding their claim for permanent employment or re-employment can be sustained in the present case.

Relief sought

F Apart from the demerits of the appeal, there is a more fundamental obstacle to the appellant's case. As I have stated earlier, the relief sought on appeal is either that of permanent employment or re-employment for a further nine months. From the outset, the appellants' case was that the letter of 27 March 2007 amounted to premature termination and was therefore subject to their being retrenched in accordance with clause 21 of their contracts of G employment. The terms of reference before the arbitrator primarily revolved around this question, and the relief sought was that the matter be referred to the Retrenchment Board. The grounds of appeal to the Labour Court were also centred on retrenchment, challenging the arbitrator's decision for having declined the application of retrenchment procedures and praying for an order H compelling the respondent to comply with clause 21.

Patel JA

It is abundantly clear, therefore, that the appellant's case did not involve A any claim for permanent employment status or re-employment. In essence, the relief that they pray for on appeal to this court is completely different from what they sought hitherto. In this respect, the appellants are effectively inviting this court to sit as a court of first instance and to adjudicate a matter that was not ventilated before or determined by the Labour Court. B

As was aptly observed by Korsah JA in *ANZ Grindlay Bank (Zimbabwe) (Pvt) Ltd* v *Hungwe* 1994 (2) ZLR 1 (S) at 5A-B, it would be highly irregular and unfair for an appellate court to assume the jurisdiction of a court of first instance and to pronounce on issues which are properly cognisable in a court of first instance but have not been canvassed before that court. The same position was adopted by Cheda JA in *Total Marketing Zimbabwe (Pvt) Ltd*C v *Pollylamp Investments (Pvt) Ltd* 2007 (2) ZLR 60 (S) at 62G. It was held that it would be wrong for this court, as if it were a court of first instance, to consider the merits of an urgent application before the High Court where those merits were not considered by that court following its decision that the matter was not urgent.

In casu, the merits of the primary relief sought by the appellants were never D debated or considered by the court *a quo* and, consequently, they cannot be entertained or determined by this court. In other words, the court has no remit to exceed its jurisdiction and powers on appeal as prescribed by ss 21 and 22 of the Supreme Court Act [*Chapter 7:13*].

In the result, the appeal cannot succeed, both on the merits and on jurisdictional E grounds. It is accordingly dismissed with costs.

MALABA DCJ and GUVAVA JA concurred.

Matikidze & Mucheche, appellants' legal practitioners F

Wintertons, respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/ZIMBABWE ELECTORAL COMMISSION & ANOR v COMMISSIONER-GENERAL, ZIMBABWE REPUBLIC POLICE & ORS 2014 (1) ZLR 405 (S)

ZIMBABWE ELECTORAL COMMISSION & ANOR v COMMISSIONER-GENERAL, ZIMBABWE REPUBLIC POLICE & ORS 2014 (1) ZLR 405 (S)

Citation	2014 (1) ZLR 405 (S)
Case No	Judgment No. CC-3-14
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA and Chiweshe AJA
Heard	26 July 2013; *CAV*
Judgment	26 March 2014
Counsel	*T Kanengoni*, with him *C Nyika*, for the applicants. *F Chimbaru* for the first, second, third, ninth, tenth and eleventh respondents. *S Hwacha*, with him *T Zhuwarara*, for the fourth respondent
Case Type	Constitution application

Annotations No case annotations to date

Flynote

D *Elections – special early voting for members of disciplined forces – date set for such voting – substantial proportion of such members unable to do vote for various logistical reasons – Electoral Commission entitled to authorise such persons to vote on date of general election*

Interpretation of statutes – presumption of constitutionality – need to interpret statute in such a way as to give effect to Constitution – interpretation E *that would result in a violation of Constitutional right not permissible – avoidance of glaring absurdity – departure of ordinary effect of words so as to avoid a glaring absurdity – the mischief rule – application of the rule in the interpretation of statutes*

Headnote

F When the date for the 2013 general election was set, the Electoral Commission was enjoined to set aside two days, at least two weeks earlier than the general election itself, for the holding of the special voting process provided for in Part XIVA of the Electoral Act [*Chapter 2:18*]. This was to enable members of the disciplined forces to cast their votes. Due to certain logistical constraints, the Commission was unable to post the G requisite ballot paper to each successful special voter within the time frame fixed for the special vote with the result that 41.3% of the successful applicants for the special vote were unable to cast their special votes. The Commission then advised that those who had not been able to cast their special votes would be able to vote in the general elections on the H normal polling day. Objections were raised by the principal opposition

party, that s 81B(2) of the Act did not allow for a person authorized to A cast a special vote to vote in any other way. The Commission brought an application before the Constitutional Court, arguing that to apply s 81B(2) would deprive those voters of their constitutional right to vote.

Held, that s 81B(2) of the Electoral Act [*Chapter 2:13*], which provides that special voters "… shall not be entitled to vote in any other manner than by casting a special vote in terms of …" Part XIVA of the Act, was B intended by the legislature to apply only in circumstances where all measures necessary to enable such voters to cast their votes had been taken by responsible agents of the State. It did not envisage a state of affairs where the State or the Zimbabwe Electoral Commission had failed to put in place the necessary measures to ensure that special voters C would be able to cast their ballot papers upon presentation of themselves at the polling station for that purpose. On the correct interpretation of s 81B(2), therefore, that provision was not in conflict with s 67(3) of the Constitution, which affords every Zimbabwean citizen who is of or over eighteen years of age the right to vote in all elections and referendums. There was therefore no impediment to the grant of the order sought by D the Commission, so as to cover only those special voters who failed to vote through no fault of their own.

Held, further, that in determining the proper construction of s 81B(2) of the Act, the court had regard to the presumption of constitutionality, that is, that every statute is presumed to be constitutional and must be so E interpreted so that wherever a doubt arises and a statute is capable of two possible interpretations, one constitutional and the other in keeping therewith, it the latter interpretation which must prevail.

Held, further, that the cardinal rule of interpretation of statutes requires that the words of a statute must be given their ordinary, literal and grammatical meaning. However, where to do so would lead to an F absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the court is justified in taking into account, then the court may depart from the ordinary meaning of the words. The right to vote is absolute G and no derogation therefrom is provided for by the Constitution. The court must proceed from the premise that Parliament intended to act constitutionally and, *in casu,* to respect the right of the special voters to vote. It could not have intended to deprive special voters of their right to vote should the necessary measures not be put in place by the State to enable them to cast their special votes on the dates prescribed. The H

Ziyambi J

A mischief rule can also be called in aid, the "mischief" that the Act was designed to remedy being the possibility of double voting by persons authorised to cast a special vote.

Cases cited

B*Attorney-General of Trinidad and Tobago* v *Ramesh Mootoo* (1974) 28 WIR 304

Crowell v *Benson* 285 US 22 (1932)

S v *Meredith* 1981 (3) SA 29 (ZA) 1981 ZLR 123 (S)

Zimbabwe Township Developers v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (s)

Legislation considered C

Constitution of Zimbabwe 2013, ss 2(1), 67(3), 155(2) & 239

Electoral Act [*Chapter 2:13*], ss 81, 81B(2) & 81H

Case information

D*T Kanengoni*, with him *C Nyika*, for the applicants.

F Chimbaru for the first, second, third, ninth, tenth and eleventh respondents.

S Hwacha, with him *T Zhuwarara*, for the fourth respondent

Judgment

Ziyambi JA: At the end of the hearing of this matter the following order was issued:

E "IT IS ORDERED THAT:

The first applicant takes all the necessary steps to ensure that its officers and officers under the command of the first, second, and third respondents, authorised to cast ballots in terms of section 81 of the Electoral Act [*Chapter 2:13*] who failed to cast their ballots on the 14th and 15th of July 2013 because of the unavailability of ballot papers, be and are hereby allowed to cast their ballots F on the 3first of July 2013."

Below are set out the reasons for this order.

Factual background

On 13 July 2013, the President of Zimbabwe, who is the ninth respondent herein, issued a proclamation, in terms of s 58 of the Constitution of Zimbabwe, G setting the polling date for the 2013 general elections as 31 July 2013. In terms of the proclamation, SI 86 of 2013, the first applicant was enjoined to set aside two days for the holding of the special voting process provided for in Part X1VA of the Electoral Act [*Chapter 2:18*] ("the Act"), the last of which must be at least 16 days before the date set for the holding of the H general elections, namely 31 July 2013.

Ziyambi J

In compliance with the proclamation, the first applicant duly set 14 and 15 A July 2013 as the days for the special voting exercise and invited the disciplined forces as well as officers of the first applicant to apply to cast a special vote. A total of 63 268 successful applicants were authorised to cast a special vote. However, due to certain logistical constraints, the first applicant was unable to post the requisite ballot paper to each successful special voter within the time frame fixed for the special vote, with the result that 26 160 applicants B (representing 41.3 percent of the successful applicants for the special vote) were unable to cast their special votes.

The applicants averred that, conscious of their duty, *inter alia*, to conduct elections efficiently, freely, fairly, transparently and in accordance with the law, they then issued a press statement advising that those who had not been C able to cast their special votes would be able to vote in the general elections on 31 July 2013.

The press statement sparked two complaints. The first was from the Secretary General of the fourth respondent, the Movement for Democratic Change-T ("the MDC-T"). He wrote to the second applicant advising that the proposed action would be illegal in that s 81B (2) of the Act disentitles a successful D applicant for a special vote from voting in any other manner than by casting a special vote.

The next complaint was from the first respondent, the Commissioner of the Zimbabwe Republic Police. His concern was in respect of members of the police force who were successful applicants for special votes and who had E been denied the opportunity to cast their special votes on the days set aside for special voting. His letter read in relevant part:

> "The Constitution in section 239(g) places an obligation on Zimbabwe Electoral Commission (ZEC) to design, print and distribute ballot papers, approve the form of and procure ballot boxes and establish and operate polling stations. Quite F clearly therefore the failure by the State to put in place the necessary measures as envisaged by sections 155(2)(b) and 239(g) of the Constitution can be deemed an impingement of the right to universal suffrage.
>
> I, on behalf of the officers and members who could not cast their vote, therefore seek in terms of section 239(k) of the Constitution recourse with ZEC. Section 239(k) of the Constitution empowers individuals who have failed to cast their vote on dates specified in line with the Act to seek recourse with ZEC. G
>
> On the other hand section 81B(2) of the Electoral Act provides that a voter who has been authorised to cast a special vote shall not be entitled to vote in any other manner than casting a special vote in line with the provisions of the Act. It is trite law that where there is apparent conflict between the Constitution and Ordinary law, the Constitution takes precedence because the Constitution is the grundnorm or master rule against which all other laws are measured for validity. H

Ziyambi J

> A It is therefore in the spirit of the provisions of section 239(K) of the Constitution and a Public Notice that ZEC put in the press regarding this subject matter that I am appealing to your esteemed office to give us a written commitment that all our officers and members who were unable to cast their vote will be catered for to ensure that they are not disenfranchised."

The applicants were, so they averred, faced with the dilemma that their B compliance with the law and specifically with s 81B (2) of the Act would, in essence, facilitate the undue deprivation of the rights provided in terms of s 67 of the Constitution to the 26 160 special voters who failed to cast their votes on 14 and 15 July 2013.

The application

C Section 239 of the Constitution of Zimbabwe provides:

> **"239 Functions of Zimbabwe Electoral Commission**
>
> The Zimbabwe Electoral Commission has the following functions –
>
> (a) To prepare for, conduct and supervise –
>
> (i) elections to the office of President and to Parliament;
>
> D (ii) elections to provincial and metropolitan councils and the governing bodies of local authorities;
>
> (iii) elections of members of the National Council of Chiefs established by section 285; and
>
> (iv) referendums; and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance E with the law …"

It was in view of its mandate set out above and out of due regard for the following provisions of the Constitution, that the applicant has felt constrained to make this application.

> **"155 Principles of electoral system**
>
> F (1) ….
>
> (2) The State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles set out in subsection (1) and, in particular, must –
>
> (a) …
>
> G (b) ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote, and must facilitate voting by persons with disabilities or special needs;"
>
> **"67 Political rights**
>
> (1) …

H (2) …

2014 (1) ZLR p410

Ziyambi J

(3) Subject to this Constitution, every Zimbabwean citizen who is of or over A eighteen 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;"

The application was opposed by the fourth respondent. Mr *Hwacha,* while acknowledging the right of the recipients of the special vote to cast their B vote, submitted that consideration should also to be given to the rights of the six million voters who are entitled to free, fair and transparent elections. He submitted that had there been a challenge to s 81B(2) of the Act, the applicant would have been able to argue that the derogation was not justifiable. As it is, the wrong procedure had been adopted by the applicant. He drew the court's attention to s 81H of the Act which makes it a criminal offence for C special voters to vote in a general election.

However, Mr *Kanengoni* expressed surprise that the MDC-T had opposed the application since it was made as a result of consultation with all the political parties involved as to the way forward as far as the special voters were concerned. D

It was submitted on behalf of the applicants that for the fundamental right to vote provided for in s 67 of the Constitution to be of any effect, the obligations placed on the applicant in terms of s 239 of the Constitution and the measures highlighted under s 155 of the same Constitution must be met with respect to every election and referendum. Where these standards E are not met, the rights of every Zimbabwean citizen enshrined in s 67 of the Constitution will have been violated. Thus the failure by the first applicant, albeit through no fault of its own, to discharge the obligations placed on it by the Constitution, resulted in thousands of potential voters, authorized to cast their ballots on 14 and 15 July 2013, being unable to vote, equally through no fault of their own. In terms of s 81B of the Act, these potential voters are prohibited from voting "in any other manner than by a special F vote in terms of this Part".

The special vote

Section 81B of the Electoral Act provides as follows:

"81B Where special voters must vote; special voters not entitled toGvote in any other way

(1) An electoral officer or member of a disciplined force who is authorized to cast a special vote in terms of this Part must cast his or her vote at the special polling station for the district in which he or she is performing duties away from the constituency in which, or the polling station at which, he or she would ordinarily be required to vote. H

2014 (1) ZLR p411

Ziyambi J

A (2) A voter who has been authorized to cast a special vote shall not be entitled to vote in any other manner than by casting a special vote in terms of this Part."

In view of the failure by the applicants to facilitate the casting of their votes, the effect of s 81B(2) would. on the face of it. be that the special voters were denied their constitutional right to vote. There is, therefore, on a reading of subs (2), an apparent conflict between s 81B of the Act and s 67(3) of the B Constitution. In this connection, the provisions of s 2(1) of the Constitution, set out below, are relevant.

"2 Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency".

C **The presumption of constitutionality**

It appears to me, however, that on a proper construction of s 81B, no conflict exists. One commences the process of interpretation of the provision with the presumption of constitutionality. Every statute is presumed to be constitutional, that is to say, the Legislature is presumed to have acted within D the parameters of the Constitution. Thus, where a provision in a statute is capable of

two possible interpretations, one contrary to the Constitution and the other in keeping therewith, the court, conducting the inquiry into the constitutionality or otherwise of the provision, must adopt the meaning which will give effect to the Constitution.

E The presumption of constitutionality was explained thus by Georges CJ in *Zimbabwe Township Developers* v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382A:

> "Arguments have also been addressed at some length on the presumption of constitutionality. It is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly a litigant who asserts that an Act of F Parliament or a regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation G falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover H whether it can be interpreted to fit into the framework of the Constitution".

2014 (1) ZLR p412

Ziyambi J

The learned Chief Justice referred to *Attorney-General of Trinidad and*A*Tobago* v *Ramesh Mootoo* (1974) 28 WIR 304, in which the following passage from *Crowell* v *Benson* 285 US 22 (1931) at 26 (*per* Hughes CJ) was quoted with approval:

> "when the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible B by which the question may be avoided."

While I am mindful that no challenge has been raised as to the constitutionality of s 81B(2), the need to ascertain the meaning of the provision has arisen because of the apparent conflict with the Constitution which arises from the interpretation of the section advanced by the respondents, an interpretation which, if adopted, will amount to a violation of the constitutional right of the C special voters to vote in the general election. As will be shown below, s 81B(2) is capable of a construction which does not offend against the Constitution.

Interpreting the statutory provisions

Various rules have been formulated to assist the court in the interpretation of D statutes. One of these, often referred to as the cardinal rule of construction, is the literal rule which requires that the words of a statute must be given their ordinary, literal and grammatical meaning. [1]

However, the object of such interpretation or construction is to ascertain the intention of the legislature in enacting the provision concerned and, even where the words employed in the statute are clear and unambiguous, E a court may depart from the ordinary effect of the words in order to remove an absurdity and to give effect to the true intention of the legislature "if to do otherwise would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other F considerations as the court is justified in taking into account". [2]

Intention of Parliament

The task before this court is therefore to ascertain the intention of Parliament in enacting the provision under scrutiny. Was it intended that, in circumstances such as obtain *in casu,* the successful applicants for special voting would G be denied their constitutional right to vote? For then that would be absurd viewed from the context of the unqualified right to vote conferred upon such persons by the Constitution.

2014 (1) ZLR p413

Ziyambi J

A The right to vote is absolute. No derogation therefrom is provided for by the Constitution. The Court must proceed from the premise that Parliament intended to act constitutionally and, *in casu,* to respect the sacred right of the special voters to vote. It therefore could not have intended to deprive special voters of their right to vote should the necessary measures not be put in place by the State to enable them to cast their special votes on the B dates prescribed.

Another rule of construction, the mischief rule, can be called in aid at this juncture. In order to assist the court in deciding on the true intention of the legislature, the court may have regard to 'the mischief' that the Act was designed to remedy. Thus the court may look not only at the language of C the statute, but also at the surrounding circumstances, and may consider its objects, its mischiefs, and its consequences [3] . In this regard, in *S* v *Meredith* 1981 (3) SA 29 (ZA) at 33, Baron JA had this to say:

> "It is trite that words and phrases cannot be construed *in vacuo*; their meaning can be discerned only in the context in which they are used. I think it is worth citing the words of Viscount Simonds in *Attorney-General* v *HRH Prince Ernest*D*Augustus of Hanover* [1957] 1 All ER 49 at 53:
>
> > 'For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its E preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.'" [4]

A reading of the provisions relating to the special vote discloses that the mischief designed to be remedied by these provisions was the possibility of double voting by persons authorised to cast a special vote.

F It appears to me that subs (2) of s 81B was predicated upon a situation where all facilities were available to enable the special voters to vote. Thus s 81 of the Act provides for the dates for special voting; the places where the votes may be cast; the form of applications for special voting and requirements therefor; the drawing of lines on the voters' rolls in the constituencies where G the names of the special voters appear and marking them "SV"; the conduct of the special poll and the handling of the ballots. It does not, in my view, envisage a state of affairs, such as presently obtains, where the State or the applicants have failed to put in place the necessary measures to ensure that

---

the special voters would be able to cast their ballots upon presentation of A themselves at the polling station for that purpose. Indeed, it seems clear that Parliament did not intend that this provision would apply in a case such as the instant one where the special voters attended at the designated polling stations in order to cast their votes and waited all day to do so only to be turned away because the proper measures were not put in place by the State. Such an intention would clearly be contrary to the Constitution. B

We are, for the above reasons, of the view that s 81B(2) was intended by Parliament to apply only in circumstances where all measures necessary to enable successful applicants to cast their special votes had been taken by the responsible agents of the State.

There was, therefore, no impediment to the grant of the order sought by the C applicants, as amended, so as to cover only those special voters who failed to vote through no fault of their own.

CHIDYAUSIKU CJ, MALABA DCJ, GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA, PATEL JA and CHIWESHE AJA D concurred.

Nyika Kanengoni & Partners, applicants' legal practitioners

Dube, Manikai & Hwacha, fourth respondent's legal practitioners

1 See G M Cockram *Interpretation of Statutes* 3ed at p 36.

2 Cockram supra at p 46

3 Cockram *supra* at p 48

4 Cockram supra at p 49

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/WYNINA (PVT) LTD v MBCA BANK LTD 2014 (1) ZLR 415 (S)

WYNINA (PVT) LTD v MBCA BANK LTD 2014 (1) ZLR 415 (S)

2014 (1) ZLR p415

Citation	2014 (1) ZLR 415 (S)
Case No	Judgment No. S-27-14
Court	Supreme Court, Harare
Judge	Gowora JA, Garwe JA & Omerjee AJA
Heard	17 January 2012; *CAV*
Judgment	28 March 2014
Counsel	*P C Paul*, for the appellant *G V Mamvura*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract – breach – damages – purpose of damages – to put plaintiff in position he would have been if breach of contract had not occurred – loss of chance to participate in scheme – how damages to be assessed – exact calculation not possible – court nevertheless obliged to attempt to make D *assessment – nominal damages – when may be awarded – purpose of awarding nominal damages*

Headnote

The appellant was engaged in the business of growing tobacco. During the 2007/2008 tobacco season, the Reserve Bank of Zimbabwe ("the E RBZ") embarked on a retention scheme in terms of which tobacco growers would be paid a portion of the proceeds on tobacco sales in foreign currency. Farmers wishing to participate in the scheme had to file applications through their commercial banks, which, in turn would forward the applications, accompanied by the requisite payment in the local currency, to the RBZ. The appellant successfully participated in F the scheme and was paid a portion of the proceeds from the sale of tobacco for that season. In September 2008 the appellant submitted an application with the respondent bank for participation in the scheme for the next season and made the necessary deposit into the account held by it with the respondent to meet the local component of the foreign currency to be paid by the RBZ under the scheme. Several months later, G the RBZ published a list of farmers entitled to benefit under the scheme. The appellant's name was not on the list. The appellant made enquiries with the respondent, which said that during the relevant period the appellant's account had been

overdrawn and as a result the application could not be forwarded to the RBZ. Attempts to persuade the RBZ to H accept the application even though the deadline had passed proved

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fruitless and the appellant thereafter sued the respondent for damages A in a sum representing the amount in foreign currency that the appellant alleged it would have received from the RBZ, had the application been received and processed by the RBZ.

Although it published the list, the RBZ did not make payments to all the participants under the scheme for the year 2008/2009. It had not fully honoured its obligations for the previous growing season and the B payments for the 2008/2009 season had only been satisfied in respect of small scale growers whose individual claims did not exceed US$1 000. Affected farmers instituted a class action against the RBZ for payment under the 2008 foreign currency scheme. That suit had not yet been determined when the appellant brought the present action. The trial C court held that until such time as that matter was finally determined or until the RBZ opted to voluntarily pay out the listed growers, whether fully or partially, it was not possible to quantify the measure of damages due to the appellant by reason of the respondent's breach of contract. The appellant held essentially a contingent right to damages as against the bank, dependent upon the eventual outcome of the claims lodged D by the listed growers.

On appeal, the appellant argued, *inter alia*, that the court should quantify and asses the damages due to it arising from the loss of the chance to participate in the scheme. It did not have to prove that it would, on a balance of probabilities, have received any payment from the RBZ. E Once it was apparent that the appellant had sustained some loss, then the court was obliged, by making a value judgment, based on the best information it has before it, to assess the value of that loss.

Held, that when the breach occurred due to the failure by the bank to meet the deadline in submitting the appellant's application, the appellant's loss of the chance to participate in the scheme occurred and damages F immediately became due and payable. It was then that the complete cause of action arose and the period of prescription would have started running as from that date. In view of this, the appellant did not have to prove on a balance of probabilities that it could have received payment from the RBZ, as long as it established that it was deprived of the chance G to receive payment as a result of the respondent's breach. The appellant could not now join in the suit against the RBZ and was not in the same situation as the farmers whose applications were duly processed and accepted by the RBZ. It had, though, suffered damages by the failure to have its application placed before the RBZ and was deprived of the chance to benefit under the scheme. Had the respondent performed H

2014 (1) ZLR p417

A its contractual obligations, the appellant would have been included in the list published by the RBZ. It could also have instituted a claim for payment under the scheme.

Held, further, that it was not necessary to join the RBZ as a party. The appellant instituted proceedings against the bank premised on a breach of the latter's contractual obligation. No allegations were made against the RBZ B and there was no suggestion that the RBZ was in some way responsible for the failure by the respondent bank to perform its obligations. The appellant's suit was not concerned with the obligations of the RBZ but the breach of the respondent's obligations to the appellant.

Held, further, that in a claim for damages arising out of breach of contract, C the plaintiff has to be placed in the same position he would have been in had the contract been properly performed. If the bank had submitted the application for the appellant to participate in the 2008 scheme the appellant would at best have a claim pending against the RBZ, as did all the tobacco farmers who applied to participate in the scheme. The appellant's claim arose from the loss of an expectation to receive payment D under the retention scheme.

Held, further, that a plaintiff who sues for damages is required to prove his damages. If he can prove none he is not entitled to any damages. This is not, however, a strict rule. What the plaintiff must do is to place before the court all the evidence that is reasonably available to him. Before this E principle can come into effect it must be established that the plaintiff has suffered some damages and that all that has to be established is the quantum of those damages. Some types of damage are difficult to estimate, but the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying F damages for his breach of

duty. The decided authorities have gone so far as to state that a court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. The existence of a contingency which is dependent upon the volition of a third person does not necessarily render the damages G for breach of contract incapable of assessment. The appellant suffered damages but on the facts presented to the court *a quo* it was almost an impossible task for a court to make an assessment of the monetary damages due to the appellant. The court would be virtually pondering the imponderable, but must do the best it can on the material available, H even if the result is an informed guess.

Held, further, that there has been much debate within the courts as to when A a plaintiff should be awarded nominal damages, and it is not exactly clear, despite the debate both from the courts and jurisprudential authors, as to whether or not nominal damages should be awarded to a plaintiff who has proved breach of contractual obligations and has suffered loss, but has not proved the extent of the damages suffered. A reading of the B various South African cases leaves a distinct impression that the courts have accepted that the principle of nominal damages is available to a plaintiff in certain circumstances and that it is not necessarily available to a plaintiff who has proved a technical breach of contract and is unable to prove damages. It is a concept derived from the English law, although its application did not follow the English law, and in the later C cases there appears to be an attempt on the part of the courts to adhere to the English law in applying the principle on the awarding of nominal damages. Sometimes nominal damages may appropriately be given to establish a right; nominal damages in the different sense of a token payment of ordinary damages may also be awarded when the plaintiff proves breach causing him loss but is unable to prove the amount of the D loss or that it is substantial.

Held, further, that the courts both in this country and in South Africa have recognised the principle of prospective loss in restricted instances. One such instance relates to the loss of a chance, which is a form of prospective loss which has been recognised in England and South Africa. In assessing E damages the court must, as one of the aspects, have regard to the events that have occurred from the damage-causing event to the date of the action in order to reach a more realistic assessment of the damage. Here, the appellant appointed the respondent as its agent in the facilitation and implementation of its application under the scheme. When it lodged its application with the respondent and paid the local currency stipulated, it F acquired a benefit to participate and at the conclusion of the season receive a value in foreign currency. It thus acquired an advantage to which a value could be attached. It was therefore the duty of the court to estimate the pecuniary value of that advantage. Factors to consider included the possibility that the RBZ might be able to satisfy a trial court that it had G no obligation to meet the claims of the tobacco growers who participated in the scheme or that if a court found in favour of the farmers, the RBZ would seek statutory protection to avoid payment under the scheme; the fact that payment was made to farmers with smaller claims would point to a lack of capacity to pay as opposed to reluctance to pay; and finally, even though the applicant funded its account with the required H

A local currency, it was not transmitted to the RBZ. Damages would be awarded in the sum of 25 percent of that claimed.

Judgment of Patel J in *Wynina (Pvt) Ltd* v *MBCA Bank Ltd* HH-273-10 (judgment delivered 11 January 2011) reversed.

Cases referred to B

A G Hendry & *Co Ltd* v *McGarry* 1936 SR 209

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

Allied Maples Group Ltd v *Simmons & Simmons (a firm)* [1995] 1WLR 1602 (CA) C

Anthony and Anor v *Cape Town Municipality* 1967 (4) SA 445 (A)

Arendse v *Maher* 1936 TPD 162

Bowman & Anor v *Stanford* 1950 (2) SA 210 (D)

Chaplin v *Hicks* [1911] 2 KB 786 (CA)

D*de Klerk* v *Absa Bank Ltd & Ors* 2003 (4) SA 315 (A); [2003] 1 All SA 651 (SCA)

du Plessis v *Singer* 1931 CPD 105

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

Enslin v *Meyer* 1960 (4) SA 520 (T)

Esso Standard SA (Pty) Ltd v *Katz* 1981 (1) SA 964 (A).

E*Farmers' Co-operative Society (Reg*) v *Berry* 1912 A.D. 343

Glass v *Santam Ins Ltd & Anor* 1992 (1) SA 901 (W)

Goedhals v *Graaff-Reinet Municipality* 1955 (3) S.A 482 (C)

Hall v *Meyrick* [1957] 1 All ER 208 (QB)

Hersman v *Shapiro & Co* 1926 TPD 367

F*Murray* v *McLean NO* 1969 (2) RLR 541 (G)

Solomon v *The Alfred Lodge* 1917 CPD 177

Steenkamp v *Juriaanse* 1907 TS 980

Trichardt v *Van der Linde* 1916 TPD 148

Turtle v *Koenig* 1923 CPD 367

Versfeld v *South African Citrus Farms Ltd* 1930 AD 452

G*Wheeldon* v *Moldenhauer* 1910 EDL 97

Woods v *Walters* 1921 AD 303

Case information

P C Paul, for the appellant

H*G V Mamvura*, for the respondent

Judgment

Gowora JA: The appellant company ("the appellant") sued the respondent A for the payment of damages in the sum of US$61 944.81 and costs of suit. The matter proceeded to trial, at the end of which the High Court found for the respondent and dismissed the claim with costs. Dissatisfied with the result, the appellant has launched this appeal.

The appellant, which was the plaintiff in the court *a quo* is engaged in the B business of growing tobacco. During the 2007/2008 tobacco season, the Reserve Bank of Zimbabwe ("the RBZ") embarked on a retention scheme in terms of which tobacco growers would be paid a portion of the proceeds on tobacco sales in foreign currency. Farmers wishing to participate in the scheme had to file applications through their commercial banks, which, in turn would forward the applications, accompanied by the requisite payment C in the local currency, to the RBZ. The appellant successfully participated in the scheme and was paid a portion of the proceeds from the sale of tobacco for that season.

In September 2008 the appellant submitted an application with the respondent for participation in the scheme for the year 2008. On 9 October 2008 the D appellant deposited Z$250 000 into an account held by it with the respondent to meet the local component of the foreign currency to be paid by the RBZ under the scheme.

In April 2009 the RBZ published a list of farmers entitled to benefit under the scheme in an edition of the *Herald* newspaper. The appellant's name was not on the list. The appellant made enquiries with the respondent and the initial E reaction from the respondent was that the appellant had not forwarded an application for it to participate in the scheme. Following further exchanges of correspondence, the application was eventually located at which stage the appellant was advised that during the relevant period its account had been overdrawn and as a result the application could

not be forwarded to the RBZ. F It was also advised that attempts would be made for the RBZ to accept the application even though the deadline had passed. These attempts proved fruitless and the appellant thereafter sued the respondent for damages in the sum of US$61 944.81 representing the amount in foreign currency that the appellant alleged it would have received from the RBZ, had the application been received and processed by the RBZ. G

In his judgment, the learned judge in the court *a quo* found that had the respondent performed its obligations and submitted the application to the Reserve Bank on behalf of the appellant, then the appellant would have been in the same position as the other growers whose claims had been properly submitted to the RBZ. He found that there was a class action pending on H

A behalf of the other growers and that as a consequence he was not in a position to make a finding as to what the growers would have been entitled to receive from the RBZ. The learned judge concluded that the position of the appellant was the same as the other growers who had yet to be paid by the RBZ and it would, in the circumstances, be inequitable to place the appellant in a better position than that occupied by growers with properly submitted claims.

B On the question of prescription raised by the respondent, the learned judge was of the view that prescription on the debt would only start running once the listed growers' claims have been finalised. The court accordingly dismissed the claim with costs.

The appellant has noted an appeal to this court on the grounds that the learned C judge in the court *a quo* erred in the following respects:

(a) in finding that the appellant's claim for damages for breach of contract was premature;

(b) in finding that the quantum of the plaintiff's claim could not be decided without the RBZ being joined as a party to the proceedings;

D (c) in failing to hold that as soon as there was a breach of contract, a contractual claim for damages arose as a result of the loss of an expectation to receive payment from the RBZ and in failing to make an estimation of the value of such loss;

(d) in failing to estimate that the value of the loss was in fact the full amount E of the claim.

The appellant has premised its claim on the publication of a list of beneficiaries under the scheme by the Reserve Bank, which list however excluded the appellant. Although it published such a list, the RBZ has not made payments to all participants under the scheme for the year 2008/2009. Before the court F*a quo* it was common cause that the Reserve Bank was yet to honour its obligations under the 2007/2008 growing season in full and that the payments for the season 2008/2009 season had only been satisfied in respect of small scale growers whose individual claims did not exceed US$1 000.

In my view the appeal is best resolved by considering the matter according to the issues raised in the grounds of appeal.

G **Whether the appellant's claim was premature**

It is well settled that the governing principle behind the award of damages arising from a breach of contract is to place the plaintiff in the same position he would have been in had the breach not occurred. If the bank had submitted the plaintiff's application to the RBZ the plaintiff would be one of the H farmers whose names were published in the *Herald* as participants under the

scheme. The court was advised that the RBZ has not paid the major portion A of amounts due under the scheme and consequently affected farmers have instituted a class action against the RBZ for payment under the 2008 foreign currency scheme detailed in the Revised Operational Modalities of the RBZ.

In coming to the conclusion that the appellant had not proved its case, the court *a quo* remarked at p 8 of the judgment:

> "…. It would be absurd and entirely anomalous for it to be put in a more favourable B position than those growers whose applications were duly forwarded to the RBZ. At the present time the rights and entitlements of the listed growers as against the RBZ are the subject of the class action instituted by the ZTA. Until such time as that matter is finally determined or until the RBZ opts to voluntarily pay out the listed growers, whether fully or partially, it is not possible to quantify the measure of damages due to the plaintiff by reason of the defendant's breach C of contract. In short, at the present time, the plaintiff holds what is essentially a contingent right to damages as against the defendant, dependent upon the eventual outcome of the claims lodged by the listed growers."

In casu, when the breach occurred, that is on the 31 December 2008, due to the failure by the bank to meet the deadline in submitting the appellant's application, the appellant's loss of the chance to participate in the scheme D occurred and damages immediately became due and payable. It is at that stage, as argued by the appellant, that the complete cause of action arose and the period of prescription would have started running as from that date. In view of this, the appellant did not have to prove on a balance of probabilities that it could have received payment from the RBZ, as long as it has established that it was deprived of the chance to receive payment as E a result of the respondent's breach.

There is no dispute that the appellant cannot benefit from the scheme. It cannot join in the suit launched against the RBZ and it is clear that it is not in the same situation as the farmers whose applications were duly processed and accepted by the RBZ. To place the appellant on the same footing as F those farmers would result in prejudice being occasioned to the same. It has suffered damages by the failure to have its application placed before the RBZ and this court accepts that it has been deprived of the chance to benefit under the scheme. Had the respondent performed its contractual obligations, the appellant would have been included in the list published by the RBZ. It would also have instituted a claim for payment under the scheme. G

In the event that a court eventually makes a determination in favour of the farmers, the latter would have a judgment against which they can execute. However no-one can predict or speculate on the outcome of that suit. The appellant is not in the same position as those other farmers as its application was never submitted to the RBZ and consequently it does not have a claim H

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A against RBZ. To that extent, its position differs from that of the other farmers participating in the scheme.

The court also erred in its finding on prescription, as the debt became due and payable when the breach occurred. The claim against the RBZ is not the determining factor as to when the appellant's claim became due and payable, and in my view the finding that the claim was premature was B clearly made in error.

Could the claim by the appellant be decided without having the RBZ joined as a party?

It is worth noting that on the evidence adduced by the plaintiff very few of C the tobacco farmers have been paid under the 2008 scheme. Those claims that have been met are said to be under US$1000 in value. The learned judge in the court *a quo* correctly stated that the allocation and expenditure of public funds was a matter that stood on a different footing from any other form of expenditure or disbursement of moneys. He correctly stated that such expenditure had to be approved by Parliament and that in addition it D was subject to executive control and restriction in the best interest of the community. See *Murray* v *McLean NO* 1969 (2) RLR 541 (G) at 550-551. The learned judge, properly in my view, could not make a determination as to whether the restrictions placed on public funds under legislation could be invoked in the matter before him.

In the view of this court it was not necessary to decide on the issue as it E was not pertinent to the disposal of the dispute. The RBZ was not a party before the learned judge but that notwithstanding, the dispute was capable of resolution without recourse to those considerations. The evidence that was placed before the High Court was that a class action instituted by the by the Zimbabwe Tobacco Association ("ZTA") had still to be determined. The learned judge consequently found that no detailed evidence was adduced as F to the specific terms of the publication by the RBZ of the list in question. The court was not, on the evidence before it, able to determine whether the publication of the list amounted to an unequivocal acknowledgment of indebtedness on the part of the RBZ or a mere acknowledgment that the farmers listed thereon had submitted applications for consideration

to G participate in the scheme. In this regard the learned judge stated as follows at p 6 of the judgment:

> "….The wording of para 28 of the RBZ's Revised Operational Modalities appears, *prima facie*, to be couched as an undertaking to transfer the global US dollar amounts claimed to the growers' respective banks. However, whether this constitutes a binding and enforceable contractual undertaking is an issue H that cannot presently be adjudicated upon without full evidence and argument

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> on the matter. Additionally and in any event, it would be incompetent to decide A this point without the RBZ having been joined as a party to these proceedings."

On appeal, the appellant has argued that it did not have to prove that it would receive, on a balance of probabilities, any payment from the RBZ. It contended that once it became apparent that the appellant had suffered some loss, the court would be obliged to assess the value of that loss on the best information it had available to it by making a value judgment. B

The appellant instituted proceedings against the bank premised on a breach of the latter's contractual obligation. The appellant did not make any allegations against the RBZ and there is no suggestion that the RBZ was in some way responsible for the failure to perform its obligations on the part of the bank. The involvement of the RBZ only becomes an issue where the RBZ has failed C to meet its obligations under the scheme. It would also only be relevant to the resolution in terms of the import of the Revised Operational Modalities. However, the suit by the appellant is not concerned with the obligations of the RBZ but the breach of the bank's obligations to the appellant. I do not find that the failure by the appellant to cite the RBZ necessarily made the resolution of the dispute difficult. D

In my view, the learned judge in the court *a quo* erred when he found that the suit could not be decided in the absence of the RBZ.

Did appellant's claim arise from the loss of an expectation to receive payment?

The appellant seeks that the court quantify and asses the damages due to it E arising from the loss of the chance to participate in the RBZ tobacco growers scheme. The appellant argues that it did not have to prove that it would, on a balance of probabilities, have received any payment from the RBZ. The appellant suggests that once it becomes apparent that it has sustained some loss, then the court is obliged, by making a value judgment, based on the best information it has before it, to assess the value of that loss. F

There exists no better example in the exercise of a value judgment by a court in a situation such as this than *Chaplin* v *Hicks* [1911] 2 KB 786 (CA). I would with respect quote the remarks of Vaughan Williams LJ at 791 where he said:

> "… Now, the moment it is admitted that the contract was in effect one which gave G the plaintiff a right to present herself and to take her chance of getting a prize, and the moment the jury find that she did not have a reasonable opportunity of presenting herself on the particular day, we have a breach attended by neglect of the defendant to give her a later opportunity; and when we get a breach of that sort and a claim for loss sustained in consequence of the failure to give the plaintiff an opportunity of taking part in the competition, it is impossible H

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> A to say that such a result and such damages were not within the contemplation of the parties as the possible direct outcome of the breach of contract. I cannot think these damages are too remote, and I need say no more on the question of remoteness.
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> … It was said that the plaintiff's chances of winning a prize turned on such a number of contingencies that it was impossible for anyone, even after arriving B at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on C which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance

> or opportunity of winning the prize. In the present case I understand that there were fifty selected competitors, of whom the plaintiff was one, and twelve prizes, so that the average chance of competitor was about one in four."

D And later at p 792:

> "… I do not agree with the contention that, if certainty is impossible of attainment, the damages for breach of contract are unassessable."

The RBZ had created, under the retention scheme, the right of obtaining foreign currency at concessionary rates for tobacco farmers and the appellant's right to be part of that class of person cannot be disputed. It was however E denied the right to participate in the scheme by the respondent. The court has the unenviable task of deciding whether or not a value can be placed on the loss by the appellant of that chance.

In *Woods* v *Walters* 1921 AD 303 at 311 Innes CJ stated:

> "[the plaintiff] lost "the opportunity of the mealie crop which would have been F a profitable item. She was put to the expense in having to live at a hotel and a tractor which had been specifically ordered had been thrown on her hands. In the result a careful investigation would have resulted in a substantial award."

In a claim for damages arising out of breach of contract, the plaintiff has to be placed in the same position he would have been in had the contract been properly performed. If the bank had submitted the application for the G appellant to participate in the 2008 scheme the appellant would at best have a claim pending against the RBZ as are all the tobacco farmers who applied to participate in the scheme.

Was the value of loss the full amount of appellant's damages?

A plaintiff who sues for damages is required to prove his damages. A court H will not presume damages in the absence of proof of such damages by a

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plaintiff. However, the principle that a plaintiff must prove his damages is A not a strict rule, what is required of a plaintiff is to place before the court all the evidence that is reasonably available to him. Before this principle can come into effect it must be established that the plaintiff has suffered some damages and that all that has to be established is the quantum of those damages. This was stated by Selke J in *Bowman & Anor* v *Stanford* 1950 (2) SA 210 (D) at 222-223 in the following terms: B

> "But to make such *dicta* into inflexible rules applicable in every instance without regard to the circumstances of the parties in respect of the availability of the evidence, or to the precise nature of the claim, or the particular injury or loss claimed for, would, it seems to me, result not infrequently in injustice. There must be many types of claim due to breaches of contract which do not admit, for various reasons, of strict or detailed proof in terms of so much money. For C example, loss of business, especially in relation to the future, cf. *Bower* v *Sparks, Young and Farmers' Meat Industries Ltd* 1936 NPD 1 at p 23."

In the court *a quo*, the respondent conceded that the appellant had deposited a sufficient sum to enable the bank to submit the application to the RBZ for the consideration of allocation of foreign currency under the scheme. It was never suggested that the appellant had failed to establish that it had D suffered loss or that the amount that had been deposited in local currency was insufficient to qualify for the sum being sought from the RBZ under the scheme.

This is not a case where an exact quantification of the damages allegedly suffered by the plaintiff is possible. *In casu*, there exists a real chance that E if the bank had submitted the plaintiff's application to the RBZ before the expiry of the deadline, then in the event that the RBZ had paid to the claimants monies under the retention scheme the appellant stood to be paid in United States dollars for the sum or part thereof deposited by it into the bank's account and which payment would have been forwarded to the RBZ under the scheme. F

Recent authorities from the courts in South Africa suggest that there is need to differentiate between the *onus* imposed on a plaintiff regarding causation and quantum. In *de Klerk* v *Absa Bank Ltd & Ors* 2003 (4) SA 315 (SCA) Schutz JA at 330B quoted with approval the remarks of Stuart-Smith LJ in *Allied Maples Group Ltd* v *Simmons & Simmons (a firm)* [1995] 1WLR 1602 (CA) G at 1614C-E to the following effect:

"In my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not H

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A think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be."

It is an accepted principle of our law that some types of damage are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach B of duty. The principle is not a novel one and decided authorities have gone so far as to state that a court doing the best it can with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess. See *Esso Standard SA (Pty) Ltd* v *Katz* 1981 (1) SA 964(A).

It is also accepted in principle that a court will come to a plaintiff's aid in C case of uncertainty and make an estimate in his favour provided that he has led the best evidence available to him. See *Enslin* v *Meyer* 1960 (4) SA 520 (T). Facts may also be proved not only by direct evidence but by inference and a man's intentions may be proved through the observations of others. In *Arendse* v *Maher* 1936 TPD 162 Greenberg J made the following pertinent D remarks at 165-6:

"It remains, therefore, for the court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate then it is a disadvantage which the person who should have put proper material before the court should suffer. The means that I have at hand are extremely unsatisfactory, but I propose to rely to some extent on E the figures appearing from the decision in Chisholm's case and to be guided by those figures."

The existence of a contingency which is dependant upon the volition of a third person does not necessarily render the damages for breach of contract incapable of assessment. See *Chaplin* v *Hicks supra* at 793 per Fletcher Moulton LJ. At p 795 he commented further:

F "Then the learned counsel takes up a more hopeful position. He says that the damages are difficult to assess, because it is impossible to say that the plaintiff would have obtained any prize. This is the only point of importance left for our consideration. Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallenged G case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been an actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should H be an absolute measure of damages in each case. There are no doubt well-settled

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rules as to the measure of damages in certain cases, but such accepted rules are A only applicable where the breach is one that frequently occurs."

And later at 769:

"Is there any such rule, if it existed as that where the result of a contract depends on the volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed would work great wrong …

… Where by contract a man has a right to belong to a limited class of competitors, B he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him."

In *Goedhals* v *Graaff-Reinet Municipality* 1955 (3) SA 482 (C) at 486C-E Hall J said:

"The general principle upon which damages are to be assessed was laid down in C*Victoria Falls and Transvaal Power Co. Ltd* v *Consolidated Langlaate Mines Ltd* 1915 AD at p 22, where it is stated that, so far as possible, the person injured through breach of contract should be placed in the same position as he would have been if the contract had been performed. On this principle it appears to me that the question which the trial court would have to decide in order to assess damages in this case is what would the opportunity of finding water be worth to the plaintiff under the circumstances of the case." D

Similar remarks were issued by Mason J in *Trichardt* v *van der Linde* 1916 TPD 148 at 152-3 to the following effect:

> "Now, it is quite clear, in this case, that there was a breach of the contract. It is quite clear that the object of the contract was that the horse should be raced and win prizes. It is quite clear that the breach defeated the very object of the contract, E and the loss of the chance is the actual and necessary result of the breach. Now, the matter was considered in the case of *Watson* v *Ambergate Railway Co* (15 Jur 448). There, the two judges differ as to whether the value of a chance should be estimated for the purpose of damages, and *Mayne on Damages* (6th ed p 60), in commenting on the decision, accepted the view of the judge who thought that a chance was not such an element of damage as could be estimated and allowed for in a court of justice. But, all these authorities were considered in the case of F*Chaplin* v *Hicks* [1911] 2 KB 786), and there it was held that – I think it was in a beauty competition – the loss of such a chance was an element of damage which the jury were entitled to estimate the value of, and the jury in that case awarded £100 damages, which was upheld on appeal. In that case, the court said there was no question that the loss of the chance was the necessary result of the breach of the contract, and that though it might be difficult to estimate what the value of a chance may be, it was the duty of the jury to endeavour to G do so, and if they awarded some reasonable sum, the court would not interfere."

This court accepts that no detailed evidence was placed before the court *a quo* on the legal implication attaching to the publication of the list of participating farmers by the RBZ. The scheme, from the evidence before the court *a quo*, was introduced at the instance of the RBZ to encourage farmers to grow H

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A tobacco as a way of boosting the foreign currency earnings of the country as a whole. It was a scheme under which the country was the major beneficiary, in that following upon the sale of the tobacco crop the farmer would be paid in the local currency with the foreign currency being retained by the RBZ. The scheme however, presented an avenue through which farmers could then obtain a benefit to access foreign currency in cash and kind, the latter B through the access to scarce farming inputs. Thus, at the end of it all, the benefit would accrue to the country and the individual farmer.

It is correct that the appellant suffered damages but on the facts presented to the court *a quo* it is almost an impossible task for a court to make an assessment of the monetary damages due to the appellant. In *Ebrahim* v *Pittman NO* 1995 (1) ZLR 176 (H) C at 187C-D Bartlett J quoted with approval the remarks of Berman J in *Aaron's Whale Rock Trust* v *Murray & Roberts Ltd & Anor* 1992 (1) SA 652 (C) at 655H-656F to the following effect:

> "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 D available to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. The court must 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 …"

E The appellant has urged this court to make the assessment as the evidence presented before the trial court was the best evidence available to the appellant. The issue, however, is whether the learned judge in the court *a quo* had sufficient evidence before him to enable him to arrive at a quantification of the amount of damages that the appellant had suffered due to the failure F of the respondent to transmit the application to the RBZ. In my view, the appellant presented to the court the best evidence it had available, and the value of the loss constituted the damages suffered.

Disposition

The respondent conceded in the court *a quo* that the deposit of Z$250 000 G made by the appellant into the account was sufficient to enable the respondent to submit the appellant's application. The question before the court however is what sum constitutes the value of the appellant's loss. Whether or not the appellant would have obtained payment from the RBZ of the amount of foreign currency it required from the Zimbabwe dollar equivalent paid to the respondent is not the issue, as what it sued for was the loss of the chance. It H is also not certain that even if the application had been submitted to the RBZ

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in time the latter would have paid any foreign currency to the participating A growers nor is the extent of the payment capable of exact calculation. Nevertheless the failure by the respondent to file the application with the RBZ left the appellant in the invidious position of having no basis to approach the RBZ for payment under the scheme. The result is that the appellant is unable to make any meaningful suggestion on the quantum of damages that this court should award in these circumstances. That notwithstanding, this B court should strive the best it can to assess damages in this matter. I would respectfully associate myself with the remarks of Holmes JA in *Anthony and Anor* v *Cape Town Municipality* 1967 (4) SA 445 (A) at 451B-C to the following effect:

> "I therefore turn to the assessment of damages. When it comes to scanning the C uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss".

I also wish to associate myself with the sage words of Schutz JA in *de Klerk* v *ABSA Bank Ltd & Ors supra* at 335F-H where he stated: D

> "The second consideration is this. If, as may be found to be the case, an unlawful negligent (or, *a fortiori*, a fraudulent) misstatement has resulted in the plaintiff being placed in the invidious position of having to ask the court to assess, with all the difficulties inherent in the exercise, the value of his lost opportunity of investing elsewhere, the court should not be too astute to entertain dire and pessimistic speculations emanating from the defendants that the plaintiff may even be worse off if he had not been culpably misled into making the investment E that he did."

Mindful of the caveat in the above authorities with which I wholeheartedly agree not to be too pessimistic as to the appellant's chances in benefiting from the retention scheme it therefore remains for this court to assess the damages due to the appellant. The object of damages for breach of contract F in our law is to compensate the aggrieved party for his actual pecuniary loss, and it is an accepted principle of the law of damages that if he can prove none he is not entitled to any damages. So that one may appreciate how this branch of the law has evolved over the years it becomes necessary to examine persuasive decisions of the courts in South African courts over a period of almost a century. The first seminal case on the issue is G*Steenkamp v Juriaanse* 1907 TS 980 at 986, where Innes CJ said:

> "We should adopt the principle that where a plaintiff claims *damnum*, whether on contract or on tort, if no *damnum* be proved he should not as a general rule, save in certain excepted cases which do not arise here, be entitled to judgment. To my mind when a plaintiff comes into court simply to claim damages, and no damage whatever is proved, he ought not to obtain a nominal judgment. There H

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> A is Roman-Dutch authority to support the ruling of the late High Court, and I think we should decide to follow it."

In *Wheeldon* v *Moldenhauer* 1910 EDL 97 at 100 Kotzé JP remarked as follows:

> "… But there are many cases where a person has been injured by another's breach of contract, and where it is impossible to prove specific damage. In such B cases it would be unjust to say that it is left to the caprice of the person who has undertaken to do or not to do something, to fulfil his obligation or not as he pleases, and in this way the creditor would be entirely without any remedy, and would be prevented from enjoying the benefits which he had stipulated for himself in the contract. In my opinion this is not in accordance with the law. I am still of that opinion, and I find several decisions of the Supreme Court of C this colony which recognise a plaintiff's right to nominal damages for breach of contract."

A broader examination of case authority would tend to show however, that the courts in South Africa differed fundamentally on the principle of the need to award nominal damages and the guiding principles as to when such damages were available to a plaintiff. One school of thought appeared to D have favoured the award of nominal damages as a matter of course where an injury had been established but the plaintiff had failed to establish damages. The other school of thought was that damages should not be awarded in the absence of proof of damages. In the latter case, nominal damages were awarded where the plaintiff sought to establish a right or claimed specific E performance and damages were claimed in the alternative. In the absence of proof of damages, the court would award nominal damages. An instructive example of the court's approach in the latter case is *Farmers' Co-operative Society (Reg*) v *Berry* 1912 AD 343 at 352, where Innes J said:

"… The present suit is not in the main for damages, but for an order for specific performance as a test of the defendant's right to disregard the regulations of the F society. The claim for damages is only in the alternative. It does not seem to me, therefore, to fall within the authority of the cases quoted; and if it should appear that the defendant cannot specifically perform his contract, then, in the absence of exact proof of loss, this is certainly a case where nominal damages might properly be given."

In *Solomon* v *The Alfred Lodge* 1917 CPD 177 at 188 Kotzé J stated:

G "… But there are many cases where it may be evident that a person has sustained loss through another's breach of contract, and where it is impossible to prove specific damage. In such cases it would be unjust to say that it is left to the caprice of the party, who has undertaken to do or not to do something, to fulfil or break his contract as he pleases, and leave the other party entirely without remedy. Where, therefore, from the evidence or the nature of the case, it is H plain that some damage, though its amount cannot be definitely ascertained and

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proved, has been sustained through the breach of contract, the plaintiff will be A awarded a small or trifling sum – *exiguam summam* – as Voet 45,1.12 terms it, or, as we would call it, nominal damages. Now, the present case appears to me to fall within this rule."

It is interesting to note that in the *Solomon* case (*supra*) Kotzé J awarded the appellant an amount of one shilling as nominal damages on a claim for damages wherein the plaintiff had been expelled from an unregistered benefit B club. The loss to the plaintiff was the benefit that membership in the club entitled her to. It was considered that a trifling sum by way of compensation would be appropriate in the circumstances of the case. The award for nominal damages in that case was obviously made given the case where no actual monetary loss was occasioned to the plaintiff as a result of the breach of contract on the part of the defendant. C

In *Turtle* v *Koenig* 1923 CPD 367, the plaintiff sued for damages arising out of the cancellation of a written agreement of sale in respect of the defendant's interest in a hotel. The defendant breached the contract and sold his rights therein to a third party. The plaintiff sued for damages arising from the breach. Sutton AJA had occasion to consider the question of damages in the absence D of proof of such damages by a plaintiff. He stated the following at p 371:

"Now, there has been a great deal of argument on the question as to whether the court is entitled to grant damages in a case where there has been a proof of a technical breach of contract. This action is purely one for damages; it is not one for specific performance or a declaration of rights; it is purely an action for damages and to my mind the case I should follow in this matter is that of E*Steenkamp* v *Juriaanse* 1907 TS 980. The two judges who decided that case were Rose-Innes CJ and Solomon J, and it seems to me it is a case which is likely to be upheld by the Appellate Division. In that case the court laid down that when an action is brought solely for damages and not to establish any right which has been violated by the defendant, the plaintiff must prove that he has actually sustained damage and that in the absence of such proof he will not be entitled to judgment for nominal damages. The matter was fully gone into in that case." F

And later on at p 371-372:

"It seems to me too that the case of *Wheeldon* v *Moldenhauer* 1910 EDL 97 is not inconsistent with the case of *Steenkamp* v *Juriaanse*. It is true that there are cases in our courts dealing with the question of nominal damages which are not very helpful or harmonious, but the modern tendency is it seems to me not in G favour of granting nominal damages as that term is understood in England. The whole tendency of our recent decisions is not in favour of adopting the English rule of granting some damages because there has been breach of contract.

In the early days there were some cases in our courts where normal damages were granted in the absence of any proof of damages, but the modern authority is against such decisions. H

A According to the decision in *Wheeldon* v *Moldernhauer (supra*) where it is clear that some damages have been sustained but the court cannot say how much; where no definite amount has been proved; then the court is entitled to grant some damages called nominal damages. That is not what the English courts intended by nominal damages. In the case of *Wheeldon* v *Moldenhauer*, Kotzé JP held that as the plaintiff had not proved what amount of damage he had B suffered, but had proved that he had sustained some damage, which, however, could not be properly fixed, he was under the principles of the Roman Dutch Law as followed in South Africa, entitled to nominal damages."

The position appears now settled in South Africa that the court cannot award damages to a plaintiff who has failed to prove damages where the claim was purely for damages and no other form of relief. This approach C finds confirmation in *Hersman* v *Shapiro & Co* 1926 TPD 367. At p 379 Stratford J had this to say:

> "Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court D is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it."

E And yet the court seems to have been inconsistent in its approach as exemplified by the *dictum* in *Versfeld* v *South African Citrus Farms Ltd* 1930 AD 452 at 459 by Stratford JA as follows:

> "… On appeal Mr *Buchanan* relied upon a principle in the assessment of damages exemplified in the case of *Turkstra Limited* v *Richards* 1926 TPD276 and thus F stated: When there is a finding or an admission that damage has been caused in a monetary amount, the court must do its best to assess the amount on such evidence as is available, and you cannot non-suit a plaintiff because, in the nature of things, the damage cannot be computed in exact figures."

In *du Plessis* v *Singer* 1931 CPD 105 at 108 Gardiner JP stated:

> "But even if cancellation was not justified, and the plaintiff must be held bound by G the lease, he would, in my opinion, be entitled to claim damages for not getting occupation of part of the leased premises, and his remedy is not confined to a remission of part of the rent-see *Pothier, Contract de Louage* (sec. 67), *Voet* 19.2.26. Here, in fact, he is not claiming a declaration that the lease is cancelled, but is claiming damages for not getting possession. If he gave *prima facie* proof that he did not get possession of part of the premises, and if he showed that he H sustained damages thereby, absolution should not have been granted. On the

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> evidence it is not possible to arrive at any exact estimate of the damages he A suffered, but that he did sustain some damages, was I think, established. At the least, therefore, he should have had nominal damages."

On a reading of the various South African cases one discerns a distinct impression that the courts have accepted that the principle of nominal damages is available to a plaintiff in certain circumstances and that it is not necessarily available to a plaintiff who has proved a technical breach of contract and B is unable to prove damages. It is a concept derived from the English law although its application did not follow the English law, and thus in the later cases there appears to be an attempt on the part of the courts to adhere to the English law in applying the principle on the awarding of nominal damages.

There has been much debate within the courts as to when a plaintiff should C be awarded nominal damages, and it is not exactly clear, despite the debate both from the courts and jurisprudential authors as to whether or not nominal damages should be awarded to a plaintiff who has proved breach of contractual obligations and has suffered loss, but has not proved the extent of the damage suffered. Visser and Potgieter *Law of Damages* state thus at 158-159: D

> "Despite opposition, nominal damages were also awarded for breach of contract. Cases where a small amount of damages was awarded should not really be cited as support for the concept of nominal damages. In some instances it was held that the court may not award nominal damages unless an action is instituted to vindicate a right which will have some value in future or unless breach of contract was intentionally committed. The availability of an action for nominal damages upon breach of contract has been confirmed by the Appellate Division E but several authors express doubt whether this is still the position. They state that since 1935 there has been almost no reported cases of nominal damages and that a plaintiff who has not proved his damage is not entitled to any compensation. It is probably correct to argue that nominal damages have no place in our law, but until the Appellate Division finally confirms this view, it cannot be concluded that nominal damages have disappeared."

Christie *The Law of Contract in South Africa* 6 ed pp 571-572 appears to F favour a different approach to the question of damages wherein the plaintiff has failed to establish any damages. This is what he has to say:

"The question whether, when damages cannot be proved, nominal damages may be awarded, has caused some difficulty, but the present law can be stated with reasonable certainty. Early cases in the Cape and Transvaal adopted, not expressly G but quite clearly, the English practice of awarding purely nominal damages (10c or so) sometimes as a peg on which to hang costs, sometimes with each party paying his own costs, and sometimes with costs to the defendant, without distinguishing between the cases where the plaintiff has suffered no loss, cases where it is clear he has suffered some loss but it is impossible to say how much and cases where the plaintiff's concern is to establish a right. H

2014 (1) ZLR p435

Gowora AJA

A This practice was defended by Kotzé CJ in *Stow*, *Jooste & Mathews* v *Chester & Gibb* (1890) 3 SAL 127, but it did not long go unchallenged. In *Weber* v *Africander GM Co* (1899) 16 CLJ 128 (SAL), Gregorowski CJ said:

> 'It is true that in England nominal damages are sometimes awarded where there has been a breach of contract without damage, but our law requires a definite *damnum* to give rise to an action for damages. The case where a right which may be valuable in future is denied is denied is the only case B where *damnum* would be assumed in consequence of an unlawful act.'

This distinction between an unsuccessful attempt to prove loss, where the plaintiff should fail, and the establishing by an award of nominal damages which may become valuable in the future became accepted law in the Transvaal in a line of cases of the former type. Referring to some of these cases in *Farmers' Co-op Society (Reg)* v *Berry* 1912 AD 343 352 Innes CJ gave them the Appellate Division's C approval:

> 'But the rule laid down in these cases was in terms stated to be subject to certain exceptions, and it was a rule applicable to claims for *damnum* alone. The present suit is one not in the main for damages, but for an order for specific performance as a test of the defendant's right to disregard the regulations of the society. The claim for damages is only in the alternative. D It does not seem to me, therefore, to fall within the authority of the cases quoted; and if it should appear that the defendant cannot specifically perform his contract, then, in the absence of exact proof of loss, this is certainly a case where nominal damages might properly be given.'

Cases of the second type, like *Berry's* case, where nominal damages may appropriately be given to establish a right, are rare because a plaintiff seeking E such relief will more frequently ask for a declaration of rights, but *Berry's* case makes it clear that he is not obliged to adopt that course.

Since *Berry's* case it can be accepted that the early Cape and Transvaal cases referred to at the beginning of the previous paragraph are no longer good law, and our courts are entitled to award nominal damages in the English sense of 10c or so only for the purpose of establishing the plaintiff's rights.

F But nominal damages in the different sense of a token payment of ordinary damages (R20 or so) may be awarded when the plaintiff proves breach causing him loss but is unable to prove the amount of the loss or that it is substantial. Kotzé JP developed this principle in a series of cases in the Cape and Eastern Districts, which have been followed in those divisions. Referring to Voet 45.1.12, he said in *Wheeldon* v *Moldenhauner* 1910 EDL 97 [at] 101:

> G 'Here we have a distinct authority for the view that, where there has been a breach of contract, and the plaintiff is unable or finds it difficult to prove what loss he has sustained, or the extent of that loss, it does not follow that he must fail in his claim, for the court may award him merely a trifling sum (*exiguam summam)*, that is, nominal damages. This will certainly be true where it is clear that some damage, however slight or unascertainable, has H been sustained by the plaintiff.'

2014 (1) ZLR p436

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The last sentence of this passage is most important, for in cases to which those A words apply damages of the order of R20 have frequently been awarded, [1] but where the plaintiff has failed to prove that he has suffered any loss at all, no damages have been awarded. [2] Thus understood there is no conflict between these Cape and Eastern District cases and the Transvaal cases approved in *Berry's* case." [3]

The seminal case on the entitlement of a plaintiff to be awarded damages for the loss of a chance is *Chaplin* v *Hicks supra* and the appellant's contention B that the respondent had failed to prove damages and in the circumstances was only entitled to nominal damages was rejected by the court. Lord Fletcher Moulton said at pp793-794:

"Mr McCardie does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he C puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a

plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy. The learned counsel admitted that it was D very difficult to formulate his proposition, but he ultimately said that where the volition of another comes between the competitor and what he hopes to get under the contract, no damages can, as matter of law, be given. I can find no authority for that proposition; in fact the decision in *Richardson* v *Mellish is obviously in the teeth of it. I do not rely, however, on that or any other authority; I would rather consider what is the right of a plaintiff as regards damages for breach of* E *contract, and regarding it as a matter of broad principle, I do not think that any such distinction as that suggested by Mr McCardie can be drawn.*

…

But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is sometimes a matter of great difficulty." F

This case was approved and applied by Ashworth J in *Hall* v *Meyrick* [1957] 1 All ER 208 (QB) at 218 where it was stated:

"Any assessment of damages in a case of this sort is bound to appear somewhat arbitrary, but I have endeavoured to find a figure which fairly represents the G

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A plaintiff's loss after giving due allowance for all the uncertainties. The sum for which I give judgment in favour of the plaintiff is £1250."

The courts both in this country and in South Africa have recognised the principle of prospective loss in restricted instances. One such instance relates to the loss of a chance. It can be said that the issue relating to a claim for damages following upon the loss of a chance appears to be on a different B footing and that following upon the dictum in *Chaplin* v *Hicks (supra*) the approach of the courts has been consistent. The loss of a chance is however described as a form of prospective loss which has been recognised within the English jurisdiction and that of South Africa. So far as I am aware, the present case is the second case within this jurisdiction where the court is being asked to make an award of damages so that a plaintiff who has suffered damage C does not walk away empty handed due to a failure to prove damage that is quantifiable. The first case decided within this jurisdiction is *A G Hendrie* & *Co Ltd* v *McGarry* 1936 SR 209 in which Hudson J stated at p 218:

"Bearing in mind in the present case that the plaintiff's agency was revocable, that the hotel was not a readily saleable property and that Gammon might have D leased or purchased another hotel, I have come to the conclusion that in this case too the damages must be assessed at a figure considerably lower than the amount of the commission. Exact computation of damages is not possible in the circumstances of the case, but there has been a deliberate breach of contract and the damages must be substantial, and not merely nominal, in spite of the impossibility of exact assessment: *Chaplin* v *Hicks* [1911] 2 KB 786. After giving consideration to all the factors involved in the case I have come to the E conclusion that the damages should be assessed at £75."

It is accepted that in assessing damages the court must as one of the aspects have regard to the events that have occurred from the damage-causing event to the date of the action in order to reach a more realistic assessment of the damage. See *General Accident Ins Co SA Ltd* v *Summers* 1987 (3) SA 577 (A) F at 615. This principle is based on the existence of uncertainty about the arising and impact of a factor which in its nature is relevant to the assessment of loss. A court therefore has no better method than to place a value on that factor according to the court's prognosis. As certainty arises, the need to speculate about probabilities and to evaluate expectations dwindles, and the actual facts form the basis for calculations: *Glass* v *Santam Insurance Ltd & Anor*G1992 (1) SA 901 (W) at 902.

In addition, the court is obliged to take into account any relevant conditions that would necessarily affect the assessment of damages. In the court *a quo* it was common cause that although the RBZ had not paid the major growers, it had paid out small claims not exceeding US$1000. The appellant H appointed the respondent as its agent in the facilitation and implementation

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of its application under the scheme. When it lodged its application with A the respondent and paid the local currency stipulated it acquired a benefit to participate and at the conclusion of the season

receive a value in foreign currency. It thus acquired an advantage to which a value could be attached. It is therefore the duty of the court to estimate the pecuniary value of that advantage.

The court must remain alive to the possibility that the RBZ may be able to B satisfy a trial court that it had no obligation to meet the claims of the tobacco growers who participated in the scheme, or that in the event that a court found in favour of the farmers, the RBZ would seek statutory protection to avoid payment under the scheme. The fact that payment was made to farmers with smaller claims would point to a lack of capacity to pay as opposed to C reluctance to pay. Finally, the court has to consider that even though the applicant funded its account with the required local currency, it was not transmitted to the RBZ but remained in the account and that the respondent offered to pay it back.

In view of the fact that the appellant did not pay to the RBZ, not through D its fault, I intend to discount the sum claimed by fifty percent, resulting in the sum of USD 30 972.40. In addition, in view of the seeming difficulties of the RBZ to pay, as exhibited by the delay in payment, I intend to further discount the sum. An additional discount of fifty percent on the discounted sum would appear to me to meet the justice of the case. Such discount would allow an award of US$15 486.20. The appellant did not claim interest and E the order that I will issue will not specify interest.

The above method of computing the damages due to the appellant is admittedly arbitrary but I cannot think of any better way of assessing damages in this case. Although the appellant did not succeed in the claim for the sum of US$61 944.81 that it was seeking from the respondent, it has established not F only the liability but an award in a specified sum. In the event, the appeal must succeed.

In the result it is ordered as follows:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and substituted with the following: G
   - 2.1 Judgment be and is hereby granted against the defendant in favour of the plaintiff in the sum of US$15 486.20 together with interest thereon at the prescribed rate with effect from the date of this judgment.
   - 2.2 The defendant is hereby ordered to pay the costs of suit. H

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A GARWE JA and OMERJEE AJA concurred.

Wintertons, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

1 See *Solomon* v *The Alfred Lodge supra*; *Emslie* v *African Merchants Ltd* 1908 EDC 82, 95; *Kelly* v *Kelly* 1913 EDL 153 at164

2 *See* McCallum v Cornelius and Hollis *1910 NPD 52,62;* Turtle v Koening *1923 CPD 367, 372*

3 *At pp 604-606*

4 *(1824) 2 Bing. 229*

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CAG FARMS (PVT) LTD v HATIVAGONI & ORS 2014 (1) ZLR 440 (H)

Citation	2014 (1) ZLR 440 (H)
Case No	Judgment No. HH-157-14
Court	High Court, Harare
Judge	Dube J
Heard	26 November 2013; *CAV*
Judgment	2 April 2014
Counsel	*Z T Zvobgo*, for the applicant *T Hove*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Contract – validity – agreement to contract in the future – when may C *be enforced – evidence showing that parties intended to enter into binding obligation – such agreement enforceable*

Headnote

The applicant company made a written final offer to the first and second D respondents for the acquisition of a farm owned by the first and second respondents. The offer specified the full price offered and the proposed payment terms. The respondents accepted and signed the offer document. Following this offer, the parties signed an irrevocable memorandum of understanding (MOU). The parties agreed that the transaction was E irrevocable. They agreed to be bound to carry out in good faith all actions as may be necessary to expedite the transfer and registration of the farm, including the obtaining of a certificate of no present interest from the relevant authority and the transfer of the farm. The MOU was to terminate upon the signature of a sale agreement .In the event of the sale agreement not being entered into within 60 days from the F date of signature of the agreement, then the MOU would terminate and all rights and obligations flowing from it would fall away. The parties agreed not to enter into any other discussion or agreement with any other party relating to the farm until the expiry of the MOU, without written consent of the other party. The parties agreed to endeavour to make all efforts to ensure that the sale was concluded and to best advantage. In G the event of a dispute, they would attempt to resolve it by discussion and conciliation, failing which the dispute would be referred to arbitration.

The applicant duly obtained the certificate of no interest from the Ministry of Agriculture, the relevant authority, within two weeks of the signing of the MOU, but the respondents did not co-operate in signing the sale H

A agreement. They evaded the applicant and ignored requests to sign the sale agreement. The applicant learned that the respondents were trying to sell the farm to someone else, so brought an action for specific performance, averring that a binding contact was concluded between the parties; that the first and second respondents breached both the agreement concluded in terms of the offer document and the MOU by delaying the signing of B the written agreement of sale until after the 60 days had elapsed.

The respondents contended that the parties did not enter into a sale agreement within the 60 days provided for, resulting in the termination of the MOU. Accordingly, all rights and obligations of

the parties fell away. The applicant could not seek an order for specific performance as there C was no binding contract.

Held, that the issue was whether a valid agreement of sale existed between the parties entitling the applicant to specific performance. It was important to determine what type of agreement the parties entered into first. The first document signed by the parties, the final offer, constituted an offer by the applicant and a preliminary agreement where the parties would sign D another contract. They had agreed on the key terms of the contract but had not signed the actual contract and agreed to be bound to carry out, in good faith all the actions as, may be necessary to expedite the transfer and registration of the farm. There was a mechanism for resolving any dispute. These facts disclose an agreement to agree in the future and in E good faith. The objective, which was to bind the parties to agree to enter into a final contract, did not happen. No agreement of sale was entered into. This scenario was distinguishable from a contract of sale subject to a suspensive condition which comes into effect on fulfilment of a specified condition. In this case, there was no contract of sale entered into as envisaged.

F*Held*, further, that generally an agreement to agree in the future and enter into a proposed final agreement does not constitute a contract between the parties as they lack legal certainty. The parties still have a discretion over whether to agree or disagree. However, it is possible to conclude an agreement that has an aspect that will be determined in the future. Each G case should be determined on its own merits. While the courts require legal certainty and do not enforce an agreement if parties have not sufficiently formulated an intention, where the court is satisfied that that the parties intended to enter into binding obligations it should attempt, so far as is consistent with essential principle and binding precedent, to give effect to the agreement and not be the destroyer of bargains. An agreement to H agree or negotiate on a future and final contract is enforceable where

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the parties have agreed on the essential terms of the contract and the A agreement provides for a dispute resolution mechanism to resolve the unresolved issues.

Held, further, that in terms of the MOU and final offer, the final offer was irrevocable. The parties promised to negotiate in good faith. There was a dispute resolution mechanism. The agreement of sale was to be concluded and signed immediately upon the successful completion of B the approvals by the authorities of the certificate of no present interest. The offer itself was described as being "final". The MOU was described as an irrevocable sale of the farm. All these factors pointed towards the suggestion that the parties intended to be bound by the final offer and the MOU at least when the regulatory approvals were through. Once C the approvals were through the agreement became enforceable. All the essential elements of a contract were present and all that remained was for the parties to prepare the contract document and sign it. The parties intended to be bound by these agreements. The farm was still available and had not yet been sold to any other party. The applicant was entitled to specific performance. D

Cases referred to

Premier, Free State & Ors v *Firedom Free State (Pty) Ltd* 2000 3 (SA) 413 (SCA)

R & D Construction Group Ltd v *Hallam Land Mgmt Ltd* [2009] CSOH 128

Southernport Developments (Pty) Ltd v *Transnet Ltd* [2005] 2 All SA 16 (SCA) E

Case information

Z T Zvobgo, for the applicant

T Hove, for the respondent

Judgment

Dube J: This is an application for specific performance of an agreement of F sale entered into by the parties.

The applicant is a company which is involved in the agribusiness. The respondents are husband and wife and are the owners of Wamica Farm, hereinafter referred to as, "the farm."

The salient facts of this matter may be summarised as follows. On 6 December 2012 G the applicant company made a written "Final offer for the acquisition of Wamica Farm" to first and second respondents .The offer describes the farm, outlines how the valuation was conducted and specifies the full price offered and proposed payment terms. The respondents accepted and signed the offer document. Following this offer, the parties signed an Irrevocable H

Dube J

A Memorandum of Understanding, MOU, on the same day .The aim and objective of the MOU was:

> "…to set out the basis upon which the transaction shall be concluded and to set out rights and obligations upon each party leading to the signing of a SALE AGREEMENT between the parties. It is the parties understanding that the sale agreement be concluded immediately upon the successful completion of the B necessary regulatory approvals by the Ministry of Agriculture, Land & Rural Resettlement".

The parties agreed that the transaction was irrevocable. The parties agreed to be bound to carry out in good faith all actions as may be necessary to expedite the transfer and registration of the farm. Such actions included the obtaining of a certificate of no present interest from the relevant authority C and the transfer of the farm. The MOU, was to terminate upon the signature of a sale agreement .In the event of the sale agreement not being entered into within 60 days from the date of signature of this agreement, then the MOU, would terminate and all rights and obligations flowing from it would fall away. The parties agreed not to enter into any other discussion or agreement with any other party relating to the farm until the expiry of the MOU, without D written consent of the other party. The parties endeavoured to make all efforts to ensure that the sale was concluded and to best advantage.

All that was holding back the signing of the agreement of sale was the issuance of the certificate .This is recorded in the Irrevocable Memorandum of Understanding as follows,

> E "The aims and objectives of this Memorandum of Understanding shall be to set out the basis upon which the transaction shall be concluded and to set out rights and obligations upon each party leading to the signing of a sale agreement between the parties. It is the parties understanding that the sale agreement be concluded immediately upon the successful completion of the necessary regulatory approvals by the ministry of Agriculture, Land and Rural Resettlement"

F The certificate of no interest was issued in December 2012. The applicant prepared the written agreement of sale in anticipation of the issuance of the certificate no present interest from the Ministry of Agriculture Lands and Rural Resettlement, the relevant authority. The agreement of sale was not subsequently signed as the first and second respondent did not co-operate. On 16 March 2013 the applicant learnt that respondents were attempting G to sell the property to someone else through the third respondent. The farm was advertised for sale and the respondents were now attempting to sell subdivided portions of the farm.

The applicant avers that a binding contact was concluded between the parties. That the first and second respondents breached both the agreement concluded H in terms of the offer document and the MOU. The applicant alleges that the

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applicants deliberately withheld the "Certificate of No Present Interest" A from the respondents and consciously delayed the signing of the written agreement of sale and now seek to rely on clause 6 of the MOU which states that the memorandum would terminate after 60 days from the date it is signed by the parties.

The applicant seeks an order declaring that a valid agreement of sale of the B farm exists between the parties and secondly an order directing the first and second respondents to sign the written agreement of sale upon payment of US$50 000 by applicant and thirdly an order directing transfer of the property into the name of the applicant.

The respondents are opposed to the application. They contend that the parties did not enter into a sale agreement within the *dies inducia* of 60 days C provided for in the said document resulting in the termination of the MOU and therefore that all rights and obligations of the parties fell away. Further that as the parties did not enter into an agreement of sale, applicant cannot seek an order for specific performance as there is no binding contract.

The issue is whether a valid agreement of sale exists between the parties D entitling the applicant to specific performance. It is important to determine what type of agreement the parties entered into first. The first document signed by the parties, the final offer, constitutes an offer by the applicant. It is clear from the offer that an agreement of sale would be concluded at a subsequent stage. The offer was subject to the acquisition of a certificate of no present interest from the relevant authority. In order to record this E fact the parties entered into a memorandum of understanding. The MOU recorded that a contract would only be concluded after the certificate of no present interest had been granted. The contract was subject to the happening of a future event. The final offer constitutes a preliminary agreement where the parties would sign another contract. The parties had agreed on the key F terms of the contract but had not signed the actual contract and agreed to be bound to carry out, in good faith all the actions as, may be necessary to expedite the transfer and registration of the farm. In the event of a dispute, the parties would attempt to resolve it by discussion and conciliation, failing which the dispute would be referred to arbitration. These facts disclose an G agreement to agree in the future and in good faith. The objective, which was to bind the parties to agree to enter into a final contract, did not happen. No agreement of sale was entered into. This scenario is distinguishable from a contract of sale subject to a suspensive condition which comes into effect on fulfilment of a specified condition. In this case, there was no contract of sale entered into as envisaged. The court is being requested to determine H

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A whether a valid agreement of sale came into existence between the parties entitling the applicant to specific performance

Generally an agreement to agree in the future and enter into a proposed final agreement does not constitute a contract between the parties as they lack legal certainty. The parties still have a discretion over whether to agree or disagree. In *Premier, Free State and Ors* v *Firedom Free State (Pty) Ltd*B 2000 (3) SA 413 (SCA) the court held that that:

> "An agreement that parties will negotiate to conclude another agreement is not enforceable, because the absolute discretion is vested in the parties to agree or disagree"

The courts have also taken the view that it is possible to conclude an C agreement that has an aspect that will be determined in the future. Each case should be determined on its own merits. In the Scottish case of *R & D Construction Group Ltd* v *Hallam Land Management Ltd* [2009] CSOH 128, the parties entered into an agreement to agree in the future. The case involved an option to purchase land. The agreement comprised an offer D and acceptance which was subject to an agreement on the purchase price and subject to the defendant obtaining a planning permission. The parties had agreed on all essential elements of the agreement except the purchase price. The defendant had seven months to complete the purchase. The court held that where a dispute resolution mechanism exists, then an agreement to agree will be held to be enforceable. The court took a commercial and E practical view that unless there is a reason for not giving effect to such an agreement, then the court should find it enforceable. It considered whether the parties intended to create contractual relations. The court (Lord Hodge) held at para [39] that

> "while the courts require legal certainty and do not enforce an agreement if parties have not sufficiently formulated an intention, judges have repeatedly stated the F position that that where they are satisfied that that the parties intended to enter into binding obligations they should attempt, so far as is consistent with essential principle and binding precedent, to give effect to the agreement and not be the destroyer, of bargains …"

Similar sentiments were expressed in *Southernport Developments (Pty) Ltd* v *Transnet Ltd* [2005] 2 All SA 16 (SCA). The parties here signed a written G agreement which was subject to a suspensive condition requiring the plaintiff to obtain a casino licence. A second agreement was concluded providing for the conclusion of a definitive agreement. The parties were to negotiate in good faith. The second agreement had a provided for referral to arbitration in the event of a dispute arising. The court held that as the parties had reached H agreement on all the essential elements of the ultimate agreement and the

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agreement provided for arbitration, this rendered the agreement sufficiently A certain and enforceable.

What is clear from the foregoing is that an agreement to agree or negotiate on a future and final contract is enforceable where the parties have agreed on the essential terms of the contract and the agreement provides for a dispute resolution mechanism to resolve the unresolved issues. I intend to determine whether the preliminary agreements by the parties are enforceable. B

I make the observation that the parties agreed on the key and essential terms of the contract: the price, *merx* and payment terms. There does not seem to be any dispute as regards the terms of the contract .There is provision for a dispute resolution process in the MOU.

Where parties have agreed on key elements of the contract it is essential that C the court enquire into whether the parties intended to enter into a binding contract. It is essential to examine the terms of the MOU and final offer in order to determine if there were any binding terms. This will assist the court in determining what the intention of the parties was when they entered into the agreements. The following observations are pertinent. The final offer D was irrevocable. The parties promised to negotiate in good faith. There is a dispute resolution mechanism. The agreement of sale was to be concluded and signed immediately upon the successful completion of the approvals by the authorities of the certificate of no present interest. The offer itself is described as being "final". That the MOU was an irrevocable sale of the farm. All these factors point towards the suggestion that the parties intended E to be bound by the final offer and the MOU at least when the regulatory approvals were through.

At the time of the final offer and the MOU a condition precedent to that sale had not been met. The court has also considered that it was not competent for the parties to enter into the contract without the authority of the relevant F ministry. Any contract for the sale of the land entered into at that stage would have been a nullity a condition precedent to the sale had not been met and a contract could not have been finalised at that stage The parties expressed an intention to be bound only when the regulatory approvals were through and the parties concluded and signed the agreement of sale. That intention controls. Once the approvals were through the agreement became G enforceable.

I am of the view that where the agreement to agree contains key or sufficient and definite terms of agreement even though a few details still have to be worked out and there is a dispute resolution mechanism provided for as in this case, this renders the agreement certain and enforceable. The agreements H

Dube J

A entered into by the parties are enforceable. All the key terms were agreed to in the final offer and the MOU. In fact all the essential elements of a contract were present and all that remained was for the parties to prepare the contract document and sign it. It is for these reasons that I conclude that the parties intended to be bound by these agreements

B The respondents avoided and ignored applicant's request to finalise the contract. The respondents did not endeavour to ensure that the final contract was signed and concluded. Instead they tried to sell divided portions of the farm to other people contrary to the agreement. The respondents played a hide and seek game and deliberately delayed the signing of the final contract until the 60 days had elapsed and ultimately refused to sign the final agreement. C They did not act in good faith. I find therefore that that the respondents are in breach of contract.

An order for specific performance can only be granted where the applicant can show the existence of a binding contract between the parties and further that the respondent breached the terms of that contract. The farm is still available and has not yet been sold to any other party. The applicant is D entitled to specific performance.

In the result it is ordered as follows

1. It is hereby declared that a valid and binding agreement of sale exists between the applicant and first and second respondents for the sale of certain piece of land situate in the District of Chegutu, called Wamica Farm, E measuring 644.7952 hectares and held under Deed of Transfer No. 3560/2001, SG No 1044/2000.
2. The first and second respondents be and are hereby ordered to sign the written agreement of sale with the applicant within 48 hours of this order subject to the payment of the amount of US$50 000 by the applicant F upon signing of the written agreement of sale, failing which the

Sheriff of the High Court be and is hereby directed and empowered to sign the agreement on their behalf;

3. That upon payment to first and second respondents of sum of US$330 000 by the applicant, first and second respondents be and are hereby ordered G to immediately cause transfer of certain piece of land situate in the District of Chegutu, called Wamica Farm, measuring 644.7952 hectares and held under Deed of Transfer No. 3560/2001, SG No. 1044/2000 to be effected into the name of the applicant failing which the Sheriff of the High Court be and is hereby directed and empowered to cause the property to be transferred into the name of the applicant and to do all H things and sign all documents necessary to effect such transfer;

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4. That first and second respondent shall bear the costs of suit.

Dube, Manikai & Hwacha, applicant's legal practitioners

Musunga and Associates, first and second respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/ZUVARIMWE & ANOR v NARAN & ANOR 2014 (1) ZLR 449 (H)

ZUVARIMWE & ANOR v NARAN & ANOR 2014 (1) ZLR 449 (H)

Citation	2014 (1) ZLR 449 (H)
Case No	Judgment No. HH-161-14
Court	High Court, Harare
Judge	Dube J
Heard	14 October 2013; *CAV*
Judgment	2 April 2014
Counsel	*L Mauwa,* for the plaintiff *P Ranchod*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C *Delict – actio injuriarum – malicious institution of legal proceedings – elements – distinction from wrongful arrest – when person making report to police may be liable for wrongful arrest*

Headnote

D The delict of wrongful arrest involves the wrongful deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Where an arrest is effected by the

police, a defendant is only liable if it can be established that the police acted on his directions, orders or command. Liability for wrongful arrest is strict: a party is not E required to show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. To succeed in an action based on wrongful arrest, the plaintiff must show that the defendant himself, or someone acting as his agent or employee, deprived him of his liberty. Where the defendant merely furnishes the police with information on the strength of which the latter decides to arrest the plaintiff, the defendant F does not effect the arrest. The first defendant admits that he furnished the police with information leading to the plaintiff's arrest. If the arrest was unlawful, the defendant cannot be liable for wrongful arrest and deprivation of liberty, as the discretion lay with the police whether to arrest the plaintiffs.

G To succeed in an action for malicious prosecution, on the other hand, the plaintiff must show: (a) that the defendant set the law in motion (instigated or instituted the prosecution) against him; (b) that at the time he instigated or instituted the legal proceedings the defendant had no reasonable and probable cause to do so; (c) that the defendant was actuated by express or implied malice (any indirect and improper motive) to set the law in H motion against him; (d) that the prosecution terminated in his favour; and

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(e) that he suffered damages as a result of the prosecution in determining A whether the defendant had a reasonable suspicion that the offence complained of was committed by the plaintiff, the court must consider whether the defendant acted as an honest man would act; not merely on wild suspicion, but on suspicion which had a reasonable basis. The suspicion need not be a matter of certainty, or even probability, it must not, at the other extreme, be vague, remote or tenuous. It is, perhaps, a B question of a feasible possibility, a matter of likelihood.

Cases cited

Bande v *Muchinguri* 1999 (1) ZLR 476 (H)

Beckenstrater v *Rottcher & Anor* 1955 (1) SA 129 (A) C

Danono v *Min of Prisons* 1973 (4) SA 259 (C)

Heyns v *Venter* 2004 (3) SA 200 (T)

Lourenco v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 15 (S)

Mapuranga v *Mangate* 1997 (1) ZLR 64 (H)

Muguti v *Sunduza* HH-45-11 D

Munyai v *Chikurira & Anor* 1992 (1) ZLR 145 (H)

Rademeyer v *van der Merwe* (1895) 12 SC 450

Relyant Trading (Pvt) Ltd v *Shongwe & Anor* [2007] 1 All SA 375 (SCA)

Rini v *Carr* 1921 EDL 239

Rossouw v *Boshoff* 1945 CPD 137

Smith v *Meyerton* 1971 (1) SA 137 (T) E

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

United Air Charters (Pvt) Ltd v J*arman* 1994 (2) ZLR 341 (S)

Case information

L Mauwa , for the plaintiffs F

P Ranchod, for the defendants

Judgment

Dube J: This is an application for absolution from the instance. The plaintiffs were friends. The first defendant is the managing director of the second defendant.

On 19 November 2008 the plaintiffs, together with Kudzanai Zaranyika G who is now deceased, were arrested on charges of extortion. The allegations against them were that they had extorted US$5 000 from the first defendant after falsely accusing him of dealing in foreign currency. The plaintiffs were arrested and detained at Matapi and Rhodesville Police Stations. They were later placed on remand and were tried on charges of extortion and acquitted. H

2014 (1) ZLR p451

Dube J

A The first plaintiff, who was employed in the President's Office as a security aide, was charged with misconduct on the basis that his arrest, detention and appearance in court was unbecoming and had brought the office into disrepute. The first plaintiff lost his employment and was forced to retire.

The first plaintiff avers that the loss of his employment stemmed directly B from the actions of the defendants, who set the law into motion by laying false charges of extortion against him. The plaintiffs claim damages in the sum of US$100 000 each for *contumelia*, deprivation of freedom, discomfort suffered and malicious prosecution.

The first plaintiff testified as follows. The initial allegations against them were that they had robbed the first defendant of money. The allegations were that he C had approached the first defendant and pretended that he was a police officer. Later charges of extortion were levelled against them. He had previously introduced some Congolese to the first defendant and they used to exchange money together. He also had dealings with the Congolese because he used to sell timber to them. He had not seen them for about 4 months when he was arrested. When he was arrested the police enquired from him where the D Congolese were. After his arrest the police scrolled his phonebook and found the name of the second plaintiff. The police instructed him to phone him to come to Newlands Shopping Centre where they were. Zaranyika came in the company of the second plaintiff and they were immediately arrested. Both are former police. They were taken to CID Homicide and later detained at E Matapi Police Station. Later they were taken to Rhodesville police station. It was only after they were taken to Rhodesville police station that they learnt that the police were preferring extortion charges. They spent three days at Rhodesville Police Station and were taken to court for initial remand on 27 November and remanded in custody

F The first plaintiff asserts that he suffered psychological injuries. The police assaulted him by punching and kicking him. He is claiming $15 000 for unlawful arrest and detention on the basis that he was arrested for a case he did not know. He claims $20 000 for loss of dignity and embarrassment. It was his first time to be put in handcuffs and his family and neighbours saw him in handcuffs and in the back of a truck, and this caused some embarrassment G to him. He was employed in the President's Office when the cause of action arose. He had a good reputation as a CIO officer. When people saw him in this state they started shouting that he was a thief, and that all the property in his house was stolen.

He retired because the CIO suggested that he retire on his own or he would be H discharged. The first plaintiff testified that he did not have payslips to prove

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his claim for loss of employment and future wages. He is currently involved A in fishing. It is a seasonal activity and he does not realise much from it. His catch averages between ten to twenty kilogrammes per day. The defendants made a false report of extortion against him and the other plaintiffs. They were later tried and acquitted. He was forced to retire because of his arrest. He claims that his liberty was reduced as a result of this arrest. He in addition to losing his employment suffered a lot of embarrassment. B

The first plaintiff avers that the defendants made a false report against him and that he suffered damages as a result of the arrest. His liberty was reduced and he suffered a lot of embarrassment. He lost his employment. He is claiming $30 000 for loss of employment and future wages, $30 000 for pain and suffering during detention, $30 000 for loss of dignity and embarrassment, C legal costs amounting to $5 000 and $15 000 for unlawful arrest. He claims a total of $100 000. He was earning $1 200 a month.

After his arrest he was taken to his house because the police wanted to search his house. When he was taken to his house, he was in handcuffs and he was made to jump off the car whilst in

handcuffs. He was driven in an open truck. The police searched his house and turned it up-side down. The D police took them to Zaranyika's house, where a search was conducted. The police wanted him to pay $3000 so that they could release him. They were concerned with recovery of the money. Whilst at remand prison he was kept in leg-irons and, when his family and friends visited him, they would see him in the leg-irons. Remand prison was filthy, infested with bed bugs and the toilets were dirty, and he was exposed to human waste during times he E had his meals. They went for six days without bathing.

The second plaintiff's evidence is as follows. He is a former police officer and is currently self-employed as a car dealer. On 20 November 2008 he was repairing his vehicle with Zaranyika when he received a call from the first plaintiff who indicated that he had had a breakdown and required to be F towed. They went to Newlands Shopping Centre, where they were arrested by the police on their arrival. The police fired shots in the air and instructed them to lie down and then arrested them. The police demanded to know where they could locate the Congolese who had duped the defendants of $5 000 using fake US dollars. He had no knowledge of the Congolese and does G not know what happened between the defendants and the Congolese. They were handcuffed and taken to CID Homicide. On their way to Homicide, the police searched them and took $20 from him and $100 and 1 050 rands from Zaranyika. They retorted that this was part of the money that was extorted from the defendants. They were advised that the allegations against them were that they had robbed the defendants using a firearm. They were H

Dube J

A taken to CID Homicide which refused to pursue the matter, and ordered the Internal Investigations department which had brought them to take them away. Before they left, the first defendant arrived at the police station and it was his first time to meet him, but he was known to the first plaintiff. The first defendant confirmed to the police that we were the people who had extorted him of his money. The issue of the Congolese was not mentioned.

B They were taken to Matapi Police Station where they were detained on charges of extortion. The next day they were taken, together with the first plaintiff, to Masasa, to the second defendant's business place and later returned to Matapi Police Station. Later they were taken to Rhodesville police station. They spent about 3 days at Rhodesville Police Station and were taken to C court on 27 November and were remanded in custody for six days. They were later acquitted on the basis that the State's case lacked sufficient evidence.

He testified that the allegations were that they had extorted money from the second defendant, who was represented by the first defendant. If the first defendant had not confirmed that they were extorted of money they would D not have been arrested. The defendants knew that it was a false allegation and seemed to just want to recover some money.

He suffered damages for unlawful detention and claims $30 000 for pain and suffering, $20 000 for loss of dignity and embarrassment, $25 000 for loss of business and $5 000 in legal fees. Had it not been for the conduct of the defendants, he would not have been detained. The detention was unlawful E as he had not committed any offence. The claim for pain and suffering arises from the detention at Matapi Police Station. The rooms there were very filthy, there was no running water and they were denied access to their relatives. The conditions were the same at Rhodesville Police Station. At the time they were taken to remand prison, there was an outbreak of cholera and there was no running water. They went without baths. They survived by F chance. All these factors contribute towards his claim for pain and suffering.

His claim for loss of dignity and embarrassment is based on the following factors. When they were arrested at Newlands Shopping Centre, the police fired shots in the air and people crowded to witness their arrest. They were G handcuffed in public. He lost dignity as people thought that he was a criminal because of the firing of shots and the subsequent arrest. He is well known at the shopping centre.

With regard to loss of business, he testified that he is in the business of selling cars. The people who used to give him business have lost trust in him since he was arrested and they no longer give him business. He has H lost customers. He used to make an average of between $800 to $1 000 per

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week in commission. He has no invoice books to prove the claim. He has A no receipt to prove his legal costs. He has no visible injuries.

At the close of the plaintiff's case the defendants applied for absolution from the instance. The defendants submitted as follows. The plaintiffs failed to lead any evidence in support of the claim for damages allegedly suffered by them. The first plaintiff failed to produce a payslip in support of his claim B for loss of earnings. No receipt from his legal practitioners for legal costs incurred at the remand leaving or in respect of any legal representation was produced. Whilst the first plaintiff alleges that he was slapped by the police, he failed to lead any evidence in support of that claim. The first plaintiff failed to produce any medical report to prove that he suffered any injury at the hands C of the police or that any injury he may have suffered was attributable to the actions of the defendants. The defendants contend that the plaintiffs were unable to attribute any wrongful conduct on the part of the second defendant.

The defendants maintained that the plaintiffs failed to establish a *prima facie* case against them in that the plaintiffs failed to adduce any evidence that the defendants were actuated by malice in making a report to the authorities. D The defendants assert that the claim for damages under the aforesaid heads is invalid and should not be granted. The second plaintiff failed to adduce evidence in support of his claim for loss of earnings. No proof of legal costs was tendered. The plaintiffs failed to prove a case against the second defendant, as no evidence of any alleged harm caused by the second defendant was led. E

The plaintiffs, in response, submitted that the conduct of the first defendant was exercised through the police and that he unlawfully caused the arrest and prosecution of the plaintiffs. The first plaintiff acknowledges that he failed to produce a payslip to prove his salary. He lost all his receipts given by his legal practitioners which he could have used to prove his claim for F legal costs. The plaintiffs maintained that it was clear in their evidence that they had suffered some inhumane treatment at the remand prison, where there was no food and clean water and they missed their families. The plaintiffs argue that, if the first defendant had not made the report and falsely identified the first plaintiff, they would not have been arrested and detained. G The first plaintiff argued that he was fired from employment because of the first defendant's conduct of reporting to the police and causing his wrongful arrest. The plaintiffs contend that all injuries and damages sustained are attributable to the actions of the defendants and hence the defendants should pay damages for these wrongs. H

2014 (1) ZLR p455

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A Both plaintiffs contend that they have made out a *prima facie* case. The test at this stage of proceedings was reiterated in *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S) where the court remarked as follows,

> "… a plaintiff will successfully withstand such 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."

B See also *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E, *Lourenco Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 15 (S) at 158B-E and *Muguti* v *Sunduza* HH-45-11 for that proposition.

The evidence reveals that the second defendant is a company owned by the C first defendant. No action has been attributed to the second defendant. It was simply joined in because it is a company belonging to the first defendant. In fact the plaintiffs maintained that the money extorted belonged to the second defendant. No basis for this assertion was laid. There is no evidence that the company was a party to the report and subsequent arrest or harm caused to the plaintiffs. The plaintiffs admitted that second defendant played no part in the D arrest and subsequent arrest of the plaintiffs. There is simply no causal link.

The brief allegations are that the plaintiffs are friends. They teamed up with Zaranyika on 19 November 2008 and went to the defendants' business place. Whilst there they pretended that they wanted to buy bond paper. They were charged in United States dollars. They asked to see the first defendant and E arrested him for selling goods in foreign currency. They ordered the first defendant to drive to Central Police Station. On the way there, they demanded $15000 from him in order for them to release him. He gave them $5000 and they went away. A report was made and the police arrested the first plaintiff and he led them to arrest Zaranyika and the second plaintiff.

F The delict of wrongful arrest involves the wrongful deprivation of a person's liberty. In *Munyai* v *Chikuriva & Anor* 1992 (1) ZLR 145 (H), the court defined wrongful arrest and imprisonment as consisting of arresting and holding a person without legal justification. The court further remarked that, where an arrest is effected by the police, a defendant is only liable if it can be established that the police acted on his directions, orders or command. G Liability for wrongful arrest is strict, a party is not required to show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. See *Minister of Justice* v *Hofmeye*r 1993 (3) SA 131 (A) and *Danono* v *Minister of Prisons* 1973 (4) SA 259 (C).

In *Smith* v *Meyerton* 1971 (1) SA 137 (T) the court held that, to succeed H in an action based on wrongful arrest, the plaintiff must show that the

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defendant himself, or someone acting as his agent or employee deprived A him of his liberty. In *Relyant Trading (Pvt) Ltd* v *Shongwe & Anor* (2005) SCA 111 RSA, the court relied on the cases of *Rini* v *Carr* 1921 EDL 239 and *Rademeyer* v *van der Merwe* (1895) 12 SC 450 and held that, where a defendant merely furnishes a police affidavit with information on the strength of which the latter decides to arrest the plaintiff, the defendant does not effect the arrest. The first defendant admits that he furnished the B police with information leading to the defendants' arrest. The defendants are not liable for wrongful arrest as they merely made the report. Once it is shown that the arrest was not unlawful, the defendants cannot be liable for wrongful arrest and deprivation of liberty. The discretion lay with the police whether or not to arrest the plaintiffs. The defendants did not effect the arrest and are therefore not liable for the delict of wrongful arrest. The C claim for wrongful arrest must fail.

The plaintiffs also claim damages for malicious prosecution. They submitted that the conduct by the first defendant was exercised through malice and unlawfulness, resulting in the malicious prosecution of the plaintiffs. The requirements for malicious prosecution are a wrongful and intentional assault D on the dignity of a person, compromising his good name and privacy. See *Heyns* v *Venter* 2004 (3) SA 200 (T) and *Mapuranga* v *Mungate* 1997 (1) ZLR 64 (H). In *Bande* v *Muchinguri* 1999 (1) ZLR 476 (H), the court laid out the requirements of the delict as follows:

> "(a) that the defendant set the law in motion (instigated or instituted the E prosecution) against him;
>
> (b) that at the time he instigated or instituted the legal proceedings the defendant was without any reasonable and probable cause to do so;
>
> (c) that the defendant was actuated by express or implied malice (any indirect and improper motive) to set the law in motion against him;
>
> (d) that the prosecution terminated in his favour; and F
>
> (e) that he suffered damages as a result of the prosecution: *Nyawo* v *Kadada* S-45-92"

A prosecution ensued. The plaintiffs were arrested and detained and claim damages under various categories. The plaintiffs were prosecuted and acquitted. The approach to take, in determining whether a defendant had G reasonable suspicion that the offence complained of was committed by the plaintiff, was enunciated in *Rossouw* v *Boshoff* 1945 CPD 137 as follows,

> "When one comes to consider whether he had reasonable grounds one must bear in mind that in exercising these powers he must act as an honest man would act, and not merely act on wild suspicion, but on suspicions which have a reasonable basis." H

Dube J

A See *Beckenstrater* v *Rottcher & Anor* 1955(1) SA 129 (A) where the court emphasised the approach to take as follows:

> "The suspicion entertained by the peace officer must, accordingly, be reasonable; that is whereas the suspicion need not be a matter of certainty, or even probability, it must not, at the other extreme, be vague, remote or tenuous. It is, perhaps, a question of a feasible possibility, a matter of likelihood."

B The first plaintiff made a report to the police. The fuller details of the report are not known. The first defendant had been extorted of some money by the plaintiffs and some other people whom he suspected to be Congolese. The first defendant was known to the first plaintiff and the Congolese as he had previously dealt with them. The allegations in the State outline are C that he saw him during

the commission of the offence. It is unlikely that he would fail to recognise him if he was involved in the commission of the offence, as he knew him previously. The first plaintiff had links with the Congolese and had introduced them to the first defendant. He used to sell timber to them and helped them to exchange foreign currency with the first defendant. There is a nexus between the Congolese and the first plaintiff. D The first plaintiff claimed that the reason why he made a report against him is that he suspected that he had connived with the Congolese to extort him of money. The police alleged that he had been in the company of the Congolese. The suspicions on which the police arrested them were reasonable, as they were told that a person known to the first defendant had come and extorted E money from him. There was reasonable suspicion of commission of an offence. The second plaintiff was a friend of the first plaintiff. The allegations are that he was in the company of the first plaintiff when the offence was committed. No evidence was led to reveal if a report was made in respect of second plaintiff. It seems that he was arrested after police investigations. The first defendant was not shown to have been involved in his arrest. The F first defendant only confirmed that he was also involved at CID Homicide after he had already been arrested.

The evidence led did not establish that the report to the police was actuated by any malice. The first defendant just made a report and let the police do their work. There is nothing to suggest that he was involved in the actual G arrest and the investigations that ensued. The plaintiffs have not been able to show that the prosecution was instigated by the first defendant, nor that the legal proceedings were without any reasonable or probable cause or that the defendant was actuated by malice. Once the plaintiffs have failed to show any wrong doing on the part of the first defendant, that is the end H of the story. The question of damages does not arise.

2014 (1) ZLR p458

Dube J

The plaintiffs have not proved a *prima facie* case against the defendants. A There is no evidence to support the plaintiffs' case. The defendants have no case to answer. I am not satisfied that sufficient evidence has been adduced which this court, acting reasonably, might find for the plaintiffs if the matter were to proceed to the defence case.

In the result, I order as follows: B

1. Absolution from the instance is granted.
2. Costs follow the event.

Mutezo & Mugomeza, firstand second plaintiffs' legal practitioners

Hussein Ranchod & Co, firstand second defendants' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/GWATIDZO NO v FIRST TRANSFER SECURITIES (PVT) LTD & ORS 2014 (1) ZLR 459 (H)

GWATIDZO NO v FIRST TRANSFER SECURITIES (PVT) LTD & ORS 2014 (1) ZLR 459 (H)

2014 (1) ZLR p459

Citation	2014 (1) ZLR 459 (H)
Case No	Judgment No. HH-165-14
Court	High Court, Harare
Judge	Makoni J
Heard	11 November 2013; *CAV*

Judgment 3 April 2014

Counsel *L Madhuku* for the applicant
No appearance for the first and second respondents
D Ochieng, for the third respondent

Case Type Chamber application

Annotations No case annotations to date

Flynote

Company – liquidation – powers of liquidator – selling shares belonging to company under liquidation – Securities and Exchange Commission – Commission directing stockbrokers not to sell such shares – Commission having no power to issue such directive – courses open to Commission if aggrieved by act of liquidator – winding up – effect of winding up order – concursus creditorum – protection of the assets of company for benefit of creditors – powers of court in regard thereto

Stock exchange – Securities and Exchange Commission – powers – directive to stockbrokers not to dispose of shares of company in distress – such company already under liquidation and liquidator having ordered sale of such shares – Commission having no power to interfere with liquidator's decision

Headnote

The applicant was the liquidator of a company. In the process of executing his duties as such, he instructed the second respondent, a firm of stockbrokers, to sell various parcels of shares in the company's name. The stockbrokers sold portion of the shares and deposited the proceeds into a trust account established for that purpose. It later sold the balance of the shares but did not tender the proceeds, as the third respondent, the Securities and Exchange Commission, had issued a directive to the effect that the stockbrokers should stop selling any or all of the company shares and if it had already sold or transferred any such shares, to reverse the sales and cancel the registrations.

The applicant sought a declaratur that the Commission had no power to interfere with a liquidation process in the manner it has done. The basis for seeking the declaratur was that the third respondent's directive was unlawful, in that once a company is under liquidation only two

authorities can make decision relating to the process: the liquidator and the court. Any third party should seek leave of the court. It was further averred that even if the third respondent has such powers these cannot be exercised arbitrarily.

The application was challenged on the ground there was no such directive to stop the applicant from dealing with the assets of the company. The Commission had issued a directive to securities companies dealing with shares of firms in distress not to dispose of such shares without obtaining prior approval from the Commission. It was also argued that the Commission was acting in terms of powers conferred on it by s 4 of the Securities and Exchange Act [*Chapter 24:25*]. Under s 4(2), the Commission was empowered to issue guidelines, notices and directives to securities dealing firms, and had acted in terms of that power. It did not issue the directive to the liquidator and therefore did not interfere with the liquidation process. It would be failing in its duties if it did not act where there was systemic risk. The shares that the stockbrokers had been instructed to dispose of were held in nominee accounts.

Held, that there was a disagreement between the applicant and the Commission regarding the ownership of the shares that the applicant had instructed the stockbrokers to sell. Instead of the Commission resolving the issue with the applicant, it issued the directive to a third party, but targeted at the applicant. The fact that the directive was not directed to the applicant was irrelevant: the intended result was that the applicant, as liquidator, could not perform his functions in relation to those shares.

Held, further, that where a company is in liquidation, the interests of all creditors are reserved in terms of the Companies Act [*Chapter 24:03*]. The effect of a winding up order is to protect the

assets of the company for the benefit of the creditors and a third party seeking to interfere with the duties of a liquidator regarding such assets has to seek the leave of F the court. The rationale thereof stems from the Roman Dutch law concept of *concursus creditorum,* whereby, after a winding up order is in place, nothing can be done by any of the creditors to alter the rights of any other creditors. In English law this is provided for in the *pari passu* rule. Once a company is in liquidation, any process that seeks to regulate the G liquidation should be done in terms of s 222(3) of the Companies Act, which provides that "any person aggrieved by an act or decision of the liquidator may apply to the court after notice of motion to the liquidator and therein the court may take such order as it thinks". There is nothing in the Securities Act and Exchange [*Chapter 24:25*] to suggest that the term "any person" would not apply to the Commission. H

Makoni J

A*Held,* further, that in terms of its powers under Securities and Exchange Act, the Commission is a regulatory body which has no powers to descend on individual transactions like it was trying to do *in casu.* Where it feels that its regulations have not been complied with, its remedy is to invoke any relevant conditions of the licence of the defaulting party. The Commission exceeded its mandate under the Act.

Case cited B

Walker v *Syfret NO* 1911 AD 141

Legislation considered

Companies Act [*Chapter 24:03*], ss 212 & 222(3)

C High Court Act [*Chapter 7:06*], ss 14 & 27

High Court Rules 1971 (RGN 1047 of 1971), r 257

Securities and Exchange Act [*Chapter 24:25*], s 4(1) & (2); First Schedule, para 21

Case information

D*L Madhuku* for the applicant

No appearance for the first and second respondents

D Ochieng, for the third respondent

Judgment

Makoni J: On 11 November 2013 I gave an *ex tempore* judgment whereby I made the following order:

E "IT ORDERED THAT:

1. The third respondent's directive to first and second respondents barring them from selling and or registering the shares of Renaissance Securities (Pvt) Limited (In Liquidation) be and is hereby declared unlawful, void and of no force.
2. The third respondent shall pay costs of this application on the scale of legal F practitioner and own client."

The parties have now requested for written reasons. These are they.

The applicant approached this court on a certificate of urgency seeking the granting, of a Provisional Order. At the end of the hearing and by consent of both parties, I issued the above final order.

G The background to the matter is that the applicant is the liquidator of Renaissance Securities (Pvt) Ltd (in liquidation). (the company). In the process of executing his duties as such, he instructed the second respondent to sell various parcels of shares in the company's name.

Between 27 June 2013 and 9 July 2013 the second respondent sold shares H valued at $308 683.57. The amount was deposited into a trust account

Makoni J

established for that purpose. During the period between 28 June 2013 A and 22 July 2013, the second respondent also sold shares to the value of $434 167.14 The second respondent is yet to tender the purchase price of the shares to the applicant.

On 25 July 2013, the second respondent advised the applicant that the third respondent had issued a directive to the effect that the second respondent B stop selling any or all of the company shares and if it had already sold or transferred any such shares, to reserve the sales and cancel the registrations. Pursuant to the directive, the second respondent has since stopped dealing with the shares and it demanded the re-imbursement of the sum of $308 687.57.

The applicant then approached the court seeking a declaratur that the third C respondent has no power to interfere with a liquidation process in the manner it has done. The basis for seeking the declaratur is that the third respondent's directive is unlawful. Once a company is under liquidation, only two authorities can make a decision relating to the process, that is, the liquidator and the court. Any third party should seek leave of the court. It was further averred that even if the third respondent has such powers, these D cannot be exercised arbitrarily.

The application is challenged on the basis that there is no such directive to stop the applicant from dealing with the assets of the company. The third respondent issued a directive to securities companies dealing with shares of firms in distress not to dispose of such shares without obtaining prior approval from it. E

It was further averred that the applicant seeks to have the decision of the third respondent reviewed in terms of the s 27 High Court Act [*Chapter 7:06*]. The application does not comply with Order 33, r 257 and therefore it is a nullity.

It was further averred that the third respondent was acting in terms of powers F conferred on it by s 4 of the Securities and Exchange Act [*Chapter 24:25*] ("the Act")

Nature of the application

Mr *Ochieng* submitted that, as the applicant was seeking final relief, it can G only obtain that relief by way of review as provided for in terms of s 27 of the High Court Act. The applicant was moving the court to set aside the directive on the basis that the third respondent acted in a flagrantly unlawful manner. The applicant should have therefore complied with Order 33, r 257.

Mr Madhuku submitted that the application is for a declaratur filed in terms of s 14 of the High Court Act [Chapter 7:06] and not an application for review. H

Makoni J

A It is clear that what the applicant seeks is a declaration. Para 6 of the founding affidavit sets out the relief that the applicant seeks "to ask that the court declare as unlawful…". The applicant again make the same point in para 11 of the founding affidavit. In fact the third respondent, in challenging whether the matter could be heard on an urgent basis, used the fact that the applicant was seeking a declaratur whose effect is find in nature. Mr Ochieng argued that it B was not competent to seek final relief in an urgent chamber application. The argument was not whether the applicant had adopted the wrong procedure of seeking a declaration instead of a review. The third respondent cannot accept that the applicant seeks a declaration when it suits it and turn around when it does not.

C **Whether the third respondent had power to act in the manner it did**

Mr *Madhuku* submitted that once a company is in liquidation, any process that seeks to regulate it should be done in terms of s 212 of the Companies Act [*Chapter 24:03*]. The directive that the third respondent made should have been made through the court. He argued, in the alternative, that if the third respondent had the power, the manner in which the directive was issued D is clearly unlawful.

In response Mr *Ochieng* argued that the applicant's case must stand or fall on its founding affidavit. He submitted that in para 7.7 of the founding affidavit, the applicant states that he has been advised by the second respondent that the third respondent had directed it to stop selling any or all of the

company's E shares. The applicant goes on to state, in para 9.51, that as liquidator he has a clear right to sell the companies' assets including its shares for the beneficial winding up of the company for all the creditors. The nub of the applicant's case is that the third respondent issued a directive to stop the applicant from dealing with the assets of the company in liquidation. He submitted that this F did not happen. What happened is as contained in para 35 of the opposing affidavit, i.e. the third respondent issued a directive to all securities dealing firms instructing them not to carry out disposal instructions for firms that are either on suspension or under liquidation. He further submitted that the applicant is attacking a directive that does not exist.

I might as well, at this stage, deal with this point. It is, in my view, a question G of semantics. The third respondent puts the applicant's issue as towhether the third respondent issued a directive to stop the applicant from dealing with the assets of the company in liquidation.

As is clear from the papers, there was a disagreement between the applicant and the third respondent regarding the ownership of the shares that the H applicant had instructed the second respondent to sell. Instead of the third

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Makoni J

respondent resolving the issue with the applicant, it issued the directive to A a third party but targeted at the applicant. The fact that the directive was not directed to the applicant is neither here nor there. The intended result was that the applicant, as liquidator, could not perform his functions in relation to those shares. Paragraph 14 of the opposing affidavit clearly sets out the third respondent's objective:

> "Third respondent has a duty, in terms of s 4(1) of the Act, to provide high levels B of investor protection. Third respondent cannot, therefore, allow the sale of shares whose ownership in doubt, for the benefit of a licensed broker… The applicant has not proven that the company in liquidation held its own shares in nominee accounts, nor has he taken full steps to ascertain the ownership of those shares. His hurry to sell those shares without taking the necessary procedures to ascertain their ownership raises suspicion". C

Paragraph 35 of the same affidavit also confirms the above when the deponent states –

> "This prompted third respondent to issue a directive to all securities dealing firms instructing them not to carry out disposal instructions for firms that are either on suspension; are under liquidation … without obtaining approval from D third respondent".

It is clear from the above that the directive that the third respondent issued to the second respondent stopped the applicant from dealing with the assets of the company as he deemed fit.

Mr *Ochieng* also submitted that the third respondent was set up in terms of E the Act. Section 4(1) sets one its function. Section 4(2) empowers the third respondent to issue guidelines, notices and directives to securities dealing firms. The third respondent acted in terms of that power. It did not issue the directive to the liquidator and therefore did not interfere with liquidation process. It would be failing in its duties if it did not act where there is systemic risk. The shares that the second respondent had been instructed to dispose of F were held in nominee accounts. The third respondent did not interfere with the liquidation process and that liquidation is not a shield to regulation. The applicant could have sought approval from the third respondent.

At the centre of the dispute between the applicant and the third respondent G are the shares that the applicant instructed the second respondent to dispose of. It is the applicant's contention that those shares belong to the company, while the third respondent contends that they belong to several clients of the company. In the course of carrying out his duties as liquidator, the applicant instructed that these shares be sold and the third respondent issued the directive in issue. H

Makoni J

A Once a company is in liquidation, any process that seeks to regulate the liquidation should be done in terms of s 222(3) Companies Act [*Chapter 24:03*]. Section 212 (3) provides:

> "*Any person* aggrieved by an act or decision of the liquidator may apply to the court after notice of motion to the liquidator and therein the court may make such order as it thinks" (my own emphasis).

B The applicant made a decision to dispose of the shares in issue and he instructed the second respondent to deal with them. If the third respondent had any issues about the disposal, he should have had recourse to s 222(3) of the Companies Act [*Chapter 24:03*]. In terms of s 4(3) and Clause

21 of the First Schedule of the Act, the third applicant can issue written guidelines, and C notices for, *inter alia,* the proper conduct of licenced persons, and registered securities exchanges such as the second respondent. It can also issue such guidelines and notices for any other purpose that it considers will facilitate the achievement of its objectives or the exercise of its functions, or otherwise give effect to the Act. It is the third respondent's contention that it was acting in terms of these provisions, when it directed the second respondent not to D deal with the shares in issue. There is nothing in the Act to suggest that the third respondent does not full under "any person" within the contemplation of s 222(3) of the Companies Act [*Chapter 24:03*]. In liquidation investors, i.e. owners of shares, take on the hat of creditors. Whatever interests the third respondent sought to protect by its purported directive are the very reason why s 222(3) is there for.

E When a company is in liquidation, the interests of all creditors are reserved in terms of the Companies Act. The effect of a winding up order is to protect the assets of the company for the benefit of the creditors. Any thirty party seeking to interfere with the duties of a liquidator regarding the assets of a company has to seek leave of the court. This rationale stems from the Roman F Dutch Law concept of *concursus creditorum.* See *Walker* v *Syfret NO* 1911 AD 141 at p 160 where Lord de Villiers stated:.

> "The effect of a winding up order is to establish a *concursus creditorum*, and nothing can thereafter be allowed to done by any of the creditors to alter the right of other creditors.

G In English law this is provided for under the *pari passu* rule. The rule, as commonly understood, provides for equal treatment of creditors belonging to the same class and that all will be paid at the same time at the same fractional amount as all other creditors. There is nothing in the Act to suggest a departure from this position of the law. If that were so, it would open the system to abuse whereby powerful creditors can circumvent the liquidation H process by resorting to the third respondent. The third respondent is creature

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of stature and it cannot operate outside the strict confines of the relevant A statute. In terms of its powers as provided for in s 4 and supplemented by the first schedule it is a regulatory body which has no powers to descend on individual transactions as it is trying to do *in casu.* Where it feels that its regulations have not been complied with, its remedy is to invoke any relevant conditions of the licence of the defaulting party. It is clear from the above analysis that the third respondent exceeded its mandate as provided for s 4 B and the First Schedule to the Act.

The applicant further contends that even if it were to be held that the third respondent has such powers, it cannot exercise such powers arbitrarily.

As I have already pointed at in my judgment earlier, there is a disagreement C between the applicant and the third respondent regarding the ownership of the shares in issue. The applicant contents that the shares belong to the company as it is the registered nominee. He made various efforts to find beneficial owners, if any, of those shares and no-one claimed them. This is confirmed by the respondent. He then concluded that they belonged to the company. The third respondent contends that shares were registered in the name of D the company as a nominee share holder but are owned by beneficial owners.

The onus is on the third respondent to prove that the shares do not belong to the company but to a third party. Before doing that, it has no basis for challenging the company's ownership of the shares in question. It would be clearly unlawful for the third respondent to exercise its powers in terms of E the Act without ascertaining the owners of the shares. Such exercise of power would be arbitrary and would undermine the rights of the owner, which is the company in this case, unless proven otherwise.

In the result, I will issue the following order:

IT ORDERED THAT: F

1. The third respondent's directive to first and second respondents barring them from selling and or registering the shares of Renaissance Securities (Pvt) Limited (In Liquidation) be and is hereby declared unlawful, void and of no force.
2. The third respondent shall pay costs of this application on the scale of G legal practitioner and own client.

Coghlan Welsh & Guest, applicant's legal practitioners

Munida & Mudhara, first respondent's legal practitioners

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FORBES & THOMPSON (BULAWAYO) (PVT) LTD v MUSASIWA NO & ANOR 2014 (1) ZLR 467 (H)

Citation	2014 (1) ZLR 467 (H)
Case No	Judgment No. HH-54-14
Court	High Court, Bulawayo
Judge	Moyo J
Heard	10 April 2014
Judgment	10 April 2014
Counsel	*P Ncube* for the applicant *V Majoko* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C *Environment – prevention of activities which pollute the environment – closure of premises where activities which pollute the environment are carried out – need for such activities to be occurring before closure may be ordered – closure to have preventive measure taken not permissible*

D *Statutes – Environmental Management Act [Chapter 20:27] – s 37(4) – power of inspector of Environmental Management Agency to close premises – need for activity which is actually polluting the environment to be occurring – no power to close premises to have preventive measures taken*

Headnote

E An officer of the Environmental Management Agency inspected the applicant's mine and subsequently issued an order, purportedly in terms of s 37(4) of the Environmental Management Act [*Chapter 20:27*], closing the mine indefinitely and directing that certain measures be taken to prevent several possible causes of pollution. The applicant sought an urgent order declaring the order to close the mine to be invalid.

F*Held,* that the section provides that the Agency may order the closure of premises for a period not exceeding three weeks where an activity which pollutes the environment is carried out; or it can serve an order requiring that the owner or occupier takes such measures as may be specified for the prevention of harm to the environment; or it can take both such G steps. However, it is not entitled to close premises so as to protect the environment and have preventive measures taken unless some activity is taking place that is actually polluting the environment. Further, any closure in terms of the section may only be for up to three weeks.

Legislation considered

H Environmental Management Act [*Chapter 20:27*], s 37(4)

2014 (1) ZLR p468

Moyo J

Case information

P Ncube for the applicant A

V Majoko for the respondents

Judgment

Moyo J: This is an urgent application wherein the applicant seeks an order in the following terms:

"Pending the determination of this matter, it is ordered: B

1. That the applicant's Vumbachikwe Mine, be and is hereby allowed and permitted to resume operations in the normal manner pending the determination of this honourable court of the propriety of the order to close it issued by the first respondent dated 6 March 2014.
2. That the applicant be and is hereby directed to observe the provisions of the Environmental Management Act [*Chapter 20:27*] in carrying out and executing the provisional order number 1 above. C

The terms of the final order sought are as follows:

That you show cause to this honourable court why a final order should not be made in the following terms:

1. The order issued by the first respondent, dated 6 March 2014, to close the applicant's Vumbachikwe Mine, be and is hereby declared invalid and of no force or effect. D

Or alternatively

2. That the said order issued by the first respondent, in terms of section 37 (4) of the Environmental Management Act [*Chapter 20:27*] ("the EMA Act") to close the applicant's Vumbachikwe Mine, be and is hereby declared automatically suspended by virtue of the appeal dated 1h[1] March 2014 lodged by the applicant against that order to the E Director General in terms of section 129 of the EMA Act.

Or alternatively

3. That the said order issued by the first respondent dated h[2] March 2014, to close the applicant's Vumbachikwe Mine, be and is hereby stayed pending the hearing, determination and finalization of the applicant's appeal against the order lodged with the Director General on F 1h[3] March 2014.

General

4. This order shall remain operational notwithstanding the noting of an appeal.
5. That the first and second respondents, jointly and severally, the one G paying the other to be absolved, be and are hereby ordered to pay the costs of suit."

The background of this matter is that the applicant owns Vumbachikwe Mine. On 28 February 2014 the second respondent's officers visited the mine in the company of the first respondent. This visit was in terms of the Environmental Management Act [*Chapter 20:27*]. At the mine the second H

2014 (1) ZLR p469

Moyo J

A respondent's representatives made findings that were documented in a report marked "AA" as part of the opposing papers. A number of findings and recommendations were recorded in the said report.

On 6 March 2014, a document was then prepared by the first respondent. The document states in the caption "Circumstances Giving Rise To The Order".

B "Now therefore under and by virtue of the powers conferred upon me under section 37(4) of the Environmental Management Act [*Chapter 20:27*], I hereby order that:

1. You cease all operations within 7 days of receipt of this environmental protection order.
2. Install dust abatement measures around the crushing area.

3. Complete the paving of the CIL floor to prevent erosion and reduce surface C and ground water pollution *in the event of spillages* (emphasis mine)
4. Decommission the return water pad close to the tailings dam which is *not adequately protected*. (emphasis mine)
5. Put neutralizing chemicals on the culverts of the road for neutralizing *accidental spillages* (emphasis mine), from CIL and tailings dam. You are required to collect water samples for analysis from the discharge point 3 D times daily each time there is flow also conduct test for PH and free cyanide. ALL records of results should be kept and produced upon demand.
6. Clean up all tailings spillages from the tailings dam and the CIL plant, and ensure regular maintenance of the tailings management system to prevent blockages, overflows and accidental spillages.
7. Make full payments of all outstanding statutory environmental fees to the E Agency by 30 March 2014."

It goes on to say:

"Conditions of the order"

1. This order will be withdrawn on your compliance with the conditions contained above to the satisfaction of the Agency but otherwise shall remain F in full force and effective until it is withdrawn or set aside or suspended by an order of the Minister in terms of section 37 (7) of the Environmental Management Act [*Chapter 20:2*].
2. An inspection to monitor progress of compliance with this order may be done at all measurable times without prior notice."

G The applicant noted an appeal to the Director General in terms of section 129(1)(2) of the Act. The applicant's case is that the appeal lodged with the Director General in terms of s 129 of the Act suspends the order of the closure of the mine as s 130 provides that only an appeal of the authority does not suspend the decision of the authority, but there is no mention of the suspension or otherwise of the decision of the inspector, meaning that H the specific mention in s 130 of the non-suspension of the appeal to the

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Moyo J

Minister of the decision of the (authority) would mean that the decision of A the inspector is suspended by an appeal.

The respondents on their part contend that only the decisions of the superior court are the ones suspended by appeals and nothing else.

The applicant's case is also that the provisions of s 37(4) of the Act do not allow the first respondent to order the closure of the mine for the reasons B given in his order. Section 37(4) provides that:

"An officer or inspector may, if he or she considers it is necessary to act for the immediate protection of the environment, do either or both of the following:

(a) close any premises for a period not exceeding thre3 weeks where an activity which pollutes the environment contrary to the provisions of this Act or any standard issued under it is carried out; C

(b) serve an order in writing on the owner, user or occupier of any land or premises requiring that owner, user or occupier to take such measures as may be specifies in the order for the prevention of harm to the environment and natural resources."

Subsection (5) of the same section provides that an order issued in terms of subs 4(b) shall be of full force or effect until it is withdrawn, set aside or D superseded by an environmental protection order.

The first respondent invoked his powers in terms of section 37(4) as per his reference to this section in the order.

The applicant's contention is that the first respondent failed to observe the provisions of s 37(4), the section he purported to be acting upon, as E the applicant is not informed by the first respondent as to the reasons for closure. The applicant's contention is that the Act is clear as to what can lead to closure, that being an activity that pollutes the environment. The applicant's contention is that the first respondent's order for closure and the report that was prepared on 28 February 2014 do not identify or specify F any activity that the applicant is doing that pollutes the environment, but they have made recommendations and preventive measures, to take care of accidental occurrences which are expected in the normal course of business. The applicant's contention is that for the

respondents to invove s 37(4)(a) there must be a specific identified activity that is polluting the environment warranting closure of the mine. G

The respondents, on the other hand, contend that it is the statutory duty of the environment agency to take preventing and corrective steps to protect the environment generally. The first respondent goes further in his affidavit to state that s 37(4) empowers him if he considers it necessary to act immediately for the protection of the environment by either closing the premises or ordering H

A compliance with measures to protect the environment or both. He says it is in this context that he acted. In his affidavit he also alludes to the history of problems they have had with the applicant mine, for instance that six such orders had been granted in the past and that therefore this was not the first time that such an order was issued.

B The respondents contended that this application is not urgent and that it should therefore be dismissed. I hold a different view. Of course it does not matter where and how a certificate of urgency was typed, but what is essential is that a legal practitioner has given his reasons for the urgency in such certificate and he has appended his signature and affixed his stamp. I hold the view that the closure of the mine obviously is affecting productivity C and consequently impacting negatively on the production at the mine, thus qualifyins this matter for urgency. I further hold the view that the applicant's reason for filing an urgent application on 18 March as opposed to 13March when they were served with the order is a valid reason, in that the applicant explains that after noting an appeal on 11 March, they were then of the view that the first respondent's order had been suspended.

D My reading of s 37(4)(a) and (b) creates a picture wherein the legislature provided for the closure of premises for a period not exceeding three weeks *where an activity which pollutes the environment … is carried out* (my emphasis) or he can also serve an order requiring that the owner or occupier takes such measures as may be specified for the prevention of harm to the E environment. An inspector can order either the clause (a) or clause (b) or both, meaning that clause (a) is independent of clause (b).

Clause (as specifiec that premises can only be closed where an activity which pollutes the environment is carried out. In his opposing affidavit, the first respondent does not clearly state that he had to order closure in terms of F clause (a) because a specific activity has been carried out resulting in harm to the environment, he in fact states in para 31 that " I do not argue that an inspector should act only when an activity pollutes the environment". He in fact interprets s 37(4)(a) to empower him to act if it is necessary to protect the environment. Section 37(4)(a) is clear and unequivocal in so far as the order of closure is concerned. If the legislature wanted to give the G inspector powers to close premises so as to protect the environment and have preventive measures taken it would not have specifically tied closure with an activity that is being carried out. I therefore disagree with the first respondent's contentions on the interpretation of that clause.

It follows, therefore, that the powers that the first respondent invoked in s 37(4) H were in fact misunderstood by him and he thus could not have exercised

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them lawfully. One cannot exercise powers that he does not understand in A a lawful manner, hence his closure of premises to protect the environment rather than to stop an activity that is polluting the environment. A reading of the record dating made on 28 February report also creates the same picture. The gist of the recommendations sounds like suggestions made to improve the situation at the mine rather than to address a specific activity that warrants the closure of the mine. B

Again, the fact that the first respondent's counsel concedes that the first respondent did not have the powers to close the mine indefinitely, as s 37(4)(a) is clear that the period should not exceed three weeks, and the fact that one of the conditions that should be fulfilled prior to the re-opening of the mine is that all outstanding fees should be paid by 30 March, buttresses the C finding I have made that the first respondent did not appreciate the powers given to him by s 37(4) and under what circumstances and for what measures he could exercise them.

I accordingly find that the first respondent's actions do not conform with the provisions of s 37(4). The first respondent could not exercise powers that he did not have, neither could he invoke the powers in circumstances D that were not covered as warranting closure by s 37(4)(a). His order is both unlawful and *ultra vires*. I accordingly grant the provisional order in terms of the draft for the aforestated reasons.

Coghlan & Welsh, applicant's legal practitioners E

Majoko & Majoko, respondents' legal practitioners

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3 ?

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Source:
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CHIOKOYO v NDLOVU & ORS 2014 (1) ZLR 473 (H)

Citation	2014 (1) ZLR 473 (H)
Case No	Judgment No. HH-321-14
Court	High Court, Harare
Judge	Uchena J
Heard	10 April 2014
Judgment	10 April 2014
Counsel	*D Mwonzora*, for the applicant *M Chivasa*, for the first respondent *C Nyika* with *T M Kanengoni,* for the thirdrespondent *M Chimombe*, for the fourthrespondent
Case Type	Electoral application
Annotations	No case annotations to date

Flynote

C *Constitutional law – Constitution of Zimbabwe 2013 – interpretation – all provisions of Constitution to be considered in interpreting any provision of the Constitution – clothing High Court with original jurisdiction over all civil and criminal matters – legislature not prevented from establishing other courts with either exclusive or concurrent jurisdiction*

D *Court – High Court – jurisdiction – original jurisdiction over all civil and criminal matters – legislature not prevented from establishing other courts with either exclusive or concurrent jurisdiction*

Election – application – court in which such application should be heard – Electoral Court having exclusive jurisdiction

Headnote

E The applicant sought an order preventing the Electoral Commission from allowing voters to take part in a by-election simply on the basis of their voters' registration slips. The issue arose whether the High Court had jurisdiction to hear the application, in view of the provisions of s 161(2) of the Electoral Act [*Chapter 2:13*], which gives exclusive jurisdiction F to the Electoral Court to hear appeals, applications and petitions in terms of the Act and to review any decision of the Commission made or purporting to have been made under the Act. The applicant argued that this provision contravened s 171(1)(a) of the Constitution, which states that the High Court has original jurisdiction over all civil and criminal G matters throughout Zimbabwe. It was argued for the Commission that s 174 of the Constitution allows for the creation of other courts subordinate to the High Court.

Held, that in terms of s 46(1)(d) as read with s 331 of the Constitution, which provide for the contextual and purposive interpretation of provisions of the Constitution, all provisions of the Constitution must be considered H in construing a provision of the Constitution. The purpose for which the

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Constitution provides for various courts and vests in them concurrent civil A and criminal jurisdiction with the High Court should guide the court in establishing whether or not the High Court's original jurisdiction ousts other court's civil and criminal jurisdiction. The fact that the Constitution permits the legislature to create and confer jurisdiction of its choice on such courts must also be taken into consideration. The Constitution vests criminal and civil jurisdiction in courts inferior to the High Court B in spite of the High Court having original jurisdiction over such cases. The High Court, though vested with original jurisdiction over all civil and criminal matters, does not have exclusive jurisdiction over all such matters. The fact that the High Court has inherent or original jurisdiction over all civil and criminal cases does not, therefore, mean that it should C exclude other courts established in terms of the laws provided for in the Constitution. These courts lawfully exist alongside it to hear and determine specified cases. Where no exclusive jurisdiction is provided for, a litigant can chose whether to litigate in the High Court or the subordinate court. Where the legislature gives the other court exclusive jurisdiction, as was done by s 161(2) of the Electoral Act, the High Court, though clothed D with original jurisdiction, cannot hear such cases. They were lawfully taken away from it and given to another court of competent jurisdiction. This is confirmed by the provisions of s 162 of the Constitution, which specifically vests judicial authority in the courts mentioned there and those established by or under an Act of Parliament. This clearly means it authorises the creation of such courts and their being conferred with E jurisdiction of the legislature's choice.

Accordingly, s 161(2) of the Electoral Act is therefore not inconsistent with the Constitution and lawfully allocates exclusive jurisdiction over electoral appeals, applications, petitions and reviews to the Electoral Court. F

Case referred to

Madoda v *Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S)

Legislation considered

Constitution of Zimbabwe 2015, ss 2(1), 46(1)(d), 171(1)(a), 174 & 331

Electoral Act [*Chapter 2:13*], s 161(2) G

Case information

D Mwonzora, for the applicant

M Chivasa, for the first respondent

C Nyika with *T M Kanengoni,* for the thirdrespondent

M Chimombe, for the fourthrespondent H

Judgment

A**Uchena J**: The applicant was an aspiring MDC (T) candidate for the council by-election for Ward 12 Gweru, which was scheduled for 12 April 2014. On 10 April 2014 he filed an urgent application in the High Court, for an interdict against the holding of that by-election under the conditions which had been communicated to his lawyers by the third respondent.

The first respondent was the aspiring ZANU-PF candidate. The second B respondent was the aspiring candidate for the National Constitutional Assembly party. The third respondent is the Chief Elections Officer. The fourth respondent is the Registrar-General of Voters.

The applicant's application was triggered by the third respondent's reply, dated 25 March 2014, to a letter from the applicant's lawyers in which he said:

> C "We confirm that those who voted on 31 July 2013 using voter registration slips will be allowed to use them as the voters roll which is going to be used is the one that closed on 10 July 2013".

The applicant sought an interim order on the following terms:

1. Interdicting the third respondent from allowing persons other than D persons who are on the voters roll or supplementary voters roll for Ward 12 Gweru to vote in the by-election set for Ward 12 Gweru on 12 April 2014;
2. Specifically, the third respondent be and is hereby ordered not to allow people to vote using voter registration slips in the by-election in question.
3. E The fourth respondent be and is hereby ordered to supply the third respondent with a copy of the updated voters roll.

Mr *Nyika* for the third respondent raised a point *in limine* on the jurisdiction of this court as the Electoral Court has exclusive jurisdiction over electoral cases. He referred the court to s 161(2) of the Electoral Act which provides as follows:

> F "(2) The Electoral Court shall have exclusive jurisdiction –
>
> (a) to hear appeals, applications and petitions in terms of this Act; and
>
> (b) to review any decision of the Commission or any other person made or purporting to have been made under this Act."

Mr *Mwonzora* for the applicant in response relied on ss 2(1) and 171 of the G Constitution of Zimbabwe 2013, which he submitted invalidates s 161(2) of the Electoral Act and bestows jurisdiction on this court.

After hearing submissions from the parties, in appreciation of the pending by-election, and the possibility of the applicant having to apply to the Electoral Court, I briefly adjourned the proceedings. When the proceedings resumed, H I ruled that this court has no jurisdiction because the Electoral Court has

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exclusive jurisdiction and indicated that detailed reasons for my judgment A would follow. The following are my reasons for that decision.

Mr *Nyika*'s reliance on s 161(2) of the Electoral Act is supported by the golden rule of interpretation. Words in a statute must be given their ordinary grammatical meaning. This was stressed by Sandura JA in *Madoda* v *Tanganda Tea Co Ltd* 1999 (1) ZLR 374 (S) at 377A-D where he said: B

> "By adopting that approach to the interpretation of s 7 of the code the learned judge in the court *a quo* departed from the ordinary grammatical meaning of the section and, therefore, erred. As Joubert JA said in *Coopers & Lybrand & Ors* v *Bryant* 1995 (3) SA 761 (A) at 767D-F:
>
> > 'The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of [construction] are available to ascertain their common C**i**ntention at the time of concluding the cession. According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.'
>
> The same view was subsequently expressed by my brother McNally in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264D-E where he said: D
>
> > 'There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, "unless that would lead to some absurdity, or some repugnance or

inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity E and inconsistency, but no further.""

Section 161(2) according to the ordinary grammatical meaning of the words used, specifically gives the Electoral Court exclusive jurisdiction –

"(a) to hear appeals, applications and petitions in terms of this Act; and

(b) to review any decision of the Commission or any other person made or F purporting to have been made under this Act."

The third respondent's decision was obviously made in terms of the Electoral Act. Therefore any application or review against it is covered by s 161(2) of the Electoral Act.

It is true that s 2(1) of the 2013 Constitution invalidates the provisions of G any law which is inconsistent with the provisions of the Constitution which is the supreme law of Zimbabwe. Section 2(1) provides as follows:

"(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."

A court should not however lightly invalidate laws in terms of this section. It must first establish, the inconsistency, and its extent, before doing so. A H

Uchena J

A law may be partially inconsistent with the Constitution. In such a case it is the part which is inconsistent which is invalidated leaving the consistent party unaffected.

Mr *Mwonzora* based his attack on s 161(2) of the Electoral Act on the provisions of s 171(1)(a) of the Constitution which provides as follows:

B "(1) The High Court –

(a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe".

The dicta in the *Madoda* case (*supra*) would equally apply to the construction of ss 2(1) and 171(1)(a) of the Constitution, subject to the contextual interpretation which is a constitutional requirement.

C Mr *Nyika* for the third respondent submitted that the provisions of s 171(1)(a) should be read and construed together with s 174(c) which provides for the creation of other courts subordinate to the High Court. He further submitted that the High Court should co-exist with such other courts and defer to their exclusive jurisdiction. Section 174 of the Constitution provides as follows:

D "An Act of Parliament may provide for the establishment, composition and jurisdiction of –

(a) magistrates courts, to adjudicate on civil and criminal cases;

(b) customary law courts whose jurisdiction consists primarily in the application of customary law;

(c) *other courts subordinate to the High Court; and*

E (d) tribunals for arbitration, mediation and other forms of alternative dispute resolution" (my emphasis).

I agree that the provisions of s 171(1)(a) of the Constitution should not be read in isolation. That would in fact be unconstitutional, as s 46(1)(d) as read with s 331 of the Constitution provides for the contextual and purposive F interpretation of provisions of the Constitution. They provides as follows:

"(1) When interpreting this Chapter, a court, tribunal, forum or body –

(a) to (c)

(d) *must pay due regard to all the provisions of this Constitution,* in particular the principles and objectives set out in Chapter 2; and

(e) …

G in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution."

"331. *Section 46 applies, with any necessary changes, to the interpretation of this Constitution* apart from Chapter 4" (emphasis added).

It is therefore a constitutional rule of interpretation that all provisions of the H Constitution must be considered in construing a provision of the Constitution.

Uchena J

Section 46 makes this rule applicable to Chapter 4 of the Constitution, while A s 331 makes it applicable to the whole Constitution.

The purpose for which the Constitution provides for various courts and vested in them concurrent civil and criminal jurisdiction with the High Court, should guide the court in establishing whether or not the High Court's original jurisdiction outs other court's civil and criminal jurisdiction. The fact that the B Constitution permits the Legislature, to create and confer jurisdiction of its choice, on such courts must also be taken into consideration. It is in fact trite that the Constitution vests criminal and civil jurisdiction in courts inferior to the High Court in spite of the High Court having original jurisdiction over such cases. See the provisions of s 174(a) to (d) of the Constitution.

Mr *Mwonzora*'s interpretation of s 171(1)(a) of the Constitution ignores C the Constitutional rule of interpretation imposed by ss 46 and 331. It leads to a meaning which ignores the Constitution's provisions on the creation of other court's which it vests with civil jurisdiction. This means the High Court, though vested with original jurisdiction over all civil and criminal matters, does not have exclusive jurisdiction over all such matters. This is because the Constitution, in s 174, provides for the creation of other courts, D by the Legislature which it authorises to determine their composition and jurisdiction.

The fact that the High Court has inherent or original jurisdiction over all civil and criminal cases, does not, therefore, mean that it should crowd out other courts established in terms of the laws provided for in the Constitution. E These courts lawfully exist alongside it to hear and determine specified cases. Where no exclusive jurisdiction is provided for, a litigant can chose whether to litigate in the High Court or the subordinate court. Where the legislature gives the other court exclusive jurisdiction as was done by s 161(2) of the Electoral Act, the High Court though clothed with original jurisdiction cannot hear such cases. They were lawfully taken away from it and given to another F court of competent jurisdiction. This is confirmed by the provisions of s 162 of the Constitution which provides as follows:

> "Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise –
>
> (a) the Constitutional Court; G
>
> (b) the Supreme Court;
>
> (c) the High Court;
>
> (d) the Labour Court;
>
> (e) the Administrative Court;
>
> (f) the magistrates courts; H

Uchena J

> A (g) the customary law courts; and
>
> (h) *other courts established by or under an Act of Parliament*" (my emphasis).

Section 162 of the Constitution specifically vests judicial authority in the mentioned courts and those established by or under an Act of Parliament. This clearly means it authorises the creation of such courts and their being B conferred with jurisdiction of the Legislature's choice.

In view of the above s 2(1) of the Constitution does not invalidate s 161(2) of the Electoral Act. The establishment of the Electoral Court is permissible under ss 162(h) and 174(c) of the Constitution. The provisions of s 161(2) of the Electoral Act are therefore not inconsistent with the Constitution. They lawfully allocate exclusive jurisdiction over electoral appeals, applications, C petitions and reviews to the Electoral Court.

The applicant therefore filed his application in a court which does not have the necessary jurisdiction to hear it. These therefore are my reasons for finding that this court has no jurisdiction to hear the applicant's application.

D*Mwonzora & Associates*, applicant's legal practitioners

Nyika Kanengoni & Partners, thirdrespondent's legal practitioners

Attorney-General's Office, Civil Division, fourthrespondent's legal practitioners

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Source:
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BRENNAN'S DIESEL SERVICES (PVT) LTD v TENDA BUS SERVICES (PVT) LTD 2014 (1) ZLR 480 (S)

2014 (1) ZLR p480

Citation	2014 (1) ZLR 480 (S)
Case No	Judgment No. S-13-14
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gowora JA & Omerjee AJA
Heard	16 October 2012; *CAV*
Judgment	16 April 2014
Counsel	*E W W Morris,* for the appellant *T Chiturumani,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract – breach – remedies – claim for payment of agreed sum due in terms of contract – nature of such claim – claim one for specific performance, not one for damages – plaintiff entitled to specific performance if payment not made D

Headnote

The appellant was in the business of providing service in the repair of diesel fuel pumps. The respondent was a public service transport operator. The appellant had, on several previous occasions, done business with the respondent. On the occasion in question, the respondent's representative took E two fuel pumps to the appellant's premises for repair. After inspection, a quotation, expressed in South African currency, was given to the respondent's representative orally. The respondent then requested the appellant to repair the pumps and offered to pay in instalments; the appellant agreed and did the work. The respondent did not challenge the invoices that were generated by the appellant. The respondent paid F about a quarter of the total sum but refused to pay the balance. The appellant brought an action for the balance, but the trial judge granted absolution from the instance, on the basis that the value of the spares and the labour costs had not been proved, when such proof is only necessary under the *actio legis Aquiliae* to prove that damages claimed are fair and reasonable. G

Held, that there was a valid contract between the parties for materials supplied and services rendered in the repair of two diesel pumps and that the contract price was agreed. By failing to pay the outstanding balance, the respondent was in breach of the contract. The appellant, as the injured party, having performed its obligations in terms of the contract, was H

2014 (1) ZLR p481

Gowora JA

A entitled to demand specific performance thereof by the respondent. The terms of the contract having been established, the trial court had to consider whether or not both parties to the contract had performed in terms of their respective obligations under the agreement. Contrary to the principle that contracts freely entered into should be enforced, the judge found that the appellant had not proved the value of the repairs B to the pumps. This finding was irrelevant to the claim before the court.

Held, further, that, the *actio legis Aquiliae* was not the cause of action with which the court was seized. The appellant did not premise its cause of action on it. The appellant's claim was not for damages arising from delict; it was a simple action for an agreed contract price. What the C appellant sought in the court *a quo* was an order that the respondent pay a specified sum of money. An order for the payment of a sum of money in terms of a contract is, in fact, an order for the enforcement of the contract. Judgment should have been given for the appellant.

D*Editor's note*: the judgment appealed against was that of Kudya J in *Brennan's Diesel Services (Pvt) Ltd* v *Tenda Bus Service (Pvt) Ltd* HH-11-12 (delivered 11 January 2012).

Cases cited

Heath v *le Grange* 1974 (2) SA 262 (C)

E Jacobs v United Bldg Soc 1981 (4) SA 37 (W)

Case information

E W W Morris, for the appellant

T Chiturumani, for the respondent

Judgment

Gowora JA: After hearing counsel in this matter we allowed the appeal F with costs. We indicated that our reasons would follow. These are they.

The facts of this matter are that on 16 February 2010, the appellant issued summons claiming:

"1. Payment of the sum of South African rand (ZAR) 17 353 being an amount due and owing by the defendant to the plaintiff in respect of services rendered G and materials supplied by the plaintiff to the defendant at the latter's special instance and request in repairing a number of fuel pumps on defendant's behalf during December 2008 and which sum, despite demand, defendant has failed or refused to pay;

2. Interest thereon at the prescribed rate from 27 January 2010, being the date of demand, to the date of final payment;

H 3. Costs of suit."

Gowora JA

The appellant, as its name suggests, provides service in the repair of diesel A fuel pumps. The respondent is a registered public service transport operator. It is common cause that the appellant had on several occasions prior to December 2008 done business with the respondent.

On 19 December 2008 the respondent's representative took two fuel pumps to the appellant's premises for repair. The appellant's personnel stripped B and examined each of the pumps. After the fuel pumps were opened up a quotation for the work to be done in the sum of ZAR24 000 was given to the respondent's representative orally. On being informed of the quotation, the respondent requested the appellant to repair the two diesel pumps and offered to pay the cost of the repairs in instalments of ZAR2 000 per month, to which the appellant agreed. A job card was then opened for the repair. C The parts fitted to each pump are listed at the back of each job card. The pumps were repaired and collected by the respondent's employees on 30 December 2008.

Subsequently the appellant sent two invoices to the respondent for ZAR9 000 and ZAR15 000. The respondent paid a total sum of ZAR6 647 and refused D to pay the balance. The appellant issued summons for recovery of the same. The matter proceeded to trial at the conclusion of which the court *a quo* issued the following order:

"1. The defendant is absolved from the instance.

2. The plaintiff shall pay the defendant's costs of suit." E

It is against that order that the appellant now appeals on the following grounds, namely:

1. That the learned judge misdirected himself by absolving the respondent from the instance on the basis that the value of the spares and the labour costs had not been proved when such proof is only necessary under the *actio legis Aquilia* to prove that damages claimed are fair and reasonable; F
2. That the learned judge misdirected himself in failing to find that the appellant's charges for work done had been accepted by the respondent, who had made part payment towards them in acknowledgment of its acceptance;
3. That the learned judge erred in failing to take into account that the G respondent's witness, in cross-examination, admitted owing the appellant the balance outstanding; and
4. That the learned judge misdirected himself in failing to find that the respondent had established no defence to the appellant's action at all, and that the entire defence had been an abuse of court process. H

Gowora JA

A Dealing with the second, third and fourth grounds of appeal, the evidence of the appellant's witnesses that a quotation for the repair of the two pumps was given to the respondent who then instructed the appellant to carry out the repairs was not disputed. The respondent's witness, Mr Mungwari, did not deny liability to pay the invoiced sum and, as has been noted above, the dispute as to whether the amount owed was to be paid in foreign currency B or in Zimbabwe dollars was resolved by the court *a quo* in favour of the appellant. The evidence presented on behalf of the appellant established that the respondent did not challenge the invoices that were generated by the appellant, which invoices reflected that the invoiced sum was to be paid in South African rand at the rate of 2 000 rand per week. The unchallenged C evidence of the appellant was that the respondent actually paid part of the total invoiced sum of ZAR24 000. Over the period extending from 14 January 2009 to 31 December 2009, the respondent had paid an amount of ZAR6 647. In my view, it would be disingenuous for the respondent to contend, on these facts, that there was no contract for the payment of the invoiced sum. D As to the currency of payment, the learned judge disbelieved the respondent and found as a fact that the parties contracted for payment in foreign and not local currency. In this regard, the learned judge in the court *a quo* said:

> "Mr Mungwari was adamant that he did not enter into any agreement to pay in foreign currency with the plaintiff. He prevaricated on whether or not the debt was paid out in local currency or in foreign currency. He exhibited confusion in E some of his responses … it seemed to me that he confused other repairs that were paid in local currency … my assessment of the credibility of the witnesses is that plaintiff's witnesses gave their evidence very well in regards to the schedule of payments found in exhibit 3."

The above facts established that there was a valid contract between the parties for materials supplied and services rendered in the repair of two diesel F pumps, and that the contract price was agreed at ZAR24 000. By failing to pay the outstanding balance the respondents were in breach of the contract. The appellant, as the injured party, having performed its obligations in terms of the contract, was entitled to demand specific performance thereof by the respondent. This is what was claimed in the summons.

G I turn to the first ground of the grounds of appeal.

The terms of the contract having been established, what the learned judge in the court *a quo* had to consider was whether or not both parties to the contract had performed in terms of their respective obligations under the agreement. It is trite that contracts freely entered into should be enforced. H Contrary to this principle, the learned judge found that the appellant had

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Gowora JA

not proved the value of the repairs to the pumps. This was irrelevant to the A claim before the court. This is what the learned judge had to say:

> "Thus even though the defendant agreed to pay for the value of repairs in rands on 19 December 2008 and the plaintiff dispatched to it the invoice for the repairs on 30 December 2008, the plaintiff has failed to

prove the value of the repairs. It did not call evidence from its buyers or store man to establish the value of the spares and its mark up. It did not lead any evidence on how labour costs B were calculated from its workshop personnel. All we have are global figures that have not been explained."

It was submitted on behalf of the appellant that what was being claimed was a simple contract price, and that the respondent had agreed to discharge its indebtedness to the appellant at the rate of ZAR2 000 per week. Mr Mungwari admitted before the court *a quo* that some payments were made in reduction C of the invoiced sums although he was unable to state how much had been actually paid by the respondent.

It was further contended on behalf of the appellant that the learned judge in the court *a quo* fell into error by confusing delictual damages with contractual damages and that the *actio legis Aquiliae* is not applicable in D the circumstances of this case. In *Amler's Precedents of Pleadings* 4 ed, the learned author states:

"The *actio legis Aquiliae* enables a plaintiff to recover patrimonial loss (including a purely economic loss) suffered through a wrongful and negligent act of the defendant … Liability is dependent upon the wrongfulness of the act or omission of the defendant". E

In the Aquilian action, damages are awarded as compensation for patrimonial loss, and are measured by the pecuniary loss, actual or prospective, sustained by the plaintiff. The measure of such loss is often referred to as the *interesse*, which is the difference between the present value of the plaintiff's patrimony and the value which it would have had if the act complained about had never F happened. In assessing the level of damages to the corporeal property of a plaintiff, the court has to apply a practical method of such assessment and, in most cases, the plaintiff has to establish what is referred to as 'the reasonable cost of repairs. In *Heath* v *le Grange* 1974 (2) SA 262 (C) at 266H-267C, the onus resting upon a plaintiff to prove damage was confirmed by Theron J thus: G

"… It appears to me to stand to reason that, if on the pleadings the onus of establishing his damages has been placed on the plaintiff and he chooses to attempt to prove the patrimonial loss sustained by him by reason of the collision not by producing appraisements of the pre-collision and post-collision values of his vehicle but by producing evidence of what it cost to have repairs done to it, he cannot discharge the onus resting upon him save by proving both that the H

Gowora JA

A repairs were necessary and that the cost thereof was fair and reasonable. That this is correct not only follows from what was stated in the judgment of *Scrooby* v *Engelbrecht* but has been accepted in an impressive number of decisions of our courts since the *Scrooby* case, some of which have been mentioned in the course of this judgment and at least two of which (*de Witt* v *Heneck, supra* and *Paarl Transport Services* v *du Toit*, *supra*) are decisions by two-judge courts of this Division."

B Clearly the *actio legis Aquiliae* is not the cause of action with which the court was seized. The appellant did not premise its cause of action on it. The appellant's claim is not for damages arising from delict. In its summons it claimed payment of a specified sum as being due and owing in respect of services rendered and materials supplied under a contract concluded between C the parties, and fully performed by the appellant on the one hand and partially by the respondent on the other.

We accept, as correct, the submissions made on the appellant's behalf by counsel that this was a simple action for a contract price, and that the parties had agreed to settle the contract price at the rate of ZAR2 000 a week for D a period of one year. What the appellant sought in the court a quo was an order that the respondent pay a specified sum of money. An order for the payment of a sum of money in terms of a contract is in fact an order for the enforcement of the contract. In *Jacobs v United Building Society* 1981 (4) SA 37 (W) at 39C-E Nestadt J described a claim for payment in terms of a contract in the following terms:

E "Our law draws a clear distinction in relation to the remedies available on breach of contract between specific performance and damages. The former is performance by the person obliged in the very terms agreed upon (Wille *Principles of South African Law* 6 ed at 381); the latter is a substitutionary performance, the object whereof is to make good the plaintiff's patrimonial loss caused by the defendant's breach of contract. When a creditor, under a contract in terms whereof payment F is a sum of money due, sues for it, this is a claim *par excellence* for specific performance. I have never heard of such claim being put forward in the form of or labelled damages and I entertain no doubt that it would be wrong to do so."

The learned judge in the court *a quo* absolved the respondent from the instance on the basis that the appellant had failed to prove the value of the G parts used in the repair of the pumps. It is clear that in so doing, he fell into error and treated the claim as if it were one for delictual damages. What was before him was a claim for specific performance by the respondent of the contract that the parties had verbally concluded. The nature of the contract itself may have confused the court and caused it to misdirect itself, but the claim was clearly stated as one for payment of the sum agreed and for which H sum, in the face of the undisputed facts and the findings of credibility made

Gowora JA

in favour of the appellant by the court *a quo*, no further proof was required A by the appellant. The learned judge ought, therefore, to have given judgment in favour of the appellant.

Accordingly the following order will issue:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the B following:
   (a) The defendant shall pay to the plaintiff the sum of ZAR17 353 together with interest thereon at the prescribed rate with effect from 27 January 2010 to date of payment.
   (b) The defendant shall pay the costs of suit. C

ZIYAMBI JA and OMERJEE AJA concurred.

Atherstone & Cook, appellant's legal practitioners

K Hove & Partners, respondent's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/CJ PETROW & COMPANY (PTY) LTD v GWARADZIMBA NO 2014 (1) ZLR 487 (H)

CJ PETROW & COMPANY (PTY) LTD v GWARADZIMBA NO 2014 (1) ZLR 487 (H)

Citation	2014 (1) ZLR 487 (H)
Case No	Judgment No. HH-175-14
Court	High Court, Harare
Judge	Mafusire J
Heard	24 February 2014 *CAV*
Judgment	16 April 2014
Counsel	*A P de Bourbon SC* for the applicant *T Mpofu* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C *Administrative law – administrative decisions and acts – decision adverse to applicant – remedies available to person aggrieved – review in terms of Administrative Justice Act [Chapter 10:28] – courses open to court – when court may substitute its own decision for that of administrative authority*

D *Company – administration in terms of Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] – purpose of such administration – duties of administrator – grant of leave to institute proceedings against company – what administrator should consider – debts incurred before or after reconstruction order issued – whether should be treated differently – duties of administrator when application* E *made to bring proceedings against company – must act in accordance with principles of Administrative Justice Act [Chapter 10:28]*

Statutes – Reconstruction of State-Indebted Insolvent Companies Act [Chapter 24:27] – reconstruction order under Act – purpose of – duties of administrator – grant of leave to institute proceedings against company – F *what administrator should consider – debts incurred before or after reconstruction order issued – whether should be treated differently – duties of administrator when application made to bring proceedings against company – must act in accordance with principles of Administrative Justice Act [Chapter 10:28]*

Headnote

G The respondent was the administrator of a company under a reconstruction order issued by the Minister of Justice in terms of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*]. Such an order may be issued against a company that is indebted to the State or to a statutory corporation or a State-controlled company through H credits or guarantees received by that entity or in its favour and that are

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payable out of public funds or that impose any liability on the State. A The order is issued if it appears to the Minister that by reason of fraud, mismanagement or for any other cause the company is unable or is unlikely to repay and the State has become or is likely to become liable to pay from public funds. The order is issued if it also appears to the Minister that the State-indebted company has not become, or is prevented from becoming, a successful concern and that there is a reasonable probability B that the company will be able to pay its debts or meet its obligations and become a successful concern if it is placed under reconstruction and that it would be just and equitable to do so.

The company was also admittedly indebted to the applicant, a South African registered company, following two loans advanced by the applicant to the C administrator on behalf of the company. These loans had been advanced after the reconstruction order in order to pay the company's suppliers in South Africa. The company was in breach of the loan terms and despite demand failed to pay. In terms of s 6 of the Act the applicant sought the leave of the respondent to sue the company for the recovery of the loans and the interest accrued. The application for leave was turned D down. The applicant brought proceedings for an order overriding the respondent's decision and granting the leave to sue. It was argued that the applicant's loans should be treated preferentially, as they had been incurred by the administrator himself. The decision had been concerned with self-preservation of the administrator's own position and not with considerations of fairness. E

The respondent argued that the application failed to satisfy the requirements for review, whether under the common law or under the Administrative Justice Act [*Chapter 10:28*]. It was also argued that the court was effectively being asked to usurp the functions of an administrative authority by granting the leave that the respondent had turned down, F contrary to the principles of administrative law. The respondent's refusal to grant leave had not been grossly unreasonable.

Held, that when a person is appointed an administrator of a State-indebted company and clothed with the powers of subss 6(b) and 6(d) of the Reconstruction Act, he is, in a sense, being empowered and authorized to be judge over his own cause. All control and management of the G company is vested in him. He decides for and on behalf of the company, is the face thereof and must know what is good for the company.

Held, further, that in deciding whether or not to grant leave under s 6(b) of the Reconstruction Act, an administrator of a State-indebted company must consider whether the proposed claim is *bona fide* or is simply H

A intended to harass him or to improperly interfere with his administration of the company. A court reviewing the decision of the administrator will scrutinise it on such broad terms as such

decisions are generally scrutinised in the field of administrative law. The administrator must act in accordance with s 3 of the Administrative Justice Act, particularly B subs (1)(a). He must act reasonably and in a fair manner. His decision must not be whimsical or capricious. He must not advance self-interests otherwise his decision will be unfair. Whilst his paramount consideration is to turn around the fortunes of the company and bring it out of the financial doldrums so as to free the State from any obligation to pay, that cannot be his singular consideration. He must not be blind to the C interests of the other stakeholders in the company, otherwise his efforts may produce unintended results. He must strive to strike a balance. He is, in a sense, being empowered and authorised to be judge over his own cause. All control and management of the company is vested in him. He decides for and on behalf of the company. He is the face of the company. He is the brains and soul of the company. He must know what is good D for the company. But in spite of all that he must remain objective.

Held, further, that the Reconstructive Act gives no suggestion as to how an administrator should treat the pre- and post-reconstruction obligations. However, in general, both kinds of obligations should be accorded equal treatment, though circumstances might arise when they may be E treated differently. It should not be the date when a particular debt was incurred that must decide preferential treatment or otherwise; rather, it should be the circumstances surrounding the particular debt. Here, when the respondent borrowed from the applicant, the purpose had been to ensure that the company continued to produce and to trade. It F should have been able to repay the applicant's loans, and remain with proceeds from its products to utilise for other purposes. However, the company, under the control and management of the respondent, who himself had incurred the debt on behalf of the company, had neither kept the arrangement of supplying the company's products to the applicant nor repaid the loans by due date. The applicant became entitled to sue G the company. The respondent himself, not the failed management of the past, had brought about the state of affairs giving rise to the debt due to the applicant. His decision to refuse the leave had been concerned with self-preservation and designed to shield himself from the consequences of his own infractions. That was wrong, unreasonable and unfair, and H was in breach of s 3 of the Administrative Justice Act.

Mafusire J

Held, further, that in terms of s 4 of the Administrative Justice Act, the A courses open to the court are to set aside or confirm the decision, to refer the matter back to the administrative authority or to give appropriate directions to the administrative authority. It is not an absolute position that a court will not substitute its own decision for that of an administrative body. In exceptional circumstances it will do so. Section 4 of the Act does not lay down an absolute course of action that the court should B follow. It gives only broad guidelines. There are, however, four criteria, namely: (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 C same jurisdiction; and (d) where the court is in as good a position as the administrative body to make the decision. All these criteria existed *in casu*.

Cases cited

Affretair (Pvt) Ltd & Anor v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

African Resources Ltd & Ors v *Gwaradzimba NO* 2011 (1) ZLR 105 (S) D

CCSU v *Minister for the Civil Service* [1984] 3 All ER 935 (HL)

Gurta AG v *Gwaradzimba NO* 2013 (2) ZLR 399 (H)

Mangenje v *TBIC Invstms (Pvt) Ltd & Ors* 2013 (2) ZLR 534 (H)

Mhanyami Fishing & Tpt Co-op Soc Ltd & Ors v *Dir-Gen, Parks & Wildlife Mgmt Authority & Ors* 2011 (1) ZLR 555 (H)

PF-ZAPU v *Min of Justice* 1986 (1) SA 532 (ZS); 1985 (1) ZLR 305 (S) E

Zindoga & Ors v *Min of Public Svc & Anor* 2006 (2) ZLR 10 (H)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 3 & 4

Constitution of Zimbabwe 2013, ss 69(3) and 85(3)

Reconstruction of State-Indebted Companies Act [*Chapter 24:27*], ss 3, 4, 6(b) & (d), & 18(1)

Case information

A P de Bourbon SC for the applicant

T Mpofu for the respondent

Judgment

Mafusire J: Paragraph (b) of s 6 of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] ("hereafter referred to as the Reconstruction Act"), provides that no action or proceeding shall proceed or commence against a company subject to a reconstruction order except by leave of the administrator and subject to such terms as he may impose.

Mafusire J

Paragraph (c) voids any attachment or execution of property put in force against the assets of the company after the commencement of a reconstruction order. Paragraph (d) also voids, *inter alia*, every disposition of the property of the company, including rights of action, unless the administrator orders otherwise.

SMM Holdings (Pvt) Ltd ("SMM Holdings") was a company under a reconstruction order. A reconstruction order is issued by the Minister of Justice ("the Minister") in terms of the Reconstruction Act. It is issued against a company that is indebted to the State or to a statutory corporation or a State-controlled company through credits or guarantees received by that entity or in its favour and that are payable out of public funds or that impose any liability on the State [1]. The reconstruction order is issued if it appears to the Minister that by reason of fraud, mismanagement or for any other cause, the company is unable or is unlikely to repay and the State has become or is likely to become liable to pay from public funds. The order is issued if it also appears to the Minister that the State-indebted company has not become, or is prevented from becoming, a successful concern and that there is a reasonable probability that the company will be able to pay its debts or meet its obligations and become a successful concern if it is placed under reconstruction and that it would be just and equitable to do so.

> "Essentially, the Act is about replacement of failed management of a State-indebted company with new management capable of turning around the fortunes of the company and enabling the State-indebted company to meet its obligations." [2]

SMM Holdings was also indebted to the applicant, a South African registered company. The amount of the debt was in excess of US$3.6 million. The debt was admitted. It was the total of two loans advanced by the applicant to the administrator on behalf of SMM Holdings. The loans had been advanced after the reconstruction order. The administrator had secured the loans to pay SMM Holdings' suppliers in South Africa. This had been intended to keep the company afloat. The company was a mining concern that produced asbestos fibre. Repayment of the loans would be through its products. The company would sell its asbestos fibre to the applicant. From it, the applicant would retain an amount equivalent to 40 per cent of each invoice. The loan tenure was 28 February 2010. SMM Holdings was in breach of the loan

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Mafusire J

terms. The applicant demanded payment. SMM Holdings failed to pay. All this was common cause.

In line with the provisions of s 6 of the Reconstruction Act the applicant sought the leave of the administrator to sue SMM Holdings for the recovery of the loans and the interest accrued. The leave was turned down. The reasons were stated in a letter by respondent's legal practitioners dated 28 August 2012. They were as follows:

> "SMM was placed under reconstruction in September 2004 as a result of problems arising out of mismanagement and accumulating debt to the State. The Administrator was tasked with resuscitation of

> the mines. However, since 2004, multiple legal battles were instigated by the former board members and beneficial Shareholders of SMM. These legal battles disrupted the Administrator's efforts. C In recent months, most of the cases were finally determined and the Administrator is now focusing on identifying potential investors. SMM currently owes several suppliers debts, some of which are in excess of what is owed to your client. To allow your client to institute legal proceedings at this stage will be opening a pandora's box. The Administrator is aware of SMM's obligations to your client and assures us that as soon as funding is in place, your client's matter will be addressed. Accordingly, for the reasons set out above, the request is declined." D

Two months later the applicant brought these proceedings. It applied for an order overriding the respondent's decision and granting the leave to sue.

Part of Mr *de Bourbon's* argument, on behalf of the applicant, and as I understood it, was that the applicant's loans to SMM Holdings should be treated preferentially. Whilst the pre-reconstruction loans had been incurred by the E failed management of the company, the applicant's loans had been incurred by the administrator himself. They were ordinary commercial loans. They had been meant to ensure that the company would trade out of its difficulties and be able to re-pay its pre-reconstruction obligations. As such the applicant should not suffer the restrictions of s 6(b) of the Reconstruction Act.

Mr *de Bourbon* also submitted that it had not been part of the terms of the F borrowing that repayment would be dependent upon new shareholders injecting new capital into the company.

As I perceived it, the applicant's main case was that the decision by the administrator to decline leave hadbeen grossly wrong. The decision had G been concerned with self-preservation of the administrator's own position and not with considerations of fairness. Reference was made to the recent judgment by Mathonsi J in the case of *Gurta AG* v *Gwaradzimba NO* 2013 (2) ZLR 399 (H).

Gurta's case concerned the same respondent as in this case. It concerned the same company and the same relief. The respondent in that case had sold H

Mafusire J

A certain mining claims to the applicant, a foreign company incorporated in Switzerland. A third party had claimed them. He had used all manner of means to evict the applicant. The applicant had sought the leave of the administrator to institute proceedings against SMM Holdings for the cancellation of the sale agreement and for a refund of the purchase price. The leave had been refused. Mathonsi J granted it.

B*In casu* the applicant's fall-back position, as it had been in the *Gurta* case, was that s 6 of the Reconstruction Act is *ultra vires* the Constitution of Zimbabwe. Thus, in spite of the decision of the Supreme Court in *African Resources Ltd & Ors* v *Gwaradzimba NO & Ors* 2011 (1) ZLR 105 (S) declaring that s 6 of the Reconstruction Act does not violate the Constitution, and in spite of C the decision by Mathonsi J in the *Gurta* case on the constitutional point, to the effect that given that the case had to be dealt with in accordance with the old Constitution which had removed the jurisdiction of this court to strike down existing legislation, reposing such power in the Constitutional Court, Mr *de Bourbon* nevertheless argued that the constitutionality of s 6 of the Reconstruction Act was still an open point. He submitted that the *African*D*Resources* case was distinguishable. The particular problem confronting this court in this matter was not what their lordships in the Supreme Court had been called upon to exercise their minds on. They had been concerned merely with the constitutional validity of legislation in relation to a reconstruction order and not with the exercise by an administrator of a power under section E 6(b) of the Reconstruction Act.

With regards to the *Gurta* case, Mr *de Bourbon* submitted that it appeared that Mathonsi J had not been referred to s 85 of the new Constitution. This section empowers every court to grant relief in relation to a breach of fundamental rights or freedoms which are enshrined in the Constitution. Specifically, subs (3) of s 85 of the Constitution requires the rules of a court to facilitate F access to, and the determination of such matters with minimal technicalities.

The precise constitutional point raised by the applicant in this matter as an alternative argument was that s 6(b) of the Reconstruction Act purports to prevent access to the courts in contravention of s 69(3) of the Constitution which reads:

> G "Every person has the right of access to the courts, or some other tribunal or forum established by law for the resolution of any dispute."

In a nutshell, that was the applicant's case.

In opposing the application the respondent first took a technical objection. It was argued that the application being in terms of the Administrative Justice H Act, and that this Act being a codification of the common law remedy for

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Mafusire J

review, [3] it was incumbent upon the applicant to have brought itself squarely A within the ambit of review, either in terms of the common law or in terms of the Administrative Justice Act. It was argued that the application failed to satisfy the requirements for review.

The respondent also argued that the applicant sought a substantive relief. The court was being asked to effectively usurp the functions of an administrative B authority by granting the leave that the respondent had turned down. This was said to be contrary to administrative law. Reference was made to *Mhanyami Fishing & Transport Co-operative Society Ltd & Ors* v *Director-General, Parks and Wildlife Management Authority & Ors* 2011 (1) ZLR 555 (H) and *Affretair (Pvt) Ltd & Anor* v *M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S).

The respondent's next argument was that his refusal to grant leave had not C been grossly unreasonable. His decision could only be set aside if it was so grossly unreasonable as to be irrational in the *Wednesbury* sense; that is to say, a decision so grossly irrational as to be outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it [4] . D

Finally, the respondent argued that in the light of *Africa Resources,* a decision of a superior court, in which it was decided that s 6 of the Reconstruction Act does not violate the Constitution, this court, being inferior, had no choice but to follow that decision.

Mr *Mpofu*, for the respondent submitted that the applicant's loans did not E deserve preferential treatment. On the contrary they should rank lower. The applicant had advanced them well knowing the precarious financial position of the company and had therefore taken a well calculated risk.

On *Gurta's* case, Mr *Mpofu* submitted that the last word regarding the constitutionality or otherwise of s 6(b) of the Reconstruction Act had not yet been spoken. The *Gurta* judgment had been appealed against. Both counsel F were set to argue the appeal in the Supreme Court on the following day [5] .

Aside from the constitutional point, in my view the substantive issue before me was the extent to which the respondent could exercise the discretion G

Mafusire J

A bestowed on him by s 6(b) of the Reconstruction Act. What factors ought he take into account? What factors ought he not take into account?

According to Mr *de Bourbon,* an administrator of a company under reconstruction, to whom leave to sue is sought, should only have regard to the following factors:

B 1 whether the proposed claim is *bona fide* or is simply intended to harass the administrator or to improperly interfere with his administration of the company;

2 whether the cause of action arose prior to the reconstruction order or after;

3 whether the administrator himself was responsible for incurring the C liability that is sought to be enforced in the legal proceedings;

4 whether the claim made is admitted;

5 whether any culpable person was involved in the facts giving rise to the cause of action;

6 whether an applicant, given the known history of the company under D reconstruction, should as a matter of policy, be deprived of the right to sue.

Other than the first criterion postulated by counsel, I find the rest of them somewhat narrow. They seem tailor-made to suit the particular circumstances of the applicant in this case. One is mindful of the dangers of being too E prescriptive and of trying to lay down a one-size-fit-all criterion.

I am content to accept that, in deciding whether or not to grant leave under s 6(b) of the Reconstruction Act, an administrator of a State-indebted company must consider whether the

proposed claim is *bona fide* or is simply intended to harass him or to improperly interfere with his administration of F the company. A court reviewing the decision of the administrator will, in my view, scrutinise it on such broad terms as such decisions are generally scrutinised in the field of administrative law.

An administrator of a company under reconstruction in terms of the Reconstructive Act whose leave is sought to institute legal proceedings G against the company in terms of s 6(b) of that Act must act in accordance with s 3 of the Administrative Justice Act, particularly subsection (1)(a) thereof. He must act reasonably and in a fair manner. His decision must not be whimsical or capricious. He must not advance self-interests otherwise his decision will be unfair. Whilst his paramount consideration is to turn around the fortunes of the company and bring it out of the financial doldrums so H as to free the State from any obligation to pay, that cannot be his singular

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consideration. He must not be blind to the interests of the other stakeholders A in the company, otherwise his efforts may produce unintended results. He must strive to strike a balance.

When a person is appointed an administrator of a State-indebted company and clothed with the powers of paragraphs (b) and (d) of s 6 of the Reconstruction Act, he is, in a sense, being empowered and authorised to be judge over his own cause. All control and management of the company is vested in him. B He decides for and on behalf of the company. He is the face of the company. He is the brains and soul of the company. He must know what is good for the company. But in spite of all that he must remain objective.

Section 6(b) of the Reconstructive Act gives no suggestion as to how an administrator should treat the pre- and post- reconstruction obligations C . However, it seems to me that in general both the pre- and post- reconstruction obligations should be accorded equal treatment. But circumstances might arise when they may be treated differently. Every case will have to be considered on its own set of circumstances. In my view, it should not be the date when a particular debt was incurred that must decide preferential D treatment or otherwise. Rather it should be the circumstances surrounding the particular debt.

In the present matter SMM Holdings had been under a reconstruction order because it was indebted to the State. The Minister must have been satisfied that the company's management had been fraudulent, negligent or guilty of some such serious infraction. The respondent had been appointed administrator. E His duty was to turn it around so that it would be able to repay its debt and free the State from the obligation to utilise public funds. He had to return the company to profitability. From the respondent's lawyer's letter of 28 August 2012, it was not only the debt to the State that the company had been saddled with. It was said there were other debts much bigger in size F than the applicant's loans. That was the state of affairs when the respondent had taken over.

In his wisdom, the respondent had borrowed from the applicant. As his general powers of administration in relation to a company under reconstruction, he had had such power to raise money in any way in terms s 18(d) of the G Reconstruction Act. When he borrowed from the applicant the purpose had been to ensure that the company continued to produce and to trade. From the loan terms not only would the company be able to repay the applicant's loans, but also it would remain with 60 percent of the proceeds from its products to utilise for other purposes. But from the papers and from the submissions during the hearing, it appeared that the company, under the H

A control and management of the same respondent, who himself had incurred the debt, albeit on behalf of the company, had neither kept the arrangement of supplying the company's products to the applicant nor repaid the loans by due date. The applicant became entitled to sue the company. But the law said it must first get permission from the respondent. The respondent refused that permission despite acknowledging the debt, and, tacitly, the breach. B His fear had been that the applicant's suit would open up the floodgates, a Pandora's Box, as his lawyers had put it.

There is something in the respondent's conduct that offends against notions of justice and fair play in the minds of reasonable men. There is something callous in the submission that the applicant was not entitled to cry foul when C it had got, as it were, its fingers burnt, allegedly because it had

entered into the loan arrangements with its eyes wide open. Yet it had been the respondent himself, not the failed management of the past, who had brought about the state of affairs giving rise to the debt due to the applicant. In my view, his decision to refuse the leave had classically been concerned with self-preservation. It had evidently been designed to shield himself from the consequences of his D own infractions. That was wrong. That was unreasonable. That was unfair. That was in breach of s 3 of the Administrative Justice Act. For that reason I set aside the respondent's decision.

I should not concern myself with whether or not the decision of the respondent in turning down the applicant's request for leave to institute proceedings for E the recovery of its loans was grossly unreasonable in the *Wednesbury* sense. I am satisfied that in coming up with his decision the applicant had failed to live up to the principles set out in s 3(a) of the Administrative Justice Act.

The respondent argued that it was not competent for this court to usurp the function of an administrative authority by, in this case, granting the leave F that the respondent ought to have granted. It was pointed out that in terms of s 4 of the Administrative Justice Act, the courses open to the court are to set aside or confirm the decision or to refer the matter back to the administrative authority or to give appropriate directions to the administrative authority.

I was urged to follow the approach of Makoni J in the *Mhanyami Fishing* case. In that case the learned judge declined to grant the fishing licences G that the applicants had clamoured for. She had felt that to do so would be tantamount to substituting the decision of the court for that of the administrative functionary.

The approach in such matters was set out by McNally JA in the *Affretair* case. Quoting from Baxter *Administrative Law* at p 681, the learned judge H of appeal saidat 24D-F:

Mafusire J

> "The function of judicial review is to scrutinize the legality of administrative A action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator'. Thus it is B said that: '[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness."

It is not an absolute position that a court will not substitute its own decision for that of the administrative functionary. In exceptional circumstances it will. C Section 4 of the Administrative Justice Act does not lay down an absolute course of action that the court should follow. It gives broad guidelines. The list of those guidelines, in subs (2), cannot be said to be exhaustive. In subs (1) the right to a recourse that an aggrieved party may seek from this court in terms of that section is made subject to that Act "*and any other law*". D Furthermore, the court may follow any of the courses suggested in subs/(2) only in "*appropriate*" circumstances.

A court will substitute its own decision for that of the administrative functionary in exceptional circumstances. There are four criteria. These were discussed by McNally JA in the *Affretair* case at 24-25, and aptly summarised by E Mathonsi J in the *Gurta* case at 411. They 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 F to the applicant to force it to submit to the same jurisdiction;

4 where the court is in as good a position as the administrative body to make the decision.

The *Mhanyami Fishing* case is clearly distinguishable from this one. In that case the court dismissed the application on the basis of the points raised G*in limine*. One of them was the question of whether or not the court could substitute its own decision for that of the administrative functionary. The court held that it could not. In my view, and with due respect, the court was quite correct. There had simply been no sufficient information laid before it to grant the licences sought. H

Mafusire J

A In the *Gurta* case the court granted the leave to institute legal proceedings under s 6(b) of the Reconstructive Act. It found that all the four criteria above existed. Again that decision was, with due respect, also correct.

In casu, I consider that the applicant's case is even stronger than that of the applicant in the *Gurta* case. Among other things, in the *Gurta* case the B respondent had declined leave because he had perceived that he had some kind of defence to the proposed action. That was an improper exercise of discretion. In the present case, the respondent admitted the debt. All the facts germane to the issue were common cause. The respondent acknowledged the applicant's right to be paid. Part of the letter of 28 August 2012 reads:

> "The Administrator is aware of SMM's obligations to your client and assures C us that as soon as funding is in place, your client's matter will be addressed. Accordingly, for the reasons set out above, the request is declined."

Thus, he had no defence to the claim. Leave was refused for fear that a suit by the applicant would trigger several other suits by other creditors. That was an improper exercise of discretion.

D Just as in the *Gurta* case, I am satisfied that the applicant *in casu* has met all the criteria for this court to take the exceptional step to substitute its own decision for that of the respondent. It will be a waste of time to refer the matter back to the respondent. The delay will prejudice the applicant. These were commercial loans. Delays are undoubtedly prejudicial, even without E considering the question of the prescription of debts. Most importantly, the court is in as good a position as the respondent to make the decision. It is not fettered by self-serving interests as the administrator undoubtedly was. That the applicant's litigation may open what the respondent termed "a Pandora's box" was not a relevant consideration. Section 6(b) of the Reconstruction Act was evidently not designed to provide an administrator F of State-indebted companies some form of immunity from civil suits. In terms of s 18(1)(e), the administrator is authorised and empowered, among other things, to defend legal proceedings of a civil nature on behalf of the company. He is also authorised and empowered, in terms of s 18(1)(g), *inter alia*, to compromise or admit any claim or demand against the company.

G In the premises, I grant the leave sought by the applicant under s 6(b) of the Reconstruction Act.

Having reached a decision on the substantive claim I find it unnecessary to deal with the constitutionality of s 6(b) of the Reconstruction Act.

Disposition

H It is ordered that:

2014 (1) ZLR p500

Mafusire J

1. The decision of the respondent on 28 August 2012 refusing the request A by the applicant in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] for leave to institute civil proceedings against SMM Holdings (Pvt) Ltd is hereby set aside.
2. The applicant is hereby granted leave to institute proceedings against SMM Holdings (Pvt) Ltd in respect of a claim for the sum of US$3 635 158.31 together with costs of suit and interest as applicable thereon. B
3. The respondent shall pay the costs of this application

Kantor & Immerman, applicant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners C

1 See s 3 and s 4 of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*]

2 Per Chidyausiku CJ in African Resources Ltd & Ors v Gwaradzimba NO & Ors 2011 (1) ZLR 105 (S) at 117G-H

3 See my recent judgment in *Mangenje* v *TBIC Investments (Pvt) Ltd & Ors* 2013 (2) ZLR 534 (H) at 555 and *Zindoga & Ors* v *Minister of Public Service & Anor* 2006 (2) ZLR 10 (H) which I referred to therein.

4 See CCSU v Minister for the Civil Service [1984] 3 All ER 939 (HL) at 950-951 which was quoted with approval by Dumbutshena CJ in PF–ZAPU v Minister of Justice 1986 (1) SA 532 (ZS) at 548 (also reported in 1985 (1) ZLR 305).

5 At the time of this judgment I had not yet been apprised of the outcome.

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Source:
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WILLOUGHBY'S INVESTMENTS (PVT) LTD v PERUKE INVESTMENTS (PVT) LTD & ANOR 2014 (1) ZLR 501 (H)

2014 (1) ZLR p501

Citation	2014 (1) ZLR 501 (H)
Case No	Judgment No. HH-178-14
Court	High Court, Harare
Judge	Zhou J
Heard	5 March 2013; *CAV*
Judgment	16 April 2014
Counsel	*L Uriri,* for the applicant *E W W Morris, for* the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Arbitration – award – setting aside of – application – must be filed within three months of applicant receiving award – applicant being notified that award available for collection – such notice not constituting receipt

D *Arbitration – award – setting aside of – grounds – public policy – award resulting in a palpable inequity – such award may be set aside*

Words and phrases – "received" – party to arbitration having "received" the award – award must have been sent or delivered to such party – not enough to notify party that award available for collection

Headnote

E The applicant and the first respondent had purchased two adjoining pieces of land of equal size. Both properties had been previously owned by a company. A building had been erected, which straddled the two properties. The greater proportion of the building was on the first respondent's piece of land, though the evidence did not establish what that proportion was. F When the company sold the building, the purchase price paid by the applicant was 30 percent of the value, while the first respondent paid 70 percent. The parties then let the building to a third party as one unit despite the fact that it sat on the two contiguous stands. The expenses for the building

were shared equally between the applicant and the first respondent. The first respondent, which received the rentals, apportioned G the net rentals on a ratio of 70 percent to itself and 30 percent to the applicant. The ensuing dispute was referred to the second respondent, as arbitrator. The issue for determination was whether the net rental realised from the building should be shared equally by the parties, as contended for by the applicant, or in the proportions of 70 percent to the H first respondent and 30 percent to the applicant. The arbitrator came to

the conclusion that the relationship between the applicant and the first A respondent in acquiring the two contiguous stands as a single entity was one of co-ownership in proportion to the purchase price each paid. He determined that the share of the income derived from the leasing of the two stands, as one indivisible unit, should be in proportion to the specific contribution made by each party to the purchase price of the single entity. The applicant brought the award on review. B

The respondent objected to the application on the grounds that it was filed out of time, the application having been filed more than three months after the applicant was notified that the award was available for collection. The application was filed less than three months after the award was actually collected. C

Held, that in terms of art 34(3) of the First Schedule to the Arbitration Act [*Chapter 7:15*], an application for setting aside of an award may not be made after three months have elapsed from the date on which the applicant had received the award. The word "received" means that the award must have been sent or delivered to D the recipient. Here, there was an invitation to collect the award. Until the award was delivered to or collected by the applicant one could not say that the applicant had "received" it. The invitation did not amount to *traditio longa manu.*

Held, further, that the parties owned their two properties individually, each in terms of a separate deed of transfer. The building was, however, a part of the two immovable properties, having acceded to them by *inaedificatio*E in accordance with the Roman law principle (which has been received in the Roman-Dutch law) that everything which is built on or attached to the soil forms part of the soil. The building, being immovable property, could not be said to be "owned" jointly by the parties in the ordinary sense of the word, as there was no title deed relating to it in which the applicant and the first respondent are stated as the owners. What could F be said is that it was indivisible property which had acceded to two separately owned contiguous pieces of land and was now an integral part of the two pieces of land. The parties' undivided shares in the building could not be determined by reference to the proportions 70:30. The two stands were being leased as one unit.

Held, further, that accepting that this arrangement was a partnership, the G parties' contributions were their immovable properties, which were of identical sizes, not the money which they paid as the purchase price for the properties. The purchase price was paid not into the partnership business but to a third party, the seller of the immovable properties. It was immaterial that a larger portion of the building was located on the H

Zhou J

A stand belonging to the respondent. The parties' contribution to their partnership having been equal, in that they had each contributed a stand, and as they shared the expenses equally, the unequal sharing of the net rentals constituted a palpable inequity that affronts the conception of justice in an intolerable manner. The award would therefore be set aside as being in conflict with public policy.

Cases referred to B

Fawcett Security Operations (Pvt) Ltd v *Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S)

Groenewald v *van der Merwe* 1917 AD 233

Madzivire & Ors v *Zvariwadzwa & Ors* 2005 (2) ZLR 148 (H)

C*Madzivire & Ors* v *Zvarivadzwa & Ors* 2006 (1) ZLR 514 (S*)*

Mankowitz v *Loewenthal* 1982 (3) SA 758 (A)

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

ZESA v *Maposa* 1999 (2) ZLR 452 (S)

Legislation considered D

Arbitration Act [*Chapter 7:15*], Schedule, art 34(2)(b)(ii) & (3)

Case information

L Uriri, for the applicant

E W W Morris, for the first respondent

Judgment

E**Zhou J**: This is an application in terms of art 34(2)(b)(ii) of the First Schedule to the Arbitration Act [*Chapter 7:15*] for the setting aside of an arbitral award rendered by the second respondent in favour of the first respondent. The application is opposed by the first respondent. The background facts to the dispute which the second respondent was called upon to arbitrate are F eminently summarised in the award. They are as follows:

The applicant and the first respondent purchased two adjoining pieces of land, known as Stands 895 and 894, respectively. They are both 892 square metres in extent. The two properties are held under separate deeds of transfer. On the two pieces of land stands a building known as Lonrho House. Prior G to 6 September 1999 the two properties were owned by one company, Lonrho Properties Zimbabwe (Pvt) Ltd. That is the company from which the applicant and the respondent purchased the two adjacent properties. The greater portion of the building rests on Stand 894. It is common cause that what was advertised for sale was the building on the two pieces of land. The applicant paid for his property a figure which represented 30 percent of the H purchase price while the first respondent paid 70 percent of the purchase

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price. Lonrho House was let to a third party as one unit despite the fact that it A sits on the two contiguous stands. The expenses for the building were shared equally between the applicant and the first respondent. The first respondent which received the rentals apportioned the net rentals on a ratio of 70 percent to itself and 30 percent to the applicant. The second respondent found, as a fact, that there was no agreement between the parties that the rentals would be shared in those proportions. B

The issue which was referred to the arbitrator, the second respondent, was whether the net rental realised from the building should be shared equally by the parties or in the proportions of 70 percent to the first respondent and 30 percent to the applicant. The second respondent came to the conclusion that the relationship between the applicant and the first respondent in acquiring C the two contiguous stands

> "as a single entity, is one of co-ownership in proportion to the purchase price each paid. And, likewise, that in leasing the stands to the World Bank as a single unit the relationship of the parties became one of co-lessors, each being due only its *pro rata* share of income derived from the payment of rental." D

Based on that conclusion, he determined that

> "the share of the income derived from the leasing of the two stands as one indivisible unit, be in proportion to the specific contribution made by each party to the purchase price of the single entity."

Accordingly, the claim by the applicant to be awarded 50 percent of the net E rental was dismissed. In the award it is held that the same conclusion would be reached even if the relationship between the applicant and the first respondent was to be regarded as a partnership and the principles relating to partnerships were applied. That is the award which the applicant invites this court to set aside on the ground that it is contrary to the public policy of Zimbabwe.

The applicant moved the court to strike out the opposing papers filed on behalf F of the first respondent on the grounds, firstly, that the opposing affidavit is invalid and, secondly, that the deponent to the opposing affidavit has no authority to represent the first respondent. The issue of the invalidity of the opposing affidavit on the basis that it was not properly sworn to was not persisted with in the heads of argument and in oral argument. The applicant persisted with the

contention that the deponent was not authorised to represent the respondent. G That argument seems to be raised with amazing regularity these days. The applicant's contention is not that the respondent has not sanctioned the opposition to the application but, rather, that the deponent is not authorised to represent the respondent in these proceedings. But the respondent is represented not by the deponent but by its legal practitioners. The rules are clear as to the H

Zhou J

A qualification for a person to depose to an affidavit. Rule 227(4) provides that an affidavit filed in written applications

> "shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein".

In other words, a person who has knowledge of the facts and can swear to those B facts is the one qualified to depose to an affidavit in application proceedings. The applicant is not contesting the assertion that the deponent to the affidavit has knowledge of the facts stated in the affidavit. The cases cited by the applicant in its heads of argument relate to authority to institute proceedings on behalf of a company or to take certain decisions on its behalf, and not to the competence of a witness to depose to an affidavit on behalf of a company. C Compare *Madzivire & Ors* v *Zvariwadzwa & Ors* 2005 (2) ZLR 148 (H); see also *Madzivire & Ors* v *Zvarivadza & Ors* 2006 (1) ZLR 514 (S*)*. For that reason, the objection cannot be sustained.

The first respondent, on the other hand, objected *in limine* to the application on the basis that it was filed out of time. The first respondent contended that the D arbitral award was ready for collection by the parties on 25 February 2011 when a letter was addressed to the applicant's legal practitioners by the Secretary to the Commercial Arbitration Centre advising them that the award was ready for collection upon payment of the fee stated in the letter. The applicant did not attend to collect the award as advised. The award was subsequently delivered to the applicant's legal practitioners on 14 March 2011 under cover of a letter E dated on the same date.

Article 34(3) of the First Schedule to the Arbitration Act provides as follows:

> "An application for setting aside may not be made after three months have elapsed from the date on which the party making the application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal."

F The above provision shows that the period of three months is reckoned from the date that a party wishing to apply for the setting aside of an arbitral award received the award. Mr *Morris*, for the first respondent, submitted that the date on which the award was made available to the parties must be taken as the date on which the parties received the award. In this instance that date would G be 25 February 2011, when the applicant was notified that the award had been completed and was available for collection.

According to the *Longman Dictionary of Contemporary English*, "receive" means "to get (something given or sent to one)".The *Oxford Advanced Learners' Dictionary* explains the meaning of the word "receive" as follows: "to get or H accept something that is sent or given to you". The word "received" to me

Zhou J

means that the award must have been sent or delivered to the recipient. In A this case there was an invitation to collect the award. Until the award was delivered to or collected by the applicant one cannot say that the applicant had received it. The letter of 25 February 2011 does not amount to *traditio longa manu* as submitted by Mr *Morris*. That letter does not amount to a pointing out (with the long hand) of the item to be delivered. Further, the nature of the thing – the award – is such that the court would be most reluctant to extend that B form of delivery to it as it could be easily handled and physically given to the applicant, as what eventually happened on 14 March 2011. See *Groenewald* v *van der Merwe* 1917 AD 233 at 239; *Mankowitz* v *Loewenthal* 1982 (3) SA 758 (A) at 765. The award was, therefore, received by the applicant on 14 March 2011 and not on 25 February 2011. The application was, therefore, filed timeously. Compare *Mtetwa & Anor* v *Mupamhadzi* 2007 (1) ZLR 253 (S). C On that account, the objection *in limine* fails.

Turning to the merits of the dispute, I need to consider, firstly, the true nature of the relationship between the parties and its implications on the sharing of the net rent, bearing in mind the fact that the parties paid different amounts as the purchase prices for their properties. Whatever conclusion I reach on D that aspect, I will then need to consider whether the arbitral award rendered is impeachable on the ground of being in conflict with the public policy of Zimbabwe. The instant case indubitably presents an unusual scenario that defies the straitjacket of the ordinary principles relating to ownership of immovable property. It is a situation *sui generis*. The parties own their two properties individually, each in terms of a separate deed of transfer. The building is, E however, a part of the two immovable properties having acceded to them by *inaedificatio* in accordance with the Roman maxims, which have been received in the Roman-Dutch law, *superficies solo cedit* and *omne quod inaedificatur solo cedit*: everything which is built on or attached to the soil forms part of the soil: C G van der Merwe & de Waal *The Law of Things & Servitudes* p 126. F The building, being immovable property, cannot be said to be "owned" jointly by the parties in the ordinary sense of the word, as there is no title deed relating to it in which the applicant and the first respondent are stated as the owners. What can be said is that it is indivisible property which has acceded to two separately owned contiguous pieces of land. It is now an integral part of the two pieces of land. G

There is no evidence that 70 percent of the usable rentable area of the building is on the land belonging to the respondent and 30 percent of it on the applicant's stand. For that reason, the parties' undivided shares in the building cannot be determined by reference to those proportions. I am not, therefore, persuaded that the conclusion by the second respondent that the relationship between H

Zhou J

A the parties is one of co-ownership in proportion to the purchase price each paid and that as co-lessors the parties are entitled to a pro rata share of the net rent based on the proportions of their purchase prices in relation to the full purchase price for the two properties and the building is legally sound. My understanding is that the entire space covered by the two stands, including the area on which there is no building, is being leased in terms of the same lease B agreement. Put in other words, the two stands are being leased as one unit.

Mr *Morris,* for the respondent, urged the court to find, as did the arbitrator, that the relationship was one of partnership. I have no difficulty with the conclusion that the relationship is one of a partnership insofar as the building is concerned. The second respondent found that capital contributions of the C parties to the partnership were 30 percent from the applicant and 70 percent from the respondent. I do not agree. The parties' contributions were their immovable properties, not the money which they paid as the purchase price for the properties. The purchase price was paid not into the partnership business but to a third party, the seller of the immovable properties. Although D the parties paid different purchase prices for the properties, they own those properties separately. Each of those properties contributes to the housing of the building. But it is not just the building which is leased by the tenant, hence an inquiry into the proportions of the building on the two contiguous stands is unnecessary. The parties have contributed equal pieces of land into the partnership. It is immaterial that a larger portion of the building is located on E the stand belonging to the respondent. The building is indivisible. It has not been shown that if the portion of the building which rests on the applicant's stand is demolished, the building can remain intact and still be leased at 70 percent of the rent, or that it can be leased at all.

Article 34(2)(b)(ii) provides that an arbitral award may be set aside by this court F if it finds that "the award is in conflict with the public policy of Zimbabwe".

The test applied in determining whether an arbitral award is in conflict with the public policy of Zimbabwe is settled. In *ZESA* v *Maposa* 1999 (2) ZLR 452 (S) at 466E-G, the test is set out as follows by Gubbay CJ:

> "(T)he court does not exercise an appeal power and either uphold or set aside G 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 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 H hurt by the award, then it would be contrary to public policy to uphold it."

Zhou J

See also *Delta Operations (Pvt) Ltd v Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81(S) A at 85C-E; *Muchaka v Zhanje & Anor* 2009 (2) ZLR 9 (H) at 11D-12B.

Having found that the parties' contribution to their partnership is equal, in that they have each contributed a stand, it seems to me that unequal sharing of the net rentals constitutes a palpable inequity that affronts the conception of justice in an intolerable manner. It has not been shown that the value B of the contribution of the respondent's property to the lease is 70 percent while that of the applicant's is 30 percent. Equally, it has not been shown that the applicant holds an undivided 30 percent share in the building. The notarial lease agreement with the International Bank for Reconstruction and Development recorded the applicant and respondent as joint lessors without reference to any shares. It is common cause that the expenses were shared C equally between the parties. The mathematical calculation posited by the first respondent in its heads of argument does not accurately reflect the effect of the parties sharing expenses equally. In any event, the fact that the expenses were shared equally is not disputed by the first respondent in its opposing affidavit. The trite principle of the law is that what is not denied in affidavits must be taken to be admitted. See *Fawcett Security Operations (Pvt) Ltd*D v *Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S) at 127F. At the arbitration proceedings the first respondent's witnes, Mr Cranswick, confirmed that the deductions for expenses from the gross rentals were paid by the parties in the proportion of 50/50. It would be a palpable inequity to require the applicant to contribute 50 percent towards the expenses while E receiving 30 percent of the net profit on the basis that it paid a lower purchase price for its stand than that paid by the first respondent. Such an approach amounts to blowing hot and cold; to approbate and reprobate. It places the award in conflict with the public policy of Zimbabwe.

In the draft order the applicant asks this court to set aside the award and to remit the matter to the second respondent for the computation of the amount F due to it under the notarial lease. The latter relief falls outside the mandate given to this court in terms of art 34 of the Arbitration Act. The court is only empowered to set aside the award.

In the result, it is ordered as follows:

1. The arbitral award rendered by the second respondent dated 25 February 2011 G be and is hereby set aside.
2. The costs of this application shall be paid by the first respondent.

Mutumbwa Mugabe & Partners, applicant's legal practitioners

Atherstone& Cook, first respondent's legal practitioners H

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/CHINYAMAKOBVU v CHINYAMAKOBVU 2014 (1) ZLR 509 (H)

CHINYAMAKOBVU v CHINYAMAKOBVU 2014 (1) ZLR 509 (H)

Citation 2014 (1) ZLR 509 (H)

Case No Judgment No. HH-181-14

Court High Court, Harare

Judge Mawadze J

Heard 29 October 2013; *CAV*

Judgment 17 April 2014

Counsel *C Venturas,* for the applicant
J Mambara, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

C *Costs – contribution towards – matrimonial case – when such costs may be ordered*

Headnote

The requirements for an order for contribution towards costs are: (a) there D must be a subsisting marriage; (b) the suit in action must be a matrimonial one; (c) the applicant must have reasonable prospects of success; (d) the applicant is not on a financial position to bring or to defend the action without the contribution from the other spouse and (e) the other spouse is able to provide the applicant with this contribution. Items (d) and (e) E above should be considered conjunctively: for an award to be made it, should not only be shown that the applicant lacks financial means to bring or defend an action without assistance from a spouse, but also that other spouse has the financial means to pay for such contribution.

Cases referred to

F*Barras* v *Barras* 1978 RLR 384 (G)

Dube v *Mavako-Dube* 2006 (2) ZLR 97 (H)

Lindsay v *Lindsay* 1993 (1) ZLR 195 (S)

Mundawarara v *Mundawarara* HH-51-12

Mutyasira v *Gonyora & Anor* 2007 (1) ZLR 318 (S)

Case information

G*C Venturas*, for the applicant

J Mambara, for the respondent

Judgment

Mawadze J: This is an opposed application in which the applicant seeks an order for contribution towards costs in terms of r 274(1) of the High Court H Rules 1971 in the following terms:

Mawadze J

"IT IS HEREBY ORDERED THAT: A

1. The respondent shall contribute the sum of $5 000 towards applicant's/defendant's costs of divorce.
2. The respondent shall pay the costs of this application on a client-attorney scale."

The respondent issued summons out of this court on 3 August 2011 seeking B a decree of divorce on the basis of irretrievable breakdown of the marriage, an order in respect of the minor child, an order in respect of sharing of the assets of the parties and that each party pays its own costs.

The parties were married on 5 January 2005 in terms of the Marriage Act [*Chapter 5:11*]. The marriage was blessed with one child born on 5 August 1997. Both parties currently reside in Germany. C

The applicant entered an appearance to defend on 4 November 2011, and filed her plea and counterclaim on the same date. The matter then proceeded in terms of the Rules. A reading of the pleadings filed by both parties reveal the following:

(a) Both parties agree that the marriage relationship between them has D irretrievably broken down and that there are no prospects of the restoration of a normal marriage relationship.

(b) Both parties agree that custody of the minor child be awarded to the applicant.

(c) On 10 February 2012 the applicant withdrew the maintenance claim in E respect of herself and the minor child indicating that these matters were being dealt with by the courts in Germany.

(d) There is no dispute over the sharing of movable assets. The parties are agreed that all household goods be awarded to the applicant. They are also agreed that the applicant should be awarded two of the three motor vehicles which are specified in the pleadings. F

(e) The only dispute before the parties relates to the sharing of immovable properties being one in Germany and six in Zimbabwe which are;

- Zwischen den Hullen 45, 53343 Wachtberg, in Germany
- Stand No 206 Goromonzi
- Stand No 176 Goromonzi G
- Stand No 6955 Dzivarasekwa, Harare.
- Stand No 798 Charlotte Brooke, Borrowdale, Harare
- Stand No 1338 Bluffhill, Harare and
- Stand No 6 Manresa Harare. H

Mawadze J

A The respondent proposes that the applicant be awarded only one immovable property, Stand No 1338 Bluffhill, Harare, and that he be awarded all the remaining properties. The applicant proposed that she be awarded a 50 percent share of the value of the property in Germany and three other properties in Zimbabwe, being Stand 172 Goromonzi, Stand 1338 Bluffhill, Harare and Stand No 6 Manresa Harare with the remainder being awarded to the B respondent.

At the time of filing of this application the parties have not been able to resolve this dispute.

It is common cause that the applicant is not employed and that the parties are living on separation in Germany. The respondent is employed by the C United Nations agency in Germany.

The applicant in her founding affidavit states that on 6 December 2011 her legal practitioners wrote to the respondent's legal practitioners seeking contribution towards costs from the respondent. The response dated 3 January 2012 was that respondent was yet to advise his legal practitioners on his attitude on D the matter. On 10 February 2012 applicant's legal practitioners renounced agency but re-assumed agency on 27 February 2012. On 27 February 2012 applicant's legal practitioners sought respondent's response to the request for contribution towards costs. The respondent's legal practitioners indicated that they were still awaiting response from the respondent. No response was formally given and on 9 May 2012 applicant filed this application.

F The basis for the application as stated in the founding affidavit is that the applicant lacks means to litigate in this divorce matter. The applicant intends to defend the divorce action and to prosecute her counter claim. The applicant believes that she will be unable to exercise this constitutional right if respondent whom she alleges has means is not ordered to contribute F towards the costs. In her founding affidavit applicant stated that she receives a monthly stipend of 550 euros given to her by the respondent for her upkeep. She later admitted in the answering affidavit that it is actually 650 euros. In addition to that, the applicant also conceded in her answering affidavit that she receives US$600 per month from rentals in Zimbabwe which she says she is currently using to renovate the very premises being rented out. The G applicant explained that she is studying in Germany and also pays for their child's bus fare for school. The respondent hotly disputed that the applicant pays the child's bus fare for school. Instead the respondent indicated that he pays 26.90 euros for the child's bus fare.

The applicant claims the sum of US$5 000 as contribution for costs as she H estimates the trial on the contested issues to last for two days. There is no

Mawadze J

further justification given for the amount in the founding affidavit. It was A only in the heads of argument that it was explained then that the applicant has engaged a very experienced legal practitioner whose tariffs would justify the amount of US$5 000. The applicant did not explain the respondent's means in her founding affidavit save to state that he is a man of means.

In his opposing affidavit, the respondent averred that applicant was unwilling B to compromise in this matter and thereby avoid costs of litigation. He states that the applicant was claiming a 50 per cent share of the value of the immovable property in Germany, when she knows respondent is still paying a mortgage for it of 190 000 euros. The respondent submitted that he offered the applicant only one immovable property because it is the only one unencumbered. As regards his means, the respondent did not address this C pertinent point in his affidavit. It was only in argument that it was submitted that the respondent is not a rich man as he earns 7000 euros per month. No proof of his earnings is provided. Instead the respondent was keen to place before this court as per his opposing affidavit his expenses or obligations which he outlined as follows;

(i) That he is paying a mortgage for the next ten years in the sum of 190 000 D euros for the Germany property.

(ii) That he has other mortgage obligations outlined in para 6.3 of his opposing affidavit.

(iii) That he pays applicant a monthly stipend of 650 euros. E

(iv) That he pays for applicant's accommodation in Germany and all utility bills which is not part of the monthly stipend of 650 euros.

(v) That he incurs monthly expenditure outlined in para 6.3 of his founding affidavit (which if my calculations are correct amounts to 4 163.14 euros per month). F

The respondent argues that applicant has means to pay her legal costs from the monthly stipend and rentals received from Zimbabwe.

The law

Hahlo S*outh Africa Law of Husband and Wife* 5 ed p 424 sets out the requirements for an order for contribution towards costs. I shall proceed to G discuss these factors and relate them to the facts of this matter.

(a) There must be a subsisting marriage. In the present case the marriage between the parties is subsisting.

(b) The suit in action must be a matrimonial one. In this matter the action relates to divorce, hence a matrimonial one. H

Mawadze J

A (c) The applicant must have reasonable prospects of success. I have already alluded to the nature of the dispute between the parties which relates to sharing of immovable assets. I am satisfied that the applicant has made out a case that it is unlikely for the court to award her one out of the seven immovable properties. The respondent seems to labour under the mistaken belief that in deciding how to share the immovable property the B court only considers direct contribution. That perception is wrong. The court is guided by the provisions of s 7(4)(a) to (g) of the Matrimonial Causes Act [*Chapter 5:13*]. See also *Mundawarara* v *Mundawarara* HH-51-12 in which I discussed these factors and referred to other cases. I am of the view that the respondent's position is untenable and that the C applicant enjoys prospects of success.

(d) The applicant is not on a financial position to bring or to defend the action without the contribution from the other spouse and

(e) The other spouse is able to provide the applicant with this contribution. See also *Dube* v *Mavako-Dube* 2006 (2) ZLR 97 (H).

D I am of the view that items (d) and (e) above should be considered conjunctively. In other words, for an award to be made it should not only be shown that the applicant lacks financial means to bring or defend an action without assistance from a spouse but also that other spouse has financial means to pay for such contribution.

E I have already alluded to the applicant's means. She is unemployed and wholly dependent on the respondent for her needs. The applicant has therefore no independent financial means to survive. All the respondent has said is that applicant should use either her monthly stipend of 650 euros or the rentals of US$600 per month or both to pay for her legal costs. I am not persuaded by this argument. The applicant receive this monthly stipend for her day to F day needs. The costs of litigation in this matter is an additional expense to her. The applicant also explained that she uses the US$600 to renovate and maintain the property being rented out in Zimbabwe. This was not seriously challenged by the respondent. It is therefore clear that applicant is not in a financial position to defend this action and prosecute her counter claim G without contribution from the respondent.

I lastly consider whether respondent is able to provide the applicant the contribution required. While applicant did not clearly explain and justify the figure of US$5 000 claimed, she nonetheless indicated that she has engaged an experienced legal practitioner and that the trial will take about two days. H I find the amount to be reasonable in the circumstances.

2014 (1) ZLR p514

Mawadze J

The respondent has not taken the court in his confidence. He was not keen A to place before the court his income per month. The respondent was simply eager to state his monthly expenses. This court had to ask for the respondent's monthly income during submissions from his counsel. The impression I get from the respondent is that he is simply unwilling to provide applicant with any contribution, not that he lacks means to do so. From the admissions made the respondent earns a salary of about 7 000 euros per month. It is B therefore well within his means to pay US$5 000 claimed by the applicant.

I am satisfied that the applicant has proved on a balance of probability that she is entitled to an order directing the respondent to contribute towards her costs in the amount claimed. Consequently the applicant's claim in this regard should succeed. C

Both parties have not made meaningful submissions in relation to costs. The applicant did not justify why she was seeking costs on an attorney-client scale. One may infer that this is informed by the applicant's lack of means. The general principle is that a successful party is entitled to his or her costs. See *Mutyasira* v *Gonyora and Anor* 2007 (1) ZLR 318 (S) at 324D. However, in cases of this nature, the court may be tempted for good reasons for costs to be D made costs in the cause of the main action and be reserved for a decision by the trial court. See *Barras* v *Barras* 1978 RLR 384 (G); *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S). The rationale is that the trial court is better placed to assess whether such an application was well founded or not after having heard evidence in detail on issues in contention between the parties. I am of E the view that there are unusual circumstances in this case in that applicant totally lacks means and that her application is well founded. The distribution of the immovable assets is very key to the dispute between the parties. It is for this reason that I will award costs on the scale prayed for.

In the result I make the following order.

1. The respondent be and is hereby ordered to contribute the sum of US$5 000 F towards the applicant's costs for divorce.
2. The respondent shall pay costs of this application on a attorney-client scale.

Munangati & Associates, applicant's legal practitioners

J Mambara & Partners, respondent's legal practitioners G

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Source:
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MUSHORIWA v CITY OF HARARE 2014 (1) ZLR 515 (H)

Citation	2014 (1) ZLR 515 (H)
Case No	Judgment No. HH-195-14
Court	High Court, Harare
Judge	Bhunu J
Heard	5 June, 23 July & 2 August 2013; *CAV*
Judgment	30 April 2014
Counsel	*T Mpofu,* for the applicant *C Kwaramba,* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

C *Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights – right to water (s 77) – municipal by-law authorising council to cut off water – by-law also allowing council to do so even if bill disputed – such by-law contrary to Constitution*

D *Human rights – right to water – right to water protected by s 77 of Constitution of Zimbabwe 2013 – municipal by-law authorising council to cut off water – by-law also allowing council to do so even if bill disputed – such by-law contrary to Constitution*

Local government – urban council – by-laws – validity – supply of water – E *cutting off supply of water to customer who fails to pay for water – by-law authorising council to cut off water even if water bill disputed – such by-law ultra vires Urban Councils Act [Chapter 29:15] and Constitution*

Headnote

The respondent council sent the applicant a bill for water supplied. The F applicant flatly disputed owing the amount claimed or indeed any other amount. He maintained that he had always paid his bills in full and on time and provided proof of payment. He argued that the amount claimed pertained to a bulk meter not connected to his premises. Nonetheless, the council without any further ado disconnected water supplies to the applicant's premises, prompting him to file an urgent chamber G application for an order directing the council to restore water services pending resolution of the dispute by the court. The order was granted by consent, but in spite of the order the council again disconnected the applicant's supply. It took the intervention of the court and threats of imprisonment for contempt of court for the council authorities to restore H water to the applicant's premises.

The issue arose whether the disconnection was lawful and what should A happen if there is a dispute regarding payment: would the council be entitled to resort to self-help and to cut off water supplies unilaterally to a citizen without recourse to law? The council claimed that it was, in terms of s 8 of the city's Water Regulations 1913 (GN 164 of 1913) as read with s 198(3) of the Urban Councils Act [*Chapter 29:15*] and para 69 of the Third Schedule to the Urban Councils Act, clothed with B unfettered discretion to disconnect water supplies to a citizen at will, without recourse to the courts of law. Section 8 of the Regulations provides that "the council may, by giving 24 hours' notice, in writing, without paying compensation and without prejudicing its rights to obtain payment for water supply to the consumer, discontinue supplies to the C consumer if he shall have failed to pay any sum which, in the opinion of the council, is due under the conditions or the water by-law".

Held, that para 69(2)(e) of the Third Schedule, which sets out the matters in respect of which a council may make by-laws about water, omits the words "in the opinion of the council". The effect of that omission was to divest the council of the unfettered discretion upon which it seeks to rely D in justifying its conduct. The council's opinion does not matter; it can only disconnect water supplies on not less than 24 hours' notice, upon proof that the consumer has failed to pay any charges which are due. The council cannot lawfully disconnect water from a consumer unless it has established that the amount claimed is actually due. E

Held, further, that the right to water is a fundamental right enshrined in s 77 of the Constitution of Zimbabwe. Under s 44 of the Constitution, the State and every institution and agency of the Government at every level must respect, protect and fulfil the rights and freedoms set out in the Declaration of Rights. The council, as a public body and institution of local government, cannot deny a citizen water without just cause. F Section 8 of the Water Regulations contradicts both the Constitution and the enabling statute in more respects than one: firstly, it authorizes the council to arbitrarily deprive citizens of their fundamental right to water without compensation, contrary to s 85 of the Constitution, which entitles an aggrieved person to appropriate compensation whenever his fundamental human rights have been violated; and secondly, in the G event of a disputed bill, it unlawfully confers the respondent with the sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law, contrary to para 69 of the Third Schedule to the Act, as read with s 165(1)(c) of the Constitution. By so doing, the by-law allows the council to be the sole arbiter in its own case, contrary to the H

Bhunu J

A well-established common law maxim that no one should be a judge in his own cause. While the council has a right to collect its debts, it cannot do so by resorting to unlawful means: for every person, including the council, is subject to the law.

Cases cited

B*City of Cape Town* v *Strümpher* 2012 (4) SA 207 (SCA)

Riggs v *Palmer* 115 NY 506, 2 NE 188 (1899)

Tuso v *City of Harare* 2004 (1) ZLR 1 (H)

Wang & Ors v *Ranchod NO & Ors* 2005 (1) ZLR 415 (H)

C**Legislation considered**

Constitution of Zimbabwe 2013, ss 44, 77, 85, 162, 165 & 171

Urban Councils Act [*Chapter 29:15*], s 198(3); Third Schedule, para 69

Water By-laws 1913 (GN 164 of 1913), s 8

Case information

T Mpofu, for the applicant

D*C Kwaramba,* for the respondent

Judgment

Bhunu J: This is an urgent chamber application for a spoliation order coupled with an interdict. The applicant seeks a final order as amended in the following terms:

E 1. that the termination by the respondent of the applicant's water supplies on the basis of a disputed water bill and in the absence of a court order is unlawful self-help.

2. the respondent and all its employees be and are hereby interdicted from interfering whatsoever with, disrupting or terminating the applicant's water supply without a court order.

F 3. that the respondent shall pay the costs of suit on the higher scale of legal practitioner and client only if it opposes the application.

In the interim, the applicant seeks a provisional order directing the respondent to reconnect water supplies at his premises. He also seeks an interim interdict barring the respondent and its

employees from interfering with his possession G of the premises by interfering or terminating water supplies to the premises and costs at the higher scale

The bulk of the facts giving rise to the application are not in dispute. The applicant is a lawful tenant and occupant of flat number 12 at Northcliff block of flats in the City of Harare. The respondent is the City of Harare, H a municipal authority duly constituted in terms of the Urban Councils Act

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[*Chapter 29:15*].It is the sole supplier of domestic water in the city, including A the block of flats in which the applicant resides.

Sometime in May 2013 the respondent sent the applicant a bill of US$1 700, claiming payment for water services rendered. The applicant flatly disputed owing the amount claimed or any other amount for that matter. He maintained that he had always paid his bills in full and on time. He attached proof of B payment to his application. He argued that the amount claimed pertains to a bulk meter not connected to his premises.

On 31 May 2013 the respondent, without any further ado, unilaterally and arbitrarily disconnected water supplies to the applicant's premises, prompting him to file this urgent chamber application the following day for a spoliation order directing the respondent to restore water services pending resolution C of the dispute by the courts.

Having regard to the urgency of the case, when seized with the matter I immediately ordered, by consent of the parties, restoration of the water services forthwith pending the determination of this application in order to avert a catastrophe, as one cannot survive without water. The respondent D duly complied, thereby ameliorating the urgency of the matter.

Despite the existence of a lawful consent court order barring the respondent from disconnecting water services from the applicant's premises until the finalisation of this application, the respondent still went ahead and defiantly disconnected water services from the applicant's premises with impunity, E without any court order or legal justification. In spite of the applicant's pleas pointing out that the respondent was in contempt of court, it insolently refused to reconnect water supplies to his premises. It had again to take the intervention of this court, and threats of imprisonment for contempt of court, for the respondent to restore water to the applicant's premises. F

The respondent raised a number of preliminary issues regarding the propriety of some issues placed by the applicant before this court. Whatever complaints the respondent might have had, have since been addressed by the amendments that I granted during the course of this hearing. The undisputed facts before me clearly establish that, prior to the disconnection of water supplies the G applicant was in peaceful and undisturbed possession of the water supplies in dispute. The only issue that arises is whether such disconnection was lawful.

There is no substance in the respondent's claim that the applicant was no longer in peaceful and undisturbed possession of the water connection because of its threats to disconnect water to the premises. That argument goes against public policy that no one should benefit from his own inequity. H

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A If its argument is sustained, the respondent stands to benefit from its own wrongs or inequities should the threats turn out to be unjustified or baseless.

The doctrine against deriving benefit from one's own wrongs was amply articulated with characteristic lucidity in the famous American case of *Riggs* v *Palmer* 115 NY 506, 2 NE 188 (1899). In that case the New York court B had this to say:

> "All courts may be controlled in their operations and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found his own claim upon his own inequity or to acquire property by his own crime."

This court came to the same conclusion in *Wang & Ors* v *Ranchod NO & Ors*C2005 (1) ZLR 415 (H),where a wife who had shot and killed her husband wanted to be appointed executrix dative to his estate to the exclusion of his relatives. I accordingly hold that the matter is properly before me and proceed to determine the application on the merits.

The dispute that has arisen between the parties has to do with their respective D rights and obligations in respect of the provision of water to a citizen by a municipal authority such as the City of Harare. The parties are generally agreed that the respondent has an obligation to provide water, and the applicant, in turn, is obliged to pay for it. The point of departure is what happens in the event that there is a dispute regarding payment. In that case, is the respondent entitled to self-help and to unilaterally cut off water supplies to E a citizen without recourse to law? Put differently, is the respondent entitled to self-help without recourse to the courts of law and be a law unto itself.

The respondent's argument is that, by virtue of s 8 of the City of Harare's Water By-laws (SI 164 of 1913), as read with s 198(3) of, and para 69 of the Third Schedule to, the Urban Councils Act, it is clothed with unfettered F discretion to disconnect water supplies to a citizen at will, without recourse to the courts of law. The by-law provides as follows:

> "8. The council may, by giving 24 hours' notice, in writing, *without paying compensation* and without prejudicing its rights to obtain payment for water supply to the consumer, discontinue supplies to the consumer:
>
> (a) if he shall have failed to pay any sum which *in the opinion* of the Council G is due under the conditions of the water by-law.
>
> (b) …"

The applicant has countered that the by-law relied upon by the respondent is *ultra vires* s 198 as read with s 69(2)(e) of the Third Schedule to the parent Act and s 77 of the Constitution.

H Section 19(3) of the Urban Councils Act provides as follows:

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> "(3) Subject to this Act, a council shall have power to do any act or thing which, A*in the opinion* of the council is necessary for administering or giving effect to any by- laws of the council"

Section 198 is, however, subject to para 69(2)(e) of the Third Schedule to the Act that specifically provides for the disconnection of water supplies to a consumer. That para deliberately omits the words *"in the opinion of"*. It reads: B

> "(2) Without derogation to the generality of subparagraph (1), by-laws relating to matters referred to in that subparagraph may contain provision for all or any of the following –
>
> (a) …
>
> (e) *cutting off the supply of water after not less than twenty-four hours' notice on account of failure to pay any charges which are due.*C

It is abundantly clear that para 69 (2) (e) of the Third Schedule to the Act, which takes precedence over s198 (3), does not contain the words "*in the opinion of*". The effect of that omission is to divest the respondent of the unfettered discretion upon which it seeks to rely in justifying its unlawful conduct. Thus, the respondent retained the words "*in the opinion of*" in its D by-law in order to unlawfully confer on itself a discretion not granted to it by the enabling parent Act.

In other words, when it comes to disconnection of water on account of failure to pay, the Council's opinion does not matter; it can only disconnect water supplies on no less than 24 hours' notice upon proof that the consumer has failed to pay any charges which are due. E

What this means is that the respondent cannot lawfully disconnect water from a consumer unless it has established that the amount claimed is actually due. That then brings us to the question as to who is to determine whether or not the amount claimed is actually due.

The respondent has sought to arrogate to itself the right to determine when F the amount claimed is due by simply laying claim to payment without proof by due process or recourse to the courts of law. What it seeks to do is to oust the jurisdiction of the courts, so that it can operate as a loose cannon and a law unto itself. It seeks to extort money from the applicant without the bother of establishing its claim through recognised judicial process. The G disconnection of water supplies without recourse to the courts of law is meant to arm twist and beat the applicant into submission without the bother of proving its claim in a court of law.

The right to water is a fundamental right enshrined in s 77 of the Constitution of Zimbabwe, which provides as follows: H

Bhunu J

A **"77. Right to food and water**

Every person has the right to –

(a) safe clean and portable water; and

(b) sufficient food;

and the State must take reasonable legislative and other measures within the limits of the resources available to it, to have a progressive realisation of this right"

B Section 44 of the Constitution imposes a duty on the State and all its institutions and agencies to respect fundamental human rights and freedoms. It reads:

"The State and every person, including juristic persons and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms set out in this Chapter."

C The respondent being a public body and institution of local government, it follows that it cannot deny a citizen water without just cause. It is trite that it is the function of the judiciary to interpret and enforce the law when a citizen complains that his human rights have been violated. Section 162 of the Constitution clothes this court with judicial authority and s 165(1)(c) provides that,

D "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law."

In the words of Francis Bennion *Statutory Interpretation* (1984) at p 50, the courts are best suited to interpret and give effect to the law:

"A court is an agency charged with the function of exercising the judicial power of E the State. Only a court as thus defined has the power authoritatively to determine what the law is, and therefore what is the legal meaning of a relevant enactment."

Those sentiments accord with s 171 of the Constitution.

In terms of s 171 of the Constitution this court, as the High Court of Zimbabwe, has full original jurisdiction over all civil and criminal matters throughout F the country. It has unlimited jurisdiction save where its power has expressly been curtailed by Parliament, for instance in labour matters: see *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H).

This court, having been conferred with the necessary jurisdiction to hear and determine this matter by the supreme law of the land, cannot abdicate its function on account of an illegal municipal by-law crafted by municipal G authorities contrary to the Constitution and the enabling statute. Above all, it is the function of the court to do justice according to law, so that justice may be seen to be done and that the question of the law in dispute may be known.

Section 8 of by-law 164 of 1913 contradicts both the Constitution and the enabling statute in more respects than one. Firstly, it authorises the H respondent to arbitrarily deprive citizens of their fundamental right to water

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Bhunu J

without compensation, contrary to s 85 of the Constitution which entitles an A aggrieved person to appropriate compensation whenever his fundamental human rights have been violated.

Secondly, in the event of a disputed bill, it unlawfully confers the respondent with the sole jurisdiction to arbitrarily determine the dispute without recourse to the courts of law, contrary to the provisions of para 69 of the Third Schedule B to the Act, as read with s 165(1)(c) of the Constitution. By so doing, the by-law allows the respondent to be the sole arbiter in its own case contrary to the well-established common law maxim that no one should be a judge in his own cause.

It is a basic principle of our legal policy that law should serve the public C interest. As we have already seen, every person has a fundamental right to water. It is therefore, clearly not in the public interest that a city council can deny its citizens water at will, without recourse to the law and the courts. While the respondent has a right to collect its debts, it cannot do so by resorting to unlawful means, for every person, including the City Council, D is subject to the law.

I take comfort in that the Supreme Court of South Africa, in a related case of *City of Cape Town* v *Strümpher* 2012 (4) SA 207 (SCA); [2012] ZASCA 54 came to the same conclusion on facts that are on all fours with this case.

The respondent's conduct in terminating the water supply in the face of a E binding court order was contemptuous of the court and unbecoming of the respondent and its officials. The court expresses its displeasure, by awarding costs at the punitive scale.

I must, however, commend counsel for the respondent, Mr *Kwaramba*, for taking prompt and appropriate action to avert a nasty standoff between the F respondent and the court in which someone was likely to emerge badly bruised, as the courts derive their authority from the people of Zimbabwe in terms of s 162 of the Constitution, and to that extent court orders must be honoured and respected. They can only be defied at one's peril because they have the full support of the State's entire enforcement machinery. G

Those in the corridors of power must not abuse their authority by usurping the functions of the courts to the detriment of innocent members of society, as happened in this case. In the final analysis, the application can only succeed. It is accordingly ordered that a provisional order be and is hereby granted in the following terms: H

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Bhunu J

A **Terms of the final order sought**

That you show cause to this Honourable Court why a final order should not be made in the following terms:
1. That the termination by the respondent of the applicant's water supplies on the basis of a disputed water bill and in the absence of any order of B court is unlawful self-help.
2. That the respondent and all its employees be and are hereby interdicted from interfering whatsoever with, disrupting or terminating the applicant's water supply without the authority of a court order.
3. That the respondent shall pay costs of suit on the higher scale of legal C practitioner and client only if it opposes this application.

Interim relief granted

Pending determination of this matter, the applicant is granted the following relief –

1. That the respondent be and is hereby ordered to immediately restore D water supply to the applicant's rented premises, being 12 Northcliff Flats, Harare.
2. That pending finalisation of this matter, the respondent and its employees and assigns be and are hereby interdicted from interfering with applicant's possession of the premises by interfering with or terminating the water supply.

E 3. That the respondent shall pay costs of suit on a legal practitioner and client scale.

Nyamayaro Makanza & Bakasa, applicant's legal practitioners

Mbidzo Muchadehama & Makoni, respondents' legal practitioners

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MAGEDI & ANOR v SAMURIWO & ORS 2014 (1) ZLR 524 (H)

2014 (1) ZLR p524

Citation 2014 (1) ZLR 524 (H)

Case No Judgment No. HH-184-14

Court	High Court, Harare
Judge	Mawadze J
Heard	20 October 2013; *CAV*
Judgment	8 May 2004
Counsel	*C Takaendesa,* for the applicants *W Bherebende,* for the first, second and third respondents. No appearance for the fourth and fifth respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Customary law – family law – husband and wife – unregistered customary C *law marriage – when regarded as marriage in law – such marriage not invalidating will executed before marriage*

Will – validity – subsequent marriage of testator – unregistered customary law marriage – such marriage not invalidating will D

Headnote

After he had made a will in favour of the children of his marriage, the testator was widowed. He married the first applicant in an unregistered customary law union. No children resulted from this union. The testator died, and the applicant, relying on s 16(1) of the Wills Act [*Chapter 6:06*], sought E to have the will declared invalid on the grounds of the subsequent marriage. Section 2 of the Act defines a marriage as including a marriage solemnised in terms of the Customary Marriages Act [*Chapter 5:07*].

Held, that a civil marriage contracted after the execution of a will invalidates that will. The object of the legislation to that effect is to afford some measure of protection to the new spouse of the testator who had been F previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous matrimonial union to one of monogamy. It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and testator to that of a married person G – from a bachelor, divorcé or widower, in the case of a man, and from spinster, divorcée or widow, in the case of a woman. It is designed to avoid a situation in which a will which predated the subsequent marriage makes no provision for the new spouse. The position in law currently is that an unregistered customary marriage is generally not a marriage in the eyes of the law except when such specific recognition is given H

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Mawadze J

A by a particular enactment. This is made clear by s 3 of the Customary Marriages Act. Such a union is not a valid marriage in terms of the section, but, for the purposes of customary law and custom relating to status, guardianship, custody and rights of succession of the children of such marriage, is regarded as a valid marriage. Section 16(1) of the Wills Act only extended the fore-mentioned protection to those spouses B married in terms of registered customary law marriages. The will was therefore valid.

Held, further, that it is not a requirement that persons who wish to challenge the decision of the Master in testamentary matters should do so by way of an appeal in terms of s 8(6) of the Wills Act. They may approach the C appropriate court by way of a court application.

Cases cited

Mapenzauswa v *Muskwe & Ors* 2008 (1) ZLR 376 (H)

In re *Savanhu* 1990 (2) ZLR 376 (H)

D*Savanhu* v *Heirs Est Savanhu* 1991 (2) ZLR 19 (S)

Legislation considered

Customary Marriages Act [*Chapter 5:07*], s 3

High Court Rules 1971 (RGN 1047 of 1971), r 248

Wills Act [*Chapter 6:06*], ss 2, 8(1), 8(5), 8(6), 9 and 16 (1)

Case information

E*C Takaendesa,* for the applicants

W Bherebende, for the first, second and third respondents.

No appearance for the fourth and fifth respondents

Judgment

Mawadze J: This is an opposed application in which both applicants seek F relief in the following terms;

"IT IS HEREBY ORDERED THAT

1. The alleged Will of Takavengwa Lovelace Samuriwo dated 2 December 1992 and accepted by the 5th respondent on 30 May 2012 be and is hereby declared as null and void.

G 2. The first, second and third respondents shall pay costs of suit at a legal practitioner and client scale."

The first applicant, Fatima Magedi, is the surviving widow of the late Takavengwa Lovelace Samuriwo (the late Samuriwo). She entered into a customary law union with the late Samuriwo and apparently no children H were born of this customary law union.

Mawadze J

The second applicant, Kennedy, is the late Samuriwo's adult son born out A of wedlock with another woman whose further particulars are not furnished by both applicants.

The first, second and third respondents are the late Samuriwo's adult children and beneficiaries of his estate. They were born out of the marriage between the late Samuriwo and the late Perpetua Samuriwo. B

The fourth and fifth respondents are cited in their respective official capacities. The fifth respondent has provided a report, as is required in terms of r 248 of the High Court Rules 1971.

The background facts of this matter are as follows;

The marital history of the late Samuriwo seems to be largely common cause, C except as regards the relevant dates. Firstly, the late Samuriwo married the late Perpetua Samuriwo, the mother of the first, second and third respondents. The type of the marriage is not stated but from what is alleged it was a registered marriage. The late Perpetua Samuriwo died in 2001, although the first applicant claims it was in 2005. I am more inclined to accept the version of the first, second and third respondents, who are Perpetua Samuriwo's D children and are likely to know better the date their mother passed on, unlike the first applicant who was not yet married to the late Samuriwo by then.

After the death of Perpetua Samuriwo, the late Samuriwo married Joseline Chiedza Mukupe in February 2003 in terms of an unregistered customary law union and the union was dissolved or ended in October 2009. No children were born out of this union. E

The late Samuriwo then entered into a customary law union with the first applicant, which union ended when the late Samuriwo passed on 29 February 2012. No children were born out of this union. The date the first applicant and the late Samuriwo entered into the union is in issue. The first applicant alleged it was F in 2009 but the first, second and the respondents allege it was in 2011. This dispute in my view is immaterial to the issues to be resolved in this matter. The point is made

that whatever the date (year) the first applicant and the late Samuriwo entered into the unregistered customary law union, the first applicant is the widow of the late Samuriwo.

The late Samuriwo died testate on 29 February 2012. On 31 August 2012, G the fifth respondent (the Master) accepted the last will and testament of the late Samuriwo which had been authored on 2 December 1992 when the late Samuriwo was married to the late Perpetua Samuriwo and they had already had the three children being the first, second and third respondents. As per that will the late Samuriwo bequeathed his entire estate to the first respondent, Ruramai Samuriwo, failing which the entire estate would devolve in equal H

A shares between the second respondent, Yvonne Samuriwo, and the third respondent, Tinashe Samuriwo, and also granting a life usufruct to his now late wife, Perpetua Samuriwo, in respect of the Bluff Hill house in Harare.

It is not clear as to when the second applicant was born but his mother, it seems, was never married to the late Samuriwo. The first, second and third B respondents allege that he was later introduced into the family.

The first and second applicants seek an order to have the will of the late Samuriwo, dated 2 December 1992 and accepted by the Master, declared null and void. According to both applicants the basis for this is two fold;

(i) that the will was invalidated when the late Samuriwo contracted an unregistered customary law union or marriage with the first applicant C either in 2009, as per the first applicant, or in 2011 as per the first, second and third respondents.

ii) that the will is probably fake as the Master accepted a photocopy and that no original copy was ever produced.

In this regard reference is made to the correspondence between the Master D and the first applicant and also between the Master and the second respondent.

The application is opposed by the first, second and third respondents. The first, second and third respondents took two points *in limine* which I intend to dispose of first.

The first point *in limine* was that the application should be dismissed on the E basis of the non joinder of the estate of the late Samuriwo itself which has a substantial interest in the matter. Mr *Bherebende* later withdrew this objection. That decision, in my view, was well founded as the executor testamentary of the estate of the late Samuriwo had been cited in his official capacity and represents the interest of the estate.

F The second point *in limine* taken is that there are serious material disputes of facts in this matter which cannot be resolved on the basis of the papers filed. It was submitted that both applicants chose the wrong procedure by approaching the court by way of a court application in view of serious disputes of facts in the matter. The major disputes of facts referred to being the date the late Samuriwo entered into an unregistered customary law union with G the first applicant and whether the will accepted by the Master is not the original one. I am not persuaded by this submission. There are no material disputes of fact in this matter as the issue to be resolved, like the basis for the invalidation of the will, is of a legal rather than factual nature. The authenticity of the will can be resolved on the papers by simply referring to H the very useful and detailed Master's report. The points *in limine* taken by

the first, second and third respondents lack merit and are dismissed. I shall A therefore proceed to deal with the merits of the matter.

A point was taken in argument by Mr *Bherebende,* for the first, second and third respondents, that this application should be dismissed for want of compliance with the provisions of s 8(6) of the Wills Act [*Chapter 6:06*] ("the Wills Act"). It provides as follows, B

> "(6) Any person who is aggrieved by a decision of the Master *may appeal* to an appropriate court within thirty days of being notified of the decision of the Master" (emphasis mine)

The point was taken in argument, although it had not been raised by the first, second and third respondents in the papers. I allowed the point to be argued as it is a question of law. It is common cause that the applicants approached C this court for relief well after the thirty day period. The provision relied upon by Mr *Bherebende* is not applicable in this case as it related to an appeal.

The applicants are not approaching this court on the basis of s 8(6) of the Wills Act. It is also not mandatory that any person who challenges the validity of a will should do so by way of appeal. The applicants opted to challenge D the validity of the will by way of a court application, which challenge can be based on many other grounds, not necessarily the Master's decision. It is therefore clear that *in casu* the will is being challenged on the basis of the alleged subsequent marriage and that the copy filed may be fake as it is not an original form. This challenge is being made through a court application and not by way of appeal. The argument raised by the first, second and third E respondents as regards the thirty day period provided for in s 8(6) of the Wills Act, is inapplicable on the facts of this case.

I now turn to the question of whether the will accepted by the Master is a fake one, as it is allegedly in photocopy form and that no original copy was produced. This point should not detain us at all. All what the applicants are F saying is that the will should be fake because it is not original form. The applicants do not refer to any provision in the Wills Act which provides for such a requirement.

The requirements for a valid will are provided for in s 8(1)(a) to (d) of the Wills Act. There is no specific requirement that the will should be in original G copy form, although generally that would be desirable. In fact s 8(5) of the Wills Act [*Chapter 6:06*] gives the Master power to accept a will for the purposes of the Administration of Estates Act [*Chapter 6:01*] even in circumstances the will does not meet the requirements in s 8(1) or (2) and s 9 (2), (3) and (4) of the Wills Act. On this basis alone I am not persuaded by the argument taken by the applicants in this regard. The applicants did H

A not specify the basis at law for the will to be deemed invalid if it is not in original form.

Assuming that I may be wrong in the finding I have made, the Master's report, dated 12 July 2013, put the matter to rest. The Master accepts and acknowledges the apparent error which may have been made by a junior B officer in the Master's Office as regards the communication referred to by the applicants between the Master's office and the first applicant and the Master's office and the second respondent. It is however important that all officers in the Master's office, no matter their seniority, should always appraise themselves of the facts of each case and where appropriate seek guidance from the Master before transmitting wrong and harmful information C to interested parties in matters related to deceased estates. I, however, do not believe that where such an error is detected and is clear a party can seek to capitalise on an error to overturn the validity of a will, as the applicants are determined to do.

The Master in the report filed of record clearly states that the original will D was filed as a live will in 1992 with the Master's office and that the will the Master considered and accepted *in casu* is an original Will and not a photocopy. The Master pointed out that the live will never went missing. The fact is supported by a letter written to the late Samuriwo by A J A Peck Legal Practitioners, which states as follows:

> E "Your Will
>
> We have to advise that your Will was registered at High Court under reference LW 263/92 dated 10 December 1992"

The letter in question is dated 16 December 1992. Its authenticity has not been put into issue. The argument by the applicants that the will accepted by the F Master is probably fake and in photocopy form lacks merit and is dismissed.

This leads me to that issue which is whether an unregistered customary law union (or marriage although I prefer the word union) entered between the first applicant and the late Samuriwo invalidates the will. The applicants' position is that it invalidates the will, whereas the first, second and third respondent argue that it does not invalidate the Will. Surprisingly both parties rely on the G same provision, s 16(1) of the Wills Act, in support of each party's position. This dispute therefore can be resolved on the basis of the interpretation of s 16 (1) of the Wills Act which provides as follows:

"16. Effect of testator's subsequent marriage on Will

(1) Subject to the section, a will shall become void upon the subsequent marriage H of a surviving testator"

2014 (1) ZLR p530

Mawadze J

The applicants submitted that the will made by the late Samuriwo became A void when the late Samuriwo entered into a customary law union with the first applicant in 2009 or 2011, which will had been made on 10 December 1992.

The question I have to answer is whether a customary law union or an unregistered customary law marriage is regarded as marriage for the purposes of the Wills Act. B

Section 2 of the Wills Act defines what is a marriage for the purposes of that Act as follows:

"'Marriage' includes a marriage solemnised in terms of Customary Marriages Act [*Chapter 5:07*]".

The applicants argue that the definition of marriage referred to above does C not exclude an unregistered customary law marriage as this is not specifically stated. I do not find favour with this rather strange interpretation.

It is trite that a civil marriage contracted after the execution of a will invalidates that Will. See In re *Savanhu* 1990 (2) ZLR 177 (H) (although the case does not deal with this specific point and is distinguished from this case). D

In *Mapenzauswa* v *Muskwe & Ors* 2008 (1) ZLR 376 (H) at 379F-H to 380A, Kudya J, in explaining the genesis of the enactment of s 16(1) of the Wills Act, referred to *Savanhu* v *Heirs Estate Savanhu* 1991 (2) ZLR 19 (S) at 23B-E, in which Gubbay CJ sets out the legislative basis for promulgating s 16(1) of the Wills Act as follows; E

"It is plain to me that by enacting the provision the lawmaker was minded to alter the common law in accordance with which a Will is not revoked by the subsequent marriage of the testator. See *Ludwig* v *Ludwig's Executor* (1848) 2 Menz 452; *Shearer* v *Shearer's Executors* 1911 CPD 813; *Brande NO* v *Perlmutter & Ors* 1969 (2) RLR 103 (A) at 109 C; 1969 (4) SA 101 (RA) at 106. It was appreciated that the operation of such a principle would cause an injustice and F untold hardship. So in 1929 a change in the law was effected by the introduction of s 2 of the former Deceased Estates Act, presently superceded by s 16 (1) of the Wills Act. Its object is to afford some measure of protection to the new spouse of the testator who had been previously married, and to any issue whether born to the parties or adopted by them. The provision contemplates more than the mere conversion of an existing polygamous matrimonial union to one of monogamy. G It envisages a necessary change, brought about by the subsequent marriage, to the status of both the spouse and testator to that of a married person – from a bachelor, divorcé or widower in the case of a man and from spinster, divorcée or widow in the case of a woman. It is designed to avoid a situation in which the will of one or each of them, which predated the subsequent marriage, makes no provision for the other's new spouse". H

2014 (1) ZLR p531

Mawadze J

A The question which arises is whether the protection referred to by Gubbay CJ has been extended in our law to those women who opt to marry in terms of an unregistered customary law marriage like in this instant case.

The position of the law, in my view, currently is that an unregistered customary marriage is not a marriage generally in the eyes of the law except when such B specific recognitions is given by a particular statute or enactment. Section 3 of the Customary Marriage Act [*Chapter 5:07*] makes the point very clear and it provides as follows;

"3. Marriages not to be valid unless solemnised

(1) Subject to this section, no marriage contracted according to customary law including the case where a man takes to wife the widow or widows of a deceased C relative shall be regarded as a valid marriage unless –

(a) such marriage is solemnised in terms of this Act ..."

The limited recognition given or afforded to an unregistered customary law marriage is provided for in s 3(5) the Customary Marriages Act [*Chapter 5:07*]. It provides as follows;

D "(5) A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, *for purposes of customary law and custom* relating to status, guardianship, custody and

rights of succession of the children of such marriage, be regarded as a valid marriage" (emphasis is mine).

Despite the progressive legislative provisions enacted since independence and positive judicial activism, the legal disabilities suffered by women who E opt to marry under the unregistered customary law marriage remain in the various spheres of our law. As an example, the Matrimonial Causes Act [*Chapter 5:13*] is not applicable in relation to such unregistered customary law marriages as such women would have to find some cause of action und,er general law if they are to benefit from the matrimonial estate outside F "*maoko* property" at the dissolution of such a union.

It is my view that s 16(1) of the Wills Act has only extended the said protection to those women married in terms of registered customary law marriages. I do not believe that the legislature in s 2 of the Wills Act intended to include unregistered customary law marriages. If that is the case, then the definition would simply have referred to customary law marriages, excluding the need G for registration. It would be absurd for the applicants to state that the definition of a marriage in the Wills Act does not exclude unregistered customary law unions or marriages. While one may make a case for the need for legislative intervention to protect those women who enter into unregistered customary law marriages to be protected by the provisions of s 16(1) of the Wills Act, H I do not share the view that the law as it is now provides for such protection.

Mawadze J

The protection has only been extended to those married in terms of registered A customary law marriages as provided for in the Customary Marriages Act.

My finding is that the customary law union or marriage which the first applicant entered into with the late Samuriwo did not invalidate the will made by the late Samuriwo on 10 December 1992 prior to this union.

In conclusion I hold the view that the will is valid. Accordingly the application B is dismissed with costs.

Charamba & Partners, applicants' legal practitioners

Bherebhende Law Chambers, first, second & third respondents' legal practitioners C

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Source:
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STOHILL INVESTMENT PROPERTIES (PVT) LTD v MAHACHI & ORS 2014 (1) ZLR 533 (H)

Citation	2014 (1) ZLR 533 (H)
Case No	Judgment No. HH-213-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	26, 27 & 28 March & 1 April 2014; *CAV*
Judgment	14 May 2014
Counsel	*L Uriri,* for the plaintiff *R Chingwena*, for the first and second defendants Third defendant in default

Case Type Civil trial

Annotations No case annotations to date

Flynote

Estate agent – commission – entitlement to – entitlement arises when agent introduces potential buyer to principal – agent entitled to commission on subsequent sale, even if price lower than originally demanded

Headnote

D The plaintiff, a registered estate agent, sued the first and second defendants, the former being the beneficial owner of an immovable property in Harare registered in the name of the latter, a duly incorporated company owned and directed by the first defendant, for payment of a sum representing E agent's commission together with interest at the prescribed rate, collection commission and costs of suit. The plaintiff had secured a mandate from the first defendant to sell the property, initially by sectional title and subsequently as an entire block. It duly searched for a buyer, finding the Ministry of Justice, which was interested in the property, and duly introduced the buyer to the seller. When a valuation of the property F was requested to be undertaken by the Government valuator, as is the norm in Government purchases, the plaintiff was side-lined and a sale concluded through another estate agent to the exclusion of the plaintiff. The plaintiff claimed that it was entitled to commission equal to 7.5 per cent of the purchase price of the property.

Held, that an estate agent is an agent who is authorised to negotiate the sale G or purchase of immovable property and the service expected of him is the introduction of a person who is willing and able to purchase the property. Where the estate agent achieves a specified event he should be remunerated. The contract between an estate agent and a principal can either be express or implied. Where a person conducts himself in a H manner that, from his conduct and from the surrounding circumstances,

Mathonsi J

it can be inferred that he has authorised the agent to act on his behalf, A then the existence of a contract between them can be implied. The estate agent is not obliged to try to find a purchaser, but if he is given a mandate by the principal to sell property the principal is entitled to claim an exact performance of the terms of the mandate. However, if the agent fails to find a person who will purchase in terms of the mandate but introduces a person who negotiates with the principal and the seller B agrees to accept a lower price, the agent is entitled to commission, even though he has not performed the original mandate.

Held, further, that if a person deliberately, intentionally, and in order to escape an obligation, prevents an event from taking place, that event may, by a fiction of law (the doctrine of fictional fulfilment), be deemed C to have taken place. In agency cases the doctrine operates when the principal intends to escape either the obligation to pay commission or the obligation between himself and the third person.

Held, further, that the fact that the seller elected to side-line the applicant, and accepted a lower price than that given in the mandate, did not disentitle the applicant to its commission on the lower price accepted by the seller, D who deliberately prevented the agent from negotiating the price. Where an estate agent introduces a person who subsequently purchases, then he has earned his commission and it is immaterial that the first negotiations led to nothing and are afterwards renewed without further introduction. There is nothing to stop the principal from negotiating direct with the E seller and selling the property for a smaller amount, but the agent is nevertheless entitled to his commission.

Cases referred to

Gluckman v *Landau & Co* 1944 TPD 261

Leader Tread Zimbabwe (Pvt) Ltd v *Smith* 2003 (2) ZLR 139 (H) F

Woolley v *Hunt and Birkley* (1894) 7 HCG 99

Case information

L Uriri, for the plaintiff

R Chingwena, for the first and second defendants

Third defendant in default G

Judgment

Mathonsi J: The plaintiff, a registered estate agent, has sued the first and second defendants, the former being the beneficial owner of an immovable property being Mahachi Quantum House (hereinafter called "the property") located in Nelson Mandela Avenue, Harare registered in the name of the latter, a duly incorporated company owned and directed by the first defendant. It H

Mathonsi J

A claims payment of a sum of US$476 250 in agent's commission, together with interest at the prescribed rate, collection commission and costs of suit. It is not clear why the third defendant was cited at all and nothing was said about the third defendant in subsequent pleadings and at the trial.

In its declaration, the plaintiff pleaded that about March 2010, it secured a B mandate from the first defendant to sell the property registered in the second defendant's name, initially by sectional title and subsequently as an entire block. It duly searched for a buyer, finding the Ministry of Justice, which was interested in the property, and duly introduced the buyer to the seller. When a valuation of the property was requested to be undertaken by the Government Valuer as is the norm in government purchases, the plaintiff C was side-lined and a sale concluded through another estate agent, Iwe Neni Real Estate ("Inre") to the exclusion of the plaintiff.

The property was sold for US$6 350 000, thereby entitling the plaintiff to US$476 250, being 7,5 per cent of the purchase price, as commission prescribed by the Real Estate Agents Council Tariff.

D The first and the second defendants have contested the action stating in their joint plea that the first defendant has been wrongly cited given that he is a separate person from the second defendant, the entity in whose name the property sold was registered. The defendants denied ever engaging the plaintiff as their sole or general agent or ever signing an exclusive or general E mandate empowering the plaintiff to sell the property.

In para 3 of the plea it is averred that:

> "The first defendant denies ever negotiating with the plaintiff for a mandate to secure a potential buyer. The defendant will state that the mandate to sell and the exclusive rights emanating there from were given to Iwe Neni Real Estate and not the plaintiff. Secondly whilst it is admitted that the second defendant F was the registered owner of the property in question the second defendant never had any dealings with the plaintiff in any way or form and the plaintiff is put to the strictest proof thereof."

In para 12 of the plea the defendants reiterated that:

> "This is admitted Iwe Neni Real Estate was the person who was given a mandate G to sell the building in question and not the plaintiff."

In their joint pre-trial conference minute following a pre-trial conference held before a judge, the parties identified the issues for trial as:

1. whether or not the plaintiff had the mandate to sell the second defendant's property and if so whether the plaintiff is entitled to an agent's commission H in the sum of US$476 250;

Mathonsi J

2. whether or not the plaintiff is entitled to interest, collection commission A on the amount due and owing, and costs of suit;
3. whether or not the first defendant should have been cited in these proceedings.

Counsel for the plaintiff has, correctly in my view, broken down the issues for determination to the following: B

1. whether the plaintiff was mandated to sell the property;
2. if so, whether the plaintiff is entitled to commission; and
3. whether the second defendant has been properly joined to this *lis*.

This is because the question of interest and collection commission are really questions of law and nothing has been advanced by the parties on those C aspects. Generally where a debt is found to be owing, interest accrues on it from the due date. No case has been presented for collection commission, probably upon a realisation that there can be no entitlement to it where the defendants have not agreed to pay it, and it is indeed an attorney and client charge. I will therefore proceed to examine the latter issues. D

Three witnesses testified on behalf of the plaintiff, namely Hozaya Gadzai, Nyarai Mubvumbi and James Marufu Chihuri. Three calm and collected witnesses, they gave simple, straight-forward and consistent evidence which corresponds to the plaintiff's pleadings and is quite easy to follow.

Nyarai Mubvumbi is the plaintiff's managing director, shareholder and is also its sales consultant. She also does property management. Although at E the material time she was not a registered estate agent, she worked for the plaintiff which was a registered estate agent, working under the supervision of a principal registered agent, one Kenneth Nakoma. This arrangement complied with the provisions of the Estate Agents Act [*Chapter 20:17*] and regulations made under it. F

Mubvumbi testified that sometime in March 2010 she made an appointment to see the first defendant ("Mahachi") after obtaining his details from an employee of Mbidzo, Muchadehama & Makoni, her legal practitioners. Meeting Mahachi at his office located at the property, they exchanged business cards and started discussing business. It was during that discussion that Mahachi disclosed to her that he was selling the property and gave her G the mandate to sell it by sectional title. He also mandated her to sell his two other properties situated in Borrowdale and Vainona. He undertook to send her an e-mail containing the details of the property including the floor areas.

True to his word, Mahachi did send an e-mail on 18 March 2010 through one Theodorah Mahachi, whom the witness assumed was his secretary. We H

A now know that she is also Mahachi's daughter. Mubvumbi referred to the e-mails that she exchanged with Theodorah during which exchange, which lasted from 18 March 2010 to 20 July 2010, the latter sent her the floor areas of the property, the title deed in terms of which the property was held by the second defendant and much later she advised Mubvumbi that Mahachi was now selling the property as an entire block and gave her the asking price of B it as $7 million. Through those e-mails, they discussed the commission of 7,5 per cent of the purchase price which the plaintiff would require, and the viewing arrangements in the event that the plaintiff wanted to bring potential buyers to view the property. Mubvumbi was advised to liaise with Constance, Mahachi's receptionist who was based at the sixth floor of the property and C was also responsible for the tenants' schedule, according to Theodorah.

In most of the e-mails which flowed between Mubvumbi and Theodorah, the subject of discussion was captured as "Proposed Sale of MQH" meaning Mahachi Quantum House, and Theodorah signed off in that correspondence as "Theodorah Mahachi, BSc Property Studies, 6th floor, Mahachi Quantum House, 1 Nelson Mandela Avenue, Harare, Fax 04 – 781181, Tel 04 – 781180, D Cell 0733550196." The fax and telephone lines belong to Mahachi, in fact the telephone number given is his direct line. All this was confirmed by both Mahachi and Theodorah. At no time did the latter give out that she was working for an entity known as Iwe Neni Real Estate and Mubvumbi insisted that at no time whatsoever did she communicate with that Agency E which she never knew existed. As far as she is concerned the e-mails show that the plaintiff had a mandate, given by Mahachi, to dispose of the property, initially by sectional title and later, as an entire block.

She stated that in pursuance of that mandate she flighted an advertisement in the *Herald* newspaper on 8 and 12 July 2010 which she produced as an exhibit, under the "Business Premises For Sale" Column and it read:

F "STOHILL PROPERTIES, 62 Livingstone Avenue/Sixth Street, Tel 707933 E-mail: stohill @zol.co.zw CBD $8 million, Strategically located, neat 7 Storey Commercial Building with lots of parking space, Call Nyarai 0912 400 665, 0912 317 390."

Mr Gadzai of the Justice Ministry responded to the advertisement by telephone on 9 July 2010 and requested to view the property at lunch-time that same day, G prompting the witness to make a rush appointment with Constance at the property as she had been directed. In the company of James Chihuri, another member of the plaintiff, the witness took a team from the Justice Ministry on a tour of the property. That team was made up of Gadzai, the Deputy Director, Administration, at the Ministry of Justice and Legal Affairs and Mr H Chekenyere, the Director, as well as members of the Zimbabwe Electoral

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Mathonsi J

Commission (ZEC) namely Chief Elections Officer L C Sekeramayi and A Commissioner Nhandara.

Upon arrival at the property she met Mahachi who was sitting in his red car. The witness advised him that she had brought clients who wanted to view the building and he gave his blessing, assigning a caretaker to take them on a conducted tour of the property. The delegation expressed satisfaction with the property and promised to get back to the witness which they later did, B after she had sent a formal offer dated 12 July 2010 on behalf of the principal, offering the property for $8 million, a figure which took into account the agent's commission and room for negotiations.

After receiving the formal offer, the Ministry of Justice, through Gadzai, responded by sending a letter dated 3 August 2010 to Mr Chimba at the C Public Works Ministry, in accordance with government purchasing procedure, requesting that a valuation be done on three buildings that had been identified, including the property. The letter, which was copied to concerned estate agents reads in relevant part thus–

"03 August 2010

Ministry of Public Works D

Attention: Mr Chimba

RE: PURCHASE OF BUILDING FOR THE ZIMBABWE ELECTORAL COMMISSION, THE ZIMBABWE HUMAN RIGHTS COMMISSION AND THE JUDICIAL SERVICES COMMISSION

The above matter refers. E

The Ministry of Justice and Legal Affairs has identified the following buildings for possible purchase so as to house the above captioned commissions:

(A)	Fournos Building	: 144 Samora Machel Avenue
	Asking price	: USD 1 700 000.00
	Agent	: Letbill Real Estate, at the same complex
(B)	Lister Building	: Cnr 4th Street/Jason Moyo Avenue F
	Asking price	: USD 2 500 000.00
	Agent	: CB Richard Ellis
(C)	Mahachi Quantum	: No 1 Nelson Mandela
	Asking price	: USD 8 000 000.00
	Agent	: Stohill Properties

Kindly proceed to do the valuations on our behalf for onward transmission to Ministry of Finance. In addition, kindly proceed to identify other suitable G buildings for possible purchase.

H Gadzai

For SECRETARY FOR JUSTICE AND LEGAL AFFAIRS"

Mubvumbi stated that she was in constant verbal communication with Mahachi with whom she had even toured his buildings with potential purchasers. When H

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Mathonsi J

A she received the letter from the Ministry of Justice, she made an appointment to see him and told him the client was sending government valuers to do a valuation. He enquired from her if they were indeed serious. After that Chihuri made follow-ups on the valuation with Chimba while she sent a copy of the deed of transfer to the Ministry of Justice which had requested it.

B As far as she was concerned, at that stage the plaintiff had made the parties meet in fulfilment of the mandate. Thereafter the plaintiff was sidelined by Mahachi who, upon realising that the other party was a genuine and serious purchaser, decided to deal directly with it depriving the plaintiff of the opportunity to complete the mandate by negotiating the purchase price and drafting the sale agreement. The plaintiff later learnt that the agreement C of sale had been drafted by an entity known as Iwe Neni Real Estate and that Mahachi had accepted far less than his asking price of $7 million, he having settled for $6 350 000, even as the Government valuer had valued the property at $6 766 000. The purchase price was paid directly into Mahachi's personal account held at Premier Bank on 3 February 2011 by ZEC, thereby D depriving the agent of its commission.

After the plaintiff had registered a caveat on the title deed, a meeting of all interested parties was convened at the Ministry of Justice offices on 5 October 2010. It was chaired by the then Acting Secretary for Justice, M Ranga. The witness referred to the minutes of that meeting which all the witnesses who testified before me, except for Mahachi, confirmed having first received in E draft form and being asked to correct, before the final minutes were signed by the chairman.

Those minutes corroborate the plaintiff's version in very material respects. They confirm that the Justice Ministry's interest in the property arose as a result of the advertisement flighted by the plaintiff. They confirm that they F toured the property led by the plaintiff, ZEC expressed an interest in it through a letter written by Commissioner Nhandara after the tour, as a result of which Gadzai wrote to Chimba at Public Works requesting valuation, Gadzai made a follow up with Chimba by telephone and he confirmed receipt of the letter from the Justice Ministry and that when Chimba engaged Mahachi he had elected to negotiate the sale on his own to the exclusion of an estate agent.

G The minutes also confirm that after the plaintiff received the request for valuation, their Chihuri had made follow ups with Chimba on it, and that Mubvumbi had notified Mahachi of the pending valuation. More importantly, Mahachi himself confirmed meeting Mubvumbi and giving her the mandate to sell his property along with other estate agents and he also confirmed seeing H the officials from the Ministry of Justice and ZEC on the day they viewed

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Mathonsi J

the property. Mahachi's denial of these facts at the trial must be viewed as A self-serving and clearly incredible.

Under cross-examination the witness maintained that she had met Mahachi several times during the tenure of the mandate and briefed him on every step of the way although she had not given written reports on what was being done. She also maintained that she worked for a registered estate agent under B a principal registered agent, Kenneth Nakoma. Although several versions of the defendant's case were put to her, Mubvumbi stuck to her story which, in my view, remained consistent throughout. I accept her evidence.

Hozaya Gadzai, the Deputy Director, Administration at the Ministry of Justice and Legal Affairs may be said to be an independent witness to the extent that he has no interest in the dispute and only

knows the parties in connection C with the transaction involving the property, a transaction which has already gone through. His evidence was substantially similar and corroborative of that of Mubvumbi and Chihuri.

He testified that he was tasked by the Honourable Justice Mangota, then the Permanent Secretary in the Justice Ministry, to look for three buildings D to house commissions which fell under their Ministry, namely the ZEC, the Zimbabwe Human Rights Commission and the Judicial Services Commission. He checked newspapers and saw an advertisement flighted by the plaintiff on 8 July 2010 for the sale of the property. He responded to it, resulting in Mubvumbi taking him and his delegation to view the property. They saw Mahachi who allowed them to tour the property on 9 July 2010. As the ZEC E was interested in the property they made a request to the Secretary through a letter dated 9 July 2010, which reads in relevant part thus:

"RE: OFFICE ACCOMMODATION FOR THE ZIMBABWE ELECTORAL COMMISSION: EXPRESSION OF INTEREST

1. The ZEC Accommodation Task force visited the Mahachi Phanton (sic) F Building in the company of your Deputy Director Administrator Mr Gadzai.
2. Previously the same committee visited Windsor Park block of flats at Famona Bulawayo.
3. The Commission wishes to express its interest in the two structures and kindly requests your good offices to facilitate the purchase of the same for the Commission Head Office in Harare and regional offices in Bulawayo. G
4. The cost of the building is:

4.1	Mahachi Phanton (*sic*) –	US$ 8 000 000
4.2	Windsor Complex:	US$ 700 000
		US$ 8 700 000

5. The two structures are adequate for our needs in these two cities.

BF NHANDARA H

Mathonsi J

A Commissioner

ZIMBABWE ELECTORAL COMMISSION"

When he received the offer from the plaintiff, he responded by sending instructions to Chimba to perform valuation, which letter of instruction was received at Chimba's office. As the matter was urgent, he made follow-ups B on the valuations to Chimba in writing and by telephone. Chimba confirmed that the issues were receiving attention. He is sure Chimba acted on their instruction, because the procedure is that once the Ministry identifies a property to be bought on behalf of a user department, they tour the property with the users. If they are interested in the property they secure the property documents and then write to Chimba, the director responsible for valuations C in the Ministry of Public Works, to do the valuation. Chimba is required to act in terms of instructions given to him and in this case he did, as the Ministry of Justice was able to purchase Fournos Building for ZHRC from the same minute sent to Chimba.

As far as Gadzai was concerned, the plaintiff was the agent selling the property and is the one which secured the buyer. He confirmed the contents D of the minutes of 5 October 2010 meeting which he said were proof-read by all concerned parties, and queried why Chimba ignored his instruction to deal with the plaintiff as agent of the seller. In his view, Chimba acted irregularly for some unknown reason.

Gadzai also gave his evidence very well. I see no reason why he would E falsify anything and none was suggested in his cross-examination. To me he is a witness who came in pursuit of the truth and nothing else. I embrace his evidence.

James Marufu Chihuri is a registered principal estate agent currently with West Wing Real Estate and has been an estate agent for 13 years. At the material F time, he was with the plaintiff, an entity which he helped set up. He is one of the partners of the plaintiff. He also corroborated the evidence of Mubvumbi, adding that he had experience in selling property to the government and knew the procedure to be followed when government purchases property. It is this experience which was invaluable in the processing of the transaction.

Chihuri confirmed that he had made follow-ups on the valuation of the G property with Chimba, a person that he knew personally, firstly in September 2010 when he showed Chimba the letter from Gadzai dated 3 August 2010, on the valuation. Chimba claimed he had not received his own copy but gave an assurance that he would act on it when he received it. After about a month he discovered that Fournos Building which was being sold to the H government by another estate agent, Letbill Real Estate, had been processed

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by Chimba. This prompted him to return to Chimba about the end of October A or beginning of November 2010, who still claimed he had not received the letter from Gadzai but made promises to get back to the witness.

Despite these promises, Chimba never got back to the witness until they discovered he had processed the agreement to the total exclusion of the plaintiff when he knew of the plaintiff's interest. That is when the witness B discovered that Chimba was not acting in good faith. In his view no agent was involved in the sale agreement because it does not contain a commission clause. Agents work for a commission. As far as he is concerned the defendants concluded the sale "in house". Mahachi and Chimba connived to deprive the plaintiff of its well-earned commission. He added that the year 2010 was a seller's market meaning that the seller would determine the purchase C price. For that reason, if the plaintiff had not been sidelined, it would have persuaded the government to buy the property at a higher price than what Mahachi settled for acting on his own.

Chihuri also gave his evidence well and did not try to exaggerate anything, sticking as he did to what is contained in the plaintiff's pleadings. D

Problems started when evidence was presented on behalf of the defendants. The defendants' case put to the plaintiff's witnesses in cross-examination kept on changing. For instance, it was put to Mubvumbi that Inre had a mandate to sell the property prior to the involvement of the plaintiff while it was put to Chihuri that there was no need for a commission clause in the agreement because there was no agent involved, Mahachi having been E approached directly. But the moment the defendants' witnesses took the stand, the entire case of the defendants as contained in the pleadings underwent some metamorphosis.

Michael Mahachi, the first defendant, is a director of the second defendant. A former chairman of the Commission appointed by the Minister of Local F Government to run the affairs of the City of Harare, he resigned from that post to take up a post as a project manager of the Airport Road construction, a project whose agreement he had signed while still chairing the Commission running Harare. He describes himself as a teacher by profession but also a quantity surveyor, a project manager and property developer, who boasts that everything he owns is for sale including the suit he was putting on as G he gave evidence.

He confirmed meeting Mubvumbi at his offices but denied giving her a mandate to sell his property either by sectional title or as an entire block. Although admitting discussing the offer that had been given to sitting tenants by letter purportedly dated 15 March 2010 (note that the date is added in H

A ink and in a date stamp), it was his evidence that by that letter they were merely seeking what he called "expressions of interest from the tenants" and not selling. This is despite the fact that the letter to tenants produced by the defendants and written by Inre stated that Inre had been appointed to commission the proposed sale of the office block and it made it clear that the sitting tenants were being given a right of first refusal. The letter B was written by Theodorah even before

she was formally employed by Inre, she only having been employed on 1 April 2010 according to documents produced by the defendants.

Mahachi stated that he advised Mubvumbi at that meeting that they were not selling the property. Surprisingly, he agreed to release to her the figures of the C sectional title units through Theodorah. As to why he saw fit to do so, he said it was merely an academic exercise. Strange indeed, that an experienced property owner would release private information relating to prices of his property and floor areas to facilitate an academic exercise by a total stranger.

On the correspondence between Theodorah and Mubvumbi, Mahachi took the view that it is no proof of any mandate given to the plaintiff. As far as D he knew, Theodarah was communicating as an employee of Inre and not on his behalf. This is at variance with the contents of her e-mails which at no point alluded to the fact that she was writing on behalf of Inre. She did sign off as one working at Mahachi, Gwaze and partners, a firm run by Mahachi, and communicated Mahachi's wishes relating to the sale of the entire block E and his asking price of $7 million. The story that she did so because she was using internet connection belonging to that firm located at the sixth floor as she could not use that of Inre at the ground floor because it was a dial-up connection is just a dog's breakfast. For a start, it is inconceivable that if indeed Inre was a stand-alone entity, divorced from Mahachi's empire, he would allow it to conduct its own business at his expense. It is also unlikely F that the daughter of a mere landlord, not even employed at the time but merely on attachment, would have what she called "signatory powers" in a company that did not employ her until much later on 1 April 2010. Perhaps Mahachi is right when he says he had surrounded himself with a group of entities, probably satellites of his own, working together in the same profession, engineers, quantity surveyors, architects and an estate agent in G the form of Inre headed by Engelbert Nyandoro, a long standing colleague and a former subordinate of his at the Ministry of Local Government. The evidence placed before me makes it difficult to accept that Inre existed independent of Mahachi.

Coming back to the e-mails, Mahachi expressed surprise that Theodorah and H Mubvumbi discussed the sale of the property and commission when he was

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not selling it. He stated that he did not know where they got the idea that A he was selling. He feigned surprise. It is highly unlikely, if not well-nigh impossible that Theodorah would have dreamt that the property was being sold and that Mahachi wanted $7 million for it.

He tried to imply that the plaintiff already had a buyer when it approached him, and for that reason, that it was an agent of the buyer. That analogy B does not sit well with the evidence on the ground. The plaintiff flighted an advertisement after securing a price for the entire block and Gadzai responded to that advertisement. The plaintiff offered the property to the Ministry of Justice in writing, thereby setting in motion the process of valuation which led to the sale.

While in his plea Mahachi averred that he gave Inre the mandate to sell the C property and repeated that in an affidavit he deposed to on 8 October 2012 in support of an application for the removal of a caveat, in his oral evidence he was adamant that he never mandated Inre to sell the property. In fact even as the sale agreement was drafted by Inre, Mahachi insisted that he acted without an agent as he was approached directly by Chimba of Public Works. In that context I have to quote what he stated at para 1.8 of his affidavit. D

> "The sale followed upon discussions between the parties and which were facilitated by a real estate company known as Iweneni Real Estate (herein after INRE). I attach hereto and marked as 'C' a copy of the letter of 22 November 2010 addressed to INRE by third respondent (Minister of Public Works). It is clear from that brief letter that third respondent made the offer to purchase that E property through INRE. It is that offer which was accepted in the terms made and which led to the conclusion of the attached agreement --------. There can be no gain-saying that this process was done by and through INRE although first applicant (sic) maintains in the face of such evidence that the position is otherwise."

We now know of course that this is not the case, as he insisted in court that F Inre was not involved. Mahachi stated in court that when Chimba approached him and asked if he had an agent he told him that although he normally used Inre, there was no need for an agent. He only requested Nyandoro of Inre, who was well known to Chimba, to assist him to negotiate the sale at Public Works with Chimba. No commission was due to Inre even though it not only drafted the agreement,

it also wrote a number of letters in pursuance of the G sale process. This sustains my view that there was no difference between Mahachi and Inre in practical terms.

Mahachi admitted that he has worked with Chimba on the Airport Road project and that Nyandoro is a former employee of the Ministry of Local Government, Public Works and National Housing where he worked with H

A Chimba and indeed Mahachi himself. The three of them have interacted in various platforms.

Mahachi did not make a good witness. He prevaricated a lot and his version of events kept on changing. When his cross-examination was over, nothing was left of his story and he resorted to blaming his legal practitioner for not B directing him to give evidence on crucial points of this case like the visit of the team from Ministry of Justice and ZEC to view the property. He could not meaningfully challenge the contents of the minutes of the meeting of 5 October 2010 where he is on record as having stated that he gave the plaintiff the mandate to sell the property. He could not explain why he allowed the team to view his property if it was not for sale and the plaintiff C had no mandate to sell it, content to say in the height of contradiction, that everything he owns is for sale.

Significantly, Mahachi confirmed under cross-examination that the purchase price of the property was paid directly into his account, that although the second defendant was the registered owner of the property, he was the D beneficial owner and that if the court finds that there was a mandate which was executed by the plaintiff then both himself and the second defendant would be obliged jointly to pay the agent's commission. In my view, this puts to rest the third issue for trial relating to the citation of Mahachi personally. Nothing more needs to be said.

If Mahachi was a bad witness, Lazarus Chimba and Theodorah Tsvaira E (nee Mahachi) were a disaster for the defendants' case. Lazarus Chimba was the Director of Valuations and Estate Management in government and obtained his qualifications at East London University in 1993, although he was employed in government from September 1981 until his welcome retirement on 31 December 2013.

F Although all the evidence presented in court shows that the process leading to the purchase of the property started when Gadzai responded to the advertisement flighted by the plaintiff, Chimba would want us to believe that it started with ZEC requesting him, in October 2010 to approach the owners of the property to purchase it. This ignores the entire process which started with Justice Mangota instructing Gadzai to look for accommodation and G ZEC writing to its line Ministry on 9 July 2010, the very day they viewed the property, requesting it to facilitate its purchase. This was in line with the procedure that commissions act through their parent ministries and not what Chimba suggested.

While Chimba accepted that Gadzai had contacted him in writing and by H telephone asking him to act fast on the valuation, he wanted to suggest

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that he never received the letter of instruction from Gadzai dated 3 August 2010 A until after he had concluded the sale and that if he did receive it, he was not obliged to comply with it because he did not take instructions from ministries. This is despite the fact that he complied with the same instruction when purchasing Fournos Building for the Human Rights Commission at a record speed, probably because the estate agent selling it was a relative of his.

Chimba admitted that Chihuri, representing the plaintiff, had visited him B making a follow-up on the matter. He however wanted to suggest that this was after the sale had been concluded, ignoring all the other evidence pointing to the contrary.

Although Chimba agreed that the letter from Gadzai was delivered while he was at work, and therefore he must be assumed to have seen it, and that C Gadzai telephoned him soon thereafter about it and also spoke about the plaintiff being the agent, he insisted that he still asked Mahachi if he had an agent and was told that Mahachi had none. It is not clear why he would have made such an inquiry when he had the answer. He then went on and on about a procedure for acquisition by

government which ignores the interests of the end user and presented himself as the ultimate authority entitled to D act as he pleases. He painted a picture that he was acting in the interest of the government in excluding the agent when the agent is that of the seller who pays the commission. Significantly he still purported to work with Inre, a front of Mahachi, an entity he says he only became aware of during the inspection of the property. E

Interestingly, Chimba claimed he only knew Mahachi as a public figure but admitted that he had his contact details which he used when the need to contact him to fix an appointment arose. Mahachi himself admitted that they knew each other and even worked together on the Airport Road project. He also worked with Nyandoro and studied with him in the United Kingdom. F

In the end, Chimba admitted that he would not have approached the seller if he had not been directed to him by the Justice Ministry, which had reacted to the plaintiff's advertisement. In short, Chimba was a very dishonest witness whose demeanour was extremely bad. He was completely unreliable. In fact, one may add that it is in everyone's interest that he has retired and will now focus on spending time with his grandchildren and stop bringing G embarrassment to the Government, the way he did in this case.

Nothing much really has to be said about Theodorah Tsvarai. She admitted having lied about her employment status on her Linked In account which stated that between March 2010 and February 2013 she had been employed by Mahachi Gwaze and Partners. She admitted that she had misrepresented H

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A herself as a property developer when she was not. She admitted that she signed off her e-mails with telephone and fax particulars of Mahachi Gwaze and Partners and not Inre which she claims employed her. Although her Linked In account says she was employed by the second defendant she said she was not.

B Here is a witness who agrees falsifying her resume, who claims she worked for a certain company even before it employed her. Who claimed she had signing powers (whatever that means) for a company that did not employ her and that she had a mandate to sell a property when the owner says he never gave any mandate. A witness who was timid and visibly unreliable. Nothing can be gained from her testimony. A witness who gives false evidence and lies C about a particular incident leads to an inference that such witness is hiding something: *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* 2003 (2) ZLR 139 (H)

I now turn to resolve the issues for trial agreed by the parties. I have already stated that issue number 3 relating to the citation of the first defendant resolves itself from the admissions he made in evidence. The first defendant, D as the avowed beneficial owner of the property, to whom the purchase price was paid, has been properly cited. In the event of a finding being made that commission must be paid, he surely must release it from the purchase price he pocketed.

An estate agent is an agent who is authorised to negotiate the sale or purchase E of immovable property and the service expected of him is the introduction of a person who is willing and able to purchase the property. Where the estate agent achieves a specified event he should be remunerated. See *The Law of South Africa* vol 9 (Butterworths) para 381.

The contract between an estate agent and a principal can either be express F or implied. Where a person conducts himself in a manner that from his conduct and from the surrounding circumstances it can be inferred that he has authorised the agent to act on his behalf, then the existence of a contract between them can be implied.

The point is made at para 385 of the *Law of South Africa op cit* at p 237 that:

> G "The estate agent is not obliged to try to find a purchaser, but if he is given a mandate by his principal to sell property the principal is entitled to claim an exact performance of the terms of the mandate. *However, should the agent fail to find a person who will purchase on the terms of the mandate but introduces a person who negotiates with the principal and the seller agrees to accept a lower price, the agent is entitled to commission even though he has not performed the*H*original mandate*." (the emphasis is mine)

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The same point is repeated by A J Kerr *The Law of Agency* 2 ed (Butterworths) A at p 151 who quoted the judgment of Solomon J in *Woolley* v *Hunt and Birkley* (1894) 7 HCG 99 at 109-10.

> "Where a clear and definite mandate for the sale of any property is entrusted to an agent by a principal, the principal is entitled to demand an exact performance of the terms of the mandate, and is not liable for commission unless the person introduced by the agent is prepared to conclude a sale at the price and upon the B terms set forth in the mandate … But suppose the agent fails to find a person who is prepared to purchase on the terms set forth in his mandate, but introduces to his employer one who us willing to negotiate with him, then if the introduction leads to business and the property is sold by the principal for a smaller amount or on different terms, that agent is entitled to commission, even though he failed to carry out the express terms of his mandate. In such a case the employer, having C availed himself of the services of the agent, must be taken to have agreed to pay the agent his commission upon the business transacted."

In casu there is no doubt, despite Mahachi's feeble protestations, that he commissioned the plaintiff to sell the property. All the evidence points to that. He held a meeting with a representative of the plaintiff. He got his daughter to send e-mails discussing the terms of the mandate and to send D the details of the property and the deed of transfer. He gave the plaintiff the purchase price he expected. He was present when the plaintiff brought the eventual purchaser to view the property and not only sanctioned the tour but also facilitated it by providing an escort. He made an unsolicited admission at a subsequent meeting held on 5 October 2010 that he had mandated the plaintiff to sell. I conclude therefore that the plaintiff had a mandate to sell E the property.

The evidence placed before me shows that the plaintiff set about fulfilling the mandate. It flighted an advertisement in the *Herald* newspaper which attracted the attention of the eventual buyer. It facilitated the inspection of the property and was able to secure the expressed interest of the purchaser, F it presided over the offer made to the purchaser which set in motion the process of valuation followed by the government when it purchases property.

The moment that process commenced and Mahachi connected with the government representative, the whole process was then adulterated with the sole intention of side-lining the estate agent. Chimba was corrupted and even expressed unbridled indignation at the use of estate agents which he G said cost government money preferring to deal directly with the owner of the property. As a result, the plaintiff was prevented from completing its mandate.

Writing about fictional fulfilment of a mandate, Kerr *op cit* states at p 154:

> "If a person deliberately, intentionally, and in order to escape an obligation, prevents an event from taking place that event may, by a fiction of law be deemed to have H

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> A taken place. The authorities on the doctrine, which is known as the doctrine of fictional fulfilment, are discussed in *The Principles of the Law of Contract* (at 231-5). In agency cases the doctrine operates when the principal intends to escape either the obligation to pay commission or the obligation between himself and the third person."

The decision taken by Mahachi to deal directly with the purchaser, ably assisted B by an associate of his, Chimba, was deliberative. He roped in a surrogate company of his, Inre, where his daughter had "signatory powers", which was headed by an associate of his, Nyandoro, as cover and disguise which completed the exclusion of the estate agent that had introduced the purchaser.

I agree with Mr *Uriri* for the plaintiff that the doctrine of fictional fulfilment C of the mandate applies in this case because of the conduct of the defendants.

Mr *Chingwena* for the defendants strongly argued that the plaintiff was not the proximate cause of the sale because either Mahachi engaged the purchaser directly or the sale came as a result of the efforts of Inre. This is one of several alternative arguments presented to avoid liability. On causation, Kerr states at p 156:

> D "The question often arises whether an agent has contributed to the desired result to an extent sufficient to entitle him to claim his commission. Courts ask whether he (or what he did) was the 'proximate cause', the '*causa cansans'* as distinct from the '*causa proxima'*, the '*causa causans' (simpliciter*), the 'efficient cause,' or 'the effective cause' of the coming into being of the transaction which is the end result of the negotiations, normally a sale."

E I have already stated that the route leading to the conclusion of the sale started with the advertisement which was flighted by the plaintiff which was responded to by the eventual purchaser.

Thereafter interest was expressed after an inspection of the property facilitated by the plaintiff. What followed after that was merely the culmination of the plaintiff's industry. In my view the plaintiff was the effective cause of the sale. I therefore reject F Mr *Chingwena*'s argument.

The fact that the seller elected to side-line the agent and accepted a lower price than that given in the mandate, does not disentitle the agent to its commission on the lower price accepted by the seller who deliberately prevented the agent from negotiating the price. As stated in G*The Law of South Africa, op cit* para 391 p 243:

> "Where an estate agent introduces a person who subsequently purchases, then he has earned his commission and it is immaterial that the first negotiations led to nothing and are afterwards renewed without further introduction. There is nothing to stop the principal from negotiating direct with the seller and selling the property for a smaller amount, but the agent is nevertheless entitled to his H commission. The fact that the agent ceases to be actively concerned in the

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> negotiations does not necessarily deprive him of his claim for commission as A his introduction might still be overriding factor inducing the sale."

See also *Gluckman* v *Landau & Co* 1944 TPD 261 at 281-2

This should really put the matter to bed. According to the common law as it stands, the plaintiff is entitled to commission on the lower price accepted by the principal. I agree with Mr *Uriri* that the common law has not been altered B by statute to the extent not provided for in the Estate Agents Act [*Chapter 27:05*] and the Estate Agents Regulations SI 200 of 1987.

Mr *Chingwena* tried to argue that the plaintiff is not entitled to commission because Mubvumbi was operating illegally as she then was not a registered estate agent, who was required by statute to be supervised by a principal estate agent. This argument ignores the evidence presented by Mubvumbi, C which was not challenged at all, which evidence I have accepted as truthful, that she worked under the supervision of Kenneth Nakoma in accordance with the provisions of the law. Indeed the Estate Agents Council saw nothing wrong with the activities of the plaintiff.

I therefore come to the conclusion that the plaintiff has proved its case on a balance of probabilities. D

1. The first and second defendants shall, jointly and severally, the one paying the other to be absolved, pay to the plaintiff the sum of US$476 250 being agent's commission, together with interest at the prescribed rate of 5 percent per annum from date of judgment to date of payment in full. E
2. The first and second defendants shall jointly and severally, the one paying the other to be absolved, pay the costs of suit.

Matsikidze and Mucheche, plaintiff's legal practitioners

Manase & Manase, first and second defendants' legal practitioners

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MUNYUKI v ESTATE NDUNA & ANOR 2014 (1) ZLR 551 (H)

Citation 2014 (1) ZLR 551 (H)

Case No Judgment No. HH-229-14

Court High Court, Harare

Judge	Chitakunye CJ
Heard	15 May 2014
Judgment	15 May 2014
Counsel	*S Machingauta*, for the applicant *S Rugwaro*, for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C *Will – validity – will making no provision for former wife under customary law – only spouse under marriage to which Matrimonial Causes Act applies entitled to be provided for in will – marriage must still subsist at time of testator's death*

Headnote

D The applicant and the testator were married for several years in terms of an unregistered customary law union, but had divorced in terms of that law some years before his death. In his will, he made no provision for the applicant. She sought to have the will set aside in terms of s 5(3) of the Wills Act [*Chapter 6:06*], which provides that no provision in a E will shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons.

Held, that for one party to be a surviving spouse the parties must have been F married as at the time of the deceased's death. The parties in this matter were no longer living as husband and wife even under customary law. Whatever relationship had existed between them had ceased. The nature of the applicant's claim showed that she was alleging the existence of a tacit universal partnership for duration of their union. Her claim was thus based on her contribution during the subsistence of that tacit G universal partnership and not a share of assets of the spouses in terms of the Matrimonial Causes Act [*Chapter 5:03*].

Held, further, that the phrase in s 5(3) of the Wills Act "in terms of any law governing the property rights of married persons" refers to the Matrimonial Causes Act, which Act is not applicable to parties in H unregistered customary law unions.

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Held, further, that the parties' unregistered union had long ceased. The A applicant was thus not a surviving spouse. As a consequence, the will could not be nullified on the ground that the testator left the applicant out of his will.

Cases referred to B

Chapendama v *Chapendama* 1998 (2) ZLR 18 (H)

Wakapila's Est v *Matongo & Ors* 2008 (2) ZLR 43 (H)

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 23, 24, 68A(2) & 68G

Wills Act [*Chapter 6:06*], s 5(3) C

Case information

S Machingauta, for the applicant

S Rugwaro, for the first respondent

Judgment

Chitakunye J: The applicant and the late Abraham Rushambe Nduna D (herein after referred to as the late Nduna) were involved in an unregistered customary law union. The late Nduna died on 26 May 2011. The deceased left a duly executed will. In the will the testator nominated Steven Rugwaro as Executor.

After the death of the late Nduna, Steven Rugwaro convened a meeting comprising Abraham Nduna's family, applicant and applicant's legal E practitioners for purposes of reading the will left behind by the late Nduna. The applicant was not one of the beneficiaries.

Dissatisfied with her exclusion applicant launched this application seeking an order that:

1. The last will and testament of Abraham Rushambe Nduna dated F 5 October 2011 be and is hereby nullified
2. The estate be and is hereby ordered to be distributed intestate
3. The applicant be and is hereby appointed executrix dative of the estate
4. The first respondent to pay costs of suit

The application was premised on the provisions of s 5(3)(a) of the Wills Act G [*Chapter 6:06*], which provides that:

> "No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons." H

Chitakunye J

A The applicant alleged that, as at the time of late Nduna's death, the two of them were married in terms of customary law and so she is the surviving spouse. As a surviving spouse she should not have been left out. The will should thus be declared null and void.

The first respondent opposed the application. In his opposition first respondent B raised a preliminary point to the effect that the application was premature as the estate late Nduna had not yet been registered and Steven Rugwaro had not yet been appointed executor, in terms of the Administration of Estates Act [*Chapter 6:01*].

On the merits respondent contended that applicant was no longer married to the late Nduna at the time of his death. The two had long ceased living C together as husband and wife.

On the preliminary point, though respondent asserted that the estate had not yet been registered I did not hear him to deny the case number referred to by applicant showing that the estate was in fact registered as DR989/12 Harare. The issue on the preliminary point is whether the application is D properly before this court.

The registration of the estate was not in itself an automatic grant of letters of administration to the executor. However on the date of hearing counsel for first respondent indicated that he was withdrawing the point *in limine*. He however did not confirm that he had been duly appointed executor in terms of the Administration of Estates Act.

E No letters of administration were referred to in the application. It is clear that applicant's application was purely based on the reading of the will and not that the will had been placed before the Master. Section 23 of the Administration of Estates Act provides:

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

Section 24(1) then states:

G "In all cases in which any deceased person has by will or codicil duly appointed any person to be his executor, the Master shall, upon the written application of such executor, forthwith grant letters of administration to him as soon as such will or codicil has been registered in the office of the Master."

The above sections clearly show that a deceased person's estate must be represented by an executor or executrix duly appointed and issued with H letters of administration by the Master.

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Where letters of administration have not been issued appointing an executor, A that office is vacant. The fact that a testator has in his will nominated an executor does not automatically clothe that executor with letters of administration. The Master must still appoint and issue letters of administration. As was aptly noted by Kudya J in *Estate Wakapila* v *Matongo & Ors* 2008 (2) ZLR 43 (H) at p 44 F-G:

"The provisions of ss 23, 24 and 25 of the Administration of Estates Act give B preference to the appointment as executor by the Master of the person nominated in the testator's will. It is only where the nominated person has predeceased the testator, declined the appointment or has the appointment challenged that the Master is precluded from issuing him with letters of administration."

In casu, when the applicant instituted this application, Mr Rugwaro had not C yet been issued with letters of administration. To that extent the estate of the late Nduna had no duly appointed representative.

The nomination of Mr Rugwaro as executor had not been challenged before the Master. In fact, the Master had not even been seized with a contest for the office of the executor, yet the application before me has the effect of setting aside Mr Rugwaro's nomination and in its place the appointment of D the applicant as executrix.

I am of the view that the applicant cannot circumvent the Master's role in this manner. The Administration of Estates Act clearly gives the Master a key role which cannot be circumvented willy-nilly. The challenge to the will raised by applicant is one that should be raised with the Master as he E considers the appointment of an executor. If for some reason applicant is not happy with the Master's decision then the matter can be brought before this court in terms of the Administration of Estates Act.

I am of the view that this application cannot succeed. It must be dismissed with costs. F

As the parties proceeded to argue on the merits I will proceed to deal with that as well.

The main issues are:

(i) whether at the time of the late Nduna's death applicant was married to the late Nduna; G

(ii) whether the will by the late Nduna should be nullified;

(iii) if so, whether applicant should be appointed executrix dative of the estate late Nduna.

It is common cause that the late Nduna and the applicant lived as husband and wife in terms of customary law. Their relationship was not solemnised H

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A in terms of any marriages Act; it was thus an unregistered customary law union. In her application the applicant does not challenge the capacity of the late Nduna to make a will. She does not challenge the authenticity of the document as a properly executed will. The applicant seeks the nullification of the will and her appointment as executrix purely on the basis that she ought not to have been excluded from benefitting from the will as she claims B to be the surviving spouse.

It is important to recognise that for one to be a surviving spouse the parties must have been married as at the time of the deceased's death.

In casu, the pleadings in case no. HC 9974/11 show that at the time of the late Nduna's death the two were no longer living as husband and wife, even C under customary law. Whatever relationship had existed between them had ceased. In response to the late Nduna's claim for eviction from Stand No. 641 Mandara (also known as No. 5 Rushett Way, Mandara, Harare) and his assertion that their relationship had ended, the applicant confirmed that the late Nduna had given her a token of divorce according to customary law but she could not be evicted until they have shared what she

termed D matrimonial property. For instance in para 3 of her plea in HC 9974/11 she said, *inter alia*, that:

> "… plaintiff and defendant's marriage subsisted for 12 years until on 18 October 2011 one week after the filing of the present summons when defendant received a divorce token from plaintiff."

E And in para 5 she went on to say, *inter alia*, that:

> "… defendant is entitled to occupation of the matrimonial house until such time when the matrimonial estate is shared between plaintiff and defendant."

The nature and extent of the applicant's claim in that case shows clearly she is alleging the existence of a tacit universal partnership for the 12 years F duration of their union. Her claim is thus based on her contribution during the subsistence of that tacit universal partnership and not a share of assets of the spouses in terms of the Matrimonial Causes Act [*Chapter 5:13*]; the nature of her claim is foreign to customary law. Nowhere in that case did she allege that the unregistered customary law union still subsisted.

Clearly her claim was in terms of general law. She cannot therefore seek to G invoke customary law at this stage.

It may also be noted that in terms of s 2 of the Wills Act a marriage is defined as:

> "'marriage' includes a marriage solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]."

Thus, in the species of the civil or general marriages, are included marriages H solemnised in terms of Customary Marriages Act.

Chitakunye J

It is in respect of these recognised marriages that s 5(3) of the Wills Act A speaks to in stating that:

> "No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property of married persons."

The phrase "in terms of any law governing the property rights of married B persons" seems to refer to the Matrimonial Causes Act. It should be common cause that the Matrimonial Causes Act is not applicable to parties in unregistered customary law unions. See *Chapendama* v *Chapendama* 1998 (2) ZLR 18 (H).

I do not believe this section refers to persons in tacit universal partnerships C whether still subsisting or dissolved as in this case. As already noted in both this case and in HC 9974/11, the applicant's contention is not based on joint ownership but on contributions during the subsistence of the partnership. It is thus clear that provisions of s 5(3) are inapplicable in this case.

In a bid to bolster her case the applicant sought to also rely on s 68G of the D Administration of Estates Act. That section pertains to the determination of whether customary law applied to a deceased person and how such determination should be conducted. In citing this section, the applicant seemed to turn a blind eye to s 68A(2) of the Act which states categorically that:

> "This Part, other than *section sixty-eight C*, shall not apply to any part of an estate that is disposed of by will." E

In my view, this puts paid to any argument based on provisions in Part IIIA of the Administration of Estates Act. As there is a will, it follows this part is not applicable except in relation to inheritance of customary articles by the heir.

I am of the view that, based on the above, the applicant cannot succeed at all. F I am of the view that at the time of the late Nduna's death applicant was no longer "married" to late Nduna. Their unregistered union had long ceased. The applicant was thus not a surviving spouse. As a consequence, the will cannot be nullified on the ground that the testator left out the applicant. As the applicant was not the surviving spouse she cannot be appointed executrix dative on the basis of being the surviving spouse. G

The respondent asked for costs on a higher scale. The basis for seeking costs at a higher scale include the fact that the applicant had previously withdrawn a similar application in case No. HC 6585/12 based on the same facts and opposition papers. When the applicant launched this application, she ought to have realised the futility of her actions. H

Chitakunye J

A I have had occasion to peruse case no. HC 6585/12 and I noted that the applicant's papers therein are exactly as filed in this case and so were the opposition papers. The only differences pertain to dates of preparing and filing the papers. In this application the applicant made no disclosure whatsoever of that previous application and its fate. No effort was made to explain the necessity for this application when a similar application had been withdrawn B upon cite of opposition papers. It was imperative for the applicant to have disclosed the previous application and explain the reasons for the present application if she was *bona fide* in her persistence.

Another point raised was that the applicant ought to have realised she had no case as she knew that she was not engaged in a valid marriage and therefore C she had no right to challenge the validity of the will.

It was also contended that this application was made despite advice that she had no case at all in view of the stark reality of her relationship with the late Nduna having been terminated, which termination she acknowledges in case HC 9974/11.

After an analysis of the arguments on this I am inclined to agree with counsel D for the respondent.

It may also be noted that in spite of the clear provisions of the law requiring a deceased estate to be represented by a duly appointed executor who has been issued with letters of administration, the applicant prematurely brought this case and could just not justify such haste. The respondent was forced E to defend the matter even before letters of administration had been sought and granted.

Accordingly the application is hereby dismissed and the applicant will bear the costs of suit on the legal practitioner and client scale.

F*Tavenhave & Machingauta*, applicant's legal practitioners

Baera & Co, first respondent's legal practitioners

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/VAN ROOYEN & ANOR v ANTUNES & ORS 2014 (1) ZLR 558 (H)

VAN ROOYEN & ANOR v ANTUNES & ORS 2014 (1) ZLR 558 (H)

Citation	2014 (1) ZLR 558 (H)
Case No	Judgment No. HH-240-14
Court	High Court, Harare
Judge	Mafusire J
Heard	13 May 2041; *CAV*
Judgment	20 May 2014
Counsel	Ms *N Timba,* for the first applicant *S Hashiti,* for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – application – chamber application – processing and set down of – duties imposed on registrar and judge – applicant's responsibilities to follow up on application

Headnote

A chamber application commences by way of an entry in the chamber book in terms of r 241(1) of the High Court Rules, using Form 29B. The basis of the application has to be set out on the face of the application. Those chamber applications that need to be served on interested parties have to be in Form 29, with appropriate modifications relating to the issue of the time limits given to the other party to file opposing papers, if any.

The chamber application has to be served on the interested party unless the exceptions in paras (a) to (e) of r 241(1) apply. Rule 243 provides that a chamber application *may* be accompanied by heads of argument. Once the chamber application has been entered into the chamber book, the Registrar is required, in terms of r 245, to submit it to a judge in the normal course of events, but without undue delay. Once the Registrar has submitted the papers to him, the judge in chambers must consider the papers without undue delay. In terms of r 245, chamber applications, even though not urgent, must be dealt with expeditiously. Unlike court applications, which are party driven, chamber applications are system driven. Where a party has filed a chamber application, the application must automatically proceed to determination.

In terms of r 246, the judge before whom the chamber application has been placed can proceed in a number of ways. He may proceed to determine the matter on the papers. He may seek further information from any person *viva voce*. He may call for argument from the parties' legal

practitioners. It is the practice of the High Court, where argument is required from one side, that the other side also be present.

The rules have no specific provisions for set down of a chamber application that has become opposed. It is up to the judge before whom the application has been placed to direct how he wants it determined. If he is not prepared to determine it solely on the papers filed of record, he may arrange for oral submissions. He may require heads of argument to be filed where these have not been filed. He may require that the chamber application be heard in open court as an opposed matter. Whatever he eventually decides, it seems that the parties can only act on his directions. However, even though the rules cast the duty on the Registrar and the judge to ensure that the chamber application, once filed, is determined without undue delay, this does not mean that the applicant can just file the application and go to sleep. Human systems are not infallible. Documents can go missing or become misplaced. It remains the applicant's duty to be vigilant. He must follow up on his application. The law helps the vigilant, not the sluggard.

Cases cited

Beitbridge RDC v *Russell Construction Co (Pvt) Ltd* 1998 ZLR (2) 190 (S)

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

Econet (Pvt) Ltd v *Min of Information* 1997 (1) ZLR 342 (H)

Kodzwa v *Sec for Health & Anor* 1999 (1) ZLR 313 (S)

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

Maravanyika v *Hove* 1997 (2) ZLR 88 (H)

Masama v *Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (S)

Mubvimbi v *Maringo & Anor* 1993 (2) ZLR 24 (H)

Muzanenhamo v *Gadaga* HH-65-06

Ndebele v *Ncube* 1992 (1) ZLR 288 (S)

Rowland Electro Engineering (Pvt) Ltd v *Zimbank* 2003 (1) ZLR 226 (H)

Swimming Pool & Underwater Repairs (Pvt) Ltd & Ors v *Rushwayo & Anor* 2012 (2) ZLR 151 (S)

Legislation considered

G High Court Rules 1971 (RGN 1047 of 1971), rr 84, 87, 92, 245, 246, 291, 293 & 295

Justices of the Peace and Commissioners of Oath Act [*Chapter 7:09*], s 8

Case information

Ms *N Timba,* for the first applicant

H*S Hashiti,* for the first respondent

Judgment

Mafusire J: This matter was, according to counsel for both parties, a A "thicket of technicalities." There were numerous proceedings by, and between, the parties which, at the time of hearing, were still pending before this court.

Essentially, the first applicant, ("Corrine") was desperately trying to put her foot back into court. The first respondent, ("Carlos"), was tenaciously fighting to keep her out. The parties were once friends. They used to do B business together. In the main matter, the nub of the dispute between them was whether or not Corrinewas indebted to Carlos in an amount in the sum of $53 764.25 jointly with a company called Corvan Enterprises (Pvt) Ltd ("Corvan Enterprises"). Carlos said she was. Corrine said she was not. Carlos now had a judgment against her in that amount. Corrine wanted that judgment overturned. If she failed that would be the end of the matter. C Carlos' judgment would stand. If she succeeded and Carlos' judgment was set aside, Corrine would then have had to have the bar operating against her, and which was preventing her from telling her side of the story, uplifted. If she failed to have that bar uplifted, Carlos' judgment would be reinstated. If she succeeded, she would then place her defence before the court. Carlos' claim would then be determined on the merits. But it seemed that getting D the matter determined on the merits, as Corrine wanted, was a long way off. That is the truncated summary of the dispute. Now the details.

In December 2012 Carlos issued a summons against Corrine and Corvan Enterprises for payment of the above amount. Corrine and Corvan Enterprises entered an appearance to defend. Carlos applied for summary judgment. He E also applied, in separate proceedings, for the registration of a caveat over Corrine's immovable property. From then on the matter seems to have gone off track. Corrine said her lawyer of record had left his erst while firm in a huff. He had lied to her. She had intended to defend the application for summary judgment and the application for the registration of a caveat. But, in spite of the assurances from her lawyer, her notice of opposition to the F application for summary judgment had been filed a day out of time. The notice of opposition to the caveat application had been filed four days out of time. Thus she had automatically become barred in both applications. Carlos did not consent to the upliftment of the bars.

In February 2013 Corrine and Corvan Enterprises filed a chamber application G for the upliftment of the two bars. It was said the application was being made under r 84(1) (a) of the rules of this court. But I think it was meant to be r 229. In my view, r 84 under Order 12 provides for the upliftment of a bar to the non-filing of a declaration, plea or request for further particulars as provided for in r 80. It is r 229 of Order 32 that provides for an extension of any of the time limits fixed in anapplication procedure. The bars operating against H

Mafusire J

A Corrine and Corvan Enterprises were not in respect of their pleas or other answers to Carlos' claim. They were in respect of their opposition to Carlos' twin applications afore said. However, nothing turns on whether Corrine's application was under r 84 or r 229. It seems to me that the procedure is the same in terms of both rules.

B Though being a chamber application it was served on Carlos. This was in terms of r 242. Carlos opposed it. His notice of opposition was served on Corrine's lawyers on 27 February 2013. On that

same day Corvan Enterprises was placed under provisional liquidation. That was in terms of an order of this court. On 1 July 2013, that is slightly more than 3 months later, Carlos filed an C application for the dismissal for want of prosecution of Corrine's application for the upliftment of the bar. He argued that after he had filed his notice of opposition Corrine had neither filed an answering affidavit and heads of argument nor done anything further to have her application set down for hearing. Such conduct, Carlos had submitted, showed that Corrine was no longer interested in pursuing her application and that therefore it must be deemed to have been abandoned.

D On the other hand, Corrine argued that she had not been obliged to do anything further in order for the matter to be set down than what she had already done. The ball had been in the court of the registrar of this court. She submitted that unlike court applications where the applicant is required, among other things, to file heads of argument, paginate the record and apply E for a date of set down, in chamber applications filed in terms of r 241 and served in terms of r 242, it was the registrar who had the duty to submit the application without delay to a judge in chambers in terms of r 245. She said she was still awaiting the determination of her application.

Carlos' application for dismissal for want of prosecution was heard in court by me on 27 February 2015. That was exactly a year after the filing of Corrine's F application for the upliftment of the bar. Hers had still not been set down for hearing. I felt Corrine had gone to sleep after her application had been filed and that therefore she had deserved no protection. As McNally JA said in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290:

> "The time has come to remind the legal profession of the old adage; *vigilantibus*G*non dormientibus jura subveniunt* – roughly translated, the law helps the vigilant but not the sluggard."

See also *Masama* v *Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 288 (S); *Mubvimbi* v *Maringa & Anor* 1993 (2) ZLR 24 (H); *Maravanyika* v *Hove* 1997 (2) ZLR 88 (H); *Beitbridge RDC* v *Russell Construction Co (Private) Limited* 1998 (2) ZLR 190 (S) and *Kodzwa* v *Secretary for Health & Anor*H1999 (1) ZLR 313 (S).

2014 (1) ZLR p562

Mafusire J

However, her counsel, Ms *Timba,* had been quite tenacious. She had put A up a convincing argument that in spite of thelackadaisical conduct that was manifest from the papers, and given the provisions of r 245 and r 246, it was undesirable that the dispute between the parties be disposed of on mere technicalities. It was important that it be determined on the merits.

After full argument I decided I would afford Corrine the chance to have B her application for the upliftment of the bar determined. But I felt I had to register my displeasure for her lack of diligence by burdening her with a special order of costs. So I issued the following order *ex tempore*

> "1 This application, which is for the dismissal for want of prosecution of respondents' application for the upliftment of the bar in HC 1100/13, is hereby dismissed. C
>
> 2 Notwithstanding the dismissal of this application, the second respondent shall pay the applicant's costs on an attorney-and-client scale.
>
> 3 The second respondent shall take all necessary steps to ensure that the aforesaid application for the upliftment of the bar in HC 1100/13, which is pending before this Honourable Court, is set down for determination within D seven court days of the date of this order failing which that application, for whatever reason it may not be set down within the stipulated time, shall automatically be deemed to have been permanently abandoned."

One would have thought that my order would have put paid to any further technical arguments. However, as subsequent developments would show, the matter went completely off rail from then on. It completely became a "thicket of technicalities". E

Within five days of my order Corrine's lawyers, attaching that order, wrote to the Registrar on 5 March 2014 imploring him to urgently place her application for the upliftment of the bar before a judge in chambers for determination, and pointing out that that failing, the application would be deemed to have been permanently abandoned. The Registrar obliged. He placed *some* court F record before Mathonsi J. I say *some* court record because, as shall become apparent shortly, it seems doubtful that it was Corrine's application that was placed before Mathonsi J. Up to the time of this judgment I had not been able to get hold of that record. Corrine's lawyers have had to provide copies of the pleadings in that matter. G

Mathonsi J neither heard the matter nor set it down for hearing. He referred it back to me. On 6 March 2014 he issued the following directive to Corrine's lawyers:

> "The above chamber application was placed before Honourable Justice Mathonsi and he raised the following query: H

Mafusire J

> A 'I think this application should be placed [before] Honourable Justice Mafusire, who made the order of 27/02/14, for his attention and directions.
>
> It has been brought to me as an urgent matter but, as you can see, it is an opposed matter which should ordinarily be set down on the opposed roll *but for*, the order of 27/02/14.
>
> I am unable to determine how it should now proceed hence my view that B it be returned to Honourable Justice Mafusire.'"

On 10 March Corrine's lawyers, by letter, brought to my attention the directive by Mathonsi J aforesaid. The court record, purportedly the one from the learned judge was placed before me. Initially I indicated that since the matter had been brought to a judge it could now be heard at any time and that my directive of 27 February 2014 aforesaid had fallen away. But I then noticed C that the record that had been brought to me was not Corrine's application for the upliftment of the bar. It was Carlos' dismissal application that I had already disposed of. So I indicated that I was now *functus officio* in respect of that matter and returned the record to the registry.

Meanwhile, Carlos was pumping up the pressure. On 18 March 2014 his D lawyers wrote to Corrine's lawyers citing my order of 27 February 2014 and claiming that she had failed to set the matter down for determination within the stipulated seven days and that therefore she must be deemed to have abandoned her application. There was a brief but sustained exchange of correspondence between the lawyers, with Corrine's lawyers maintaining that they had done all what they had been obliged to do in terms of my order E and the directive by Mathonsi J, and Carlos' lawyers insisting that they had breached my order and that therefore Corrine's application had to be deemed to have been permanently abandoned. Among other things, Carlos lawyers argued that for her to be considered to have taken steps to set her matter down for determination Corrine should have filed a blank a notice of set down and requested the registrar to allocate a date of hearing. They said F they would now proceed with Carlos application for summary judgment.

Carlos' lawyers proceeded to set down the original application for summary judgment on the unopposed motion roll for 2 April 2014. It happened that on that day it was Mathonsi J who was presiding. The order of summary judgment was granted unopposed. Corrine's lawyers said they became aware G of the order immediately afterwards. On 10 April 2014 they filed Corrine's application for the setting aside of that order. That was on the ground that the order had been granted in error. But Carlos' lawyers proceeded to issue a writ of execution. Corrine's property was attached on 5 May. Removal was set for 7 May. On 6 May Corrine filed an urgent chamber application to stay execution pending the determination of her application for the setting H aside of the order of summary judgment. She said that the application for

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Mafusire J

rescission had been set down on the unopposed motion roll for 14 May 2014. A That was a week away.

On being served with Corrine's urgent chamber application for a stay of execution, the Sheriff had, on his own, refrained from uplifting her property, opting to wait for the decision of this court. That, in my view, was a most reasonable and commendable approach. I heard the urgent chamber application on 13 May. I reserved judgment on both the points raised *in limine* and the B merits. This now is my judgment.

During the hearing it transpired that Corrine's application for the setting aside of the order of summary judgment, which was due to be heard on the unopposed roll on the following day, had become opposed. Therefore, in all probabilities it would have been removed from the roll to be dealt with C as an opposed application. However, at the time of this judgment I had not been apprised of the developments. At the hearing, both sides raised some points *in limine*. A number of them were quite frivolous and demonstrably meant to harass the other party. Some had to be

abandoned. Others were conceded. But that just goes to show what a "thicket of technicalities" the whole matter had become. D

For Corrine, Ms *Timba* charged that Carlos' counsel, Mr *Hashiti*, in a Supreme Court judgment in which he had been a party, had been prohibited from practising as an advocate yet he had continued to masquerade and assess his fees as one. She claimed that the taxation of the costs following my order of 27 February 2014 had become stalled because of an attempt to ascribe E an exorbitant fee for Mr *Hashiti's* appearance purportedly as an advocate. However, this point readily fell away during argument. Mr *Hashiti* had never lost the right of audience as a legal practitioner. Furthermore, the legal profession is a fused bar with no legal distinction between an attorney and an advocate. If Mr *Hashiti* was inflating his attendance fees on the basis that he was an advocate or whatever, then that was a matter for taxation and review. F

Ms *Timba's* next point was that Carlos' affidavit that had been filed in opposition to her urgent chamber application had been sworn to before a commissioner of oaths who was a lawyer from Zuze Law Chambers, Carlos' legal practitioners of record. It is trite that a lawyer from the same firm cannot commission, as a commissioner of oaths, an affidavit of a client of G that firm. Mr *Hashiti* readily conceded the point and withdrew the affidavit.

Mr *Hashiti's* first point *in limine* was that the commissioner of oaths who had commissioned Corinne's affidavit had neither stated the area of his authority, allegedly in contravention of s 8 of the Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*], nor indicated the capacity in H

Mafusire J

A which he had acted as a commissionher of oaths. He cited the following passage in the judgment of Gowora J, as she then was, in *Muzanenhamo* v *Gadaga* HH-65-06:

> "An affidavit must be sworn before a person competent to administer an oath. The applicant in his affidavit makes the averment that the document was sworn to before a magistrate. The document bears the stamp of the magistrate's court. B The person who signed as commissioner of oaths is not identified, nor is he described as a commissioner of oaths. In the circumstances the document is not an affidavit. What it is in effect [is] a written statement not made on oath."

This point is devoid of merit. The facts in *Muzanenhamo's* case *supra* were significantly different. In that case there had been no indication as to who C had signed the affidavit as a commissioner of oaths. All there had been in the document was a stamp from the magistrate's court and some signature. Whoever had signed as the commissioner of oaths had neither identified, nor even described himself, as a commissioner of oaths. In the present case Corrine's affidavit not only states the place where it was sworn and the date when it was sworn, but also it states that it was sworn to before a D commissioner of oaths whose name was Chris Somo. Chris Somo affixed his commissioner of oaths stamp. I have seen nothing in the Justices of the Peace and Commissioners of Oaths Act that militates against what Corrine did. It was not Mr *Hashiti's* argument that Chris Somo was not a commissioner of oaths. Therefore, I dismiss this point and uphold Corrine's affidavit.

E Mr *Hashiti's* next point in *limine* was that Corvan Enterprises was not properly before this court because it was under provisional liquidation and that Corrine, not being the provisional liquidator, could neither speak on its behalf nor represent it in legal proceedings. However, this point was manifestly frivolous. Corvan Enterprises was cited as second applicant. That was how F all the previous pleadings had been prepared. More importantly, Corrine did not purport to be representing or speaking on behalf of Corvan Enterprises. On the contrary, in her affidavit she had expressly stated as follows:

> "The second applicant herein is no longer a party to these proceedings because it was placed under provisional liquidation. All proceedings against the second applicant have been automatically stayed by operation of the law due to its G provisional liquidation."

But most importantly, even if Corrine had improperly joined Corvan Enterprises to her application, in terms of Order 13 r 87 her case or matter would not be defeated by reason of such misjoinder. But, to expedite the matter, Ms *Timba* simply sought to have Corvan Enterprises misjoined. H That seems permissible in terms of r 87(2)(a). Thus this point just fell away.

Mafusire J

Mr *Hashiti's* third point *in limine* was that Corrine's application was not A urgent. He submitted that the urgency could not be predicated on the order of summary judgment by Mathonsi J on 2 April.That judgment was still extant.Therefore it was executable until set aside. But again this point is frivolous. Corrine's application is simply for a stay of execution pending the determination of her application for rescission of judgment. The attachment had been made on 5 April. Removal had been scheduled for 7 May. Her B application for rescission of judgment had been set down for 14 May. On 6 May she had filed the application for stay of execution. If that was not urgent, what then is? I dismiss this point.

Mr *Hashiti's* fourth point *in limine* was, in essence, that Corrine had become non-suited because the costs that had been awarded against her in terms of C my order of 27 February were still outstanding. That was despite the fact that the taxation of the bill of costs was still underway. That point had no merit. I dismiss it.

Mr *Hashiti's* fifth and final point *in limine* was that Corrine's draft order was defective in that the interim relief sought was the same as the final relief. That was said to be contrary to case law and practice. Reference was made to, D among other cases, *Engineering (Pvt) Ltd* v *Zimbabwe Banking Corporation Ltd* 2003 (1) ZLR 226; *Econet (Pvt) Ltd* v *Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342; *Swimming Pool & Underwater Repairs (Pvt) Ltd & Ors* v *Rushwaya & Anor* 2012 (2) ZLR 151 (S); *Chikafu* v *Dodhill (Pvt) Ltd & Ors* 2009 (1) ZLR 293 (S) and *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H). E

It is trite that, to seek an interim relief that is exactly the same as the substantive relief being sued for and which has the same effect, defeats the object of seeking the interim relief. An interim relief is granted on *prima facie* proof. The substantive relief is granted on a balance of probabilities and after a thorough ventilation of the matter. Where the applicant is granted F an interim relief that is the same as the final relief sought, there will be no motivation for him to pursue the substantive relief. That is undesirable. It is unfair to the respondent.

In casu, the final order sought by Corrine reads as follows:

> "That you show cause, if any, to this Honourable Court why a final order should G not be made on the following terms:-
>
> 1. That the attachment and removal in execution of the movable assets situate at 7 Bidford Close, Greystone Park, Harare be stayed until the court application for rescission of judgment in case no. HC 3002/14 has been adjudicated upon.
> 2. That first respondent bears the costs." H

2014 (1) ZLR p567

Mafusire J

A The interim relief was couched in the following terms:

> "Pending the determination of this matter, the first applicant is granted the following relief:
>
> 1. That this order operates as an interim interdict directing the Sheriff to stay execution in respect of the writ issued under HC 14561/12 until the determination of case no. HC 3002/14.
> B 2. That in the event that removal of the attached goods has already been effected by the set down date of this matter, the Sheriff be and is hereby directed to return possession of the movable goods to the first applicant pending determination of case no. HC 3002/14.
> 3. That the costs of this application be borne by the first respondent if he opposes this application."

C In my view, whether in an urgent chamber application for a provisional order, the final relief sought is identical or the same as the interim relief sought depends on the circumstances of each case. Circumstances may be that an aspect of the final order sought on the return day may properly be granted as an interim relief. It cannot be an absolute rule of thumb that in D all situations the substantive relief can never be the same or similar to the interim relief. In the present matter the imminent harm that caused Corrine to act urgently was the attachment of her assets on 5 May and the pending removal in two days'time. Ultimately, she wanted the writ of execution giving rise to that attachment stayed or set aside permanently or until her application for rescission of judgment was determined. That ought to have E been the object of the final order sought. In the interim she would want the removal that had been scheduled for 7 May stayed.

Admittedly the couching of the relief sought lacked precision and finesse. The criticism is justified. However, there was nothing fatal in that. Effectively, Corrine sought a stay of execution pending the determination of her application F for rescission of judgment which was set to be heard on the following day. But for the notice of opposition, that I was advised had now been filed, to that application the matter had been set to be determined on the following day. It was understandable for her to have become singularly preoccupied with that one relief in both the final order sought and the interim relief. I also dismiss this point *in limine*.

G Paragraphs 2 and 3 of the draft interim relief sought were not put in issue. But they were irregular. I shall revert to them when I deal with the merits.

On the merits, Ms *Timba* submitted that she had done all she had been obliged to do to have Corrine's application for the upliftment of the bar set down for hearing following my order of 27 February. She submitted that my order had H not had the effect of requiring Corrine to go outside the provisions of the

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rules of court in an effort to get her matter set down for hearing. Carlos was A labouring under a misconception. Hers is not a court application in respect of which the procedure for set down was markedly different from that of a chamber application. Hers was a chamber application. Once the matter had been referred to Mathonsi J – a development that had occurred at her instance – it must be taken that she had indeed caused it to be set down for determination within the meaning of my order. If Mathonsi J had heard the B matter there would have been no issue about whether or not she had taken steps to have the matter set down for determination. That Mathonsi J may have opted to issue a directive instead of hearing the matter or setting it down for determination did not detract from the fact that the matter had been set down before him for determination as required by my order. C

On the other hand, Mr *Hashiti* submitted that there had been no compliance with my order. The mere placing of a file before a judge in chambers does not mean that a matter has been set down. Mathonsi J neither heard the matter nor set it down. Corrine had not taken all the necessary steps to have the matter set down for determination. She had not been diligent. The matter had D practically become opposed. She had been required to paginate the record, submit a consolidated index, prepare a blank notice of set down and pay the Sheriff's security deposit for his costs of service of the notice of set down, in accordance with the new Practice Direction 1 of 2014.

Mr *Hashiti* also submitted that Corrine's defence on the merits in the main matter had no prospects of success. Carlos' claim was unassailable. Among E other things, Corrine had, through e-mail communications, expressly and unequivocally admitted personal liability.

I must point out that in February 2014, when the parties had argued Carlos' application for dismissal for want of prosecution after which I had issued my order aforesaid, it was almost common cause that, among other things, F Corrine had not done anything else after the filing of her application for the removal of the bars. It was one of the reasons that had strongly influenced me to issue that strong order. But during argument in the present matter, it turned out that in fact heads of argument had been filed for Corrine's application for the upliftment of the bars on 6 September 2013. Ms *Timba* conceded that, at the time that she appeared before me in February 2014, G she had just been briefed with the matter and that she had not been fully conversant with the facts.

Had I been apprised of the filing of Corrine's heads of argument in the application for the upliftment of the bar, I probably would not have concluded that she had gone to sleep after she had filed the application. I probably H

A would not have issued the order of 27 February 2014 in such terms as I did. The order was manifestly oppressive and burdensome. Nonetheless, I am of the view that Corrine did comply with that order. Within five days she had impressed upon the Registrar the urgent need to place the outstanding matter before a judge in chambers for determination. That had been done. A B directive had been issued by Mathonsi J. She had followed up on it. It was not her fault that there had been an apparent mix up in the court records or that the actual record could not be located.

In any event, what is a party expected to do in order to ensure that his or her chamber application is set down for determination? The procedure for set C down is different from that for ordinary court applications. In an opposed court application, once all the necessary affidavits have been filed, the party requiring set down has to file heads of argument, prepare a consolidated index, bind the court record and paginate it in accordance with the consolidated index, which he must serve on the other side and apply to, or liaise with, the Registrar for a date of set down. In accordance with the Practice Direction 1 D of 2014, which came into effect on 1 February 2014, the party shall deposit with the Sheriff such an amount as determined by the Sheriff for the security of his costs of service of the notice of set down and then submit the receipt issued in respect thereto to the Registrar, failing which the application is deemed to have been abandoned.

E There is no such elaborate procedure for chamber applications. A chamber application commences by way of an entry in the chamber book in terms of r 241(1). Form 29 B is used. The one significance of this form is that the basis of the application has to be set out on the face of the application. Those chamber applications that need to be served on interested parties have to be in Form No 29 with appropriate modifications. Form No 29 is the one for F ordinary court applications. The appropriate modifications referred to in the proviso to r 241(2) must relate to the issue of the time limits given to the other party to file opposing papers, if any.

The chamber application has to be served on the interested party unless one of the exceptions in paras (a) to (e) of r 241(1) apply. Rule 243 provides that G a chamber application *may* be accompanied by heads of argument. Thus, this is merely directory or permissive, but not peremptory. It seems that once the chamber application has been entered into the chamber book, the onus shifts to the Registrar. In terms of r 245, the Registrar is required to submit it to a judge in the normal course of events, but without undue delay. The use of H the word "*shall*" means it is peremptory that the Registrar acts expeditiously.

2014 (1) ZLR p570

Mafusire J

Once the Registrar has submitted the papers to him, the judge must consider A the papers without undue delay. Again, there is the use of "*shall*". In terms of r 3 "*judge*" means a judge sitting otherwise than in an open court. The repeated reference to "*without undue delay*" in r 245 in relation to what the Registrar and the judge are required to do, means that chamber applications, even though not urgent, must be dealt with expeditiously. Unlike court applications which are party driven, chamber applications are system driven. B A party that sleeps on his application in a court application may not have it set down. But in a chamber application, once a party has filed it the application must automatically proceed to determination.

In terms of r 246, the judge before whom the chamber application has been placed can proceed in a number of ways. He may proceed to determine the C matter on the papers. He may seek further information from any person *viva voce*. He may call for argument from the parties' legal practitioners. Paragraph (b) of subrule (1) of r 246 provides that the judge may hear either of the parties' legal practitioners. However, it is the practice of this court where argument is required from one side that the other side also be present.

The rules have no specific provisions for set down of a chamber application D that has become opposed. However, the reference to "*either party's legal practitioner*" in paragraph (b) of subrule (1) of r 246 shows that it was also meant to cater for those chamber applications that become opposed. In my view, it is up to the judge before whom the application has been placed to direct how he wants it determined. If he is not prepared to determine it E solely on the papers filed of record, he may arrange for oral submissions. He may require heads of argument to be filed where these have not been filed. He may require that the chamber application be heard in open court as an opposed matter. Whatever he eventually decides it seems that the parties can only act on his directions. ,

However, even though the rules cast the duty on the Registrar and the judge to F ensure that the chamber application, once filed, is determined without undue delay, this does not mean that the applicant can just file the application and go to sleep. Human systems are not infallible. Documents can go missing or become misplaced. It remains the applicant's duty to be vigilant. He must follow up on his application. The law helps the vigilant, not the sluggard. G

However, in the present case, whilst Corrine had been sluggardly in her original application for the upliftment of the bars, and for which she paid in terms of my order of 27 February 2014, the same

cannot be said of her efforts after that order. She did all that she was required to do to have her matter set down for determination. On the other hand, Carlos continued to pile up H

Mafusire J

A relentless pressure. Whilst from his point of view this was understandable, given that ultimately he wanted payment of his money, the unfortunate consequence was that a great deal of time was being wasted in dealing with nothing but technical issues. It is important that the real disputes between the parties be resolved on the merits. Whether or not Corrine's defence on the merits has prospects of success is, in my view, an open question. *Prima*B*facie*, the defence does have some merit. She may have addressed e-mails to Carlos in the first person suggesting that she may have been undertaking, in her personal capacity, to pay the debt. However, the e-mails are not by themselves decisive or conclusive. They could also be construed to mean that she was speaking on behalf of Corvan Enterprises, as its director and agent. Evidently the company was her *alter ego*. It is desirable that her defence be C tested properly in court.

In the premises, the application for stay of execution is hereby granted. But only para 1 of the interim relief sought is hereby granted. Paragraph 2 is incompetent. Paragraph 3 relating to costs of suit if the application was opposed is also incompetent at this stage. Costs will be decided on the return D date. The draft order shall be issued as amended.

Finally, it is undesirable that the dispute between the parties be fragmented and determined piece meal, as has already happened. There is the danger that this approach is set to continue because what is set to be heard next is the application for rescission of judgment. Depending on the outcome, the E next application to be heard after that will be the one for the upliftment of the bar which has been in limbo for all this while. The record for that matter seems unavailable. It seems to me that the pending application for rescission of judgment and that for the upliftment of the bars properly ought to be consolidated. The parties are urged to utilise the provisions of Order 13 r 92.

F*Kantor & Immerman*, first applicant's legal practitioners

Zuze Law Chambers, first respondent's legal practitioners

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S v MPA 2014 (1) ZLR 572 (H)

Citation	2014 (1) ZLR 572 (H)
Case No	Judgment No. H-469-14
Court	Supreme Court, Harare
Judge	Hungwe J and Bere J
Heard	20 May 2014
Judgment	20 May 2014
Counsel	*B Mahuni*, for the appellant *I Muchini*, for the respondent
Case Type	Criminal appeal

Annotations No case annotations to date

Flynote

Criminal law – general principles – possession – what constitutes – a person C *has possession of something if he knows of its presence and has physical control of it or has the power or intention to control it – different types of possession – actual possession and constructive possession – prohibited items not on person of suspect – when mental element may be established*

Evidence – circumstantial – drawing an inference of guilt – what needs D *to be proved – evidence of a police informer who is not called to give evidence – extreme danger involved in convicting without hearing such evidence – violation of an accused's rights to a fair trial*

Property and real rights – possession – what must be shown to establish possession – actual or constructive possession – distinction between E

Headnote

Where a person is charged with a crime involving the element of criminal "possession" it is crucial to recognize that the legal definition of "possession" is much broader than the common definition. At law, a person has "possession" of something if the person knows of its presence and has physical control of it or has the power and intention to control F it. The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession. A person who has direct physical control of something on or around his person is then in actual possession of it. A person who is not in actual possession but who has both the power and the intention to take control over something alone or together with G someone else is in constructive possession of it.

In considering circumstantial evidence, before a court may draw an inference of guilt, that inference must be the only one that can be fairly and reasonably be drawn from the facts. It must be consistent with the proven facts and must flow naturally, reasonably and logically therefrom and H

2014 (1) ZLR p573

Hungwe J

A must exclude, beyond reasonable doubt, every reasonable hypothesis of innocence.

It is extremely dangerous to convict an accused person on the evidence of a police informer who is not called to testify. Such a person's evidence remains hearsay. It may be a direct result of police collusion or an outright figment of that particular person's fertile imagination concocted by an B accomplice to exculpate himself from a possible prosecution. It violates an accused's rights to a fair trial in that he cannot test the evidence by cross examination.

Case cited

C*S* v *Young* 1983 (1) ZLR 258 (S)

Legislation considered

Parks and Wildlife (General) Regulations 1990 (SI 360 of 1990), s 82(1)

Case information

B Mahuni, for the appellant

D*I Muchini,* for the respondent

Judgment

Hungwe J: At the hearing of the appeal we allowed the appeal, quashed the conviction and set aside the sentence in this matter. We indicated that our reasons will follow. These are the reasons for that decision.

E The appellant was convicted of contravening s 82(1) of the Parks and Wildlife (General) Regulations, 1990 (SI 362/1990) as read with s 128(B) of the Parks and Wildlife Act [*Chapter 20:14*], unlawful possession of unregistered or unmarked ivory. He was sentenced to 9 years' imprisonment. The unmarked ivory was declared forfeited to the State. He appeals against conviction only. The facts upon which a finding of guilt was based are the following. F Police got a tip-off that there was at Rhodesville Shopping Centre, an elderly man of Congolese origin who was driving a pick-up truck in possession of unmarked ivory in respect of which he was looking for buyers. Police details set out to arrest. Upon arrival, they observed a Toyota pick-up truck fitting the description given them. They saw a person who fitted their suspect. He sat in G the passenger seat. After placing the truck under surveillance they pounced and arrested the appellant. They recovered 21 pieces of ivory from the truck.

The court *a quo* relied on the following evidence in convicting the appellant:

1. That when he was arrested, the appellant's wallet was found in the glove compartment of the motor vehicle. Therefore, the court reasoned, he was H more than a mere passenger.

Hungwe J

2. There was a police informer who gave the police details about the A appellant, the motor vehicle and its contraband cargo as well as where it was.
3 The appellant was the only person observed to be inside the motor vehicle some 10 to 15 minutes before the appellant was arrested.

It is trite that the burden of proof in a criminal trial lies with the State to B prove its case beyond a reasonable doubt. In cases of criminal possession, the State must not only prove physical element of possession but also the mental element. Where, as here, the substance constituting the subject of the charge was not on the person of the suspect, the task for the State becomes even more onerous, in that unless there is presumptive evidence set out in the offence-creating provision, or reverse onus cast on the accused by law, the C State is required to prove either actual or constructive possession. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession. D

A person who has direct physical control of something on or around his person is then in actual possession of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it. E

When a person has been charged with a crime involving the element of "criminal possession", it is crucial to recognize that the legal definition of "possession" is much broader than the common definition. Generally in our law, "possession" extends to that which is found even beyond one's person, bag or clothing. F

In discussing the concept of possession in the case of *S* v *Young* 1983 (1) ZLR 258 (S) at 261 Georges JA stated the following:

> "In *S* v *Smith* 1965 (4) SA 166 (C) Corbett J pointed out that this element of *mens rea* should not be confused with and must not be identified with the mental element which must be proved in order to establish the act of possession. He G stated at p 171:
>
> > 'The weight of this authority [*R* v *Sibanda (supra)*] is undoubtedly in favour of the general proposition that, where a person is charged with the contravention of a statutory provision which prohibits the possession of certain articles except under authority of a permit, *mens rea* in the sense of the accused person knowing that he has in his custody or under his control H

Hungwe J

> A the forbidden article, is normally an essential ingredient of the offence and the onus of establishing such *mens rea* lies upon the State.'

> With the greatest deference I would venture to suggest that in a number of cases establishing this proposition the court has failed to distinguish clearly between the mental element necessary to establish custody or possession, as the case may be, and the mental element constituting *mens rea.* The concepts of custody or B possession comprise two main elements: they are, firstly, the physical element of *corpus*, i.e. physical custody or control over the *res* question, exercised either mediately or immediately, and the mental element of *animus*, i.e. the intention to exercise control over the thing … At the same time there is a general rule that, ordinarily speaking, a crime is not committed if the mind of the person doing the act in question is innocent: *actus non facit reum nisi mens sit rea.*"

C There could be invoked a law which provides that certain facts are assumed in favour of the prosecution to reduce the State's burden to prove certain facts which would otherwise be required to prove beyond a reasonable doubt. There is no such provision in either the regulations or the Act. In my view such a provision could be couched in the following terms:

> "(1) The presence of a controlled substance or article in an motor vehicle is D presumptive evidence of knowing possession by each and every person in the motor vehicle; and
>
> (2) The presence of a substance in open view in a room, other than a public place, is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance."

E However, these presumptions would not usually apply if the substance is found on the person of one of the occupants.

In casu, the ivory was recovered from the loading tray of a motor vehicle belonging to a third party parked in a public place. The ivory was concealed under vegetables and would not be apparent upon a cursory glance inside the loading tray of the truck. As such, the appellant was not in physical F possession of the ivory. The court, therefore, convicted the appellant on the basis of circumstantial evidence. Because circumstantial evidence requires the drawing of inferences, it may well be appropriate to set out the process involved in analysing that evidence and what a court must do before it returns a verdict of guilty based solely on circumstantial evidence.

G Initially, the court must decide, on the basis of all of the evidence, what facts, if any, have been proven. Any facts upon which an inference of guilt can be drawn must be proven beyond a reasonable doubt. After it has determined what facts, if any, have been proven beyond a reasonable doubt, then the court must decide what inferences, if any, can be drawn from those facts. Before the court may draw an inference of guilt, however, that inference must be H the only one that can fairly and reasonably be drawn from the facts, it must

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be consistent with the proven facts, and it must flow naturally, reasonably, A and logically from them.

Again, it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes, beyond a reasonable doubt, every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the defendant's innocence, then the court ought not to convict but must find the B accused not guilty.

If, however, the only reasonable inference the court finds is that the accused is guilty of the charged crime, and that inference is established beyond reasonable doubt, then the court must find the accused guilty of that crime.

The magistrate reasoned that the appellant must have known of, and therefore, C was in possession of the ivory.

The magistrate states thus in his reasons for judgment:

> "These circumstances point to one reasonable inference which can be drawn that [the appellant] has something to hide. The information which police got is admitted by the accused save the fact that accused was looking for a buyer of D the ivory. It is agreed that accused is a Congolese national who is elderly who was in a Toyota vehicle which was parked at Rhodesville Shopping Centre. The informer who supplied the information has all the details. From the totality of the evidence I am convinced that accused was aware of the existence of the ivory in the vehicle and he possessed it but has no licence" (*sic*).

Firstly, the circumstances do not point to only one reasonable inference. E There was no evidence led to exclude other possible scenarios including that put forward by the appellant. Secondly, the

appellant disputed quite a number of assumptions which the police furnished to court as fact. Thirdly, the police witnesses' evidence was contradictory in certain material respects. Notwithstanding all this, the court swallowed these assumptions as facts, hook, line and sinker, leading to an unsafe conviction. In my respectful view, F the appellant's explanation was reasonably possibly true on all the evidence placed before the court.

The claim that appellant was in possession of the ivory was never tested by independent evidence. It is extremely dangerous to convict an accused person on the evidence of a police informer who is not called to testify and G cross-examined in court. Such a person's evidence remains hearsay. It may be a direct result of police collusion, or outright figment of that particular person's fertile imagination concocted by an accomplice to exculpate himself from possible prosecution. It violates an accused person's right to a fair trial in that the accused does not test the evidence by cross-examination. There are other reasons why the inference drawn by the court is not the only H

Hungwe J

A reasonable one on these facts. Since it was established that in fact there was a driver who had driven this vehicle to Rhodesville, it is reasonably possible that that driver is the only person who was acquainted with the cargo, and hence he disappeared without trace. Why has the police not explained their failure to bring him to account for his actions? Could he possibly be the police informer? In my view it is possible that he is the culprit, probably B together with the appellant, but that is not proof beyond a reasonable doubt, as far as, the appellant is concerned. The police could have done more to exclude other possible inferences.

It was on the basis of the above that on the day of the hearing of the appeal we allowed the appeal and stated that our reasons will follow. These are they.

C BERE J concurred

Mahuni & Mutatu, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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KOK v MAXWELL 2014 (1) ZLR 578 (H)

Citation	2014 (1) ZLR 578 (H)
Case No	Judgment No. HH-236-14
Court	High Court, Harare
Judge	Tsanga J
Heard	13 January & 19 March 2014; *CAV*
Judgment	21 May 2014
Counsel	*R Stewart*, for the applicant Mrs *Munangati Manongwa,* for the respondent
Case Type	Civil application

Annotations No case annotations to date

Flynote

Family law – husband and wife – maintenance order – variation – good cause C *for variation – what constitutes – maintenance of children – subsequent re-marriage of person paying maintenance – whether priority should be given to children of first marriage – tertiary education – whether should be included in maintenance order even though child above age* D *of majority*

An appropriate court may on good cause shown vary suspend or rescind an order for maintenance made in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. As to what constitutes "good cause", the two E cardinal points which must guide courts in dealing with applications for alterations of maintenance are (a) a change in financial circumstances and (b) the ability of the person being ordered to provide maintenance to pay the increment sought. A change in needs and obligations brought on by a spouse's remarriage amounts to good cause. Where a divorced man with maintenance obligations towards his first family remarries, F it is superficial and unrealistic to suggest that the first family must continue to be maintained at the same standard regardless of her former husband's subsequent commitments. The obligations owed to the first wife and children are properly regarded as a first charge, but subsequent commitments will possibly reduce the husband's capacity to maintain the first wife to the extent originally decreed. In order to accommodate G both needs, the standards of living of all parties may possibly have to be reduced, with the second family playing a subordinate role to the first. In assessing the needs of all concerned, a variety of considerations would obviously have to be examined, and the ultimate decision would be based on an evaluation of all these considerations. H

2014 (1) ZLR p579

Tsanga J

A The 2013 Constitution appears to lend interpretative support in favour of an "equalisation" as opposed to a "first family" approach in assessing any child's needs. Non-discrimination in general is the ethos underlying the Constitution. Section 81(1), which deals with the rights of children, accords rights equally to every child.

With regard to tertiary education, although child support can be terminated B on grounds such as majority status or emancipation, among others, it is now generally the reality that parents can reasonably expect that their obligations towards their child support will go beyond the children's majority status. Where parties have express agreements in their divorce orders, such an obligation would at most extend up to the first degree. C In an increasingly competitive world, college education is frequently an indispensable stepping stone.

Cases referred to

Chizengeni v *Chizengeni* 1988 (1) ZLR 286

Crone v *Crone* 2000 (1) ZLR 367 (S)

D*Hingeston* v *Lightfoot* 2000 (2) ZLR 247 (S)

Rabvukwa v *Rabvukwa* 2004 (1) ZLR 530 (H)

Chiomba v *Chiomba* 1992 (2) ZLR 197 (S)

Legislation considered

E Constitution of Zimbabwe 2013, s 81(1)(d)(f), (2) & (3)

Matrimonial Causes Act [*Chapter 5:13*], s 8(2) & (3), 9 & 11

Case information

R Stewart, for the applicant

Mrs *Munangati Manongwa,* for the respondent

Judgment

F**Tsanga J**: This is an application for modification/variation of a consent paper entered into by the applicant and the respondent in 1999 as part of their divorce settlement and upon which they obtained a consent order incorporating the terms of their agreement. Judicial action is called for because the parties are not in agreement regarding the modifications/variations sought. The G respondent, who is the applicant's former wife, not only challenges some of the proposed modifications but has also put in her own counter-application with her set of proposals. What this court has to decide is which of the modifications and variations sought are justified by the circumstances. Below I detail the issues and the nature of the modifications/variations sought, in H light of their factual context and grounding in the consent paper.

Tsanga J

The facts A

The parties were married in 1994 and divorced in 1999. One child, A, was born of the marriage on 15 of January 1998 making him now 16 years old. As part of their divorce which was granted in November 1999, the parties had entered into a consent paper, which according to the decree of divorce, was to govern issues relating to the custody, maintenance, propriety and other ancillary matters between the parties. B

The applicant, who has since moved to South Africa, brought this application prior to his move, desirous of formalising various aspects of the consent which he says have been brought on by changed circumstances. For one, the consent paper contains a fixed monthly payment for child support that remains couched in Zimbabwean dollar terms despite the adoption of C multi-currency, the US dollar in particular, since 2009. An amount of Z$10 000 in Zimbabwean currency at the time was to be paid as monthly maintenance until the child attained the age of 18. With the demise of the Zimbabwean dollar, the applicant says he has been paying a sum of US$550 per month for the minor child. It is this amount which he wishes the court to endorse as appropriate. This is also in the context that he has since remarried and D therefore has assumed added obligations The respondent, on the other hand, counter-claims for US$1 000 per month which she says would meet the child's needs and allow the minor child to lead the life style he would have led had the parties not divorced. This amount would also in her view, be more in line with the Z$10 000 that was agreed to at the time of the signing E of the consent paper in 1999. She lists the child's expenses as amounting to $1 160 per month. Among major expenditures in her tabulation is a sum of $320 as fuel expenses for the child; a monthly clothing allowance of $100; a budget for school tuck, groceries and incidentals amounting to $345 every month. The respondent argues that the sum of US$550 per month is a complete mockery of the standard of life the parties had and that is being F led by the applicant.

Besides the monthly sum, a second issue in dispute pertains to costs related to the child's schooling. In the consent paper the applicant agreed to take responsibility for all school fees and costs relating to the education of the minor child, including costs for reasonable sporting equipment, school G uniforms, books and costs of extramural activities. The consent paper also stated that to the extent that the respondent was able to afford it, she would come in with her assistance. As regards payment of fees, the child attends a private school. Being gifted in sports, the child's gift has resulted in some monetary relief for his parents since he has a scholarship which meets part of his school fees. The applicant has been responsible for paying the balance of H

Tsanga J

A whatever is owing in fees that is not being met by the bursary. This amounts to US$$7 027.50 per year. It is with regard to the payment for extras such as sporting equipment, school uniforms, and extramural activities that the parties are not in agreement. The applicant says that the cost of these is adequately covered by the monthly payment of US$550 per month. This is given that the minor child is at boarding school while the US$550 is paid per month B regardless. His annual contribution for maintenance amounts to US$6 600. His reasoning is that the minor child is only in the physical custody of the respondent for three to four months of the year. As such, he argues that the respondent receives an ample amount to meet all expenses from this amount including those for

sports, school uniforms and extramural activities. The C respondent disagrees on the basis that these are entirely separate expenses as per the consent paper, which are to be paid separately. She also claims an amount of US$3 300 owing that has been advanced by her for these expenses between August 2010 and September 2013. At issue, therefore, is whether the applicant should also pay this amount separately as arrears for school trips and related expenses for extra mural activities in addition to these items D clearly remaining the applicant's responsibility.

The third issue relates to the futuristic clause on tertiary education. In addition to the child's fundamental education is a clause in the consent paper on tertiary education whereby 'subject to his means at the relevant time, and subject to discussion between the parties as to the type of tertiary education,' the applicant may meet the child's needs in this regard. The E applicant's request is to have the clause deleted on the grounds that as the child will be a major, he will liaise directly with the child due to the embittered relationship between him and the respondent. It is the respondent's position that the clause remains as is.

The fourth contested issue relates to the payment of the respondent's medical F aid. A related issue under medical expenses is the respondent's claim that the applicant should pay for all the minor child's medical aid shortfalls. In the consent paper is an agreement to retain the minor child and respondent on the applicant's medical scheme described therein as his "current Medical and Dental Aid Scheme and pay all reasonably and necessarily incurred shortfalls G in regard thereto". The applicant was also to reimburse the respondent upon production of invoices any monies expended by her for prescription medicines for herself and the minor child. With reference to the medical aid provision, the applicant pays for the child's medical aid under a private medical scheme to the tune of US$2 200 per year. However, since 2003 he has not been paying the respondent's medical aid. The applicant also says H the clause in the consent paper was specifically linked to the medical aid

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scheme which he had with his former employer. The contributions were A paid for by the employer. He has long since left that job. He also asserts that the parties have been divorced for the last 14 years and the fact that the respondent has managed to pay for herself over the last nine to ten years for the highest available package under her own chosen medical scheme is, in his view, indicative of her ability to pay. He also avers that she acquiesced to this new arrangement. Besides, he says he pays the lion's share of the B child's maintenance thereby relieving her to meet her own expenses. In light of the fact that he has since remarried, he also considers payment of medical aid for a former spouse an unfair burden. The applicant would therefore like to amend the consent order to reflect the fact that he is not obliged to pay her medical aid from 2003 when he claims they acquiesced to this current arrangement. He would also want her to take responsibility C for any shortfalls on the minor child's medical expenses using the monthly maintenance which she receives.

The respondent on the other hand, insists that it is the applicant's obligation to pay her medical expenses as per the consent order. She counterclaims a sum of US$5 5781, being the amount that she has paid for her subscriptions D from 2009 to date. She says that she suffered from breast cancer in 2003 and struggles to meet her medical expenses.

The fifth issue for modification relates to access to the minor child. In terms of the consent paper, the respondent retained custody of the minor child. Access to the child by the applicant was, rather loosely, to be agreed to from E time to time. Such clause, when so laxly worded, more often than not attracts a return to the courts in quest of amendment with more specific detail. The applicant now wishes to formalise his access rights in more specific terms. He seeks to exercise his access rights, at his expense, every alternate school holiday and every alternate Christian holiday without interfering with any of the child's school programmes. The parties are not in dispute in this regard F save that the respondent has utilised the opportunity to ventilate her displeasure at what she perceives to have been neglect of duty on the applicant's part when it came to access. He attributes his distance to an endeavour to keep the peace given their constant disagreements. Suffice it to state that the only intervention deemed necessary for the court is to endorse this agreed new arrangement regarding more defined access rights. G

The guiding legal principles

The provisions of the Matrimonial Causes Act [*Chapter 5: 13*] that are of relevance to this application are s 9 on variation; s 11 on arrear maintenance and s 8, subss (2) and (3), on the

duration and extension of maintenance orders.

2014 (1) ZLR p583

Tsanga J

Section 9 on variation states as follows:

> "Without prejudice to the Maintenance Act [*Chapter 5:09*] an appropriate court may *on good cause shown* vary suspend or rescind an order made in terms of section seven …" (my emphasis).

Of significance therefore in any given case is what constitutes *good cause*. In *Crone* v *Crone* 2000 (1) ZLR 367 (S) at 371 Ebrahim JA captured the two cardinal points which must guide courts in dealing with applications for alterations of maintenance. The first is a change in financial circumstances. The second is the ability of the person being ordered to provide maintenance to pay the increment sought.

Section 11(1) on arrear maintenance is couched as follows:

> "Where a spouse has provided for the maintenance of any children of the marriage or a former marriage of one or other of the spouses, that spouse shall be entitled to recover from the other spouse such maintenance or such portion of such maintenance as *an appropriate court may consider just and equitable in the circumstances*" (my emphasis).

Of significance is that in making any decision regarding arrear maintenance the court is enjoined to look at the circumstances holistically in arriving at its conclusion as to what is just and equitable.

Subsections (2) and (3) of s 8, on the duration of a maintenance order, are relevant to the analysis of the issue as to whether the clause on tertiary education should be dispensed with. Section 8(2) states as follows:

> "Subject to subsection (3), an order for the periodic payment of maintenance in respect of a child shall cease
>
> (a) when the child dies or marries
>
> (b) when the child is adopted
>
> (c) when the child attains the age of eighteen years; or
>
> (d) when the child becomes self-supporting
>
> whichever occurs earlier."

Section 8(3) reads as follows:

> "(3) An appropriate court may direct that the maintenance order referred to in subsection (2) shall extend beyond the date when the child attains the age of eighteen years –
>
> (a) if the child is or will be receiving education or training beyond attaining that age; or
>
> (b) if there are special circumstances which justify such direction"

In the event that a consent paper does not incorporate any arrangements on tertiary education, it is these clauses that kick into play. An appropriate court would have to order the extension of the continued payment of maintenance.

2014 (1) ZLR p584

Tsanga J

Below I analyse each of the issues raised by the parties in the application and the counter-application against the applicable legal framework.

Factual and legal analysis of the core disputes

The monthly child support payable

I will start by addressing the first issue which is that of changed financial circumstances in relation to the monthly sum payable. *In casu* the changes in financial circumstances are at two levels. At one level is the formalisation of the US dollar as the currency of operation from 2009. Since dollarization, the applicant, as stated, has been paying US$550 as a monthly sum which he has no objection to continuing to pay. The respondent's averment that this amount is grossly inadequate needs to be viewed against the value of what was ordered at the time the consent paper was entered into in US dollars. Also the agreement was made when the child was one year old. No doubt a child's needs increase as the child gets older, due to schooling needs in particular.

I have found some guidance from the *Crone* case *supra* at 370F as to what the Z$10 000 was equivalent to D in US dollar terms at the time the consent paper was entered into. An amount of Z$10 000 was calculated to be equivalent to US$270 as at December 1998. This figure was deemed acceptable by all parties in that case as representative of actual values at the time. It was calculated using the Quarterly Digest of Statistics. *In casu* the parties' consent paper was entered into in 1999. No doubt the value of Z$10 000 by November 1999 would have represented somewhat less than the US$270 of December 1998 E due to the inflationary tendencies already in flow at that time. Nonetheless, I will use US$270 as a yardstick for the value of maintenance ordered at that time in its Zimbabwean dollar terms. This is primarily to assess how much of an increase the sum of US$550 per month represents in comparison to the value of the amount ordered at the time.

It is clear that in US dollar terms the amount of US$550 is at least twice F the value of the amount that informed the consent paper. The respondent's request for US$1000 per month is informed by her standpoint that over and above any actual needs, her minor child is entitled to enjoy a lifestyle that he would have enjoyed if the marriage had not broken down. The sum of $1 000 a month is one that she insists the applicant is well able to afford. The applicant's position is that the total economic package for his son, G which amounts to US$15827.50 a year inclusive of school fees and medical expenses, more than meets his son's support needs.

The applicant was indeed already financially encumbered by existing obligations towards his child at the time of his remarriage. However, the context in which he has approached the court needs mention. In bringing H

Tsanga J

A forth the reality of additional dependants, the applicant is not doing so from the perspective of seeking a downward variation to what he has been paying. According to him, his school-related expenditures on his son are already significantly higher than what he expends on his daughters, since his son is attending a private school. Nonetheless he is prepared to continue with his level of payment. He thus mentions the reality that he has two other children B to support, to "defensively" avoid an upward variation as opposed to him raising the issue to "offensively" seek a downward variation.

The change in needs and obligations brought on by a spouse's remarriage amounts to '*good cause*' as required by s 9 of the Matrimonial Causes Act. As Reynolds J put it in *Chizengeni* v *Chizengeni* 1988 (1) ZLR 286 (H) at 288:

> C "Where a divorced man with maintenance obligations towards his first family remarries, it is superficial and unrealistic to suggest that the first family must continue to be maintained at the same standard regardless of her former husband's subsequent commitments."

He further elaborated on this at 289as follows:

> "I believe that the apparently conflicting judicial views on the position of the D first wife *vis-à-vis* a husband's new family are capable of reconciliation. I would suggest with due deference, that the true position is that the obligations owed to the first wife and children are properly regarded as a first charge, but subsequent commitments will possibly reduce the husband's capacity to maintain the first wife to the extent originally decreed. In order to accommodate both needs, the standards of living of all parties may possibly have to be reduced, with the second family playing a subordinate role to the first. In assessing the E needs of all concerned, a variety of considerations would obviously have to be examined, and the ultimate decision would be based on an evaluation of all these considerations."

I would venture to add that our new Constitution appears to lend interpretive support in favour of an "equalisation approach" as opposed to a "first family F approach" in assessing any child's needs. Non-discrimination in general is the ethos underlying the Constitution. Section 81(1) which deals with the rights of children accords rights equally to *every child.* Of relevance are paras (d) and (f) of s 81(1) which are couched as follows:

> "*Every child,* that is to say every boy and girl under the age of eighteen years, has the right –
>
> G (a) …
>
> (b) …
>
> (c) …
>
> (d) to family or parental care, or to appropriate care when removed from the family environment;
>
> H (e) …

(f) to education, health care services, nutrition and shelter." A

2014 (1) ZLR p586

Tsanga J

In addition, the child's best interests are paramount when deciding a matter. It is also the duty of the High Court to ensure that all children are adequately protected. (See s 81 subss (2) and (3), in this regard.

This court cannot ign,ore the fact that the applicant's circumstances have changed as he has since remarried. His exercise of his right and freedom to B found a new family must be respected and recognised. He has equal obligations to the offspring that have been sired prior to the divorce and after. His own needs must also be taken into account. To permit an upward variation as requested by the respondent oblivious of these changed circumstances and increased obligations inevitably brought on by a new family would, in my view, not serve the best interests of any of the children. C

With reference to the second guiding principle which is whether or not he can afford to pay, the applicant's sworn statement is that he is a self-employed man whose move to South Africa is for economic reasons. The respondent's request for US$1 000 per month as being more indicative of the standard of life they had and that is being led by the applicant, has to be examined D against the evidence that was placed before the court regarding his earnings.

He states that he sold his house here and moved to South Africa. From December 2012 to about April 2013 he relied on the proceeds from the sale of his house to meet all his obligations. It was from May 2013 that his newly registered company began to generate income. This he put at R65 000 for the month of May 2013 which approximates to US$6 500. He further states in his E sworn statement that this has been the average income at least between May and July 2013 as his affidavit was sworn to in August 2013. The amount takes care of all his obligations including contributions towards renting his office space for business. His rentals are R22 000 a month (US$2 200 at current rate), inclusive of home and office rental. He approximates the rest of his F expenses to R42 991.42 a month (US$4299 at the current rate). A breakdown of expenses was provided. I had no difficulties with the evidence he placed before the court which I found credible as every effort seemed to have been made to put his financial picture before the court for its consideration.

Due to his higher income earning capacity, he meets most of the minor G child's financial needs whilst the respondent has largely played an important custodial role in addition to keeping a job. A custodial role, despite its ceaseless demands, is one that has no monetary value and that is considerably undervalued in terms of its contribution to a child's life. In assessing child support, it is vital as such that the custodial parent who may have a lower income than the noncustodial parent as in this case, does not find herself in H

2014 (1) ZLR p587

Tsanga J

A addition to her demanding role, saddled with extra financial costs that she can ill afford. With already such a demanding role to play, it is significant that the respondent should not be left impoverished by additionally having to subsidise the child's upkeep from her own inadequate resources. It is therefore within this framework that I cast an eye on what is being availed as child support.

B The respondent, who is in formal employment, states that she earns $1 500. Albeit formally employed, no firm proof of her earnings was provided in her papers to the court. The itemised monthly expenses by the respondent for the minor child which amount to $1 160 per month exclusive of school fees and medical expenses are grossly exaggerated. A monthly expenditure C totalling US$345 on food items alone for a minor child who attends boarding school for almost nine months of the year where meals are provided, is clearly not realistic. The expenditure on fuel amounting to US$320 every month is again inflated. Even factoring the occasional requisite school visits, this figure would amount to the respondent needing at least six full tanks of fuel a month to a school no more than 100 km out of Harare.

D Significant in my view is that the US$550 per month represents more than double the value of the figure that was reflected in the consent paper in terms of US dollar value at the time. Put against realistic expenditures this amount is in my view more than adequate as monthly maintenance. Also

the figure of US$ 550 is more in line with the lifestyle that they were leading if the E value of the original sum is taken into account.

Costs for school trips and other related expenses

The next issue is whether this amount covers or should cover incidentals such as sporting school trips and other related school expenditures which the applicant agreed to pay under the consent paper. A concomitant issue F is whether the applicant is liable for example for the US$ 3 300 that the respondent says she has expended on the child's school trips from 2010. The consent paper indeed dealt with these as a separate item from the monthly payments. However, the applicant has indeed been paying a significantly higher value as monthly maintenance compared to the US dollar value at the time of the consent paper. While it is indeed useful and necessary in consent G agreements to categorise the items that will be catered for as part of the overall package for child support, ultimately one has to look at the payments as a total economic package. This is more so when items such as sporting equipment or extra-mural activities, that are not expressed in exact monetary terms at the time of the agreement, take on their monetary value depending H on the school that the child ultimately attends. In my view, looking at the

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2014 (1) ZLR p588

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contributions and financial situation of the parties, the monthly payments of A US$550 are adequate to cover the costs of these additional expenses, given that the monthly sum is payable even when the minor child is at school. There is no justification for ordering that the applicant pays $3 300 as arrears for this category of costs. The applicant meets most of the minor child's financial needs, but this does not mean that the respondent is totally absolved from contributing anything. It is perhaps in this regard that she too can make B some contribution if the monthly payments amounting to US$6 600 a year are inadequate as she claims. Her own estimate is that the amount needed for sporting gear and trips outside the country is about US$1 600 a year. This can be her contribution to his maintenance, given that the applicant's net contribution as his total package of support is US$15 827.50. This is C broken down as US$6 600 in monthly payments, $7057.50 as school fees and $2 200 for medical aid.

The clause on tertiary education

Although child support can be terminated on grounds such as majority status or emancipation among others, it is now generally the reality that parents D can reasonably expect that their obligations towards their child support obligations will go beyond the children's majority status. Where parties have express agreements in their divorce orders, from our court's point of view such an obligation would at most extend up to the first degree. See *Hingeston* v *Lightfoot* 2000 (2) ZLR 247 (S) at 253. In an increasingly competitive world, college education is frequently an indispensable stepping stone. The E applicant is not averse to paying subject to his means. His desire is to remove the clause so that he communicates directly with his son at the given time to avoid what he sees as an acidic relationship with the respondent.

In my view, this is not an adequate justification for the removal of the clause. If the child is aware that tertiary education is within the realm of possibilities F of support by the applicant as stipulated in the consent paper, the chances are that he is likely to pursue it in the comfort of that knowledge. Whilst it is true that legally the child will be a major and would be able from a legal standpoint to represent his own interest, I agree with Ms *Munangati,* counsel for respondent, that there is no need to burden the child with unnecessary worries. I do not see how the respondent can be totally out of the picture G when the child stays with her and will most likely still do so from time to time when he is at college. Besides, what values would the court be sanctioning were it to permit the removal of the clause primarily so that the parents do not have to talk directly with each other concerning their child? In my opinion, the parties have at least two years to learn to "sheath their swords". H

2014 (1) ZLR p589

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A Success at this would be a far better value to instil than imbuing their son with notions that it is fine for offspring to stand in and act as protective shields against the poor communication skills of their parents. The removal of this clause would in my view send the message that tertiary education is now a combat ground that he will have to traverse on his own. This is not what the applicant intends. The court's dominant concern cannot be about putting in B place measures that would

relieve the parents from having to have dialogue directly with each other. It is always about what works best in the interests of the child. The clause will therefore remain as is in the consent paper.

Contribution towards the respondent's medical expenses

Turning to the issue of the applicant's contribution towards the respondent's C medical aid, the argument by counsel for the applicant, Mr *Stewart* that the respondent acquiesced to the current arrangement where she has been paying for her own medical aid is highly unlikely. Given that their relationship appears to have been anything but cordial over the years, an agreement is less likely to have been reached. More significantly however, is that there are generally two factors that courts take into account in deciding on spousal D support. These are the inability of the spouse to support herself, and secondly, whether the other party is reasonably able to provide support. Such inability must be due to factors such as age, and physical or mental incapacity. She was 28 when they divorced in 1999. She admits that she has always worked. She has been paying for her own medical aid since the applicant ceased to do so. E The applicant has since remarried and has taken on added responsibilities. As has also been highlighted, he bears virtually all the financial responsibilities for the child's upkeep. Therefore, while the respondent says that she has suffered in the past from breast cancer and therefore has added medical bills, cognisance must be had to the fact that a very significant portion, if not all, of the minor child's financial upkeep is met by the applicant.

F Furthermore, spousal support for life is not the norm in our case or elsewhere in the world for that matter. It has been highlighted in various cases in our courts that the expectation of a former spouse cannot be that of a bread ticket for life. See, for example, *Rabvukwa* v *Rabvukwa* 2004 (1) ZLR 530 (H); *Chiomba* v *Chiomba* 1992 (2) ZLR 197 (S). The length of the marriage is a determining factor regarding the length of support for a former spouse. In G*Chiomba supra* at 199B the court cited with approval the following excerpt from Hahlo *South African Law of Husband and Wife* 5 ed at 363-4 regarding spousal maintenance:

> "… Today, the courts are no longer prepared to award maintenance to a young woman who has been working before marriage, and can be expected to work H again after divorce, at least if there are no young children of the marriage. At

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Tsanga J

> most, if she has given up her job, she will be given a few months' maintenance A to tide her over until she finds a new one. Middle aged women who have for years devoted themselves full time to the management of the household and care of children of the marriage, are awarded 'rehabilitative maintenance' for a period sufficient to enable them to be trained or retrained for a job or profession. '*Permanent maintenance' is reserved for the elderly wife who has been married to her husband for a long time and is too old to earn her own living and is*B*unlikely to marry"* (my emphasis).

An order for spousal support should not be punitive in its quest. Orders for spousal support are essentially either rehabilitative, or compensatory as in the case of more lengthy marriages. The respondent enjoyed the benefit of the applicant's medical aid benefit until sometime in 2003, which was more C than an adequate time span to adjust to her new reality of no longer being his spouse. It could not reasonably have been expected, given the factual realities which include the short duration of their marriage, that he would continue to shoulder the burden of her medical aid even after he had left the employer and even after he had remarried. The amount of US$5 781 that the respondent seeks to reclaim from the applicant for her subscriptions is D not justified and is denied.

The child's medical aid shortfalls

There was no evidence placed before the court as to the extent of the nature of the shortfalls which she expects the applicant to meet on behalf of the E child. Shortfalls can be very basic or if they involve a major procedure, they can be substantial. Since the child's medical aid is paid for by the applicant, I assume that he receives any necessary statements pertaining to the account and would be better placed to reconcile any shortfalls should the need arise. At the same time, I appreciate that it would also be highly inconvenient for F him to address each and every expenditure on medicines. As such, it seems logical to me that only shortfalls above $100 are to be sent to the applicant. Those below that can easily be met from the monthly payment for maintenance as they are unlikely to be a monthly occurrence.

In the result, it is ordered as follows: G

1. The applicant shall pay all school fees at [the private school] incurred in respect of the minor child A.

2. The applicant shall pay all contributions to maintain the minor child on his existing medical aid scheme and all shortfalls that are above $100 at any given time. H

Tsanga J

A 3. The applicant shall pay to the respondent as maintenance for the child, an amount of US$550 per month until the child completes his secondary education or becomes self-supporting whichever occurs later.

4. The applicant shall cease to make any contributions towards the respondent's medical aid scheme or insurance, the effective date being from 2003 and henceforth.

B 5. The applicant shall have access to the minor child at his expense in South Africa every alternate school holiday and every alternate Christian Holiday and shall be entitled to have the child with him in South Africa.

6. The consent paper entered into between the applicant (as defendant) and the respondent (as plaintiff) in case HC 14110/99 be and is hereby C amended by the inclusion of paragraphs 1-5 of this order and to the extent that anything in this order is contrary to the terms of the said consent paper, the terms of this order shall prevail.

Each party to pay their own costs.

D*Wintertons*, applicant's legal practitioners

Munangati & Associates, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/EX P P G INDUSTRIES (ZIMBABWE) LTD 2014 (1) ZLR 592 (H)

EX P P G INDUSTRIES (ZIMBABWE) LTD 2014 (1) ZLR 592 (H)

Citation	2014 (1) ZLR 592 (H)
Case No	Judgment No. HH-239-14
Court	High Court, Harare
Judge	Ndewere J
Heard	26 March 2014; *CAV*
Judgment	21 May 2014
Counsel	Ms *M J Remba,* for the applicant *D Ochieng,* for the respondent
Case Type	*Ex parte* application under s 191 of Companies Act [*Chapter 24:03*]
Annotations	No case annotations to date

Flynote

Company – scheme of arrangement with creditors – sanctioning of scheme C *by court – objections to scheme – must be heard before court may sanction scheme*

Headnote

At meetings to sanction a scheme of arrangement between the applicant and D its creditors, one creditor objected to the scheme on the ground that it was a secured creditor, not a concurrent one. The chairperson for the scheme meetings determined the issues raised by that creditor and made a finding that it was not a secured creditor but a concurrent creditor. Thereafter, the scheme was put to the vote and the majority of concurrent E creditors present voted for the scheme arrangement. The applicant then made an *ex parte* application in motion court for the sanctioning of the combined scheme of arrangement by its creditors by the court in terms of s 191 of the Companies Act [*Chapter 24:03*]. The objecting creditor made an oral application for leave to file its opposing papers so that its objections to the sanctioning of the scheme could be heard. The applicant F opposed the application for leave to oppose.

Held, that if there are objections before the court sanctions the scheme, those objections must be considered by the court and a decision made. The Act requires not only the holding of a meeting, but the submission of even an accepted scheme to the scrutiny of the court thereafter. This G scrutiny should not be a mere rubber stamp for the majority decision. The proposer of the scheme has to persuade, not only the meeting of shareholders and creditors, but also the court, that the scheme is a fair one. Conversely, a minority group should be able to ventilate and pursue its protests if so advised at both stages. H

2014 (1) ZLR p593

Ndewere J

Case referred to A

Ex p *Maceys Stores Ltd* 1983 (2) SA 657 (ZH)

Legislation considered

Companies Act [*Chapter 24:03*], s 191

Case information

B Ms M J Remba, for the applicant

D Ochieng, for the respondent

Judgment

Ndewere J: On 18 December 2013, the High Court sanctioned the holding of scheme meetings between PG Industries Zimbabwe Ltd and its creditors.

C The scheme meetings were held from January 2014. At a scheme meeting of concurrent creditors, one creditor, Jones Holdings (Pvt) Ltd, raised certain issues pertaining to its interest in the scheme. It indicated that it considered itself as a secured creditor rather than a concurrent creditor. It also made submissions relating to the quantum of its claim against PG, where there was a discrepancy between the amount in the books of PG Industries as at D 30 September, 2013 and the amount according to Jones Holdings.

The chairperson for the scheme meetings determined the issues raised by Jones Holdings and made a finding that Jones Holdings was not a secured creditor but a concurrent creditor. Thereafter, the scheme was put to the vote and the majority of concurrent creditors present voted for the scheme arrangement.

E On Wednesday, 26 March 2014, PG Industries made an *ex parte* application in motion court for the sanctioning of the combined scheme of arrangement by its creditors by the court in terms of s 191 of the Companies Act [*Chapter 24:03*]. Jones Holdings appeared in court and made an oral application for leave to file its opposing papers so that its objections to the sanctioning of F the scheme can be heard. PG Industries opposed the application for leave to oppose. Both counsel for PG Industries and Jones Holdings referred the court to case authorities in support of their submissions. Judgment was reserved at the end of the oral application for leave to file opposing papers.

In Ex p *Maceys Stores Ltd* 1983 (2) SA 657 (ZH), referred to by Jones Holdings' counsel, there were objections to a scheme of arrangement before G the scheme was sanctioned by the court. The court considered the objections, dismissed them and sanctioned the scheme. So that case is authority for the proposition that if there are objections before the court sanctions the scheme, those objections must be considered by the court and a decision made. That is what Jones Holdings asked for orally in court on 26 March 2014, that H the case be referred to the opposed roll and that it be given leave to file its

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Ndewere J

opposing papers so that its objections are considered by the court before it A makes a decision to sanction or not to sanction the scheme.

In Ex p *Maceys Stores Ltd supra* at 667*,* the court had this to say:

> "But the Act seems to require not only the holding of a meeting, but the submission of even an accepted scheme to the scrutiny of the court thereafter. That this scrutiny should not be a mere rubber stamp for the majority decision is also clear from a number of judicial decisions. The whole process therefore seems to B contemplate that the proposer of the scheme has to persuade not only the meeting of shareholders and creditors, but also the court, that the scheme is a fair one. *And conversely, it contemplates that a minority group should be able to ventilate and pursue their protests if so advised at both stages*" (the emphasis is my own).

The scheme of arrangement may still be sanctioned, as in the *Maceys Stores* case, but before that happens, Jones Holdings must be given the right to be C heard by a court. The consideration of its objections by the chairperson of the scheme arrangement does not remove the court's obligation to hear the objections.

Section 193(1)(e) of the Companies Act [*Chapter 24:03*] is also relevant in deciding Jones Holdings' application to be heard. The section provides D as follows:

> "(1) Where an application is made to the court under section one hundred and ninety-one for the sanctioning of a compromise or arrangement proposed between a company and any such amalgamation of persons as are mentioned in that section and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the E reconstruction of any company or companies or the amalgamation of any two or more companies and that under the scheme the whole or any part of the undertaking, or the property of any company concerned in the scheme, in this section referred to as a 'transferor company', is to be transferred to another company, in this section referred to as the 'transferee company', the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters – F
>
> (a) to (d)
>
> (e) the provisions to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement …"

Section 193(1)(e) shows that there is room for dissent in an application for the sanctioning of a scheme in terms of s 191. Indeed, Jones Holdings dissented G right from the outset during one of the scheme meetings. The court cannot make any provisions for Jones Holdings as a dissenting member without hearing him. Such provisions can only be made after Jones Holdings has filed its opposing papers, giving its reasons for disagreeing with the scheme of arrangement. Only after the court has heard Jones Holdings' position will H

Ndewere J

A it be in a position to give appropriate provisions to it as a dissenting member if it finds merit in its objections.

In view of the above, it is ordered that:

(a) the sanctioning of the scheme of arrangement proposed by PG Industries (Zimbabwe) Ltd be and is hereby declined.

B (b) Jones Holdings be and is hereby given leave to file opposing papers in terms of the High Court Rules and thereafter the matter should be set down on the opposed roll.

(c) There will be no order on costs.

Dube, Manikai & Hwacha, applicant's legal practitioners

C*Atherstone & Cook*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/ARUNDEL SCHOOL TRUST v PETTIGREW 2014 (1) ZLR 596 (H)

ARUNDEL SCHOOL TRUST v PETTIGREW 2014 (1) ZLR 596 (H)

Citation	2014 (1) ZLR 596 (H)
Case No	Judgment No. HH-242-14
Court	High Court, Harare
Judge	Chigumba J
Heard	9 May 2014; *CAV*
Judgment	21 May 2014
Counsel	*T Nleya,* for the applicant Respondent in person
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Employment – contract – termination – retention of assets forming part C *of conditions of service – right of employee to retain such assets until contract conclusively terminated – need for employee to show that possession of assets was part of conditions of service*

Property and real rights – vindication – owner entitled to repossess property D *at any time unless possessor can establish claim of right – claim of right arising from employment – need to show that contract of employment conferred such right*

Headnote

The respondent was employed as the sick-bay matron at a private girls' E school. Her contract of employment stated that she was required to live on campus during the term time. The contract also stated that the post was a full-time position, although during the school holidays her services were not normally required. The rooms allocated to her were a stone's throw away from the girls' dormitory bathrooms. She occupied the rooms continually during the time she was employed at the school, F not just during the term time. She was suspended from employment for disciplinary reasons and, after a hearing, was dismissed from her employment. The school sought an order for her eviction from the rooms, from which she refused to move, on the grounds that she was disputing her dismissal in the Labour Court and that the provision of accommodation was part of her conditions of service. G

Held, that this was a vindicatory action. An owner of property is at liberty to repossess his property at any time that he desires, because it is a principle of ownership that possession of the property

should repose in its owner at all times, unless the possessor is vested with some right enforceable against the owner. The onus is on the defendant to prove a H

A right of retention. A claim of right, in general, is a valid claim, which is enforceable at law against the registered owner of the property sought to be vindicated. Where vindication is sought in the context of a labour dispute, a claim of right is a right which is vested in an employee, and which is enforceable against the employer who owns the property sought to be vindicated. The existence of this right may be derived from the contract B of employment. Where the parties reduced a contract of employment to writing, evidence of the terms of the contract is usually derived from examining that written document. In the absence of a written contract of employment, it will be necessary to adduce other cogent evidence of the terms of the contract of employment.

Held, further, that assets which form part of conditions of service may be C retained until the contract of employment is conclusively terminated. As long as the contract of employment remains extant, the employee's rights remain vested in the employee. However, the employee's rights must be recognized and understood by both employer and employee as rights conferred by the contract of employment. Here, the letter of appointment D stated that the respondent was required to reside on the premises during term time. She was not expected to remain on the school grounds during half-term. The premises belonged to the applicant. If it was the applicant's intention to provide the respondent with accommodation forming part of her conditions of service, then her letter of appointment would have said so expressly. The requirement to live on campus during term time E could not be interpreted as conferring on the respondent an enforceable right to accommodation on the premises.

Cases cited

Alspite (Pvt) Ltd v *Westerhoff* 2009 (2) ZLR 226 (H)

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

Graham v Ridley 1931 TPD 476

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

Masudi v Jera HH-67-07

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

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

Legislation considered G

Labour Act [*Chapter 28:01*], s 12

Case information

T Nleya, for the applicant

H Respondent in person

Judgment

Chigumba J: The respondent, a sickbay matron of a posh private all-girls A school in Harare is facing eviction from the rooms that she has occupied for the last four years of her employment at this exclusive boarding school. She has not denied that she is co-habiting in these rooms, with a male partner. She has not denied that her allocated rooms are a stone's throw away from the girls' dormitory bathrooms. She says that she is entitled to remain in these rooms, pending determination by the Labour Court whether or not her B contract of employment was lawfully terminated. The applicant has engaged a new sickbay matron. It has petitioned this court to order the eviction of the respondent forthwith. The respondent maintains that she is entitled to remain in occupation of those rooms because of the terms of her contract of employment. The applicant disputes that the contract of employment made such a provision. The court has not been asked to adjudicate on the moral C implications of the respondent's co-habitation with her male partner in close proximity to the living

quarters of impressionable young girls. It must simply decide whether the respondent's contract of employment confers a right on her, to remain in occupation of her allotted rooms, pending determination of the legality of the termination of her contract of employment.

"It is not desirable to cultivate a respect for the law, so much as a respect for right":

so said Henry David Thoreau (1817-1862), American naturalist, poet, and philosopher.

At the hearing of the matter, the respondent appeared in person and admitted that she had received the applicant's heads of argument on 17 December 2013, and that she had not filed her heads of argument contrary to the provisions of r 238(2b) of the rules of this court. The court, cognizant of the fact that the respondent was not legally represented, explained the provisions of r 238(2b) and advised the respondent that she was barred, and could not be heard. The respondent's letter of appointment, dated 20 January 2009, appears to be the only evidence in the papers filed of record, of the respondent's conditions of employment. It reads as follows:

"Dear Sister Pettigrew

Thank you for coming for an interview today in response to our advertisement for a Nursing Sister for our School sickbay. I have pleasure in offering you the position of Sickbay Matron with effect from January 2009. This is a full time position although during the school holidays your services are not normally required. Your starting salary will be 300 Arundel Trust Units (each unit equivalent to $US1) per month. This will be reviewed after the probationary period. An annual bonus is paid in November each year at the discretion of the Head and board of Governors. *You are required to live on campus during the term time and all meals are provided except during the half term break.* You may take an afternoon off each week and at least one weekend off as a result. Your duties

Chigumba J

will be covered by a relief matron or member of the resident staff. Please note that the school does not pay into any pension fund and providing for the future is up to the employee. As with all Arundel appointments, the first three months are probationary. During the probationary period one month's notice of termination of employment is required on either side. Your probationary period will run from 25 January to 25 April 2009. Upon confirmation of a permanent appointment, a term's notice of termination of employment is required on either side. If you are willing to accept this position I should be grateful if you would please sign and return the duplicate copy of this letter indicating your acceptance of the terms and conditions of your appointment. I look forward to your joining our community and hope that you will be happy at Arundel School."

The facts giving rise to the cause of action in this matter are as follows: the respondent was employed by the applicant as a sickbay sister on 20 January 2009. During the course of her employment, she was accommodated, at the applicant's pleasure, in or around the applicant's sanatorium, at 28 Arundel School Road, Mt Pleasant, Harare, at the school premises. On 29 May 2013, the respondent was suspended from employment as sanatorium sister at Arundel School without pay or benefits, pending the outcome of a disciplinary hearing. The suspension was premised on the allegations which arose after an inspection of the respondent's living quarters had been carried out by members of the board of governors of the applicant on 4 March 2013. Certain concerns were raised regarding the alleged unhygienic state of her living quarters, and the presence of an unauthorized male on the premises. Another inspection of the premises was subsequently carried out on 22 May 2013 by the Bursar and two board members, who noted that the concerns which had been previously raised had not been addressed.

On 13 June 2013, the respondent was dismissed from her employment, after a disciplinary hearing. The disciplinary hearing made a determination that the respondent was guilty of willful disobedience to a lawful order in terms of s 4(b) of SI 15 of 2006, and of an act or conduct inconsistent with the fulfillment of the express or implied conditions of her contract of employment. The respondent was given formal notice to vacate the premises, in accordance with the provisions of s 12(6) of the Labour Act [*Chapter 28:01*], on 7 August 2013. The requisite notice period expired on 30 September 2013. The respondent has failed or refused to vacate the premises, to date. The applicant now seeks an order for the eviction of the respondent and all those claiming occupation through her. The respondent opposed the granting of the relief sought by the applicant, on 12 September 2013. Her preliminary point, that this court has no jurisdiction to hear the applicant's claim because the matter was labour related and pending before

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the Labour Court, was disregarded by this court. The law is settled on this A point. See *Zimasco (Pvt) Ltd* v *Marikano* HH-235-11.

On the merits, the gist of the respondent's opposition to eviction is that the disciplinary proceedings instituted against her were malicious and vindictive and were in retaliation of her having lodged a complaint against the applicant at the Department of Labour, regarding long outstanding labour disputes. B With all due respect to the respondent, this is an averment that pertains to labour matters which are the exclusive jurisdiction of the Labour Court. Her application for review of the disciplinary proceedings, currently pending before the Labour Court, will ventilate such issues. The respondent's second point in opposition to the application for her eviction is that she was never in occupation of the sanatorium, as alleged by the applicant. The applicant, C at the hearing of this matter, applied for an amendment of the draft order to reflect the fact that eviction is being sought from the rooms occupied by the respondent, which adjoin the sanatorium, and are part of the Angwa Hostel complex.

According to the respondent's opposing affidavit, the last point on which the application before me is being resisted by the respondent is that, the D Labour Court is likely to overturn the decision to terminate her contract of employment and to order that she be reinstated, so, pending the Labour Court's determination, the applicant has no right to evict her. The applicant, in its answering papers refuted the *bona fides* of the respondent's resistance to eviction. The applicant averred that the respondent was merely buying time, E and seeking to frustrate it by refusing to vacate its premises. The applicant averred that the application for review of the disciplinary proceedings, which is pending before the Labour Court, had no bearing on its entitlement to exercise its right of ownership to the premises occupied by the respondent.

It is unfortunate that the respondent did not file heads of argument to buttress the averments in her opposing affidavit. It would have been most interesting F to consider the legal basis for the position that she took in her papers. In its heads of argument, the applicant submitted that the application before this court is for the relief of *rei vindicatio.* Such relief is available to the registered owner of property who is, at law, entitled to be in physical possession of his property, the *res.* An owner of property is at liberty to repossess his G property at any time that he desires, because it is the nature of ownership that possession of the property should repose in its owner at all times. See *Graham* v *Ridley* 1931 TPD 476, where the principle was set out as follows:

> "… It is inherent in the nature of ownership that possession should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner." H

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A In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 14 the principle was reinforced as follows:

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

B In *Masudi* v *Jera* HH-67-07 at 2-3 it was stated that:

> "Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action *in rem*, is only available to owners of the property in issue, which at the time of the commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner."

C In *Stanbic Finance Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H), Malaba J (as he then was) applied the principle behind the *rei vindicatio* to the case of a motor vehicle owned by the plaintiff and leased to a buyer 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) where he had this to say at p 88:

> D "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 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 E 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 at 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings."

In *Alspite (Pvt) Ltd* v *Westerhoff* 2009 (2) ZLR 226 (H) at 236E-F, which was a case involving distribution of property following divorce, and the court F was required to distinguish between rights enforceable against the whole world, and rights which are enforceable *in personam,* the court stated that:

"The *rei vindicatio* is an action that is founded in property law. It is aimed at protection ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his or her property, that, at law he or she is entitled to recover G it wherever found and from whomsoever is holding it, without alleging anything further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action in *rem,* enforceable against the world at large. This is settled law in our jurisdiction, and hardly requires authority. See *Siyanda* v *The Church of Christ* 1994 (1) ZLR 74 (S), *Musanhi* v *Mt Darwin Rushinga Co-operative Union* 1997 (1) ZLR 120 (S), *Mashave* v *Standard Chartered*H*Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) …"

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It is clear that the applicant, being the registered owner of the rooms which A adjoin the sanatorium and which the respondent occupied when she was employed as a nursing sister, is entitled to possession of that property which possession is currently reposed in the respondent. Does the respondent have a claim of right or a right to retain those rooms which she is currently in occupation of? The respondent argues that she does have a right of retention because her contract of employment had not been conclusively terminated. B There is a hearing pending before the Labour Court in which she has challenged the legal validity of her dismissal from employment. We know that the respondent was suspended without pay and benefits, then subsequently fired. It has been held that an employee can hold onto those benefits that accrued to him or her as part of his or her conditions of service, pending C determination of the validity of termination of the contract of employment. See *Zimasco* v *Marikano supra.* The *ratio* of that judgment in my view, was that assets which form part of conditions of service may be retained until the contract of employment is conclusively terminated. As long as the contract of employment remains extant, the employee's rights D remain vested in the employee. My reading of that case, however, is that the employee's rights must be recognized and understood by both employer and employee as rights conferred by the contract of employment. Let us examine the evidence on record about the terms of respondent's contract of employment.

It would appear to me to be fallacious reasoning to say that the respondent had a right to certain premises as accommodation, which right had been E conferred on her by the contract of employment. The letter of appointment filed of record stated that respondent was required to reside on the premises during term time. She was not expected to remain on the school grounds during half term. The premises belong to the applicant. A girl's boarding school operates from there. If it was applicant's intention to confer the respondent with accommodation forming part of her conditions of service, then, in my F view her letter of appointment would have said so expressly. Unfortunately it does not. The respondent cannot retrospectively conjure up a right to accommodation in unspecified rooms that are annexed to the sickbay where she worked, when it is clear that no such right was expressly conferred on her when she took up her post with applicant. If such a right was impliedly G conferred on respondent, and the applicant reneged on a verbal promise to confer such right on respondent, as alleged, then in my view there are other remedies at respondent's disposal, but opposing a claim for eviction is not one of them. I say so because there is no evidence before the court, other than a bald and unsubstantiated averment by the respondent, in the papers filed of record, that this is what transpired. H

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A It is common cause that the applicant is the registered owner of the premises that it seeks to evict the respondent from. The application before me, is in effect, a claim for vindication. In my view, respondent's entitlement to occupy the premises under consideration may only be used as a shield B against the applicant, to defeat applicant's claim for vindication, if the court finds that the nature of the entitlement is such that it is capable, at law, of being enforced against the applicant. So, the question that the court must ask itself is this: What is a claim of right which is capable of defeating

an application for vindication? It has been said that a claim of right is a right to retention, or a contractual right. In *Black's Law Dictionary* 5 ed, a claim of right has been defined as: "claimant's intention to claim in hostility to real owner". This C definition implies that a claim of right need not necessarily be derived from contract, as long as it is of such a nature as to defeat a claim for vindication by an owner entitled to possession of his property. The court must extend its inquiry further, and ask itself what a claim of right is in the context of a labour dispute, where the contract of employment has been terminated, but its status is not conclusively determined, because the Labour Court has yet D to determine the validity of the termination

In my view, a claim of right, in general, is a valid claim, which is enforceable at law against the registered owner of the property sought to be vindicated. Where vindication is sought in the context of a labour dispute, it is my view that, a claim of right is a right which is vested in an employee, and which is enforceable against the employer who owns the property sought to be E vindicated, which may be derived from the contract of employment. Where the parties reduced a contract of employment to writing, evidence of the terms of the contract is usually derived from examining that written document. In the absence of a written contract of employment, it will be necessary to adduce other cogent evidence on the terms of the contract of employment.

F I have considered whether, at the time that this application was made, the respondent made any averment in resisting her proposed eviction, which constitutes sufficient proof of a right to retention of the applicant's rooms which she occupied as a consequence of her employment. I have considered whether the respondent has adduced any evidence of the right that she avers she has, which is enforceable against the applicant's claim for vindication. G The answer is simple, and the law settled. The respondent may only enjoy such rights as are expressly conferred on her by the contract of employment, until such time as the status of the contract of employment, is conclusively determined. The evidence before the court, is that the respondent's letter of appointment, dated 20 January 2009, stated that she was required to live on H campus during term time. Even if I stretch my imagination, I cannot interpret

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that sentence as conferring an enforceable right to accommodation on the A respondent. There is no evidence that the applicant intended that the respondent be entitled to have an enforceable right to be housed on the premises. The applicant has not provided evidence that it had a housing policy that applied to all its employees. Neither has the respondent.

In the absence of evidence that the applicant conferred a right to accommodation B on the respondent in the contract of the employment between the parties, there is consequently no right of retention, based on contract or otherwise. The respondent cannot, retrospectively, manufacture a right which she never acquired, much less use it as a sword to smite the applicant's right to possession of its property. In the absence of evidence of a claim of right, a right to retention or a contractual right, I find that the applicant's claim must C succeed. There are only two defences to an action for vindication: where there is proof that the applicant is not the owner of the property in question, or where the applicant had given away its right to exclusive possession of the property at the time the application was filed. Neither of these defences is available to the respondent.

For these reasons, the application is allowed with costs. D

Gill, Godlonton & Gerrans, applicant's legal practitioners

Respondent, in person

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MAVHIZA & ANOR v MUWAMBWI & ORS 2014 (1) ZLR 605 (H)

Citation	2014 (1) ZLR 605 (H)
Case No	Judgment No. HH-247-14
Court	High Court, Harare
Judge	Zhou J
Heard	19 & 20 May 2014; *CAV*
Judgment	21 May 2014
Counsel	*J Dondo,* for the plaintiffs Ms *G Garise-Nheta,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Damages – delictual – assessment – actio injuriarum – unlawful arrest and detention – need for exemplary and punitive damages – factors to be considered

Delict – actio injuriarum – unlawful arrest and detention – elements of the delict – plaintiff need only prove that arrest or imprisonment was illegal – intention not a requirement – presumption of animus injuriandi

Headnote

The plaintiffs, officers of the Zimbabwe National Water Authority, went to the Zimbabwe Republic Police camp at Chirundu to disconnect water supplies owing to unpaid water charges. They discovered the following day that the water had been reconnected. Having advised their superiors in Harare about the unauthorised reconnections, the plaintiffs were instructed to remove the water meters and plug the pipes so that the water supplies would be disconnected. They did that. A day later they were taken to Chirundu police station where they were kept from about 9 am up to about 4.30 pm, when they were released after they had reinstated the meter and restored the water supply to the police station. While at the police station, they were ordered to sit on a bench behind the counter in the charge office. They were ordered to remove their shoes and to switch off their mobile phones. They had to seek leave to be allowed to ask someone to bring food for them, which they only ate late in the afternoon. They brought an action for damages for unlawful arrest and detention against the first and second defendants, the responsible officers, and against the responsible Ministers.

Held, that on the facts, the delict of unlawful arrest and detention had been established.

Held, further, that an action for unlawful arrest and detention is one that falls under the *actio injuriurum*, and so proof of actual damage is not necessary to support such an action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty. Damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be offenders. The factors to be considered include: the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or "malice" on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e.g. solitary confinement) of the deprivation of liberty; the status, standing, age, and health of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that, in addition to

physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effects of inflation and the fact that the *actio injuriurum* also has a punitive function. Here, the plaintiffs were D not handcuffed, and were allowed to sit on a bench at the police station. They spent eight hours but that was during the day. However, they were deprived of their liberty in circumstances where they had removed the meter in question in the honest performance of their work. There was an abuse by the defendants of their positions to obtain a reconnection of water by arresting and detaining the plaintiffs. An improper motive or malice was clearly established. The fact that the plaintiffs were ordered to remove their shoes amounted to inhuman and degrading treatment. The plaintiffs were ordered to switch off their mobile phones and were denied food at the appropriate time. Damages of US$5 000 for the deprivation of liberty and $1 000 for *contumelia* for each of the plaintiffs F would be appropriate.

Cases cited

Botha v *Zvada & Anor* 1997 (1) ZLR 415 (S)

Masawi v *Chabata & Anor* 1991 (1) ZLR 148 (H)

Min of Home Affairs & Anor v *Bangajena* 2000 (1) ZLR 306 (S) G

Muskwe v *Min of Home Affairs & Ors* HH-83-13

Musundire v *OK Zimbabwe Ltd* 2012 (1) ZLR 292 (H)

Muyambo v *Ngomaikarira & Ors* 2011 (2) ZLR 51 (H)

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

2014 (1) ZLR p607

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Case information

A*J Dondo,* for the plaintiffs

Ms *G Garise-Nheta,* for the defendants

Judgment

Zhou J: In July 2012 the plaintiffs, who are employed by the Zimbabwe National Water Authority (hereinafter referred to as ZINWA) attended at the Zimbabwe Republic Police camp at Chirundu to disconnect water supplies B owing to unpaid water charges. They discovered the following day that the water had been reconnected. Having advised their superiors in Harare about the unauthorised reconnections, the plaintiffs were instructed to remove the water meters and plug the pipes so that the water supplies would be disconnected. They did that. A day later they were taken to Chirundu Police Station where they were kept from about nine o'clock in the morning up to C about half past four in the afternoon when they were released after they had reinstated the meter and restored the water supply to the police station. Based on the above facts, the plaintiffs instituted the instant action for damages for unlawful arrest and detention against the first and second defendants, who are officers of the Zimbabwe Republic Police, and the third defendant who D is responsible for the police.

In their plea the defendants denied that the arrest and detention of the plaintiffs was unlawful or wrongful, and averred that they acted on reasonable suspicion that the plaintiffs had committed the offence of theft of a water meter. The defendants stated that the plaintiffs had removed the meter in the middle of E the night without notifying the relevant authorities, and that the police had only discovered that the meter had been stolen the following morning. That discovery, according to the plea, triggered a report and an investigation into the theft of the meter. The investigation revealed that the meter had been taken by the plaintiffs, hence their arrest and detention. They only released the plaintiffs after it was established that the meter had been removed for F non-payment of water charges.

The two plaintiffs gave evidence. Jorum Mavhiza is employed by ZINWA as operator-in-charge of purification of water, new connections and disconnection of water supplies where clients have defaulted in their payments. He is based at Chirundu. He testified that prior to 6 of July 2012, he

had discussed the G issue of the unpaid water bills for Chirundu Police Station with a Mr Bare who was the Member-In-Charge at that station. When a decision was taken to disconnect the water supplies to the police station he informed Bare. On the day that the disconnections were effected he spoke to Bare, who suggested that they disconnect the water at the charge office and at the residential area of the police camp. The water supply to Bare's residence was not H disconnected because, according to the first plaintiff, a small amount was

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owed. He and the second plaintiff carried out the disconnection by a method A which he described as putting pieces of plastic on the meter. The witness stated that he discovered the following day that the water had been illegally reconnected. He did not know who had restored the water connections. He advised his superiors in Harare who, in turn, instructed him to disconnect the water supply by removing the meter and plugging the pipes. The second disconnection was carried out in the morning around eleven o'clock. Having B removed the meter, the witness and the second plaintiff took the meter to their office where they labelled it and kept it together with other meters. The following morning, 6 July 2012, at about eight o'clock, the first defendant came to the witness's work place at the ZINWA offices. He complained about the disconnection of the water and suggested that they could not live C harmoniously because of that. The witness stated that he advised the first defendant that they could only restore the water supplies upon instruction from their superiors. The first defendant left. At about nine o'clock that same morning the second defendant came and advised the plaintiffs that he was taking them to the police station because they had stolen a water meter. Before being taken to the police station the plaintiffs telephoned their Head D Office in Harare to notify them of the development. They shut down the plant and went to the police station accompanied by the second defendant. Upon arrival at Chirundu Police Station the plaintiffs were introduced by the second defendant as the persons who had stolen the meter. They were ordered to sit on a bench behind the counter in the charge office. They were ordered to remove their shoes and to switch off their mobile phones. They E had to seek leave to be allowed to ask someone to bring food for them which they only ate late in the afternoon. The first defendant came to the police station at about three o'clock in the afternoon. After a conversation with the plaintiffs' manager, a Mr Makwangudze, the first defendant ordered the plaintiffs to collect the water meter and restore it to where they had removed it and reconnect the water supply. The plaintiffs were only released from the F police station after four o'clock in the afternoon after they had reconnected the water supply to the police station.

The second plaintiff, Wilson Tapfuma, was at all material times employed by ZINWA as a water operator. His evidence was materially the same as that of the first plaintiff. The two were taken to the police station together G and were released at the same time.

Evidence for the defendants was given by the first and second defendants. The first defendant, Teddy Muvambwi, was at the relevant time the officer in charge of the Criminal Investigations Department at Chirundu Police Station. He denied that the plaintiffs were arrested or detained on 6 July 2012. He H

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A testified that on that day he received a report of a theft of a water meter. The meter had been stolen from Chirundu Police Station. As a senior officer who resided in the police camp, he caused a report of a theft to be recorded in the Reports Received Book (RRB). He then instructed the second defendant to investigate the theft while he went to the Zambian side of the border to attend a meeting. While he was still at the meeting he received a telephone B call from the second defendant advising him that the meter had been located at the ZINWA offices. He was further advised that ZINWA employees had removed the meter while disconnecting water supplies for non-payment of the water charges. When he went back to the police station after the meeting he found the plaintiffs in the charge office waiting for him. He stated that C he advised the plaintiffs that the meter was Government property, which could not be removed without following some laid down procedures. He told them to restore the meter and use other methods of disconnecting the water supply. During examination-in-chief, he was asked if he had visited the ZINWA offices in the morning of 6 July 2012 at about eight o'clock as alleged by the plaintiffs. He stated that he did not

recall doing that. Later in D cross-examination he flatly denied going to the ZINWA offices in the morning.

The second defendant, Takauya Bvokoto, gave evidence that he is a police officer based at Chirundu. He works in the charge office in the Investigations Department. He stated that on 6 July 2012 he was in the charge office when the first defendant and one Vimbe who was a member-in-charge at Chirundu E Police Station, came to report a case of theft of a water meter. The first defendant was the complainant. Vimbe recorded the report in the Reports Received Book. The second defendant was instructed by the first defendant to investigate the theft. He stated that he took with him the relevant documents and handcuffs and proceeded to the scene of the theft. He observed that the meter was missing. He then went to the ZINWA offices. According to F him, ZINWA employees were suspects because they sometimes worked at the place where the meter was and had been mentioned as suspects by the complainant. At the ZINWA offices he spoke to the first plaintiff and informed him of his investigation. He was advised that the meter in question had been removed for non-payment of water charges. He was shown the G meter which was properly labelled and was kept in a room where there were other meters. From the explanation given he accepted that no offence had been committed. He nevertheless asked the two plaintiffs to accompany him to the police station so that they would explain to the first defendant their reason for removing the meter. He stated that before they left the ZINWA offices the plaintiffs asked for permission, which he granted, to telephone H their superiors in Harare. At the police station he made the plaintiffs to sit

on a bench meant for witnesses. When he finished work at 1300 hours he A informed his colleagues that the plaintiffs were not under arrest but were waiting for the first defendant. He asked the plaintiffs to go and get food if they wanted but they refused.

Based on the pleadings filed by the parties, three issues were referred to trial, namely: B

(1) whether the arrest and detention of the plaintiffs effected by the defendants was lawful;

(2) whether the plaintiffs suffered damages (*sic*) arising from the arrest and detention?

(3) the quantum of damages.

It is clear from the above issues and, indeed, from the defendants' plea, that C the arrest and detention of the plaintiffs were admitted. The defendants' case as pleaded was that the arrest and detention were lawful because of the reasonable suspicion that the plaintiffs had committed an offence. Even in their draft minute, which they filed prior to the pre-trial conference, the defendants had proposed the first issue to be formulated as follows: D

> "Whether or not the first and second defendants acted unlawfully by detaining the first and second plaintiff(s) for not more than 48 hours".

The evidence which the two defendants gave before this court is inconsistent with their plea. Such evidence has no value as it contradicts their defence. For what it is worth, the evidence ineluctably points to an unlawful arrest. Firstly, the defendants in their evidence testified on what they consider to be E the proper procedure for arresting a person. According to them, the procedure entails the laying of the police officer's hand on the shoulder of the person being arrested, followed by the notification to that person as to why he is being arrested. On their own evidence, that procedure was not followed when the plaintiffs were arrested. Secondly, both defendants admitted that they accepted from the explanation given by the plaintiffs as to why the meter had been F removed that no offence had been committed. But they nonetheless proceeded to arrest and detain the two plaintiffs for close to eight hours. Thus the arrest and detention are rendered unlawful by the absence of reasonable grounds for the deprivation of liberty. Thirdly, even if there was a genuine belief that an offence had been committed, having found that the meter in question was G being kept at the ZINWA offices by the plaintiffs, who had removed it during the course and scope of their employment, it was an improper exercise of the discretionary power to proceed to arrest and detain them. The fact that the second respondent did not consider it necessary to take the meter with him when he took the plaintiffs to the police station shows that he did not believe that there was a chance that it might go missing. H

A The defendants contended, in their evidence in this court, that the taking of the plaintiffs from their work place at nine o'clock in the morning and the keeping of them on a bench in a police station for close to eight hours should be classified as something else other than an arrest and detention. In *Muyambo* v *Ngomaikarira & Ors* 2011 (2) ZLR 51 (H) at 55A-C, Patel J (as he then was) stated the law as follows:

> B "The delict of unlawful arrest and detention is committed when a person, without lawful justification, restrains the liberty of another by arresting or imprisoning him. See *Macheka* v *Metcalfe & Anor* HH-62-07 (at pp 6-7) and the authorities there cited. As is explained by Feltoe *A Guide to the Law of Delict* (2ed) at p 48, the plaintiff need only prove that the arrest or imprisonment was illegal and not that there was intention to act illegally or to cause him harm. In our C law, unlike South African Law, *animus injuriandi* is presumed and, therefore, intention is not a requirement for this delict. Moreover, the use of force is not a prerequisite and neither is pecuniary loss. Damages can be awarded for any affront or humiliation stemming from the unlawful arrest and imprisonment of the plaintiff. Although this action is usually brought against members of the police or other uniformed force, a private individual can also be held liable for this delict committed against another private individual. See *Mapuranga* v *Mungate*D1997 (1) ZLR 64 (H)."

The plaintiffs were taken to the police station by the second defendant. They did not voluntarily make a trip to the station. The visit by the second defendant to the plaintiff's place of employment was preceded by an earlier visit by the second defendant during which a subtle threat was made by stating that E they could not live harmoniously in light of the disconnection of the water supply by the plaintiffs. In his evidence-in-chief, the first defendant did not unequivocally deny that he went to the ZINWA offices around eight o'clock on 6 July 2012. Instead, his evidence was that he did not "recall doing that". It was only during cross-examination that he sought to categorically deny the morning visit to the ZINWA offices. In any event, the plaintiffs were F not challenged by the defendants through cross-examination when they testified on that visit. There are other inherently unconvincing aspects of the defendants' evidence. The second defendant could not explain why the plaintiffs would ask him for permission to telephone their superiors in Harare at the time that he was at their offices if he had not purported to arrest them. G His suggestion that the plaintiffs opted to go with him to the police station because they needed company and someone to be chatting with does not make sense given that this was during normal working time and even he was in uniform and on duty. The suggestion that the plaintiffs were made to sit on a bench meant for witnesses is equally tenuous. The plaintiffs were not witnesses even according to the testimonies of the defendants. If they regarded H them as visitors who had come to explain the removal of the meter only, then

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they would have allowed them to sit on the bench which was meant for the A visitors or those that came to report cases. There was also no dispute that the plaintiffs only had food late in the afternoon. I do not accept the second defendant's statement that he had given them the option to go and get food and they had refused. The second plaintiff testified, and his testimony was not challenged, that he suffered from an ulcer and was denied the opportunity to take his medication which he had not brought to the police station. It was B never suggested to both plaintiffs in cross-examination that they had been told to go and get food and they had refused to do that. The defendants only made those assertions when they were giving evidence themselves.

The defendants' version that they merely asked the plaintiffs to attend at the police station for the purpose of explaining to the first defendant the reason C for removing the meter must therefore be rejected.

The defendants' assertion that they were not aware that the meter had been removed by the plaintiff does not accord with the probabilities. The meter was removed in broad daylight, around eleven o'clock in the morning. There were persons around when it was removed. Mr Bare, who was an D officer-in-charge, had been notified. The plaintiffs had on the previous day disconnected the water supply to the police station and someone had unlawfully reconnected it. That first disconnection was not done at night but during the day. The plaintiffs had the opportunity to call Bare to testify, as he is one of them. They did not do that.

In my view, the plaintiffs have proved that they were unlawfully arrested and E detained by or at the instance of the defendants. Exhibit 1 and the evidence of the second defendant show that the first defendant was, in fact, the person who initiated the arrest. He was the complainant. The

second defendant was the one who effected the arrest and detention. At all material times the two were acting within the course and scope of their employment with the third defendant. F

> "As regards the quantum of damages, the position of the law is that an action for unlawful arrest and detention is one that falls under the *actio injuriurum*, and so proof of actual damage is not necessary to support such an action. Even if no pecuniary damage has been suffered the court will not award a contemptuous figure for the infringement of the right to liberty": G

per Korsah JA in *Botha* v *Zvada & Anor* 1997 (1) ZLR 415 (S) at 422F. In *Muzonda* v *Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 100E Gubbay CJ stated:

> "The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury." H

A See also *Minister of Home Affairs & Anor* v *Bangajena* 2000 (1) ZLR 306 (S) at 309G-H; *Muyambo* v *Ngomaikarira & Ors supra* at 55F-H; *Botha* v *Zvada & Anor supra* at 422F; *Masawi* v *Chabata & Anor* 1991 (1) ZLR 148 (H) at 159.

These authorities show that damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be offenders.

B The factors which are relevant in assessing the appropriate quantum of damages for unlawful deprivation of liberty and *contumelia* are set out in Visser and Potgieter *Law of Damages* 2 ed at 472-4. These include:

> "the circumstances under which the deprivation of liberty took place, the presence or absence of improper motive or 'malice' on the part of the defendant, the harsh C conduct of the defendants, the duration and nature (e.g. solitary confinement) of the deprivation of liberty, the status, standing, age, and health of the plaintiff, the extent of the publicity given to the deprivation of liberty, the presence or absence of an apology or satisfactory explanation of the events by the defendant, awards in previous comparable cases, the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed, the high value of the right to physical liberty, the effects of inflation, and the fact D that the *actioinjuriurum*also has a punitive function."

In *Muyambo* v *Ngomaikarira & Ors supra* at 57C damages in the sum US$3 000 were awarded where the plaintiff was unlawfully arrested and detained some 300 kilometres away from his residence for three days. In *Musundire* v *OK Zimbabawe Ltd* 2012 (1) ZLR 292 (H), where the plaintiff E was arrested and detained for four days at the instance of the defendant's employee, and was moved from one police station to another and made to spend time in squalid conditions, in handcuffs and barefoot, a sum of US$8 500 was awarded. Mr *Dondo* referred me to *Muskwe* v *Minister of Home Affairs* HH-83-13, in which there were reasonable grounds for arresting F but this court found that the power of arrest was improperly exercised. In that case a total of US$1 500 was awarded, $1000 being for the deprivation of liberty while $500 was for *contumelia*. The awards confirm the pertinent observation by the Supreme Court that "awards of damages made in recent decisions provide only general guidance" and that "each case is in a sense without parallel, having individual subjective aspects to it": see G*Muzonda* v *Minister of Home Affairs & Anor supra* at 101E-F; *Botha* v *Zvada & Anor supra* at 422G-H.

In the instant case each of the plaintiffs asked for a sum of US$50 000, of which $35 000 is in respect of "physical discomfort and anguish" while a sum of $15 000 is for *contumelia*. Unlike in some of the cases referred to H above, the plaintiffs *in casu* were not handcuffed, and were allowed to sit on

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a bench at the police station. They spent eight hours but that was during the A day. However, they were deprived of their liberty in circumstances where they had removed the meter in question in the honest performance of their work. I have taken into account, too, the evident abuse of the powers, as the defendants abused their positions to obtain a reconnection of water by arresting and detaining the plaintiffs. This is a case in which an improper motive or malice is clearly established. The fact that the first defendant B became a complainant as well as investigating officer in the matter points to an undue interest which affected the manner in which the case was handled. At the police station the plaintiffs were ordered to remove their shoes. That, in the circumstances,

amounts to inhuman and degrading treatment. The evidence of the first defendant that he found them wearing their shoes cannot be believed. Firstly, when they testified that they were ordered to remove C their shoes that evidence was not challenged. Secondly, it is curious that the first defendant would, upon entering the police station, mind the issue of whether or not the plaintiffs were wearing shoes when he knew and should have been concerned at that they had been waiting for him for more than six hours. The plaintiffs were ordered to switch off their mobile phones and D were denied food at the appropriate time. In the circumstances, it seems to me that an award of US$5 000 for the deprivation of liberty and $1 000 for *contumelia* for each of the plaintiffs would accord with justice.

In the result, judgment is hereby granted in favour of the plaintiffs against the defendants jointly and severally, the one paying the others to be absolved, for payment of a sum of US$12 000, together with interest thereon at the E prescribed rate from the date of judgment to the date of full and final payment, and costs of suit.

Dondo & Partners, plaintiffs' legal practitioners

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

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S v KAMBARAMI & ANOR 2014 (1) ZLR 615 (H)

Citation	2014 (1) ZLR 615 (H)
Case No	Judgment No. HH-273-14
Court	High Court, Harare
Judge	Hungwe J and Bere J
Heard	1 April 2014; *CAV*
Judgment	28 May 2014
Counsel	Ms *S Gutsa,* for the appellants *E Makoto,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C *Evidence – identification – precautions to be taken by court – honesty of witness not sufficient – when evidence of identification needs corroboration*

Headnote

Questions of identification are always difficult. This is why extreme care D should always be exercised when it is proposed to carry out identification parades, to prevent the slightest hint

reaching the witness of the identity of the suspect. People often resemble each other and it is not uncommon that strangers are sometimes mistaken for old acquaintances. The positive assurance of identification by a single honest witness may not be enough. E The possibility of a mistake occurring in the identification, especially where the witness has not known the person previously, demands that the greatest circumspection should be employed. The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence. It F is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration and suggestibility; the accused's face, voice, build, gait, and dress; the G result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive.

Good identification does not need corroboration or support, but poor identification does. Examples of good identification include: (1) A kidnapped person kept for many days in the company of his kidnapper, H who identifies him without hesitation months later. (2) A suspect person

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Hungwe J

kept under observation and seen by two policemen several times, identified A by them six months later. (3) A colleague, known from work for several years, seen clearly stealing a wallet from a locker. On the other hand, identification is poor when it depends solely on a fleeting glance or on a longer observation made in difficult conditions.

Cases referred to B

S v *Dhliwayo & Anor* 1985 (2) ZLR 101 (S)

S v *Mthetwa* 1972 (3) SA 766 (A)

S v *Nkomo* 1989 (3) ZLR 117 (S); 1990 (1) SACR 682 (ZS)

Case information

Ms *S Gutsa,* for the appellants C

E Makoto, for the respondent

Judgment

Hungwe J: The two appellants were convicted by the regional magistrate at Harare for armed robbery as defined in s 126 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. They were sentenced to eight D years' imprisonment of which four years' imprisonment was suspended for five years on conditions of good behavior. A further year was suspended on condition they both effect restitution in favour of the complainant on or before 28 February 2013. The main ground of appeal was that the appellants had not been properly identified by the State witnesses called to prove identification, and therefore they were wrongly convicted. A supplementary E ground of appeal raised was that there was no proof that the taking of the money was induced by the use of threats of violence; therefore the offence of robbery had not been proved.

In order to deal with these two grounds of appeal, it is necessary to set out the findings of the trial court and decide, in light of the evidence led in the F court *a quo*, whether there is merit in these two grounds.

Evidence led from no less than five witnesses establish the following:

Obey Chiwara, the complainant, told the court that on 10 April 2012, the first appellant together with the second appellant, approached their bus at the Roadport bus terminus. The first appellant identified himself as Detective Kambarami. He was dressed in a suit. He demanded US$2 000 for their bus G not to be impounded. The second appellant was dressed in police uniform. They both claimed that the bus carried smuggled goods. According to the witness, the first appellant then produced a fire-arm from his jacket stating that they were not joking. The witness, who is a bus

conductor of the bus which had just arrived from Zambia, then handed over US$980 to the two. They H

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Hungwe J

A drove off in a white vehicle which had arrived at the scene after one of them had spoken on his mobile phone. The bus crew and the passengers discussed the incident. It was decided not to report this incident since, according to the witness, the two were well-known for this kind of behaviour. It was felt they would return and appropriate action would then be taken. They decided to entrap them. Sure enough, on 12 May 2012 the duo struck. Except for B himself, the rest of the bus crew was present. He learnt later how these two were driven to the police station and arrested for the robbery of 10 April 2012.

Mafios Meki, a traveler who was on board the bus on 10 April 2012 when the offence was committed stated that the first appellant was dressed in a suit and the second appellant in a police uniform. They had taken the conductor C to the front of the bus which was lit up by both the headlamps of the bus as well as the flood lights at the terminus. He had also spoken to the second appellant during the commission of the offence and therefore had had a good look at him. His evidence corroborated that of the first witness in that they both confirm that they each spoke to one or other of the two appellants in a well-lit area. When he was later summoned to an identification parade, he D was able to pick out the second appellant. He described the features by which he was able to pick out the second appellant, which features he had taken note of earlier the previous month. Another witness, Caiphas Rino, the bus driver, also confirmed that the two appellants were the same people who had accosted the bus crew and relieved the conductor of cash in April 2012 and E were arrested a month later when they attempted to commit the same offence using the same tactics at Roadport. Regarding the incident in April 2012, the bus driver described the first appellant as having been dressed in a suit whilst the second appellant was in police uniform. He confirmed what Mafios Meki had told the court - that the second appellant had boasted that he had once had an altercation with the bus conductor, the first state witness, when they F were committing the present crime in April 2012. He maintained that on the day of their arrest, the two appellants had been spotted at a service station near Roadport called Engen. He had identified them and caused their arrest.

Naboth Chikomo, a taxi driver who plies his trade around the Roadport area, testified that on the day in April 2012, when this crime was committed, he G had identified the first appellant during the commission of the crime. The first appellant had chased him away on that occasion. He was later called to an identification parade where he was able to easily pick out the first appellant and described the features through which he had identified the first appellant. He disputed the evidence given by the appellants in respect of the manner in which the identification parade was carried out by the police. His evidence H tallied with that of the police officer who carried out the identification parade.

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Hungwe J

Questions of identification are always difficult. This is the reason why A extreme care should always be exercised when it is proposed to carry out identification parades, that is to prevent the slightest hint reaching the witness of the identity of the suspect. People often resemble each other and it is not uncommon that strangers are sometimes mistaken for old acquaintances. In *S* v *Dhliwayo & Anor* 1985 (2) ZLR 101 (S) at 101 G it was held that: B

> "Where an identifying witness has been shown to be careful and truthful, it is not always necessary for the witness to be asked to give details of every feature by which he identified the accused. Evidence of identification, however, must be treated with some caution and the reliability of the witness's evidence must be tested against the cumulative weight of such factors as lighting, visibility and eyesight, his proximity to the accused, his opportunity for observation, the extent of his prior knowledge of the accused, the accused's features and appearance, C the result of an identification parade and the accused's evidence".

In *S* v *Ndhlovu & Ors* 1985 (2) ZLR 261 (S) at 263G-264 E it was similarly held that the positive assurance of identification by a single honest witness was not enough. The court (*per* Gubbay JA, as he then was) went on:

"The possibility of a mistake occurring in the identification, especially where D the witness has not known the person previously, demands that the greatest circumspection should be employed. As Williamson JA warned in *S* v *Mehlape* 1963 (2) SA 29 (A) at 32F-G:

> 'The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger E of error in such evidence.'

In similar tone Holmes JA, in *S* v *Mthetwa* 1972 (3) SA 766 (A) at 768 A-C, remarked with his accustomed lucidity:

> 'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also F be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not G exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities.'
>
> (See also *Aluverino* v *R* 1963 R&N 614 (SR) at 615I-616H.) Hence a cautious approach is necessitated, not only because a conviction is sought upon the evidence of a single witness, but also because the identification of an accused person is H

Hungwe J

> A a matter notoriously fraught with error. It is an area wherein the potential for honest mistake looms large.'"

In *S* v *Nkomo* 1989 (3) ZLR 117 (S) at 121; 1990 (1) SACR 682 (ZS) at 684j McNally JA put the issue of identification this way:

> "Very broadly speaking, the judgment of Lord Widgery was to the effect that B good identification does not need corroboration or support, but poor identification does. Good identification he defined by examples: (1) a kidnapped person kept for many days in the company of his kidnapper, who identifies him without hesitation months later; (2) a suspect person kept under observation and seen by two policemen several times, identified by them six months later; (3) a colleague, known from work for several years, seen clearly stealing a wallet from a locker. Such cases, said Lord Widgery, could safely be left to the jury to decide. On C the other hand, identification is poor 'when it depends solely on a fleeting glance or on a longer observation made in difficult conditions'. 'Recognition, he said elsewhere in the judgment, 'may be more reliable than identification of a stranger'. In such cases corroboration or support (and odd coincidences, unexplained, can, he said, be regarded as support) should be required."

The court *a quo*, in a well reasoned judgment, set out how it treated the D evidence on identification and concluded that the State witnesses could be relied upon as truthful and not being mistaken when they identified the appellants as the culprits. It is important that the State witnesses had prior knowledge of the two. That is why they resolved not to report the offence on the day it was committed. They knew that these two, apparently, had a E habit of harassing bus crews over unsubstantiated allegations so as to gain some advantage of sorts. Their predictions proved true as, indeed, the two appellants struck the following month. It is no coincidence, in my view, that the first appellant who described himself as Detective Kambarami in fact turned out to be one Kambarami when he was picked out of an identification parade. This fact lends support to the correctness of the identification of F the appellants by the State witnesses. It is also no coincidence that indeed they are police officers, both of them. Again this corroborates and confirms the correctness of the evidence of identification relied upon by the court *a quo*. They were known by the taxi driver as well as by the traveler who was present when the appellants committed this crime. I am satisfied that the ever-present danger of honest but mistaken identification of an accused has G been satisfactorily excluded in this case.

As for the essential elements of the offence, evidence led showed that the first appellant produced a fire-arm as the demand for money was made. In my view this meets the essential elements of the crime of armed robbery which require that the taking be induced by threats of violence or the use H thereof. In the result the conviction of the two appellants is unassailable.

Hungwe J

The appeal against conviction is therefore dismissed in its entirety. A

BERE J concurred.

Chingeya-Mandizira Legal Practitioners, appellants' legal practitioners

National Prosecuting Authority, legal practitioners for the respondent B

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Source:
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MAFIRAMBUDZI FAMILY TRUST v MADZINGIRA & ORS 2014 (1) ZLR 621 (H)

2014 (1) ZLR p621

Citation	2014 (1) ZLR 621 (H)
Case No	Judgment No. HH-338-14
Court	High Court, Harare
Judge	Takuva J
Heard	28 May 2014
Judgment	28 May 2014
Counsel	Ms *B Machanzi*, for the applicant *C Chinyama*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C *Trust – status of – not a separate legal persona – representation in legal proceedings – must be represented by trustee – need for trustee to aver his capacity and how he was appointed*

Headnote

According to the law of persons, a trust is not a separate legal *persona*. It D follows naturally that the principles applicable to corporate bodies do not necessarily apply to trusts. A trust, in the wide sense, is any legal arrangement by which one person is to administer property, whether as an officer holder or not, for another or for some impersonal object. In the narrow sense, a "trust" exists when the creator of the trust hands over or E is bound to hand over the control of an asset which is to be administered by another for the benefit of some person other than the trustee or for some impersonal object. It is a legal relationship, not a separate legal entity such as a corporation or *universitas*, even though the trustees may together form a board akin to a board of a company or of a voluntary F association. Our law of trusts has not sufficiently grown to recognise a limited separate personality of a trust, even though some trusts operate more or less on the same lines as a voluntary organisation or incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees.

A person who is *de facto* administering a trust as trustee has *locus standi* in any matter relating to the trust, so has a person who claims to be the rightful trustee and seeks confirmation of his status. An action relating to trust affairs, for example, for damage to trust property must be brought by the trustee in his capacity as such and not in his private capacity. A trustee bringing an action or application should aver his capacity and that he was properly appointed by a given instrument, or order of court.

Takuva J

The source of the authority of a trustee must be averred (e.g. will, deed *inter vivos*, appointment to an insolvent estate).

Cases referred to

Air Zimbabwe Corporation & Ors v *ZRA* 2003 (2) ZLR (H)

Crundall Bros (Pvt) Ltd v *Lazarus NO & Anor* 1990 (1) ZLR 290 (H)

Gold Mining & Minerals Development Trust v *Zimbabwe Miners' Federation* 2006 (1) ZLR 174 (H)

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

Madzivire & Ors v *Zvarivadza & Ors* 2006 (1) ZLR 514 (S)

Mall (Cape) (Pvt) Ltd v *Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C)

Legislation considered

Companies Act [*Chapter 24:03*], s 9

High Court Rules 1971 (RGN 1047 of 1971), rr 7, 8, 87 & 91

Case information

Ms *B Machanzi*, for the applicant

C Chinyama, for the respondent

Judgment

Takuva J: This is an opposed application. Shortly after hearing argument, I issued the following order:

1. The first and second respondents sign all necessary documents to effect transfer of Stand 1396, Cosmos Westgate Township to the applicant.
2. In the event that the first and second respondents do not comply with (1) above, the fourth respondent be and is hereby authorised to sign necessary documents to effect transfer of Stand 1396, Cosmos Westgate Township to the applicant.
3. The third respondent be and is hereby directed to transfer Stand 1396, Cosmos Westgate Township to the applicant.
4. The first and second respondents to pay costs of suit on a higher scale.

This order was issued on 12 December 2013.

Subsequently, on 14 February 2014, Mr *Chinyama* requested reasons. These are they.

The facts of this matter are in the main common cause. They are as follows:

The first and second respondents who reside in California, USA, granted one Jimias Madzingira of 29 Churchill Avenue, Alexandra Park, Harare power of attorney to act for them in any lawful way with respect to the following subjects:

Takuva J

(a) real property transaction.

(b) banking and other institution transactions, and

(c) tax matters.

Further, the first and second respondents granted their agent the following "special instructions:

B "The real property transaction is related to property No 1396, Cosmos Street Westgate Bluff Hill, Harare, Zimbabwe."

Acting on this power, Jimias Madzingira entered into an agreement of sale with the applicant in respect of Stand 1396, Cosmos Westgate Township, Harare, belonging to first and second respondents on 30 October 2012. The applicant, a duly registered family trust, had been a tenant on the subject C property since 2003 in terms of a lease agreement between Brian Mafirambudzi and the first and second respondents.

The lease was facilitated by the respondents' own agents, namely, Property Hopes Real Estate, to whom the applicant had always paid rentals for onward transmission to the respondents. The applicant was informed by these D estate agents that the property was for sale in 2011. Negotiations ensued, culminating in an agreement of sale. In terms of this agreement, the first and second respondents sold the property to applicant for US$95 000 payable on or before 7 November 2012. The applicant paid the full purchase price into the first and second respondents' nominated agents account by August 2012. Despite giving applicant vacant occupation, first and second respondents have E failed or refused to pass transfer to the applicant, prompting the applicant to make this application.

The first and second respondents opposed the application through their agent Jimias Madzingira who filed their opposing affidavit. In that affidavit, it is conceded that indeed the property was sold to the applicant. It is further F conceded that the applicant was represented in those "negotiations for the sale of property" by Brian Mafirambudzi. The respondents averred, however, that there was in fact no agreement of sale concluded between the parties because Mafirambudzi did not sign the agreement of sale. Further it was conceded that the applicant paid at least US$ 73 500 to the parties' joint estate agents, Property Hopes Real Estate.

G The respondents also contended that they cancelled the agreement of sale on 13 December 2012 and served a notice to this effect on the estate agent. The respondents prayed for the dismissal of applicant's case with costs on a higher scale.

The applicant then filed an answering affidavit in which it insisted *inter alia*H that there was a valid agreement of sale between the parties and that

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it paid the purchase price in full as evidenced by the receipts attached and A marked Annexure A.

Both parties then filed heads of argument. For the first time the respondents raised in their heads of argument the issue of Mafirambudzi's *locus standi*. The issue was raised in the following fashion:

"There is nothing in the whole application to show that the deponent to the B purported applicant's founding affidavit is *clothed with authority to represent the applicant.* He does not state either in his founding or answering affidavit *the source of that authority nor does he attach a copy of resolution reached by applicant's trustees clothing him with the necessary authority* to represent the applicant. See the case of *Madzivire and Ors* v *Zvarivadza and Ors* 2006 (1) ZLR 514. Consequently what is before the court is a nullity which must be dismissed with costs at attorney-client scale" (my emphasis). C

Reliance was then placed on Lord Denning's remarks in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172 that:

"If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court D 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."

On the merits, the respondents in their heads submitted that there was no valid agreement between the parties in that the written agreement was not signed by the applicant's representative. The argument is put thus: E

"6.1 Pursuant to that power of attorney, Jimias Madzingira nominated and appointed Property Hopes Real Estate (Pvt) Ltd as an agency for the first and second respondents represented by Madzingira concluding a written agreement which the applicant did not sign."

Further it was submitted in the same heads that the applicant was in breach F of the terms of the written agreement. The argument was couched in the following manner:

> "4. The applicant has breached the terms of the alleged agreement by failing to pay the whole amount due to the first and second respondent resulting in the first and second respondents cancelling the purported agreement and counter suing for an order confirming cancellation … G
>
> 9. The applicant has breached the terms of this agreement which he did not sign by failing to pay the purchase price. See clause 2 of the agreement which says that, 'the purchaser shall pay the full purchase price of US$95 000 to Property Hopes Real Estate by 30 October 2012 and to be released to the seller within seven days of signing of the agreement of sale but not later than 7 November 2012 less estate agent commission and capital gains tax.'" H

Takuva J

A During the hearing, Mr *Chinyama* indicated to the court that he was "dropping, the second point and concentrating on the first point *in limine*." In my view this climb down was inevitable for it could not sensibly be contended on one hand that there was no agreement and on the other that there was breach of the agreement. In any case, the respondents' representative signed that agreement and surely on that basis they are bound by its terms.

B As regards the question of *locus standi*, Ms *Machanzi* for the applicant submitted that both respondents failed to raise the issue in their notice of opposition. If they had raised that issue, the applicant would have replied. In any case, so the argument went, the deponent has the requisite authority by virtue of the trust deed which is registered. The deponent is a trustee who C is authorised to depose to the affidavit.

In my view, the sole issue for determination is whether a trustee of a registered trust has authority to act on behalf of such trust.

Mr *Chinyama*'s contention was that such a trustee requires the authority of other trustees to so act. He relied on the *Madzivire* case s*upra* in support of D this proposition. In *Madzivire supra* at 516B-C it was held per Cheda JA that:

> "A company being a separate legal person from its directors cannot be represented in a legal suit by a person who has not been authorised to do so. This is a well-established legal principle, which the courts cannot ignore. It does not depend on the pleadings by either party. The fact that a person is the managing director of the company does not clothe him with the authority to sue on behalf of the E company in the absence of any resolution authorising him to do so. The general rule is that directors of a company can only act validly when assembled at a board meeting. An exception to this rule is where a company has only one director who can perform all judicial acts without holding a full meeting."

The court also referred to s 9 of the Companies Act [*Chapter 24:03*] which F reads as follows:

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of excising such powers."

In my view, this case is distinguishable in that it deals with companies which are separate legal *personae*, while *in casu* we are dealing with a trust. According to the law of persons, a trust is not a separate legal *persona*, and *in casu* we are dealing with a trust. G According to the law of persons, a trust is not a separate legal p*ersona*. See *Crundall Bros (Pvt) Ltd* v *Lazarus NO & Anor* 1990 (1) ZLR 290 (H). For this reason it follows naturally that principles applicable to corporate bodies do not necessarily apply to trusts. See *Gold Mining and Minerals Development Trust* v *Zimbabwe Miners' Federation*H2006 (1) ZLR 174 (H) where Makarau J (as she then was) held that:

Takuva J

> "A trust, in the wide sense, is any legal arrangement by which one person is to A administer property whether as an officer holder or not, for another or for some impersonal object. In the narrow sense, a 'trust' exists when the creator of the trust hands over or is bound to hand over the control of an asset which is to be administered by another for the benefit of some person other than the trustee or for some impersonal object. It is a *legal relationship, not a separate legal entity such as a corporation or* universitas*, even though the trustees may together form*B*a board akin to a board of a company or of a voluntary association.* Our law of trusts has not sufficiently grown to recognise a limited separate personality of a trust, even though some trusts operate more or less on the same lines as a voluntary organisation or incorporated company. In such cases, the trust has evolved a personality of sorts that appears separate from the personality of the trustees. A trust is not a legal person and therefore cannot be defamed,

although *the trustees themselves retain the capacity to sue for damages for their injured* fama *collectively or individually*" (my emphasis).

A M Honoré *The South African Law of Trusts* 3 ed p 313, while dealing with "*locus standi*" in matters relating to trusts, states that:

> "The general principle is that a person who is *de facto* administering a trust as *trustee* has *locus standi* in any matter relating to the trust, so has a person who claims to be the rightful trustee and seeks confirmation of his status … An action relating to trust affairs, for example, for damage to trust property must be brought by the *trustee in his capacity as such* and not in his private capacity … A trustee bringing an action or application should *aver his capacity* and that he was properly appointed by *a given instrument, or order of court.* The source of the authority of a trustee must be averred (e.g. *will, deed* inter vivos*,* appointment to an insolvent estate) …" (my emphasis).

In casu, the trustee's source of authority is the duly registered trust deed MA 718/2010. In his founding affidavit he averred as follows:

> "1. I am a trustee of the applicant and am duly authorised to depose to this affidavit on applicant's behalf in that capacity.
>
> 2. The applicant is Mafirambudzi Family Trust, a trust duly registered MA 718/2010 whose address for service is care of its legal practitioners of record…….
>
> 6. I represented the applicant in an agreement of sale entered into between applicant and first and second respondents on 30 December 2012."

In terms of that agreement of sale, the purchaser is indeed described as "The Mafirambudzi Family Trust represented by Brian Mafirambudzi of No 1396 Cosmos Street Westgate, Harare." This is the property that was the subject of the agreement. The first and second respondents were happy to enter into an agreement of sale with Brian Mafirambudzi as a representative of the Trust. Further, the first and the second respondents did not challenge Mr Mafirambudzi's authority when they duly received the purchase price. They failed to challenge this status in their pleadings. The matter was only raised

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Takuva J

during the hearing when they argued that this was a legal issue which could be raised at any stage. Assuming that the trustee's authority was a requirement, in my view this is a case where it would not have been necessary to produce such authority. The reason is simply that the prior dealings as outlined above between the trustee and the first and second respondents provided sufficient evidence that when the trustee instituted these proceedings he was acting on the authority of the applicant. Proof in the form of an affidavit is not necessary in every case as each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. See *Mall (Cape) (Pvt) Ltd* v *Merino Ko-Operasie Bpk* 1957 (2) SA 347 (C) and *Air Zimbabwe Corporation & Ors* v *ZRA* 2003 (2) ZLR (H).

In casu, I do not think that it is proper for the first and second respondents to enter into an agreement of sale with a trustee in his capacity as such, receive and spent US$95 000 belonging to the trust and when asked to pass transfer, turn around and challenge the trustee's *locus standi* to institute proceedings.

Also in terms of Order 2A rr 7 and 8 of the High Court Rules 1971, a trustee is entitled to issue out process in the name of the trust. The rules state:

> **"7. Interpretation in Order 2A**
>
> In this Order –
>
> "associate," in relation to –
>
> (a) a trust means a trustee;
>
> (b) an association other than a trust, means a member of the association;
>
> "association" includes –
>
> (a) a trust; and
>
> (b) a partnership, a syndicate, a club or any other association of persons which is not a body corporate.
>
> **8. Proceedings by or against associations**
>
> Subject to this Order, associates may sue, and be sued in the name of their association."

There is no provision that a trustee must be authorised by a "board resolution" G before he so acts. Indeed the "other" trustees may join in if they are in existence and willing to do so but misjoinder or non-joinder of such trustees does not defeat the cause of action or matter. See rr 87 and 91 of this court's rules.

The first and second respondents also submitted in their heads of argument that the applicant was in breach of the agreement of sale in that it failed to H pay the purchase price in full.

2014 (1) ZLR p628

Takuva J

As regards this alleged breach of the agreement, the first and second A respondents raised this issue in both the notice of opposition and the heads of argument. In the notice of opposition it was contented that the total payments as shown by receipts on Annexure B add up to US$73 500 and not US$95 000 which is the purchase price. See para 7.1. In para 9 of the heads of argument, the first and second respondents claimed that the applicant breached clause 2 of the agreement by failing to pay the full purchase price forcing the first B and second respondents to cancel the agreement by notice.

In its answering affidavit, the applicant averred that the attached receipts add up to US$95 000 and not US$73 500. Upon adding up the figures the court came up with a total figure of US$95 000. There was therefore, no proven breach by the applicant since quite clearly there is a miscalculation by the first and second respondents. C

For these reasons, I granted the order referred to earlier in this judgment.

C Mpame & Associates, applicant's legal practitioners D

Chinyama & Partners, first and second respondents' legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/S v KARENYI 2014 (1) ZLR 629 (H)

S v KARENYI 2014 (1) ZLR 629 (H)

2014 (1) ZLR p629

Citation	2014 (1) ZLR 629 (H)
Case No	Judgment No. HH-281-14
Court	High Court, Harare
Judge	Hungwe J and Bere J
Heard	29 May 2014
Judgment	29 May 2014
Counsel	*D Tandiri,* for the appellant *I Muchini,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C *Statutes – Public Order and Security Act [Chapter 11:17] – s 25 – notifying police of public meeting – failure to do so – offence committed by convenor – meeting itself not unlawful – no offence to address such meeting – police permission not required for meeting*

Headnote

D The appellant, a member of Parliament, addressed a meeting convened in a rural village within her constituency. The police arrived and asked her whether the meeting she was addressing had been sanctioned by the police. She said she thought that a local party official had given notice to the police of the meeting. The official, when contacted, advised that E he had forgotten to notify the police. The appellant was charged with, and convicted of, contravening s 25(5) of the Public Order and Security Act [*Chapter 11:17*], which makes it an offence for the convenor of a public meeting or procession to fail to give to the police the notice specified in subs (1). The averments in the charge related to lack of authorisation to hold a political meeting rather than failure to notify F the regulating authority.

Held, that only the convenor of a meeting is required to give the notice to the police. The trial court had laboured under the assumption that the appellant was the convener because she was addressing the meeting, although the evidence was that the local official was the convenor.

Held, further, that nothing renders a meeting called without notice in terms G of s 25 unlawful. Even if the appellant had known that the police had not been notified of this meeting, her addressing it did not constitute an offence in terms of the Act.

Held, further, that whatever powers the police wielded prior to the 2007 amendment to the principal Act, the power to sanction a political gathering H is no longer one of the powers which the police had when the meeting

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2014 (1) ZLR p630

Hungwe J

in question was held. Consequently, if political parties did not require A permission from the police to hold their meetings, it was vexatious, when charging the accused with contravening s 25(5) of the Act, to aver that the accused "unlawfully and intentionally held an unsanctioned political meeting." Section 25(5) of the Act does not create such an offence, only that of failure to notify the regulating authority. B

Legislation considered

Public Order and Security Act [*Chapter 11:17*], s 25

Case information

D Tandiri, for the appellant

I Muchini, for the respondent C

Judgment

Hungwe J: After hearing counsel in argument we allowed the appeal and indicated that our reasons for allowing the appeal will follow. These are they.

The appellant was convicted of contravening s 25 (5) of the Public Order and Security Act, [*Chapter 11:17*] ("the Act") . She was sentenced to a fine of US$200 or, in default of payment, four months' imprisonment. In addition, D a further three months were wholly suspended for five years on condition she did not commit any offence involving contravening any section of the Act for which she is sentenced to imprisonment "without any option."

The main ground of appeal, out of a possible four grounds put forward by the appellant, was that the trial magistrate erred in holding that the appellant E was the convener of the meeting as contemplated in s 25(5) of the Act.

The appellant was convicted on the basis of the following findings of fact. She, at the time, was a member of Parliament for a constituency in Chimanimani for the Movement for Democratic Change

("MDC-T"). On 24 November 2012 she attended a meeting convened in a rural village within her constituency. When a police patrol unit, led by the officer-in-charge of Nyanyadzi police F station, arrived at the meeting, the appellant was addressing the meeting. The officer-in-charge, who holds the rank of inspector, approached the gathering. He heard her chant political slogans. Some of the people gathered there wore their political party regalia. This was a political meeting for which the requisite notice had not been filed with Nyanyadzi police station as required by law. G The police inspector called upon the appellant and asked her whether the meeting she was addressing had been sanctioned by the police. The appellant intimated to him that she believed that one Freddie Dziwande, who was later to be her co-accused, had made the requisite application to the regulating authority. The appellant, in the presence and hearing of the officer-in-charge and his subordinates, called the said Freddie on the latter's mobile number. H

Hungwe J

A Freddie Dziwande advised the appellant that he had forgotten to notify the police. Three other police details who were in the officer-in-charge's party testified to this effect. According to their evidence, which was not seriously disputed, the appellant was addressing a gathering which had not been sanctioned by the regulating authorities. They all confirmed that she had called Freddie Dziwande in their presence and he advised her that he had B forgotten to notify the police.

Section 25(5) of the POSA provides thus:

> **"25 Notice of processions, public demonstrations and public meetings**
>
> (1) The convener shall not later than –
>
> (a) seven days before the date on which a procession or public demonstration is C to be held, give notice of the procession or public demonstration in writing signed by him or her to the regulating authority for the district in which the procession or public demonstration is to be held:
>
> (b) five days before the date on which a public meeting is to be held, give notice of the public meeting in writing signed by him or her to the regulating authority for the district in which the public meeting is to be held:
>
> D Provided that –
>
> (i) if the convener is not able to reduce a proposed convening notice to writing a regulating authority shall at his or her request do it for him or her;
>
> (ii) during an election period the period of notice referred to in paragraph (b) shall be three days.
>
> E (2) The convening notice shall contain at least the following information –
>
> …
>
> (3) If a gathering is postponed or delayed, the convener shall forthwith notify the regulating authority thereof, and section 26 shall, with such changes as may be necessary, apply to such postponed or delayed gathering as it applies to gatherings that are not postponed or delayed.
>
> F (4) If a gathering is cancelled or called off, the convener shall forthwith notify the regulating authority thereof and the notice given in terms of subsection (1) shall lapse.
>
> (5) Any person who knowingly fails to give notice of a gathering in terms of this section, shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year or to both such G fine and such imprisonment."

It will be seen from the above that, for example, a convener who fails to give the requisite five days' notice of a public gathering is liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year. Only the organizer or convener of a public gathering is guilty H of an offence where, as here, the convener fails to give notice of a public

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Hungwe J

gathering, notwithstanding that those attending may be aware that no notice A has been given. Nothing renders a meeting called without notice in terms of s 25 unlawful. In order to secure a conviction the State would have to prove one of two things; (1) that the appellant of her own accord convened a gathering of people at the meeting in issue; or, (2) that the MDC-T appointed appellant as the convener of the meeting of 24 November 2012. This much is clear from the wording of s 25(5) when read with s 2 of the Act. By s 2 B the "convener" is defined as;

> "(a) any person who, on his own accord , convenes a gathering; and

(b) in relation to any organisation, any person appointed by such organisation in terms of s 23(1)."

The trial magistrate at the beginning of his judgment correctly framed the C issues relevant to the matter before him when he stated that the court had to determine first whether the appellant was the convener, and, if she was, whether the meeting fell into the category of meetings to which certain exemptions applied. Unfortunately, later in the judgment, the magistrate reformulated the issues to be whether the meeting was a political meeting D and whether the appellant was the convener of that meeting. The issue, in my respectful view, remained whether the appellant was the convener of that meeting since, if she was, then she was obliged to have notified the police prior to convening the meeting. The record reflects that upon being quizzed by the police on whether there was notification to the regulating authority filed, appellant expressed her belief that the person who had E convened the meeting had done the necessary preparatory work. This ought to have indicated to the investigating officer that the real issue was whether the appellant was the convener. This was never investigated as the police proceeded on the assumption that the appellant was the convener because she was addressing the meeting. The court seems to have laboured under the same belief that since she was addressing the meeting, she was the convener. F Yet the evidence was that she had called one Freddie Dziwande to ascertain whether the processes had been complied with. As I have demonstrated above, even if the appellant had known that police had not been notified of this meeting, her addressing it did not constitute an offence in terms of the Act. She therefore would not have been liable for prosecution. As for Freddie, the court found that there was insufficient evidence against him G hence his acquittal. That acquittal was proper.

At the outset, the appellant excerpted to the charge as disclosing no offence. In dismissing the subsequent application to amend the charge brought by the State, the magistrate took the view that there was no need to amend the charge. In the magistrate's reasoning, the use of the word "sanction" in the H

Hungwe J

A charge instead of the word "notify" as would have been required by the Act was just a matter of terminology or semantics. In the view of the court, there was no defect in the charge as it stood and to which the appellant had pleaded.

Quite clearly the magistrate missed the point raised in the application to amend. The averments in the charge related to lack of authorisation to hold B a political meeting rather than failure to notify the regulating authority. The magistrate's reasoning reflect a serious misconception of the issues before him in the trial. Had he taken time to reflect on the proposed amendment sought at that early stage he most likely would have realised what the real issue in the trial was. He would have proceeded to deal with that issue more competently than he did. Whatever powers the police wielded prior to the C 2007 amendment to the principal Act, the power to sanction a political gathering was no longer one of the powers which police had on 24 November 2012. Consequently, if political parties did not require permission from the police to hold their meetings, it was vexatious, when charging an accused for contravening s 25(5) of the Act, to aver in the charge that the accused "unlawfully and intentionally held an unsanctioned political meeting." Section D 25(5) of the Act does not create such an offence, but that of failure to notify the regulating authority. A convener of such a meeting would be criminally liable for this offence. As a result, the trial was aimed at establishing whether the appellant addressed a meeting for which no police authority had been granted, instead of whether the appellant had convened a political gathering or meeting without notifying the police. The key word was "convene." The E magistrate fell into error when he found that the appellant had convened the meeting since no evidence was led to establish this as fact. The fact that she had attended and addressed the meeting did not elevate her to being the convener. The State was obliged to prove that she had convened this meeting in order to secure a conviction. It did not secure such evidence and as such F her appeal ought to succeed.

In the result her conviction is set aside and the sentence quashed. The judgment in the court *a quo* is substituted with the following:

"The accused is found not guilty and acquitted."

G BERE J concurred.

Zimbabwe Lawyers for Human Rights, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/UZ-UCSF COLLABORATIVE RESEARCH PROGRAMME v HUSAIWEVHU & ORS 2014 (1) ZLR 634 (H)

UZ-UCSF COLLABORATIVE RESEARCH PROGRAMME v HUSAIWEVHU & ORS 2014 (1) ZLR 634 (H)

2014 (1) ZLR p634

Citation	2014 (1) ZLR 634 (H)
Case No	Judgment No. HH-260-14
Court	High Court, Harare
Judge	Mafusire J
Heard	21 May 2014; *CAV*
Judgment	2 June 2014
Counsel	*F Girach* for the applicant Ms *N Timba* for the first, second and third respondents No appearance for the fourth respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Employment – contract – termination – fixed term contract – legitimate expectation of renewal of contract – such expectation only extending to period following expiry of first contract – no claim to have legitimate expectation of renewals indefinitely D

Employment – Labour Court – judgment of – registration of with High Court for enforcement – once registered, becomes a judgment of the High Court – High Court entitled to order stay of execution

Employment – wrongful dismissal – damages for – assessment of – requirement to take into account employee's obligation to mitigate damages E

Practice and procedure – applicant – urgent – certificate of urgency – basis on which such certificate may be issued – duties of certifying legal practitioner

Headnote

A certificate of urgency signed by a legal practitioner in terms of r 244 of the F High Court Rules 1971 (RGN 1047 of 1971) is a condition precedent to an urgent chamber application being heard on an urgent basis. It is unethical and an abuse of the privilege for legal practitioners to certify matters mechanically without having properly applied their minds thereto. They risk an adverse order of costs against themselves personally. However, G the duty of a legal practitioner in this regard does not extend to deciding or assessing the merits of the matter. That is the function of the judge.

Rule 227(1)(c) of the High Court Rules 1971, which deals with the pagination of written applications, notices and affidavits is one of the rules meant for the convenience of the court and the parties appearing before it. It is H

A an important rule and must be observed. Good reasons must be proffered for its non-observance.

Section 92B(3) of the Labour Act [*Chapter 28:01*] entitles a party, to whom a decision, order or determination by the Labour Court relates, to register it for enforcement purposes with either the magistrates court or the High Court, depending on the jurisdictional limits. The law on this aspect is B obviously unsatisfactory in that, among other things, the Labour Court, whose status the legislature undoubtedly elevated to that of a court of first instance in practically all labour matters, withheld from it the power to enforce its own judgments. Successful litigants in that court and the other judicial structures created under it have to be shunted from C that court to the magistrates court or the High Court for the purposes of enforcing any orders or decisions made in their favour. However, it is now settled law that the superior courts have the power to regulate their own processes. Section 98(15) of the Labour Act provides that where an arbitral award has been registered with the magistrates court or the High Court, it shall have, for enforcement purposes, the effect D of a civil judgment of the appropriate court. The High Court has an inherent jurisdiction to order a stay of execution of its judgment. There is nothing in the Labour Act or the regulations made under it that has ousted that jurisdiction. Execution is a process of the court and every court has the power to control its own process subject to the rules of court. In the High Court that power is inherent.

E After protracted litigation over a period of seven years and involving an employment dispute, the applicant had brought a chamber application seeking an order to suspend the execution of a writ pending the determination of its application to the Labour Court for leave to appeal to the Supreme Court. The matter arose out of the dismissal of three F of its employees who had subsequently successfully claimed that the termination of their employment by the applicant had been improper. In the course of the dispute, the complaints of the three employees (the respondents) had been submitted, in terms of the Labour Act, to two separate arbitrations, the second of which was concerned with the quantum of their damages consequent upon their dismissal. At the conclusion G thereof, the arbitrator had made an award based upon the respondents' expectation of re-employment for every year, in perpetuity, following upon the improper termination of their employment. When the writ was issued, and based upon a three year period of unemployment, during which time none of the respondents had made any attempt to secure H new employment, this had resulted in a quantification in excess of three

quarters of a million dollars If the sale in execution of all applicant's A property, being its office furniture, was allowed to take place, applicant, a non-profit organization, would be unable to continue its operations. It was argued on its behalf, that the second arbitrator had erred in his award on the quantum of respondents' damages as it had been based upon a legitimate expectation of re-employment in perpetuity. In answer, B thereto, it was argued on behalf of the respondents that there was no basis for the grant of an interdict until such time as applicant took it upon itself to terminate the respondents' contracts of employment properly.

Held, that the writ issued by the three respondents on the basis of which the sheriff had attached the applicant's entire furniture was for a very large amount, which was computed by the respondents themselves. C That computation was allegedly on the basis of the second arbitrator's quantification, which was itself allegedly on the basis of the first arbitrator's award. It had been wrong for the second arbitrator to have assumed that the respondents' legitimate expectation to be re-employed had applied to every year thereafter in perpetuity. The legitimate expectation must have been only in relation to the year following the D expiry of the respondents' contracts of employment by effluxion of time and in which the first arbitrator had sat in judgment. Any period thereafter had not been determined. The extreme absurdity of the respondents' position was that there would be no end to what they would perceive to be their continued entitlement in terms of the contracts of employment. E It would mean that even after recovering the large sum in terms of the writ they would still come back for more *ad infinitum*.

Held, further, that a party that is entitled to claim damages for any wrong done to him is obliged to mitigate his damages. An employee who has been dismissed, wrongly or otherwise, should not just sit back and watch the clock tick as he waits to claim damages. He must look for F alternative employment. His entitlement to damages will be limited to the period he would be expected to have found alternative employment. What that period is depends on the

circumstances of each case. The purported quantification of the first arbitrator's award took no account of the respondents' obligation to mitigate their damages. G

Held, further, that the respondents had clearly failed to mitigate their damages. In the result, therefore, *prima facie* the applicant's case on the merits was so strong that the execution of the writ of execution should be suspended so as to enable it to put forward its case in the Supreme Court.

Held, further, that on the facts of the matter all the requisites for the grant of an interdict were present and, in particular, was the fact that failure to H

Mafusire J

A grant applicant the relief it sought would result in considerable prejudice to it as it, would be unable to continue its operations.

Editor's note: earlier reported judgments in this matter are UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira 2010 (1) ZLR 127 (S) and Husaihwevhu & Ors v UZ-UCSF Collaborative Research Programme 2010 (2) ZLR 448 (H).

Cases cited B

Ambali v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S)

Chidawu & Ors v *Shah & Ors* 2013 (1) ZLR 260 (S)

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

Flame Lily Invstms Co (Pvt) Ltd v *Zimbabwe Salvage (Pvt) Ltd & Anor*C 1980 ZLR 378

General Tpt & Eng (Pvt) Ltd v *Zimbank* 1998 (2) ZLR 301 (H)

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

Hix Networking Technologies v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 191 (SCA)

Ritenote Printers (Pvt) Ltd v *A Adam and Co & Anor* 2011 (1) ZLR 521

D*Setlogelo* v *Setlogelo* 1914 AD 221

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

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 227(1)(c) & 244

E Labour Court Act [*Chapter 28:01*], ss 92B(3), 98(14) & 98(15)

Labour Court Rules 2006 (SI 59 of 2006), r 34

Case information

F Girach for the applicant

Ms *N Timba* for the first, second and third respondents

F No appearance for the fourth respondent

Judgment

Mafusire J: This was an urgent chamber application for an interlocutory interdict. The applicant sought an order suspending the execution of a certain writ pending the determination of its application for leave to appeal to the Supreme Court that was pending at the Labour Court. Despite fierce G opposition, I granted the relief sought and promised to provide my reasons in due course. These are they.

The parties had been involved in protracted litigation since 2007. The respondents were former employees of the applicant on fixed term contracts. But even this was in dispute. The respondents claimed the applicant was H still to formally and properly terminate their contracts of employment. In

Mafusire J

2006 a dispute had arisen as to whether or not the applicant had terminated A the respondents' contracts of employment properly. The dispute had been referred to arbitration. In August 2007 the arbitrator, one Mr Mutongoreni ("Mutongoreni"), had ruled in favour of the respondents. The ruling had been, among other things, that the respondents' contracts of employment had not been terminated properly; that they had a legitimate expectation that their contracts of employment would be renewed; that those contracts B of employment would be deemed to have been automatically renewed on the same terms and conditions with effect from 1 July 2007 and that, up to the date of the arbitration, the respondents would be deemed to be still employed by the applicant. It was a period of two months from the date of the purported termination of employment to the date of Mutongoreni's award. C

Aggrieved by Mutongoreni's decision, the applicant appealed to the Labour Court. Pending the determination of that appeal, the applicant applied to the Labour Court for a stay of execution. That application was dismissed in May 2010. Whilst the appeal against Mutongoreni's decision was pending, the respondents applied for the quantification of the award. The quantification was done before another arbitrator, Mr Matsikidze ("Matsikidze"). In March D 2010 Matsikidze ordered the applicant to pay the respondents various sums of money as arrear salaries up to the date of his quantification. The first respondent would receive US$94 920, the second respondent US$46 818.78 and the third respondent US$55 118.48. In addition, the applicant was ordered to pay each of the respondents various sums of money per month at rates commensurate with their monthly salaries until the date when their contracts E of employment would have been lawfully terminated.

Aggrieved by Matsikidze's decision, the applicant appealed to the Labour Court. It also applied to that court for an order of stay of execution pending the determination of its appeal. On 12 October 2010 the application for stay of execution was granted. Meanwhile on 30 March 2010 the respondents F had applied to this court for the registration of Matsikidze's award, for enforcement purposes, in terms of s 98(14) of the Labour Court Act [*Chapter 28:01*]. The applicant opposed the application. In a judgment of this court by Gowora J, as she then was, on 20 October 2010, the application was granted. The applicant appealed to the Supreme Court. However, it subsequently withdrew that appeal. G

In May 2011 the Labour Court dismissed the applicant's appeal against Mutongoreni's decision. But obviously that development had been superseded by events. On 28 March 2014 the Labour Court handed down its judgment on the appeal against Matsikidze's quantification. It dismissed the appeal and upheld the quantification. On 8 May 2014 the respondents issued out of H

Mafusire J

A this court a writ to execute such of the amounts as they deemed to be due in terms of Matsikidze's quantification. The total amount inserted in the writ was US$788 296.21. On 12 May 2014 the fourth respondent, in pursuance of the writ, attached what the applicant claimed was its entire office furniture.

On 14 May 2014 the applicant applied to the Labour Court for leave to B appeal to the Supreme Court against the Labour Court's judgment of 28 March 2014 which had upheld Matsikidze's quantification. The applicant also filed in that court an urgent chamber application for a stay of execution of Matsikidze's award which, however, had now been registered as an order of this court in terms of the aforesaid judgment by Gowora J. Having no jurisdiction to regulate orders or processes of this court, the Labour Court, C not unexpectedly, dismissed the application. That was on 15 May 2014. However, on that same day the applicant filed this application. I heard it on 20 May 2014. The applicant sought the following order:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be D made in the following terms:
>
> (i) The writ of execution issued out of this Honourable Court under Case No. HC 2411/10 be and is hereby set aside.
>
> (ii) In the event that this application is opposed, the applicant's costs shall be paid by any such respondent as shall have opposed same.

INTERIM RELIEF GRANTED

E That the applicant is granted the following relief:

(a) The execution of the writ issued under Case No. HC 2411/10 be and is hereby suspended pending the determination by the Labour Court of the applicant's application for leave to appeal filed under Case No. LC/H/158A/10."

On 21 May 2014 I granted the interim order. Ms *Timba*, for the respondents, had taken a number of points *in limine*. I had dismissed them all for lack F of merit.

The respondents' first point *in limine* was that the certificate of urgency that had been filed in accordance with r 244 of the rules of this court had been defective, invalid and therefore inadmissible. It was alleged that the legal practitioner who had certified the matter as being urgent had not personally G applied her mind to the matter. It was argued that she had failed to mention some crucial dates such as when the arbitral award had been registered and when the writ of execution sought to be stayed had been issued. It was also contended that she had failed to appreciate that both the applicant's intended appeal to the Supreme Court and the instant application were devoid of merit. H It was also pointed out that the certificate of urgency had not been dated.

2014 (1) ZLR p640

Mafusire J

Regarding the last point about the certificate of urgency not having been dated, A Mr *Girach*, for the applicant, explained that it was a harmless oversight that probably was occasioned by the haste in which urgent chamber applications are prepared. I condoned the oversight.

A certificate of urgency in terms of r 244 is a condition precedent to an urgent chamber application being heard on an urgent basis. A legal practitioner, B as an officer of the court, certifies the matter to be one of urgency. He or she does so from an informed position, having carefully applied his or her mind to the matter. Even though the judge dealing with the matter will still decide whether or not the matter is urgent, he or she is entitled to rely on the opinion of the legal practitioner who certifies the matter to be one of urgency. It is unethical and an abuse of the privilege bestowed on them as C legal practitioners in this regard to mechanically certify matters as urgent without having properly applied their minds. They actually risk an adverse order of costs against themselves personally. However, the duty of the legal practitioner in this regard does not, in my view, extend to deciding or assessing the merits of the matter. That is the function of the judge.

The duties of a legal practitioner in relation to certificates of urgency have D been expounded in a number of cases. In *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation (Pvt) Ltd* 1998 (2) ZLR 301 (H) Gillespie J stated at 302-303:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be E abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner F is involved if a legal practitioner is prepared to give his assurance that such treatment is required.
>
> It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a G lawyer could not reasonably entertain the belief he professes in the urgency of a matter he runs the risk of a judge concluding that he acted wrongfully if not dishonestly in giving his certificate of urgency."

The Supreme Court, in *Chidawu & Ors* v *Shah & Ors* 2013 (1) ZLR 260 (S) at 264E-F, recently endorsed the approach in the *Zimbank* case. Gowora JA there stated: H

2014 (1) ZLR p641

Mafusire J

> A "In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the

certificate of urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal B practitioner applies his mind to the facts."

The learned judge of appeal quoted the above passage in the *Zimbank* case and continued at 265B-C:

"Whilst the remarks of the learned judge were not concerned with the validity or otherwise of a certificate of urgency, they are apposite and pertinent in that the requirement that a lawyer must apply his or her mind to the facts of the case C is emphasised. In order for a certificate of urgency to pass the test of validity it must be clear *ex facie* the certificate itself that the legal practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute."

In casu, I dismissed the point *in limine* because I was satisfied that the legal practitioner who had certified the matter as being one of urgency had D properly applied her mind to the matter. Among other things, she had clearly articulated the grounds upon which her own judgment as to urgency had been predicated. She had refrained from merely regurgitating the details in the founding affidavit. Contrary to the respondents' assertion, she had expressly mentioned the date when the writ had been issued even though E the failure to do so would not have been decisive. She had not been required to pass judgment on the merits of the intended appeal or the merits of the application before me and she had not done so.

The next point *in limine* taken by the respondents was that the application was fatally defective for want of compliance with r 227(1)(c). It was emphasised that the rule was couched in peremptory language. The rule, which is under F the section dealing with the general provisions for all application procedures, reads:

"227. Written applications, notices and affidavits

(1) Every written application, notice of opposition and supporting and answering affidavit shall –

G (a) …

(b) …

(c) have each page, including every annexure and affidavit, numbered consecutively, the page numbers, in the case of documents filed after the first set, following consecutively from the last page number of the previous set, allowance being made for the page numbers of the proof of service filed H for the previous set."

2014 (1) ZLR p642

Mafusire J

Whilst the original chamber application filed of record had been satisfactorily A bound and paginated consecutively, apparently the copy served on the respondents had not. That inevitably caused some inconvenience during the hearing as it was difficult to refer to documents by page numbers. Mr *Girach* explained that it must also have been another oversight on the part of his instructing practitioners. He sought condonation in terms of r 4C. This rule, *inter alia*, empowers a judge, *inter alia*, to condone a departure from B any provision of the rules in the interest of justice.

Rule 227(1)(c) is undoubtedly one of the rules that classically is meant for the convenience of the court and the parties appearing before it. Unless all the sets of papers that have been filed of record for use during the proceedings are properly paginated and the annexures properly labelled, it may be extremely C difficult for the hearing to flow. It may be difficult to readily draw attention to any particular document or item. It is an important rule. It must be observed. Good reasons must be proffered for its non-observance.

However, the rules are meant for the court and not the court for the rules. In the instant case I considered the failure by the respondents to scrupulously D follow the rule in relation to all the sets of papers filed of record as being a minor infraction especially given the surrounding circumstances. The urgent chamber application was undoubtedly prepared in extreme haste. It had been the same application that had wrongly been launched in the Labour Court and had been dismissed on the same day that it had finally been filed in this court. Furthermore, it seems it was only the copy that had been served on E the respondents that was offending. Under the circumstances, I did not think that condoning such an infraction would make justice turn on its head. On the contrary, it would if I were to dismiss the application solely on that basis.

The next point *in limine* by the respondents was that the matter was now *res judicata* in that the same application had been dismissed by the Labour F Court. During the hearing I was advised that the applicant had conceded at the Labour Court that it had gone to the wrong forum. The Labour

Court had dismissed the application for lack of jurisdiction. It had not decided it on the merits. Under such circumstances the matter could not be said to have become *res judicata*. ,

Tied to the issue of *res judicata* was the respondents' argument that, except for G applications for the registration of arbitral awards for enforcement purposes in terms of s 98(14) of the Labour Act, this court lacks jurisdiction in all other employment matters as they are the preserve of the Labour Court in terms of the Labour Act. Ms *Timba* submitted that in terms of r 34 of the Labour Court Rules (SI 59 of 2006), the Labour Court or a President sitting H

Mafusire J

A in chambers may, on application, order a stay of execution of a decision, order or determination that has been registered in terms of s 92B(3) of the Labour Act.

Section 92B(3) of the Labour Act entitles a party to whom a decision, order or determination by the Labour Court relates, to register it for enforcement B purposes with either the magistrate's court or the High Court, depending on the jurisdictional limits.

The state of the law on this aspect is obviously unsatisfactory in that, among other things, the Labour Court, whose status the Legislature undoubtedly elevated to that of a court of first instance in practically all labour matters, C withheld from it the power to enforce its own judgments. Successful litigants in that court and the other judicial structures created under it have to be shunted from that court to this court or the magistrates' court for the purposes of enforcing any orders or decisions made in their favour.

Be that as it may, and in spite of the provisions of r 34 of the Labour Court Rules (which, incidentally, is confined to decisions of the Labour Court itself D as opposed to that of an arbitrator as was the case in the present matter), it is now settled law that the superior courts have the power to regulate their own processes. Section 98(15) of the Labour Act provides that where an arbitral award has been registered with the magistrates' court or this court, it shall have, for enforcement purposes, the effect of a civil judgment of the E appropriate court. This court has an inherent jurisdiction to order a stay of execution of its judgment. There is nothing in the Labour Act or the regulations made under it that has ousted that jurisdiction. The issue was put beyond doubt in *Dhlodhlo* v *Deputy Sheriff, Marondera & Ors* 2011 (1) ZLR 416 (H). At 422-423 Gowora J (as she then was) had this to say:

> "The contention by the applicant is that, as a result of the registration, the Labour F Court ceases to have jurisdiction over the judgment and it cannot control, vary, set aside or rescind the judgment. I think this is a correct exposition of the law. The effect of the registration with this court is that only the High Court, barring an appeal to the Supreme Court, can interfere with the judgment or its execution. This is because, the High Court, being a court of superior jurisdiction, has the inherent power to regulate its own proceedings ...
>
> G Clearly the import of r 34(1) is to permit the stay of any judgment registered with a court, possibly with inferior jurisdiction to it. I say 'possibly' because this aspect was not argued before me as that was not the situation confronting the parties. I am therefore not in a position to state with certainty that the rule permits this. It is an issue that would have to be argued before a court can pronounce on it. What I can state is that the rule cannot be read as giving the H Labour Court the power to regulate proceedings of the High Court. To the extent

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Mafusire J

> that it appears to do so, the rule is, in my view, in conflict with the Act and the A limited jurisdiction granted to the court in terms of s 89 thereof.
>
> It is trite that a judicial officer cannot vary or set aside a judgment or order issued by an officer of parallel jurisdiction, except in the case of a rescission of an order granted in default, or in restricted circumstances in accordance with the provisions of r 449 of the Rules of this court. As the applicant rightly argues, if a judge cannot vary or alter aside an order issued by a judge with parallel B jurisdiction, [1] how can it be possible for a judge from a lower court [to] have the power to stay an order issued by a court of superior jurisdiction? I cannot conceive of a situation where a court can lawfully interfere with execution or suspension of a court order issued by [a] court of superior jurisdiction to its own.
>
> Execution is a process of the court and every court has the power to control its own process subject to the rules of court. In the High Court that power is inherent. See *Strime* v *Strime* 1983 (4) SA 850 (C) and *Stumbles & Rowe* v C*Mattinson* 1989 (1) ZLR 172 (H). The courts in this country have all been imbued

with the power to regulate their own proceedings and therefore no other court can legally interfere with those proceedings, unless in an appeal or a review of the proceedings of that other which in any case would have to be a court of inferior jurisdiction. *In casu*, the Labour Court is not such a court as can review or subject to appeal the proceedings of the High Court and it ought not to have D stayed the judgment of this court, as that is not within its jurisdictional power."

The Supreme Court, in *Ritenote Printers (Pvt) Ltd* v *A Adam & Co Anor* 2011 (1) ZLR 521 (S) at 525B-E, confirmed the doctrine of the inherent jurisdiction enjoyed by the superior courts to regulate their own processes. Therefore, I dismissed the point *in limine*.

The last point taken *in limine* by the respondents was that the application E was not urgent. Ms *Timba* submitted that once the arbitral award had been registered as an order of this court way back in 2010, it must have been obvious to the applicant that the next stage by the respondents would be execution. She submitted that the applicant had itself not treated the matter as urgent. Its appeal against Matsikidze's quantification had been dismissed F by the Labour Court on 28 March 2014. The applicant had only applied for leave to appeal to the Supreme Court on 14 May 2014, which, she submitted, was outside the 30 day period permitted by the Rules of the Labour Court. Thus, the need to act had arisen much earlier than 15 May 2014 when the urgent chamber application had been launched. Reference was made to the well-known case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H). G

I dismissed that point *in limine*, firstly because it appeared the respondents had miscalculated the 30 day *dies induciae* the applicant was entitled to in

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Mafusire J

A order to file the application for leave to appeal. 14 May 2014 was the thirtieth day. Secondly, until the respondents had issued the writ and had caused the attachment of the applicant's property for the somewhat staggering amount that was inserted in that writ and which none of the parties nor any of the courts or quasi-courts had previously mentioned in express terms, one cannot really say the need to act by the applicant had arisen earlier. The imminent B harm for which the applicant sought an interdict had arisen on 14 May 2014 when the fourth respondent had attached its entire office furniture and had been poised to return for its upliftment, probably in two days' time. To all the other processes that the respondents had instituted towards enforcing Matsikidze's quantification, the applicant had mounted appropriate opposition, albeit without success. The applicant had also instituted processes of its own C to reverse Matsikidze's quantification and one such was still pending when the writ had been issued. Under such circumstances it cannot be said that the applicant had been dilatory.

After the disposal of the points *in limine* I heard argument on the merits. Mr *Girach* contended strongly that Matsikidze's quantification was manifestly D flawed in principle. He had wrongly determined that the respondents' contracts of employment had still been running when he had sat to quantify Mutongoreni's award about three years later and that those contracts would continue to run indefinitely until the applicant had properly terminated them. Yet Mutongoreni's ruling had been that the respondents, whose initial E contracts of employment had been for fixed periods of 12 months only, had had a legitimate expectation to have those contracts renewed on the same terms and conditions. Therefore, Mr *Girach* contended, the legitimate expectation could only have been in respect of the next 12 months and not for every 12 month period in perpetuity. He was confident that the Supreme Court would overturn Matsikidze's quantification. That made it imperative F for the writ of execution to be stayed since the applicant would inevitably be rendered dysfunctional if its entire office furniture was auctioned. Any success at the Supreme Court would then be a pyrrhic victory and any order of the Supreme Court in its favour would be a *brutum fulmen*.

On the other hand, Ms *Timba* charged that what the applicant sought to achieve by its application was a re-opening of the merits of the labour matter that had G been conclusively dealt with by the arbitrators and the Labour Court; that this court had no jurisdiction to decide the merits of a labour dispute as such jurisdiction is reposed in the Labour Court only; that the interdict was being sought pending a non-existent appeal since what was pending at the Labour Court was not an appeal but merely an application for leave to appeal, and H that, at any rate, that application for leave to appeal was devoid of merit.

Mafusire J

I granted the order sought because I felt that the applicant's prospects of A success on appeal on the merits were so overwhelming as to overshadow all the other requirements for an interlocutory interdict. Contrary to the respondents' contention, the strength or weakness of an applicant's case on the merits is a necessary consideration in an application for an interdict: see *Hix Networking Technologies* v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (SCA). B

I also felt that the balance of convenience favoured a stay of execution so that the rights of the parties could properly and finally be determined by the Supreme Court if the leave to appeal was granted. It was true that what was pending at the Labour Court at the time of the applicant's urgent chamber application before me was merely an application for leave to appeal and not C the appeal itself. However, given that there is no automatic right of appeal from a decision of the Labour Court to the Supreme Court, it is my considered view that by that application, the applicant had put the appeal process in motion. The process deserved to be given the chance to run its full course if the applicant satisfied the requirement for an interdict.

The requirements for an interlocutory interdict are well known. They are: D

1. that the applicant has a *prima facie* right that he or she wishes to protect even though that right be open to some doubt;
2. that the applicant has a well-grounded apprehension of an irreparable harm such as would not be cured by damages;
3. that the balance of convenience favours the granting of the interim E interdict;
4. that there is no other alternative remedy that is effective;
5. that the applicant has prospects of success on the merits

See *Setlogelo* v *Setlogelo* 1914 AD 221 *; Hix Networking Technologies* v F*System Publishers (Pty) Ltd & Anor supra*; *Flame Lily Investments Co (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G) and *Universal Merchant Bank Zimbabwe Ltd* v *Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H).

The above requirements are considered cumulatively.

The writ issued by the three respondents on the basis of which the fourth G respondent had attached the applicant's entire furniture was for a whopping US$788 296.21. That was an amount computed by the respondents themselves. That computation was allegedly on the basis of Matsikidze's quantification which was itself allegedly on the basis of Mutongoreni's award. I was mindful of the fact that the full merits of the parties' contracts of employment had H

Mafusire J

A not been argued before me, a point Ms *Timba* pressed home. Therefore, all I do here is to express my *prima facie* impression of the matter, both from the documents filed of record and the submissions made by counsel.

However, even from a common sense point of view, the amount of US$788 296.31, i.e. more than three-quarters of a million dollars, was B manifestly unreasonable. It was said to be the total due to the three employees. These were employees whose contracts of employment had only been for fixed terms of 12 months each. One earned US$2 800 per month. The other earned US$1 418.42 per month. The last earned US$1 667.73. The huge amount in the writ was arrived at on the assumption that up to the day of that writ the respondents were deemed to be still employed by the applicant. They C would remain so until their contracts had allegedly properly been terminated.

I agreed with Mr *Girach's* submissions that it had been wrong for Matsikidze to have assumed that the respondents' legitimate expectation to be re-employed which Mutongoreni had referred to in his award, had applied to every year thereafter in perpetuity. The legitimate expectation must have D been only in relation to the year following the expiry of the respondents' contracts of employment by effluxion of time and in which Mutongoreni had sat in judgment. Any period thereafter had not been determined. The extreme absurdity of the respondents' position was that there would be no end to what they would perceive to be their continued entitlement in terms of the contracts of employment. It would mean that even after recovering the E more than three-quarters of a million dollars in terms of the writ they would still come back for more, *ad infinitum*. Ms *Timba* urged that that was so until the applicant had taken it upon itself to properly terminate the contracts of

employment. It sounded so wrong. I felt the applicant had been entitled to have its case re-looked at by a superior court.

F It is trite that a party that is entitled to claim damages for any wrong done to him or her is obliged to mitigate his or her damages. It is the law that an employee who has been dismissed wrongly or otherwise should not just sit back and watch the clock tick as he or she waits to claim damages. He must look for alternative employment. His or her entitlement to damages will be limited to the period he would be expected to have found alternative G employment. What that period is depends on the circumstances of each case. This position was elucidated by the Supreme Court in *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S). At 418-419 McNally JA said this:

> "I think it is important that this court should make it clear, once and for all, that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for H alternative employment. If he does not, his damages will be reduced. He will be

> compensated only for the period between his wrongful dismissal and the date A when he could reasonably have expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.
>
> There are also those, and Ambali is one of them, who seem to believe that they must on no account look for alternative employment; that so long as their case B is pending they must preserve their unemployment status; that if they look for and find a job in the meanwhile they will destroy their claim.
>
> It cannot be emphasised too strongly that this is wrong … [I]f an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after his dismissal he must take it, or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for C six months, he must take it. If in the meantime he has instituted proceedings for reinstatement, he may continue there, but his claim for damages will usually then be limited to his loss over the six month period."

In casu Matsikidze's award in favour of the respondents was an award of damages. But it was common cause Matsikidze had in his purported quantification of Mutongoreni's award taken no account of the respondents' D obligation to mitigate their damages. Mutongoreni may not have mentioned the need for the respondents to mitigate their damages. However, whatever Mutongoreni had meant to award the respondents, it could only be what the law would permit. Matsikidze could not purport to quantify what the law would not permit. That issue should properly be determined by the Supreme Court if leave to appeal was granted. E

It was on the basis that *prima facie* the applicant's case on the merits seemed so robust that I was persuaded to suspend the respondents' writ to enable the applicant to put forward its case to a superior court.

Regarding the other requirements for an interlocutory interdict, I was satisfied that the applicant had satisfied them all. There was no question that the property that the fourth respondent had attached belonged to the F applicant. The respondents did not dispute that that property constituted the applicant's entire office furniture. Thus, it was accepted that the applicant had every right to it.

The applicant was a non-profit making organisation that was involved in collaborative research programmes with the University of Zimbabwe. The G attached assets, according to Mr *Girach*, constituted the bulk of its assets. If the property was disposed of in terms of the writ for the benefit of the respondents and the applicant went on to win on appeal, the harm to the applicant would be irreparable given that the respondents seemed to be people of little means. They were still to get alternative employment more than seven years after the expiry of their contracts with the applicant. They H

A seemed to lack capacity to pay back if they eventually lost. There seemed to be no effective alternative remedy for the applicant if it eventually succeeded. Coupled with the need to balance competing interests it seemed so logical that the writ be stayed temporarily.

It was for the above reasons that I granted the interim relief.

B*Gill, Godlonton & Gerrans*, applicant's legal practitioners

Kantor & Immerman, first, second and third respondents' legal practitioners

1 See *Parker* v *Parker* 1985 (2) ZLR 79 (H) at 85A

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IN RE **CHIKOMBINGO & ORS 2014 (1) ZLR 650 (H)**

Citation	2014 (1) ZLR 650 (H)
Case No	Judgment No. HH-294-14
Court	High Court, Harare
Judge	Mawadze J
Heard	3 June 2013
Judgment	3 June 2013
Counsel	Details not supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

Court – children's court – a court of record – enquiry in terms of s 18 of C *Children's Act [Chapter 5:06] – duty of court to keep proper record, even if no viva voce evidence led – duty of court to forward record for review to High Court within seven days*

Family law – child – child in need of care – application to put child in place of safety – nature of proceedings – duty of court to keep proper record D *of proceedings*

Headnote

Applications to place a child in a place of safety are brought to the children's court in terms of s 18 of the Children's Act [*Chapter 5:06*]. In terms of s 19(1)(a) of the Act, the court, in dealing with such an application, is enjoined to hold an inquiry in respect of the child or juvenile brought before it. This inquiry is important to verify the facts upon which the application is E premised. It is also to assist the court to establish whether the child is in need of care, as defined in the Act. The inquiry also assists the court to exercise any of the powers vested in it in terms of s 20 of the Act. It is therefore as a result of such an inquiry that the court may F decide on the proper option to take in terms of s 20.

The children's court is a court of record. This means that all proceedings in this court should be recorded. The inquiry held should be recorded. The inquiry may entail the hearing of *viva voce* evidence or may be based on affidavits and reports admitted in court as exhibits during the inquiry. The G record of proceedings should reflect all this. It would be disingenuous to argue that since there was no *viva voce* evidence led there was no need to keep a record of proceedings showing the nature of the inquiry held. The court has a duty to keep a full legible record of proceedings in all matters dealt with. In addition to that there should be brief reasons explaining the decision made by the court. The court should explain the H

Mawadze J

A brief circumstances of the child, the nature of the evidence relied upon, findings made on why the child is in need of care and the basis of the particular order granted in terms of s 20. This entails the confirmation of the requisite vacancy at the relevant institution.

In terms of s 27 of the Act, after the holding of the inquiry and the granting of the order, the court is enjoined within seven days to submit the record B of proceedings to the High Court for review. Such a review can only be meaningful where a proper record of proceedings has been kept. The record must include reasons for the court's decision, because the High Court cannot carry out its review powers to determine whether the proceedings were in accordance with real and substantial justice where there is no record of proceedings and no written reasons for the decision C made. In the absence of a proper inquiry, the record of proceedings and reasons for the order made, the High Court is hamstrung in deciding whether the children's court has taken into consideration the principles that bear on the child's best interests.

Cases referred to D

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

Legislation considered

Children's Act [*Chapter 5:06*], ss 19(1) & 27

Judgment

E**Mawadze J**: I should mention from the onset that these civil review proceedings are now purely for academic purposes due to the lapse of time between the period when the relevant orders were granted and the time when the records were forwarded to me. The only reason I have decided to write this review judgment is to give guidance to magistrates who deal with these F matters and seem not to appreciate how these matters should be properly handled. In some cases it would appear that magistrates are not aware of the need to send such matters for review and to do so timeously.

I have decided to deal with all the matters at the same time because they were dealt with by the same magistrate at Bindura and the queries raised in G each of those matters are also the same.

It is important at this point to highlight the inordinate delay in how these matters were dealt with. In In re *Sithole* my brother Musakwa raised the query on 21 November 2005. In the cases of In re *Hutu and Ors* my sister Makarau J (as she then was) raised queries on 15 May 2006. In In re *Chikombingo* it is not clear who raised the query on 19 December 2005. H The magistrate responded to all the queries under cover of one minute dated

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Mawadze J

16 August 2006. It is not clear as to when the records were received by the A Registrar after the magistrate's response. All I can state confidently is that all these records, tied together, were referred to me in December 2013. I am unable therefore to explain the inordinate delay from 2006 to 2013, a period of seven years. I have also decided to deal with the matter of *Sithole* despite that tht initial query was raised by my brother Musakwa. (I have brought this to his attention and he believes this is in order). As for my sister Makarau J, B she left the High Court bench in 2010 after her deserved elevation to the highest court of the land.

The common thread which runs through all these cases is that they involve juveniles, and the magistrate who dealt with these matters did not compile or constitute a record of proceedings in each matter. This is a misdirection C as will be shown later.

All these matters were dealt with in terms of the Children's Act [*Chapter 5:06*] although the magistrate who dealt with the matters mistakenly believed that he did so in terms of the then Children's Protection and Adoption Act of 1972. This is the same Act which was renamed the Children's Act in 2001 with amendments being done to the provisions of the old Act. D

The query raised by my brother Musakwa was as follows in respect of In re *Enia Sithole*:

> "This is another delayed review having been occasioned by the late submissions of the record of proceedings.
>
> Section 19(1)(a) of the Children's Act enjoins a children's court to hold an inquiry E in respect of a child brought before it. Apart from a letter from *SOS Children's Village Zimbabwe* and on order in terms of the Children's Act, there is nothing to show what inquiry was conducted by the magistrate. The matter is remitted to the relevant magistrate to conduct an inquiry as required by the Act."

In respect of Margret Chikombingo the same query that there was no record of the inquiry held before the magistrate was raised. F

Lastly in respect of all the other matters Makarau J (as she then was) raised the following issues;

> "1. These matters were handled by the same magistrate.
> 2. There is no record of inquiry held by the magistrate.
> 3. Please ask him to explain." G

The trial magistrate who handled these matters responded to the queries raised in all these matters in one minute dated 16 August 2006 as follows;

> "In this matter, the probation officer presented the court with reports which the court went through. Having satisfied myself with the contents of the report, I did not feel it necessary to call him or other persons. H

2014 (1) ZLR p653

Mawadze J

> A I based my decisions on the provisions of s 5(1) and (2) of the Children's Protection and Adoption Act. In subs (2) it is stated that –
>
> '(2) The officer presiding over a juvenile court may in his discretion permit evidence to be given to the court by way of affidavit or report.'
>
> The reports of the probation officer form part of the records. From the contents of the reports I did not feel that it was necessary for any other person to appear B before the court. I thus made the order that I made."

It is clear that the magistrate who handled these matters misdirected himself and that even after the omissions he made were raised by all three judges he seemed unwilling to accept that he erred. Before demonstrating this fact let me briefly summarise the facts of each case and the contents of each record.

C 1. In re *John*

The juvenile was born on 3 October 2004. Both parents of the juvenile died when the juvenile was just 6 months old. The juvenile was left in the custody of a 64 year old uncle who was unable to take care of the child and decided to send the child to Howard Mission Hospital. D The officials at the hospital decided to put the juvenile at Montgomery Heights as no relative was willing to take care of the juvenile. All this is outlined in the probation officer's report filed of record. The probation officer on that basis made an application to the children's court to have the juvenile placed at Montgomery Heights Christian Centre on 5 April 2006. Attached to that application was a letter of proof of vacancy from E the institution confirming the institution's willingness to accept the juvenile. The order was granted on 6 April 2006 placing the juvenile at Montgomery Heights Christian Centre.

The record of proceedings in this matter consists of the probation officer's report, the confirmation letter and the order granted by the magistrate F only.

2. In re *Kanzimbe*

At the time the order was made the juvenile was 11 years old. The facts of the matter are that the mother of the child was unknown and the father died in 2004. The juvenile had nowhere to

go and decided G to board a bus in Matepatepa area. The conductor of the bus took him to Bindura Police Station who brought the plight of the juvenile to the social welfare department who in turn took the juvenile to Ponesai Vanhu Junior School, being a place of safety. An application was then made in terms of the Children's Act to have the juvenile declared a child in need of care and placed at Ponesai Vanhu Junior School. The order was H granted on 5 January 2006.

2014 (1) ZLR p654

Mawadze J

3. In re *L* (aged 9 years); *T* (aged 15 years); *E* (aged 5 years) A

Although there are three separate records for these three juveniles their circumstances are the same as they are siblings hence I have decided to deal with them at the same time. The Probation Officer's report in respect of each of the juveniles reflects the following;

The parents or the juvenile are either deceased or unknown as they B could not be traced. All what is known is that the mother died in 2004 at Maizelands Farm and that she had no relatives as she was just a migrant worker. An employee at the farm took care of the siblings, T a girl aged 15 years, P a boy deaf and dumb aged 6 years, E a boy aged 5 years and L a girl aged 9 years. The owner of the farm a Mr Nel on a voluntary basis provided food and clothing from 2004 but was later C unable to help in 2006. The social welfare department was alerted of the need to institutionalise the juveniles, hence the application to the children's court. The order placing the three juveniles at SOS Village was made on 27 April 2006. However, the record shows that besides the probation officer's report and a copy of the order as per Form 8 no other notes were recorded by the court which means no inquiry was held. D

4. In re *J* aged 6 months (born on 19 July 2005)

The mother of the juvenile died when the juvenile was four months' old and was left in the custody of the father. The father is alive. He had no experience to look after the child and approached the Social Welfare Department who decided to remove the juvenile from the father's custody E and place it in the children's home where the child's social needs would be met as the child would be in a family environment with other children and receiving motherly care and love. On the basis of the report, the probation officer made an application to have the child declared to be a child in need of care and to be placed in an institution. The order to that effect was granted on 20 January 2006. F

This record of proceedings contains the probation officer's report and the court order on Form 8. There is no affidavit from the father and neither was the father heard during the inquiry.

5. In re *M* (born 7 October 1995 – 10 years)

The background facts are that the juvenile was staying with a stepbbrother G and his wife at a farm in Concession. The brother is called J. He was employed at this farm. This brother raped the complainant and was subsequently convicted and incarcerated. The juvenile had to leave the farm and a step-sister, one Mary, in Glendale, who is a commercial sex worker took care of the juvenile. The juvenile was exposed to immoral H

2014 (1) ZLR p655

Mawadze J

A behaviour by the step-sister who brought many boyfriends home to spend the nights in a single room with the juvenile also present. Members of the Glendale Child Welfare Forum notified the Probation Officer of the juvenile's plight and authorities at SOS Children's Village in Bindura agreed to take the juvenile into their custody. An application to that effect was made and granted. This order howeve, expired on 18 March 2003 B and the current application is for the renewal of the order, as the juvenile is still in need of care because no relative was willing to or capable of looking after the juvenile. The order reviewing the previous order was granted on 25 February 2005.

In this record of proceedings there is only the probation officer's report C and the court order. There is no confirmation letter from SOS Children's Village in Bindura. A copy of the expired order is not attached.

6. In re *E*

The facts of this matter are not explained as there is no probation officer's report. The record only contains Form 8, which is this court order placing D the juvenile at Shearly Cripps

Children's Home dated 23 February 2005 and a letter from Shearly Cripps Children's Home to the Department of Social Welfare Glendale, dated 10 April 2001, confirming that the juvenile was placed at that institution in 2000 and that there was need for the Department of Social Welfare to regularise this position urgently by obtaining a court order to that effect. This probably triggered the E order granted by the court on 23 February 2005. The circumstances of the juvenile however remain unknown.

It is common cause that applications of this nature are brought to the Children's Court in terms of s 18 of the Children's Act [*Chapter* 5:06]. ("the Act"). In terms of s 19(1)(a) of the Act the Children's Court, in dealing with such an F application, is enjoined to hold an inquiry in respect of the child or juvenile brought before it. This inquiry is important to verify the facts upon which the application is premised. It is also to assist the Children's Court to establish whether the child is in need of care as is defined in the Act. The inquiry also assists the court to exercise any of the powers vested in the Children's Court in terms of s 20 of the Act. It is therefore as a result of such an inquiry that G the Children's Court may decide on the proper option to take in terms of s 20 of the Act.

It is common cause that the children's court is a court of record. This means that all proceedings in this court should be recorded. The inquiry held should be recorded. The inquiry may entail the hearing of *viva voce* evidence or H may be based on affidavits and reports admitted in court as exhibits during

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the inquiry. The record of proceedings should reflect all this. It is therefore A disingenuous for the trial magistrate in this case to argue that since there was no *viva voce* evidence led there was no need to keep a record of proceedings showing the nature of the inquiry held. The children's court has a duty to keep a full legible record of proceedings in all matters dealt with. In addition to that there should be brief reasons explaining the decision made by the children's court. The children's court should explain the brief circumstances B of the child, the nature of the evidence relied upon, findings made on why the child is in need of care and the basis of the particular order granted in terms of s 20. This entails the confirmation of the requisite vacancy at the relevant institution.

In terms of s 27 of the Children's Act, after the holding of the inquiry and the C granting of the order, the Children's Court is enjoined within seven days to submit the record of proceedings to the High Court for review. Such a review can only be meaningful where a proper record of proceedings has been kept.

In In re *Gonyora* 2001 (2) ZLR 573 (H) it was pointed out that the record of proceedings of a children's court which is submitted for review (whether in terms of the Guardianship of Minors Act [*Chapter* 5:08] or the Act [*Chapter* 5:06]) D must include reasons for the court's decision. The reason for this is clear. This court cannot carry out its review powers to determine whether the proceedings were in accordance with real and substantial justice where there is no record of proceedings and no written reasons for the decision made. In the absence of a proper inquiry, the record of proceedings and reasons for the order made, this court is hamstrung in deciding whether the E children's court has taken into consideration the principles that bear on the child's best interests.

It is clear that in all these eight matters dealt with by the magistrate there are no records of proceedings. There is no evidence on record that an inquiry as envisaged in terms of s 19 (1) of the Act was held before the relevant orders F were granted in terms of s 20 of the Act. This constitutes a misdirection. See In re *Gonyora supra* at 578G-H.

It is not helpful for the magistrate to allege that an inquiry was held without such evidence in the form of a record of proceedings. Such a purported inquiry, which remains stored in the mind of the magistrate, falls far short of G what is required in terms of s 19 (1) of the Act. In the absence of the reasons for decisions made in all eigh8 matters it is difficult to assess on review if the proceedings were in accordance with justice.

Due to the lapse of time it is now not possible, through the process of review, to rectify the anomalies. No useful purpose would be served by remitting H

A the matters to the magistrate for a proper inquiry to be held. Due to lapse of time some of the juveniles are now majors. Further, the circumstances of the juveniles have changed since 2005 and 2006. All I can do now is to withhold my certificate and decline to certify the proceedings in all matters B as in accordance with real and substantial justice.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/SURFACE INVESTMENTS (PVT) LTD v CHINYANI 2014 (1) ZLR 658 (H)

SURFACE INVESTMENTS (PVT) LTD v CHINYANI 2014 (1) ZLR 658 (H)

Citation	2014 (1) ZLR 658 (H)
Case No	Judgment No. HH-295-14
Court	High Court, Harare
Judge	Dube J
Heard	3 June 2014
Judgment	3 June 2014
Counsel	Ms *F Mahere,* for the applicant *L Shambamuto*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Employment – Labour Court – jurisdiction – vindicatory action for return C *of vehicle issued to former employee – court having no jurisdiction to deal with such an action*

Property and real rights – ownership – vindication – actio rei vindicatio – what person relying on such action must show D

Headnote

The applicant sought the return of a motor vehicle that had been issued to the respondent. He had been engaged on a five year contract, which was not renewed when it expired. He lodged a complaint of unfair labour practice with the Ministry of Labour and that matter was still pending at the time the present application was filed. He resisted the claim for E vindication of the vehicle on the grounds that the application was a pure labour issue and that, as he was challenging his dismissal at the Labour Court, the matter was solely in the hands of the Labour Court. On the merits, his argument was that he was entitled to purchase the vehicle in terms of the motor vehicle scheme and contract of employment. F

Held, that the Labour Court is a creature of statute and is only empowered to deal with matters brought to it in terms of s 89 of the Labour Act [*Chapter 28:01*]. It can only deal with disputes that are provided for in terms of the Act in terms of both the cause of action and the remedy sought. The *actio rei vindicatio* is a common law remedy and the Labour Court has no jurisdiction to deal with

common law remedies. The High Court could G deal with this application, as it is a court of inherent jurisdiction and it could do so regardless of the stage at which proceedings had reached at the Labour Court are. What was before the court was not a labour dispute. Clearly the Labour Court was not conferred with the jurisdiction to deal with claims of *rei vindicatio.* H

A*Held*, further, that an applicant seeking to rely on the *actio rei vindicatio* must prove (a) that he is the owner of the property; (b) that at the commencement of the action, the thing sought to be vindicated was still in existence and the respondent was in possession of the property; and (c) that the respondent's possession is without his consent

B*Held*, further, that the vehicle was owned by the applicant and the respondent possessed the vehicle without its consent. The respondent's term of employment had been terminated. He was only entitled to hold onto the vehicle upon establishing a defence that entitled him to continue holding onto the vehicle. The onus was on him to allege and establish the right to continue holding onto the vehicle. He contended that he was entitled to C purchase the vehicle in terms of the motor vehicle scheme negotiated at the time he was employed. That scheme stated, firstly, that the employee was entitled to purchase the vehicle at the end of five years. The clause presupposed that the employee would be required to have driven the vehicle for five years before he could purchase it. As the respondent had only had the use of the vehicle for two years, he was not entitled to D purchase it. He therefore had no claim of right in respect of the vehicle.

Cases referred to

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

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

E*Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A)

Jolly v *Shannon & Anor* 1998 (1) ZLR 78 (H)

Mashave v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S)

Masuli v *Jera* HH-67-07

NRZ v *Zimbabwe Railway Artisans Union & Ors* 2015 (1) ZLR 341 (S)

Oakland Nominees Ltd v *Gelria Mining & Invstm Co Ltd* 1976 (1) SA 441 (A) F

Stanbic Finance Zimbabwe v *Chivhungwa* 1999 (1) ZLR 262 (H)

Telecel Zimbabwe (Pvt) Ltd v *Omar* HH-116-11

Tuso v *City of Harare* 2004 (1) ZLR 1 (H)

Unimark Distributors (Pvt) Ltd v *Erf 94*, *Silvertondale (Pvt) Ltd* 1999 (2) SA 986 (T) G

Zimbabwe Broadcasting Hldgs v *Gomo* 2010 (1) ZLR 8 (H)

Zimtrade v *Makaya* 2005 (1) 427 (H)

Legislation considered

H Labour Act [*Chapter 28:01*], s 89

Dube J

Case information

Ms *F Mahere,* for the applicant A

L Shambamuto, for the respondent

Judgment

Dube J: This is an application for a *rei vindicatio*. The respondent was employed as applicant's chief executive officer for a five year contract. He was issued with a Mercedes Benz S280. The contract was not renewed after its expiry. He lodged a complaint of unfair labour practice with the Ministry B

of Labour and that matter was still pending at the time this application was filed. On termination, he refused to hand over the vehicle prompting the applicant to compel him to surrender the vehicle through this application.

The respondent's defence is that this application is a pure labour issue and that the respondent is challenging his unfair dismissal at the Labour Court C which places this matter solely in the hands of the Labour Court. This court has no jurisdiction to determine this application pending the determination of the matter pending at the Ministry of Labour. On the merits, the respondent's argument is that he was entitled to purchase the vehicle in terms of the motor vehicle scheme and contract of employment.

The jurisdiction of the Labour Court is governed by s 89 of the Labour Act D [*Chapter 28:01*]. The relevant paragraphs read as follows;

> "89 (1) The Labour Court shall exercise the following functions –
>
> (a) hearing and determining applications and appeals in terms of this Act or any other enactment; and …
>
> (6) No court, other than the Labour Court, shall have jurisdiction in the first E instance to hear and determine any application, appeal or matter referred to in subsection (1)."

These provisions have been interpreted in a number of cases. In *DHL International (Pvt) Ltd* v *Madzikanda* 2010 (1) ZLR 201 (H), Makarau J (as she then was) held that s 89 means that if the dispute is provided for in the Act both in terms of the cause of action and the remedy, then the Labour F Court has jurisdiction over the matter. Similar sentiments were expressed in *NRZ* v *Zimbabwe Railway Artisans Union and Ors* 2015 (1) ZLR 341 (S) where Ziyambi JA, in reviewing a matter involving an application for an interdict which had been taken to the Labour Court, remarked thus:

> "Thus, the application and the remedies obtainable thereby must be authorised G in the Act or the enactment authorising the application to the Labour Court. Nowhere in the Act is the power granted to the Labour Court to grant an order of the nature sought by the respondents in the court *a quo*, nor have I been referred to ant enactment authorising the Labour Court to grant such an order."

The reasoning of the judge is equally applicable here as both remedies are common-law remedies which the Labour Court has no jurisdiction to deal H

Dube J

A with. See also *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H). The reasoning behind this is that the Labour Court is a creature of statute and its jurisdiction is confined to the four corners of the statute.

The next issue is whether the High Court has jurisdiction to determine an application for vindication of property where the Labour Court is seized B with a dispute over the dismissal of the employee. In *Zimtrade* v *Makaya* 2005 (1) 427 (H) Makarau J declined to grant a vindicatory order where an employee had been dismissed and the matter was still pending at the Labour Court. She remarked as follows:

> "It is in my further view unacceptable splitting of hairs to separate the determination of the validity of suspension from employment, on one hand, C from the determination of whether or not that suspension affects the benefits enjoyed by the employee, on the other hand. The two are interdependent and are both governed by the existing employment relationship obtaining between the two parties. The argument that the employer can vindicate his property at any time does not impress me as the employee can always raise the defence of claim of right to possess the property until he or she is effectively and lawfully disentitled to the property."

D This case was followed in *Telecel Zimbabwe (Pvt) Ltd* v *Omar* HH-116-11. Chiweshe JP was of the view that the wording of ss 89(1) and (6) empowers the Labour Court to deal with applications of this nature and, further, that the legislature intended that all labour disputes be dealt with to the exclusion of any other court by the Labour Court. In *Zimasco (Pvt) Ltd* v *Marikano* HH-235-11, E the respondent's contract of employment was terminated and he retained the applicant's vehicle. The applicant filed an application for *rei vindicatio* with this court. Mtshiya J declined to exercise his jurisdiction over the matter on the basis that the matter was a labour dispute. The Supreme Court on appeal set aside the order of the High Court and remitted the matter to the court for determination on the merits before the same judge. The F Supreme Court did not expressly deal with the question whether this court has jurisdiction to entertain a *rei vindicatio* application where

the former employee was dismissed and an appeal is pending in the Labour Court. However, it is apparent that the Supreme Court's position was that the High Court has jurisdiction to deal with applications for *rei vindicatio* pending litigation in the Labour Court.

G In an earlier case of *Zimbabwe Broadcasting Holdings* v *Gomo* 2010 (1) ZLR 8 (H), Gowora J had expressed the view that this type of application can be determined by this court. This case involved an employee who had noted an appeal against her dismissal to the Labour Court. The applicant had in the interim applied for return of its property. The court held that an H appeal to the Labour Court did not give the employee the right to retain the

property she was in possession of in terms of a contract of employment that A had been terminated unless she had a recognisable defence to the claim by the applicant. The court remarked as follows:

> "Our law, as it currently stands, is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that relationship cease. In *Chisipite Schools Trust (Pvt) Ltd* v *Clark*, Gubbay CJ stated: B
>
> > 'Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the Headmistress's house and the continued use of the motor vehicle. A Labour Relations Officer cannot order the respondent to surrender these particular benefits. Consequently, the applicant being unable to resort to self-help approached the High Court for relief. I consider it was justified C in doing so'."

The Labour Court is a creature of statute and is only empowered to deal with matters brought to it in terms of s 89 of the Act. This implies that it can only deal with disputes that are provided for in terms of the Act thus in terms of both the cause of action and the remedy sought. *The rei vindicatio* is a common law remedy and is not provided for in terms of the Act. The High D Court can deal with this application as it is a court of inherent jurisdiction and it can do so regardless of the stage at which proceedings at the Labour Court are. This approach is based on the principle that despite an employee's challenge to the dismissal, the employee stands dismissed. What is before me is not a labour dispute. Clearly the Labour Court was not conferred with the jurisdiction to deal with vindication claims. A vindication order is a E common law remedy and the Labour Court has no jurisdiction to deal with common law remedies. Makarau J expressed reservations in *Madzikanda supra* regarding separation of the determination of validity of suspension from employment and determination of whether a suspension or dismissal affects the benefits enjoyed by the employee. It would be desirable to have F a one stop shop for all labour related issues. That simply is not the position at law and will remain so until the legislature has decided otherwise.

I am going to deal with the matter without regard to what is happening at the Labour Court. The application is properly before the court.

The *actio rei vindicatio* is a common law remedy which is based on the G principle that an owner is entitled to recover his property from whoever may possess it without his consent. See *Chetty* v *Naidoo* 1974 (3) SA 13 (A). The same principle was enunciated *in Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) where McNally JA stated that the law protects the right of an owner to vindicate his property and "as a matter of policy favours him as against an innocent purchaser". H

A The same principles governing the law of vindication were outlined in *Oakland Nominees Ltd* v *Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 452A where the court remarked as follows:

> "Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course the possessor has some enforceable right against the owner."

B See also *Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A) and *Stanbic Finance Zimbabwe* v *Chivhungwa* 1999 (1) ZLR 262 (H) where the court, in dealing with the question of onus, remarked as follows:

> "The owner may claim his property wherever found, from whosoever is holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold C it from the owner unless he is vested with some right enforceable against

> the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*, the onus being on the defendant to allege and establish any right to continue to hold against the owner."

See also *Unimark Distributors (Pvt) Ltd* v *Erf 94*, *Silvertondale (Pvt) Ltd*D1999 (2) SA 986 (T) where the following sentiments touching on the respondent's defence appear:

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

E An applicant seeking to rely on the *actio rei vindicatio* must prove the following,

1. that he is the owner of the property: *Jolly* v *Shannon and Anor* 1998 (1) ZLR 78 (H);
2. F that at the commencement of the action, the thing sought to be vindicated was still in existence and the respondent was in possession of the property: *Masuli* v *Jera* HH-67-07;
3. that the respondent's possession is without his consent: *Stanbic Finance Zimbabwe supra*.

G It is common cause that the vehicle in issue is owned by the applicant and the respondent possesses the vehicle without its consent. The respondent' term of employment has been terminated. He is only entitled to hold onto the vehicle upon establishing a defence that entitles him to continue holding onto the vehicle. The onus is on the respondent to allege and establish the right to continue holding onto the vehicle. The respondent contends that H he is entitled to purchase the vehicle in terms of the motor vehicle scheme

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Dube J

negotiated at the time he was employed. The respondent avers that in the A first three years of his employment he used his own vehicle and the applicant paid all running costs and that he was issued with the vehicle in terms of his contract of employment in June 2010 and only used the vehicle for two years. He contends that his contract of employment entitled him to purchase the vehicle and, further, that the years during which he used his personal vehicle are part and parcel of the five years, thus entitling him to purchase B the vehicle. Clause 6 of his letter of appointment reads as follows:

> "Company Car: An executive car to be provided in terms of the company's Management Car Scheme which the CEO is expected to develop and operationalize in respect of all managers."

The clause entitles him to use of a company vehicle only and makes no C reference to purchase.

The respondent was in terms of his contract required to develop a vehicle scheme. The respondent has produced a motor vehicle scheme which he avers he developed. The applicant contends that he failed to produce one. The applicant disputed the existence of the undated scheme produced which it claims is fictitious and a fraud and contends that it was created only D for purposes of this application. The respondent has asked this court to dismiss the application and refer it to trial on the basis of the existence of a material dispute of fact over the existence of the vehicle scheme. The court is only required to refer a matter for trial where material disputes of facts exist and it cannot resolve the dispute on the papers before it. I am going to take a robust E approach and resolve the issue on the papers before me. I will examine the scheme and determine if the respondent was in terms of that scheme entitled to purchase the vehicle.

Clause 4 and 5 of the scheme reads as follows:

> "4. Depreciation
>
> Except when directed by the board otherwise or in specific contractual F circumstances vehicles will be depreciated over a five year period. At the end of the said period, the employee will be entitled to purchase the vehicle at the residual value, being ten percent of original cost".
>
> 5. Transitional provisions
>
> Where the company is not yet in a position to provide a vehicle, the eligible G employee will be paid for both capital and running expenses for use of their personal vehicles on the same terms and conditions as provided in this motor vehicle scheme."

The gist of these clauses is, firstly, that the employee is entitled to purchase the vehicle at the end of five years. The vehicles would be depreciated over a five year period. Secondly, clause 4 presupposes that the incumbent will H

Dube J

A be required to have driven the vehicle for five years before he can purchase it. That vehicle had not been depreciated over a five year period. There was no direction by the board waiving this requirement to sell the vehicle before the five years had elapsed. The applicant drove the vehicle for just two years and is not in terms of clause 4 entitled to purchase the vehicle. The transitional provisions make provision for payment of capital and running B expenses where the company is not in a position to provide a vehicle. There is no provision that the period over which an employee would have driven his own vehicle would be taken into account for purposes of calculating the five year period. He was paid his capital and running expenses and was therefore adequately compensated. Reference under clause 5 to the effect that such employee would be entitled to capital and running expenses "on C the same terms and conditions as provided for in this motor vehicle scheme'' refers to clause 6 which deals with payment of car maintenance allowances and other running costs.

The respondent has not been able to point to any right or entitlement to the car. The applicant is entitled to the return of its vehicle. The respondent D therefore has no basis to continue holding onto the vehicle.

In the result it is ordered as follows:

1. That the respondent be and is hereby ordered, within 24 hours of the grant of this order (or of service of this order on him) to deliver the applicant's motor vehicle, to wit, a Mercedes Benz registration number ABP 7891, E to the applicant at its premises, at 20647 Masanga Road, Chitungwiza.
2. That in the event of the respondent failing to comply with para 1 hereof, the Deputy Sheriff for Harare be and is hereby ordered, authorized and required, to seize the aforesaid motor vehicle from the respondent, or from whomsoever and wherever it be found, and to deliver same to the applicant at the aforesaid premises.

F 3. That in the execution of the provisions of para 2 above, the Deputy Sheriff be and is hereby authorised to enlist the services and/or assistance of the Zimbabwe Republic Police and/or any other service providers as he may deem necessary.

4. That the costs of this application, together with any costs attendant upon giving effect to this order, shall be paid by the respondent.

G*Muzangaza Mandaza & Tomana,* applicant's legal practitioners

Matsikidze & Mucheche, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/AIR ZAMBEZI (PVT) LTD & ORS v OAFC AVIATION EIGHTEEN LTD & ORS 2014 (1) ZLR 666 (H)

AIR ZAMBEZI (PVT) LTD & ORS v OAFC AVIATION EIGHTEEN LTD & ORS 2014 (1) ZLR 666 (H)

Citation	2014 (1) ZLR 666 (H)
Case No	Judgment No. HH-263-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	28 May 2014; *CAV*

Judgment 4 June 2014

Counsel *S Hashiti,* for the applicants
P Nyeperai, for the first & second respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Practice and procedure – provisional sentence – purpose of procedure – remedies open to defendant after provisional sentence has been granted – writ of execution issued – defendant not having satisfied judgment – not open to defendant to obtain stay of execution D

Headnote

Provisional sentence had been obtained against the applicants following judgments against them in a foreign court. Security *de restituendo* was furnished by the respondents, the amount of the security being fixed by consent. When writs of execution were issued against the applicants, the applicants E sought a stay of execution and an order that the Registrar should accept a guarantee issued by a bank (which was itself financially unstable) as security for the debt.

Held, that provisional sentence is a speedy remedy available to a party who is equipped with a document acknowledging indebtedness. It accords such party the opportunity to obtain payment of what is owed without the F unnecessary delay and expense of a trial. The procedure is not designed to disarm prospective defendants but it enables the plaintiff to receive prompt payment without having to wait for the final determination of the dispute between the parties. It is provided for in the rules of court and, while it may be true that other jurisdictions are moving away from it for one reason or the other, provisional sentence remains firmly recognised G in this country as a remedy available to a party with an unassailable case.

Held, further, that the remedies open to a defendant when provisional sentence has been granted are set out in r 28 of the High Court Rules. This provides that the defendant may, within one month after the attachment, or if he has satisfied the judgment without an attachment,

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Mathonsi J

A 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 immediately becomes a final judgment. By granting provisional sentence, the court would have recognised that the plaintiff was entitled to the judgment. The defendant is entitled to B demand security *de restituendo* from the plaintiff where he satisfies the judgment. The plaintiff is required to give security *de restituendo* if he wishes to issue a writ of execution against the defendant's property. The court, having granted that judgment, cannot be expected to contradict itself by granting an interdict staying execution of that judgment when C the defendant would have failed to satisfy the judgment.

Held, further, that it is not for a defendant who has not satisfied the judgment to say that the judgment should not be carried into execution and that the defendant should be allowed to defend the action when payment has not been made. If that were to be allowed, it would render nugatory the D entire remedy of provisional sentence. While r 28 allows a defendant whose property has been attached to enter appearance and defend the action, it does not prevent execution. The defendant can only be allowed to defend where he has satisfied the judgment on his own or the judgment would be satisfied by a sale of the property attached.

Case cited E

Chibwe v Fawcett Security Ops (Pvt) Ltd HH-235-13

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 28, 30, 31 and 241

Case information

F*S Hashiti,* for the applicants

P Nyeperai, for the first & second respondents

Judgment

Mathosi J: The applicants have approached this court on an urgent basis seeking the following relief:

G "TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms:

1. That the writs of execution issued by the fourth respondent under High Court case numbers HC10520/13 and HC10521/13 be and are hereby suspended H pending the final and definitive determination of the said matters.

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Mathonsi J

2. That the fourth respondent be and is hereby ordered to accept the bank A guarantee issued by Allied Bank in his favour as sufficient security in respect of High Court case numbers HC10520/13 and HC10521/13.
3. That the first, second and third applicants be and are hereby granted leave to defend to completion High Court case numbers HC10520/13 and HC10521/13, respectively, and that the notices of appearance to defend filed therein are regular. B
4. That the first and second respondents shall bear the costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant (*sic*)is granted the following relief:

1. That the third respondent or his lawfully appointed deputy be and is hereby C ordered to refrain from proceeding with the implementation of the writs of execution issued under High Court case numbers HC10520/13 and HC10521/13.
2. In particular, that the third respondent or his lawfully appointed deputy be and is hereby ordered to refrain from removing any of the first, second or third applicant's property which was attached in terms of the writs of D execution referred to in (1) above pending the return date of this matter.
3. That the first and second respondents should bear the costs of suit on an attorney and client scale."

The Supreme Court of Mauritius delivered judgement on 1 September 2011 in a matter in which the first and second respondents herein sued the applicants. It ordered them to pay the first and second respondents sums of E US$223 236.20 and US$182 052.21. Armed with the judgment, the first and second respondents approached this court in HC10520/13 and HC10520/13 for provisional sentence. The two summonses for provisional sentence were strongly contested by the applicants, who filed opposing affidavits and heads of argument. The matters were placed before this court, *per* Mafusire J, on F 5 March 2014, who, after hearing arguments, granted provisional sentence in both matters.

When no payment in settlement of the debts was forthcoming from the applicants, the first and second respondents approached the Registrar of this court, who has been cited herein as fourth respondent, in terms of r 30, as read with r 31, of the High Court of Zimbabwe Rules, 1971 seeking to give G security *de restituendo*. Rule 31 provides:

"The plaintiff shall give security *de restituendo* in the following cases:

(a) when he desires to issue a writ of execution against the defendant and before its issue;

(b) against payment by the defendant who demands security." H

2014 (1) ZLR p669

Mathonsi J

A I have stated that the applicants made no payment to satisfy the provisional sentences granted by the court. The approach for purposes of giving security *de restituendo* was therefore in pursuance of

a desire to issue writs of execution.

Acting in terms of the powers reposed in him by r 32, the Registrar fixed the security to be given by the first and second respondents. Although the B record does not show this, Mr *Nyeperai,* for the first and second respondents, submitted that the figures of security *de restituendo* were fixed by the Registrar, not in the exercise of the discretion given to him by r 32, but with the consent of the parties. The applicants must have satisfied themselves as to the appropriateness of the security before rendering their consent.

C The first and second respondents then issued writs of execution against the applicants' property and instructed the Sheriff, who is cited as third respondent in these proceedings, to attach property in execution. The Sheriff obliged and promptly did, although in a report that he submitted during the hearing he states:

> "I have gone through the applicant's founding affidavit and advise that I have D been sighted (*sic*) as the third respondent in my official capacity. The applicants' goods were attached by the Sheriff on 29 April 2014 and the removal of the goods was suppose(d) to have been effected on 5 May 2014.
>
> I have however stopped the removal of the goods and will not oppose the relief sought. I will abide by the decision of this Honourable Court."

The Sheriff does not state why removal was not done as scheduled.

E Be that as it may, the applicants must have been determined, not only to avoid divesting themselves of the value of the judgement but also to prevent execution. They "girded their loins", as William Shakespeare would say, first securing a bank guarantee from troubled Allied Bank on 13 May 2014 given in favour of the Registrar for the total sum of US$410 000. Apart from F it being given in favour of the Registrar instead of the judgement creditor, the guarantee is replete with conditions. What is more significant is that the bank will pay the Registrar if the applicants are unsuccessful in defending the action. The guarantee reads in part:

> "Preservations of Rights
>
> G v. The Guarantor hereby executes a bank guarantee in favour of the Registrar in the sum of US$410 000 being the sum total of the amounts provisionally granted in the plaintiff's favour against the defendants in the matters, inclusive of costs of execution.
>
> vi. The Guarantor hereby undertakes to pay the entire amount of US$410 000 to the Registrar in the event that the defendants are unsuccessful in their attempt H to defend the matters at trial;

> vii. The Guarantee is executed in favour of the Registrar who, if payment is made A to him in terms hereof, will receive payment on behalf of the plaintiffs for the amounts provisionally granted by the High Court in their favour;
>
> viii. The obligation of the Guarantor herein contained shall constitute and be continuing obligations, but shall cease to exist in the event that the defendants and plaintiffs reach a settlement which effectively disposes of the matter in the High Court. B
>
> ix. The Guarantor shall not be obliged either by the Registrar or by the plaintiffs to make payment in terms hereof before the final and definitive conclusion of the matters in the High Court.
>
> x. The Guarantor agrees that, so long as the defendants are unsuccessful in defending the matters in the High Court of Zimbabwe after the final and definitive determination of the same, payment shall be made to the Registrar who will C receive payment on behalf of the plaintiffs."

It is not clear why payment would have to be made to the Registrar and why it would be made "after the final and definitive determination" of the matters. What appears to be lost is that the guarantee is not for security *de restituendo* but should infact be settlement in satisfaction of provisional sentence. D

The first and second respondents did not accept the guarantee for a number of reasons, including that Allied Bank is so financially unstable that recently depositors were reported to have rioted and broken windows when they failed to access their deposits. In addition, the guarantee has not been authenticated, especially as the signatory to it is the son-in-law of the second applicant. In E any event, it is not payment.

Notwithstanding the foregoing, the applicants seek a stay of execution effectively to enable them to defend the action before any payment can be made. Provisional sentence is a speedy remedy available to a party who is equipped with a document acknowledging indebtedness. It accords such

party F the opportunity to obtain payment of what is owed without the unnecessary delay and expense of a trial: *Chibwe* v *Fawcett Security Operations (Pvt) Ltd* HH-235-13 at p 2.

The procedure of provisional sentence is not designed to disarm prospective defendants, but it enables the plaintiff to receive prompt payment without having to wait for the final determination of the dispute between the parties. G It is provided for in the rules of this court and, while it may be true that other jurisdictions are moving away from it for one reason or the other, provisional sentence remains firmly recognised in this country as a remedy available to a party with an unassailable case. It better be, because quite often in recent history this court has been inundated with so many cases H

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Mathonsi J

A of debtors doing everything in their power to frustrate just claims. It is an abuse of court process.

Mr *Nyeperai,* for the first and second respondents, raised four points *in limine,* namely that there is no proper application before the court in that the application does not comply with r 241; that the matter is not urgent; that there is no cause of action disclosed in the papers; and that the applicants B have come to court with dirty hands and therefore cannot obtain assistance.

I must mention that Mr *Hashiti*, who appeared for the applicants, applied to amend the application to bring it within the provisions of r 241, an application hotly contested by Mr *Nyeperai* on the basis that a fatally defective application is incapable of amendment.

C To my mind, it is not necessary to determine all the points taken *in limine* because it occurs to me that this matter resolves itself on those facts which are common cause. It is common cause that there exists a judgment of the Supreme Court of Mauritius directing the applicants to pay to the first and second respondents the amounts being pursued. That judgment has not D been contested and was used by the first and second respondents to obtain provisional sentences.

It is common cause that the provisional sentences have not been satisfied by the applicants, who believe they are entitled to defend the main action without settling the debt and have indeed entered appearance to defend, following the issuance of writs of execution and attachment. In my view this application E is the product of a regrettable misunderstanding of the rules of court.

The rights of a defendant when provisional sentence has been granted are set out in r 28 which provides:

> "A defendant against whom provisional sentence has been granted may –
>
> (a) within one month after the attachment made under a writ of execution issued F by virtue of such sentence, or
>
> (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 G time, the provisional sentence shall immediately thereafter become a final judgment of the court and the security given by the plaintiff shall *ipso facto* become null and void."

That rule recognises that the plaintiff is entitled to the enjoyment of the judgment in the form of payment in satisfaction of the debt. After all, this court would have considered the matter and satisfied itself that the plaintiff H is so entitled before granting provisional sentence. The defendant is entitled

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Mathonsi J

to demand security *de restituendo* from the plaintiff where he satisfies the A judgment. The plaintiff is still required to give security *de restituendo* if he wishes to issue a writ of execution against the defendant's property.

In my view, a writ is not issued for decorative purposes but to enable a plaintiff who has not received payment in satisfaction of the judgment to attach property in order to realise the value of the judgment. A court that has B granted that judgment cannot be expected to contradict itself by granting an interdict staying execution of that judgment when the defendant would have failed to satisfy the judgment.

It is not for a defendant who has not satisfied the judgment to say that the judgment should not be carried into execution, and that the defendant should be allowed to defend the action when payment has not been made. C If that were to be allowed, it would render nugatory the entire remedy of provisional sentence.

To my mind, while r 28 allows a defendant whose property has been attached to enter appearance and defend the action, it does not prevent execution. In fact, the defendant is allowed to defend because execution should take place in order to realise the value of a judgment that has not been satisfied. D In other words, the defendant can only be allowed to defend where he has satisfied the judgment on his own or the judgment would be satisfied by a sale of the property attached.

To that extent, the amount of industry put by the applicants in securing a guarantee for payment after the determination of the matter at a trial was E an excursion in purposeless activity. This entire application is a wonderful laboratory for futile intellectual energy, because a defendant simply has to satisfy the judgment for provisional sentence or suffer execution against property for the right to proceed to trial to accrue.

The bank guarantee that is relied upon does not advance the case in any way. For one thing, payment is conditional upon the unsuccessful defence of the F claim at the trial. There can be no such trial where no payment is made and yet the applicants want to stop the alternative remedy, that of execution. They cannot. More importantly, a bank guarantee is not payment, it is no satisfaction of the judgment at all, especially as it has been categorically rejected by the first and second respondents for valid reasons.

It is also remarkable that the applicants do not even begin to suggest a defence G that they intend to rely upon should the matter go to trial. Given that a stay of execution is discretionary upon the court, I cannot give the applicants an indulgence where it is apparent that they are playing football with the court, and in the process succeeding in abusing the process of the court. H

Mathonsi J

A I conclude therefore that there is no merit whatsoever in this application. It is accordingly dismissed with costs on a legal practitioner and client scale.

Dube, Manikai & Hwacha, applicants' legal practitioners

Costa & Madzonga, first and second respondents' legal practitioners

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Source:
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NZARA v TSANYAU & ORS 2014 (1) ZLR 674 (H)

Citation	2014 (1) ZLR 674 (H)
Case No	Judgment No. HH-303-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	4 June 2014
Judgment	4 June 2014

Counsel *W Bherebende,* for the applicant
Ms *S Nyathi,* for the first respondent
Second respondent in default

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Appeal – execution – leave to execute pending appeal – when may be granted – principles

Practice and procedure – execution – pending appeal – application for a stay of execution – when stay appropriate

Headnote

An appellant has an absolute right to appeal and to test the correctness of the decision of the lower court before he is called upon to satisfy the judgment appealed against. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal vesting in the appellant.

Where an application is made to execute despite the noting of an appeal, the court should determine what is just and equitable in all the circumstances, and in doing so, would normally have regard, *inter alia*, to the following factors:

(a) the potentiality of irreparable harm or prejudice being sustained by the appellant if leave to execute were to be granted or by the respondent if leave to execute were refused;

(b) the prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party; and

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Mathonsi J

(c) where there is the potentiality of irreparable harm or prejudice to both parties, the balance of hardship or convenience, as the case may be.

Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.

An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospect of success on appeal, especially where the whole object of the appeal is defeated if execution were to proceed.

Cases cited

Arches (Pvt) Ltd v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H)

Dabengwa & Anor v Minister of Home Affairs & Ors 1982 (1) ZLR 223 (H)

Marume v Gwarada & Ors HH-92-13

Old Mutual Life Assurance Co (Pvt) Ltd v Makgatho HH-39-07

Case information

W Bherebende, for the applicant

Ms *S Nyathi,* for the first respondent

Second respondent in default

Judgment

E**Mathonsi J**: The applicant seeks an order for stay of execution of a judgment granted by the magistrates court sitting at Mvuma in case no. GL 16/13, pending the hearing and determination of a review application he has launched in this court in HC 4191/14 wherein he protests that the magistrate's decision to allow the first respondent to execute pending appeal F is reviewable by reason of procedural irregularities and bias.

The applicant is the chairperson of a co-operative comprising of 4 members namely, himself, Calisto Tsanyau, Simpson Mangwanda and Tafirenyika Dzvarai, which was engaged in the business of fattening cattle for sale. He was sued by the other members of the co-operative for delivery of five head of cattle or their value of $5 375 in the magistrates court of Mvuma. He G contested the claim and says that during the trial the magistrate denied him an opportunity to call a witness because "she had too many cases to handle" after which the matter was decided against him.

The applicant noted an appeal to this court against the decision of the magistrates court but, not to be outdone, the first respondent made an H application for leave to execute pending appeal. The magistrate granted

Mathonsi J

leave on 8 May 2014. Unhappy with that outcome, especially cognisant of A the procedural improprieties which occurred during the trial and what he deemed to be the bias of the magistrate against him, the applicant brought an application for review in the court.

Unperturbed and determined to reach the land of milk and honey, the first respondent has issued a writ of execution against the applicant's property and B instructed the messenger of court to proceed against the applicant's property. Sensing danger and impoverishment, the applicant has now approached this court for a stay of execution aforesaid.

It is not clear what the trial magistrate considered when she granted leave to execute pending appeal. What the court has regards to in determining such an application was summarised by Makarau JP (as she then was) in C*Old Mutual Life Assurance Company (Pvt) Ltd* v *Makgatho* HH-39-07 (unreported) as:

> "The position as stated in the decided cases then appears to me to be as follows:
>
> 1. An appellant has an absolute right to appeal and to test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
> 2. Execution of the judgment of the lower court before the determination of the D appeal will negate the absolute right that the appellant has and is generally not permissible.
> 3. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment E notwithstanding the absolute right to appeal vesting in the appellant.
> 4. In exercising its discretion, the court has regard to the considerations suggested by Corbett JA in *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.
> 5. Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the F court may exercise its discretion against the appellant's absolute right to appeal.
> 6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospect of success on appeal, especially where the whole object of the appeal is defeated if execution were to proceed. (See *Wood NO* v *Edwards & Anor* 1966 RLR 335)." G

See also *Dabengwa & Anor* v *Minister of Home Affairs* 1982 (1) ZLR 223 (H) at 225; *Arches (Pvt) Ltd* v *Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H) at 155; *Marume* v *Gwarada & Ors* HH-92-13.

The applicant has raised very pertinent issues concerning the conduct of the trial which require interrogation. He has also questioned how he could be H

Mathonsi J

A ordered to pay to the first respondent the whole amount, when he was also a member of the co-operative, entitled to a share of the proceeds from the sale of the cattle. In my view, it cannot be said that his appeal is frivolous or vexatious, nor that he has launched the appeal to harass the first respondent.

Now that an application challenging the propriety of the decision granting B leave to execute pending appeal has been made, it cannot be said that such application does not deserve consideration, especially against the background of an appeal that appears to deserve its day in court. The applicant has an absolute right of appeal and I am not satisfied that the trial magistrate property exercised her discretion in effectively denying him the right of appeal by authorising execution.

C Ms *Nyathi,* for the first respondent, submitted that the matter is not urgent at all, this being a self-created urgency because the applicant delayed in approaching this court by about 18 days. To my mind that argument is not sustainable at all because there was no inordinate delay in the approach to the court. I, therefore, dismiss that argument.

On the merits of the matter, Ms *Nyathi* did not advance any basis for denying D the applicant his absolute right of appeal, content to say that the trial magistrate was correct in arriving at that decision because the other members of the co-operative had been prejudiced.

Considering that an interim order for a stay of execution presents the applicant with a window period to pursue a remedy available to him in this court, I E am of the view that he should be allowed that opportunity. It has not been shown that the balance of convenience favours the first respondent. Neither has it been suggested that all the considerations, set out in the authorities on applications for leave, were indeed taken into account given that the magistrate only gave an order with no reasons.

F In the circumstances, I am satisfied that the applicant has made out a case for the relief sought. Accordingly, I grant the provisional order in terms of the amended draft order.

Bherebende Law Chambers, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/WILLIAMS & ORS v CO-MINISTERS OF HOME AFFAIRS & ORS 2014 (1) ZLR 678 (CC)

WILLIAMS & ORS v CO-MINISTERS OF HOME AFFAIRS & ORS 2014 (1) ZLR 678 (CC)

Citation	2014 (1) ZLR 678 (CC)
Case No	Judgment No. CC-4-14
Court	Constitutional Court, Harare
Judge	Ziyambi JA, Garwe JA, Makarau JA, Gowora JA and Omerjee AJA
Heard	14 June 2012; *CAV*
Judgment	5 June 2014
Counsel	*L Uriri*, for the appellants *R Goba*, for the respondents

Case Type Constitutional application

Annotations No case annotations to date

Flynote

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 15 (right not to be subjected to inhuman or degrading punishment or treatment) – arrested being women being made to remove shoes and brassieres before being detained in overcrowded cells in conditions not D *complying with elementary norms of human decency or internationally accepted minimum standards – such treatment a breach of rights set out in s 15 – s 23 (prohibition against discrimination on grounds of gender) – women needing two articles of underwear – requirement to remove brassieres discriminatory* E

Headnote

The applicants, all women, were members of an organisation called Women of Zimbabwe Arise, a non-profit organisation seeking to advance the rights of women in Zimbabwe. The applicants were arrested during the course of a demonstration against what they alleged to be the appalling service provision from the Zimbabwe Electricity Supply Authority and F detained at the Harare Central Police Station for four nights.

On arrival, they were made to remove their brassières and shoes and to place them in a bag with their other belongings. The bag was dirty, probably by reason of use by other detainees. They were made to walk barefoot to and in the cell. There were sixteen detainees, including the G applicants, in the cell which was meant to accommodate six people. Only three blankets were provided for use by the sixteen occupants of the cell. The applicants were provided with no food or drinking water, no toilet paper or soap. The occupants of the cell were unable to flush the toilet after use, having to depend on the pleasure of the police to flush it from outside. H

A In an application alleging breaches of their rights under the 1980 Constitution (which was then in force), they alleged that they were treated in a discriminatory manner in that firstly, they were subjected to sanitary conditions, restrictions or disabilities that peculiarly isolated them and amounted to inhuman and degrading treatment. The fact that they were made to remove their brassières was not only inhuman and degrading B but discriminatory. The respondents argued that a woman's brassière is not "necessary wearing apparel" as contemplated by s 61 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. They said that in some places women go about bare-breasted. The applicants, averred, on the contrary, that a brassière was, for them, a necessary piece of intimate wearing apparel.

C*Held,* that the blanket application of the requirement that each detainee is allowed one layer of clothing and one undergarment ignored the fact that the applicants, being women, had, by reason of their sex, personal needs which differed from those of men. This resulted in discrimination against the applicants, who by virtue of their biological make-up, had need of two undergarments.

D*Held,* that detention in the conditions in which the applicants were detained constituted a gross violation of the applicants' right not to be subjected to inhuman and degrading treatment. The removal of their brassières was not only discriminatory, but constituted inhuman and degrading treatment. Detention ought not reduce the detainee to humiliation and E indignity. Every detainee is entitled to be treated with some modicum of decency and respect. The order to the applicants to remove their brassières caused them great humiliation. The treatment meted out to the applicants could not be said to be reasonably necessary to prevent their escape, which is the only derogation allowed by s 15 of the right F enshrined therein. Further, to require the applicants to walk barefoot in such unsanitary conditions was also to subject them to inhuman and degrading treatment.

Cases referred to

G*Kachingwe & Ors* v *Min of Home Affairs & Ors* 2005 (2) ZLR 12 (S)

Mukoko v *A-G* 2012 (1) ZLR 321 (S)

S v *Ncube & Ors* 1987 (2) ZLR 246 (S)

Legislation considered

Constitution of Zimbabwe 1980, ss 15(1)(2), 23 (1)(2)

H Criminal Procedure and Evidence Act [*Chapter 9:07*], s 41(2)

Ziyambi JA

Case information

L Uriri, for the appellants A

R Goba, for the respondents

Judgment

Ziyambi ?JA: This application is brought in terms of s 24(1) of the Constitution of Zimbabwe 1980 which provides as follows:

> **"24 Enforcement of protective provisions**B
>
> (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress". C

The applicants, who are members of an organisation called Women of Zimbabwe Arise (WOZA), a non-profit organisation which seeks to advance the rights of women in Zimbabwe, allege that their various rights enshrined in the Declaration of Rights as set out below were violated by the respondents.

The background D

The applicants were arrested during the course of a demonstration, on 15 April 2010, against what they alleged to be the appalling service provision from the Zimbabwe Electricity Supply Authority (Zesa), and detained at the Harare Central Police Station. The first applicant is the Director of WOZA. E

It was alleged by the first applicant that on arrival at the police station, she was ordered by police officers at the Law and Order Section to remove her shoes, jacket and brassière, causing her to remain with a single top and bottom. She felt violated by being forced to remove such an intimate piece of apparel and deposit it with the police. She was shocked to be handed a filthy bag in which to place such intimate wearing apparel as well as her F outer clothing and personal belongings and this made the whole exercise "all the more dehumanising".

She was force-marched, barefoot on a dirty floor, to the holding cells where her senses were assaulted by the choking smell of human excreta and flowing urine of varying colours. The holding cells were "full to overflowing" with G human excreta and the built-in beds were also covered with the same. The lights did not work and the entire atmosphere was damp and dark without any fresh air. She spent the night in one of the corridors huddled up together with the second, third and fourth applicants even though urine flowed there as well. H

Ziyambi JA

A During the night, she discovered that the toilet was within the cell. When she needed to relieve herself she had to wade through a pool of urine. The toilets had no running water and were full of human excreta. She later discovered that this was because the toilets are flushed from outside and are thus flushed at the pleasure of the police officers who did not do so often, judging by the fact that excreta from the toilet was flowing into the cells.

B There was no toilet paper and she was refused permission to carry her own. The toilet bowl is not partitioned from the rest of the cell and it was not possible to relieve oneself in privacy. She had to use the toilet in full view of the other occupants of the cell.

No sanitary provisions were made for menstruating women, such as washing C and disposal facilities and provision of sanitary towels.

During the night, she requested blankets for warmth and was given three blankets, which reeked of urine, for use by the sixteen detainees in the cell.

There was no shower, no bathing or ablution facilities and no drinking water was available. She had to depend on the kindness of those who visited her D for that.

Although certain cleaners came to mop the floor, they confined themselves to cleaning the corridors and the cells were not cleaned. She was given no food by the police and had to rely on the food brought to her by friends and relatives. However, that was unpalatable as she had to eat it in the corridor E of the same cell which was over flowing with excreta. She spent five nights in the cell under these conditions and her complaints to the police fell on deaf ears.

The other three applicants associated themselves with these averments. In addition, the second applicant alleged that her mobile phone, which she was made to surrender to the police at the time of her detention by them, had F been tampered with.

The applicants claimed that in view of the above, their constitutional right to protection from torture or to inhuman and degrading treatment or punishment as enshrined in s 15(1) of the Constitution of Zimbabwe was violated by the respondents.

G They alleged also that the failure to make provision for the peculiar needs of women, for example, sanitary facilities as set out above, amounted to discrimination against women in violation of s 23 of the Constitution.

In essence, the applicants aver that the circumstances in which they were detained, as narrated above, deprived them of protection of the law guaranteed H in s 18 of the Constitution, constituted inhuman and degrading treatment

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Ziyambi JA

prohibited under s 15 of the Constitution, and amounted to a violation A of their right enshrined in s 23 of the Constitution to be protected from discrimination on the basis of sex. They sought declaraturs to the effect that their constitutional rights enshrined in those sections of the Constitution had been violated, as well as certain consequential relief.

The respondents opposed the application and relied on the affidavit of the B second respondent. They denied that the conditions in the cells were as deposed to by the applicants. They averred that it is procedural for detainees to be made to remove some of their apparel. This is standard procedure and is provided for by s 41 of the Criminal Procedure and Evidence Act [*Chapter 9:01*] ("the Act") as read with Police Standing Orders Volume 1. Arrested persons, they averred, are searched by the arresting detail in strict C compliance with the terms of the Act and particularly s 41(4) of the Act with reference to women, and all money and articles connected with an offence as well as all things which a prisoner could use to cause harm to himself or others or which could be used to effect his escape are collected from the arrested persons. They denied that the applicants were ordered to remove their "undergarments" because "the law does not allow it" but did not deny D that they were made to remove their brassières. Whatever was meant to be conveyed by the term "undergarments", the respondents' attitude, as expressed in their heads of argument as well as in oral argument before us, that brassières are not necessary wearing material within the meaning of s 41 of the Act would appear to support the applicants' averment that they E were made to remove their brassières. Indeed the respondents in their heads of argument submit:

> "The applicants contend that they were made to remove their undergarments and in their founding affidavit the undergarments are specified as brassière. They argue that it is necessary wearing apparel. Although the brassières are mentioned in their founding affidavits, in their heads of argument they simply F use the word undergarments, which ordinarily would include panties. However since the applicants' case is founded on their founding affidavits, the *respondents submit that what the applicants were made to remove were their brassières*" (my emphasis).

We therefore resolve this apparent dispute of fact in favour of the applicants.

It was not denied that the applicants were made to remove their shoes as G this was "standard procedure".

In response to the allegation that the light in the cell was not functioning, they averred that the lighting system at the police station is fully functional. While the location of the toilet within the holding cell was admitted, it was denied that the applicants had to wade through urine. The reason given for the H

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A denial was that, if that had happened, the applicants would have contracted a disease of some sort. They maintained that there is running water at the police station and denied that there was human excreta flowing into the holding cell from the toilet.

They averred, further, that it is standard procedure that a police detail is placed on guard duty at the cells to deal with detained persons' requests. B Where no member is placed on guard duty all suspects are to be visited at least every half hour. Such visits are recorded in the charge office diary or report book maintained for this purpose. However neither the diary nor the report book was attached to the opposing affidavit.

They maintained that, although no toilet paper is kept in the cells, it is issued C upon request. While it was admitted that no sanitary provisions are made for menstruating women, the women are permitted to bring their sanitary requirements. They added that these concerns are being addressed by a committee set up by Cabinet to look into the conditions of police and prison cells, which committee is expected to make recommendations on how best to improve the detention conditions of suspects and convicted persons.

D It was denied that the blankets given to the applicants were dirty although, by virtue of the number of detainees in the cells, they could have been inadequate.

According to police standards, so they averred, prisoners are to be supplied with good drinking water and sufficient wholesome food. The inadequacy of these provisions is also one of the matters being looked into by the committee.

E It was denied that the cells were unclean as deposed to by the applicants because, so it was averred, general hands scrub the police cells daily with detergent and disinfectant during the daily prisoners' exercise period of thirty minutes and the Officer in charge arranges for daily inspection of the cells. The court was urged to inspect the cells in order to ascertain the actual conditions prevailing thereat.

F An inspection of three cells was undertaken at the Harare Central Police Station, the applicants being unsure of the actual cell in which they were detained. It is common cause that all the cells are structurally standard.

Of the cells inspected, two were located on the second floor and one on the first floor. The structural details differ little from that deposed to in the G applicants' papers. There were six built-in concrete beds in bunk form in each of the cells. In the cell on the first floor there were six folded blankets lying on one of the built-in concrete beds. The one shown to the court was torn and frayed but appeared to be clean. There was a toilet in one corner of each cell in the form of a raised platform in the centre of which was an open H hole. There was a wall approximately one metre high separating the toilet

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from the rest of the cell but there was no door. There was a small window A about one metre from the ceiling which let in some measure of light. There was a fluorescent light in the ceiling which, though dim, was functioning. Directly above each toilet was a tap of running water which emptied into the toilet hole. There was no toilet paper, no soap, no wash basin, no bathing facilities and no drinking water. A detainee would have to drink from the tap right above the open toilet hole. The flushing mechanism for the toilet B was located outside the cell and the toilets were flushed at the convenience of the police.

In addition to the court's observations above, the established facts were that the applicants, women, were made to remove their brassières and shoes and to place them in a bag with their other

belongings. The court was shown a C canvas bag of the type used by the applicants and noted that it, as well as the others observed to be hanging nearby, was dirty, probably by reason of use by other detainees. Established also was the fact that the applicants were made to walk barefoot to and in the cell. There were sixteen detainees including the applicants in the cell which was meant to accommodate six people. Only three blankets were provided for use by the sixteen occupants of the D cell. The applicants were provided with no food or drinking water, no toilet paper or soap. The occupants of the cell were unable to flush the toilet after use, having to depend on the pleasure of the police to flush it from outside.

The complaint against discrimination

Section 23(1) of the Constitution provides: E

> **"23 Protection from discrimination on the grounds of race, etc**
>
> (1) Subject to the provisions of this section –
>
> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
>
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any F public office or any public authority.
>
> (2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability are prejudiced – G
>
> (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
>
> (b) by the according to persons of another such

The applicants allege that they were treated in a discriminatory manner in that firstly, they were subjected to sanitary conditions, restrictions or disabilities H

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A that peculiarly isolate them and amount to inhuman and degrading treatment. In that connection it was submitted that:

> "treatment which results in some partiality or inequality of treatment is the popular meaning of the word 'discrimination' and is the meaning which should be adopted in this case for 'It is the duty of the court to hold the scales evenly between different classes of the community and to declare invalid practice, B which...results in partial and unequal treatment to a substantial degree between different sectors of the community.'"

Secondly, they were made to remove their brassières, which was not only inhuman and degrading but discriminatory. I will revert later in this judgment to the question of inhuman and degrading treatment.

C **The failure to provide sanitary provisions for menstruating women**

The applicants were alive to the fact that on them rests the onus of establishing that they were treated in a discriminatory manner. Mr *Uriri* submitted that the discharge of the onus which lay on the applicants had been facilitated by the admission by the second respondent that the police do not provide sanitary provisions for menstruating women. That is not so.

D While the idea would appear to be abhorrent that sanitary provisions are not afforded to women in custody, the applicants do not allege that they were menstruating and were refused sanitary provisions by the police. They simply allege that no such provisions are made for women generally. But s 24 (1) of the Constitution does not allow the applicants to be torchbearers E for women in general. The applicants have to show that there has been a violation of the declaration of rights in relation to themselves. This, they have failed to do and accordingly no violation of the applicants' rights under this head has been established.

The order to remove their brassières

F The applicants further contend that the order to remove their brassières was discriminatory. The respondents submit that in requiring them to remove their brassières, they were acting in terms of s 41 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which states as follows:

> "(1) ...
>
> (2) A peace officer or other person arresting any person under this Part may G search that person, and shall place in safe custody all articles, *other than necessary wearing apparel, found on him"* (my emphasis).

They contend that a woman's brassière is not "necessary wearing apparel" as contemplated by the Act. They aver that in some places women go about bare breasted. The applicants, who are all women, aver, on the contrary, H that a brassière is, for them, a necessary piece of intimate wearing apparel.

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I am unable to accept the contention by the respondents that brassières A do not fall within the class of necessary wearing apparel for women. It was submitted on behalf of the applicants that to oblige them to remove such undergarments was to subject them to discriminatory treatment. The submission is not without merit. It seems to me that the blanket application of the requirement that each detainee is allowed one layer of clothing and one undergarment ignores the fact that the applicants being women, have, B by reason of their sex, personal needs which differ from that of men and has resulted in discrimination against the applicants, who by virtue of their biological make-up, have need of two undergarments. The applicants have in our view established that their right enshrined in s 23 of the Constitution to protection against discrimination has been violated.

The right to be protected against torture or cruel and inhuman C punishment or treatment

Section 15(1) of the Constitution of Zimbabwe provides:

> **"15 Protection from inhuman treatment**
>
> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment. D
>
> (2) No treatment reasonably justifiable in the circumstances of the case to prevent the escape from custody of a person who has been lawfully detained shall be held to be in contravention of subsection (1) on the ground that it is degrading."

Section 15, therefore, proscribes torture, inhuman punishment, degrading E punishment, inhuman treatment, degrading treatment. See *S* v *Ncube & Ors* 1987 (2) ZLR 246 (S) at 264C-H.

Many decisions of this court have dealt with the issue of what constitutes inhuman or degrading treatment. See for example *Ncube*'s case *supra*, *Kachingwe & Ors* v *Min of Home Affairs & Ors* 2005 (2) ZLR 12 (S) and *Mukoko* v *A-G* 2012 (2) ZLR 11 (S). F

In the *Kachingwe* case, this court (*per* Chidyausiku CJ) declared that the applicants were subjected to inhuman and degrading treatment. It found that the holding cells in which the applicants had been detained overnight at Highlands police station and Matapi police station, respectively, fell short of the minimum standards of decency. The learned Chief Justice said at 32: G

> "I have no doubt, in my mind, that the holding cell that the court inspected at Highlands police station, the same holding cell in which he Kachingwe was detained overnight, does not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, the failure:
>
> (a) to screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private; H

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> A (b) to provide a toilet flushing mechanism from within the cell;
>
> (c) to provide toilet paper;
>
> (d) to provide a wash-basin; and
>
> (e) to provide a sitting platform or bench;
>
> constitute inhuman and degrading treatment prohibited in terms of s 15(1) of the Constitution. The evidence clearly establishes that Chibebe was subjected B to similar treatment."

The remarks quoted above apply equally to the cells at Harare Central Police Station which were seen by the court. That there was a sitting platform surrounding the toilet hole and a one metre wall separating the toilet from the rest of the cell is of little significance because there was no door and the C one metre wall is inadequate to provide privacy to the users of the toilet.

Thus the conditions experienced by the applicants in the *Kachingwe* case are little or no different from those experienced by the applicants in the instant case. In addition, the applicants shared the cell, which was made to accommodate six people, with thirteen others. It was not denied that no D drinking water was available to the applicants. However, even assuming that the tap in the cell was meant to be the source of drinking water for the occupants of the cell, the implications arising from the fact that the tap was positioned directly above, and emptied into, the toilet which could only be flushed from without, are too ghastly to contemplate.

E The applicants in *Kachingwe's* case were detained for one night. The position in respect of the applicants is aggravating in that they were detained in such degrading conditions for four days and forced to rely on relatives for food and drinking water. Detention for four or five nights in the conditions described by the applicants in my view constitutes a gross violation of the applicants' right not to be subjected to inhuman and degrading treatment. Accordingly, F I find that the applicants were detained in conditions that constitute inhuman and degrading treatment in violation of their right enshrined in s 15 of the Constitution.

Removal of brassieres

G The applicants averred that their brassières are items of intimate underclothing and being forced to remove them was inhuman and degrading. The respondents could only submit in reply that in some cultures women go about bare breasted. However, it would seem to me that the applicants are in a better position to comment on this issue. They have said how humiliated they felt not only by being made to remove what were personal underclothing but H also by being forced to place them in a dirty bag.

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The question then is posed: Are these measures reasonably necessary to A prevent the applicants' escape from custody? Surely not. Further, such treatment cannot be justified by the reasoning that the applicants might use these items of clothing to harm themselves – for then any item of clothing can be turned into a weapon or an instrument for self-affliction or suicide.

Detention ought not to reduce the detainee to humiliation and indignity. B Every detainee is entitled to be treated with some modicum of decency and respect. The order to the applicants to remove their brassieres caused them great humiliation. Such treatment meted out to the applicants cannot be said to be reasonably necessary to prevent their escape which is the only derogation allowed by s 15 of the right enshrined therein. Accordingly, the applicants have established, in this regard also, that their right enshrined in C s 15 not to be subjected to cruel and inhuman and degrading treatment has been violated by the respondents.

Removal of shoes

The applicants averred that they were made to walk barefoot on dirty floors. D The respondents deny that the floors were dirty and based their denial on the fact that Standing Orders require the floors to be cleaned. However, the respondent admits that there were sixteen persons, including the applicants, detained in one cell which is meant for six people. It is admitted also that the toilet in the cell is only flushed at the pleasure of the police from outside. The cells are cleaned only once a day during the detained persons daily E exercise period of 30 minutes. In these circumstances, the probabilities are that the floor of the cell did become wet with human waste as deposed to by the applicants. To require the applicants to walk barefoot in such unsanitary conditions is to subject them, in my view, to inhuman and degrading treatment.

The order sought F

The applicants premised their argument on the fact that the conditions experienced in the Police cells amounted to a violation of their right to the protection of the law enshrined in s 18. Having

found the treatment experienced by the applicants to amount to a violation of ss 15 and 23 we do not consider it appropriate or necessary to grant the declaratur sought G in this regard.

Seizure of cellphones

The papers establish that personal possessions of detainees are taken on detention and stored pending their retrieval on the release of the detainee. No breach of an enshrined right has been shown in this regard. Suffice it to H

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A say that a claim for any damages suffered as a result of such seizure may be made in the appropriate forum.

Conclusion

The applicants have established that their rights enshrined in ss 15 and 23 of the former Constitution of Zimbabwe were violated by the respondents. B We consider the following order to be appropriate.

Order

It is declared:

1. That the applicants' rights in terms of s 23 of the Constitution of Zimbabwe not to be discriminated against, have been violated.

C 2. The applicants' rights, in terms of s 15 of the Constitution, to protection from inhuman and degrading treatment have been violated.

Consequently it is ordered that:

3. The first and second respondents are directed to take all necessary steps and measures within their power to ensure that at Harare Central Police D Station:
   (a) the holding cells shall have clean and salubrious flushing toilets with toilet paper and a washing bowl.
   (b) the flushing toilets shall be cordoned off from the main cell to ensure privacy.
   E (c) a good standard of hygiene shall be maintained in the holding cells.
   (d) every person detained in police custody overnight shall be furnished with a clean mattress and adequate blankets.
   (e) adequate bathing facilities shall be provided for all persons detained in custody overnight.
   F (f) every person detained shall have access at all times to wholesome drinking water from a source other than the tap above the toilet.
   (g) women detained in police custody shall be allowed to keep their undergarments including brassières, and to wear suitable footwear.
4. There shall be no order as to costs.

G GARWE JA, MAKARAU JA, GOWORA JA and OMERJEE AJA concurred

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners

Attorney General's Office, respondents' legal practitioners

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HALE v HALE 2014 (1) ZLR 690 (H)

Citation	2014 (1) ZLR 690 (H)
Case No	Judgment No. HH-271-14
Court	High Court, Harare
Judge	Tsanga J
Heard	28 March 2014; *CAV*
Judgment	5 June 2014
Counsel	*D Ochieng,* for the applicant *I Mureriwa,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Constitutional law – Constitution of Zimbabwe 2013 – Declaration of Rights C *– rights of children – (s 81) – right to be heard – issues of custody and what is in best interests of child – child's right to be heard on such matters*

Family law – child – custody – parents separated pending divorce – to whom custody should be granted – may be granted to father or other D *appropriate person if in the best interests of the child – whether courts should necessarily favour mother being given custody – child's best interests – right of child to be heard – right to be part of decisions affecting them*

Headnote

In terms s 5(1) of the Guardianship of Minors Act [*Chapter 5:08*], the applicant E initially had custody of the two minor children from her marriage to the respondent, pending divorce, since the parties were living separately. Additionally, she had full custody over her oldest child, born from a prior union. However, as a result of her problems of addiction that necessitated a period of treatment at a rehabilitation clinic, the respondent stepped in as F the custodial parent. Upon the applicant's return from her rehabilitation, she insisted on resuming custody on learning that the respondent had launched an application for full custody. The respondent's application for custody of all three children was on the strength of a negative letter from the addiction counsellor. He obtained an order of custody of the G children through an order of the juvenile court, the applicant being in default. Subsequently, the parties signed an agreement, which recognised the applicant's rights as custodian. The respondent, though admitting having signed the document, claimed he did so out of desperation. It was when the applicant proposed to move all the children, from the schools they were attending in or near Harare to one near the town she resided H

A in, that trouble flared again. The applicant sought an order compelling the respondent to place the children in her sole custody and to allow the children to attend the school near her home. It was argued that the oldest child could only be removed from her mother's custody where there was harm or danger to her welfare. It is not for the applicant to show grounds that she be awarded custody but for the respondent to B show grounds for her to be refused such custody.

Held, that under s 5(1) of the Guardianship of Minors Act, the mother would normally have custody when parents commence living apart, but custody may be awarded to the father if it is shown that it is detrimental to the interests of the minors for them to be in her custody. This is what C

happened *in casu*. Under s 4(1)(b) of the Act, the High Court may, on application of either of the estranged parents of a minor, make an order granting one of them sole custody of the minor.

Despite the fairly common occurrence of children being looked after persons other than the biological parents, our legislature has still not seen fit to extend parental rights to *de facto* or psychological parents as in this D case. Whilst the legal relationship between the respondent and the eldest child excluded him as parent, it would be very pedantic to ignore the circumstances that triggered the application for custody of all three children into respondent's care, as what motivated the application for modification of custody was the fear of harm and neglect of the children E in light of the experience that had led to the applicant's rehabilitation, stimulated by the rather grim prognosis given by her counsellor.

Held, further, that protection of children from harm or neglect is a constitutional guarantee: s 81(e) of the Constitution. It is also expressed in legislation such as s 7 of the Children's Act [*Chapter 5:06*]. This was not a case of a stranger seeking to impose himself as custodian inclusive of one of F the children who is not his. There was a parent-like relationship with the child, who had been living with the respondent since she was three years and eight months. That a parental bond existed between him and the child was not disputed. The custody order was issued on the basis of the best interest of the child to be protected from potential neglect. It would have been undesirable to try and separate the children, who are G siblings. It was even more important not to add any further stress to the children's lives by introducing a "yours and ours" approach.

Held, further, that with regard to the applicant's averment that it was necessary for her to play her maternal role, given the children's tender ages, while it remains the reality that women still find themselves saddled with the H child caring and roles, child rearing is no longer seen as a naturally

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exclusive domain for women only. Indeed our Constitution espouses A equality and non-discrimination as the guiding standard in parental roles. Breaking down stereotypes about gendered roles is also what State parties undertake to work towards in terms of art 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which Zimbabwe is a party. In more recent cases, the value systems and societal beliefs underpinning "maternal preference" or "tender B years" principle have been challenged and the courts have emphasised that parenting is a gender neutral function and that the assumption that the mother is necessarily in a better position to care for a child than the father belongs to a past era. In determining what custody arrangement will best serve the children's interest in, a court is not looking for the C "perfect parent", but for the least detrimental available alternative for safe guarding the child's growth and development. *In casu* the court could not make a determination on the applicant's suitability or otherwise on all the pertinent matters raised, outside of a professional report on her recovery.

Held, further, that the issue regarding the children's schooling could not D be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who were already at the boarding school in question. A particularly noteworthy aspect of the new Constitution is that it grants both parents and children rights. Parents, for instance, can expect in terms of s 25 that the State and all its institutions E will protect and foster the institution of the family. This provision can be said to protect parents in the upbringing of children within the family context. They can also expect the State to take measures to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution in terms of s 26(b). For women in particular, s 80(2) guarantees women the same rights as men regarding custody and F guardianship, although an Act of Parliament may regulate the exercise of those rights. The right to privacy is guaranteed through s 57. Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents, as in this case, are not in agreement as to what is G best for the child. Constitutionally, as of right, children are no longer at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions. This is provided by s 81(1)(a), which effectively incorporates in our domestic setting the spirit of art 12 of the UN Convention the Rights of the Child. That article advances this notion of their participation and inclusion. H

A*Held*, further, that the best interest principle which has also been the criterion used by our courts in matters concerning children now not only finds constitutional expression but also exists amidst certain rights given to children by the Constitution. Thus the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution, is now also better placed to take its B specific character and meaning from the rights that are accorded children by our Constitution. In this case, it is their best interests that the children be heard, especially the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain in order for the court to make an informed decision that takes into account C their experiences with boarding school.

Held, further, that the decision of the children's court was still extant. There had been no appeal, and the "agreement" did not amount to an abandonment by the respondent of the judgment in his favour. The applicant had applied for rescission of the default judgment. The magistrate ordered a dismissal of the application for rescission and for stay of execution. The D applicant's noting of an appeal against that dismissal did not suspend execution of the judgment.

Cases referred to

Goba v *Muradzikwa* 1992 (1) ZLR 212 (S)

E*Hardy* v *Skaramangas* 2000 (1) ZLR 196 (H)

Lothian v *Valentine* 2007 (2) ZLR 168 (H)

McCall v *McCall* 1994 (3) SA 201 (C)

Mutetwa v *Mutetwa* 1993 (1) ZLR 176 (H)

P v *P* 2007 (5) SA 94 (SCA)

Ritenote Printers (Pvt) Ltd v *A Adams and Co & Anor* 2011 (1) ZLR 521 (S) F

Sub Saharan Mgmt Consultants (Pvt Ltd) v *Sirituta Invstms (Pvt) Ltd & Ors* 2012 (1) ZLR 462 (H)

van der Linde v *van der Linde* 1996 (3) SA 509 (O)

Legislation considered

G Zimbabwean legislation

Children's Act [*Chapter 5:06*], s 7

Constitution of Zimbabwe 2013, ss 25, 26, 57, 80(2), 81(1) & (3)

Guardianship of Minors Act [*Chapter 5:08*], s 5(1), (3) & (7), (10)

Magistrates Court Act [*Chapter 7:10*], ss 39, 40

H Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 31 r 6

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International instruments A

Convention on the Elimination of All Forms of Discrimination against Women, art 5

UN Convention on the Rights of the Child, art 12

Case information

D Ochieng, for the applicant B

I Mureriwa, for the respondent

Judgment

Tsanga J: Custody involving three minor currently aged 11, 6 and 4 years informs the dispute that surrounds this application. The dispute centres on custody temporarily lost by the applicant (wife) through a court order granting the respondent (husband) this custody. Custody was regained again by the C applicant as a result of a now disputed privately brokered interim access agreement

(hereinafter referred to as "the Agreement"), subsequently signed by the parties that gave the applicant custody. The applicant argues that by signing the Agreement, the respondent effectively abandoned the court order. She also argues that withdrawal of the order was done within the ambit of the Magistrates Court (Civil) Rules. Stemming from her resumption of custody, D what she seeks is an order to shift the children to a school in proximity to where she resides. Two of the children attend boarding school at Lilfordia in Nyabira while the youngest attends a nursery school in Harare. The applicant wishes all children to attend a primary school in Chinhoyi where she lives. It caters for pre-school.

The respondent opposes the application on the grounds that the court order E granting him custody remains extant. He also says the Agreement was obtained under undue pressure brought to bear upon him. He further argues that as the order that granted him custody has been appealed against by the applicant, this application cannot be brought pending this appeal. It is the status of that court order as contrasted with the Agreement that this court has F to decide on in order to determine whether applicant's quest is legitimately before this court and additionally whether given the circumstances under which the applicant lost custody to the respondent, the full merits can be determined without the setting aside of that court order.

The fuller context of the above issues is as follows. The applicant initially G had custody of the two minor children from the marriage pending divorce in terms s 5(1) of the Guardianship of Minors Act [*Chapter 5:08*] since the parties were living separately from October 2010. Additionally, she had full custody over the oldest child born from a prior union. As such, all three children were in her custody. However, as a result of the applicant's history of substance and alcohol abuse that necessitated a period of treatment at a H

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A rehabilitation clinic in South Africa in August 2011, the respondent stepped in as the custodial parent. The parties are in agreement that definitely during this period leading to the applicant's rehabilitation, her addiction problems had affected her custodial role. The children were virtually in the respondent's custody. She describes this period as a time when she "fell off the rails".

Upon the applicant's return from her rehabilitation on 11 November 2011, she B insisted on resuming custody on learning that the respondent had launched an application for full custody. She filed a notice of opposition to his claim. The respondent's application for custody of all three children was on the strength of a negative letter from the addiction counsellor sent to him on 8 November shortly before the applicant's return. The letter highlighted applicant's denial C of her addiction problem and that she needed to 'experience and acknowledge the consequences of her behaviour and addiction'. The letter recommended as many Alcoholic Anonymous (AA) meetings as possible on her part as well as the need for her to engage a counsellor.

The respondent obtained an order of custody of the children through an order of the children's court on 6 December 2011. The order was, however, a result D of a default judgment. Although the applicant engaged lawyers to represent her, on the day in question they did not turn up. The applicant immediately applied for rescission and stay of execution the following day, 7 December, on learning of the court order. She also at the same time appealed against the default judgment. The rescission and stay of execution were subsequently E dismissed on January 2012 again in default of appearance by the applicant's lawyers. The applicant had nonetheless by this time taken custody of the children on the strength that the law recognised her custodial rights given the parties' separation pending divorce. Moreover, the oldest child being from a former union, her argument was that the respondent in any event had no rights over this child.

F The parties signed the Agreement in February 2012. It effectively recognised the applicant's rights as custodian, following a period of intense disagreement on the custodial arrangement. The Agreement states that it is to terminate upon a decree of divorce being granted dealing with issues of access custody, guardianship and maintenance. Following this Agreement it appears that the applicant effectively abandoned her appeal of the default judgement G (H CIV A651/11). Her position is that the Agreement disposes with the need to pursue it. The respondent does not dispute signing this agreement but says it was signed by him out of desperation following arm twisting tactics by the applicant. In particular he avers that applicant was being difficult regarding him accessing the children and was also making exorbitant financial demands. He H says the relationship, with regard to access, was at least smoother following

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the Agreement. Moreover he argues that the Agreement is a clear interim A agreement pending the appeal. His erstwhile position is that the judgment of the children's court has not been reversed and remains of full legal force.

The applicant's quest to shift the children from the schools that they were placed has re-ignited the flames and calls for the court's intervention. The oldest child was already at Lilfordia boarding school at the time of the B applicant's rehabilitation. She has since been followed by her younger sister and both are weekly boarders. The youngest remains at nursery school in Harare and is therefore largely in the respondent's custody during term time.

The order sought by the applicant is in the following terms:

1. (a) That the respondent be and is hereby required to place the minor children T, K and O with the applicant, who has sole custody in C terms of section 5 of the Guardianship of Minors Act [*Chapter 5:08*], failing which the Deputy Sherriff, (if necessary with the assistance of members of the Zimbabwe Republic Police) is hereby authorised to remove the said minor children from the respondent or anyone keeping the said minor children and to deliver them to D the applicant.

   (b) That the respondent will have, at all reasonable times with prior arrangement with the applicant, access to the minor children.

2. That the minor children will attend L Primary School in Chinhoyi as soon as practicable and following the date of this order. E

3. In the event of an appeal being noted against this order, notwithstanding such noting of appeal, this order be and is hereby declared operative and in effect and shall not be suspended.

4. The respondent shall bear the costs of these proceedings.

The applicant emphasises that she is a fully recovered alcoholic, who has not F touched a drink since her rehabilitation. On her return she says she attended AA meetings and also asserts in her founding affidavit that her sobriety has been buoyed by her Christian faith and desire to adhere to strict moral values. Her argument is that she should not be judged by her past but by her present circumstances. What she would like is to have full custody of her children G to enable her to play her motherly role instead of having her children thrust to the care of a boarding school at what she considers to be of very tender ages. She states that she has all the time in the world and that it would ultimately be in their best interests that they reside fully with her under her capable, loving and responsible care as day scholars at L Primary School in Chinhoyi, which is where she lives. With regards to the youngest child, H

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A she says that he too would benefit greatly from having not only his mother care for him, but seeing and interacting with his sisters on a daily basis. She argues that respondent is too busy with his work to give the children the same kind of attention that she would avail. She states that they in fact spent considerable periods with their paternal grandparents during the period that she was away. She also says that they spend more time with their aunt the B respondent's sister rather than with the respondent or are left in the custody of domestic workers. The two older children are weekly boarders and the parents alternate seeing them each weekend.

Mr *Mureriwa* raised a point *in limine* regarding the validity of the order sought. In brief, his objection was that this application cannot stand as it C is not an appeal of the juvenile court order and nor is it an application for revocation or setting aside this order. Were it to be granted his argument is that it would effectively result in two orders affecting the children. Mr *Ochieng* for the applicant asserted that this argument would be valid in the magistrates court but that the High Court trumps the children's court, no matter what the sequence. He relied on s 5(7)(a)(1) of the Guardianship of D Minors Act as the basis for seeking custody as this provision permits a quest for sole custody in circumstances such as this.

That the High Court is upper guardian of all minor children is a constitutionally enshrined principle. Children have a right to be protected by the High Court as their upper guardian. See s 81(3) of the

Constitution. Having heard and E examined this case fully, in light of this provision my conclusion was that it would be very difficult to address the point *in limine* outside the full context of the points raised in the application. As such I start by examining the law regarding the custody rights in question in the context of the applicant's quest. I also examine the application and the objections raised within the F framework of the best interests of the child and then finally address the impact of the existing order as raised by the respondent. Hopefully this will do justice to the case.

Custody rights and circumstances allowing for modification under the law

G Section 5(1) of the Guardianship of Minors Act is the law that accords a mother custody when parents commence living apart. It is worded as follows:

> "Where either of the parents of a minor leaves the other and such persons commence to live apart the *mother* of that minor shall have sole custody of that minor until an order regulating the custody of that minor is made under section four or this section or by a superior court such as is referred to in subparagraph (ii) H of paragraph (a) of subsection (7)" (my emphasis)

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Courts will award custody to the father if it is shown that it is detrimental A to the interests of the minors for them to be in her custody. Section 5(3) (b) in particular reads as follows:

> "Where the mother of minor has the sole custody of that minor in terms of subsection (1), a children's court may at any time upon the application –
>
> (a) …
>
> (b) of the father, make an order depriving the mother of the sole custody of the B minor and granting the sole custody to the father *if the court is satisfied that it is in the best interests of that minor that the father be granted sole custody* and, further make such order relating to the payment of maintenance by the mother and the right of the mother to have access to the minor as the court thinks fit" (my emphasis).

The applicant's right to custody under s 5(1) was therefore altered by the C respondent's application for custody under s 5(3).

Section 5(7)(a) states as follows with regard to such order made in terms of s 5(2) & (3):

> "An order of a children's court made in terms of subsection (2) or (3) shall cease to be of effect – D
>
> (a) if and when any order regulating the custody of the minor concerned is made –
>
> (i) in terms of section four".

The applicant therefore seeks to rely on s 4(1)(b) of the Guardianship of Minors Act in support of her application. This section provides that the High Court may, on application of the estranged parents of a minor, make an order granting one of them sole custody of the minor. E

Mr *Ochieng* argued in relation to the oldest child T, who is from another union, that she can only be removed from her mother's custody where there is harm or danger to her welfare. *Hardy* v *Skaramangas* 2000 (1) ZLR 196 (H) at 199 is cited in support of this contention. He also argued that it is not for the applicant to show grounds that she be awarded custody but for F respondent to show grounds for her to be refused such custody. *Lothian* v *Valentine* 2007 (2) ZLR 168 (H) was cited in support of the court leaning in favour of the child's guardian even where the parent battles an addiction. The important thing is that the addiction must impact on the children if an argument is to be made for their removal. In that case the mother admitted to doing drugs but had started counselling sessions at the time of the application. G Counsel's argument was that *in casu* the applicant is already a well-adjusted member of society.

Despite the fairly common occurrence in our context of children being looked after by non-biological parents in one guise or another ranging from grandparents, relatives, to step parents, our legislature has still not seen fit H

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A to extend parental rights to *de facto* or psychological parents as in this case. Whilst indeed the legal relationship between the respondent and T excludes him as parent, it would amount to taking a very pedantic approach to the law to ignore the circumstances that triggered the application for

custody of all three children into the respondent's care. It is a vital fact that what motivated the application for modification of custody was the fear of harm B and neglect of the children in light of the experience that had led to the applicant's rehabilitation. More importantly it was stimulated by the rather grim prognosis about her acceptance of her condition given by her counsellor at the time of her imminent return.

Protection of children from harm or neglect is a constitutional guarantee. C See s 81(e) of the Constitution. It is also expressed in legislation such as the Children's Act [*Chapter 5:06*] in s 7. Furthermore, this was not a case of a stranger seeking to impose himself as custodian inclusive of one of the children who is not his. There is a parent-like relationship with the child. Moreover, the respondent has been in the child's life as a *de facto* parent since the child was three years and eight months old and he has lived with D the child since. He has also taken care of the child although it is conceded that her father now meets her schooling costs. That a parental bond exists between the respondent and T is not disputed. His quest for custody in the court below has to be understood in this context. Although the respondent may indeed not have any recognised legal right over the child, it is clear E that the order was deemed warranted and was granted in his favour on the basis of the best interest of the child to be protected from potential neglect.

While the applicant contends that it was astonishing that the respondent should have also applied for the custody of T who is not his biological child, the reality is that it would have been far from realistic for him not to have F done so. It would have been undesirable to try and separate the children who are siblings. It was even more important not to add any further stress to the children lives by introducing a "yours and ours" approach.

As explained in *van der Linde* v *van der Linde* 1996 (3) SA 509 (O) at 510 *per* Hattingh J,

> "… all being equal, siblings should not be unnecessarily separated from each G other. The reason being that siblings experiencing the trauma of a divorce tend to form a bond with each other. A bond which to a great extent gives them a feeling of security against the 'onslaught from outside'".

In the case of the two younger children, Mr *Ochieng*'s argument was that the best interests of the children dictate that because of their tender ages their H interests are best served by being with their mother. Reference was made

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to *Goba* v *Muradzikwa* 1992 (1) ZLR 212 (S) at 214C-G and *Mutetwa* v
A*Mutetwa* 1993 (1) ZLR 176 (H) at 183A-F.

Mr *Mureriwa,* on the other hand, argued that the criteria to be used in assessing the best interests of the child are, which parent is better able to promote and ensure the physical, emotional and spiritual welfare of the children. The criteria laid down in *McCall* v *McCall* 1994 (3) SA 201 (C) was referred to for guidelines that courts generally take into account in determining "best B interests". He also emphasised in his argument that a professional evaluation of the current position of the applicant with regards to her stability to look after the children is imperative. Also a professional social welfare officer's report on the applicant's suitability as parent is deemed necessary.

The applicant's averment that it is necessary for her to play her maternal role C given the children's tender ages also needs scrutiny. For while, comparatively speaking, it remains the reality that women still find themselves saddled with the child caring and roles, child rearing is no longer seen as a naturally exclusive domain for women only. Indeed our Constitution espouses equality and non-discrimination as the guiding standard in parental roles. Breaking down stereotypes about gendered roles is also what State parties undertake D to work towards in terms of art 5 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to which we are also a party.

In *P* v *P* 2007 (5) SA 94 (SCA) at 102 van Heerden JA commented as follows regarding the "tender years and maternal preference" principle within the E context of the South African Constitution which likewise embraces equality and non-discrimination in parental roles for men and women:

> "In more recent cases, the value systems and societal beliefs underpinning maternal preference or tender years principle have been challenged and courts have emphasised that parenting is a gender neutral function and that the mother is necessarily in a better position to care for a child than the father belongs to F a past era".

He also further suggested at p 102 that:

"in determining what custody arrangement will best serve the children's interest in a case such as the present, a court is not looking for the 'perfect parent' – doubtless there is no such being. The court's quest is to find what has been called 'the least detrimental available alternative for safe guarding the child's G growth and development".

In casu the court cannot go on to make a determination on the applicant's suitability or otherwise on all the pertinent matters raised, outside of a professional report on her recovery. In a case such as this, where a link between the addiction and failure to play a custodial role has been previously H

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A made, it is vital before an applicant can resume custody which has been taken away for a professional evaluation to be availed to the court. A self-assessed declaration of recovery is clearly not adequate especially where children's lives and welfare is involved as in this case. It is in all probability necessary for a clinical psychologist to provide a report on the children involved since the applicant re-assumed custody in spite of the court order.

B **The best interests of the children**

In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly C noteworthy aspect of the new Constitution is that it grants both parents and children rights. Parents for instance can expect in terms of s 25 that the State and all its institutions will protect and foster the institution of the family. This provision can be said to protect parents in the upbringing of children within the family context. They can also expect the State to take measures D to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution in terms of s 26(b). For women in particular, s 80(2) guarantees women the same rights as men regarding custody and guardianship although an Act of Parliament may regulate the exercise of those rights. The right to privacy is guaranteed through s 57. Yet all these rights that undoubtedly impact on parents now have to be balanced against E those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is best for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions. I say this in light of s 81(1)(a) which grants children F the right to be heard. It is framed as follows:

"Every child, that is to say, every boy and girl under the age of 18 years has the right:

(a) to equal treatment before the law, including *the right to be heard* …" (my emphasis).

This section effectively gives a "voice" to children on matters that concern them. The provision is also effectively an incorporation in our domestic G setting of the spirit of art 12 of the UN Convention on the Rights of the Child which advances this notion of their participation and inclusion. Article 12 explains this rights thus:

" a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of that child H being given due weight in accordance with the age and maturity of the child".

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The "best interest" principle which has also been the criteria used by our courts A in matters concerning children now not only finds constitutional expression but also exists amidst certain rights given to children by the Constitution. Thus the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution, is now also better placed to take its specific character and meaning from the rights B that are accorded children by our Constitution. Pertaining to this case, it is their best interests that they be heard, especially for the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain in order for the court to make an informed decision that takes into account their experiences with boarding school. My assumption here is that, having already spent time at the boarding school, they are C able to comprehend the issue at stake and exercise their right to be heard on what they think is best for them. Given that participation has to be age appropriate, in practice courts have often achieved participation through a judge or judicial officer speaking to the

children themselves or where it is not practical through child welfare professionals giving their report. The D youngest child O may not be able to exercise this right due to his age, thus a welfare report that is done in consultation with those at his nursery would fulfil the purpose.

The status of the appeal

The order obtained by the respondent may according to the law, be varied, E suspended, or rescinded upon application by a children's court upon affording the other parent an opportunity to oppose the application.

Section 5(10) in this regard puts it thus:

> "Any person who is aggrieved by –
>
> (a) an order of a children's court in terms of subsection (2) or (3) or the variation, F suspension, rescission or revival thereof; or
>
> (b) the refusal of the children's court to grant an application in terms of this section
>
> may appeal against such order, variation, suspension, rescission revival or refusal to a judge of the High Court who may refer the matter to the High Court for argument."

The applicant, as stated, did apply to rescind the order and rescission was G refused in default. She also filed an appeal. The applicant's argument that the Agreement dispensed with the need to pursue her appeal is based on her reliance on Order 31 r 6 of the Magistrates Court (Civil) Rules 1980. This provision states as follows regarding abandonment of the whole or part of a judgment by a respondent: H

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> A "A respondent desiring to abandon the whole or any part of a judgment appealed against may do so by the delivery of a notice in writing stating whether he abandons the whole or, if part only, what part of such judgment."

There is no evidence of any notice in writing to the effect that the respondent explicitly abandoned the whole or any part of the magistrate's ruling. The B argument by the applicant's counsel that the provision does not state the format which this notice is supposed to take is not sustainable. Given that a judgment is an order of the court, I cannot see how such a notice can evade proper notification of the court that granted it. The reality is that there is no such notification by the respondent. As such the order of the magistrates court, that the application for stay of execution and rescission of the default C judgment be dismissed, still stands. This order granting the respondent custody of the children is valid until it has been successfully appealed against.

Whether the order is suspended by the appeal

The application for rescission of the default judgement was made in terms of s 39(1)(a) of the Magistrates Court Act. This provision permits the court D to rescind or vary a judgment granted in the absence of the other party. In terms of s 39(3), such an application to rescind, correct, or vary may further direct that the judgment be carried into execution, or that execution be suspended pending decision on the application. *In casu,* the court below ordered a dismissal of the application for rescission and for stay of execution.

E Section 40(3) which deals with appeals, is also a subsection that addresses suspension or execution of a judgment pending the hearing of an appeal. In terms of this subsection, where an appeal has been noted, the court may direct that the judgment be carried into execution or that it be suspended.

However, for the court to make a decision either way, it must be approached F specifically with a request. This provision was unpacked in the case of *Ritenote Printers (Pvt) Ltd* v *A Adams and Co & Anor* 2011 (1) ZLR 521 (S). At 524C of that judgment, Chidyausiku CJ opined as follows with regards to this section:

> "In my view, the wording of s 40(3) of the Act leaves a lot to be desired, but a G proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. The section also confers on the magistrate the power to order execution despite the noting of appeal. It follows therefore that for the magistrate to exercise the discretion in terms of s 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the

making of such application the magistrate H exercises the judicial discretion and makes a proper determination."

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See also *Sub Saharan Mgmt Consultants (Pvt Ltd)*A v *Sirituta Invstms (Pvt) Ltd & Ors* 2012 (1) ZLR 462 (H) at 470A-D where the above reasoning is also followed).

In casu, the decision of the court below in terms of s 39(3) already addressed the issue of stay of execution. The judgment was in the respondent's favour so he would not have needed to approach the court for a determination in terms of s 40(3). On the applicant's part, it would have made no sense for B her to re-approach the same court to make yet another determination on the very point it had already canvassed. This would have been tantamount to asking it to reverse its decision. Consequently, the appeal that the applicant lodged in the High Court did not suspend execution of judgment. That aspect had already been addressed within the ambit of the powers granted to the court below to do so. C

The option of pursuing the appeal lodged with the High Court, to its logical conclusion, remains open to the applicant. Her quest to have sole custody involves the welfare of children especially given the realities that led to the loss of custody to the respondent, albeit by default. In light of these circumstances, I cannot see how the order granted can simply be dispensed D with by an agreement without the involvement of a court specifically setting aside the existing order. This remains to be done.

The respondent sought the dismissal of this application with costs on a higher scale. However, in my view, these are not justified because his signing of the so called Interim Access Agreement, in the face of an existing court order, E has partly contributed to the confusion.

In the circumstances, this application is hereby dismissed with costs on an ordinary scale.

Atherstone & Cook, applicant's legal practitioners F

Scanlen & Holderness, respondent's legal practitioners

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S v MAIMBA 2014 (1) ZLR 705 (H)

Citation	2014 (1) ZLR 705 (H)
Case No	Judgment No. HH-293-14
Court	High Court, Harare
Judge	Mawadze J
Heard	5 June 2014
Judgment	5 June 2014
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C *Criminal procedure – trial – judgment – what judgment should contain – need for reasons for decision to be stated and to be clear – failure to give reasons an irregularity – review – request for magistrate to give detailed reasons for conviction – magistrate's duty to comply with such request*

Headnote

D The accused was charged with five offences. He pleaded not guilty to all the five charges. He was found guilty in all counts and sentenced to five years' imprisonment, of which six months were suspended on condition he made restitution in the sums of $70, $25 and $20 respectively to the three complainants whose property he was charged with stealing. The record of the case was forwarded to the High Court for automatic E review. The reasons for judgment by the trial magistrate did not state specific findings made or the evidence which linked the accused to the counts he was charged with.

Held, that unless reasons are given for a judgment, it is impossible to determine how the ultimate conclusion was reached and whether it was reached on F a proper reasoned basis. The need for this is clear. The trial court cannot just make arbitrary decisions based on mere caprice, whim or casting of lots. A clear thought-process, based on evidence adduced, should be evident. A judgment must be reasoned and the reasons for reaching a verdict must not only be stated but clear. Failure to give reasons for judgment is a gross irregularity. What is required is a complete and G meaningful judgment touching all material evidence led during the trial. Magistrates should always bear in mind that in criminal trials the giving of reasons for conviction is a very important part of the trial, the purpose of which is to avoid creating the impression that the decision is arbitrary or capricious. For a magistrate not to record what he considered H amounts to gross irregularity, which will usually result in a conviction

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being set aside on appeal or review, although the conviction may still A be upheld if the evidence on record supports it.

Held, further, that it would be disingenuous for a trial magistrate, when asked by a reviewing judge to provide detailed reasons for the conviction, to suggest that he had been asked to manufacture another judgment or that he could not comply because he was functus officio. The purpose for criminal review is to assess if proceedings are in accordance with real B and substantial justice. The judge cannot properly discharge that function where meaningless judgments, devoid of any analysis or assessment of evidence on record, are routinely conveyed to judges who are then expected not to only read the evidence on record but to analyse it as well.

Cases cited C

S v *Makawa & Anor* 1991 (1) ZLR 142 (S)

S v Ncube & Ors 2003 (1) ZLR 581 (H)

Judgment

Mawadze J: This record is a classic example of how not to write a judgement in a criminal matter. D

The record was referred to me on automatic review in 2011 and on 21 May 2011 I raised the following query with the trial magistrate:

> "1. The reasons for judgement by the trial Magistrate do not at all state specific findings made and the evidence which links accused to all 5 counts.
>
> 2. May a detailed and well reasoned judgment be submitted to enable this E court to properly review the proceedings."

Instead of responding to my minute the trial magistrate, on 15 November 2011, decided to seek guidance from the provincial magistrate in charge of Mashonaland, Harare. The pertinent part of the trial magistrate's minute reads as follows:

> "I am hereby seeking for your indulgence if it is not only impossible but also F unlawful for me to rewrite my judgment again at this stage."

The import of the trial magistrate's minute is that he or she was seeking "administrative protection" from my apparent unlawful instructions and that he or she could not act as directed by this court. The provincial magistrate decided to refer the matter to the Acting Chief Magistrate under cover of a minute dated 14 November 2011, which reads in the relevant part as follows: G

> "The magistrate has written seeking guidance on whether it is permissible for him to redo the judgment considering that he is now *functus officio*."

Apparently the Acting Chief Magistrate referred the matter to the Secretariat of the Judicial Service Commission, which in turn referred it to the Judge President. No official endorsements were made until the record later found H

A its way to my office again, on dates which I cannot recall. This delay, in my view, has now rendered these review proceedings merely academic. The mind boggles why this matter for review was now being dealt with administratively.

The facts of this matter are as follows: The accused was arraigned on 8 February 2011 before a Harare magistrate facing five counts, being four counts B relating to contravening s 131(1) of the Criminal Law Code [*Chapter 9:23*] – unlawful entry in aggravating circumstances and one count of contravening s 113(1) of the Code – theft. The accused pleaded not guilty to all the five counts and, after a protracted trial, he was found guilty as charged on all the five counts on 10 March 2011. On the same date, all five counts were treated as one for sentence and the accused was sentenced as follows:

> C "5 years' imprisonment, of which 6 months' imprisonment is suspended on condition accused restitute Methulisi Dube the sum of $70, Ziwakaya in the sum of $25 and Abel Charangiwa in the sum of $20, through the Clerk of Court Harare, on or before 30 /05/ 2011 by 4pm. 4 years 6 months effective."

In denying the charge, the accused, in his defence outline, stated that the D police arrested him while at a bus stop when he was from Westlea, Harare, and that at the police station a bag containing clothes was planted on him. He said the bag contained clothes and two cellphone handsets. The accused said he was assaulted and forced to make admissions to cases reported to the police which he was not aware of.

The allegations made in each count and the evidence led can be summarised E as follows.

In count 1 it is alleged that on 2 December 2010 at No. 11 Kimberley, Ashdown Park, the accused, during the night, approached Charles Chimukute's house and opened the bedroom window, through which he fished out a laptop bag F valued at US$20. The bag was recovered when the accused was arrested on 28 December 2010. In his evidence Charles Chimukute confirmed the theft of the bag, which he discovered later. He said that he was called to the police station, where he was advised that the accused had been arrested in possession of his bag. He said that the accused was implicated by the police. The accused, as already said, denied possession of the bag in issue G and committing the offence.

In count 2 it is alleged that on 20 December 2010 at No 8 Jeffries Road, Ashdown Park, which is owned by Methulisi Dube, the accused at about 0300 hrs approached the complainant's bedroom window, which he opened and took out a cellphone valued at US$70. The accused was arrested on H 25 December 2010. While it is alleged in the facts that the cellphone was

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recovered, the complainant, in his evidence, said the cellphone was not A recovered.

In his evidence Methulisi Dube alleged that on the day in question he was woken by the noise which the accused had made after opening the window and fishing out his jacket at about 0200 hrs. He said that despite it being dark outside, he was able to peep out and identify the accused, who was

not known to him. He was later told by the police after the accused's arrest that B the accused had confessed to committing the offence at his house and made indications in the presence of his brother Thulani Mbano. He was allowed to give hearsay evidence on indications allegedly made. Under cross-examination by the accused, the witness admitted that he only identified the accused as the culprit at the police station after the police had indicated the accused to C him. All he said is that the accused looks similar in stature to the silhouette he saw outside his house when the offence was committed. He disputed that the cellphone was recovered.

Methulisi Dube's evidence in count 2 on identifying the accused is clearly not credible and his property, which could have linked the accused to the D offence, was not recovered. The evidence of Thulani Mbano in respect of count 2 seems inadmissible and irrelevant. He was allowed to give evidence on indications the accused allegedly made at the house relevant to count 2. The accused disputed voluntarily leading the police to this house, let alone making any indications. No proper evidence of indications made by the accused in count 2 was adduced, neither was the accused's confirmed or E unconfirmed statement produced. The stolen item was not recovered hence the apparent lack of nexus with the accused.

In count 3 it is alleged that on a date unknown to the State in December 2010 at No. 10 Powel Close Ashdown Park, the accused approached the bedroom window of the complainant, Mila Ziwakaya, which he opened and fished F out a cellphone valued at US$25 and it was not recovered as it is alleged that the accused sold it.

In his testimony Mila Ziwakaya told the court that on a night he could not recall he woke up due to some noise and realised that his bedroom window had been opened. He woke up, went outside but did not see anyone. He later realised his cellphone was missing. He did not make a report to the police. G He did not recover the cell phone. His only link to the accused is that, after the arrest of the accused, the accused was brought to his house by the police where he made some indications. In cross-examining Mila Ziwakaya, the accused even took the witness to task on the truthfulness of the alleged theft of the cellphone as no report was made to the police. Mila Ziwakaya was H

A not able to explain why no such report was made. The accused vehemently denied leading the police to Mila Ziwakaya's residence. He denied making indications confirming the commission of the offence. All what Mila Ziwakaya said is that the accused committed the offence because he allegedly confessed. The nature of the confession is unclear. The evidence in support of count 3 is difficult to appreciate.

B In count 4 it is alleged that on 21 December 2010 the accused approached Abel Chirangwa's residence, No. 4 Elas Close, Malborough at about 2200 hrs, where he opened a bedroom window and stole a cellphone valued at US$20, which was not recovered. It remains a mystery as to how the accused was convicted of this count. As per the record, no evidence was led from the C complainant explaining the alleged commission of the offence and how the accused is linked to the offence. The basis of the conviction remains unexplained on the record.

In count 5 it is alleged that, on the day accused was arrested, on 28 December 2010, the accused approached the residence of Moses Matibvu, 42 Eves D Crescent, Ashdown Park, where a Mercedes Benz motor vehicle was parked in the yard. The accused is alleged to have broken the passenger window and stolen a car radio and a knife valued at US$600 which were all recovered on the arrest of the accused. In his evidence the complainant, Moses Matibvu, explained that on the night in question he heard some noise outside, woke up but did not see anything. The next morning he realised that the glass window E of his motor vehicle had been broken and that the face of the car radio (not the car radio) and a knife had been stolen. He immediately reported to the police, and at the police station the accused had been arrested in possession of the stolen items, which he identified, and was able to fit the face cover of the radio on his car radio. No useful questions were put to him by the accused. As he maintained that the accused was in possession of his stolen F property and accused did not dispute that at the police station, the accused is clearly linked to the offence in count 5.

The last State witnesses who gave evidence are two police details, Constable Matope, the arresting detail, and the investigating officer, Detective Sergeant Pfidza.

G The evidence of Constable Matope is that on 28 December 2010 he arrested the accused, who was carrying a bag which he discovered contained a cellphone, a knife and a car radio (probably the face cover of the radio), brown shoes and khaki shorts. From the list of the property stated, only the bag was relevant to count 1 and the car radio cover and the knife was relevant H to count 5 and are material. It was never established on the record who the

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2014 (1) ZLR p710

Mawadze J

owner or owners of the cellphone, the khaki shorts and brown shoes were. A Constable Matope said the accused at the time of his arrest, claimed that all the property in his possession was his. He said that he took the accused to the police station and the complainant in count 5 arrived reporting the theft. He immediately showed him the property and Moses Matibvu identified the car radio cover and knife as his property.

All that the accused said in cross-examining Constable Matope is that he was B never in possession of the bag and the property therein but that the police planted it on him. This was dismissed as false by the witness. The evidence of Constable Matope only relates to counts 1 and 5.

The evidence of Detective Sergeant Pfidza, who is the investigating officer, is that the accused confessed to the commission of the offence in the company C of the accomplice who is at large. He said that the accused led him to the house of the complainant in count 2 where he made indications, although the stolen property was not recovered. He said that the accused again led him to the house of the complainant in count 3 and made indications relating to the commission of an offence involving a cellphone. No further evidence was led from him in respect of count 1, 4 or 5 as regards the nature of the D investigations he carried out. He was not asked to point out the specific investigations he made linking the accused to each of the 5 counts. In cross-examining Detective Sergeant Pfidza, the accused denied ever confessing to committing the offences or making any indications. As already said, the accused's warned and cautioned statement was not produced nor were the E nature of the indications made explained.

This is the State case.

The accused gave evidence and adopted his defence outline as his evidence. He was cross-examined but stuck to his story. The accused denied the time given by the arresting detail as the time he was arrested. He denied possessing F the bag or the radio. The accused was not able to explain why the stolen bag and other items would be planted on him by the police, who were not known to him. The accused vehemently denied making any confessions or indications. He disputed that there is evidence linking him to all the 5 counts. The prosecutor made reference to an unconfirmed statement which was not produced. G

The reasons for judgment by the trial magistrate hardly covers a page, part of which relates to the charges preferred and the accused's defence. Let me quote the relevant part of the judgment.

> "It was the State's case to prove beyond reasonable doubt that accused committed the alleged offences. In trying to do so the State called 7 witnesses whose evidence H

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> A is filed of record and it is irrelevant to recite the same. However of importance to note is the fact that all the evidence from the witnesses corroborated each other that accused was found in possession of some stolen property, accused even led the police to all different houses he had committed the offences he is facing.
>
> In his defence accused denied the allegations and testified that the police were in possession of a bag which had stolen property. Accused however failed to B give a reasonable explanation and therefore did not have any defence to profer. After the close of the State case it is the court's findings that:
>
> (i) State managed to prove its case beyond reasonable doubt.
>
> (ii) Accused is found guilty as charged on all counts."

It is these perfunctory reasons for judgment which prompted me to seek further details from the trial magistrate on the specific findings of facts proved and C the specific evidence he considered in arriving at the verdict in respect of each count. The so-called judgment is not detailed enough for me to appreciate the reasoning of the trial magistrate, who had clearly chosen the easy way out by writing a scanty judgment devoid of any reasoning process. All the trial magistrate had to do was,

on the basis of evidence of the record, point out the facts proved in each count and the nature of evidence linking accused D to each count. The trial magistrate was to give reasons why he believed or disbelieved the State witnesses and the accused.

The Magistrates' Handbook by G Feltoe, which is a very useful book for judicial officers, explains that unless reasons are given for a judgment it is impossible to determine how the ultimate conclusion was reached, and E whether it was reached on a proper reasoned basis. The need for this is clear. The trial court cannot just make arbitrary decisions based on mere caprice, whim or casting of lots. A clear thought process based on evidence adduced should be evident.

It is trite that a judgment must be reasoned and the reasons for reaching F a verdict must not only be stated but also beclear. In *S* v *Makawa & Anor* 1991 (1) ZLR 142 (S), where the trial court had failed totally to provide reasons for judgment (unlike in this case), it was pointed out that failure to give reasons for judgment is a gross irregularity.

In *S* v *Ncube & Ors* 2003 (1) ZLR 581 (H) Ndou J, with the concurrence G of Cheda J, explained at great length the basic steps a trial court should take and the techniques it should follow in reaching a decision. The learned judges said at 585A-E:

> "I think the words of John Reid-Rowland in *Criminal Procedure in Zimbabwe* are instructive in this regard. At pp 24-10 the learned author remarked:
>
> > 'Essentially, the judgment should contain a brief summary of the facts found H proved and the trial court's appraisal of the credibility of each witness,

> > stating what evidence was accepted or rejected and giving reasons for its A decision. It is of no help to simply outline the evidence of all witnesses and make bald comments such as –
> >
> > > "The state witnesses gave evidence well and accused gave his badly. Accordingly, I found this accused guilty." B
> >
> > Where there are questions of law the application of the law to the facts found proved should then be dealt with.'"

The learned judges continued at 585D-E:

> "What is required is a complete and meaningful judgment touching all material evidence led during the trial. Magistrates should always bear in mind that in criminal trials the giving of reasons for conviction is a very important part of the trial, the purpose of which is to avoid creating the impression that the decision is arbitrary or capricious. For a magistrate not to record what he considered amounts C to gross irregularity, which will usually result in a conviction being set aside on appeal or review, although the conviction may still be upheld if the evidence on record supports it. See *S* v *Makombe* HH-120-86 and *S* v *Rusero* HH-151-86."

All I had requested the trial magistrate to do *in casu,* as per my minute, was to provide the full reasons informing his decision in all five counts. It is disingenuous for the trial magistrate to suggest that he had been asked to D manufacture another judgment, as it were. The purpose for criminal review is to assess if proceedings are in accordance with real and substantial justice. This court cannot properly discharge that function where meaningless judgments devoid of any analysis or assessment of evidence on record are routinely conveyed to judges who are then expected not to only read the evidence on record but to analyse it as well. I had simply asked the trial magistrate to do E what he is expected to do, which he had chosen not to do in the first place, to enable me to properly and meaningfully review these proceedings.

It is clear that the judgment by the trial magistrate falls far short of the standard expected. There is no summary of facts found proved in each count. There is virtually no attempt to undertake an appraisal of the credibility of State witnesses. This amounts to gross irregularity. F

I have deliberately summarised the evidence led in court on each count to enable me to dispose of the matter in a fair and just manner, despite the shortcomings of the trial magistrate.

On the basis of the evidence on record, I am satisfied that when the accused G was arrested on 28 December 2010 he was in possession of the bag relevant to count 1 which contained the front cover of the radio and a knife relevant to count 5. I am not persuaded that the police planted that evidence on the accused. The complainant in counts 1 and 5 explained how the offences were committed at night at their premises and the said property stolen. This clearly links the accused to offences of count 1 and count 5. H

Mawadze J

A In respect of count 2, there is clearly no evidence linking the accused to the offence. The alleged identification of the accused by Methulisi Dube in darkness cannot be credible. No property linking the accused to the offence in count 2 was recovered.

In count 3, the complainant did not even report the offence. The property B stolen was not recovered. The only link to the accused are alleged indications he made which are disputed. This cannot be the basis to found a conviction in count 3.

In respect of count 4, it is clear that in writing his meaningless judgment the trial magistrate never bothered to consider seriously the evidence on record. The complainant in count 4 was not called to testify to provide evidence of C the commission of the offence and what was stolen. It remains a mystery as to how the accused was convicted in count 4.

The attendant delays I have earlier on alluded to mean that this review process is now merely for academic purposes. The accused has been prejudiced as, by now, if he was not a beneficiary of the Presidential Amnesty, he has finished D serving the sentence imposed. Nonetheless, there is need to do justice for the case and possibly ensure that the accused has a correct criminal record.

After analysing the evidence on record, a task which the trial magistrate should have done, I have arrived at the following conclusions in respect of the verdicts in all five counts.

E In counts 1 and 5 the accused was properly convicted. The convictions in counts 1 and 5 are therefore confirmed.

In respect of counts 2, 3 and 4, there is no evidence to support the conviction of the accused. Consequently, the convictions in counts 2, 3 and 4 are set aside. The only evidence led relates to the accused's alleged confessions and indications. As already said, that evidence is disputed and was not properly F adduced and admitted in the court *a quo.* The trial magistrate did not analyse that evidence at all.

For the avoidance of doubt the following verdicts are entered;

Count 1	-	guilty as charged
G Count 2	-	not guilty and acquitted
Count 3	-	not guilty and acquitted
Count 4	-	not guilty and acquitted
Count 5	-	guilty as charged.

In respect of sentence, it is clear that even if the accused had been convicted in respect of all counts, the overall sentence of five years' imprisonment H induces a sense of shock. The total value of the property allegedly stolen in

Mawadze J

all the counts is only US$735. There would be no reason to visit the accused, A who is a first offender, with such a harsh penalty, more so when property valued at US$620 was recovered. The actual prejudice in all counts would be a paltry US$125.

In view of the verdict now entered, I can only consider the appropriate sentence in respect of counts 1 and 5. I believe a sentence of eight to ten months in each count would be appropriate, with a part suspended on the B usual condition of good behaviour and part on condition of restitution if the property had not been recovered. An effective sentence of eight to ten months' imprisonment would meet the justice of the case in counts 1 and 5.

I am therefore unable to correct the sentence in respect of counts 1 and 5 in view of the inordinate delay involved to the extent that it would benefit C the accused. However, in order to correct the accused's criminal record, this court should consider the sentence in counts 1 and 5. All the property was recovered, hence there is no need to suspend part of the sentence on condition of restitution.

The sentence imposed by the trial court is set aside on its entirety and substituted with the following: D

"Count 1	– 10 months' imprisonment
Count 5	– 10 months' imprisonment
Total	: 20 months' imprisonment, of which 10 months' imprisonment are suspended for 5 years on condition the E accused does not commit, within that period, any offence involving dishonesty for which he is sentenced to a term of imprisonment without the option of a fine."

The accused should be called and advised of the altered verdicts and sentence. In addition the Registrar should forward a copy of this judgement to the Chief Magistrate since the matter had been referred to his office as already F explained.

Tagu J agrees.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/SHUMBA v MINISTER OF JUSTICE & ORS 2014 (1) ZLR 715 (H)

SHUMBA v MINISTER OF JUSTICE & ORS 2014 (1) ZLR 715 (H)

Citation	2014 (1) ZLR 715 (H)
Case No	Judgment No. HB-106-14
Court	High Court, Bulawayo
Judge	Moyo J
Heard	4 June 2014; *CAV*
Judgment	10 June 2014
Counsel	*B Masamvu,* for the plaintiffs Ms *Saruwaka,* for the respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

C *Administrative law – review – in terms of Administrative Justice Act [Chapter 10:28] – High Court's powers of review – such power not extending to labour matters – review of such matters the sole concern of the Labour Court*

D *Court – High Court – jurisdiction – application for relief under Administrative Justice Act [Chapter 10:28] – relief constituting review of decision by employers in a labour matter – court having no jurisdiction*

Employment – Labour Court – jurisdiction – review – relief sought under Administrative Justice Act [Chapter 10:28] – relief constituting review E *of decision by employers in a labour matter – court having jurisdiction*

Headnote

The applicant filed an application in terms of s 3 of the Administrative Justice Act [*Chapter 10:28*], seeking an order setting aside the decision of the respondent to transfer him without giving him an opportunity to be heard, together with ancillary relief. The respondent opposed the application, F on the grounds that the application was one for the review of a labour decision, wherein only the Labour Court has jurisdiction.

Held, that the relief sought by an applicant in terms of s 3 is subject to the provisions of any other law. The relief sought by the applicant was clearly a review of the decision of the respondents in their capacities as the employers of the applicant. His dissatisfaction with the steps taken by his G employers and the manner in which these steps were taken, resulting in his transfer and "demotion", were purely a labour issue, which the Labour Court, in terms of s 89(1)(d)(i) of the Labour Act [*Chapter 20:01*] had exclusive jurisdiction over. Section 89 takes away from any other court the powers to determine or hear matters provided for in that section. H Powers of review in terms of ss 3 and 4 of the Administrative Justice

Moyo J

Act, where labour matters are concerned, fall into the same category. A Thus the High Court has no jurisdiction to hear or determine the matter.

Cases cited

Moyo v *Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H)

Medical Investments Ltd v *Pedzisayi* 2010 (1) ZLR 111 (H) B

*Samudzim*u v *Dairibord Hldgs* 2010 (2) ZLR 357 (H)

Tuso v *City of Harare* 2004 (1) ZLR 1 (H)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 3, 4 & 7

High Court Act [*Chapter 7:06*] ss 26 & 27(1)a C

Labour Act [*Chapter 28:01*], ss 89(1)(d1) & 89(6)

Case information

B Masamvu, for the applicant

Ms *Saruwaka*, for the respondents

Judgment

Moyo J: The applicant filed an application in terms of section 3 of the D Administrative Justice Act [*Chapter 10:28*]. In this application the applicant seeks an order in the following manner:

(i) An order setting aside the decision of the respondent to transfer the applicant without giving him an opportunity to be heard.

(ii) An order setting aside the decision to demote the applicant to an inferior E post.

(iii) An order setting aside the decision to serve the applicant with a notice to vacate a Masvingo government residence without alternative accommodation as being unlawful unprocedural, unreasonable, unfair and substitute it with an order that: F

(1) the Masvingo *status quo ante* be restored without the loss of benefits or alternatively if the applicant remains at Gweru, that he occupies the office of the Area Public Prosecutor attendant with all its benefits.

(2) the notice to vacate the Masvingo government accommodation without alternative government accommodation be declared invalid. G

The applicant contends that the respondent's decision contravenes s 3 of the Administrative Justice Act in that it was unlawful, unreasonable and unfair.

The respondents raised a point *in limine* to the effect that the application should be dismissed as it is in fact an application for the review of a labour decision, wherein only the Labour Court has jurisdiction and therefore it has H

Moyo J

A been brought on the wrong platform. It is this point *in limine* that I would want to deal with.

Section 4 of the Administrative Justice Act provides for relief against administrative authorities and it is worded as follows:

> "Subject to this Act *and any other law*, any person who is aggrieved by the failure of an administrative authority to comply with section 3 may apply to the High B Court for relief" (emphasis mine).

This section clearly shows that the relief that can be sought by an applicant in terms of s 3 is subject to the provisions of any other law. Section 7 of the same Act provides thus:

> "Without limitation to its discretion, the High Court may decline to entertain an C application made under section 4 if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy must be first exhausted."

The relief sought by the applicant is clearly a review of the decision of the respondents in their capacity as the employers of the applicant. The applicant's dissatisfaction with the steps taken by his employer and the manner in which D these steps were taken, resulting in his transfer and "demotion" are purely a labour issue, in which the Labour Court, in terms of s 89(1)(d1) of the Labour Act [*Chapter 20:01*], has jurisdiction. That section provides as follows:

> "The Labour Court *shall* exercise the following function:
>
> Exercise the same powers to review as would be exercised by the High Court E in respect of *labour matters*." (Emphasis mine)

Section 89(6) of the Labour Act provides:

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

This in effect means that the Labour Court and only the Labour Court can F exercise review powers and any other powers regarding the decisions of administrative authorities in labour matters.

Whilst the High Court has inherent jurisdiction in all matters, s 26 of the High Court Act [*Chapter 7:06*] provides as follows:

> "Subject to this Act *and any other law*, the High Court shall have power, jurisdiction G and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities in Zimbabwe." (emphasis mine)

Section 27(1)(a) of the High Court Act provides that:

> "Subject to this Act *and any other law*, the grounds on which any proceedings or decisions may be brought on review before the High Court *shall be absence of jurisdiction on the part of the court*, tribunal or authority concerned (emphasis H mine).

Moyo J

Section 89 of the Labour Act, as alluded to above, clearly takes away from A any other court, the powers to determine or hear matters provided for in that section. Powers of review in terms of ss 3 and 4 of the Administrative Justice Act where labour matters are concerned in my view fall into the same category. On the other hand, s 26 of the High Court Act subjects the High Court powers of review to the provisions of any other law, clearly meaning that where another law provides otherwise, the High Court would not be B allowed to exercise review powers that have been specifically taken away from it by another enactment. I therefore find that I can not usurp powers specifically given to the Labour Court in no uncertain terms.

I am in total agreement with the findings of the learned judges in the following cases: *Samudzimu* v *Dairibord Hldgs* 2010 (2) ZLR 357 (H), *Tuso* v *City of Harare*C2004 (1) ZLR 1 (H), *Moyo* v *Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H) and *Medical Investments Ltd* v *Pedzisayi* 2010 (1) ZLR 111 (H)

The essence of all these judgments was that the provisions of the Labour Act specifically exclude the jurisdiction of the High Court in Labour matters.

It therefore follows that since I have found that whatever the applicant decides to call his application, I have however on its grounds, facts and D relief sought, determined that this is in fact an application for review that the applicant decided to call a declarator, and it is therefore improperly before me as the jurisdiction to review labour authorities' decisions clearly lies with the Labour Court.

I accordingly dismiss the application with costs for the aforestated reasons. E

Dube, Tachiona Tsvangirai, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/MADANHIRE & ANOR v A-G 2014 (1) ZLR 719 (CC)

MADANHIRE & ANOR v A-G 2014 (1) ZLR 719 (CC)

Citation	2014 (1) ZLR 719 (CC)
Case No	Judgment No. CC-02-14
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA Hlatshwayo JA, Patel JA & Guvava JA
Heard	9 October 2013; *CAV*
Judgment	12 June 2014
Counsel	*E W W Morris,* for the applicant *E Makoto,* with him *T Mapfuwa*, for the respondent
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law – Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(1) (right to protection of the law) – s 18(9) – right to a fair trial – not breached by use of word "serious" in definition of crime D *of criminal defamation – s 20(1) – freedom of expression – permissible derogations from – protection of reputation of other persons – whether such protection by criminalising defamatory statements justifiable in a democratic society – freedom of speech as a cornerstone of a democratic society – adequate protection provided to injured party through civil* E *law – criminalising defamation a disproportionate instrument to protect reputations of other persons*

Criminal law – offences under Criminal Law Code – criminal defamation – history of offence – criminalising defamation not justifiable in terms of s 20 of Constitution of Zimbabwe 1980

Headnote

F The applicants, the editor of and a reporter for a weekly newspaper, were arrested and charged with criminal defamation, under s 96 of the Criminal Law Code [*Chapter 9:23*]. This followed the publication of an article which suggested that a named medical aid society was insolvent. They applied for an order declaring the offence to be unconstitutional in terms G of s 20 of the 1980 Constitution (which protects freedom of expression), and for a permanent stay of proceedings. In terms of s 96 of the Code, the offence is committed when a person, intending to harm the reputation of another, publishes a false statement which causes serious harm to the reputation of that other person or creates a real risk or possibility of H causing serious harm to that other person's reputation.

It was argued for the applicants that the word "serious" was a comparative A adjective which was almost impossible to define as a benchmark or judicial definition. Consequently, the requirement was unduly subjective and its application would depend on the idiosyncratic views of the parties involved, the investigating officer, the prosecutor and, ultimately, the presiding judicial officer. The offence therefore violated not only the right to protection of the law secured by s 18(1) of the former Constitution B but also the right to a fair trial guaranteed by s 18(9).

Held, that our law of criminal defamation is essentially an amalgam of Roman-Dutch and English law. The original rationale of the crime of defamation under Roman and Roman-Dutch law is not readily ascertainable, but may have originated from the social insecurity of the C patricians, who became increasingly threatened by the mounting power of the plebeians. In 17th and 18th century Holland, the *Groot Placaat Boek* abounds with enactments on the subject, seemingly because of the prevalence of defamatory lampoons, squibs, verses and scurrilous satires, pertaining in particular to persons in authority. The offence has been codified in Zimbabwe. D

Held, further, that the use of adjectives to define the constituent elements of criminal offences is commonplace and can hardly be regarded as being remarkable. Examples include possessing an "offensive" or "dangerous" weapon, causing "serious" or "grievous" bodily harm, and committing "aggravated" indecent assault or theft in "aggravating" circumstances. E The interpretation and application of any such defining epithet forms part of the daily diet of judicial officers in the lower courts. The offence of criminal defamation was clearly formulated with sufficient precision in the Code so as not to create any ambiguity or vagueness as to the conduct that is proscribed as being punishable. The specific factors that may entail harm of a "serious" nature are succinctly articulated F in s 96(2) to afford adequate guidance to the trial court in determining whether or not the alleged harm to a person's reputation is sufficiently serious to constitute criminal defamation. Although these factors were not exhaustive, they tended to enhance rather than diminish the prospect of the accused receiving a fair trial.

Held, further, that freedom of expression, coupled with the corollary right G to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument. The importance of the right to freedom of expression has often been stressed by our courts. It has been said that H

A freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. The offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, the offence falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as B being a provision designed to protect the reputations, rights and freedoms of other persons. What had to be determined was whether or not this derogation was reasonably justifiable in a democratic society. What is democratically reasonable and justifiable is not susceptible to precise legal formulation. The test may well vary from one society to another, depending upon its peculiar political organisation and socio-economic C underpinnings

Held, further, that there was no conceptual or practical impediment to the criminalisation of defamation. The objective behind s 96 of the Code, *viz.* to protect the reputations, rights and freedoms of other persons, was sufficiently important to warrant the limitation of freedom of expression, D and the detailed provisions of s 96 are clearly rationally connected to that objective. What was contentious was the proportionality of the means deployed in this instance. In other words, is it necessary to criminalise defamatory statements in order to accomplish what is otherwise an unquestionably legitimate objective? This question could be answered in E two stages: firstly, what are the consequences of criminalising defamation; and, secondly, is there an appropriate and satisfactory alternative remedy to deal with the mischief of defamation? With regard to the first stage, there would be the normal consequences of being charged with a serious offence, but what was distinctive about criminal defamation was the stifling or chilling effect of its very existence on the right to speak and the right to F know. This was the more deleterious consequence of its retention in the Code, particularly in the present context of newspaper reportage. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices. The chilling effect of criminalising G defamation was further exacerbated by the maximum punishment of two years' imprisonment imposable for the offence. This penalty was clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectre of imprisonment as a measure that is reasonably justifiable in a democratic society. Although H false information will not benefit a society, democratic or otherwise,

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the right to freedom of expression is not restricted to correct or truthful A information because errors are bound to be made from time to time and to suppress the publication of erroneous statements on pain of penalty would of necessity have a stifling effect on the free flow of information.

Held, further, that another very compelling reason for eschewing resort to criminal defamation was the availability of an alternative civil remedy B under the *actio injuriarum* in the form of damages for defamation. Although this remedy may not be as expeditious as criminal prosecution, it affords ample compensatory redress for injury to one's reputation. If this is correct, the invocation of criminal defamation to protect one's reputation would be unnecessary, disproportionate and therefore excessive. The offence could not be compared to offences like assault C or malicious damage to property, which, unlike defamation, impinge upon the very fabric of society, *i.e.* by threatening the manner in which citizens are expected to interact in their daily lives without fear of physical violence. In the case of defamation, only the individual rights of the complainant are affected, and he has a clear alternative remedy D in civil law. Civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending. The very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated inconvenience and scandal. E These ills can barely be corrected on appeal, and thus the crime could easily be used to cow courageous journalists. It is this brand of public disapproval that criminal law rightly casts on murderers, rapists and thieves, precisely for its deterrent potency. The same objective could not and should not apply to injurious speech, the borders of which are F elusive and essentially subjective.

Held, further, that various international institutions have decried recourse to criminal defamation in order to stifle free speech, finding in particular that the imposition of imprisonment is a contravention of the International Covenant on Civil and Political Rights.

Held, further that accordingly, the offence of criminal defamation constituted G a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. It was not necessary to criminalise defamatory statements. The offence was not reasonably justifiable in a democratic society within the contemplation of s 20(2) of the former Constitution. H

Patel JA

A*Held*, further that the Minister of Justice should therefore be called upon, if he so wished, to show cause why s 96 of the Code should not be declared to be in contravention of s 20(1) of the former Constitution.

Editor's note: if the applicants had been arrested without a warrant, such arrest would have been unlawful, criminal defamation being one of the offences listed in the First Schedule to the Criminal Procedure and Evidence Act [*Chapter 9:07*] for which an B arrest may not be made without a warrant.

Cases referred to

S v *Hoho* [2008] ZASCA 98; [2009] 1 All SA 103 (SCA); 2009 (1) SACR 276 (SCA)

In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S)

C*Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S)

Retrofit (Pvt) Ltd v *PTC & Anor* 1995 (2) ZLR 199 (S)

R v *Harrison and Dryburgh* 1922 AD 320

United Parties v *Min of Justice* 1997 (2) ZLR 254 (S)

Legislation considered D

Constitution of Zimbabwe 1980, ss 18(1)(9), 20 (1)(2), 24(5)

Constitution of Zimbabwe 2013, ss 51, 61(5)(c)(i)(ii), 86

Criminal Law (Codification and Reform) Act [*Chapter9:23*], s 96

Case information

E W W Morris, for the applicant

E*E Makoto,* with him *T Mapfuwa*, for the respondent

Judgment

Patel JA: The applicants herein were jointly charged with the crime of criminal defamation as defined in s 96 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). Pursuant to an application under s 24(2) of the former Constitution, the magistrates court F sitting at Harare has referred the matter to this court for the determination of certain constitutional questions.

Background

The first applicant is the editor of *The Standard* newspaper, while the second applicant is employed by the same journal as a reporter. On 6 November 2011, G they published an article concerning the complainant, Munyaradzi Kereke, who is the founder and Chairman of the Green Card Medical Aid Society (the Society). The article stated that the Society was unable to pay its members and staff as well as its creditors and that it was on the brink of collapse as its expenditure outstripped its income. The applicants were H subsequently arrested and charged under s 96 of the Criminal Law Code.

Patel JA

It was alleged that they published the foregoing statements knowing that A they were false and intending to cause serious harm to the reputations of Kereke and the Society.

The application before this court, as originally posited, was for the offence of criminal defamation as defined in s 96 of the Criminal Law Code to be declared unconstitutional and struck down as being null and void. The same B relief was initially propounded by Mr *Morris* at the hearing of the matter. However, after it was observed by the court that the application in its original form did not address the relevant provisions of the new Constitution, the application was confined to the consistency of the offence with the former Constitution.

The relief now sought is for the perpetual stay of prosecution of the applicants C in respect of the offence of criminal defamation allegedly committed under the aegis of the former Constitution. It was noted that the decision of the court in this matter would also affect the prosecution of several other cases involving offences allegedly committed before the advent of the new Constitution.

Relevant constitutional provisions D

Section 18(1) of the former Constitution secures the protection of the law in crisp and concise terms:

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

Section 18(9) guarantees the right to a fair hearing in the determination of E civil rights and obligations:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations." F

Protection of the freedom of expression is enshrined in s 20(1) of the former Constitution in the following terms:

> "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 opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence." G

Section 20(2) delineates permissible derogations from the freedom of expression under the authority of law:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision – H

Patel JA

A (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of –

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

B (ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch C therewith of other matter; or

(c) that imposes restrictions upon public officers;

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."

D **Criminal defamation**

Our law of criminal defamation is essentially an amalgam of Roman-Dutch and English law. The original rationale of the crime of defamation under Roman and Roman-Dutch law is not readily ascertainable. According to Jolowicz *An Introduction to Roman Law* 3 ed at 171, its rationale may

derive from the social insecurity of the patricians, who became increasingly threatened by E the mounting power of the plebeians. In 17th and 18th century Holland, the *Groot Placaat Boek* abounds with enactments on the subject. The reason for such repeated restatements of the offence seems to have been the prevalence of defamatory lampoons, squibs, verses and scurrilous satires, pertaining in particular to persons in authority. See *R* v *Harrison and Dryburgh* 1922 F AD 320 at 327-328.

In Zimbabwe, the offence of criminal defamation and its parameters are prescribed in s 96 of the Criminal Law Code as follows:

> "(1) Any person who, intending to harm the reputation of another person, publishes a statement which –
>
> G (a) when he or she published it, he or she knew was false in a material particular or realised that there was a real risk or possibility that it might be false in a material particular; and
>
> (b) causes serious harm to the reputation of that other person or creates a real risk or possibility of causing serious harm to that other person's reputation;
>
> shall be guilty of criminal defamation and liable to a fine up to or exceeding H level fourteen or imprisonment for a period not exceeding two years or both.

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> (2) In deciding whether the publication of a statement has caused harm to a A person's reputation that is sufficiently serious to constitute the crime of criminal defamation, a court shall take into account the following factors in addition to any others that are relevant to the particular case –
>
> (a) the extent to which the accused has persisted with the allegations made in the statement;
>
> (b) the extravagance of any allegations made in the statement; B
>
> (c) the nature and extent of publication of the statement;
>
> (d) whether and to what extent the interests of the State or any community have been detrimentally affected by the publication.
>
> (3) Subject to subsection (4), a person accused of criminal defamation arising out of the publication of a statement shall be entitled to avail himself or herself of any defence that would be available to him or her in civil proceedings for C defamation arising out of the same publication of the same statement.
>
> (4) If it is proved in a prosecution for criminal defamation that the defamatory statement was made known to any person, it shall be presumed, unless the contrary is proved, that the person understood its defamatory significance."

Protection of the law and right to a fair trial D

In his heads of argument, Mr *Morris* submits that the requirement of serious harm in the crime of defamation is vague, in that the word "serious" is a comparative adjective which is almost impossible of a benchmark or judicial definition. Consequently, the requirement is unduly subjective and its application will depend on the idiosyncratic views of the parties involved, the investigating officer, the prosecutor and, ultimately, the presiding judicial E officer. For these reasons, the offence violates not only the right to protection of the law secured by s 18(1) of the former Constitution but also the right to a fair trial guaranteed by s 18(9).

In my view, these submissions, which were not pursued with any vigour in oral argument, are flimsy and highly unpersuasive. The use of adjectives to F define the constituent elements of criminal offences is commonplace and can hardly be regarded as being remarkable. To cite a few examples relating to the *actus reus* of various offences, there are the crimes of possessing an "offensive" or "dangerous" weapon, causing "serious" or "grievous" bodily harm, and committing "aggravated" indecent assault or theft in "aggravating" circumstances. The interpretation and application of any such defining epithet G forms part of the daily diet of judicial officers in the lower courts.

As I read it, the offence of criminal defamation is clearly formulated with sufficient precision in s 96 of the Criminal Law Code so as not to create any ambiguity or vagueness as to the conduct that is proscribed as being punishable. Moreover, the specific factors that may entail harm of a "serious" H

Patel JA

A nature are succinctly articulated in s 96(2) to afford adequate guidance to the trial court in determining whether or not the alleged harm to a person's reputation is sufficiently serious to

constitute criminal defamation. These include the extent to which the accused has persisted with the defamatory allegations, the extravagance of the allegations, the nature and extent of the publication, and whether and to what extent the interests of the State or any B community have been detrimentally affected thereby. Although these factors are not exhaustive, they tend to enhance rather than diminish the prospect of the accused receiving a fair trial.

In the premises, I am satisfied that the challenge against the constitutionality of criminal defamation *vis-à-vis* the rights enshrined in ss 18(1) and 18(9) C of the former Constitution is devoid of merit and cannot be upheld.

Freedom of expression

There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it D is prominently recognised and entrenched in virtually every international and regional human rights instrument. Indeed, at its first session in 1946, through Resolution 59(I) of 14 December 1946, calling for an international conference on freedom of information, the United Nations General Assembly declared that:

> "Freedom of information is a fundamental human right and is the touchstone of E all the freedoms to which the United Nations is consecrated."

This sentiment is echoed with specific reference to the media by the Human Rights Committee (established under Part IV of the International Covenant on Civil and Political Rights 1976). In General Comment No. 34, issued at its 102nd session in July 2011, the Committee observed as follows, at para 13:

> F "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to G comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output."

This court too has had occasion to recognise the freedom of expression as a core value of a free and democratic society. See *Retrofit (Pvt) Ltd* v *PTC & Anor* 1995 (2) ZLR 199 (S) at 211C-F; *United Parties* v *Min of Justice*H1997 (2) ZLR 254 (S) at 269A-E. More recently, the South African Supreme

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Patel JA

Court of Appeal made the following pronouncement *per* Streicher JA, in A the case of *S* v *Hoho* [2008] ZASCA 98; [2009] 1 All SA 103; 2009 (1) SACR 276 at para 29:

> "The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong B policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said 'that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man'." C

It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, it is also not in doubt that the offence of criminal defamation falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. What is in D issue for determination by this court is whether or not it is a limitation that is reasonably justifiable in a democratic society.

The test as to what is democratically reasonable and justifiable is not susceptible to precise legal formulation. In my own appreciation, the test may well vary from one society to another depending upon its peculiar E political organisation and socio-economic underpinnings. Nevertheless, as was recognised by Gubbay CJ in the oft-cited In re *Munhumeso & Ors* 1994 (1) ZLR 49 (S) at 64B-C:

> "What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision

under challenge is to be F judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right."

In *Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S) at 13C-F, Gubbay CJ elaborated the test as follows:

"In effect the court will consider three criteria in determining whether or not G the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it; and H

2014 (1) ZLR p729

Patel JA

A (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

As regards the first two rungs of this test, I do not perceive any conceptual or practical impediment to the criminalisation of defamation. The objective behind s 96 of the Criminal Law Code, *viz.* to protect the reputations, rights and freedoms of other persons, is sufficiently important to warrant the B limitation of freedom of expression, and the detailed provisions of s 96 are clearly rationally connected to that objective. What is contentious, in my view, is the proportionality of the means deployed in this instance. In other words, is it necessary to criminalise defamatory statements in order to accomplish what is otherwise an unquestionably legitimate objective? It seems logical C to answer this question in two stages: firstly, what are the consequences of criminalising defamation and, secondly, is there an appropriate and satisfactory alternative remedy to deal with the mischief of defamation?

The practical consequences that would ordinarily flow from a complaint of criminal defamation are as follows. The accused person would be investigated and face the danger of arrest. This would arise even where the D alleged defamation is not serious and where the accused has an available defence to the charge. Thereafter, if the charge is prosecuted, he will be subjected to the rigours and ordeal of a criminal trial. Even if the accused is eventually acquitted, he may well have undergone the traumatising gamut of arrest, detention, remand and trial. Moreover, assuming that the accused has employed the services of a lawyer, he will also have incurred a sizeable E bill of costs which will normally not be recoverable.

I would accept that the foregoing tribulations are not peculiar to the offence of criminal defamation and would potentially be encountered by an accused person charged with any serious criminal offence. However, what is distinctive about criminal defamation, though not confined to that offence, is the stifling F or chilling effect of its very existence on the right to speak and the right to know. This, in my view, is the more deleterious consequence of its retention in the Criminal Law Code, particularly in the present context of newspaper reportage.

It cannot be denied that newspapers play a vital role in disseminating G information in every society, whether open or otherwise. Part and parcel of that role is to unearth corrupt or fraudulent activities, executive and corporate excesses, and other wrongdoings that impinge upon the rights and interests of ordinary citizens. It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to H stifle and silence the free flow of information in the public domain. This,

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2014 (1) ZLR p730

Patel JA

in turn, may result in the citizenry remaining uninformed about matters of A public significance and the unquestioned and unchecked continuation of unconscionable malpractices.

The chilling effect of criminalising defamation is further exacerbated by the maximum punishment of two years' imprisonment imposable for any contravention of s 96 of the Criminal Law Code. This penalty, in my view, is clearly excessive and patently disproportionate for the purpose of B suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectre of imprisonment as a measure that is reasonably justifiable in a democratic society.

The fact that investigative journalism may on occasion involve the publication of erroneous or inaccurate information does not detract from the reciprocal C rights to receive and impart

information and ideas without interference. As was aptly observed in *Hoho's* case s*upra* at para. 29:

> "Although false information will not benefit a society, democratic or otherwise, the right to freedom of expression is not restricted to correct or truthful information because errors are bound to be made from time to time and to suppress the publication of erroneous statements on pain of penalty would of necessity have D a stifling effect on the free flow of information."

Another very compelling reason for eschewing resort to criminal defamation is the availability of an alternative civil remedy under the *actio injuriandum* in the form of damages for defamation. Although this remedy may not be as expeditious as criminal prosecution, it affords ample compensatory redress for injury to one's reputation. If this is correct, the invocation of criminal E defamation to protect one's reputation would be unnecessary, disproportionate and therefore excessive.

One of the arguments proffered for the retention of criminal defamation is that injury to one's reputation may have more serious and lasting effects than a physical assault and that, as is the case with assault, there is nothing F excessive about one injury attracting both a civil claim and a criminal penalty. See *Hoho's* case s*upra* at para. 35. However, what this argument disregards is that an act of assault or malicious damage to property, unlike defamation, impinges upon the very fabric of society, by threatening the manner in which citizens are expected to interact in their daily lives without fear of physical violence. In the case of defamation, only the individual rights of G the complainant are affected, and he has a clear alternative remedy in civil law, without subjecting the defamer to the distress attendant upon criminal arrest and detention.

In *Hoho's* case, the Supreme Court of Appeal dealt with the constitutionality of a conviction for criminal defamation. The court deemed civil and criminal H

Patel JA

A liability for defamation to be equivalent in the extent of their limitation, as the onerous consequences of criminal liability are counterbalanced by an onerous burden of proof. It was accordingly held, at para. 36, that criminal defamation was not abrogated by disuse and was perfectly consonant with the new South African Constitution. The offence was reasonably required to protect personal reputations and did not go further than was necessary to B accomplish that objective. It was not too drastic a limitation on the right to freedom of association.

In an article written by Vinayak Bhardwaj and Ben Winks, in the *Mail & Guardian* of 1 to 7 November 2013, commenting on the decision in *Hoho's* case, the vital differences between criminal and civil liability are commendably C highlighted. I take the liberty to quote extensively from this article and to associate myself with the propositions articulated therein:

> "Civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests. Criminal law exists to ensure retribution and protection of the public, by detaining offenders and deterring others from offending.
>
> D For assault, imposing imprisonment or supervision is essential to protect the victims and the public at large. For damaging speech, however, the civil law is as effective, if not more so, in providing the public with proportionate protection from offenders.
>
> Crucially, freedom of expression is constitutionally enshrined and encouraged, as the lifeblood of democracy. The freedom to wield fists and firearms enjoys E no similar status in our supreme law. Thus the analogy between assault and defamation breaks down. It is an unreliable guide to finding an appropriate balance between the rights to dignity and free speech.
>
> It is also disputable that civil and criminal defamation impose equivalent limitations, and that the harsher consequences of criminal liability are neatly offset by the heavier burden of proof. There are important differences in practice and in principle. First, a prosecution targets the journalist rather than the journal. F A civil suit is aimed primarily at the defendant with the deepest pockets,
>
> Furthermore, while civil liability may be discharged within days, through payment or some other performance, criminal liability endures long after the sentence has been served, or even if the sentence has been suspended. Criminal liability is permanent and pervasive. It brands the accused with a mark so deep and indelible, it can be expunged only by presidential pardon. It stains every G sphere of that person's life. He becomes a criminal, and must disclose that every time he applies for a job, a visa or even a bank account.
>
> Even if the State does not discharge its onerous burden of proof, the very existence of the crime creates the risk of wrongful accusation, investigation, prosecution and even conviction, with all the associated

inconvenience and scandal. These ills can barely be corrected on appeal, and thus the crime could easily be used H to cow courageous journalists.

2014 (1) ZLR p732

Patel JA

It is this brand of public disapproval that criminal law rightly casts on murderers, A rapists and thieves, precisely for its deterrent potency. The same objective could not and should not apply to injurious speech, the borders of which are elusive and essentially subjective."

The international dimension

On the international plane, it is not without significance that the United Nations Commission on Human Rights has decried recourse to criminal B defamation in order to stifle free speech:

"Detention as a sanction for the peaceful expression of opinion is one of the most reprehensible practices employed to silence people and accordingly constitutes a serious violation of human rights".

In similar vein, in General Comment No. 34 s*upra* at para 47, the Human C Rights Committee stipulates the following guidelines on defamation laws *vis-à-vis* the application of art 19 of the International Covenant on Civil and Political Rights:

"Defamation laws must be crafted with care to ensure that they comply with para 3 [the derogation clause in Article 19 of the Covenant], and that they do not serve, in practice, to stifle freedom of expression. … Care should be taken D by States Parties to avoid excessively punitive measures and penalties. … States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."

The Committee endorsed and applied these strictures in a complaint by one E Alexander Adonis against the Government of the Philippines. The complaint involved the imprisonment of a radio broadcaster for alleged defamation. In its decision in Communication No. 1815/2008, adopted on 26 October 2011 at its 103rd session, the Committee found as follows, at paras. 7.7 to 7.10:

"The Committee takes note of the author's allegation that his conviction for defamation under the Philippine Penal Code constitutes an illegitimate restriction F of his right to freedom of expression because it does not conform to the standards set by article 19, paragraph 3, of the Covenant. The author maintains, in particular, that the criminal sanction of imprisonment established by the Philippine Revised Penal Code for libel is neither necessary nor reasonable …

Article 19, paragraph 3, lays down specific conditions and it is only subject to these conditions that restrictions may be imposed, i.e. the restrictions must be G provided by law; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality …

In light of the above, the Committee considers that, in the present case the sanction of imprisonment imposed on the author was incompatible with article 19, paragraph 3, of the Covenant." H

2014 (1) ZLR p733

Patel JA

A Turning to the regional sphere, the African Commission on Human and Peoples' Rights, in Resolution 169 adopted on 24 November 2010, condemns criminal defamation in the specific context of journalism and the media, by emphasising that:

"criminal defamation laws constitute a serious interference with freedom of expression and impedes on [*sic*] the role of the media as a watchdog, preventing B journalists and media practitioners to practice [*sic*] their profession without fear and in good faith;"

Accordingly, the Commission calls upon States Parties to the African Charter on Human and Peoples' Rights:

"to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated C in the African Charter, the Declaration, and other regional and international instruments."

Conclusion

Having regard to all of the foregoing, I take the view that the harmful and undesirable consequences of criminalising defamation, *viz.* the chilling D possibilities of arrest, detention and

two years' imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. In short, it E is not necessary to criminalise defamatory statements. Consequently, I am satisfied that the offence is not reasonably justifiable in a democratic society within the contemplation of s 20(2) of the former Constitution. Accordingly, it is inconsistent with the freedom of expression guaranteed by s 20(1) of that Constitution.

F **Freedom of expression under the new constitution**

As I have observed at the outset, the principal issue for determination *in casu* is the constitutionality of criminal defamation under the former Constitution. What has not and need not be considered for present purposes is the validity of that offence within the framework of the new Constitution. What I would G simply note at this stage is that the freedom of expression and freedom of the media as secured by s 61 of that Constitution are framed differently in several material respects. Of particular significance is subs (5)(c) which expressly excludes malicious injury to a person's reputation or dignity from the ambit of the freedom of expression and freedom of the media guaranteed by subss (1) and (2). Also relevant is s 51 which declares that every person H has inherent dignity and the right to have that dignity respected and protected.

Patel JA

Having regard to these provisions, taken together, it is arguable that the A freedom of expression conferred by s 61 is to be more narrowly construed as being subordinate to the value of human dignity. It might also be argued that the offence of criminal defamation is a justifiable limitation on the freedom of expression as envisaged by s 86 of the new Constitution. In any event, as I have said, these are matters for argument and consideration as and when an appropriate case is brought for determination before this court. B

Disposition

The relief sought herein is for the permanent stay of prosecution of the applicants on the charge of criminal defamation brought against them as being in contravention of s 20(1) of the former Constitution. They have succeeded in demonstrating that the offence of criminal defamation is not reasonably C justifiable in a democratic society on any of the grounds mentioned in s 20(2) of the Constitution. However, before the declaratory relief that they seek can be granted, it is necessary to apply the rule *nisi* requirements of s 24(5) of that Constitution, which subsection provides as follows:

> "If in any proceedings it is alleged that anything contained in or done under the D authority of any law is in contravention of section 16, 17, 19, 20, 21 or 22 and the court decides, as a result of hearing the parties, that the complainant has shown that the court should not accept that the provision of the law concerned is reasonably justifiable in a democratic society on such of the grounds mentioned in section 16(7), 17(2), 19(5), 20(2) and (4), 21(3) or 22(3)(*a*)to (*e*), as the case may be, as are relied upon by the other party without proof to its satisfaction, it shall issue a rule *nisi* calling upon the responsible Minister to show cause E why that provision should not be declared to be in contravention of the section concerned."

In the result, the Minister of Justice, Legal and Parliamentary Affairs is hereby called upon, if he so wishes, to show cause why s 96 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] should not be declared F to be in contravention of s 20(1) of the former Constitution. The Registrar is directed to set the matter down for hearing on the earliest available date.

In considering his position in light of this judgment, the Minister's attention is drawn to the observations made by this court in *Chimakure & Ors* v *A-G* Case No. CCZ 247/09[1] as to what is ordinarily expected in any Executive G response to a rule *nisi* issued in terms of s 24(5). Thus, if the Minister intends to oppose the confirmation of the rule *nisi*, he is enjoined to canvass new facts and legal arguments rather than recapitulate those that have already been traversed and, in keeping with the intention behind s 24(5), to focus H

Patel JA

A his submissions on the critical question of whether or not the impugned provision is reasonably justifiable in a democratic society.

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA, and GUVAVA JA concurred

B*Atherstone & Cook*, applicant's legal practitioners

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

1 Judgment No. S-14-13, reported in 2013 (2) ZLR 466. – *Editor.*
1 Judgment No. S-14-13, reported in 2013 (2) ZLR 466. – *Editor.*

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STREAMSLEIGH INVESTMENTS (PVT) LTD v AUTOBAND INVESTMENTS (PVT) LTD 2014 (1) ZLR 736 (S)

Citation	2014 (1) ZLR 736 (S)
Case No	Judgment No. S-43-14
Court	Supreme Court, Harare
Judge	Malaba DCJ, Garwe JA & Gowora JA
Heard	11 September 2012; *CAV*
Judgment	17 June 2014
Counsel	*A P de Bourbon SC*, for the appellant *L Uriri,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court – Supreme Court – jurisdiction – power to take any course which may lead to just and speedy settlement – eviction order improperly granted in lower court – Supreme Court ordering reinstatement of evicted party

Practice and procedure – declaratory order – requirements for issue of – D *who may seek such order*

Headnote

The Supreme Court is a creature of statute and can only do that which its enabling statute permits. The jurisdictional limits and powers of the court are found in ss 21 and 22 of the Supreme Court Act [*Chapter 7:13*]. The E court has extensive powers, which include the power to amend, vary,

confirm or set aside a judgment of a lower court or tribunal. It also has the power to take any course which may lead to the just, speedy and inexpensive settlement of the case. Where the appellant was evicted by virtue of an order of eviction which was obtained under circumstances which could only be described as irregular, an order directing the F appellant to return to the High Court for appropriate relief in relation to its eviction from the premises would result in the appellant having to institute fresh proceedings for its reinstatement. Such a course would merely serve to delay the process. This would be a proper case where the Supreme Court may issue an order that the appellant be reinstated in the premises. G

A declaratory order under s 14 of the High Court Act [*Chapter 7:06*] is appropriate to determine any existing, future or contingent right or obligation. An applicant for a declaratory order must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the H

Gowora JA

A judgment of the court. In addition, an applicant must establish that some tangible and justifiable advantage in relation to its position with reference to an existing, future or contingent legal right or obligation may appear to flow from the grant of the declaratory order sought.

Cases referred to B

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

Johnsen v *Agricultural Finance Corporation* 1995 (1) ZLR 65 (S)

Munn Publishing (Pvt) Ltd v *ZBC* 1994 (1) ZLR 337 (S)

Nino Bonino v *de Lange* 1906 TS 120

Scoop Industries (Pty) Ltd v *Langlaagte Estate* & *GM Co Ltd (in vol liq)*C1948 (1) SA 91 (W)

Legislation considered

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

Supreme Court Act [*Chapter 7:13*], ss 21 & 22

D Supreme Court Rules 1964 (RGN 380 of 1964), r 39

Case information

A P de Bourbon SC, for the appellant

L Uriri, for the respondent

Judgment

E**Gowora JA**: This is an appeal against a judgment of the High Court dismissing an application, firstly, for a declaration of rights in respect of an immovable property known as No. 15 Lanark Rd, Avondale, Harare and, secondly, for an interdict against the eviction of the appellant from the said premises.

Pending this appeal, on 5 September 2012, the respondent filed a chamber F application for leave to adduce further evidence. The appellant filed a notice of opposition and an opposing affidavit. For reasons that follow, it will not be necessary to traverse the contents of the affidavits filed in that application.

Mr *de Bourbon,* on behalf of the appellant, raised a point *in limine* to the effect that the application did not comply with the rules of the Supreme Court, in G particular r 39 which provides that no less than five days' notice of the date of hearing shall be given by the applicant. The appellant had opposed the application citing the lack of compliance with the Rules and the failure to give notice as provided in the rules. It is common cause that the respondent ignored the notice of opposition and in particular the peremptory requirements H of the rules which the appellant made reference to.

Gowora JA

It is my view that in making that submission Mr *de Bourbon* was correct. A The application could only have been made in terms of s 39 of the Supreme Court Rules 1964. The rule reads in relevant part:

> **"39. Applications**
>
> (1) Subject to the provisions of rules 31, 36, 37 and 38, applications shall be by court application signed by the applicant or his legal representative and accompanied by an affidavit setting out any facts which are relied upon. B
>
> (2) …
>
> (3) …
>
> (4) An application to lead further evidence on appeal shall be accompanied by that evidence in the form of an affidavit and also by an affidavit, or a statement from counsel, showing why the evidence was not led at the trial, as also a copy C of the judgment appealed from and a statement indicating in what manner it is alleged the evidence sought to be adduced affects the matters at issue.
>
> (5) When making an application the applicant shall, if he wishes to state the date of hearing in his court application, arrange a suitable date with a registrar prior to serving the application. Where no such date has been arranged the registrar shall appoint a date of hearing and notify the parties of the date: D
>
> Provided that no less than five days' notice of the date of hearing shall be given by the applicant or by the registrar, as the case may be."

In terms of sub-rule (5), an application under the rule must be heard upon no less than five days' notice. The respondent served the application on the appellant three days before the appeal was scheduled to be heard. Clearly, E there was no compliance with the rule.

Mr *Uriri* conceded that the application did not meet the peremptory requirements set out in r 39 and, submitted that, in fairness, he could not persist with the application. The concession was properly made. Accordingly, the application was struck off the roll with the respondent being ordered to pay the costs. I turn now to the merits of the appeal itself. F

The facts surrounding this dispute are convoluted and I will endeavour to simplify them. At the centre of the dispute is control of the Trauma Centre. Although the parties involved in the dispute refer to the ownership of the same, in this matter the court is seized only with the question of which of the parties is legally entitled to the physical occupation and possession of G the same.

The "Trauma Centre" is a state of the art hospital which is situated at 15 Lanark Road in Harare. It is common cause that for a considerable period the hospital leased the premises from the administrators of the estate of the late Rosa Alhadeff. On 30 March 2010 the ownership of the land on which H

A the hospital is situate was transferred to Streamsleigh Investments (Pvt) Ltd, the appellant herein.

The appellant is a private company which is duly registered in Zimbabwe in accordance with the laws of the country. Its shareholding is at the core of the dispute between the parties, which dispute is, however, not the issue B presently for determination before this court. Its directors upon registration were Wessel Roets and Zarina Dudhia. The latter was also the principal officer of the company.

The respondent is a private company duly registered in accordance with the laws of Zimbabwe. On 30 January 2008, the respondent concluded a management agreement with CA Meifco Ltd, which is a company registered C in accordance with the laws of Mauritius, for the provision of certain specified services by CA Meifico to the respondent at what is colloquially referred to as the "Trauma Centre". The agreement was to run for a period of five years from the effective date.

A management team comprising Dr Vivek Solanki, Marco Cerunschi and D Wessels Roets was to be responsible for the overall management of the Trauma Centre. CA Meifco was responsible for the financial management of the hospital including the procurement of medication. On an undisclosed date CA Meifco changed its name to VIP Healthcare Solutions. Although it was not specifically mentioned in the agreement, CA Meifico was a wholly owned subsidiary of African Medical Investments plc ("AMI plc").

E On 26 April 2010, AMI plc executed a deed of trust in terms of which the Streamsleigh Trust was created. Jeremy Darroll Stewart Sanford, Anis Abdulkarim Omar and Gary Maitland Crosland were

named as trustees. On 28 April 2010 Streamsleigh Investments (Pvt) Ltd issued a share certificate in terms of which the Streamsleigh Trust was recorded as the holder of 100 F fully paid shares of US$0.001 each. On the same date Jeremy Darroll Stewart Sanford was appointed as one of the directors of the company, in addition to Dudhia and Roets.

On 28 September 2011 the respondent filed an application in the magistrates court Harare. The deponent to the affidavit was Dr Vivek Solanki ("Solanki"), who described himself as the founder and director of the respondent company. G In the application AMI plc was cited as the sole respondent.

In the founding affidavit, Solanki alleged that he had incorporated Autoband Investments (Pvt) Ltd (the respondent in this appeal), and that, pursuant thereto he had been leasing the premises at No 15 Lanark Road for about 15 years. He averred further that he had been approached by officers of AMI H Plc with a proposal that Autoband enter into a joint venture agreement with

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the former and the negotiations had culminated in the parties executing a A management agreement in terms of which AMI plc was to purchase Autoband. He averred that the agreement had fallen through and subsequent to that the employees of AMI plc had unlawfully evicted the employees of Autoband from No 15 Lanark Rd during his absence from the country. In the affidavit, Solanki alleged that the employees of Autoband had been intimidated by B people who posed as police officers, and who later turned out to be bogus. It was further alleged in the affidavit that AMI plc had taken the law into its hands and evicted Autoband and its employees illegally from the premises that it had been leasing for over 15 years. The draft order attached to the application sought the eviction of anyone seeking occupation through AMI plc.

The application was opposed by the appellant. The deponent to the opposing C affidavit, one Peter J Annesley, described himself as "the Chief Operating Officer of Streamsleigh Investments (Pvt) Ltd", a duly registered company which trades under the name of AMI Hospital Harare. It seems to have escaped the notice of Annesley and his legal practitioners that the appellant had not been cited as a party to the application and that it could not challenge the application unless it was joined as a party. D

In his response to the opposing affidavit, Solanki claimed that Streamsleigh Investments (Pvt) Ltd was a company in which he had an interest and he put into issue the status of Annesley in the said company. Presented with these facts, the magistrate who heard the application found that the appellant's occupation of the premises was questionable in the absence of proof to show E that the respondent had been removed from the same lawfully. The magistrate as a consequence found that the respondent had been dispossessed unlawfully as there was no court order prior to its eviction. The magistrate then ruled that the respondent was entitled to an order for restoration and consequent thereto issued the following order: F

> "The respondent, its officials and anyone claiming through them and grant (*sic*) restored occupation to the applicant 7 days upon delivery of judgment."

An appeal was noted against the judgment of the magistrate and in response the respondent sought and obtained an order for leave to execute pending appeal. Consequent thereto, Autoband obtained a writ of eviction. Being the G registered owner of the premises in question, the appellant considered that its position had been compromised by the order. It had to protect its occupation and as a result it approached the High Court on a certificate of urgency in which it sought a provisional order in the following terms:

> "TERMS OF INTERIM RELIEF SOUGHT
>
> IT IS ORDERED THAT: H

Gowora JA

A 1. In the absence of any direct order against the applicant for its eviction from Stand No 2924 Salisbury Township of Salisbury Township Lands also known as No. 15 Lanark Road, Belgravia, Harare, the respondent be and is hereby interdicted from utilizing the eviction order in Case No. MC 16435/11 to evict the applicant from the premises set out here above.

2. The respondent be and is hereby interdicted from utilizing any relief obtained B in Case No.s HC 619/11 and 2125/11 against the Applicant.

3. The respondent be and is hereby ordered to pay the costs of this application."

TERMS OF FINAL ORDER SOUGHT

IT IS DECLARED THAT:

1. The eviction order granted in Case MC 16435/11 between the respondent and African Medical Investments plc is of no force, effect or application C as against the applicant and its occupation of the premises known as Stand No. 2924 Salisbury Township of Salisbury Township Lands also known as No. 15 Lanark Road, Belgravia, Harare.
2. Any relief granted in Case No.s HC 619/11 and 2125/11 be and are hereby declared to be of no force, effect or application as against the applicant in respect of its occupation of their (sic) premises known as Stand No 2924 Salisbury Township of Salisbury Township Lands also known as No. 15 D Lanark Road, Belgravia Harare.
3. That the Respondent pay the costs of this application."

The respondent opposed the application and in turn the appellant filed an answering affidavit. The learned judge before whom the urgent chamber application was placed, understandably, faced with the apparent disputes E was unable to issue an order in terms of the interim relief being sought and instead issued a provisional order by consent which preserved the rights of the parties pending the hearing and determination of the application for relief in terms of the final order sought. He also gave directions for the filing of further affidavits by the parties as well as heads of argument. The matter was F subsequently set down before a different judge who, after hearing counsel dismissed the application and discharged the provisional order. Following upon the discharge, the appellant was ordered to pay punitive costs. It is against that judgment that the appellant has noted an appeal to this court.

It was contended on behalf of the appellant that the critical issue before the High Court was whether or not it was AMI plc or Streamsleigh (Pvt) Ltd G which was in occupation of the premises at the time that the eviction order was granted. I agree that this was the critical issue for resolution by the court *a quo* in the determination of the application for the declaratur and consequential relief sought by the appellant.

The learned judge in the High Court was persuaded to accept that the H finding by the magistrate as to who was in possession of No 15 Lanark Rd

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was correct, and that consequent thereto, the respondent had been illegally A dispossessed of its occupation of the same. This is what the learned judge had to say at pp 3 to 4 of the judgment:

> "I am extremely concerned with the approach being advocated by the applicant in this case. It wants this court to grant a declaratory order to subvert a process that started in the lower court in which it actively participated and lost. I see nothing but a stout (*sic*) effort to indulge in forum shopping and the High Court B must not be used to subvert court process emanating from the lower court for no good cause. I agree with the forceful submissions made by Adv *Uriri* that in these circumstances a declaratory order would not be competent.
>
> Before concluding this matter, I wish to observe that the applicant has placed so much emphasis on the ownership of stand 2924 Salisbury Township of Salisbury Township Lands (No 15 Lanark Road, Belgravia, Harare). The application for C eviction had nothing to do with the ownership of the property but was restricted to possessory rights of the applicant in the lower court. Again this issue was dealt by the lower court in its judgement referred to above. The lower court made a specific finding that the now respondent had been unlawfully dispossessed of the property. The applicant exercised its right of appeal against the decision of the lower court and certainly it was not competent for the applicant to apply for a declaratory order to short circuit the appeal process." D

The learned judge in the court *a quo* concluded that the magistrate was correct in finding that the respondent had been unlawfully dispossessed by the appellant. It is clear that the judge based his decision on a number of documents placed before him by the parties.

A perusal of the documents reveals the following. On 13 December 2010 the E appellant wrote to the City of Harare requesting that an inspection be carried out at No 15 Lanark Rd. The inspection was carried out on 15 December 2010 as confirmed by a letter written to the appellant by that department on 20 December 2010. Ultimately, the stand was registered as a hospital. On 15 April 2011 the Civil Aviation Authority of Zimbabwe allocated the F appellant an account for the use of facilities at its premises for navigation, landing, parking and other apron fees. On 1 March 2011, the

Medicine Control Authority of Zimbabwe issued a hospital pharmacy licence to the appellant. Lastly, on 27 January 2012 the City of Harare issued a municipal licence to the appellant for a coffee shop.

Indeed, as stated by the learned judge in the court *a quo*, there are documents G in the form of statements of accounts apparently generated by African Medical Investments t/a Streamsleigh Investments plc addressed to a number of individuals who appear to be patients or recipients of services. In my view, the documents in question do not confirm that the occupant of the premises was AMl plc. They confirm instead, that a subsidiary of AMI plc was running H

A the hospital, as indicated by the statutory licences and permissions granted in the name of the appellant.

The respondent accepts that in the proceedings before the magistrate it bore the *onus* to prove that an act of spoliation was committed by the appellant. The affidavit in relation to the alleged act of spoliation was adduced by Solanki. He stated that the act of spoliation had happened in his absence B from the country. This is how the alleged act is described:

> "I was however surprised that the respondent's employees unlawfully and illegally evicted applicant's employees whilst I was out of the country. The respondent used unorthodox means to evict applicant's employees including robbery, theft, corruption and fraud as a result the respondent took occupation, such occupation was and remains unlawful as they did not obtain a court order neither did they C agree with me or my employees."

Where an act of spoliation has been alleged, it is trite that the act of spoliation has to be proved. The respondent did not state when such act occurred, how it occurred or by whom it was perpetrated. In his founding affidavit Dr Solanki refers in general terms to "robbery, theft, corruption and fraud" as D constituting the act of spoliation. It cannot be gainsaid that robbery, theft, corruption and fraud are different and distinct species of criminal offences. Each of the offences referred to by the respondent as having been perpetrated has its own separate essential elements constituting the specific offence. The respondent does not, in the affidavit of Solanki, give details on each of the alleged offences nor does he state how each of these acts which are alleged E to constitute spoliation were effected, when they occurred or by whom they were perpetrated. In short, the affidavit is devoid of any specifics on the act of spoliation in terms of which the order of eviction was premised. It is lacking in detail and substance as to how the respondent was illegally dispossessed of occupation.

F In my view, the record does not reflect that the respondent has discharged the *onus* it bears. In *Nino Bonino* v *de Lange* 1906 TS 120, Innes CJ stated the following in describing acts of spoliation:

> "The best definition I have been able to find is one given by Leyser, who states that spoliation is any illicit deprivation of another of the right to possession which he has, whether in regard to movable or immovable property or even in G regard to a legal right."

It has been stated in numerous authorities that before an order for a *mandement van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly. In *Scoop Industries (Pty) Ltd* v *Langlaagte Estate* & *GM Co Ltd (in vol liq)* 1948 (1) SA 91 (W) H Lucas AJ said at pp 98-99:

> "Two factors are requisite to found a claim for an A order for restitution on an allegation of spoliation. The first is that the applicant was in possession and, the second that he has been wrongfully deprived of that possession against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before the order is granted. (See *Rieseberg* v *Rieseberg* 1926 WLD 59 at 65). It must be shown that the applicant had free and undisturbed possession (*Hall* v *Pitsoane* 1911 TPD 853). When it is shown that there was B such possession, which is possession in the physical fact and not in the juridical sense, and there has been such deprivation, the applicant has a right to be restored in possession *ante omnia*. On a claim for such restoration it is not a valid defence to set up a claim on the merits."

Broken down in simple terms, an applicant for an order for a *mandament van spolie* must establish the following: C

(1) that he was in peaceful and undisturbed possession of the property;

(2) that he was unlawfully deprived of such possession.

See also *Davis* v *Davis* 1990 (2) ZLR 136 (H) at 141B-C.

It was necessary, in my view, for the respondent to have shown that it was in occupation of the premises in question and that further to that it was, in fact, D the appellant, as opposed to AMI plc, that caused its unlawful dispossession from the premises. It did not establish that it was in peaceful and undisturbed possession and that it was disposed by the appellant. Consequently, there is no substance to the allegation by the respondent that it had been unlawfully dispossessed of occupation of the hospital premises by the AMI plc against which it took no action. E

I therefore conclude that the learned judge misdirected himself in accepting the finding by the magistrate that the respondent had been unlawfully removed from the premises by AMI plc.

In my view, the resolution of which entity was in lawful possession of the premises is critical in the determination as to whether or not the learned judge F was correct in dismissing the application, as the finding would put paid to the allegation by the respondent that AMI plc caused its unlawful ejectment from the premises. However, the issue before this court does not end there.

It is trite that a party is not entitled to use the court system in a manner that undermines the judicial process. The learned judge in the court *a quo* was of G the view that, by seeking a declaratur before the High Court, the appellant was attempting to subvert a process that had started in the lower court and in which the appellant had participated. As a consequence of that view, the learned judge not only dismissed the application, he also granted an order of punitive costs against the appellant. The learned judge was clearly in error. H

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A Contrary to the assertions by the respondent that the appellant had gone forum shopping by seeking a declaratur in the High Court, the entire process that plagues the dispute between the parties commenced in the High Court and not in the magistrates court, as is being alleged by the respondent, which error was further compounded by the learned judge in the court *a quo*.

B A narration of the sequence of events appears from the appellant's heads of argument which sets out the facts as follows. The respondent brought an urgent chamber application on 28 February 2011 in an effort to interdict the appellant from proceeding with the imminent opening of the hospital. The court, however, opined that the matter was not urgent. Despite the finding of the lack of urgency, the appellant filed opposing papers. It is common cause C that the application has not been pursued by the respondent.

Apart from the urgent chamber application referred to above, the parties also filed documents under case No. HC 619/11. Again, this application is at a standstill. The application in D the magistrates court was filed on 28 September 2011. It is obvious that by the time the respondent filed the application in the magistrates court, it had become aware, from the documents filed in the two High Court applications mentioned above, that the appellant was in occupation of the hospital, yet it chose deliberately not to cite the appellant in the application for an order for spoliation.

In addition, if regard is had to the attempt by the respondent to obtain an E interdict against the opening of the hospital, the assertion that it had been despoiled sounds hollow and instead points to an apparent intent to mislead the court. The record speaks for itself and shows that before the filing of the application in the magistrates court the parties had been involved in other proceedings over the same issue in the High Court and that several matters F were pending in that court which could have achieved the same result as the respondent sought to obtain from the magistrates court. Between 2 July 2010 and 28 February 2011 the respondent brought three applications before the High Court, all of them seeking the eviction of AMI plc from 15 Lanark Rd. Clearly, as argued by the appellant, the respondent went forum shopping after realising that it could not obtain relief in the High Court.

G In an answering affidavit before the magistrates court, Solanki averred that the respondent was seeking an order for spoliation before that court and went on to aver that in the High Court the applications were substantially different as the relief being sought in one of the applications was an order for the eviction of AMI plc. This was far from the truth and, sadly, the H magistrate failed to relate to the whole application by the respondent

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in respect of which the relief being sought was an order of eviction. The draft A order was similarly worded.

Apart from a bald allegation that it was in possession, the respondent did not, before the magistrate or the High Court, establish proof of its occupation of the disputed premises. The affidavit from Solanki suggests that he occupied No. 15 Lanark Rd in his personal capacity which, given the documents B in the record, is an obvious lie. He was not in occupation, but was on the premises pursuant to the management agreement that got terminated, which termination he accepted.

According to the documents on the record, Dr Solanki was employed by AMC plc and was one of the directors of the company. When the management agreement was concluded with Autoband, he, Marco Cerunschi and C Wessel Roets constituted the management team on behalf of AMI plc.

On 9 July 2010 Sallans LLP, the legal practitioners for African Medical Investments, addressed a letter to Dr Vivek Solanki, who, at the relevant time was in Mozambique, in the following terms:

> "Following upon the management discussion on 30 June 2010 and the subsequent D engagement of independent auditors to conduct investigations into the group's operations in Harare and Johannesburg, as lawyers for the Company we are instructed by the Board of the Company to write to confirm that, as of the date of this letter, you are suspended from work until further notice pending investigation into an allegation of gross misconduct in relation to potential financial and administrative irregularities at the Company's Harare and Johannesburg medical E facilities. The Company reserves the right to change or add to this allegation as appropriate in the light of its investigation.
>
> …
>
> During your suspension, the Company shall continue to pay your salary in the normal way. You are also entitled to your normal contractual benefits. F
>
> You will continue to be employed by the Company throughout your suspension and you remain bound by your terms and conditions of employment, including but not limited to your duty of fidelity. You are required to co-operate in the Company's investigation and you may be required to attend, remotely or in person, investigative interviews or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend G any of the group's operational locations unless authorised by Phil Edmonds to do so. Your e-mail account will be suspended. You must not communicate with any of the group's employees, contractors, suppliers or customers unless authorised by Phil Edmonds or Brett Winstone in writing. However, you are required to be available to answer any work related queries.
>
> … H

Gowora JA

> A If you require access to the group's premises or computer network during the period of suspension please let Brett Winstone know as the Company may agree to arrange this under supervision.
>
> If you have any questions about this matter or the terms of your suspension please feel free to contact Philip Enoch."

The response from Dr Solanki was as follows:

> B "This letter is formal notice that I hereby resign as Chief Executive Officer of African Medical Investments Plc ("AMI"), to which I was appointed pursuant to the Directors' Service Agreement ("the agreement") made on or about 3rd October 2008.
>
> AMI is in repudiatory breach of the Agreement and by resigning I hereby accept such repudiation and give AMI notice of such acceptance. It follows that I have C been wrongfully constructively dismissed by AMI. A detailed letter setting out particulars of AMI's repudiation of the Agreement, is in the course of preparation, and will be sent once it has been concluded.
>
> I also give notice that I hereby resign my directorship in AMI.
>
> I intend to claim compensation and / or damages for having been wrongfully constructively dismissed, including representing twelve (12) months loss of salary.
>
> D In the event that you dispute my entitlement to resign as mentioned above, then I give you notice that a difference dispute will have arisen within the meaning of clause 20.3 of the Agreement."

When these two letters are examined against the averments in the affidavits attested to by Solanki, the only conclusion that one can reach is that there is E a grand scheme at fraud on his part. Firstly, it is claimed by Solanki that he is the founder and director of Autoband. He then claims that he was approached by the AMI plc in 2009 with a proposal to go into a joint venture which would involve the exchange of shares. He claims further that the negotiations fell through but that they

executed a management agreement in respect of F the Harare operations. Yet in the letter quoted above, he admits to being an employee of AMI plc. In none of the applications did he submit proof of ownership of shares in Autoband nor did he file a form CR 14 from the Registrar of Companies establishing that he was indeed a director of the respondent. It is common cause that in this jurisdiction records in companies are kept by the Companies Registry and a Form CR 14 constitutes confirmation of G the names of the directors appointed to a company. Ironically, such a form has been filed in respect of Streamsleigh, in which Solanki's name does not appear on the list of directors.

According to Solanki, he had been in occupation of the premises as a tenant for a period in excess of 15 years. The letter from Kantor & Immerman of H 19 August 2008 identifies the tenant to the premises as VBL Medical Networks

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(Pvt) Ltd, which clearly discounts the version by Solanki that he was the A tenant to the premises.

Further to this, the management contract in terms of which the respondent occupied the hospital was terminated. On 30 August 2010 the interim Chief Executive Officer for African Medical Investments addressed a letter to the respondent which reads as follows in relevant part: B

> "On behalf of our wholly owned subsidiary VIP Healthcare Solutions Limited (formerly known as CA Meifco Limited "VIP") as a result of numerous alleged transgressions, relating to fraud, mismanagement and misappropriation of funds at the Trauma Centre Harare, we hereby give you notice, pursuant to clause 9.1 of the Management Agreement entered into between yourself and VIP that, if such breaches are not remedied within 5 days of the date of this letter, the Management Agreement shall be formally terminated … C
>
> If you fail to remedy the breaches referred to above in the specified time limit and the Management Agreement is terminated you shall immediately cease to hold yourself out as having any connection with African Medical Investments plc or any of its group companies. We will reserve our rights against you in the event that you fail to take such actions as and when required."

The respondent has not adverted to this letter nor sought to explain how it D remained in possession of the premises given the relationship between itself and AMI plc. If the respondent or Solanki assumed occupation after the date of the letter, it has not been stated on the papers. The respondent is a corporate entity and in the light of its claim that it was running a hospital, it was incumbent that it established before the magistrate proof of its occupation. Although it alleged a lease, no lease agreement was produced. Given the fact E that the appellant was the registered owner, there was no evidence adduced as to who the premises were being leased from. In addition, a hospital has licences and permissions from various authorities which enable it to operate as such. There was no attempt by the respondent to produce any document in its name to establish its occupation of the premises. F

It was argued that the manner in which the eviction order was framed did not put the appellant at risk of being evicted at the instance of the respondent, a factor which appears to have escaped the notice of the learned judge. An order for the eviction of AMI plc would not disturb the lawful occupation of the premises by the appellant as such order is not aimed at the latter. I agree. This is because there was no allegation that it had been the appellant G that was responsible for the alleged acts of spoliation being complained of.

It was stated by the court *a quo* that the identity of the property had never been in issue and that it was clear that all the parties were aware that the property being referred to was No. 15 Lanark Rd. I am not convinced that this is a correct interpretation of the order from the magistrates court. The H

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A order did not mention the premises from which the respondent sought that AMI plc should be evicted. The order also sought the eviction of officials without specifying the names of which officials it was seeking to be evicted.

An order must be framed in such a manner as to leave no doubt in the minds of any party to the dispute as to its meaning, effect and application. B It should not be vague or ambiguous. It must be clear and precise. That said, the same cannot be said of the order issued by the magistrate. The

premises from which the occupants are to be evicted are not specified. In addition the order targeted anyone who was not an official of the respondent and, given that it was common cause that the premises were owned by the appellant, it put the owner at risk of being evicted, which is what occurred. The obvious C deficiencies in the order left the discretion of the description and location of the premises and, further to that, the identification of the targeted officials to be evicted to the messenger of court.

The appellant argued before the High Court that the respondent, having been aware of its occupation of the premises, should have addressed the application D to it and not to a party which was not in occupation at the relevant time. The learned judge, however, was of the view that the appellant should have sought to be joined in the proceedings before the magistrate. In my view he erred. The appellant had placed before the court sufficient evidence which established that it was in occupation and further that it owned the premises. That should have alerted the learned judge to the very real danger of the E appellant being evicted without due process. It was not the obligation of the appellant to seek joinder. To the contrary, the respondent had the obligation to seek the eviction of the party that was in occupation. The fact that the appellant had not sought to be joined in any of the cases was not sufficient cause for the court to dismiss the application. There was sufficient evidence of the interest that the appellant claimed to have in the property on the papers to entitle it to a declaratur being issued in its favour. The finding therefore that the appellant lacked *bona fides* because F of the failure to seek joinder is not correct. This is so for a number of reasons which I shall clarify below.

The application for a declaratur in the court *a quo* involved the existence or otherwise of two rights, *viz.* the right of the appellant to occupy the premises G that it indisputably owned and from which it had operated in excess of one year, and secondly, the right of the appellant to be afforded a fair hearing before the magistrates court. The appellant's legal representatives had clearly erred in the procedure that they adopted. They opposed a number of legal processes in which it was not cited as a party. They should have applied for H its joinder in the applications in question.

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Gowora JA

The papers filed on behalf of the appellant clearly exhibited that the premises A in question were owned by the appellant which fact was never disputed by the respondent. The papers, in addition, raised the possible existence of a prior management contract between the parties and the possibility of disputes of fact in the application before the magistrate and in the numerous applications filed by the respondent in the High Court which had seemingly been abandoned. B

A declaratory order under s 14 of the High Court Act [*Chapter 7:06*] is appropriate to determine any existing, future or contingent right or obligation. An applicant for a declaratory order must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. C In addition, an applicant must establish that some tangible and justifiable advantage in relation to its position with reference to an existing, future or contingent legal right or obligation may appear to flow from the grant of the declaratory order sought. See *Johnsen* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at 72E-F; *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) at 344. D

The dispute between the parties in the magistrates court was not concerned with a declaratory order and in this jurisdiction only the High Court is empowered to issue a declaratory order. There can therefore be no legal justification to accuse the appellant of forum shopping in seeking a declaratory order from the High Court. E

An order for the eviction of AMI plc would not disturb the appellant and a spoliation order can only be issued against the party that caused the spoliation. The respondent has never alleged that it was deprived of possession by the appellant and has always stated that it was AMI plc that caused its unlawful ejectment. By the time it sought redress, AMI plc was not in possession. F Instead, as the documents would show, it was the appellant that was in occupation of No. 15 Lanark Rd. It is for these reasons that the High Court should have granted the declaratur being sought by the appellant.

The draft order sought by the appellant in the High Court had the effect of nullifying the eviction order granted by the magistrate. It is apparent from the papers that the appellant did not hold the premises through AMI plc G and consequently the order issued by the magistrates court was of no force and effect upon the appellant.

We were informed from the bar that the respondent proceeded to have the appellant ejected from the premises. Counsel for the appellant suggested that this court can issue an order for the reinstatement of the appellant to the H

Gowora JA

A premises instead of the interdict. Whilst this court can issue the declaratur that the High Court ought to have issued, I am of the view that the interdict cannot be issued as the eviction was effected.

The Supreme Court is a creature of statute and can only do that which its enabling statute permits. The jurisdictional limits and powers of the court are found in ss 21 and 22 of the Supreme Court Act [*Chapter 7:13*] which B read as follows in relevant part:

> **"21 Jurisdiction in appeals in civil cases**
>
> (1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court.
>
> C (2) Unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act.
>
> **22 Powers of Supreme Court in appeals in civil cases**
>
> (1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court –
>
> D (a) shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;
>
> (b) may, if it thinks it necessary or expedient in the interests of justice –
>
> (i) – (viii)
>
> (ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case;
>
> E (c) may, if it appears to the Supreme Court that a new trial or fresh proceedings should be held, set aside the judgment appealed against and order that a new trial or fresh proceedings be held.
>
> (2) …"

It is clear from the above that the Supreme Court has extensive powers which F include the power to amend, vary, confirm or set aside a judgment of a lower court or tribunal. It also has the power to take any course which may lead to the just, speedy and inexpensive settlement of the case.

In casu, the appellant was evicted by virtue of an order of eviction which was obtained under circumstances which can only be described as irregular. G An order directing that the appellant return to the High Court for appropriate relief in relation to its eviction from the premises would result in the appellant having to institute fresh proceedings for its reinstatement. Such a course, under the circumstances of this case, would merely serve to delay the process as this court has already held that the eviction was irregular. This, in my view, is a proper case where this court may issue an order that the appellant H be reinstated in the premises.

Gowora JA

With regard to the question of costs, Mr *de Bourbon* argued that the A appellant's costs in the court *a quo* should be paid by the respondent on a legal practitioner client scale. It was submitted that, in the circumstances of this case, the delay in bringing the application for spoliation more than fourteen or fifteen months after possession had been lost was so gross as to disentitle the respondent the relief sought.

The facts show that there was indeed a considerable delay from the time B the respondent claimed it lost possession to the time it approached the magistrates court for spoliatory relief. Prior to that, it launched a number of applications in the High Court seeking the same relief. The first filed on 2 July 2010 was dismissed. Thereafter it filed other applications, some of which respondent abandoned or did not pursue. The abuse of court process C is clear. Its conduct throughout the period that the dispute has been raging deserves censure by this court. An order for costs on the punitive scale in the court *a quo* was warranted.

In the premises the appeal must succeed.

Accordingly it is ordered as follows: D

1. The appeal is upheld with costs
2. The judgment of the court *a quo* is set aside and substituted with the following:
   (a) The eviction order granted by the Magistrates Court Harare, in the matter between *Autoband Investments (Pvt) Ltd t/a Trauma Centre* E v *African Medical Investments plc* under Case No MC 16435/11 be and is hereby declared to be of no force, effect and application as against the applicant.
   (b) It is ordered that the applicant be and is hereby restored to possession and occupation of premises known as Stand 2924 Salisbury Township of Salisbury Township Lands situated at Number 15 Lanark Road F Belgravia, Harare.
   (c) It is ordered that the respondent pays the costs of this application on a legal practitioner and client scale.

MALABA DCJ and GARWE JA concurred. G

Mtetwa & Nyambirai, appellant's legal practitioners

Venturas & Samkange, respondent's legal practitioners

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MUGWADI v DUBE & ORS 2014 (1) ZLR 753 (H)

Citation	2014 (1) ZLR 753 (H)
Case No	Judgment No. HH-314-14
Court	High Court, Harare
Judge	Chigumba J
Heard	20, 21 & 22 May 2014; *CAV*
Judgment	18 June 2014
Counsel	*B Maruva,* for the plaintiff *O T Gasva,* for the first, second and third defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Delict – actio injuriarum – defamation – when words may be held to be defamatory – tests – meaning assigned by ordinary reader of publication in question – defences – fair comment – defence not available when allegations do not amount to opinions – damages – aggravating factors D *– lack of apology – widespread publication through social media and internet – reckless and unethical conduct on part of journalists*

Headnote

The plaintiff brought an action against the defendants for defamation, following the publication of an article about her in a widely circulated E newspaper. The article allegedly dealt with drugs and other problems the plaintiff, an entertainer, was having. The article was headlined "Tererai on drugs", above that headline the following statement appeared in bold underlined type: "She has been sexually abused by several musicians to the extent that nobody really cares about her anymore", "she got F pregnant and could not pinpoint the father, several possible fathers of the baby were listed in the fiasco". She was described as "the wild child of Zimbabwean music" and was said to have "gone back to her wayward behaviour". Other statements made about her included: "she has been exhibiting signs and symptoms of alcohol and drug abuse", "she has always been struggling to overcome her addiction to *mbanje*, alcohol G and other hard drugs", "troubled Terry", "she cannot control her urge to get drunk or high", "has a history of wild behaviour", "…the heartbreak she suffered when she broke up with Liberty has seen her relapse", "we have to raise funds to check her into a private rehabilitation centre", "she is now exposed to several other dangers like sexual abuse", "sometimes H goes for days hopping from one friend's place to another", "I think she

is losing her marbles", "she was still wearing the same clothes she had A been donning the previous night at a local nightclub".

Held, that when one's good name and standing is harmed, by lowering the estimation in which it was held by ordinary people, in the course of a publication, then one has been defamed. The law is now settled that where the words are alleged to convey a meaning that is *per se* defamatory, it is the duty of the court to determine the ordinary meaning of the words B – in other words, the meaning which an ordinary or reasonable reader would attribute to the words.

Held, further, that the three stage approach in determining whether the words complained of are defamatory is as follows: (a) consider whether the words as specified are capable of bearing the meaning attributed to them, C that is, whether the defamatory meaning alleged is within the ordinary meaning of the words; (b) assess whether that is the meaning according to which the words would probably be reasonably understood, and (c) decide whether the meaning identified is defamatory.

Held, further, that the ordinary meaning of the words complained of was that the plaintiff had a problem with drugs, which led to her being sexually D abused to such an extent that she was now regarded as a person of loose morals, who has no qualms about indulging in sexual intercourse with multiple partners, leading to her being unable to tell who fathered her baby. There could be no doubt that a statement which imputes that a person takes drugs, which is a crime, and has loose morals, is defamatory. E Similarly, describing a person as "wild" is tantamount to imputing negative qualities to that person's behaviour. It implies behaviour which is unacceptable in polite company. It is clearly capable of being defamatory within the ordinary meaning of those words. Again, calling the plaintiff an "addict" to drugs and alcohol is capable of being defamatory, the normal and ordinary meaning of the word addict depicting negative F behaviour, which is repeated despite adverse consequences, and implies the need for others to intervene in order to save the addict from herself. Finally, words which imply that the plaintiff cannot help herself, that she loves drinking and taking drugs and going to nightclubs, that she is a vagabond who doesn't care where she sleeps, and that she has no one to take care of her are capable of defaming the plaintiff. G

Held, further, that in determining how an ordinary reader of the newspaper in question would understand the words, it is necessary to strike a balance between subtle analysis and hasty misconception, between cool reserve and excitability. One is entitled to assume of the ordinary reasonable reader that he gets a general impression and one can expect him to look H

A again before coming to a conclusion and acting upon it. The ordinary reasonable reader is not super-intelligent, highly educated or sophisticated. At first glance, such a reader would immediately become aware that the article was a "from grace to grass" story about the plaintiff, who was healthy and robust and lively during her sober days, but was now B allegedly shabby, unkempt, disoriented, and addicted to alcohol, *mbanje* and other hard core drugs, and the situation had deteriorated to such an extent that she was now pitiful, and had been sexually

abused by her fellow musicians. After formulating this general impression, bolstered by the before and after photographs that accompanied the article, our ordinary reader of average intelligence and average education would C have his attention drawn to the statement that the plaintiff was the wild child of Zimbabwean music who was now unable to control her urge to get drunk or high, and who was now a prostitute and a vagabond, who had run away from home and had no one to take care of her, who could not even identify the father of her child, such that an association of young musicians like her, had taken pity on her and was in the process D of raising money to check her into a rehabilitation centre.

Held, further, that the final step was to determine whether the meaning assigned by the ordinary reader to the article was one calculated to bring the plaintiff into contempt and undue ridicule, or to diminish the willingness of others to associate with her, or to lower her in the E esteem of right-thinking or reasonable members of society generally. The inescapable inference alluded to by the article was that the plaintiff was now a spent force, unable to function, an object to be pitied, and ridiculed. The article was calculated to make reasonable members of society loath to associate with the plaintiff.

F*Held,* further, that with regard to defence of justification, the question of the plaintiff's moral probity was a matter of public interest. However, where there is evidence that such a defendant was motivated by malice, the defence cannot shield him from a plaintiff who has discharged the onus of proving *animus iniuriandi.* The contents of the article exceeded the bounds of privilege because it was based on fabrications. Not only was G the article untrue, it was not for the public benefit, it was unsubstantiated and unfounded, and it was calculated to bring plaintiff into disrepute.

Held, further, that the defence of fair comment was also unavailable, because most of the allegations in question did not amount to opinions. The article was unfair to the plaintiff in its implication that she needed rehabilitation H to wean her off from alcohol and other drugs, when it had not been

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proven, as a fact, that she was actually addicted to these substances, A other than by virtue of having been seen at nightclubs.

Held, further, that on the question of damages, the content and the nature of the defamatory publication were sensational and scandalous and largely untrue. The consequences of the defamation touched the plaintiff, whose musical career has now stagnated. She had become a recluse; she was ridiculed in public at the supermarket and while using public transport, B her fans expressed disappointment, and family and friends all felt that they had been brought into disrepute by the contents of the article. Her son had been named as fatherless, and her husband and his family were tainted by their association with her after the article was published. Finally, despite being invited to do so, neither the first nor the third defendant C apologized to the plaintiff. This would have mitigated damages. The conduct of both the first and the third defendant was unethical, deplorable and unconscionable and motivated by malice. The publication was reckless because basic journalistic principles were ignored. In order to keep up with current trends, the court should seriously consider the effect that social media like Facebook, WhatsApp, Twitter and Instagram D now has on the extent of the publication, for purposes of assessing the quantum of damages. There was evidence in this case that people as far away as America and the United Kingdom read the article almost at the same time as the plaintiff's family did, because the newspaper was now published online. An award of US$10 000 would be appropriate. E

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Case information

B Maruva, for the plaintiff

O T Gasva, for the first, second and third defendants

Judgment

E**Chigumba J**: This is a case in which the court has to determine whether the plaintiff was defamed by the defendants. The court also has to consider how much money will be enough to compensate her if it finds that her good name was tarnished by the alleged publication of false statements.

> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls;
> F Who steals my purse steals trash; 'tis something, nothing
> Twas mine, 'tis his and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed."
> (William Shakespeare, *Othello*, Act III Scene 3 lines 155-61).

G The following article was published in *The Sunday Mail* newspaper in Harare, on 3 July 2011

> "TERERAI ON DRUGS"

She has been sexually abused by several musicians to the extent that nobody really cares about her anymore by Mtandazo Dube.

The wild child of Zimbabwean music Tererai Mugwadi is set to be checked into a H rehabilitation centre, following reports that the 26 year old diva could be hooked

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on drugs and alcohol. Her behaviour has been weird lately, *exhibiting signs and*A*symptoms of alcoholism and drug addiction,* her colleagues in urban grooves music say. So, could she be *the Zimbabwean version of Whitney Houston, or closer to home, the late South African pop singer Brenda Fasie?* Tererai, who had vowed to stay out of trouble, upon her return from a four year degree study in South Africa last year, seems to have gone back to her *wayward behaviour.* Urban Groover's Association chairman Eddie Dhliwayo, popularly known as Nitredy said *he would help raise funds to have Tererai checked into a private*B*rehabilitation home. 'I thought her problem with alcohol and drugs was over',* said Dhliwayo. 'I have personally spoken to her about the problem before and she even came to me saying "the talk" I had with her had helped her immensely.She vowed she would stay clean and for a while things seemed as if they had improved and we actually believed she had become a better person'. *Urban groovers close to Tererai say she has always been struggling to overcome her*C*addiction to mbanje, alcohol and other hard drugs.* But things had improved last year when she was dating Liberty Mafukidze, her manager at the time. The musicians, who are concerned about their colleague's situation, *believe that it is the heartbreak she suffered when she broke up with Liberty that has seen her relapse,* plus the other misfortunes that she has had to go through in her life. Although the musicians volunteered the information on conditions of anonymity, their chairman Dhliwayo, said he could not hide behind a finger as 'this is a D serious matter, which deserves to be treated as such. I am like a big brother to most of these musicians. Parents sometimes release their children directly into my care and I take full responsibility for all the things they do'.

Dhliwayo said his association has a plan for troubled Terry, as Tererai is affectionately known in music circles. 'It's only that the country does not have proper Government run drug rehabilitation centers, *otherwise we would have*E*checked her in a long time ago', he said. 'So now we must raise funds to get her into a private rehabilitation centre or, better still, take her to South Africa where they are better equipped to deal with such problems'.*

The Urban Groover's Association last weekend raised US1 400 for their colleague Luscious, who needed the money to undergo surgery. Dhliwayo says Tererai is not the only one who requires such help, as many of her colleagues in urban F groovers circles are also struggling with the same problem. He says Tererai's case should be dealt with immediately as she is now exposed to several other dangers like sexual abuse.

'*Because she cannot control her urge to get drunk or high, and sometimes goes for days hopping from one friend's place to another, she has exposed herself to several other dangers', says Dhliwayo. 'She has been sexually abused by several musicians to the extent that nobody really cares about her anymore*. But I have G to care because I know the talent that she has and I am confident the situation can still be dealt with successfully'. Dhliwayo blamed Roki (Rockford Josphats), who has previously been convicted for possessing mbanje, for re-introducing Tererai to drugs. 'I hear she is now hanging around with Roki again,' he said. 'That boy is not a good influence on anyone – something has to be done quickly to get her away from that Waterfalls drug hub that Roki calls a home'. But Roki H

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Chigumba J

A strongly denied this. In a recent interview with Roki at his Waterfalls home, where a group of up to 30 youths hang around for the entire day, the bad boy of Zimbabwean music said he was not using drugs and he did not encourage anyone to. When this reporter visited Roki's residence, Tererai was part of the more than 20 young men and women who were milling around the yard. *She was still wearing the same clothes she had been donning the previous night at a local nightclub*.

B*Tererai appeared unsettled and never addressed the issues brought before her in a sensible manner. Roki said then that he suspected Tererai was on drugs. Anenge ave kumhanya bani (I think she is losing her marbles)* 'I think she is on drugs or something'. Roki was not even sure what time of the night Tererai had arrived at his house. *Tererai has a history of wild behaviour which includes constantly running away from her parents' plush farm in Mt Hampden, where her five year*C*old son Gabriel also stays*. She burst onto the limelight as a teenager with her hit song 'Waenda' but was in controversy after she got pregnant and could not point out the father. This led to speculation about the possible fathers. Several possible fathers of the baby were listed in the fiasco, including Roki and Sani Makalima. In South Africa, *Tererai failed to complete her degree in Psychology on time. Her time in South Africa is said to have been her turning point, where she moved from just being an alcohol drinker to a hard-core drug addict*".

D The article was accompanied by five pictures; the one in the middle had the following caption: "A LIVELY Tererai during her sober days". In the other four pictures, the plaintiff was wearing the same clothes, and she appeared unkempt. In comparison to the picture in the middle, she looked disoriented.

On 18 July 2011 the plaintiff issued summons against *The Sunday Mail*E reporter Mtandazo Dube, the author of the article, Zimbabwe Newspapers (1980) Ltd, the publisher, and Eddie Dhliwayo, who supplied information to the reporter, seeking payment of damages in the sum of one million United States dollars, being damages suffered as a result of a malicious, wrongful, injurious and defamatory article, as well as interest on that sum F at the prescribed rate calculated from 3 July 2011, the date of publication, to the date of payment in full. On 5 September 2011, the plaintiff gave notice to amend the declaration to the summons by identifying the statements in the article which she alleged had irreparably injured her reputation and demeaned her in her public standing. Those statements have been set out in bold typescript in the article which the court has set out in full above.

G The defendants, in their plea filed of record on 26 August 2011, denied that the words in the article were written with malice, or that they were wrongful or defamatory of the plaintiff or that the words could be understood by an ordinary reasonable reader as being defamatory to the plaintiff. The defendants pleaded further, that the statements complained of were substantially true, H and that the plaintiff's reputation and public standing were already in tatters,

Chigumba J

and her claim an affront to the law of defamation. The parties filed a joint A pre-trial conference minute, on 3 December 2012, in which the following issues were referred to trial:

1. whether or not the article published by the defendants was defamatory of the plaintiff, and if so,
2. what is the quantum of damages for such defamation? B

The plaintiff testified and told the court that she is a legal secretary at Mugwadi & Associates, as well as a musician, a singer/songwriter. Shesaid that the article which was published by the defendants was destructive, and that it made her career suffer tremendously, because after it was published people believed that she was unable to function. She testified that she received negative comments from her fans on social media networks like Facebook, C WhatsApp and Twitter, and that random strangers would approach her even while she was aboard a commuter omnibus and castigate and ridicule her about the contents of the article.

She became reclusive, and afraid to show her face in public. She said that members of her family received concerned phone calls from family members D residing overseas, who had read the article online. She lost some lucrative music engagements at high schools, such as St Ignatius and Dominican Convent, where she had been invited to perform previously, and she was told that she was no longer a suitable role model for young impressionable school children. She said that prior to the publication of the article her career was flourishing, and her star was rising; as a mark of her success as a musician, E she was in the process of bringing in musical instruments and she had her own band, which was growing.

The plaintiff told the court that the allegations contained in the article were not true, and they were very damaging because the headline appeared on the front page of the newspaper. She had not broken up with her husband, F Liberty Mafukidze, who was her fiancé at the time, and whom she has never separated from. In fact, he accompanied her to *The Sunday Mail* offices to demand an explanation, and they were told that the first defendant had edited the article himself, which was contrary to company policy and a violation of journalism ethics. She referred to the letter of demand dated 4 July 2011, addressed to the first defendant, in which her legal practitioners demanded G a retraction of the story on the front page of *The Sunday Mail*. To date, no apology was made and no retraction was printed, as demanded.

The plaintiff told the court that she confronted the third defendant and that he denied that he supplied information to the first defendant She said that she drinks alcohol socially and has never been on drugs, and is not addicted H

Chigumba J

A to alcohol or drugs. She was affronted by the tone of the article, which she feels criminalises her and implies that, as a wild child, she is a person of loose morals who is too free with her affections, who has no value system, and who is so depraved that no one cares about her anymore. She denied that she had ever been sexually abused, and challenged the defendants to B supply the names of her alleged sexual abusers. She said that she admired Whitney Houston, and was dismayed and hurt by the comparison made in the article between herself, Whitney Houston and Brenda Fassie, who were both great singers but self-confessed substance abusers, and who came to untimely deaths because of their inability to control their addictions. She denied having a history of drug abuse, and challenged the defendants to C produce proof of this history, since drug addiction is a medical condition.

The plaintiff denied that her name was ever on a list of "problem children" discussed at an urban groovers meeting, in April 2010, in connection with alcohol and drug abuse. She denied that the third defendant ever intended to raise money to check her into a rehabilitation centre out of concern for her D "wayward behaviour". She accused the Urban Groovers Association of not acting in its members' best interests, and of having dubious motives. The plaintiff suggested that, if the association members cared that much about her alleged deterioration, they should have approached her father or another member of her family to discuss an intervention, not to take it upon them to raise funds to check her into a treatment centre.

E On the issue of the pictures which accompanied the article, the plaintiff stated that the pictures make her look like a disoriented and unkempt alcoholic or drug addict, especially when the four pictures are viewed in contrast to the fifth one, in which she was younger and smiling. She denied posing for those pictures, and told the court that the pictures were taken surreptitiously, F after she had expressly refused to give the first defendant an interview, at Roki's house in Waterfalls. The plaintiff told the court that she had not been wearing the same clothes that she had worn the night before, as alleged by the first defendant in the article. Finally, she told the court that the father of her son Gabriel is David Mukwedeya, and denied that she had no idea who the father was, or that her son had been fathered by Roki or Sani Makalima.

G Under cross-examination, the plaintiff maintained her stance that she had never been discussed in a meeting of the Urban Groovers Association in connection with alcohol and drug abuse. She denied that the minutes of the Urban Groovers Association, which the first and third defendants sought to rely on, were correct or accurate. She agreed that she was a celebrity, a role H model for young aspiring musicians, but denied that she was a public figure.

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Chigumba J

The court generally found the plaintiff credible and believable, and accepted A her testimony that after the article was published prople viewed her negatively, and were angry with her and believed the allegations that she was wild, a person of loose morals who was sexually abused by fellow musicians whilst under the influence of illegal substances, who did not know the father of her child, and who was so addicted to hard drugs that she was dysfunctional and needed urgent intervention to check her into rehabilitation. The court did not B find the plaintiff's testimony regarding the contents of the minutes of the Urban Groovers Association of 13 April 2010 to be entirely true. Clearly, the issue of excessive drinking was raised and discussed at that meeting in connection with the plaintiff, but, based on the evidence of Enoch Munhenga, there was no discussion in connection with *mbanje* and other hard-core drugs, and the plaintiff's testimony is to be believed when she alleges that C the minutes were tampered with, and did not accurately reflect what was discussed in the meeting that day.

Everisto Elarius Mugwadi testified on behalf of the plaintiff. He told the court that he is the plaintiff's father, a legal practitioner, an officer of the court, and a successful farmer. His daughter had been defamed by the article and D he had come to court to help her to seek redress, because the article did not state the truth. He said that he had raised the plaintiff from childhood and that when he read the article, he was stunned, surprised and taken aback. He said that he was shocked and traumatized by the tone of the report, and that he sought out the first and third defendants and demanded an explanation, and that the third defendant flatly denied that he had supplied the first defendant E with the information that formed the basis of the article.

Mr. Mugwadi told the court that his daughter had a decent upbringing, which was based on his culture and tradition, and a normal childhood. She is a talented musician. His daughter has never exhibited any symptoms of alcoholism or drug abuse and, as her father, he would have noticed if there F was anything amiss. He described himself as a strict disciplinarian, and said that he believed his daughter, when he quizzed her after the article was published, that she is a social drinker who is not addicted to any prohibited substances. He said that he was surprised and outraged at the suggestion that no one cared about his daughter, that he was derelict in his duty as a father to her, to the extent that an association of young musicians was having to G raise money to check his daughter into a rehabilitation centre.

Mr Mugwadi said that his grandson Gabriel was fathered by David Mukwedeya, of the Museyamwa clan. His daughter did not abuse any prohibited substances while she was studying for her degree in South Africa. He accused the first defendant of sensationalism for the sole reason H

Chigumba J

A of improving circulation of the newspapers, and of being unethical, of not verifying the truth, of failing to report in a balanced manner by seeking comments from the plaintiff or members of her family. He said that the article tarnished his image and damaged the Mugwadi name, with family members in the diaspora contacting him to demand that he seek redress.

The court believed the witness when he said that the defendants knew where B he lived and that they knew the plaintiff's husband, so it was not feasible or honest to say they tried and failed to publish a balanced article when they never sought a comment or opinion from the plaintiff or from members of her family. The court accepted this witness's evidence that the defendants were not *bona fide* and that they had ulterior motives in their portrayal of the C plaintiff's sexual proclivities, her alleged addiction to alcohol, mbanje, hard-core drugs, the status of her relationship with her husband, and her alleged inability to pinpoint the father of her son Gabriel. The court accepted his evidence that the allegation that the plaintiff did not know who fathered her son is simply not true. The court accepted that the allegation that the plaintiff graduated from alcohol abuse to hard core drugs whilst she was studying D in South Africa is simply not true. The first defendant admitted that he had no basis for making the allegations, and the third defendant said he knew nothing about plaintiff's lifestyle while she was a student.

Kudzai Chisvo was the plaintiff's third witness. He told the court that he has known the plaintiff since they were in high school together, and that, at E the time that the article was published, he was the secretary general of the Urban Groovers Association. He testified that even though he has known the plaintiff since she was seventeen years old, he has never seen her take drugs and she is not a wild child. He told the court that he took the minutes of the Urban Groovers Association meeting on 13 April 2010 at Zimex Mall. He flatly denied that there was any discussion at that meeting concerning the F plaintiff's alleged alcoholism or drug addiction. He said that at that meeting, there were discussions about the conduct expected of urban groove artists in general, and specific artists' names were not mentioned.

Mr Chisvo's evidence on this aspect is directly contradictory to that given by the defendants' witnesses. He also denied writing in those minutes that G the plaintiff had been reprimanded for alcoholism and drug abuse, or that Roki had been mentioned for possession of *mbanje*, Diana Samkange for wrecking marriages, and XQ for piracy. He submitted his notes into evidence to buttress his evidence that none of those names were mentioned in that context at the meeting. He tendered what he referred to as an original copy of the minutes of that meeting, and told the court that someone had added H a paragraph to the minutes that he had produced, and that that paragraph

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Chigumba J

contained false information. Under cross-examination, the witness maintained A that the minutes had been tampered with, and denied that he was misleading the court.

The court found that this witness was not truthful or believable on the aspect of the minutes of the meeting of 13 April 2010. Mr Munhenga told the court that the issue of the plaintiff's alleged alcoholism was tabled and discussed at that meeting. The court believed Mr Munhenga, who is the plaintiff's friend B and has known her for some time. He had no cause to mislead the court. Mr

Chisvo made a misguided attempt to shield the plaintiff by misleading the court on the aspect of the minutes. What the court accepts is that there was no mention or discussion of addiction to hard-core drugs in respect of the plaintiff, but the issue of drinking alcohol excessively certainly was discussed. C

Liberty Mafukidze then testified. He is a sales supervisor who is also a second year journalism student, and the plaintiff's husband. He read the article published by the defendants and told the court that the plaintiff is not an alcoholic or a drug addict. He said that he has never separated from her since June 2010 to date, and that the article published untruths that were calculated to assassinate her character. In the month that the article was D published, he had just become engaged to his wife and was shocked to read about their alleged separation. He was shocked to read that his fiancé needed rehabilitation, and angry that he was not asked to comment or give his side of the story before the article was published. As a student of journalism, he was appalled at the level of malice in the publication of the article which E flouted all the journalistic ethics, and made no attempt to give a balanced report or to verify the information that formed the basis of the article. He was upset because the article depicts the plaintiff as a whore and a prostitute. He said that the article was read by his friends and relatives in the diaspora, who would telephone him to find out if it was true, especially since they had just become engaged. He said that it was not true that no one cared F about the plaintiff anymore. He confronted the third defendant, who denied supplying information to the first defendant. He accompanied the plaintiff to the second defendant's offices to confront the first defendant, where they failed to locate him, but were told that he had edited the article himself, in clear violation of journalistic ethics. He said that the third defendant was motivated by malice, and by an ambitious plan to attract funding for the G Urban Groovers Association from the Ministry of Youth.

On the issue of the plaintiff's drinking of alcohol, and in what quantities, the court found this witness guilty of the same thing as Mr Chisvo; he sought to protect her, and may have been economical with the truth. It does not make sense that random members of the Urban Groovers Association would H

A table her name at their meeting in connection with those of their members who needed discipline in certain aspects of their lives, when there was no basis for doing so.

At this juncture, the plaintiff closed her case.

The first witness called by the defendants was Mtandazo Dube, the first B defendant, who testified as follows. He authored the article that is sought to be impugned. He is employed by the second defendant as a senior journalist. He joined the second defendant in 2008. His portfolio is arts and culture, and he frequents places of entertainment, events and functions, trawling for stories to publish in his column. He encountered the plaintiff several times at such events and each time she would be drinking, so he decided to C investigate her. He had met her at local nightclubs like Londoners, Red Fox and Sports bar, and after meeting her at such a nightclub, he saw her the next day at Rockford Josphat's house in Waterfalls wearing the same clothes that she had worn the night before. When he tried to talk to the plaintiff she just mumbled a response, She looked shabby and dirty, she appeared disoriented D and "high", on hard drugs, and he suspected that she was drunk and had taken drugs, marijuana or Histalix cough syrup which is abused by local drug addicts who call it "Bronco".

He told the court that he contacted the third defendant, the chairman of the Urban Groovers Association, and he asked him what was wrong with the plaintiff. After protracted negotiations, the third defendant told him that the E plaintiff's behaviour had been discussed at a meeting of the Urban Groovers Association, and gave him a copy of the minutes of the meeting on 13 April 2010. The witness said court that the plaintiff's behaviour was in the public domain because she loves partying in public, she drinks and dances suggestively in public and frequents nightclubs, while other celebrities F like her do their partying in private. He compared the plaintiff to Whitney Houston and Brenda Fassie because those two artistes became popular for their talent, their great voices and their extravagant lifestyles. He said that he had anonymous sources for the information that he published that the plaintiff was struggling to overcome her addiction to mbanje, alcohol and other drugs.

G The witness said that he quoted the third defendant, who was his authoritative voice in the story and was his source for the allegation that the plaintiff had been sexually abused by several

musicians, to the extent that no one cared about her anymore. He denied that he was motivated by malice in writing the article and said that he trusted the third defendant as a source because H they had worked together in the past on similar stories. He denied that he

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expressly intended to defame the plaintiff. Under cross-examination, in answer A to the question, "was the article you published the truth?" the witness said: "that's what I managed to come up with". In my view, that response speaks for itself. When asked to define the word "wild" he said: "wild partying and bingeing". He also said that the basis for his conclusion that the plaintiff was wild was her public consumption of Carling Black Label beer, a brand which is not associated with nice girls who were well brought up by their families. B He said he had seen the plaintiff bingeing on Black label beer at City Sports bar, and at Red Fox where she was dancing uncontrollably. On the question of hard drugs, he said the plaintiff smokes marijuana and abuses a cough syrup, and that he had always suspected her of being an addict, but had no proof. He said he never saw her take heroin or cocaine. He admitted that he C had no proof that the plaintiff became a hard-core drug addict while she was studying in South Africa. He admitted that the article was widely circulated, even online, and that a lot of Zimbabweans in the diaspora read the article. Finally, he failed to supply the name of the editor who edited the article.

There is no doubt, in the court's mind, that the first and third defendants conspired to write the article. They knew that the contents of the article D would damage the plaintiff's reputation. The first defendant made sure that the headlines were sensational and scandalous. There is no doubt that the publication was circulated widely, and to people in the diaspora. There is no doubt that the plaintiff was held in low regard by ordinary and reasonable members of the public after the article was published, including members of her own family, here and abroad. The first defendant relied solely on the E information given to him by the third defendant, especially on the aspect of addiction to hard-core drugs and other substances, on the issue of sexual promiscuity and on the issue of needing rehabilitation. He failed to verify the information before publishing the article.

The next witness was Eddie Dhliwayo, the third defendant, who testified as F follows. He e had a good relationship with the plaintiff, since they met around 2007-2008. They used to go to music shows together, and attend meetings of the Urban Groovers Association together. The plaintiff recorded some of her songs at his studio. He said that the plaintiff once brought bottles of beer in her handbag and drank them at his studio before recording a song. He confronted her and she promised to reform. He has seen the plaintiff G abuse alcohol on many occasions at Sports Diner, KFC and Londoners, and she takes alcohol before going to perform on stage. He admitted being the source of the information in the article written by the first defendant. He testified that he gave an interview to the first defendant in his capacity as the chairman of the Urban Groovers Association. He confirmed that he told the H

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A first defendant that the plaintiff had a problem with alcohol and drugs. He confirmed that he told the first defendant that the association wanted to raise funds to check the plaintiff into a rehabilitation centre. He said that a number of members of the association told him that plaintiff had a problem with drugs and alcohol and begged him to help her. As a result of these reports, the Urban Groovers Association formed a disciplinary committee, and at B the meeting held on 13 April 2010 they agreed to clean up their image, and to discipline their members such as Diana Samkange, MC Villa, Rockford Josphat, the plaintiff and others. He confirmed that he told the first defendant that the plaintiff had been sexually abused by fellow musicians. He admitted that he did not verify this allegation with the plaintiff or any of the alleged abusers. He confirmed that he did not engage the plaintiff's parents or her C husband, who is well known to him. He admitted that he didn't really know what happened to the plaintiff in South Africa, whether she became a hard-core drug addict. He denied that he intended to defame the plaintiff.

Under cross-examination, the third defendant said that the only drug that he saw the plaintiff abuse, once, at his studio, in the company of "Roki", D was mbanje, but other members of the association reported to him regularly about her drug problem. He said that the caption "wild child" means that the plaintiff takes drugs, parties uncontrollably, is a prostitute and does not know the father of her child, Gabriel. He said that the plaintiff sometimes drinks until she cannot walk straight and that

when she is in that condition, he has seen E random men touch her breasts. He said that members of the association have taken the plaintiff to their homes to protect her when she was in a drunken stupor. The plaintiff was once booed off the stage when she was too drunk to perform. On being questioned as to whether the plaintiff was addicted to alcohol, marijuana and other hard drugs, he said that she cannot function without taking alcohol. He admitted that he never told the plaintiff that the F association intended to raise funds to check her into a rehabilitation centre.

The word that comes to the court's mind to describe the conduct of the third defendant is unconscionable. He chaired an association of young up-and-coming singers who invented a modern genre called "urban grooves". The association was not registered. They met regularly to discuss their problems and agreed to clean up their image and regulate themselves. He had no G mandate to give the minutes of the meeting of the association on 13 April 2010 to the first defendant. He acted like a wolf amongst sheep. He collected information from members of the association, and passed it on to the first defendant for publication, for his own selfish reasons, which had nothing to do with concern for their welfare. The article was published a year after the H minutes were taken. If the third defendant wanted to save the plaintiff, why

did he wait a whole year to "attempt to save her by naming and shaming A her"? If the plaintiff was a hard-core drug addict in April 2010, why was she still standing and functional in 2011? The third defendant was motivated by malice, and the desire to milk his position in the Urban Groovers Association, to attract funding, by portraying himself as "big brother", who was watching all the urban groovers and ready to step in and discipline them. In reality, he was just an opportunist, who willingly participated in the destruction of the B plaintiff's career, by imputing untruths about her character, and her behaviour.

The last witness was Enoch Manhanga, who told the court that he was not there to testify for the defendants but to clarify the issue of the minutes of the meeting of the Urban Groovers Association on 13 April 2010. He said that he is a professional singer and a member of the Urban Groovers C Association. He has known the plaintiff since 2002, that they have a cordial relationship and that they have done some music collaborations together. He was present at the meeting of the Urban Groovers Association at Zimex Mall on 13 April 2010. The minutes of that meeting are mostly accurate and correct. During the meeting, it was mooted that a disciplinary committee be formed for the purposes of self-regulation and bringing into line errant D members of the association. He said that Rockford Josphat was mentioned for domestic violence and possession of marijuana, Diana Samkange for husband snatching, XQ for piracy and the plaintiff for drinking alcohol excessively. He said that the plaintiff was referred to by some members of the association, but he did not remember whether she was present at that meeting, although she used to attend some of the meetings. E

During cross-examination the witness said that the plaintiff's witness, Kudzai Chisvo, was misleading the court when he said that the plaintiff's name never came up during the meeting in connection with excessive alcohol consumption The witness said that the issue of the plaintiff's hard-core drug F problem was never discussed during the meeting, and insisted that the third defendant had to explain how that issue ended up in the minutes. The court accepted the evidence of this witness in its entirety. He struck the court as an upright and sober young man, who took his profession seriously.

The court accepted that there was never any discussion at the meeting of the Urban Groovers Association on 13 April 2010 of the plaintiff's alleged G hard-core drug addiction. The court accepts that the third defendant did not get a mandate from the association to wash its dirty linen in public, or to sell its secrets to the highest bidder. The court accepts that the plaintiff drank alcohol socially and that, at times, she over indulged, but the evidence does not support the allegation that she was addicted to alcohol, or that she could not function without alcohol. The rest of the allegations in the article H

A published by the defendants were baseless, without foundation and based on unsubstantiated gossip, unverified information, biased personal opinions of the writer and, at times, pure speculation

dressed up and masquerading as fact.

A claim for defamation is premised on the *actio iniuriarum*, which is founded in delict, and is designed to protect a person's dignity. Defamation violates a person's dignity or reputation. Reputation is the regard in which one is held B by other reasonable members of society. One can be held in high regard, which means that one has a good reputation, or in low regard, which means that one has a bad reputation. When one's good name and standing is harmed, by lowering the estimation in which it was held by ordinary people, in the course of a publication, then one has been defamed. See *Masuku* v *Goko & Anor*C2006 (2) ZLR 341 (H) at 347C-D, and *Butau* v *Madzianike & Ors*HH-378-12 at 8. The Supreme Court recently, in *Makuyana* v *Rugeje*S-33-12 at 6-7, reiterated that the law is now settled that where the words are alleged to convey a meaning that is *per se* defamatory, it is the duty of the court to determine the ordinary meaning of the words – in other words, the meaning which an ordinary or reasonable reader would attribute to the words. See D Jonathan M Burchell *The Law of Defamation in South Africa* at 84-86.

The three stage approach in determining whether the words complained of are defamatory is well established, and set out as follows:

1. Firstly, consider whether the words as specified are capable of bearing the meaning attributed to them, that is, whether the defamatory meaning E alleged is within the ordinary meaning of the words.
2. Secondly, assess whether that is the meaning according to which the words would probably be reasonably understood.
3. Thirdly, decide whether the meaning identified is defamatory. See *Moyse & Ors* v *Mujuru*1998 (2) ZLR 353 (S) at 356G-H. This objective approach F to determining whether defamation had taken place was endorsed by the full bench of the Supreme Court in the *Moyse* case *supra.* It had been developed over time: see *Wonesayi* v *Smith NO & Anor*1971 (2) RLR 62 (G); *Tekere* v *Zimbabwe Newspapers & Anor*1986 (1) ZLR 275 (H) *, Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H). In more recent times, the objective approach to defining defamation has been followed in the G following cases: *Chinamasa* v *Jongwe Printing & Publishing (Pvt) Ltd & Anor* 1994 (1) ZLR 133 (H) *, Madhimba* v *Zimbabwe Newspapers (1980) Ltd*1995 (1) ZLR 391 (H) *, Masuku* v *Goko & Anor* 2006 (2) ZLR 341(H)*,* and the *Butau* case *supra*

I will now apply the objective test of determining whether there has been H defamation, to the facts of this case.

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Are the words specified in the article in question capable of A bearing the meaning attributed to them?

In order to decide whether the plaintiff was defamed, we will first consider whether the defamatory meaning is within the ordinary meaning of the words, the primary meaning of the words. This is a question of law. The article was headlined "Tererai on drugs", above that headline the following statement B appeared in bold underlined type: "She has been sexually abused by several musicians to the extent that nobody really cares about her anymore", "she got pregnant and could not pinpoint the father, several possible fathers of the baby were listed in the fiasco". The ordinary meaning of those words is that the plaintiff has a problem with drugs, which has led to her being sexually abused to such an extent that she is now regarded as a person of C loose morals, who has no qualms about indulging in sexual intercourse with multiple partners, leading to her being unable to tell who fathered her baby. There can be no doubt, that a statement which imputes that a person takes drugs, which is a crime, and has loose morals is defamatory. See *Lilford* v *Rhodesian Printing & Publishing Co & Anor*1967 (2) RLR 274 (H), *Khan* v *Khan* 1971 (1) RLR 134*, Moyo* v *Abraham* HH-467-84. Clearly, the D defamatory meaning alleged is within the ordinary meaning of those words.

The next statement that the plaintiff complains of is being labelled "the wild child of Zimbabwean music", and that she has "gone back to her wayward behaviour". The dictionary definition of "wild" is; "not under, or not submitting to, control or restraint, taking or disposing to take one's own way, uncontrolled, not submitting to moral control, taking one's own E way in defiance of moral obligation or authority". Describing a person as wild is tantamount to imputing negative qualities to

that person's behaviour, it implies behaviour which is unacceptable in polite company. It is clearly capable of being defamatory within the ordinary meaning of those words.

The plaintiff alleges that she was defamed by the following statements: that F "she has been exhibiting signs and symptoms of alcohol and drug abuse", "she has always been struggling to overcome her addiction to mbanje, alcohol and other hard drugs", "troubled Terry", "she cannot control her urge to get drunk or high", "has a history of wild behaviour". An addict is somebody who is "physiologically and psychologically attached to an activity, habit or G substance", as in drug addict. To be addicted to something is to "devote or surrender oneself to something habitually or obsessively"(all the definitions can be found in the *Shorter Oxford English Dictionary*, Vol I and II), for example addicted to gambling. "Addiction is the continued repetition of a behaviour despite adverse consequences". This court has already found that to publish an article which states that someone drinks excessively is defamatory. H

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A See the *Tekere* case *supra.* It is an inescapable conclusion that calling the plaintiff an addict to drugs and alcohol is capable of being defamatory, the normal and ordinary meaning of the word addict depicts negative behaviour, which is repeated despite adverse consequences, and implies the need for others to intervene in order to save the addict from themselves.

B "…the heartbreak she suffered when she broke up with Liberty has seen her relapse", "we have to raise funds to check her into a private rehabilitation centre", "she is now exposed to several other dangers like sexual abuse", "sometimes goes for days hopping from one friend's place to another", "I think she is losing her marbles", "she was still wearing the same clothes she had been donning the previous night at a local nightclub". The ordinary C meaning of those words is that the plaintiff cannot help: herself she loves drinking and drugging and going to nightclubs, she is a vagabond who doesn't care where she sleeps, and that she has no one to take care of her. Those words are capable of defaming the plaintiff. All the words that the plaintiff complains of are capable of bearing the meaning attributed to them. The D defamatory meaning is within the ordinary meaning of the words

What is the meaning according to which the words would probably be reasonably understood? – the ordinary reader test

The second rung of the test involves an analysis of the words complained E of, to determine how an ordinary reader of *The Sunday Mail* newspaper would understand them, bearing in mind that *The Sunday Mail* is a well respected family newspaper. Firstly, I am guided by the *dicta* of Gillespie J in *Makova* v *Modus Publications (Pvt) Ltd* 1996 (2) ZLR 326 (H) at 353G-354B where he said

> "It is plainly necessary, when attempting to discover the ordinary meaning of a F passage, to strike a balance between subtle analysis and hasty misconception, between cool reserve and excitability. In doing so, in my view, one should nevertheless tend to favor the more reasoned approach to the illogical, for that is the very heart of the definition of a reasonable man. One is entitled to assume of the ordinary reasonable reader that:
>
> > 'he gets a general impression and one can expect him to look again before G coming to a conclusion and acting upon it.'"

See *Madhimba* v *Zimbabwe Newspapers supra* at 403G-404G*; Demmers* v *Wyllie & Ors* 1978 (4) SA 619 (D) at 622F; and *Morgan* v *Odhams Press Ltd & Anor* [1971] 2 All ER 1156 (HL) at 1170f-g, where Lord Morris said:

> "…the average reader does not read a sensational article with cautious, critical H and analytical care…"

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See also *Dorfman* v *Afrikaanse Pers Publikasies (Edms) Bpk en Andere*A 1966 (1) PH J9 (A) at 45.

The ordinary reasonable reader is not super-intelligent, highly educated or sophisticated. At first glance, such a reader would immediately become aware that the article was a "from grace to grass" story about the plaintiff, who was healthy and robust and lively during her sober days, but was now B allegedly shabby, unkempt, disoriented and addicted to alcohol, mbanje and other hard-core drugs, and the situation had deteriorated to such an extent that she was now pitiful, and had been

sexually abused by her fellow musicians. After formulating this general impression, which is bolstered by the before and after photographs that accompany the article, our ordinary reader of average intelligence and average education would have his attention drawn C to the statement that the plaintiff is the wild child of Zimbabwean music, who is now unable to control her urge to get drunk or high, and who is now a prostitute and a vagabond, who had run away from home and had no one to take care of her, who could not even identify the father of her child, such that an association of young musicians like her had taken pity on her and was in the process of raising money to check her into a rehabilitation centre. D The ordinary reader would understand the comparison between the plaintiff and Brenda Fasie and Whitney Houston very well. These were great female international singers, with great voices, who had unravelled in the public eye because of well-documented substance abuse problems and died, as a result of their addictions.

Whether the meaning identified is defamatory – the right-thinking E test

This final rung of the test involves a determination as to whether the meaning found by the court as that which would probably be assigned by the ordinary reader to the article, is one calculated to bring the plaintiff into contempt and undue ridicule, or to diminish the willingness of others to associate with F her, or to lower her in the esteem of right-thinking or reasonable members of society generally. See *Velempini* v *Eng Svcs Dept Workers Ctte for the City of Bulawayo & Ors* 1988 (2) ZLR 173 (H) at 178G-H*, Moyse & Ors* v *Mujuru supra*, *Madhimba* v *Zimbabwe Newspapers supra at* 407F-H*, Simm* v *Stretch* [1936] 2 All ER 1237(HL). The inescapable inference alluded to G by the article in *The Sunday Mail*, is that the plaintiff is now a spent force, unable to function, an object to be pitied, and ridiculed. The court finds that the article was calculated to make reasonable members of society loath to associate with the plaintiff. She had accomplished much that girls of her age had not. She was a celebrated singer who had produced hit songs. She had fans who communicated with her. H

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A Right-thinking members of society would have been appalled at the implications of the comparison between the plaintiff and other female singers who literally drank themselves, and abused their substances of choice, to death. Right-thinking members of society would have wondered why the plaintiff had allowed herself to spiral out of control. Right-thinking members of society would not have wanted their children to continue to B admire the plaintiff, or to emulate her. It is my view that the right-thinking test was met. All the statements complained of by the plaintiff are found to have been defamatory. The court is satisfied that, having applied the three stage test to the facts of this matter, the plaintiff has discharged the onus on her and established all the three stages of the test. In my view, the plaintiff C has established that the defamatory meaning is the meaning by which the words would probably be understood by an ordinary, reasonable reader. I am satisfied that the plaintiff has established that the meaning identified is defamatory on application of the right-thinking test. The article is *prima facie* defamatory. See *Ndewere* v *Zimbabwe Newspapers 1980 & Ors* 2001 (2) ZLR 508 (S) at 511E I will now turn to consider the defences raised.

D The Constitutional Court, in its recent judgment on the constitutionality of the offence of criminal defamation *Madanhire & Anor* v *Attorney-General* 2014 (1) ZLR 721 (S) at 729 recognised "freedom of expression as a core value of a free and democratic society". It also had occasion to comment on *S* v *Hoho* [2008] ZASCA 98; [2009] 1 All SA 103 (SCA) at para 29, E where it was said [1] :

> "Freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man".

What is noteworthy for the purposes of this case is that the court accepted the conclusion in *Hoho's* case that civil and criminal liability for defamation F are equivalent in the extent of their limitation.

In the context of civil liability for defamation, certain limitations have been accepted over the years, bearing in mind that "… civil law exists to provide relief and restitution when one person harms or threatens to harm another's private interests". The debate that aims to ventilate the propriety of the limitations on the right to freedom of expression in the context of civil G defamation has exercised the minds of academics for some time.

> "The law of defamation seeks to balance two competing interests. On the one hand, it recognizes the right of the individual to be afforded protection against

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> harm to his reputation. On the other hand, it also recognizes that the public have A a right to free speech and to proper access to information. Put in the context of newspaper reporting it is vitally important that there should be a free press which keeps the public informed, especially about public affairs. This free press should not be stifled by highly restrictive defamation laws. But at the same time, the law cannot ignore the fact that newspapers and other broadcasting media are extremely powerful agencies which are able to reach enormous numbers B of the public and that, if they publish defamatory material, the end result can be devastating harm to reputation. It should also be borne in mind that harm to reputation is extremely insidious and once reputation has been damaged it is very difficult to repair the damage":*per* G Feltoe *A Guide to the Law of Delict*.

The defendant raised two defences, privilege/justification and fair comment. I will deal with the two defences.

Privilege/justification C

The defence of privilege or justification is established by a defendant who can show that he had a duty or interest in publishing the statement that is sought to be impugned or that the people to whom the statement was published had a duty to receive it. The most common mantra by defendants under this defence is that the plaintiff was a public figure and that the article was published D in the public interest. Members of the public in general have a voracious appetite for reading about the peccadillos of public figures or about any alleged shenanigans that they get up to. It is accepted that newspapers have a right to keep the public informed about the behaviour of public figures on matters of public interest. Despite the plaintiff's protestations, the evidence E before the court is that she had attained celebrity status with her hit songs and had become somewhat of a role model to young children who followed the urban groovers craze that hit Zimbabwe.

The question that is exercising the court's mind is not whether the question of the plaintiff's moral probity was a matter of public interest. In my view, F it was. The issue is whether the defence of justification is available to a defendant who publishes blatant untruths. It is now trite that where there is evidence that such a defendant was motivated by malice, the defence cannot shield him from a plaintiff who has discharged the onus of proving *animus injuriandi.* See *Musakwa* v *Ruzariro* 1997 (2) ZLR 533 (H) at 535-537, *Mugwadi* v *Nhari & Anor* 2001 (1) ZLR 36 (H) at 41-46 It is my view that G the contents of the article published by the defendants exceeded the bounds of privilege, because it was based on fabrications, especially the minutes of the meeting of the Urban Groovers Association, which the evidence showed had been doctored by the third defendant to reflect a lie, that the plaintiff had been censured for being a drug addict. It is my view that the first defendant acted recklessly in relying on those minutes without verifying them with H

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A their author, Mr Chisvo, with the plaintiff or any other member of the Urban Groovers Association who had been present at that meeting. He used those minutes as an excuse to sensationalise the article and attract the interest of his readers, because the plaintiff is a household name, and the fact that she was allegedly hooked on hard-core drugs would have been shocking and scandalous to the readers of a family newspaper like *The Sunday Mail*. B Not only was the article untrue, it was not for the public benefit, it was unsubstantiated and unfounded and it was calculated to bring the plaintiff into disrepute. The article was not even substantially true.

Fair comment

The requirements of the defence of fair comment are as follows:

C 1. The allegation in question must amount to comment(opinion)

2. It must be fair

3. The factual allegations on which the comment is based must be true

4. The comment must be a matter of public interest

D 5. The defence must be based on facts expressly stated or clearly indicated, in a document or speech, which contains the defamatory words. See Heard v Times Media Ltd & Anor

1993 (2) SA 472 (C) at 477A-G, Madhimba v Zimbabwe Newspapers supraat 410F-H, Crawford v Albu 1917 AD 102 at 125; Tekere v Zimbabwe Newspapers supra and Zvobgo v Kingstons supra.

E A perusal of the statements complained of by the plaintiff will show that this defence is not available to the defendants because most of the allegations in question do not amount to opinions. The writer did not place certain statements in quotation marks to indicate that they were opinions. For example: "wild child of Zimbabwean music", "set to be checked into a rehabilitation centre".., F "seems to have gone back to her wayward behaviour". The first defendant showed that he knows the difference between facts and opinions. He put some of the third defendant's opinions in quotation marks. For example: "… I thought her problem with alcohol and drugs was over" said Dhliwayo, Unfortunately, most of the statements that ought to have been clearly shown to be comment were not, so there was no fairness.

G Further, some of the factual allegations made are simply not true. The plaintiff clearly knows the identity of the father of her baby, he is David Mukwedeya of the Museyamwa clan, as she testified to and was corroborated by her father. The article does not identify which of the signs and symptoms of alcohol and drug addiction the plaintiff exhibited. There was no evidence that H plaintiff was addicted to alcohol, mbanje and other hard drugs. The article

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was unfair to the plaintiff in its implication that she needed rehabilitation A to wean her off from alcohol, mbanje and other hard drugs addiction, when it had not been proven, as a fact, that the plaintiff was actually addicted to these prohibited substances.

The basis of the article seems to be the first defendant's various encounters with the plaintiff at local nightspots and his bias towards young ladies who B imbibe a particular brand of beer. Clearly, in his mind, such young ladies deserve to be labelled prostitutes, especially when they dance uncontrollably by themselves.

Section 326(2) and 327 of the Constitution provides that

> "When interpreting legislation, every court ... must adopt any reasonable interpretation … that is consistent with customary international law applicable C in Zimbabwe",

while s 327(6) is to similar effect with respect to any international convention treaty or agreement which is binding on Zimbabwe.

Section 56(3) of our Constitution provides for equality and non discrimination, more particularly, that: "every person has the right not to be treated in an D unfairly discriminatory manner on such grounds as … sex, gender …" According to the Convention on the Elimination of all Forms of Discrimination against Women – Policy and Practice June 2011 (CEDAW), governments must ensure that nothing stops girls and women from enjoying their rights (such as stereotypes about girls and women). Zimbabwe is a signatory to this international convention and has been since 13 May 1991. By virtue of E its ratification of the convention, the State has a duty to end discrimination faced by women and girls in this country. Discrimination had been defined as "unfair treatment by reason of being a girl", and in art 5 of CEDAW, there is recognition that there are some roles that are attributed to girls which are based on stereotypes, and that this is discriminatory. Zimbabwe also signed F the Protocol on the African Charter on Human and People's Rights (of Women in Africa) (ACHPIRI). Article 2 of the Charter enshrines the principle of non-discrimination on the basis of sex. Article 3 of the protocol stipulates that:

> "1. Every woman shall have the right to dignity inherent in a human being and to the protection of her human and legal rights.
>
> 2. Every woman shall have the right to respect as a person and the free G development of her personality."

Zimbabwe signed the Protocol on 18 November 2003 and ratified it on 15 April 2008. By implying that the plaintiff was in a space where women and girls are ordinarily viewed as prostitutes, especially if they drink beer, the first defendant inadvertently discriminated against the plaintiff, because of H

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A that stereotype, which promotes gender inequality, and has a chilling effect on women or girls who are equally talented as their male counterparts, but end up abandoning lucrative careers in that industry, because of that perception.

The first defendant told the court that he started investigating the plaintiff's behaviour after seeing her in various nightclubs holding a bottle of Black B Label beer. In his view, nice girls don't drink that particular brand of beer, and he concluded that the plaintiff was of loose morals. In my view, that is a gender stereotype, and it brings into question what the role of law and justice is, in achieving gender equality. The first defendant did not see fit to investigate any of the plaintiff's male counterparts who obviously also frequented these nightclubs while plying their trade and are artistes, singers, C who can be engaged to sing anywhere, even in nightclubs. The legal sphere has penetrated into many aspects of people's public and private social spheres, and achieving gender equality is a developmental goal that law and justice should aspire towards.

The third defendant testified that he saw the plaintiff smoke *mbanje* once, and that he has seen her drunk more than ten times over the space of a few years. D The court accepts that his testimony might be true. Does this evidence show addiction to alcohol, mbanje and other hard drugs? In my opinion, it does not. It is insufficient to support such a finding. There is no truth to the allegation that the plaintiff is an addict, bearing in mind that to be addicted means "…to devote or apply habitually to a practice": see *Shorter Oxford*E*English Dictionary* p 22 It is noteworthy that the minutes of the meeting of the Urban Groovers Association which were touted as the basis for the allegations in the article, are of a meeting that took place in 2010. The article was written a year later, and the third defendant had still not made good his promise to check the plaintiff into a rehabilitation centre. The evidence before the court, which was accepted by the court, is that the minutes of the F Urban Groovers Association meeting mentioned the plaintiff in the context of excessive consumption of alcohol, and were tampered with to include a reference to *mbanje* and other hard drugs, in order to give the third defendant a basis for the article. This conduct, or conspiracy, between the first and third defendants, is unethical, unconscionable, and the main reason why the defence of fair comment cannot be availed to them. The first defendant G clearly tried, and failed, to get an interview from the plaintiff, at Roki's house. Yet he colluded with his photographer and surreptitiously took the four pictures that were published together with the article, in typical paparazzi style. He violated her right to privacy, especially after she declined to give him an interview.

H It has been held by this court that

Chigumba J

> "A false story cannot be substantially true … no justification or public interest A was served in writing and publishing a false story. The defences of justification and public interest are grounded in the truth".

See *Manyanga* v *Mpofu & Ors* HH-162-11 at pp 11-12. Where the article is based on truth and an opinion is expressly stated as such, and the comment is fair and in the public interest, and the report is balanced and not biased, it is my view that, in that case, that article is a publisher's dream. B

The final matter for determination is assessment of the quantum of damages. Damages in this jurisdiction have remained modest: see *Tekere* v *Zimbabwe Newspapers, supra, Zvobgo* v *Kingstons supra,* and *Chinengundu* v *Modus Publications Ltd* HH-132-92. The factors which a court should take into consideration in assessing an appropriate estimate of damages are settled. C They include:

1. The content and nature of the defamatory publication.
2. The plaintiff's standing in society.
3. The extent of the publication.
4. The probable consequences of the defamation. D
5. The conduct of the defendant.
6. The recklessness of the publication.
7. The comparable awards in other defamation suits.
8. The declining value of money. See the *Manyanga* case *supra* at 14, E the *Butau* case *supra* at 9*, Garwe* v *Zimind Publishers (Pvt) Ltd & Ors* 2007 (1) ZLR 209 (H) at 236-242*, and Chivasa* v *Nyamayaro & Ors* HH-50-13.

In this case, the content and the nature of the defamatory publication was sensational and scandalous, more suitable to other scandal-mongering publications that are in circulation than to a leading and well established F family newspaper such as *The Sunday Mail*. The content of the defamatory publication was largely untrue. It was accepted during the trial that *The Sunday Mail* is a widely circulated newspaper in Zimbabwe, and that in 2011, it was circulated online and reached audiences abroad. The evidence which was accepted by the court is that the consequences of the defamation G touched the plaintiff, whose musical career has now stagnated. It turned her into a recluse when she became a laughing stock and was ridiculed in public at the supermarket and while using public transport. Her fans expressed disappointment via social media. Her extended family, her in-laws, her friends and her parents and siblings all felt that they had been brought into disrepute by the contents of the article. Her son Gabriel had been named as H

Chigumba J

A fatherless, which would haunt him as an adult, her husband and his family were tainted by their association with her after the article was published. Finally, despite being invited to do so, neither the first nor the third defendant apologized to the plaintiff. This would have mitigated damages.

The conduct of both the first and the third defendant was unethical, deplorable, B and unconscionable and motivated by malice. No attempt was made to investigate the story or verify with the plaintiff, her husband, her siblings or her parents. Allegations of sexual abuse were made casually, only for the court to establish during trial that they had no basis. The allegation of addiction to hard-core drugs was a fabrication in its entirety. The article was calculated to tarnish the plaintiff's image and to lower her in the eyes of C ordinary Zimbabweans, to bring her down from her pedestal, and to leave her mired in controversy. The publication was reckless, because basic journalistic principles were ignored. The third defendant appears to have edited the article himself, contrary to the second defendant's policy and standing orders.

In *Zimbabwe Banking Corp Ltd* v *Mashamhanda* HH-135-92*,* it was held that:

> D "… an award of damages for defamation is intended to provide vindication and consolation, not to provide the plaintiff with a financial windfall. Awards in Zimbabwe will generally not equate with those in larger and wealthier economies, but they must take into account the rapid rate of inflation here".

Zimbabwe became a multicurrency economy in 2009. Inflation is currently not a factor that should influence the court in assessing the quantum of E damages. It is my view that, in order to keep up with current trends, the court should seriously consider the effect that social media like face book, watsapp, twitter and instagram now has on the extent of the publication, for purposes of assessing the quantum of damages. There was evidence in this case that people as far away as America and the United Kingdom, read the F article that was published almost at the same time as the plaintiff's family, because *The Sunday Mail* is now published online.

Comparable awards in other defamation suits are as follows:

Chinengundu supra – ZW$$23 000 in 1992

Zimbabwe Banking Corp supra – ZWD$45 000 in 1995

G *Chinamasa supra* – ZWS30 000 in 1994

Zvobgo supra – ZWD$20 000 in 1995

Masuku supra – ZWD$80 000 (revalued)

Butau supra – US$3 000

Chivasa supra – US$4 000

Moyo v *Nkomo & Anor* HB-38-11 – US$5 000

H *Manyange supra* – US$2 000 and US$5 000

Chigumba J

Taking all the above factors into account, including the effect that social A media platforms have had on the extent and speed of publication, as well as our country's obligations in terms of international and regional protocols and conventions, as well as the provisions in our new Constitution that seek to protect the right to non-discrimination on the basis of sex and gender, and

gender stereotypes, as well as the fact that our country has now adopted a multicurrency regime, I am satisfied that an award of US$$10 000 is justified B in this case.

In the result, it is ordered that judgment be and is hereby granted in favour of the plaintiff as against the defendants jointly and severally, the one paying the others to be absolved, for payment of:

(i) the sum of USD$10 000

(ii) interest thereon *a tempore morae* from the date of judgment to the date C of payment in full: and

(iii) costs of suit

Mugwadi & Associates, plaintiff's legal practitioners D

Chirimuuta & Associates, defendants' legal practitioners

1 Quoting from *National Media Ltd & Ors* v *Bogoshi* 1998 (4) SA 1196 (SCA) at 1208, which in turn quoted from *Handyside* v *UK* (1976) 1 EHRR 737 at 754.

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/FAIRDROP (PVT) LTD v CAPITAL BANK CORPORATION LTD & ORS 2014 (1) ZLR 781 (H)

FAIRDROP (PVT) LTD v CAPITAL BANK CORPORATION LTD & ORS 2014 (1) ZLR 781 (H)
2014 (1) ZLR p781

Citation	2014 (1) ZLR 781 (H)
Case No	Judgment No. HH-305-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	28 May 2014; *CAV*
Judgment	18 June 2014
Counsel	*L Uriri,* for the applicant *T Magwaliba,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court – jurisdiction – peregrinus – need for defendant to be present or to have property within the jurisdiction – need for attachment order to be issued before summons is issued – existence of claim within Zimbabwe – D *not enough to satisfy requirements relating to jurisdiction*

Practice and procedure – parties – joinder – discretion of court – when inappropriate to order such joinder

Headnote

E To the extent that a court has a discretion in determining an application for the joinder of a party to proceedings in terms of r 85 of the High Court Rules, 1971 (RGN 1047 of 1971), such a discretion should not be exercised in favour of an applicant where it will cause inconvenience to the other party and, if refused no prejudice to the applicant will result.

A person domiciled and resident in a foreign country cannot be sued in this F country as the courts have no jurisdiction over that person. For that reason, there is need for an attachment *ad fundandam jurisdictionem* of that person or his property 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. The attachment order should be issued by G the court before the summons is issued against that person. The presence in the country of unspecified and undefined property belonging to the defendant or the debt which is the subject of the dispute is not enough for the court to exercise jurisdiction. The existence of a claim in Zimbabwe, which claim is the subject of the dispute, no matter how substantial that H claim is, cannot satisfy the requirement relating to jurisdiction.

Mathonsi J

Where a *peregrinus* is being sued, even if it has property in Zimbabwe, A a plaintiff must first seek and obtain an attachment order to found or confirm jurisdiction, as the case may be. Even if the court were to act in terms of s 15 of the High Court Act [*Chapter 7:06*] which allows a court to direct service of process without an attachment order, it can only do so if satisfied that the person or his property is capable of attachment or arrest. The existence of a claim in Zimbabwe, which is the subject B of the dispute, cannot satisfy the requirement relating to jurisdiction no matter how substantial that claim is.

Cases referred to

Bowes & Ors v *Manolakakis* 2011 (2) ZLR 59 (H)

Chirongoma v *Tdg Logistics & Anor* 2011 (1) ZLR 98 (H) C

Ginsberg v *Estate Kulf* 1924 SWA 1

Ex p *Mor-tal Construction Co (Pvt) Ltd* 1962 (2) SA 664 (SR)

Voicevale Ltd v *Freightlink (Malawi) Ltd* 1987 (2) ZLR 22 (S)

Wong & Ors v *Liu & Anor* 2013 (2) ZLR 576 (H) D

Legislation considered

High Court Act [*Chapter 7:06*], s 15

High Court Rules 1971 (RGN 1047 of 1971), rr 44(3) & 120

Case information

L Uriri, for the applicant

T Magwaliba, for the first respondent E

Judgment

Mathosi J: At the request of the parties to these two applications I agreed to hear both of them simultaneously, given that the matters are related and arise from the same issue. In the first application, namely HC 3020/13 the applicant seeks to join the fifteenth respondent, the Eastern and Southern F African Trade and Development (PTA) Bank ("the PTA Bank") as a party to the proceedings brought by the first respondent ("Capital Bank") in HC 999/13.

In the second application, namely HC 3114/14, the same applicant seeks leave to serve process in HC 999/13 upon the PTA Bank at Chaussée du Prince Loise Rwangasore, Bujumbura in Burundi, by edictal citation. This G judgment therefore disposes of both applications.

Capital Bank sued the applicant and 13 others on the basis of agreements entered into on 19 July 2010, 2 September 2010 and 9 December 2010, in terms of which the applicant was loaned sums of money the balance of which allegedly stood at US$ 2 575 038.70 as at 31 March 2012. The other H

Mathonsi J

A defendants in that matter, who are also respondents herein, were sued as sureties and co-principal debtors in that action.

The defendants contested that suit and in due course the applicant, who is the first defendant in that action, filed a plea in which, pleading rectification, prayed that the action be stayed pending the determination of its counterclaim B for the rectification of the contract upon which Capital Bank sued as well as the determination of another matter being HC 5427/12, in which it had sued Capital Bank and others for certain damages.

The applicant then filed a counterclaim in that matter wherein it cited the PTA bank as the fifteenth defendant. It averred that itself and Capital Bank had executed the loan agreements I have already referred to but that such C agreements do not correctly record the agreement of the parties in that it records Capital Bank as the lender when, in actual fact, the lender was the PTA Bank, which granted the applicant a loan facility of US$2.5 million. It averred further that the PTA Bank could not register the loan in its books because Munyaradzi Kereke, who is the thirteenth defendant in that matter, D and is associated with the applicant, was on the European Union sanctions list. The PTA Bank had then appointed Capital Bank's predecessor, Renaissance Merchant Bank Ltd as its escrow or disbursement agent as a sanctions breaking measure. The applicant then sought an order rectifying the contracts by the substitution of the PTA Bank in the place of Renaisance Merchant Bank and costs of suit on the legal practitioner and client scale.

E For completeness, I must mention that the action in HC 999/13 is still to be set down for trial. Meanwhile, the applicant has brought these two applications. In HC 3020/13, Munyaradzi Kereke, reiterated what is contained in the plea in HC 999/13 in his founding affidavit, that the applicant applied to the PTA Bank for an offshore line of credit of US$2.5 million. He attached F a copy of the application which is headed "PTA Bank, $2.5 Million Loan Application" dated 21 July 2010. He deposed that the PTA Bank granted the facility and as proof of that he attached what is termed "Indicative Term Sheet; Proposed Structured Amortized Medium Term Import Financing Facility for Fairdrop Trading Private Limited Trading as Rock Foundation Medical Centre July 2010".

G Kereke stated that although Capital Bank has issued summons as the principal lender, there is no privity of contract between the parties. As the applicant has pleaded rectification and counterclaimed for it and cited the PTA Bank as a defendant, leave was being sought to join the PTA Bank in the proceedings. In the event of the counterclaim being granted, the dispute H in the claim in convention cannot be decided without PTA Bank. For that

Mathonsi J

reason the applicant sought to invoke third party procedure to join the PTA A Bank as a party.

The application is strongly opposed by Capital Bank and in the opposing affidavit of Lawrence Tamayi, its managing director, it denied the allegation that it was the escrow or disbursing agent of the PTA Bank. He stated that clause 19 of the credit facility letters specifically excludes any other terms or conditions or agreements which are not recorded in the credit facility B letters. The said clause reads:

> "This offer, once accepted, constitutes the entire agreement between the parties who acknowledge that there are no other oral or written undertakings or agreements between them relating to the subject matter of this agreement. No amendment, consensual cancellation or other modification of this agreement shall be valid or binding on a party hereto unless reduced to writing and executed by both C parties hereto."

As Kereke signed the agreement on behalf of the applicant, he being an accomplished banker, he knew the import of that provision and it bound the applicant to the agreement and nothing else. Tamayi vehemently denied that the application form to PTA Bank relied upon by the applicant is a binding D contract between the applicant and the PTA Bank, as it makes it clear that the PTA Bank

was not making any undertaking to legally bind itself to lend on the terms set out therein and that any agreement reached would be subject to the written approval of the PTA Bank.

In any event, Tamayi argued, the document applicant relies on, makes it E clear that it is governed by the laws of England. In addition, the applicant and sureties provided security to Capital Bank in the form of mortgage bonds, notarial bonds and unlimited guarantees. These securities were not given in favour of the PTA Bank. Significantly, the applicant made loan payments amounting to US$ 634 794.95 to Capital Bank and not the PTA Bank. According to Capital Bank the application is designed to delay the F finalisation of the action and nothing else. It accessed funds from the PTA Bank by a separate arrangement and lent the funds to its clients including the applicant, which explains why its predecessor made reference to the "PTA Bank credit facility" in correspondence.

The second application, HC 3114/13, is made in terms of Order 6 r 44 for edictal citation. The applicant insists that this court has jurisdiction over G the matter because:

> "8.1. the court has already assumed jurisdiction in respect of the claim in convention, in which rectification has been pleaded, and
>
> 8.2. the rectification necessarily requires that the PTA Bank be a party in the counter claim, and H

Mathonsi J

> A 8.3. the PTA Bank is the principal lender, and
>
> 8.4 the PTA Bank's loan to the applicant constitutes sufficient assets to found jurisdiction in addition to the fact that it has other numerous assets in Zimbabwe."

The issues for determination in this matter are whether this is a proper B case in which the PTA Bank should be joined as a party to the proceedings and whether this court does have jurisdiction over the PTA Bank and the agreement, if any, which was entered into between the applicant and the PTA Bank, which is an entity cherishing its domicile in Burundi.

Mr *Uriri* for the applicant submitted that the applicant seeks third party joinder in respect of the claim in reconvention, which it has already filed C and in which it has gone on to cite the PTA Bank as a defendant. For that reason the PTA Bank is already in court and it would be undesirable to have it as a party in reconvention and not a party in convention. He conceded that a joinder is discretionary on the court.

I take the view that in order for the court to exercise its discretion in favour D of the applicant, it must be satisfied, not only in the procedure adopted but also on the question of jurisdiction. It would be pointless to join a party to the proceedings when the court enjoys no jurisdiction over that party. In fact, even the grant of leave for edictal citation is predicated upon the existence of jurisdiction. In terms of r 44(3) of the High Court Rules 1971:

> E "Application for leave of the court or of a judge shall be made by application in terms of Order 32 setting out concisely –
>
> (a) the facts upon which the cause of action is based;
>
> (b) the grounds upon which the court has jurisdiction to entertain the claim;
>
> (c) the manner of service which the court or judge is asked to authorise, and if personal service cannot be effected the last-known whereabouts of the person F to be served and the inquiries made to ascertain his present whereabouts."

Mr *Uriri* submitted that, while the PTA Bank is a foreign entity domiciled in Bujumbura, Burundi, it has valuable property within this jurisdiction which can found or confirm jurisdiction. In addition, the debt which is the subject of the litigation is itself sufficient to found jurisdiction. The court, having G already assumed jurisdiction in the main *lis*, should do so in respect of the counter claim. I have serious difficulties with that argument.

I stand by the pronouncement that I made in *Wong & Ors* v *Liu & Anor* 2013 (2) ZLR 576 (H) at 581D-F, where I stated:

> "The first respondent was therefore proceeding rough shod against all procedures H set out in the rules, disregarding the rules and the law in cavalier fashion.

Mathonsi J

> I say so because our civil practice and procedure is clear that a person domiciled A 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 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 B court before the summons is issued against that person."

The point is also made by Herbstein and van Winsen *The Civil Practice of the Superior Courts of South Africa* 3 ed (1979) at pp 788-789 that 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 C precedent to the action, for it is upon the attachment that the court's jurisdiction is founded.

I therefore do not agree with Mr *Uriri* that the presence of unspecified and undefined property belonging to the PTA Bank or the debt which is the subject of the dispute is enough for the court to exercise jurisdiction. Where D a *peregrinus* is being sued, even if it has property in Zimbabwe, the plaintiff must first seek and obtain an attachment order to found or confirm jurisdiction, as the case may be. Even if the court were to act in terms of s 15 of the High Court Act [*Chapter 7:06*] which allows the court to direct service of process without an attachment order, it can only do so if satisfied that the person E or his property is within Zimbabwe and is capable of attachment or arrest: *Chirongoma* v *Tdg Logistics & Anor* 2011 (1) ZLR 98 (H) 101H and 102A-B.

The existence of a claim in Zimbabwe, which claim is the subject of the dispute, no matter how substantial that claim is, cannot satisfy the requirement relating to jurisdiction: *Bowes & Ors* v *Manolakakis* 2011 (2) ZLR 59 (H) at 63C; *Ginsberg* v *Estate Kulf* 1924 SWA 1 at 2. F

Mr *Uriri* for the applicant sought to rely on the authority of *Voicevale Ltd* v *Freightlink (Malawi) Ltd* 1987 (2) ZLR 22 (S) to submit that the subject matter of the litigation can be a basis upon which jurisdiction is founded. In that case both parties were *peregrini* and the peas which were the subject of the contract were in Harare when one of them terminated the contract. G The other party had sought an order for attachment of the consignment of peas to found jurisdiction for an order of specific performance against the respondent. The Supreme Court held that the High Court had jurisdiction by virtue of being the forum *rei sitae*, the court within whose area of jurisdiction the subject matter of the dispute is situated. H

2014 (1) ZLR p787

Mathonsi J

A In my view, that case is clearly distinguishable from the present. There the matter involved an application for leave to attach in order to found jurisdiction. The goods sought to be attached were pointed out and firmly located in Harare, Zimbabwe. This is not an application for leave to attach in order to found jurisdiction. It is an application for leave to serve process outside Zimbabwe; a process which has been issued before an order of attachment and without B leave. The case of Ex p *Mor-tal Construction Co (Pvt) Ltd* 1962 (2) SA 664 (SR) does not advance the applicant's cause either because in that case, the court already had jurisdiction against the *peregrinus* not dependant solely on attachment of property, as the cause of action arose within its jurisdiction.

Mr *Magwaliba,* for the first respondent, submitted that this is not a case in C which I should exercise my discretion in favour of joinder because Capital Bank, which is the plaintiff, does not have any claim against the PTA Bank. What has happened is that one of the 14 defendants in the main suit, the applicant herein, seeks the joinder in order to substitute a creditor. Strange indeed. The two applications are a grand scheme in order to avoid liability. He maintained that the applicant's counterclaim, apart from it having been D issued without the leave of the court where leave was required, cuts against the provisions of r 120 of the High Court Rules 1971. That rule allows a defendant in an action to set up by way of claim in re-convention any right or claim he may have against the plaintiff. *In casu*, the applicant's claim is against the PTA Bank and should be made separately.

E To my mind, these applications are meant to cloud an otherwise straight forward case. They bring inconvenience to the parties which is as unnecessary as it is undesirable. The applicant seeks to import into the dispute an intended transaction with the PTA Bank which does not appear, *ex facie* the papers, to have been consummated. It was proposed and as to when it transformed into a fully-fledged agreement, we are not told. Significantly, not only is F the PTA Bank a *peregrinus* whose

property has not been attached to found jurisdiction, the intention of the parties in the document relied upon was to be governed by the "Laws of England", not of this court. It had certain conditions precedent which do not appear to have been fulfilled.

The applicant does not dispute that it paid substantial sums to Capital Bank G towards satisfaction of the debt without demanding that payment be made to the PTA Bank. It is noteworthy that the securities given for the debt were given in favour of Capital Bank and not the PTA Bank. It is difficult to comprehend what the rectification the applicant is seeking would achieve.

In my view, the balance of convenience favours the refusal to grant the H indulgence of joinder. To the extent that third party joinder is discretionary

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2014 (1) ZLR p788

Mathonsi J

upon the court, I cannot exercise such discretion to cause inconvenience A under circumstances where the applicant can still rely on the defence it has elected without the need of having the PTA Bank in court.

It occurs to me that these applications should not have been made at all. They are an attempt to frustrate and harass the first respondent by a litigant trying to construct a defence which is probably as limping as it is non-existent. It B is a matter be fitting an award of costs on the punitive scale. It is only that way that such conduct can be discouraged.

In the result, I make the following order that:

1. The application in case number HC 3020/13 is hereby dismissed.
2. The application in case number HC 3114/13 is hereby dismissed.
3. The applicant shall bear the costs of suit in respect of both applications C on the legal practitioner and client scale.

Honey and Blanckenberg, applicant's legal practitioners

Danziger and Partners, respondent's legal practitioners D

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Source:
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TRUST ME SECURITY ORGANISATION v MARARIKE & ORS 2014 (1) ZLR 789 (H)

2014 (1) ZLR p789

Citation	2014 (1) ZLR 789 (H)
Case No	Judgment No. HH-325-14
Court	High Court, Harare
Judge	Mangota J
Heard	17 June 2014; *CAV*
Judgment	24 June 2014
Counsel	*C K Mutevhe,* for the applicant *T Moyo,* for the respondent
Case Type	Civil application

Annotations No case annotations to date

Flynote

Arbitration – award – enforcement of – registration with magistrates court or High Court – successful party must apply, on notice to other party, for registration – only a magistrate or judge having power to order D *registration – no other officer of court having power to register award – award not enforceable unless formally registered – mere submission of award to relevant court not sufficient*

Headnote

An arbitrator's award is enforced by having it registered with the magistrates E court or the High Court (depending on the monetary value of the order or award which is intended to be registered for purposes of enforcement). The arbitrator's award is, by the process of registration, turned into an order of the court in which the order or award is being, or has been, registered. The registration exercise converts the award into a civil judgment of the court in which such award has been registered. F Registration is not just an event; it is a process. The process may be by way of action or application. Litigants who want to register awards which arbitrators grant to them do, invariably, employ the application mode of having their awards registered with the magistrates court or the High Court. The application procedure which they adopt places a duty upon them to notify the other party of their intention to register and G enforce the order which had been awarded in their favour by the court *a quo*. The aggrieved party has every right to acquiesce in, or to oppose, the registration of the award. The act of registration is the preserve of a magistrate or a judge of the High Court, who is enjoined to entertain the application on notice to the other party. No other official, such as H the clerk of court, has the power to register an award.

2014 (1) ZLR p790

Mangota J

As soon as the award has been registered with the relevant court, it assumes A the meaning and content of a civil judgment of the court in which the award has been registered. Once it has taken that substantive content, the civil judgment becomes executable. It is not enough for the successful party simply to submit the award to the relevant court.

Cases referred to B

Muneka & Ors v *Manica Bus Co* 2013 (1) ZLR 81 (H)

Olympio & Ors v *Shomet Industrial Development* HH-191-12

Tapera & Ors v *Field Spark Investments (Pvt) Ltd* HH-102-13

Legislation considered

Labour Act [*Chapter 28:01*], s 92B(3) C

Case information

C K Mutevhe, for the applicant

T Moyo, for the respondent

Judgment

Mangota J: The present application which the applicant filed with the D court on 9 June 2014 was referred to me for my attention. When I went through the application, I noted that the event which the applicant wanted arrested had already taken place. I accordingly endorsed on the face of the application the words "the application has been overtaken by events and hearing it would not serve any purpose". The endorsement which I made on the morning of 11 June 2014 was as a result of what the applicant had E stated in its founding affidavit. It said:

"The third respondent has since attached the applicant's property and *removal has been set for 10 June 2014*" (emphasis added)

Following this seemingly simple disposal of the matter which had been placed before me, the applicant filed a supplementary affidavit advising the F court that the first and second respondents' representatives agreed that the removal of the attached goods be suspended pending the determination of the applicant's urgent chamber application or a mutual resolution of the issues which existed between the parties. Paragraphs 2 and 3 of the applicant's supplementary affidavit are pertinent to the court's reconsidered opinion to hear the application. The paragraphs read: G

"2. Considering execution was scheduled for 10 May, 2014 the application filed on 9 June 2014 only appeared before the judge on the 11th after the date scheduled for the removal, hence the Honourable Justice Mangota noted that the application had been superseded by events consequently applicant responded in a letter dated 11 June 2014 attached as Annexure A and herein furnishes further information to paragraph 14 of the founding affidavit; H

2014 (1) ZLR p791

Mangota J

A 3. Though attachment was scheduled for the 10th of June 2014, the applicant's legal practitioners and the first and second respondents' representatives Zimbabwe Security Guards Union have agreed that the said removal be suspended until 13 June, 2014 pending either a determination on the urgent chamber application or a mutual resolution of issues between the parties".

The supplementary affidavit which the applicant filed with the court and B served on the respondents persuaded the court to entertain the application which was set down for hearing at 10 am on Friday, 13 June 2014. On the mentioned date and time, the parties duly appeared and counsel for the first and second respondents requested that he be given time within which he would receive instructions, study the application and do justice to the respondents' case. The matter was, by consent of all the parties who were C then present, postponed for hearing at 9:00 am on Wednesday 18 June, 2014. The postponement was subject to the fact that the parties would allow the *status quo* to remain until the hearing and the determination of the application.

The first and second respondents filed their opposing papers on Tuesday 17 June, 2014. The third, fourth and fifth respondents who were cited in D their respective official capacities as the messenger of court, the clerk of magistrates civil court and the provincial magistrate did not appear in person or through legal representation. The court remains of the view that all the three will abide by the decision which will have been reached.

The papers which are filed of record show that the applicant and the first two respondents were embroiled in two labour disputes both of which ended E up with arbitrators R E Nhiwatiwa and P Shawatu for arbitration. Arbitrator Shawatu's award was issued on 30 January 2013 and Arbitrator Nhiwatiwa's award was issued on 17 April 2013. Both arbitral awards were issued in favour of the first and second respondents who, in the first case, raised the complaint of under-payment of wages, non-payment of overtime, leave pay F and gratuity. In the second case, the two respondents raised the complaint of non-payment of wages and terminal benefits.

Armed with the two arbitral awards, the first and second respondents approached the fourth and fifth respondents with a view to having the arbitral award of 17 April 2013 registered and enforced against the applicant. The applicant was not aware of the four respondents' move until 5 June 2014, G when the third respondent called at the premises of the applicant on whom he served notice of attachment of the applicant's property setting 10 June as the date of removal of the same. The gravamen of the applicant's complaint was, or is, that the arbitral award of 17 April 2013 *was not registered with the magistrates court* and service upon it of the warrant of execution as H well as the notice of attachment and removal of its property came to it as a

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2014 (1) ZLR p792

Mangota J

surprise, as no process was served upon it for the registration of the arbitral A award (emphasis added). It stated that the removal and sale of its property based on an unregistered arbitral award would visit it with untold hardship as its operations would be crippled.

The first and second respondents filed their papers opposing the application. They raised one preliminary matter after which they proceeded to address the court on the substantive aspects of the application. The matter which B the respondents raised *in limine* was that the deponent to the

applicant's founding affidavit did not have the applicant's authority to depose to the same. That matter was, however, disposed of when, on 18 June 2014, the applicant filed with the court the resolution which authorised the deponent to represent the applicant in legal proceedings which challenge the arbitral awards involving the applicant and the two respondents. C

On the substance of the application, the respondents stated that the manner in which the parties were cited was rather tardy and somewhat vexatious. They contended that the relief which the applicant was or is seeking had very little or no bearing on the third, fourth and fifth respondents. The applicant's position on the matter was that the conduct of the fourth and fifth D respondents created the unpalatable situation under which the parties were currently labouring. It submitted that the *directive* which the fifth respondent *displayed* at the magistrates court stated that any party with an arbitral award who intends to register it with the magistrate's court as provided for in terms of the Labour Act [*Chapter 28:01*] should *submit such award*and a draft E warrant of execution which *when issued* instructs the messenger of court to execute (emphasis added). The fourth respondent, the applicant claimed, *issued* the warrant of execution in respect of the arbitral award which had been made in favour of the first and second respondents on 17 April 2013. It is this issued warrant of execution upon which the third respondent based his action when he proceeded to attach the applicant's property, the applicant said. F It accordingly prayed the court to declare that the directive which the fifth respondent issued was or is unconstitutional. The directive, it said, violated its constitutional right to administrative justice as contained in s 68 of the constitution. It stated further that the directive violated the rules of natural justice which are embodied in the *audi alteram partem* rule.

Looked at from the above-mentioned perspective, the applicant cannot be G faulted when it cited the third, fourth and fifth respondents as it did. The fourth and fifth respondents are the major cause of its concern. The third respondent, in the court's view, acted pursuant to the directive of the fifth respondent which directive the fourth respondent translated into what may be regarded as an order of the magistrates court through which order the H

Mangota J

A arbitral award of 17 April 2013 was apparently registered for purposes of having it enforced.

The first and second respondents spent a great deal of their time lecturing the court on the obvious. They centred most of their submissions on wanting to convince the court of this simple fact which is that the Labour Court B and arbitrators who are appointed in terms of the Arbitration Act [*Chapter 7:15*] have inherent and exclusive jurisdiction in all labour matters. They submitted that the directive which the fifth respondent issued and displayed at the magistrate's court was or is consistent with s 92B(3) of the Labour Act, [*Chapter 28:01*]. They argued and stated that, in terms of the wording of the mentioned section, registration of an arbitral award was an event C which was completed by the submission of the award to a court which has jurisdiction over the registration of the award. They referred the court in this regard to three case authorities which they said supported the view which they held and hold of the matter. The cases in question were *Tapera & Ors* v *Field Spark Investments* HH-103-13, *Muneka & Ors* v *Manica Bus Company* 2014 (1) ZLR 88 (H) and *Olympio & Ors* v *Shomet Industrial*D*Development* HH-191-12.

All three above-mentioned cases involved registration of arbitral awards for purposes of having them enforced. A reading of the cases in question shows that the arbitral award winning parties did not just *submit* their arbitral awards to the court(s) which had jurisdiction to register the awards. The E parties went by way of application and serving their respective applications on the respondents when they sought to have the awards which had been made in their favour registered for purposes of enforcing them. That, in the court's considered view, is the correct position of the law on the matter. The registration of a Labour Court order or an arbitral award is not an event but F a process.

The legislature, it hardly requires any emphasis, conferred on the Labour Court and arbitrators who are appointed in terms of the Arbitration Act inherent and exclusive jurisdiction to hear all labour disputes as well as to make orders, decisions and determinations on the same. The legislature, however, deprived the Labour Court, arbitrators and such like tribunals G which are set up to hear and determine labour matters, the power to enforce their judgments, orders, determinations or decisions. It reposed such powers of enforcement in the magistrates court or the High Court depending on the monetary value of the order or award which is intended to be registered for

purposes of enforcement. The questions which must be asked and answered H in respect of this part of the case are:

Mangota J

(i) why should the order or the award be registered; and A

(ii) what process must be involved in the registration of the order or award.

It goes without saying that the Labour Court or the arbitrator's award is, by the process of registration, turned into an order of the court in which the order or award is being, or has been, registered. The registration exercise converts the Labour Court order, award, decision or determination into a civil B judgment of the court in which such order, award decision or determination has been registered. The question which begs an answer at this stage of the proceedings centres on how the substantively made order of the Labour Court or the arbitral award is converted into a civil judgment of the court in which the order or award is being, or has been, registered. There are two known processes through which a court is clothed with the power to make an order. C The processes in question may be by way of *action* or *application*. Litigants who want to register orders or awards which the Labour Court or arbitrators grant to them do, invariably, employ the application mode of having their orders or awards registered with the magistrates court or the High Court. The application procedure which they adopt places a duty upon them to notify D the other party of their intention to register and enforce the order which had been awarded in their favour by the court *a quo*. The aggrieved party has every right to acquiesce to, or to oppose, the registration of the Labour Court order or the arbitral award. However, as soon as the order or award has been registered with the relevant court, the order or award assumes the meaning and content of a civil judgment of the court in which the award E or order has been registered. Once it has taken that substantive content, the civil judgment becomes executable.

It is a cardinal rule of our procedure and practice that parties who bring matters to court or to the arbitrator must be allowed to participate at every stage of the proceedings which are before that court or arbitrator. They must be heard F when the matter is set down for hearing, when judgment is pronounced for or against them and when, as *in casu*, the award winning party moves the relevant court in the form of an application to have the award which was issued in its favour registered for purposes of having it enforced. The word *order*which appears in s 92B(3) of the Labour Act does contemplate the fact that the registration of the order or award turns it into an order of the G court in which the order or award is registered.

The directive which the fifth respondent issued and displayed at his court does, with respect, set a dangerous precedent which cannot be allowed to stand. The directive gives the distinct impression that courts allow parties who approach them in search of justice to ambush each other as persons who H

Mangota J

A are playing a game of cards are, more often than not, inclined to do. It runs contrary to some long-established principles of natural justice and rules of courts of all levels, and in the process places the due administration of justice into very serious dispute. The fifth respondent issued it in the hope, it is the court's view, that it would assist in the immediate disposal of such cases as the present one which is labour-related. The directive, however, remains B unclear as regards the designation of the court official who is clothed with the authority to issue or register the arbitral award. If anything, it raises more questions than it can answer. Questions which immediately come to the fore on a reading of the directive are such as:

(a) which official between the magistrate and the clerk of court has the C power to register the award?

(b) what papers accompany the arbitral award when it is submitted for registration?

(c) to which court official are the award and a draft warrant of execution submitted?

D (d) how does the person who submitted the papers get to know that his or her or its or their order or award has been registered with the court?

(e) does he or she or it or they keep on checking upon the progress or otherwise of the registration process and, more importantly,

(f) how do the views of the party who is adversely affected by the effects E of the directive get to be known as well as registered with the court?

The last mentioned of the six questions which have been posed in the foregoing paragraphs constitutes the substance of the present application. The applicant submitted, and correctly so, that it was not heard when the event which related to the apparent registration of the award was effected in terms F of the fifth respondent's directive. It argued that the writ of execution which resulted from the directive was improperly issued and it cannot, therefore, be used to attach and remove its property, let alone have such sold under the hammer. It is the court's considered view that the applicant was within its rights when it argued as it did and questioned the manner in which the writ of execution had come into existence.

G The respondents, on their part, could not assert with any degree of certainty that the arbitral award which was made in their favour on 17 April 2013 was registered with the magistrates court. They did not even say that they submitted the arbitral award and a draft warrant of execution to the magistrates court in terms of the fifth respondent's directive. They did not produce any paper H which showed that registration of the award took place. They, however,

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remained of the view that registration took place. Their contention in this A regard runs contrary to the case authorities which they cited, where it was observed that registration is not an event but a process which is instituted by way of application and on notice to the other party.

The court cannot, under the circumstances of this case, state that the writ of execution was properly issued. It cannot say so when it does not know B if the arbitral award was registered and, if it was, the court official through whom it was registered. The probabilities of this case are that, when the fifth respondent issued the directive which lies at the centre of these proceedings his intention was to shed off from himself all responsibility which relates to the registration of Labour Court's or arbitrators' orders, awards decisions and/or determinations onto the clerk of court. However, the Magistrates C Court (Civil) Rules do not clothe that official with the power to register such awards, orders, decisions and/or determinations. Registration of these are the preserve of a magistrate or a judge of the High Court who is enjoined to entertain the application on notice to the other party.

The applicant's property was attached on 5 June 2014 and it was due for D removal on 10 June 2014. The applicant filed its application with the court on 9 June, 2014. The applicant, on the mentioned basis, appears to have treated its case with some urgency. Its case is, however, among many cases which the court would, all things being equal, refuse to entertain. The applicant was aware as far back as 30 January and 17 April 2013 that the first and second respondents would most likely want to move the courts to enforce what had E been awarded to them. It did nothing from the mentioned period to date and it only approached the court when its interests were under threat. This is not the kind of urgency which is contemplated in the rules of this court. On that basis, therefore, the application would have failed.

In the circumstances of this case, however, the application is allowed to F succeed on the basis that the first and second respondents, acting with and through the unconstitutional directive of the fourth and fifth respondents, did not register the award which they properly obtained and wanted to enforce. They cannot enforce an unregistered award. The applicant did well to refer the matter which relates to the apparent registration of the award through the fifth respondent's directive to court for review. The court remains unseized G with that review. It is, however, its considered opinion that the applicant's prospects of success on review are pretty high.

The court has considered all the circumstances of this case. The applicant, in the court's view, proved its case on a balance of probabilities to the satisfaction of the court. The court, accordingly, orders as follows: H

A (a) that the application be and is hereby sustained.

(b) that each party bears its own costs.

Muvingi & Mugadza, appellant's legal practitioners

B*Tamuka Moyo Attorneys*, respondent's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/CHIYANGWA v NEHANDA RADIO & ANOR 2014 (1) ZLR 798 (H)

CHIYANGWA v NEHANDA RADIO & ANOR 2014 (1) ZLR 798 (H)

Citation	2014 (1) ZLR 798 (H)
Case No	Judgment No. HH-333-14
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	24 June 2014
Judgment	24 June 2014
Counsel	Details not supplied
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Court – jurisdiction – peregrinus – test of effectiveness – court cannot exercise C *jurisdiction unless judgment can be enforced*

Headnote

The test for jurisdiction is mainly whether the court would be able to enforce its judgment. The courts should only determine matters where there is evidence that, at the end, such judgments could be enforced. If there D is no proof that the enforcement of these judgments would be carried out, then the courts should not entertain jurisdiction over such matters. The doctrine of effectiveness underpins the rule that a court will not entertain an action against a *peregrinus* unless there has been an arrest of his person or an attachment of his property.

Cases referred to E

Morten v *van Zuilecom* (1907) 28 NLR 500

Steytler NO v *Fitzgerald* 1904 TH 108

Utah International Inc v *Honeth & Ors* 1987 (4) SA 145 (W)

Zakowski v *Wolff* 1905 TS 32 F

Legislation considered

High Court Act [Chapter 7:06], s 15

Judgment

Matanda-Moyo J: This is an application for leave to serve respondents by way of edictal citation and also by substituted service. G

The first respondent has been described in the applicant's founding affidavit as

> "internet based radio and news publication which primarily focuses on Zimbabwe news and is accessible to all Zimbabweans and the entire world. The first respondent ... purports to be established in London, England, but whose full and further particulars are to the plaintiff unknown". H

2014 (1) ZLR p799

Matanda-Moyo J

A The second respondent is the first respondent's managing editor and is also purportedly based in London, England.

The initial issue which falls for determination is whether this court has jurisdiction to hear the matter involving the respondents. The test for jurisdiction is mainly whether the court can be able to enforce its judgment. B The courts should only determine matters where there is evidence that at the end, such judgments could be enforced. If there is no proof that the enforcement of these judgments would be carried out then the courts should not entertain jurisdiction over such matters.

Herbstein and van Winsen *Civil Practice of the Superior Courts in South Africa* at pp 29-31 gives the meaning of the doctrine of effectiveness as C essentially meaning the power of the court to give an effective judgment. In *Steytler NO* v *Fitzgerald* 1904 TH 108 at 111 de Villiers JP held that:

> "A court can simply be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit but also of giving effect to its judgment".

In *Morten* v *van Zuilecom* (1907) 28 NLR 500 at 509 the court held the D above to be the greatest test of the jurisdiction of the courts.

In the present case, both defendants are *peregrini* according to papers filed. The defendants are purportedly resident in the United Kingdom. This court cannot therefore give effect to a judgment given in favour of the plaintiff, and against the defendant where there has not been attachment of either the E defendants' persons or their property. Such a judgment would be a *brutum fulmen*.

The doctrine of effectiveness underpins the rule that a court would not entertain an action against a *peregrinus* unless there has been an arrest of his person or an attachment of his property. See *Zakowski* v *Wolff* 1905 TS 32 F at 33, *Utah International Inc* v *Honeth & Ors* 1987 (4) SA 145 (W) at 147.

Part III of the High Court Act [*Chapter 7:06*] deals with the jurisdiction of the High Court. Section 15 of the Act provides:

> **"Exercise of jurisdiction founded on or confirmed by arrest or attachment**
>
> In any case in which the High Court may exercise jurisdiction founded on or G confirmed by the arrest of any person or the attachment of any property the High Court may permit or direct the issue of process, within such period as the court may specify, for service either in or outside Zimbabwe without ordering such arrest or attachment if the High Court is satisfied that the person or property concerned is within Zimbabwe and is capable of being arrested or attached, and the jurisdiction of the High Court in the matter shall be founded or confirmed, H as the case may be, by issue of such process".

2014 (1) ZLR p800

Matanda-Moyo J

I understand the above section to be confirming jurisdiction on this court A only upon satisfaction that the person concerned is within Zimbabwe and is capable of being arrested, or that the property concerned is within Zimbabwe and capable of being attached. From the applicant's papers it is clear that the applicant himself is not sure where the first respondent's offices are nor where it is registered. The applicant is also not sure where the second respondent is based. What is evident from the papers is that both defendants B are out of Zimbabwe.

I am, therefore satisfied that this court has no jurisdiction to deal with the action as the court is not satisfied that the defendants are within Zimbabwe and capable of being arrested or attached. Hence the issuance of the summons and service by edictal citation would not in my opinion confer jurisdiction C on the court in the current scenario.

In the result the application is dismissed.

Mutamangira & Associates, plaintiff's legal practitioners D

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/MADZIMBAMUTO v REGISTRAR-GENERAL & ORS 2014 (1) ZLR 801 (CC)

MADZIMBAMUTO v REGISTRAR-GENERAL & ORS 2014 (1) ZLR 801 (CC)

Citation	2014 (1) ZLR 801 (CC)
Case No	Judgment No. CC-5-14
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlashwayo JA, Patel JA & Guvava JA
Heard	12 February 2014; *CAV*
Judgment	25 June 2014
Counsel	Mrs *J B Wood* and *E H Mugwadi* for the applicant *S Pedzisayi,* for the respondents
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

C *Constitutional law – Constitution of Zimbabwe 2013 – citizen – by birth – cannot be deprived of citizenship – rights of citizen – freedom of movement and to enter and leave Zimbabwe – such right cannot be restricted, even if person travelling on a foreign passport – person entitled endorsement on foreign passport stating his right to unrestricted residence*

Headnote

D The applicant was a citizen of Zimbabwe by birth. While living outside the country, he obtained a South African passport, by virtue of his mother's birth in that country. When he returned to Zimbabwe and presented his South African passport, he was told that he had to get a residence permit. He obtained one which expired after two years. Sometime E later, he re-acquired a Zimbabwean passport, but also applied for an endorsement on his South African passport, showing that he had a right to unrestricted and unconditional residence in Zimbabwe. The immigration authorities refused to grant this endorsement, saying that as a South African passport holder, he was an alien and governed by the F Immigration Regulations 1998.

Held, that a Zimbabwean citizen by birth does not lose his citizenship on acquiring a foreign citizenship. He is entitled to hold foreign citizenship and a foreign passport. Zimbabwean citizenship by birth cannot be lost. The freedom of movement and residence in Zimbabwe is a right guaranteed by s 66 of the Constitution to every Zimbabwean citizen G and every person who is legally in Zimbabwe. It includes the right to enter and leave Zimbabwe as well as

immunity from expulsion from Zimbabwe. There would be a real danger of expulsion of the applicant by the immigration authorities if the applicant entered Zimbabwe and presented his South African passport endorsed with an expired residence H permit, a withdrawn residence permit or no residence permit at all.

2014 (1) ZLR p802

Ziyambi JA

Held, further, that it must be emphatically stated that the Regulations are A governed by the Constitution and not the Constitution by the Regulations. Any law which is inconsistent with the Constitution is void to the extent of the inconsistency. To say that the applicant, as a citizen by birth, was entitled to dual citizenship and then to deny him the right under s 66 to freely enter and leave Zimbabwe, on the grounds that he has presented a foreign passport, would be to deprive him of the benefits of the enjoyment B of two fundamental rights conferred on him by the Constitution, namely the right to dual citizenship inherent in his birthright as a Zimbabwe citizen by birth and the right to freedom of movement. His right to enter, remain and leave Zimbabwe could not be restricted even when he presented or travelled on a foreign passport. Because of the attitude C taken by the immigration authorities, the order sought would be granted

Cases cited

Mawere v *Registrar General* 2013 (1) ZLR 578 (CC)

Rattigan & Ors v Chief Immigration Officer & Ors 1994 (2) ZLR 54 (S)

Legislation considered D

Constitution of Zimbabwe 2013, ss 36, 42 & 66

Case information

Mrs *J B Wood* and *E H Mugwadi* for the applicant

S Pedzisayi, for the respondents E

Judgment

Ziyambi JA: The applicant is a citizen of Zimbabwe by birth. He initially sought a declaratory order confirming his right to a Zimbabwean passport and certain ancillary relief. He also sought an order compelling the second respondent to endorse his South African passport with an unrestricted and indefinite residence permit. F

The background

The appellant was born in Zimbabwe. One of his parents is Zimbabwean by birth while the other is South African by birth. Sometime in 2003, the applicant left on a Zimbabwean passport for the United Kingdom in order to take up employment in that country. On the expiry of his passport, he G attempted to get a new one through the Zimbabwean Embassy in London but was referred to Harare, the embassy no longer having the capacity to issue passports.

The applicant returned home briefly but, due to the chaotic situation and long queues then prevailing at the passport office, he failed to submit an H

2014 (1) ZLR p803

Ziyambi JA

A application for a passport. He returned to the United Kingdom where he was able to obtain a South African passport by virtue of his mother's birth in South Africa. In mid 2012, the applicant returned home permanently. Upon presentation of his South African passport to the second respondent's officials, he was advised to apply for a residence permit, which he did. A two-year residence expiring on 16 August 2014 was granted to him by the B second respondent.

When the new Constitution was promulgated, the applicant applied to the second respondent for his acceptance as a citizen, and therefore a permanent resident, by making an endorsement of his

permanent residence status on his South African passport. The application was declined, with the advice C that the applicant should first acquire a Zimbabwe passport. On 28 October 2013 the applicant wrote to the second respondent advising that he now had a Zimbabwe passport, and requesting an endorsement of his permanent residence status on his South African passport. No response has been received to date.

The order sought

At the hearing, the court was advised that the order initially sought against D the first respondent was no longer being pursued, as the applicant had been granted a Zimbabwean passport. The order now being sought is set out in the draft order produced to the court by Mrs *Wood*. It prays that:

> "The applicant be and is hereby declared to be a citizen of Zimbabwe by birth with entitlement to dual citizenship;
>
> E The second respondent shall with immediate effect record in the applicant's South African passport his right to unrestricted and unconditional residence in Zimbabwe."

The second respondent's opposition

The second respondent opposed the application on the basis that its officials were within their rights to refuse the endorsement sought. He took the F position that:

> "To the extent that the applicant holds a South African passport, he is an alien and we are entitled to govern his status in terms of the Immigration Regulations, 1998. The applicant's current status is as provided for in section 16 of the Regulations. In terms of section 17 of the Immigration Regulations, on the face of it, the applicant does not qualify for an unrestricted residence permit given G the circumstances he has presented…"

It was submitted by Mr *Pedzisai*, on behalf of the second respondent, that the latter was acting in terms of the Immigration Regulations 1998, which regulations govern the actions of immigration officers. Upon presentation of a South African passport, the presenter is regarded as an alien and is expected H to comply with the Regulations. While acknowledging the entitlement of

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the applicant to dual citizenship, and therefore to unrestricted entry into A and exit from Zimbabwe, the second respondent is of the firm view that, if the applicant chooses to travel on a South African passport, then he should apply for a residence permit like all other alien holders of a foreign passport.

The constitutional provisions

> **"36 Citizenship by birth** B
>
> (1) Persons are Zimbabwean citizens by birth if they were born in Zimbabwe and, when they were born –
>
> (a) either their mother or their father was a Zimbabwean citizen; or
>
> (b) any of their grandparents was a Zimbabwean citizen by birth or descent.
>
> (2) Persons born outside Zimbabwe are Zimbabwean citizens by birth if, when C they were born, either of their parents was a Zimbabwean citizen and –
>
> (a) ordinarily resident in Zimbabwe; or
>
> (b) working outside Zimbabwe for the State or an international organisation.
>
> (3) A child found in Zimbabwe who is, or appears to be, less than fifteen years of age, and whose nationality and parents are not known, is presumed to be a Zimbabwean citizen by birth. D
>
> **42 Powers of Parliament in regard to citizenship**
>
> An Act of Parliament may make provision, consistent with this Chapter, for –
>
> (a) procedures by which Zimbabwean citizenship by registration may be acquired;
>
> (b) the voluntary renunciation of Zimbabwean citizenship; E
>
> (c) procedures for the revocation of Zimbabwean citizenship by registration;
>
> (d) the restoration of Zimbabwean citizenship;
>
> (e) the prohibition of dual citizenship in respect of citizens by descent or registration; and
>
> (f) generally giving effect to this Chapter." F

The powers given to Parliament in respect of revocation of Zimbabwean citizenship and the prohibition of dual citizenship relate only to citizens of Zimbabwe other than by birth. No similar provision is made in respect of citizens by birth. Thus a Zimbabwean citizen by birth does not lose his or her citizenship on acquiring a foreign citizenship. He or she is entitled G to hold foreign citizenship and a foreign passport. Indeed the Constitution has made it clear that Zimbabwean citizenship by birth cannot be lost. That much was decided in *Mawere* v *Registrar-General* 2013 (1) ZLR 578 (CC) and conceded by the respondents in this case. The only issue which falls for determination is whether this court should order the endorsement sought by the applicant. H

Ziyambi JA

A **The right to freedom of movement**

The freedom of movement and residence in Zimbabwe is a right guaranteed by the Constitution to every Zimbabwean citizen and every person who is legally in Zimbabwe. It includes the right to enter and leave Zimbabwe, as well as immunity from expulsion from Zimbabwe. Section 66 of the Constitution provides:

> B**"66 Freedom of movement and residence**
>
> (1) Every Zimbabwean citizen has –
>
> (a) the right to enter Zimbabwe;
>
> (b) immunity from expulsion from Zimbabwe; and
>
> (c) the right to a passport or other travel document.
>
> C (2) Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to –
>
> (a) move freely within Zimbabwe;
>
> (b) reside in any part of Zimbabwe; and
>
> (c) leave Zimbabwe."

D It was contended, on behalf of the applicant, that the two-year time-restricted residence permit endorsed by the second respondent on his South African passport is an infringement of his right under s 66 of the Constitution to immunity from expulsion from Zimbabwe, and to enter Zimbabwe on such passport once the two year permit expires or is, at the second respondent's E whim, withdrawn.

In view of the submission by Mr *Pedzisai*, on behalf of the second respondent, that

> "if the applicant presents a South African passport upon entry into Zimbabwe to the immigration officials he will be treated as an alien and made to apply for a residence permit in terms of the Regulations,"

F there is, in my view, a real danger of expulsion of the applicant by the second respondent's officials in the event that the applicant enters Zimbabwe and presents his South African passport, endorsed with an expired residence permit, a withdrawn residence permit or no residence permit at all.

G **Interpretation of the constitutional right**

The approach to interpretation of a constitutional right has been laid down in many decisions of the predecessor of this court. Thus, in *Rattigan & Ors* v *Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57F-H the court held:

> "This court has, on several occasions in the past, pronounced upon the proper approach to constitutional construction embodying fundamental rights and H protections. What is to be avoided is the imparting of a narrow, artificial, rigid

Ziyambi JA

> and pedantic interpretation; to be preferred is one which serves the interest of A the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed."

Conclusion B

The second respondent concedes that the applicant is entitled to dual citizenship by virtue of the Constitution, but insists that he be treated as an alien if he enters Zimbabwe using a South African passport. This, it was submitted, is because the second respondent is governed by the Regulations. It must be emphatically stated here that the Regulations are governed by the Constitution and not the Constitution by the Regulations. Any law which is inconsistent C with the Constitution is void to the extent of the inconsistency – see s 2 of the Constitution. To say that the applicant, as a citizen by birth, is entitled to dual citizenship conferred by the Constitution and then to deny him the right to freely enter and leave Zimbabwe, which right is afforded to all citizens in terms of s 66, on the grounds that he has presented a foreign passport, is D to deprive him of the benefits of the enjoyment of two fundamental rights conferred on him by the Constitution, namely the right to dual citizenship inherent in his birthright as a Zimbabwe citizen by birth and the right to freedom of movement.

A purposive interpretation of the right conferred by s 66, read with the E applicant's entitlement to dual citizenship ,is that the applicant's right to enter, remain in and leave Zimbabwe cannot be restricted, even when he presents or travels on a foreign passport. It is for the Regulations to be brought into conformity with the Constitution and not for the Constitution to conform to the Regulations. It is also for the framers of the Regulations to decide how F best to align the Regulations with the Constitution in order to give effect to the constitutional rights of Zimbabwean citizens.

Because of the firm stance taken by Mr *Pedzisai*, on behalf of the second respondent, that the applicant will be treated as an alien if he presents a South African passport to the immigration officials upon entry into Zimbabwe, G we consider that it is necessary, in this case, to grant an order in the terms sought by the applicant.

Accordingly, the application is allowed and the following order is issued:

1. It is declared that the applicant is a citizen of Zimbabwe by birth with entitlement to dual citizenship. H

2014 (1) ZLR p807

Ziyambi JA

A 2. The second respondent is hereby ordered to endorse in the applicant's South African passport upon presentation thereof to him, the applicant's right to unrestricted and unconditional residence in Zimbabwe.

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, B GARWE JA, GOWORA JA, HLATSHWAYO JA, PATEL JA, and GUVAVA JA concurred.

Mugwadi & Associates, applicant's legal practitioners

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

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/GLOAR DESIGN TEAM v ZIMBABWE NATIONAL ROAD AUTHORITY 2014 (1) ZLR 808 (H)

GLOAR DESIGN TEAM v ZIMBABWE NATIONAL ROAD AUTHORITY 2014 (1) ZLR 808 (H)

2014 (1) ZLR p808

Citation 2014 (1) ZLR 808 (H)

Case No Judgment No. HH-319-14

Court High Court, Harare

Judge	Mtshiya J
Heard	17 June 2014; *CAV*
Judgment	25 June 2014
Counsel	*E T Moyo,* for the plaintiff *F Girachi,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure – parties – citation of – party operating under a trade name – entitled to sue or be sued under that name

Headnote

The plaintiff brought an action against the defendant for payment for services rendered. The declaration stated that the plaintiff was a company duly incorporated under the laws of Zimbabwe. The defendant filed a special plea, stating that, as there was no company registered under the plaintiff's name, the summons was a nullity. The plaintiff's response was that, in terms of r 8C of the High Court Rules, the citation of the plaintiff by a trading name was not fatal. It was averred that the plaintiff was an architect who traded as Gloar Design Team.

Held, that in terms of r 8C, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and the rules relating to proceedings by associations would apply. It could not therefore be argued that there was no plaintiff. The question of a nullity was removed by r 8C. That being the case, there was a summons and declaration that the plaintiff could amend. The issue of substitution did not arise. There had always been a plaintiff.

Cases cited

J D M Agro-Consult & Mktg (Pvt) Ltd v *Editor,* The Herald *& Anor* 2007 (2) ZLR 71 (H)

Sheriff of Zimbabwe v *Mackintosh & Ors* 2013 (2) ZLR 352 (H)

Stewart Scott Kennedy v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S)

2014 (1) ZLR p809

Mtshiya J

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 8A, 8B(1), 8C and 132

Case information

E T Moyo, for the plaintiff

F Girach, for the defendant

Judgment

Mtshiya J: On 7 October 2011 the plaintiff (Gloar Design Team) issued summons against the defendant for the following relief:

> "(a) Payment of USD184 450-65 being an amount due and owing to the plaintiff by the defendant in respect of services rendered.

(b) Interest on the above amount at the prescribed rate calculated from the date of summons to the date of full and final payment both dates inclusive.

C (c) Costs of suit."

Under para 1 of its declaration, the plaintiff went on to describe itself as follows:

"The plaintiff is a company duly incorporated in terms of the laws of the Republic operating and carrying on business from the 6th Floor, Hungwe House, Suit 605, D Jason Moyo Avenue, Harare, but for whose address for service for purpose of these proceedings is care of its undersigned Legal Practitioners, Messrs Scanlen & Holderness, 13th Floor, 74 Jason Moyo Avenue, Harare."

The above description was incorrect because the plaintiff is not a body corporate.

E Upon filing an appearance to defend, the defendant proceeded to file a special plea indicating that, because of the above description of the plaintiff, the summons was a nullity. The dependant, however, pleaded over and raised a counterclaim for damages in the sum of US$165 461.

Since the special plea is based on the validity of the summons, I shall not, at this stage, go into the details of the parties' claims.

F In its special plea filed on 14 November 2011, the defendant averred that the summons and declaration are invalid because:

"i. Gloar Design Team – as pleaded in the heading and thus citation of the parties – is a juristic non-entity. Significantly the legitimately expected suffix after 'Gloar Design Team' of "(Pvt) Limited or Limited" is absent. G The entity cited and pleaded by the plaintiff is a non-entity incapable of suing or being sued in its own name.

ii. The further averment in paragraph 1 of the plaintiff's declaration that 'Plaintiff is a company duly incorporated in terms of the laws of the Republic operating and carrying on business' is incorrect and denied. There is no private limited or publicly listed company by that name registered H in Zimbabwe under the Companies Act. The plaintiff accordingly has no

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Mtshiya J

locus standi and is in want of juristic personality. Plaintiff's claim is fatally A defective.

Defendant prays that plaintiff's claim be dismissed with costs of suit on a legal practitioner and client scale."

In its replication, filed on 25 November 2011, the plaintiff responded to the special plea in the following terms:

"Having regard to provision of Rule 8C of the High Court Rules RGN 1047/71 B regarding proceedings against persons under their trading name, the citation of the plaintiff by its trading name is not fatal to the proceedings and hence the special plea must fail."

The above response from the plaintiff was, in my view, correct in law.

At the commencement of the trial the plaintiff, as a way of dealing with the C special plea, applied to amend para 1 of its declaration to read as follows:

"The plaintiff is a registered architect by the name of Owen Chikuhuhu trading as Gloar Design Team whose address for service for the purposes of these proceedings is care of his undersigned legal practitioners, Messrs Scamlen & Holderness, 13th Floor, CABS Centre, Harare." D

The application to amend the declaration was strongly opposed.

Mr *Moyo,* for the plaintiff, submitted that the amendment was necessitated by the need to properly describe the plaintiff. He said there was no intention to substitute the plaintiff. He said the architect trading under the name "Gloar Design Team" was Owen Chikuhuhu and that r 8C of the High Court Rules allowed for the said Owen Chikuhuhu to issue summons in his business name. E

Indeed Order 2A of the High Court Rules 1971, which was promulgamated under SI 192 of 1997, came into force on 1 October 1997. Rules 8A, 8B and 8C thereunder provide, as follows:

"8A. Naming of associatesF

(1) In any proceedings to which an association is a party, any other party may, by written notice to the association, require a statement of the names and places of residence of the persons who were the association's associates at the time the cause of action accrued.

(2) A person who receives a notice in terms of subrule (1) shall, within five days after receiving it –

(a) furnish the party concerned with a written statement containing the required G information; and

(b) file a copy of the written statement with the Registrar;

and the proceedings shall continue in the same manner, and the same consequences shall follow, as if the associates had been named in this summons or notice commencing the proceedings: H

2014 (1) ZLR p811

Mtshiya J

A Provided that the proceedings shall continue in the name of the association except where a writ of civil imprisonment is sought against an associate, in which event the associate shall be specifically named in the civil imprisonment proceedings.

8B. Declaration of persons to be associates

(1) Where proceedings have been instituted by or against an association in terms of this Order, the court or a judge may, on court application made by any B party to the proceedings either before or after judgement, declare any person to be an associate of the association.

(2) Upon a declaration being made in terms of subrule (1), the proceedings shall continue in the same manner, and the same consequences shall follow, as if the person who is the subject of the declaration had been named in the summons or notice commencing the proceedings.

C**8C. Proceedings by or against persons under their trade name**

Subject to this Order, a person carrying on business in a name or style other 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."

D Clearly r 8C equates a business name to an association.

However, notwithstanding r 8C above, Mr *Girach*, for the defendant, persisted that there was no valid summons before the court. He said the court could not be asked to amend a nullity.

In the main, Mr *Girach* relied on *Stewart Scott Kennedy* v *Mazongororo Syringes*E*(Pvt) Ltd* 1996 (2) ZLR 565 (S) and *J D M Agro-Consult & Marketing (Pvt) Ltd* v *Editor,* The Herald & *Anor* 2007 (2) ZLR 71 (H).

In the *Stewart Scott Kennedy* case s*upra*, the Supreme Court stated the following:

"But the crucial distinguishing feature is that the institution of the action in the F name of Stewart Scott Kennedy was void *ab initio*. Without a plaintiff there can be no claim. A document which purports to be a summons requiring the defendant to comply with a claim of a non-existent person, is null and void as far as the institution of the claim is concerned. The plaintiff is the one who issues the challenge to litigation (see Voet 5.1.9) and must be a *persona*. If authority is needed for such an axiomatic statement it is to be found in *Kelly* v *Petersen*G1948 (4) SA 958 (A)."

The above is a correct exposition of the law prior to 1 October 1997 when r 8C was introduced into our High Court Rules 1971. In reading *J D M Agro-Consult (Pvt) Ltd supra*, I did not find any reference to r 8C which was already in force. I noted, however, that there was, in that case, reliance on H*Stewart Scott Kennedy supra*, a case which was decided before r 8C came into force.

2014 (1) ZLR p812

Mtshiya J

As submitted by the plaintiff's counsel, r 8C was relied upon in the decision A in *Sheriff of Zimbabwe* v *Mackintosh & Ors* 2013 (2) ZLR 352 (H). In that case Mathonsi J said:

"It is a celebrated principle of company law that a company, once incorporated, becomes a fictitious 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. B In my view, an incorporation which carries on business in a name or style can be sued in that name or style."

As already stated, the rule actually elevates the business or trade name to an association.

Apart from being guided by the fact that, in terms of our law, as from 1 October 1997 a party or "person carrying on business in a name or style C other than his own name *may sue* or *be sued* in that name or style as if it were an association", (my emphasis), I readily associate myself with the above enunciation of our current law on the issue before me.

On 7 October 2011, Owen Chikuhuhu, referred to in the proposed amendment, decided to sue under his business name, Gloar Design Team, as permitted by D r 8C. It cannot therefore be argued that as at that date there was no plaintiff. The question of a nullity, in my view, is thrown away by r 8C. That being the case, there is a summons and declaration that the plaintiff can amend. The issue of

substitution does not arise and therefore the defendant is estopped from arguing prescription. There has always been a plaintiff.

In *Stewart Scott Kennedy supra*, the Supreme Court at 571E to 572B made E the following observations:

> "Rule 132 of the High Court Rules stipulates that:
>
> > '… failing consent by all parties, the court or judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be F made as may be necessary for the purpose of determining the real question in controversy between the parties.'
>
> The general principle which guides the court in allowing an amendment is stated in Beck's *Theory and Principles of Pleading in Civil Actions* 5 ed para 83. It is that:
>
> > 'an amendment will be granted unless the application to amend is *mala fide* or would cause prejudice to the other side which cannot be compensated by a postponement or by an order for costs or both.' G
>
> There are very many cases in which the court has granted applications for substitution involving the introduction of a new *persona* upon being satisfied that no prejudice would be caused to the other side."

The above are the guiding principles placed before me in dealing with the plaintiff's application to amend the declaration. H

2014 (1) ZLR p813

Mtshiya J

A It is also important to note that r 8C must be read together with rr 8A and 8B. Accepting that r 8C treats a business name as an association, I believe that the plaintiff can legitimately bring this application under r 8B(1) which provided as follows:

> "Where proceedings have been instituted by or against an association in terms of this Order, the court or a judge may, on court application *made by any party*B*to the proceedings* either before or after judgement, declare any person to be an associate of the association" (my own emphasis).

In casu, the plaintiff seeks to declare that Owen Chikuhuhu is the person behind the trading name "Gloar Design Team."

The applicant wants to amend para 1 of the declaration in order to properly C describe itself. There is no substitution at all because the plaintiff remains as was when summons was issued. In fact, were it not for the incorrect description of the plaintiff in para 1 of the declaration, there would, in my opinion, have been no need for the proposed amendment. I believe all what the plaintiff is saying is:

> D "Whilst I should have cited myself as Owen Chikuhuhu trading as Gloar Design Team, I want it to be clearly known that I am the person trading under that name i.e Gloar Design Team."

The law allows him to do that by way of an application as he has done (*i.e*. r 8B(1) above). The record also shows that, through correspondence, E the defendant was always aware who Gloar Design Team was. I therefore find it unbecoming on the part of the defendant to attempt to avoid court proceedings through an unsustainable legal technicality. I also want to believe the incorrect description of the plaintiff was made in error.

Indeed at the end of it all, I am asking myself why I have had to write all this when r 8C is clear and unambigious. That rule requires no super legal F interpretation. It simply says a person can, with effect from 1 October 1997, sue and be sued under the business or trade name he or she operates. There has to be evidence of the existence of a person and the business name under which the person operates. That is why rr 8A(1) and 8B(1) apply. *In casu*, the amendment is being sought under r 8B(1) in order to make the correct G declaration of the person who trades under "Gloar Design Team" so as for the court to determine the real issues of dispute between the parties.

The amendment, in my view, does not prejudice the defendant, who has, in any case, already pleaded to the summons.

The application to amend the declaration should succeed and that being H the case, the special plea cannot be upheld. Our law allows the procedure

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2014 (1) ZLR p814

Mtshiya J

adopted by the plaintiff. The trial should proceed on the basis of the pleadings A already filed.

I therefore order as follows:

1. The defendant's special plea is dismissed.
2. The plaintiff be and is hereby granted permission to amend para 1 of its declaration so that it reads as follows: B

   "1. The plaintiff is a registered architect by the name of Owen Chikuhuhu trading as Gloar Design Team whose address for service for the purposes of these proceedings is care of his undersigned legal practitioners, Messrs Scanlen & Holderness, 13th Floor, CABS Centre, Harare;" and

3. Costs shall be costs in the cause.

Scanlen and Holderness, plaintiff's legal practitioners

Honey & Blackenberg, defendant's legal practitioners

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Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2014/Volume 1/PACKERS INTL (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2014 (1) ZLR 815 (H)

PACKERS INTL (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2014 (1) ZLR 815 (H)
2014 (1) ZLR p815

Citation	2014 (1) ZLR 815 (H)
Case No	Judgment No. HH-328-14
Court	High Court, Harare
Judge	Chigumba J
Heard	15 & 20 June 2014; *CAV*
Judgment	25 June 2014
Counsel	*J Samukange*, for the applicant *A Moyo,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administrative law – administrative authority – who is – Commissioner of Revenue Authority – requirement to act in accordance with requirements of Administrative Justice Act – directing garnishee order which would D *leave taxpayer unable to continue operating – such decision unreasonable*

Revenue and public finance – Commissioner of Revenue Authority – requirement to act in accordance with requirements of Administrative Justice Act – directing garnishee order which would leave taxpayer E *unable to continue operating – such decision unreasonable*

Headnote

The applicant was a registered operator in terms of the Value Added Tax Act [*Chapter 23:12*]. The revenue collection system is based on a self-assessment system by registered operators. The Act

provides a detailed mechanism for vendors to keep certain kinds of records and to calculate, account, and pay VAT to the taxing commissioner. The respondent F does not have the capacity or manpower to effectively monitor every transaction liable to VAT, which is why registered operators have to assess themselves. In order to ensure compliance, the respondent carries out periodic investigations and audits the operators to ensure full compliance by the operators with their obligation to declare and remit in full any G VAT that will be due.

Following an audit by the respondent, the applicant made a declaration to enable tax which was due to be assessed. On realising that there were some significant discrepancies between its self-assessed figures and those of the respondent, the applicant proposed a compromise, undertaking to pay a stated sum per day as a sign of its intention to cooperate fully with H the respondent's investigations. This offer was rejected. The applicant

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noted an appeal to the Fiscal Appeal Court against the respondent's A assessment. The respondent's officials then, without any prior notice, garnisheed the applicant's bank account held for the sum allegedly due. The respondent's officers advised the applicant that officers were due to be posted at all the applicant's branches to man them forthwith. The applicant was told that it could no longer transact as a result of the garnishee order. B

The applicant sought an order compelling the respondent to uplift the garnishee order and revoking the appointment of the appellant's bank as the respondent's agent. It averred that this conduct on the part of the respondent was unlawful, as its net effect was to close down its business, by rendering it inoperable. It argued that the respondent's conduct was C unconstitutional as the quantum of the garnishee order was arbitrary, and was imposed without notice. The quantum of the garnishee ought to be in the amount admittedly owing (less than 5 percent of what was garnisheed) because, at law, the disputed amount is suspended by the noting of the appeal. D

The applicant alleged that it faced imminent closure if it remained unable to operate; it could not pay its suppliers, or its workers, and was being forced into liquidation by the respondents. The welfare of its one thousand plus employees was at risk, and was being ignored by the respondent, contrary to the provisions of the Constitution. Finally, the applicant averred that it had no other remedy. The applicant contended E that the prevailing economic conditions, where at least ten companies every month are being liquidated, made it irrational and unreasonable of the respondent to order a garnishee of the sum claimed when it was clear that the effect of that directive would be to force the applicant into liquidation. The respondent denied that it acted unlawfully, maliciously, F capriciously or unconstitutionally. It averred that it was perfectly lawful for it to impose the garnishee in the manner that it did, and reiterated that the applicant ought to have exhausted its domestic remedies first by approaching the Commissioner for relief as provided for in the VAT Act, and the Income Tax Act. It was submitted that the court lacked the power to consider the merits of the tax assessment as that was the G exclusive purview of the Fiscal Appeal Court.

Held, that it was permissible to hear the matter as a matter of urgency. The applicant's commercial interests were at risk, in circumstances where failure to hear the applicant urgently would make it unnecessary or impossible for the applicant to be heard at all in future. Any future H

A application would be a futile exercise, because the harm that the applicant feared would have already befallen it.

Held, further, that the effect of s 36 of the Act is that the liability to pay remains extant until the appeal is finalised or, in the alternative, unless the Commissioner directs that the obligation falls away pending appeal is finalised. The applicant had not argued that the effect of the noting B of the appeal was to extinguish its obligation to pay. Section 33 of the VAT Act provides for the circumstances in which an aggrieved person can appeal to the Fiscal Court against the exercise of discretion by the Commissioner. The right to appeal against the exercise of discretion by the respondent's officers, to the Commissioner, is provided for in terms C of s 32 of the Act. This section provides that, when the Commissioner notifies, in writing, a person who is liable to pay tax to the respondent, of any decision or assessment made against that person, then that person may lodge an objection, also in writing, specifying the grounds of the objection, to the Commissioner, within a specified time period. Here, the Commissioner exercised his discretion and disallowed the objection D to the tax assessment, in terms of s 32(4)(c).

Held, further that, under of s 48 of the Act, the Commissioner has a discretion to declare any person to be his agent, and that once such a declaration is made, the proposed agent has no choice but to pay any amount of money, held on behalf of the tax payer, to the respondent, as long as it E is required for purposes of fulfilling tax obligations, and must even pay money held in an account for wages. However, s 48 does not override the Constitution, and the discretion exercised by the Commissioner was reviewable because of the use of the word "may", which is not peremptory. The intention of the legislature was to protect designated/appointed agents of the respondent from litigation in terms of other F laws for the act of forwarding money in their client's accounts to the respondent, even if that results in loss or prejudice to their clients, the account holders. It could not have been the intention of the legislature to put the exercise of discretion by the Commissioner beyond the reach of the law. However, there was no evidence that the discretion exercised by the Commissioner in making the appointment violated any of the G tenets by which the exercise of administrative justice ought to be guided.

Held, further that under s 14 of the Fiscal Appeal Court Act [*Chapter 23:05*], the applicant should not be required to pay the full sum that the respondent had garnisheed its accounts for. The noting of the appeal suspended actual payment of only that portion of the sum that the applicant was H disputing liability for. This interpretation is subject to the rider: "…unless

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the Commissioner … otherwise directs". By directing that a garnishee A order in the full sum be imposed, the Commissioner had directed that the full amount of the tax assessed be paid. However, the Commissioner was required to expressly say this, and to reduce his direction to writing, and notify the applicant of his direction, in writing. This was not done. The obligation or liability to pay was not suspended by the noting of the appeal. The appeal would establish whether the taxpayer was indeed B liable to pay the assessed sum. What was suspended was the actual payment of the assessed sum, in full.

Held, further, that the respondent was an administrative authority in terms of the Administrative Justice Act [*Chapter 10:28*]. Any action taken by the respondent, or any of its employees, was an administrative action, and C that in exercising discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. Irrationality, in relation to the exercise of discretion by an administrative body, has been defined as a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his D mind to the issue to be decided would have arrived at it. The imposition of the garnishee order on the applicant's accounts was an exercise of discretion on behalf of the respondent. In view of the provisions of s 14 of the Fiscal Appeal Court Act, the figure garnisheed was not proportionate, or reasonable, and was outrageous in its defiance of logic. Imposing the garnishee order on the applicant's account was not procedurally fair E because s 14 of the Fiscal Appeal Court Act stipulates that the disputed amount of the tax assessment be suspended pending the determination of the appeal. It was not substantively fair because there was no provision, in s 32 of the VAT Act, for objection to the Commissioner against the imposition of a garnishee order. The applicant's fear that it would be F forced into liquidation if the garnishee order remained in place in its current form constituted irreparable harm to it. By the time damages were ordered to be paid, there would likely be no applicant to receive the damages, because the applicant was not likely to remain in business. The balance of convenience favoured granting an interim order that the directive be suspended. G

Cases referred to

Affretair (Pvt) Ltd & Anor v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA) H

Chigumba J

A*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Ors* [2004] ZACC 15; 2004 (4) SA 490 (CC)

CCSU v Minister for the Civil Service[1984] All ER 3 935 HL

Dilwin Invstms (Pvt) Ltd v Jopa Eng Co (Pvt) Ltd HH-116-98

Document Support Centre (Pvt) Ltd v Mapuvire 2006 (2) ZLR 240 (H)

Fairdrop Trading (Pvt) Ltd v ZRA HH-68-14

B*Inyanga Downs Orchard v Buwu* HH-108-10

Johannesburg Consol Invstm Co v Johannesburg Town Council 1903 TS 111

Khunou & Ors v Fihrer & SCN 1982 (3) SA 353 (W)

Metcash Trading Ltd v Commr, SARS & Anor 2002 (4) SA 317 (CC)

Moyo & Ors v Zvoma NO & Anor 2010 (1) ZLR 178 (H)

C*New Vision Promotions v Ganya & Ors* HB-54-07

Nhliziyo v Greys Svc Station & Ors HH-194-10

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S)

Rudolph & Anor v CIR & Ors 1994 (3) SA 771 (T)

Shumba & Anor v ZEC & Anor 2008 (2) ZLR 65 (S)

D*Silver's Trucks & Anor v Dir of Customs & Excise* 1999 (1) ZLR 490 (H)

Stauffer Chemicals v Monsanto Co 1988 (1) SA 805 (W)

Szedlacsek v Szedlacsek 2000 (4) SA 147 (E)

Tarumbwa v Tarumbwa 2007 (1) ZLR 211 (H)

Triple C Pigs & Anor v Commr-Gen, ZRA 2007 (1) ZLR 27 (H)

E*Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 (H).

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 2 & 3(1)(a)

Constitution of Zimbabwe 2013, s 68

Fiscal Appeal Court Act [*Chapter 23:*05], s 14

F High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 241 & 244

Income Tax Act [*Chapter 23:06*], s 69

Value Added Tax Act [*Chapter 23:12*], ss 32(1)(a)(i), (ii) & (iii); 32(1)(b) & (c), 32(4), 33, 36 & 48

Case information

J Samukange, for the applicant

G*A Moyo,* for the respondent

Judgment

Chigumba J: "Pay now, argue later" is a pithy phrase that is used as a different expression of the biblical injunction to "render unto Caesar what belongs to Caesar". Put differently, it means that the obligation to pay tax H is inviolable, one cannot escape from that obligation, and, one is required

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to discharge the obligation first, and then raise objections after paying. This A case concerns a taxpayer who has approached the court for relief, after its bank accounts were garnisheed by the revenue authority, on the basis that the effect of the garnishee is to force it into liquidation. The question that arises for determination is whether the circumstances are such that this court can intervene and accede to the relief that is sought, in the face of certain B statutory provisions that appear to give the tax collector absolute power to impose and collect taxes. This is an urgent chamber application for a provisional order in which the applicant seeks the following interim relief:

INTERIM RELIEF GRANTED

1. That the respondent uplifts the garnishee order, and/or letter of appointment of agency placed/served to applicant's bank, FBC C bank, immediately and forthwith.
2. That respondent revoke and /or withdraw the appointment of applicant's FBC bank as its agent in terms of s 58 as read with s 59 of the Income Tax Act [*Chapter 23:06*] immediately and forthwith.
3. That the respondent shall not unlawfully interfere with applicant's D business operations and day to day activities, including the placing of its officers or agents at applicant's business premises.

The applicant is a private limited company, duly registered and operating in terms of the law of Zimbabwe. The respondent is the Zimbabwe Revenue Authority, an administrative authority established in terms of s 3 of the Revenue E Authority Act [*Chapter 23:11*] and tasked with collecting revenues due in terms of the Value Added Tax Act [*Chapter 23:12*] (hereinafter referred to as the VAT Act). The Finance Minister is mandated to administer the VAT Act.

The applicant is a registered operator in terms of the VAT Act. The country's value added tax system is embodied in the VAT Act. The system involves F the imposition of value added tax at each step in the chain of manufacture and distribution of goods and services that are supplied to the country in the course of business; and it is calculated on the value that will have been added at each step of the supply process, at a specified rate. The revenue collection system is based on a self assessment system by registered operators. The G VAT Act provides a detailed mechanism for vendors to keep certain kinds of records and to calculate, account, and pay value added tax to the Taxing Commissioner. The respondent does not have the capacity or manpower to effectively monitor every transaction liable to value added tax; that is why registered operators have to assess themselves. In order to ensure compliance, the respondent carries out periodic investigations and audits the operators to ensure full compliance by the operators H

Chigumba J

A of the obligation to declare and remit in full any value added tax that will be due.

The applicant has approached this court because sometime at the end of April 2014, the respondent carried out a tax investigation and audit of its affairs. It is common cause that the respondent's officers removed and took possession of certain documents from the applicant's operations, in terms B of s 60 of the VAT Act. In its founding affidavit, the applicant avers that the respondent advised it to make a voluntary declaration to enable tax which was due to be assessed. It was alleged that the voluntary declarations were done under duress and extortion, an allegation which was vigorously denied by the respondent's chief investigations officer Oppah Zinhumwe. The C applicant complied with the request, and attached copies of the voluntarily declared figures to its founding affidavit. The applicant attached a schedule which stated that it opened its branches as follows: Mvuma in September 2010, Angwa in May 2013, Slice Groceries in December 2012, and Speke in December 2013. According to annexure 1 to the founding affidavit, in 2010 the applicant's total sum of declared tax was US$522 012.95, in 2011 D it was US$ 2 323 234.06, in 2012 it was US$3 510 189.01, and in 2013 it was US$6 952 536.43.

On realising that there were some significant discrepancies between its self-assessed figures and those of the respondent, the applicant wrote to the respondent on 4 April 2014, (annexure B), and confirmed that, in terms E of its proposal to the respondent, it was paying US$2 000 per day to the respondent, as a compromise and as a sign of its intention to cooperate fully with the respondent's investigations. Copies of the tax assessment schedules are attached to the notice of opposition as E1 to E4. For the period January to June 2013, the VAT due was assessed at US$1 856 837.14, for the period January to December 2012, the VAT due was assessed at US$3 489 955.17, F for the period January to December 2011 the VAT due was assessed at US$1 585 356.69, for the period February to December 2010 the VAT due was assessed at US$ 321 441.92. It appeared that the assessments were a result of calculating the VAT which was deemed to be due, subtracting the VAT which was paid, and then imposing a 100 percent penalty.

The respondent wrote a letter attached as annexure F1 to the opposing G papers dated 4 April 2014, in which it advised the applicant that it had been penalised for gross under-declaration of sales, which had resulted in VAT under-payments, and that this information had been gleaned from the applicant's own documents. In that letter, the respondent advised that:

"… the US$5 000 weekly payments are not commensurate with the debt at hand H and therefore not accepted".

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That letter also reminded the applicant of its as yet unassessed obligation to A pay income tax, and Pay as You Earn (PAYE) for its employees. The applicant accepted, in its founding affidavit, para 5 thereof, that according to its calculations and its voluntarily declared liability, an amount of US$905 801.32had not been paid to the respondent. It stated that its decision not to pay any more money was based on advice from its accountant that the respondent's tax assessments were incorrect and highly exaggerated, for failure to take B into account non-taxable products such as goat meat, beef, chicken, bread and other groceries.

The applicant stated that it has been advised that it does not owe the respondent anything at all, and had taken the position that it has in fact overpaid the respondent and will be refunded some of the monies that it alleges it has C overpaid to the respondent. The applicant averred that it suspects the hidden hand of its competitors who have lost a significant market share to it, to be behind its perceived "persecution" by the respondent. The applicant alleged jealousy and malice as the cause of the threats to close it down, and to deploy the respondent's employees to man its operations. The applicant cites, as an example of *mala fides* and malice, the refusal by the respondent to accept D its payment proposal when it had paid a total of US$204 000 in terms of that proposal. On 2 May 2014, the applicant wrote a letter to the respondent (Annexure C) in which it raised objections to the tax assessments set out in the respondent's letter to it of 4 April 2014. The merits of the objections need not detain us. They will properly be assessed by the appropriate court. These objections were dismissed in their entirety by the respondent, and this E decision was communicated to the applicant in a letter dated 12 June 2014 (Annexure D founding affidavit).

It is common cause that the applicant has appealed to the Fiscal Appeal Court. On 13 June 2014, it is alleged that the respondent's officers, without any prior notice, garnisheed the applicant's account held at FBC bank for F the sum of twenty million United States dollars. The applicant alleges that the respondent's officers have advised it that officers are due to be posted to all its branches to man them forthwith. The applicant also alleges that it was told that it could no longer transact as a result of the garnishee order. The applicant alleges that this conduct on the part of the respondent is unlawful as its net effect is to close down its business, by rendering it inoperable. G The applicant alleges that the respondent's conduct is unconstitutional as the quantum of the garnishee order is arbitrary, and was imposed without notice. The applicant alleges that the quantum of the garnishee ought to be in the amount that it admitted to owing, of about US$900 000, because at law, the disputed amount is suspended by the noting of the appeal. H

2014 (1) ZLR p823

Chigumba J

A The applicant alleges that it is facing imminent closure if it remains unable to operate, it cannot pay its suppliers, or its workers, and is being force-marched into liquidation by the respondents. The welfare of its one thousand plus employees is at risk, and is being ignored by the respondent, contrary to the provisions of the Constitution. Finally, the applicant avers that it has no B other remedy. The respondent denied that it acted unlawfully, maliciously, capriciously or unconstitutionally. It averred that it was perfectly lawful for it to impose the garnishee in the manner that it did, and reiterated that the applicant ought to have exhausted its domestic remedies first by approaching the Commissioner for relief as provided for in the VAT Act and the Income Tax Act. It was submitted that this court lacked the power to consider the C merits of the tax assessment that was the exclusive purview of the Fiscal Appeal Court.

The question that is exercising the court's mind is whether there are any circumstances in which this court can examine the rationality or the reasonableness of the Commissioner of Tax's decision, specifically to place a D garnishee on the applicant's account, in circumstances where the effect of the garnishee order is to render the applicant incapable of funding its operations, forcing the applicant into insolvency, and ultimately shooting itself in the foot by killing the goose that lays the golden egg? A necessary offshoot of that question is whether this matter deserves to be heard on an urgent basis.

E **Compliance with rules**

Counsel for the respondent raised a point in *limine* that the application before the court contravened the provisions of r 241 of the High Court Rules 1971 by not having attached to it the correct form of 29B, or of form 29. He relied on *Inyanga Downs Orchard* v *Buwu* HH-108-10 at p 6 where the court stated F that Form 29B requires the applicant to set out in summary the basis of the application, and that this requirement is mandatory as stipulated by Order 1 rule 4. See also *New Vision Promotions* v *Ganya & Ors* HB-54-07 at p 3 and *Nhliziyo* v *Greys Svc Station & Ors* HH-194-10 at p 3 and *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR 101 (H).

G Counsel for the applicant implored the court to use its discretion n the applicant's favour, in the interests of justice. The court was referred to the following: *Tarumbwa* v *Tarumbwa* 2007 (1) ZLR 211(H) at p214E where it was held that

> "… the court can fall back on its inherent powers to control its own procedures H and fulfil its core mandate of doing justice to all";

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to *Khunou & Ors* v *Fihrer & Son (Pty) Ltd* 1982 (3) SA 353 (W) at 355 E-H; A and to *Szedlacsek* v *Szedlacsek* 2000 (4) SA 147 (E) at 149, where Leach J held:

> "It is trite that rules are there for the court, not the court for the Rules and this court must zealously guard against its Rules being abused, particularly the making of unnecessary procedurally related applications which are not truly required in order for justice to be done or for the speedy resolution of litigation ..." B

I associate myself fully with these sentiments. Legal practitioners in this jurisdiction increasingly appear to trawl through court documents with a magnifying glass in search of the littlest anomaly in their opponent's papers. Much time is wasted in court whilst they wax lyrical on a myriad "points *in limine*" which are not conclusively dispositive of the matter. It is time C to curtail this practice, and to advocate that points *in limine* be raised only where their resolution disposes of the issue under consideration. The court is perfectly capable of defending its rules, or lack of compliance with them where necessary. In this case I find that the effect of the applicant's failure to comply with r 241 is not fatally defective. The court can use its discretion in terms of r 4C, and condone the lack of compliance, in the interests of D doing justice.

Urgency

In terms of Order 22 r 244, where a chamber application is accompanied by a certificate from a legal practitioner in terms of para (b) of sub-rule (2) of r 242 to the effect that a matter is urgent, giving reasons for its urgency, E the Registrar shall immediately submit it to a judge who shall consider the papers forthwith. In this case the certificate of urgency was filed by Ticharwa Garabga, who stated that the applicant's business had literally been shut down and that the garnishee order for twenty million dollars was for money which was not due to the respondent, and was imposed arbitrarily. F

Other reasons advanced for the urgency of the matter were:

> " the applicant was set to lose one thousand workers, in a country where the unemployment rate was 90 per cent, the threat to send the respondent's employees to man the applicant's tills would send the wrong message to the applicant's investors and competitors, the respondent's conduct would result in the closure of the applicant's business and this was counterproductive, especially since the G applicant was cooperating fully with the respondent and had paid more than two hundred thousand dollars by way of daily installments since April 2014; the appeal to the Fiscal Appeal Court would be rendered nugatory."

The test for urgency is objective. See *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 (H) This case also found that, in some cases, even purely commercial interests can be protected urgently in appropriate cases H

Chigumba J

A and considered the case of *Silver's Trucks & Anor* v *Director of Customs & Excise* 1999 (1) ZLR 490 (H) which considered the release of certain attached imported goods on the basis that the applicant would face bankruptcy and its 67 employees would lose their jobs as a

result. It was found that, had the court waited, there would have been no need to act subsequently as the applicants would have been liquidated.

B Counsel for the respondent submitted that this matter was not urgent, and relied on *Triple C Pigs & Anor* v *Commissioner-General, ZRA* 2007 (1) ZLR 27 (H) as its authority. The headnote states:

> "… in order to give effect to the intention of the courts to dispense justice fairly a distinction is necessarily made between those matters that ought to be heard C urgently and those to which some delay would not cause harm …"

See also *Dilwin Investments (Pvt) Ltd* v *Jopa Engineering Company (Pvt) Ltd* HH-116-98 where Gillespie J stated:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown D for treating one litigant differently … for instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it".

Can it be said that in the circumstances of this case, where the applicant has averred that it cannot operate and is facing insolvency and liquidation, in these current harsh economic times, a delay in the hearing of this matter E would not cause harm?

The court was urged to desist from usurping the powers of the administrative agency, and referred to the following cases: *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs & Tourism & Ors* 2004 (4) SA 490 (CC); [2004] ZACC 15, where the court affirmed that the court's task is to ensure that decisions taken by administrative agencies fall within the bounds of F reasonableness; and *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at 21E where the Supreme Court stated that

> "The duty of the courts is not to dismiss the authority and take over its functions, but to ensure … that it carries out its functions fairly and transparently."

The court should decide whether the threat of being forced into liquidation G constitutes a violation of some legitimate interest that the applicant has, that the obligation to discharge its tax liabilities to the respondent does not result in the applicant closing its doors. Surely, by the respondent's own test referred to in *Triple C Pigs supra,* if the applicant is not heard immediately, and is forced into liquidation, any relief given in future would be a *brutum fulmen,* and there will be no applicant company to speak of. The respondent sought H to rely on the judgment of my brother Mafusire in *Fairdrop Trading (Pvt)*

Chigumba J

Ltd v *ZRA* HH-68-14. With all due respect to counsel for the respondent, that A judgment was concerned with the vicissitudes of s 69 of the Income Tax Act.

While I accept that s 36 of the VAT Act is similarly worded to s 69 of the Income Tax Act, in my view the two tax regimes are based on different premises, different methods of calculation and an over-simplistic view of the similarities would set a dangerous precedent, as each case must be decided on its own peculiar circumstances. The applicant, Fairdrop Trading, did B not cooperate with the respondent or make payment proposals to discharge its liability to the respondent, that applicant denied being indebted to the respondent at all. That distinguishes the circumstance of that case from the case under consideration. I found this matter to be urgent, not because I disapprove of the conclusion of the respondent to garnishee the applicant's C account, or because I wish to usurp the authority of the respondent. I formed the view that the respondent did not carry out its functions in a fair or reasonable manner, in arriving at the decision to garnishee the applicant's account in the sum of twenty million dollars. I concluded that previous decided cases, of persuasive authority, have set precedents that allow a matter to be heard urgently, where the applicant's commercial interests are D at risk, in circumstances where failure to hear the applicant urgently would make it unnecessary for the applicant to be heard at all in future; rather it would be a futile exercise, because the harm that the applicant fears would have already caught up with the applicant.

Merits E

The cannons of statutory interpretation are well established. See *Moyo & Ors* v *Zvoma NO & Anor* 2010 (1) ZLR 178 (H); and *Shumba & Anor* v *ZEC & Anor* 2008 (2) ZLR 65 (S) at 80, where Chidyausiku CJ said:

"It is a generally accepted rule of interpretation that the use of peremptory words such as 'shall', as opposed to 'may' is indicative of the legislature's intention to make the provision peremptory. The use of the word 'may' as opposed to 'shall' is F construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. The difficulty arises where the legislature has made no specific indication as to whether failure arises where the legislature has made no specific indication as to whether failure to comply is fatal or not."

Francis Bennion *Statutory Interpretation* at p 21-22 writes as follows: G

"Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequences Parliament intended should follow from breach of the duty. This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing 'shall' be done. Too often they fail to consider the consequences when it is not done…" H

Chigumba J

A It has been suggested that breach of a mandatory duty which is set out in a statute invalidates the thing done. Section 36 of the Value Added Tax Act [*Chapter 23:12*] provides that:

"36 Payment of tax pending appeal

The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner B so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the Fiscal Appeal Court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate (but subject to section forty-six) and calculated from the date proved to the satisfaction of the C Commissioner to be the date on which such excess was received, and amounts short-paid being recoverable with penalty and interest calculated as provided in subsection (1) of section thirty-nine." (my emphasis)

My reading of s 36 is that the liability to pay remains extant until the appeal is finalised, or in the alternative, unless the Commissioner directs that the obligation falls away pending the finalizing of appeal. The applicant in D this matter has not argued that the effect of the noting of the appeal is to extinguish its obligation to pay. Section 33 of the VAT Act provides for the circumstances in which an aggrieved person can appeal to the Fiscal Court, against the exercise of discretion by the Commissioner. The right to appeal to the Commissioner against the exercise of discretion by the respondent's officers is provided for in terms of s 32 of the VAT Act. My reading of s 32 E is that, when the Commissioner notifies, in writing, a person who is liable to pay tax to the respondent, of any decision or assessment made against that person, then that person may lodge an objection to the Commissioner also in writing within a specified time period, specifying the grounds of the objection . Section 32(1) (a) (i), (ii), (iii), 32 (1) (b), and 32(1) (c) provide all the prescribed circumstances where the Commissioner must give a decision in writing, which decision must be objected to, F in writing.

These circumstances include:

(a) refusal to register that person in terms of the VAT Act

(b) cancellation of that person's registration in terms of the VAT Act or refusal to cancel registration.

G (c) refusal to make a refund.

(d) an assessment made in terms of ss 31,36 or 37

(e) any direction or supplementary action made by the Commissioner in terms of s 52(3) or 52(4).

The applicant has appealed to the Fiscal Court against an assessment made in H terms of s 31 of the VAT Act. It is clear that the applicant correctly appealed

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Chigumba J

to the Fiscal Court against the dismissal of its objection, in terms of A s 32 (1)(d). The respondent itself advised the applicant to appeal to the Fiscal Appeal Court if it was dissatisfied with the dismissal of its objection to the tax assessment. In terms of s 32(4) of the VAT Act the Commissioner, on receiving an objection is entitled to:

"(4) After having considered the objection, the Commissioner may – B

(a) alter any decision pursuant thereto; or

(b) alter or reduce any assessment pursuant thereto; or

(c) disallow the objection."

In this case the Commissioner exercised his discretion and disallowed the objection to the tax assessment, in terms of s 32(4)(c). So which exercise of discretion by the Commissioner is being challenged by the applicant in this C application? It appears as if the applicant is challenging the Commissioner's appointment of agents in terms of s 48 of the VAT Act, and the consequences that flowed from such appointment, the imposition of a garnishee order on the applicant's account. The Commissioner's power to appoint agents is found in s 48 of the VAT Act: D

"48 Power to appoint agent

(1)…

(2) The Commissioner *may*, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent of such other person for the purposes of this Act, and, *notwithstanding anything to the contrary contained in any other law, may be required to pay*E*any amount of tax,*additional tax, penalty, or interest due from any moneys in any current account, deposit account, fixed deposit account or savings account or any other moneys –

(a) including pensions, salary, wages or any other remuneration, which may be held by him …" (my emphasis).

My reading of s 48 of the VAT Act is that the Commissioner of Taxes has a F discretion to declare any person to be the respondent's agent, and that once such a declaration is made, the proposed agent has no choice but to pay any amount of money held on behalf of the applicant, to the respondent, as long as it is required for purposes of fulfilling tax obligations, and must even pay to the respondent money that will be held in an account for wages.

This obligation on the part of the appointed agent is not subject to any other G law except s 48. Section 48 overrides anything that is contrary to it which may be set out in any other law. In my view, s 48 of the VAT Act does not override the Constitution, and the discretion exercised by the Commissioner is reviewable because of the use of the word "may" which is not peremptory. I hold the firm view that the intention of the legislature was that s 48 protects H

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Chigumba J

A designated/appointed agents of the respondent from litigation in terms of other laws for the act of forwarding money in their client's accounts to the respondent. Its purpose is to absolve the designated agents from liability if their act of forwarding their client's money to the respondent results in loss or prejudice to their clients the account holders. I hold the respectful view that it could not have been the intention of the legislature to put the exercise B of discretion by the Commissioner beyond the reach of the law. However, I respectfully decline to accede to the relief sought by the applicant, to direct the respondent to revoke the appointment of FBC bank as its agent. There is no evidence before me that the discretion exercised by the Commissioner in making the appointment violated any of the tenets by which the exercise C of administrative justice ought to be guided.

I accept the argument proffered by counsel for the respondent that the act of designating an agent was lawfully done by the respondent as provided by the law, s 48. What I find difficulty with is whether that exercise of discretion which resulted in a garnishee order being placed over the applicant's account, is reviewable, for compliance with the tenets of administrative justice. Section 14 D of the Fiscal Appeal Court Act [*Chapter 23:*05] provides that:

"14 Suspension of tax on noting of appeal

Where any person has given notice of intention to appeal in accordance with section *eleven* or *thirteen* payment of so much of the tax which he has been called upon to pay as would not be payable by him if the appeal were allowed shall be suspended until the appeal has been decided, *unless the Commissioner*E*whose decision is the subject of the appeal otherwise directs."*

My interpretation of this Act is that the applicant in this case should not be required to pay the twenty million dollars that the respondent has garnisheed its accounts for. I hold the considered view that, the noting of the appeal suspended *actual payment* of only that portion of the twenty million dollars F that the applicant is disputing liability for. This interpretation is subject to the

rider: "… unless the Commissioner … otherwise directs". It is arguable that, by directing that a garnishee order in that sum be imposed, the Commissioner has directed that the full amount of the tax assessed be paid. In my view however, the Commissioner is required to expressly say this, and to reduce his direction to writing, and notify the applicant of his direction, in writing, G which was not done in this case. In the circumstances, I maintain that, only the approximately one million dollars that the applicant admitted to owing in its founding papers would, on the face of it, remain payable until the appeal to the Fiscal Court is finalized.

It should be emphasized that my reading of s 14 is that the obligation to pay H is not suspended, otherwise that would result in conflict with s 36 of the

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Chigumba J

VAT Act. The *obligation /liability* to pay is not suspended by the noting of A the appeal. The appeal will establish whether the taxpayer is indeed liable to pay the assessed sum. What is suspended is the *actual* payment of the assessed sum, in full. I am fortified in my view by certain *obiter dicta* in the case of *Metcash Trading Ltd* v *Commissioner for the SARS & Anor* 2002 (4) SA 317 (CC) para 33 *per* Kriegler J:

> "…common law judicial review as now buttressed by the right to administrative B action under s33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act … the Act nowhere excludes judicial review in the ordinary course … it leaves intact all other avenues of relief."

For the scope and origin of the common law judicial review, see *Johannesburg Consolidated Investment Co* v *Johannesburg Town Council* 1903 TS 111. C

Kriegler J in Metcash supra continued at para 71:

> "… that does not mean that a court is prohibited from hearing an application for interlocutory relief in the face of a pending VAT appeal, or from granting other appropriate relief. Nor does it mean that the jurisdiction is theoretically extant but actually illusory".

For this reason the court must examine whether the exercise of discretion by D the Commissioner of Taxes, in directing its designated agents to garnishee the applicant's accounts in the full sum of twenty million dollars, when s 14 of the Fiscal Appeals Court Act provides that payment of the disputed sum is suspended until the appeal is finalized by the Fiscal Appeals Court, is reasonable, or rational, or procedural. E

I propose to start by looking at what the highest law in this land has to say about the exercise of discretion by an administrative body. Section 68 of the Constitution of Zimbabwe 2013 (Right to Administrative Justice) provides that

> "Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

Section 3 of the Administrative Justice Act [*Chapter 10:28*] provides as F follows:

> **"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 expectations of any person shall – G
>
> (a) act lawfully, reasonably, and in a fair manner".

Section 2 (Interpretation and application) provides:

> "'administrative action' means any action taken or decision made by an administrative authority ...
>
> 'administrative authority' means any person who is – H

Chigumba J

> A (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal …"

The respondent by its own description in para 5 of its notice of opposition is an administrative authority. My reading of the interpretation section of the Administrative Justice Act is that any action taken by the respondent or any of its employees is administrative action, and that in exercising B discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. The applicant has not denied that the respondent's actions were lawful. It has not

sought to challenge the powers of the respondent to act in the manner that it did. My understanding of the applicant's contention is that the exercise of discretion by the respondent C was not reasonable, in the sense of violating the provisions of s 3(1)(a) of the Administrative Justice Act, and s 68 of the Constitution, in the sense that the exercise of discretion was not reasonable, or proportionate, or both substantively and procedurally fair to it.

The applicant contended that it has been rendered unable to operate, and D consequently unable to discharge its tax obligations to the respondent. The applicant contended that the respondent is shooting itself in the foot, which indicates that its decision is irrational. The argument is that the respondent ought to cooperate with the applicant so that if the applicant remains a going concern, it is likely to discharge its tax obligations in full, now and in the future. The applicant has contended that it stands to lose its workforce of E over 1000 workers. The applicant has contended that the prevailing economic conditions, where at least ten companies every month are being liquidated, make it irrational and unreasonable of the respondent to order a garnishee of twenty million dollars when it is clear that the effect of that directive will be to force the applicant into liquidation. The applicant's contention that its right to administrative action that is fair and reasonable has been violated F can be examined further.

Irrationality in relation to the exercise of discretion by an administrative body had been defined as a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the issue to be decided would have arrived at it. See *CCSU* v G*Minister for the Civil Service*[1984] 3 All ER 935 (HL) at 950-51, followed in Zimbabwe in *PF-ZAPU* v *Min of Justice (2)* 1985 (1) ZLR 305 (S). The "Wednesbury" principle was laid down by Lord Greene in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223 (CA) in the context of judicial review.. What has come to be known as H "Wednesbury unreasonableness" was described, by Lord Greene, as follows:

Chigumba J

> "When an executive discretion is entrusted by Parliament to a body such as the A local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of cases".

Counsel for the respondent sought to argue that the applicant has not exhausted its domestic remedies and therefore should not be heard by this court, it should instead appeal to the Commissioner, and thereafter to the Fiscal Appeals Court. With all due respect to counsel, that argument failed to find favor with B me, for the reason that s 32 of the VAT Act does not mention the directive to issue a garnishee order as one of the issues that an aggrieved taxpayer can object to. Section 32 mentions the refusal to register that person in terms of the VAT Act, cancellation of that person's registration in terms of the VAT Act or refusal to cancel registration, refusal to make a refund, an assessment C made in terms of ss 31, 36 or 37, any direction or supplementary action made by the Commissioner in terms of s 52(3) or 52(4). None of these areas cover the discretion to place a garnishee order over the taxpayer's account. It is my respectful view that s 48 does not oust this court's inherent power of judicial review of an administrative body to scrutinize the exercise of discretion by that body at any time and to ensure, on the limited grounds provided in s 68 D of the Constitution and s 3 of the Administrative Justice Act, that there has not been any element of "Wednesbury unreasonableness".

It is this court's considered view that the imposition of a garnishee order on the applicant's accounts was an exercise of discretion on behalf of the respondent, and that, in view of the provisions of s 14 of the Fiscal Appeal E Act, the figure of twenty million was not proportionate, or reasonable, and was outrageous in its defiance of logic, in the Wednesbury sense. The Fiscal Appeals Act, in s 14 clearly stipulates that the applicant is liable to pay the admitted amount, which in this case is about a million dollars. Its *liability to pay the disputed amount of nineteen million dollars was not automatically suspended by the noting of the appeal in terms of s 14. What was suspended*F*was the requirement to make actual payment of the disputed nineteen million dollars*(my emphasis). To direct that the applicant's account be garnisheed for the full twenty million dollars was grossly unreasonable. To infer that the applicant ought to beg the Commissioner to revise or reconsider an exercise of discretion which was made in violation of its right to fair, reasonable and G proportionate administrative justice, is, in my view, also grossly unreasonable. This court is not agitating for the watering down of any powers that the respondent has in respect of various tax instruments to appoint designated agents, and to direct that taxpayers' accounts be garnisheed. This

court is merely reminding the respondent, that as an administrative body, its power and discretion must always be exercised reasonably and fairly, at all stages H

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Chigumba J

A at all times, particularly because, by the very nature of tax collection, some of the action that the respondent is authorized to take may be considered necessarily draconian.

The respondent submitted that its actions were not unlawful and relied on *Rudolph & Anor* v *CIR & Ors NNO* 1994 (3) SA 771 (W) and *Stauffer*B*Chemicals* v *Monsanto Co* 1988 (1) SA 805 (T) at 809F-G, in which the court made a finding that the applicants had failed to establish a *prima facie* right because the respondents had acted lawfully in terms of the powers granted to them by an existing Act of Parliament, and that they had properly exercised those rights.

This case begs the question of what happens where these lawful powers are C not exercised properly. It is not only unlawful exercise of power which may establish a *prima facie* right for purposes of qualifying for an interim interdict. Failure to take relevant principles into consideration may result in the improper exercise of rights which are lawfully conferred on an administrative body. In my view, the applicant has a *prima facie* right conferred on it by s 68 of D the Constitution, by s 3 of the Administrative Justice Act, by the principle of Wednesbury unreasonableness, to administrative justice. This means that it has the right to administrative conduct that is reasonable, proportionate and both substantively and procedurally fair.

Imposing a garnishee order of twenty million on the applicant's account was not procedurally fair because s14 of the Fiscal Appeals Act stipulates E that the disputed amount of the tax assessment be suspended pending the determination of the appeal. It was not substantively fair because there is no provision in s 32 of the VAT Act for objection to the Commissioner against the imposition of a garnishee order.

I find that the applicant's fear that it will be forced into liquidation if the F garnishee order remains in place in its current form constitutes irreparable harm to it. By the time damages are ordered to be paid, there will likely be no applicant to receive the damages, because the applicant is not likely to remain in business, at this time when our economy is in freefall, under these circumstances. The balance of convenience favours granting an interim order that the directive to garnishee twenty million dollars on the applicant's account G be suspended. In my view there is no alternative remedy that is effective. In the result the following interim order is granted by the court.

IT IS HEREBY ORDERED THAT:

1. The respondent uplifts and suspends the garnishee order placed on the applicant's accounts with FBC bank, immediately and forthwith, until H the appeal that is pending before the Fiscal Appeals Court is finalised.

2014 (1) ZLR p834

Chigumba J

2. The respondent shall allow a period of seven working days to elapse A after the upliftment and suspension of the original garnishee order, whereafter it shall replace it with a fresh garnishee order for the sum of US$905 801.32, which shall remain in place until the appeal is finalized or payment is made in full, whichever comes first.
3. The respondent shall not unlawfully interfere with the applicant's B business operations and its day to day activities, including the placing of its officers or agents at the applicant's business premises.

Venturas & Samukange, applicant's legal practitioners

Kantor & Immerman, respondents' legal practitioners

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S v BOWA 2014 (1) ZLR 835 (S)

Citation	2014 (1) ZLR 835 (S)
Case No	Judgment No. HH-47-14
Court	Supreme Court, Bulawayo & Harare
Judge	Ziyambi JA, Garwe JA & Hlatshwayo JA
Heard	5 May 2014 (in Bulawayo); *CAV*
Judgment	27 June 2014 (delivered in Harare)
Counsel	*B Majuru,* for the appellant *T Makoni,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C *Criminal law – defences – indemnity for acts committed in good faith for the purpose of or in connection with the suppression of poaching activities – what must be shown for indemnity to attach*

Statutes – Protection of Wild Life (Indemnity) Act [Chapter 20.15] – s 3 D *– indemnity for acts committed in good faith for the purpose of or in connection with the suppression of poaching activities – what must be shown for indemnity to attach to accused*

Words and phrases – "good faith" – "for the purposes of" – "in connection with" – Protection of Wild Life (Indemnity) Act [Chapter 20.15] – s 3

Headnote

E The appellant was employed as a game ranger by the Department of National Parks and Wildlife. Sometime in February 2012 a senior prisons officer was arrested at a road block whilst carrying ivory. On his arrest he implicated two named persons as the source of the ivory. Thereafter further information was received by the Department to the effect that F these persons worked with the deceased in the illegal hunting syndicate**.**

About four months later, a group of ten parks rangers, accompanied by two police officers, embarked on an operation to arrest the suspected poachers. Nine of the game rangers were armed with rifles. On arrival at the homestead of one of the suspects, at about 1.00am, the rangers G discovered that he was not present. On further questioning the employees present, the rangers formed the impression that the suspect was putting up at his father's place of residence, so went there with the employees. On arrival they split into two groups in order to secure two paths that exited from the homestead. The appellant was in the group that first approached the homestead. Two persons ran out of the hut – one after the H other – and disappeared into the darkness. The deceased also came out

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of the same hut after which the appellant then fired his firearm, hitting A him in the chest and killing him instantly. The gunfire awakened other occupants of the homestead including the mother of the deceased, who, on discovering that the deceased had died, challenged the rangers not to go away and grappled for possession of the firearm with the appellant. The rangers,

together with the two police officers and the suspect's employees, B managed to flee from the homestead. They eventually proceeded to a police base where the appellant was arrested the following morning and his weapon confiscated.

The appellant was subsequently charged with murder. The court *a quo* rejected the appellant's claim that he was protected by the provisions of s 3 of the Protection of Wild Life (Indemnity) Act [*Chapter 20.15*], holding C that a person in the position of the appellant would be indemnified where "for instance (*sic*) he comes across poachers who resist arrest and threaten to harm him or threaten to kill him." In view of its finding that the deceased was not armed and was not resisting arrest but was simply running out of the house to avoid further assaults by the other rangers inside, the court found that the appellant was not entitled to D such indemnity. On the appellant's claim of self-defence, the trial court held that the appellant was not defending himself as the deceased was not armed and was running away to avoid further assaults. The court accordingly rejected that defence as well and consequently found the appellant guilty of murder with actual intent, and, upon finding no E extenuating circumstances, imposed the death sentence on the appellant.

Held, that it was clear from the evidence that the rangers believed they were going after suspects who were armed, which was why a total of ten rangers, nine of whom were armed with rifles, were involved in this operation. The appellant was a senior ranger, having been employed F as a ranger for 35 years. If indeed the deceased was not armed, why would the appellant have fired at him in the manner he did? Two of the deceased's younger brothers ran out of the house, but were not shot. Had it been a case of the appellant being trigger happy, he would, in all probability, have fired at the two young men as well. He did not do so. The probabilities were that the deceased must have conducted himself G in a manner that made the appellant believe that he was in danger. There could be no other explanation for the events that unfolded. The trial court should, at the very least, have concluded that there was some doubt as to what happened exactly, and, in keeping with the principle applicable in these circumstances, resolved the doubt in favour of the appellant. H

A*Held*, further, on the question of indemnity, that it must have been the intention of the legislature to provide indemnity to armed personnel in the employ of the State who are involved in anti-poaching activities in respect of conduct which might otherwise attract criminal sanction, if such conduct is done in good faith for the purpose of or in connection with the suppression of poaching activities. The Act recognizes the B fact that such personnel may find themselves in situations in which decisions have to be made in a split second in order to subdue, arrest or contain dangerous persons involved in poaching activities. As long as the conduct is *bona fide* and intended to suppress poaching of wild life, such personnel would be indemnified.

C*Held*, further, that a person claiming indemnity must satisfy two important requirements: (a) such person must have been acting in good faith; and (b) the act done by him must have been for the purposes of or in connection with the suppression of the unlawful hunting of wild life. These two requirements must be present and read in conjunction with each other. If either is lacking such indemnity would not attach to such D person. "Good faith" is the subjective state of mind that a certain set of facts genuinely exists, on the basis of which it becomes necessary to act in a manner most right thinking people would consider appropriate given those facts. A disproportionate reaction, given a particular set of facts, may well justify an inference that such reaction was not actuated E by good faith. The words "for the purposes of or in connection with the suppression of the unlawful hunting of wild life" must be given a wide interpretation and would include anything linked to, related to or connected with attempts to suppress the unlawful hunting of wild life. The words "for the purpose of" have been interpreted to refer to the F main or dominant purpose. The words "in connection with" are wider and can quite properly cover the whole spectrum of relationships from a close and direct relationship, at the one end of the scale, to a remote and indirect relationship, at the other end. The term is an elastic one and the context and purpose of the statutory provision must be considered in order to assess the degree of elasticity appropriate to the case. It should G not to be presumed that, when the legislature was trying to be fair to an accused, as it manifestly was in the case of this section, it intended a narrow construction to be put upon these words which could, and probably would, result in unfairness to an accused. In the present matter the killing of the deceased, though unfortunate, was the result of a *bona fide* H attempt to apprehend persons who were believed to be armed and

Garwe JA

involved in poaching activities. The trial court should have found that such A indemnity attached to the appellant and entered a verdict of not guilty.

Held, further, that even on the basis of the facts it found proved, the trial court was clearly in error in finding that no extenuating circumstances existed. The circumstances surrounding the death of the deceased provided mute evidence of extenuation. Against the background that existed, the incident occurred on the spur of the moment during the execution of official duty, B in poor visibility and in circumstances in which the appellant may have genuinely believed that harm was likely to befall him.

Cases referred to

Mogridge v *Clapp* [1892] 3 Ch 382 (CA) C

S *v Chindunga* S-21-02

S v *Manyika* 2002 (2) ZLR 103 (H)

S v *Mpetha & Ors (1)* 1982 (2) SA 253 (C)

S v *Mubaiwa* S-33-98

Stobart v *Codd NO* 1965 RLR 67 (G); 1965 (2) SA 253 (R) D

Legislation considered

Protection of Wild Life (Indemnity) Act [*Chapter 20.15*]

Case information

M Majuru, for the appellant

T Makoni, for the respondent E

Judgment

Garwe JA: This is an appeal against conviction on a charge of murder and the sentence of death imposed by the High Court at Gweru on 17 September 2013.

The facts of this case which are either common or were not seriously in dispute during the trial proceedings are as follows. The appellant was F employed as a senior game ranger by the Department of National Parks and Wildlife. Sometime in February 2012 an Assistant Commissioner with the Zimbabwe Prison Services was arrested at a road block whilst carrying ivory. On his arrest he implicated one Tanaka Nyoni and Moses Makwavarara as the source of the ivory. Thereafter further information was received by the Department to the effect that one Makwavarara operated as the gunner, G Lennon Nkosana as the carrier and Tanaka Nyoni as the sponsor of the illegal hunting syndicate**.** Lennon Nkosana is the deceased.

On the day in question, that is, 12 June 2012, a group of ten parks rangers accompanied by two police officers proceeded to Simuchembo area of Gokwe North in an operation to arrest the suspected poachers. Nine of the H

Garwe JA

A game rangers were armed with rifles. Simuchembo area is within walking distance of a number of national parks areas. It is common cause that on arrival at Tanaka Nyoni's homestead at about 1.00am, the rangers discovered that Tanaka Nyoni was not present. On further questioning the employees present, namely, Africa Dakura, Tichaona Makoni and Tichaona Ndlovu, the game rangers formed the impression that Tanaka Nyoni was putting up at B his father's place of residence. With the employees, the rangers proceeded to Tanaka Nyoni's father's homestead. On arrival they split into two groups in order to secure two paths that exited from the homestead. It is common cause the appellant was in the group that first approached the homestead. It was at that stage that Dakura's wife indicated a house in which Tanaka Nyoni was believed to have been

sleeping. Tanaka Nyoni's vehicle was also parked at C the homestead. What happened immediately outside the house was in dispute but it is clear that two persons ran out of the hut – one after the other - and disappeared into the darkness. It is also common cause that the deceased, Lennon Nkosana, also came out of the same hut after which the appellant then fired his firearm hitting him in the chest and killing him instantly. The D gunfire awakened other occupants of the homestead including the mother of the deceased who, on discovering that the deceased had died, challenged the rangers not to go away and grappled for possession of the firearm with the appellant. The rangers together with the two police officers and Tanaka's employees managed to flee from the homestead. They eventually proceeded to Chitekete Police Base where the appellant was arrested the following E morning and his weapon confiscated.

As indicated earlier the above facts were largely common cause or at least not seriously in dispute during the trial. However, the circumstances surrounding the actual shooting of the deceased were the subject of much controversy. The appellant claimed that he believed he was under attack but such claim F was rejected in its entirety by the trial court. In order to determine whether the court *a quo* correctly assessed the evidence before it, it become necessary for this court to analyse relevant portions of the evidence led before the court.

Four witnesses gave evidence for the State. These were Lesbern Nkosana, Africa Dakura, Teddy Nhidza and Aaron Chiramba. For the defence, the appellant, Archbat Zhou and Jonathan Mashava gave evidence. The summary G of their evidence follows;

Lesbern Nkosana was the deceased's brother and was sharing a bed with the deceased. He was 20 years old at the time. In an inner room were their younger brothers Liverton, Luxon and McDonald. Armed game rangers forcibly opened the door and ordered everyone to lie on the floor. He and H the deceased were then assaulted as the rangers asked where Tanaka was.

2014 (1) ZLR p840

Garwe JA

As the rangers illuminated the inner room in which their younger brothers A were sleeping, Luxon and McDonald, aged 16 and 17 respectively, came out of the inner room and walked out. The deceased immediately followed them and shortly thereafter there was the sound of a gunfire. When he went out, he found the deceased lying on the ground about three metres from the door bleeding from the chest. He appeared to have two chest wounds. He denied that the deceased was holding an axe at the time he exited B from the house. He told the court that although the moon had risen, visibility was not good. He admitted that his mother followed the rangers and grabbed them, telling them they were not going anywhere after killing her son. He denied that Tanaka was present at the homestead, or that he was one of the two that ran out of the house. C

Africa Dakura was employed by Tanaka Nyoni and was staying at Tanaka Nyoni's homestead together with his wife. He shared the residence with Tichaona Makoni and Tichaona Ndlovu aged twenty two and fifteen years respectively. It was his evidence that whilst asleep game rangers came into the house where he was sleeping with his wife and child. They assaulted him with sticks and booted feet asking where Tanaka Nyoni was. When they told D the rangers that Tanaka was not present, he, together with his wife and the two young men, were ordered to accompany them. He told the court that on the way the rangers would assault him, asking him where the elephant tasks were as well the firearm that was being used to hunt elephant. He admitted that they found Tanaka's vehicle parked at his father's homestead that night, E having been brought there by Lesbern, his younger brother and that it was the same vehicle that was used the following morning to ferry the deceased's body to the police station.

Teddy Nhidza was one of the two police officers who accompanied the rangers. He was made to understand that the rangers wanted to arrest one Tanaka Nyoni who was suspected of dealing in ivory and possessing a firearm. F He denied that Africa Dakura was assaulted. It was his evidence that when they proceeded to Tanaka Nyoni's father's residence they had been told by Dakura and the two young men, both known by the name Tichaona, that he was there. He denied seeing any axe or other weapon at the scene where the deceased was shot. He admitted that there was a National Park located about G three to four kilometres from Tanaka Nyoni's homestead and that the police station was receiving many reports of the killing of elephant. During the questioning of the employees, information was given by one of the two young men to the effect that the firearm belonging to Tanaka had been collected by a person called Ndombolo. He denied hearing any warning shots before the deceased was shot. It was also his evidence that the vehicle that Tanaka H

Garwe JA

A Nyoni normally used was parked in front of his father's homestead where the incident occurred. All in all he recovered a total of six spent cartridges.

The State also called Aaron Chiramba who was the member-in-charge of Chitekete Police Base. It was he who arrested the appellant the following morning and recovered what he called a commando rifle. The trigger of the B rifle could be positioned on safe, rapid and automatic. On rapid it would only fire one bullet at a time whilst on automatic it would release many bullets at the same time. He confirmed that there were a number of national parks close to the Police Base.

At the instance of the court Edwick Nkosana, the mother of the deceased was called. She explained that although her family used the name Nkosana and Nyoni interchangeably, Nkosana was the surname C and Nyoni the totem.

In his defence, the appellant told the court that their department had received information that Tanaka Nyoni was engaged in poaching together with his younger siblings. On the fateful night it was Africa Dakura who indicated that Tanaka Nyoni was not present at his homestead and that he had proceeded D to his father's homestead. It was Dakura and his wife Agnes and the two young men both by the name Tichaona who led them to Tanaka's father's homestead. He confirmed that the group of rangers split into two groups as they approached the homestead. It was his group that approached the house that had been indicated by Agnes and when he knocked and indicated that he and his colleagues were from National Parks, the door was not immediately E opened. It was only opened when he knocked for the second time at which stage one man opened the door, came out and ran away. He was followed by another, who appeared to be holding a gun. He then fired warning shots and it was then that the deceased came out holding an axe and walked in his direction. Although he told the deceased to throw down the axe the deceased continued walking at a fast pace in his direction at which stage he fired toward F the hand holding the axe. In the process however the deceased was hit in the chest and he fell. He was thereafter accosted by the deceased's mother and realising that a grave situation had arisen, he and the other rangers then left the homestead running. He denied that on arrival at the homestead, they forcibly opened the door and went in. This would not have been wise because G they were aware that Tanaka Nyoni whom they were looking for was armed. He confirmed that his firearm was on automatic. He denied that he intended to kill the deceased. Although he did not personally know Tanaka Nyoni, he was aware that Tanaka operated in a ring which included his siblings and one Moses Makwavarara. It was his H evidence that the other rangers in his company must have seen the axe that the deceased dropped. It was also his evidence that the two men who ran out of the house before the deceased did

Garwe JA

so had taken a different direction whilst the deceased, on coming out of the A house had advanced towards him.

Jonathan Mashava told the court he is in the investigations and security section of the Parks and Wild Life Management Authority at Gokwe. He was part of the group that went to apprehend persons suspected to have been involved in the poaching of elephants at Chirisa Game Park four days earlier. The B appellant was his senior during the operation. Amongst the poachers to be apprehended was one Tanaka Nyoni who was known in poaching circles as "TK". They also intended to apprehend one Ndombolo, the deceased, Moses Makwavarara and Jimmy Sibanda. It was Africa Dakura who advised them that since the arrest of the Prison Service Assistant Commissioner in February 2012, Tanaka Nyoni was no longer putting up at his homestead but rather C at his father's homestead. It was for that reason they proceeded to Tanaka Nyoni's fathers' homestead where Dakura's wife indicated the house in which Tanaka Nyoni was supposed to be sleeping. He did not get the opportunity to see the deceased's body after the shooting. It was his evidence that Chirisa Safari area was about ten kilometres due south of Tanaka Nyoni's residence, whilst Chizarira National Park was about three kilometres due west of the D homestead. It was also his evidence that poaching is a violent offence and very often involves the use of firearms. For that reason they are equipped with AK47 assault and other rifles to defend themselves. It was upon interviewing Assistant Commissioner Mudzamiri of the Prison Service who had been found in possession of ivory that he learnt that Moses Makwavarara acted E as the gunner, the deceased as the carrier and Tanaka Nyoni as the sponsor. This information was treated as classified and was not available

generally to the other rangers. However, the names of the suspects were discussed at the Police Base that night before the rangers left for Simuchembo area. He told the court he personally knew both Tanaka Nyoni and the deceased Lennon Nkosana, who was tall and wore dreadlocks. F

Archbat Zhou was, like the appellant, a senior ranger with the Department of National Parks and Wild Life. He had been a ranger for 24 years. He was involved in the operation that resulted in the death of the deceased. He knew both Tanaka Nyoni and the deceased as persons who were suspected of engaging in poaching elephant. On the night in question he saw two young G boys come out of a house at Tanaka Nyoni's father's homestead. The house had been indicated to them by Agnes, Dakura's wife. He was standing near the entrance at the time the appellant knocked. When the door was opened, he noticed there were two men sleeping in the outer room and three in the inner room. He walked back in order to alert the other group of rangers, leaving the appellant and Mabushe standing near the entrance. It was then H

Garwe JA

A he heard gunshot – at least seven rounds – and he went back. He found the deceased lying down and close to his feet was an axe. He went back to the other rangers who were on the perimeter of the homestead and told them that a man had been shot. When they went back into the homestead a number of people came out of the adjacent houses and, fearing for their lives, they hurriedly left the homestead.

B In its judgment, the court *a quo* rejected the appellant's claim that he was protected by the provisions of s 3 of the Protection of Wild Life (Indemnity) Act [*Chapter 20:15*]. The court was of the view that a person in the position of the appellant would be indemnified where "for instance (*sic*) he comes across poachers who resist arrest and threaten to harm him or threaten to C kill him." In view of its finding that the deceased was not armed and was not resisting arrest but was simply running out of the house to avoid further assaults by the other rangers inside, the court found that the appellant was not entitled to such indemnity. On the appellant's claim of self-defence, the court was of the view that the appellant was not defending himself as the deceased was not armed and was running away to avoid further assaults. The D court accordingly rejected that defence as well and consequently found the appellant guilty of murder with actual intent, and, upon finding no extenuating circumstances, imposed the ultimate sentence of death on the appellant.

In this appeal, the appellant has attacked both the conviction for murder with actual intent and the finding that there were no extenuating circumstances. In E particular the appellant has submitted that the court *a quo* misdirected itself in relying on the evidence of Lesbern Nkosana and Africa Dakura and in failing to appreciate that Lesbern Dakura was the deceased's brother as well as the brother of Tanaka Nyoni and therefore not an independent witness. The appellant has further attacked the evidence of the two witnesses on the basis that they were also suspected of complicity in the poaching of elephant and F should therefore have been treated as accomplices. Further the appellant has submitted that both the defence of self defence and the defence of indemnity under the Protection of Wild Life (Indemnity Act) should have succeeded.

On a careful consideration of the evidence given during the trial, it is clear that the appellant and his colleagues were of the opinion that Tanaka Nyoni, G together with some of his brothers and other persons, were involved in the poaching of elephant from the nearby national parks. It is also clear from the evidence that approximately four days before this operation elephant had been killed in a national park and it was believed that it was Tanaka Nyoni and his accomplices who were involved in the killing. The appellant and the other rangers were also aware that Tanaka Nyoni was in possession of a H firearm. It was for that reason that a decision was taken to proceed to Tanaka

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Garwe JA

Nyoni's homestead in the dead of night in order to arrest him and possibly A secure the firearm and the ivory. The evidence of Africa Dakura is clear that when the rangers came, not only were they demanding to know whether Tanaka Nyoni was present at the homestead, but also the whereabouts of the firearm and ivory. It is apparent from all this that the rangers believed they were going after suspects who were armed. It was for that reason that a total of ten rangers, nine of whom were armed with rifles, were involved B in this operation.

It was common cause that two persons ran out of the house in which Tanaka Nyoni was believed to be sleeping. When the deceased ran out and was shot, the only persons outside the house were the appellant and other game rangers. Lesbern Nkosana, whose evidence was believed by the court, was still inside C the house. He did not witness the shooting although it appears he went outside immediately after the sound of gunfire to ascertain what was taking place. The evidence also established that although there was moonlight visibility was poor outside the house. It was never clearly established how, given such poor visibility and the commotion that ensued he would have concluded that he had not been in possession of an axe just before the shooting. D

Given the overall circumstances of this case, it seems to me that there may be substance in the submission by the appellant that the court *a quo* misdirected itself in believing the evidence of Lesbern Nkosana without properly analysing it and considering the probabilities. I would agree that in all the circumstances, the evidence of Lesbern was not only suspect but E also did not accord with the probabilities.

The appellant is a senior ranger in the Parks and Wild Life Department and had been employed as a ranger for 35 years. If indeed the deceased was not armed, why would the appellant have fired at him in the manner he did? It is common cause two of his younger brothers ran out of the house, but F were not shot. The appellant would have been a few metres from the door when the two ran out and disappeared into the darkness. Had it been a case of the appellant being trigger happy, he would, in all probability, have fired at the two young men as well. He did not do so. The probabilities are such that the deceased must have conducted himself in a manner that made the appellant believe that he was in danger. In my view, there can be no other G explanation for the events that unfolded. Indeed, Archbat Zhou told the court *a quo* that he saw an axe lying close to the deceased's feet. Whilst accepting that Archbat Zhou is the appellant's workmate, that the appellant was his senior at the workplace and that he may have reason to lie and protect the appellant, his version was not shown to be untrue. H

2014 (1) ZLR p845

Garwe JA

A In coming to the conclusion that the deceased was not armed with an axe and that the appellant was never under any threat the court *a quo* in my view misdirected itself. There was no credible evidence to the contrary and the probabilities indicated the possibility that the deceased must have conducted himself in a manner that must have convinced the appellant that his own life was in danger. On the evidence led before it, the court could not have been B satisfied beyond a reasonable doubt that the claim by the appellant was entirely false and stood to be rejected out of hand. At the very least, the court should have concluded that there was some doubt as to what happened exactly, and, in keeping with the principle applicable in these circumstances, resolved the doubt in favour of the appellant. In this regard I agree wholeheartedly with C remarks of Sandura JA in S *v Chindunga* S-21-02 that:

> "... In my view, the appellant gave a reasonable explanation of what he did during the night in question. That explanation cannot be rejected out of hand.
>
> As I said in *S* v *Kuiper* 2000(1) ZLR 113 (S) at 118B-D:
>
> > 'The test to be applied before the court rejects the explanation given by an accused person was set out by Greenberg J in *R* v *Difford* 1937 AD 370. D At 373, the learned judge said:
> >
> > > ".. no *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal ..."'
>
> E Similarly, in *R* v *M* 1946 AD 1023, Davis AJA said the following at 1027:
>
> > 'And, I repeat, the court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true ...'"

In this regard attention is also drawn to *S* v *Manyika* 2002 (2) ZLR 103 (H) at 105A-G; *S* v *Mubaiwa* S-33-98 at p 3.

F I am satisfied that the court *a quo* misdirected itself in completely rejecting the claim by the appellant that the deceased came out holding an axe and that although he warned the deceased to

drop the weapon, the deceased continued running towards him, as a result of which he then fired at him. There was a real possibility that the claim may have been true.

G In the light of the above finding the issue that now arises is whether the provisions of the Protection of Wild Life (Indemnity) Act ("the Act") apply to the appellant. The Act in s 3 provides:

> "**3. Indemnity**
>
> No criminal liability shall attach to any person who, at the relevant time, was H an indemnified person, in respect of any act or thing whatsoever advised,

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2014 (1) ZLR p846

Garwe JA

> commanded, directed or done or omitted to be done by him, whether before, A on or after the date of commencement of this Act, in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life."

The pertinent question therefore whether the killing of the deceased was done "in good faith for the purposes of or in connection with the suppression of the unlawful hunting of wild life."

In coming up with the above provision, it must have been the intention of B the legislature to provide indemnity to armed personnel in the employ of the State who are involved in anti-poaching activities in respect of conduct which might otherwise attract criminal sanction if such conduct is done in good faith for the purpose of or in connection with the suppression of poaching activities. In my view, the Act recognizes the fact that such personnel may C find themselves in situations in which decisions have to be made in a split second in order to subdue, arrest or contain dangerous persons involved in poaching activities. As long as the conduct is *bona fide* and intended to suppress poaching of wild life such personnel would be indemnified.

It is clear from the above provision that a person claiming indemnity must satisfy two important requirements. The first is that such person must have D been acting in good faith. The second is that the act done by him must have been for purposes of or in connection with the suppression of the unlawful hunting of wild life. These two requirements must be read in conjunction with each other. If good faith is lacking or if the act is not for the purposes of or connected with the suppression of the unlawful hunting of wild life E then such indemnity would not attach to such person. But what do these two requirements entail?

Dealing firstly with the question of good faith, I can do no better than repeat the remarks of Kekewich J in *Mogridge* v *Clapp* [1892] 3 Ch 382 (CA). At p 391 the learned judge stated:

> "… Now, what does 'good faith' mean? What is meant by those two English F words which are the exact equivalent in every sense of the expression which is perhaps more commonly used, though not more correctly or properly, *bona fides*? I think that the best way of defining the expression, so far as it is necessary or safe to define it, is by saying that it is the absence of bad faith – of *mala fides* …"

In short, good faith is the subjective state of mind that a certain set of facts genuinely exists on the basis of which it becomes necessary to act in a manner G most right thinking people would consider appropriate given those facts. A disproportionate reaction given a particular set of facts may well justify an inference that such reaction was not actuated by good faith.

On the other hand, the words "for the purposes of or in connection with the suppression of the unlawful hunting of wild life" must be given a wide H

2014 (1) ZLR p847

Garwe JA

A interpretation and would include anything linked to, related to or connected with attempts to suppress the unlawful hunting of wild life. The words "for the purpose of" have been interpreted to refer to the main or dominant purpose – *Stobart* v *Codd NO* 1965 RLR 67 (G); 1965 (2) SA 253 (R) at 258 A. The words "in connection with" are wider. As stated by Williamson J in *S* v *Mpetha & Ors (1)* 1982 (2) SA 253 (C), the words are not of precise B connotation. At 257C-D, he remarked:

> "They indicate a relationship between two things, but the degree of relationship or connection is undefined and indefinite. These words can quite properly cover the whole spectrum of relationships from a close and direct relationship, at the one end of the scale, to a remote and indirect relationship, at the other end. The term is an elastic one and the context and purpose of the statutory provision must C be considered in order to assess the degree of elasticity appropriate to the case."

In suggesting a wide interpretation the learned judge further remarked at 257H:

> "It is surely not to be presumed that, when the legislature was trying to be fair to an accused, as in my opinion it manifestly was in the case of this section, it intended a narrow construction to be put upon these words which could, and D probably would, result in unfairness to an accused."

In the present matter the killing of the deceased, though unfortunate, was the result of a *bona fide* attempt to apprehend persons who were believed to be armed and involved in poaching activities. In my view, the court *a quo* should have found that such indemnity attached to the appellant and consequently a verdict of not guilty entered.

E In view of the conclusion I have reached above, it becomes unnecessary to consider whether the appellant successfully demonstrated that he was also acting in self defence. However, comment is called for on one further aspect of this case. Even on the basis of the facts it found proved, the court *a quo* was clearly in error in finding that no extenuating circumstances existed. The F circumstances surrounding the death of the deceased, in my view, provided mute evidence of extenuation. Against the background already given in this judgment, the incident occurred on the spur of the moment during the execution of official duty, in poor visibility and in circumstances in which the appellant may have genuinely believed that harm was likely to befall him.

G In the circumstances, the appeal is allowed and the conviction and sentence are set aside.

ZIYAMBI JA and HLATSHWAYO JA concurred.

Chinongwenya & Zhangazhe, appellant's legal practitioners

H*National Prosecuting Authority*, respondent's legal practitioners

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