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DAMSON v USHAMBA 2014 (2) ZLR 1 (H)

Citation 2014 (2) ZLR 1 (H)

Case No Judgment No. HH-335-14

Court	High Court, Harare
Judge	Tsanga J
Heard	13 June 2014; *CAV*
Judgment	1 July 2014
Counsel	Applicant in person Respondent in person
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – rights of* C *children (s 81) – application of section in determining best interests of children*

Court – *jurisdiction – concurrent – two courts having jurisdiction over same* D *subject matter – lower court seized with matter – higher court not entitled to deal with matter save by way of appeal or review*

Family law – *child – best interests of – determination of – guidance to be obtained from rights of child set out in Constitution – right of support from parents – both parents must play role according to ability*

Headnote

The applicant sought, on an urgent basis, an upward variation of a maintenance E order that had been granted by a magistrates court. The application was occasioned by a need to pay school fees for the child of the former marriage. The maintenance order, having been varied upwards by the magistrates court in a default judgment, had been reduced to what it F originally stated when the default judgment was rescinded. The applicant had filed an application for variation at the magistrates court when the present proceedings were brought.

Held, that where there is an existing order by a competent court of jurisdiction, another court cannot make an order competing with or overriding it G even if the court making the original order is inferior to the High Court. The issue is not that the magistrates court is an inferior court, but that the courts have to adopt a sensible and practical approach to the matter and avoid dealing with orders that are properly before another court of competent jurisdiction, save as is provided for under the procedure of review or appeal. The applicant's quest to bring an urgent application H which would, in effect, vary the maintenance upwards, would in essence

amount to interfering with an existing order of a court of competent A jurisdiction. To try and reverse maintenance proceedings, which are already under review, by way of an urgent chamber application in the High Court, however temporarily or provisionally, would be tantamount to misapplication of inherent powers to simply muscle out decisions of the lower courts.

Held, further, that maintenance and its variation are by way of enquiry and B cannot be dealt with through an urgent chamber application. While cognisant of the High Court's role as upper guardian of all minor children and whilst alive to the principle of the best interests of the child as one of the vital tenets of our Constitution, these are not principles to be applied in a knee-jerk manner. They certainly cannot be read to mean C that every order asked for in the name of urgency and the "best interests" of the child should be granted. They equally do not mean that a party can unilaterally create urgency through incurring expenses on behalf of the child that the parent herself cannot afford and expect the courts to endorse her actions thereafter in the face of an existing maintenance order.

Held, further that under s 81(1) of the Constitution, every child has the right to D family and parental care. With a comprehensive articulation of children's rights in the Constitution, when

courts are called upon to make decisions which call into play an interpretation of "best interests", guidance must of necessity come from the constitutional formulation of children's fundamental rights so as to avoid a purely subjective assessment of what E comprises those "best interests" of the child. In other words, it is not what a parent has put forth that should guide the courts in making a legal decision, but what our Constitution provides. It is the rights contained in s 81(a) to (h) that must of necessity inform our understanding of the "best interests" principle if we are to avoid a situation where the meaning essentially stems from each according to one's own understanding. In F summary, these include the right to be heard; to a name and family name; to family and parental care or appropriate care outside a home environment; to protection from economic and social exploitation; and to education, health and care services nutrition and shelter. They further include the right not to be recruited into a militia; not to be forced to take part in any political activity and the right not be detained save as G a measure of last resort. While these rights canvass a broad range of children's experiences, in addition, children as full citizens, equally benefit from the provisions of the Constitution as a whole.

Held , further, that both parents, constitutionally, have the obligation to provide parental care and the responsibility to take care of their children H

Tsanga J

in terms of education, health care and shelter. While the State also has A specific obligations regarding these rights that centre on the duty to respect, protect and fulfil, the fundamental focus of the facts here bring to the fore the obligation of parents specifically with regard to the rights accorded children. With parents in mind, there is no suggestion, either constitutionally or in terms of s 4(d) of the Maintenance Act [*Chapter 5:09*], B that only the father is to contribute to the financial upkeep of a child. In fact the opposite is true. Both parents are called upon to play their role. Support which the mother herself can provide is a matter to be taken into account in determining whether the child is without adequate means of support.

Cases cited C

Karimatsenga v *Tsvangirai & Ors* 2012 (2) ZLR 195 (H)

Kunz v *Pretorius* 1982 (2) ZLR 24 (H*)*

Nyaguwa v *Gwinyai* 1981 ZLR 25 (G)

Raath v *Carikas* 1966 (1) SA 756 (W)

Surtee v *Surtee* 2008 (1) ZLR 145 (H) D

Thomson v *Thomson* 1968 (2) RLR 247 (A); 1968 (4) SA 270 (RA)

Walkinshaw v *Walkinshaw* 1971 (1) SA 148 (NC)

Legislation considered

Constitution of Zimbabwe 2013, ss 81(1) & (2)

Maintenance Act [*Chapter 5:09*], s 4(d)

Case information

Applicant in person

Respondent in person

Judgment

Tsanga J: This urgent application turned upon the issue of whether an order F of maintenance from the magistrate court, that is currently pending review, can be varied even provisionally by the High Court through an urgent chamber application. My immediate legal view was that this was not possible. However, since the parties were self-actors and since on the affidavit of urgency the matter involved a young child who had been sent G home for non-payment of fees, as upper guardian, I did set down the matter down for hearing as an urgent application so as to determine more fully the circumstances and nature of the urgency expressed in the affidavit. However, having heard the parties on the circumstances of the urgency, I declined to grant the order sought by the

applicant and dismissed the matter as not urgent. H This judgment captures the full reasons for so holding.

2014 (2) ZLR p4

Tsanga J

From the applicant's founding affidavit, the basis of her claim was that a child A whom she has with the respondent who is doing Grade one at Cornway College had been sent home from school for outstanding payment of fees. Under an existing maintenance order from 2010, the respondent has been paying $150 a month as maintenance and $670 a term as fees. The applicant applied for a variation upward in February 2014 from $150 to $600 for child's upkeep and from $670 to $1550 for school fees. She obtained a default judgment in B Bulawayo for these amounts on 24 April 2014. However, on 19 May 2014 (ruling stamped 9 June 2014), this default judgment was rescinded and the maintenance court ordered that the maintenance should revert back to $150 for upkeep and $670 for the school fees. The respondent, though, was also ordered to repay a sum of $248 constituting various expenses for settling C the child at Cornway College. The applicant's affidavit of urgency, as well as her founding affidavit, indicated that she had brought the proceedings of the magistrate court for review under HC 4663/14, which matter was still pending.

The basis of the urgent application brought before me was the insufficiency D of the maintenance amount to meet the child's costs and the fact that the child had been sent home from the school for owing the sum of $1 021 in fees. The applicant's contention was that the sum of $670 represented the fees for when the minor was still at pre-school. What was gleaned from a letter, attached from the school regarding the amount owing to Cornway College where the child is now doing grade one, was that of the sum owing, E $571 was a balance from the first term. The fees for the second term was stated as $1 100 and $650 had been paid, thus bringing the total amount outstanding to $1021.

The applicant's averment was that the respondent, who owns KWMM Investments (Pvt) Ltd and is said to operate a fleet of 16 haulage trucks, is F able to pay. She therefore sought an order couched as follows:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That pending the finalisation of case HC 4663/14, respondent be ordered to maintain the minor in terms of Annexure C. G
> 2. That respondent bears the cost of this application.
>
> INTERIM RELIEF GRANTED
>
> Pending determination of this matter there is granted the following relief:
>
> 1. That respondent is ordered to pay all the school arrears forthwith and to provide $500 for the upkeep of the minor child per month. H

2014 (2) ZLR p5

Tsanga J

> 2. That this provisional order be served upon the respondent by the Sheriff." A

There were three primary reasons for my rejecting the matter as urgent once the urgency had been ventilated and the circumstances surrounding it. The first was that the order of maintenance granted at $150 per month for upkeep and $670 for fees per month remains extant. Secondly, the review of the matter B by the magistrate ordering that the maintenance revert to original amount stated above is still pending. Thirdly, the applicable constitutional provisions call into play the participation of both parents towards their children's needs. As such, where an order already exists that governs a particular parent's contribution, a matter cannot be rendered urgent by unilaterally increasing that party's contribution and subsequently seeking to have that endorsed, C when not honoured, by way of an urgent application. The urgency under such circumstances becomes self-created.

The reluctance of higher courts to interfere with proceedings, outside a review or an appeal, is one that is captured in a number of decisions. In *Surtee* v *Surtee* 2008 (1) ZLR 145 (H) Makarau J (as she then was) stated thus:

> "It would appear to me that this court has over the years adopted the approach that D where there is an existing order by a competent court of jurisdiction, another court cannot make an order competing with

> or overriding it even if the court making the original order is inferior to the High Court … The issue is not that the juvenile court is an inferior court, but as pointed out by McNally J (as he then was) the courts have to adopt a sensible and practical approach to the E matter and avoid dealing with orders that are properly before another court of competent jurisdiction save as is provided for under the procedure of review."

For further articulation of this rule that an order made by a court can only be varied by that court save by way of appeal or review in a higher court, see also *Raath* v *Carikas* 1966 (1) SA 756 (W); *Kunz* v *Pretorius* 1982 (2) ZLR 24 (H); F*Walkinshaw* v *Walkinshaw* 1971 (1) SA 148 (NC). In light of these legal authorities, I considered that the applicant's quest to bring an urgent application, which would in effect vary the maintenance upwards, would in essence amount to interfering with an existing order of a court of competent jurisdiction. To try and reverse maintenance proceedings which are already under review by way of an urgent chamber application in the High Court, G however temporarily or provisionally, would be tantamount to misapplication of inherent powers to simply negate decisions of the lower courts.

In *Karimatsenga* v *Tsvangirai & Ors* 2012 (2) ZLR 195 (H) Guvava J (as she then was) cited the following *dicta* in *Nyaguwa* v *Gwinyai* 1981 ZLR 25 (G) at 27, where Pittman J stated as follows regarding the need to fully H respect the jurisdiction granted a court by statute:

2014 (2) ZLR p6

Tsanga J

> "I was of the opinion that, in this country, each court is a creature of statute, and A its powers are created and defined by statute. If one court were to claim that it has same inherent power to overrule another court instead of a power specifically created by statute, in effect it would be claiming the power to nullify the body of statute law…"

She thus went on to conclude as follows regarding the overlap of jurisdiction in the case that was before her: B

> "Thus it is clear to me that where the legislature has intentionally and by statute set out procedures and remedies for certain acts these must be followed. This court cannot invoke its inherent powers to take away powers which have been given to certain persons in an act of parliament."

Besides, maintenance and its variation are by way of enquiry and cannot be C dealt with through an urgent chamber application. While cognisant of the High Court's role as upper guardian of all minor children and whilst alive to the principle of the best interests of the child as vital tenets of our Constitution, these are not principles to be applied in an automatic manner. They certainly cannot be read to mean that every order asked for in the name of urgency and the 'best interests' of the child should be granted. They equally do not mean D that a party can unilaterally create urgency through incurring expenses on behalf of the child that the parent herself cannot afford and expect the courts to endorse her actions thereafter in the face of an existing order maintenance order. Drawing on relevant provisions of the Constitution, the best interests of the child in the case before me mean the child's right to parental care as articulated in s 81(1)(d) of the Constitution and the right to education, health E care services, nutrition and shelter as found in s 81(1)(f). For the sake of clarity the applicable provisions are worded as follows:

> **"Section 81 Rights of children**
>
> (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right – F
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) to family and *parental care* or to appropriate care when removed from the family environment G
>
> (e) …
>
> (f) to education, health care services, nutrition and shelter
>
> (g) …
>
> (h) …
>
> (i) … H

2014 (2) ZLR p7

Tsanga J

> (2) A child's best interests are paramount in every matter concerning the child. A

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian" (my emphasis).

These are part of the fundamental rights granted to the child by our Constitution, and to the constitutional cohort of what constitutes "best interests" that are B to be embraced in every matter concerning a child, as enjoined by s 81(2) of the Constitution. In my opinion, with a comprehensive articulation of children's rights in the Constitution, when courts are called upon to make decisions which call into play an interpretation of "best interests", guidance must of necessity come from the constitutional formulation of children's fundamental rights so as to avoid a purely subjective assessment of what C comprises those "best interests" of the child. In other words, it is not what a parent has put forth that should guide the courts in making a legal decision but what our constitution provides. It is the rights contained in s 81(1)(a) to (h), that must of necessity inform our understanding as a point of departure of the "best interests" principle if we are to avoid a situation where the D meaning essentially stems from each according to one's own understanding. In summary these include the right to be heard; to a name and family name; to family and parental care or appropriate care outside a home environment; to protection from economic and social exploitation; and to education, health and care services nutrition and shelter. They further include the right not to be E recruited into a militia; not to be forced to take part in any political activity and the right not be detained save as a measure of last resort. While these rights canvass a broad range of children's experiences, in addition, children as full citizens, equally benefit from the provisions of the Constitution as a whole.

In dismissing the application as not urgent on the basis of the existing F maintenance order and the pending review, I therefore considered that it is both parents, constitutionally, who have the obligation to provide parental care and, additionally, who have the responsibility to take care of their children in terms of education, health care and shelter. While the State also has specific obligations regarding these rights, which involve the duty to G respect, protect and fulfil them, the nature of these obligations are not in my view the subject matter of this case, other than the duty to protect, which is what courts are called upon to do as an operative arm of the State. The fundamental focus of the facts before me bring to the fore the obligation of parents specifically with regard to the rights accorded children. With parents H in mind, there is no suggestion whether constitutionally or in terms of s 4(d)

2014 (2) ZLR p8

Tsanga J

of the Maintenance Act [*Chapter 5:09*] [1] that only the father is to contribute to A the financial upkeep of a child. In fact the opposite is true. It is both parents who are called upon to play their role. Support which the mother herself can provide is a matter to be taken into account in determining whether the child is without adequate means of support. See, for example, *Thomson* v *Thomson* 1968 (4) SA 270 (RA).

It was for this reason that, while dismissing the matter as not urgent for the B reasons that I have given, I did seek to at least find out from the applicant whether she was able to make up the difference pending the review. After all her own founding affidavit suggests that the child commenced schooling at Cornway College under an existing order where the father was expected to contribute U$670 for fees per term. It was only in February, after the child C had already started school, that the application for variation was sought. In response to the urgency articulated by the applicant, respondent said he was unable to provide any more than what the existing order provides. I considered it important not to leave the child in limbo and to at least try to get the parents to find some solution to the predicament facing the child, pending the review and the possible search for an affordable school. The D applicant's own indications were that she could possibly devote $500 from rentals she receives towards the child returning to school as a matter of urgency pending the outcome of the review. There was also the $248, which she said the court had ordered the respondent to reimburse for monies she said she had expended on uniforms and other sundry expenses on behalf of the minor child. This he was willing to pay. Still, this would not be enough. E Neither parent, however, seemed particularly enthusiastic about devoting the necessary energy towards finding an affordable alternative. Each saw it as something the other should be doing. Realistically, pending the review, the parties seem to have very little choice other than to live within their means. Realism in this moment practically translates to finding a school for their F child which both of them can afford. The court's role in protecting the best interests of the child does not translate to a higher court, foisting a decision on top of an existing one from the court below through an urgent application. As emphasised, this court is not in a position to interfere with the

order of the court below save by way of review, which is still pending, or by appeal, which is not the subject matter of the case. The State's role in giving effect G to the right to education equally does not translate to handing out parental subsidies under these "lifestyle" type of circumstances.

Tsanga J

Taking into account the sum total of the above reasons, I therefore dismissed A the application as not urgent. I made no order as to costs since the parties were both self-actors.

1 Section 4(d) of the Maintenance Act [*Chapter 5:09*] states that in making an order for maintenance the court is to have regard to whether the dependant or any of his parents is able to work and if so whether it is desirable that he or she should do so.

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[zRPz]S v CHIKWASHIRA 2014 (2) ZLR 10 (H)

Citation	2014 (2) ZLR 10 (H)
Case No	Judgment No. HH-282-14
Court	High Court, Harare
Judge	Hungwe J and Bere J
Heard	2 July 2014
Judgment	2 July 2014
Counsel	*PT Shumba* for the appellant Mrs *S Fero*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure – *plea – change of plea – change of plea from guilty to* C *not guilty – what accused must show – must give reasonable explanation as to why he pleaded guilty – court not entitled to refuse to change plea unless satisfied beyond reasonable doubt that explanation is false*

Headnote

The appellant, who was unrepresented at his trial at the magistrates court, D pleaded guilty to a charge of stock theft. After conviction, but before sentencing, he applied to change his plea to

one of not guilty. The magistrate rejected the application and sentenced him to the mandatory minimum sentence of nine years' imprisonment. On appeal:

Held, that in terms of s 272 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the court is required to record a plea of not guilty if E any of three situations become apparent at any stage before sentence is pronounced: (a) when the court, for any reason, entertains doubt that the accused is in law guilty of any offence to which he has pleaded guilty; (b) where the court is not satisfied that the accused has correctly admitted all the essential elements of the offence or all the acts or omissions on which F the charge is based; or (c) if the court is not satisfied that the accused has no valid defence to the charge. Where the accused makes an application after verdict to alter his plea to one of not guilty, all that he is required to do is to give a reasonable explanation of why he pleaded guilty to the offence charged in the first place. It is only when the court is satisfied that the explanation tendered by the accused is beyond reasonable doubt G false that the court can refuse to alter the guilty plea to one of not guilty. The court is not required to delve into the merits of the accused's case in order to determine whether his application for a change of plea ought to succeed. The question is not whether the accused's case carries with it any prospects of success. The issue is whether he has put forward an H

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explanation for the guilty plea which, in the circumstances, is beyond A reasonable doubt false.

Cases cited

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

S v *Maseko* 1986 (2) ZLR 52 (S) B

S v *Matare* 1993 (2) ZLR 88 (S)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 272

Case information

P T Shumba, for the appellant

Mrs *S Fero*, for the respondent C

Judgment

Hungwe J: The appellant was convicted on his own plea of guilty to a charge of stock theft as defined in s 114(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The matter was adjourned prior to sentencing. D In the meantime, the appellant, then unrepresented, applied for a change of plea unsuccessfully. The trial court, finding that there were no special circumstances, imposed the minimum sentence of nine years imprisonment. The appellant thereafter engaged legal counsel who applied for alteration of the guilty plea to one of not guilty. The appellant's application was made in E terms of s 272 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Three grounds were advanced in explanation of the tendering on a guilty plea. The first reason was that the appellant alleged intimidation and undue influence by the police; secondly the appellant claimed that he was ignorant of the consequences of the plea of guilty; and finally the appellant contends that the facts which he admitted to did not disclose an offence in light of F the decision of this court in *S* v *Machokoto* 1996 (2) ZLR 190 (H). He now appeals to this court against his conviction.

Five grounds of appeal are advanced on behalf of the appellant. The first and main ground of appeal is that the court *a quo* erred in dismissing the appellant's application to withdraw his plea of guilty. The remaining grounds are a rehash of the same reasons put forward on the appellant's G behalf regarding his earlier application. The notice and grounds of appeal appear to be muddled up. The reasons could be that the appellant's legal practitioner was unsure as to what it was he was now bringing on appeal: the refusal to grant the application to withdraw the guilty plea before counsel was engaged, or the subsequent dismissal of the counsel's application for H changing of the plea. What would constitute the proper grounds of appeal

Hungwe J

in the present appeal? The appellant's apparent confusion would have A been much less if counsel had born in mind that the reasons given in the final determination by the court *a quo* dismissing the application for change of plea provided him with the reason why he was approaching this court by way of an appeal rather than review.

I will proceed to determine whether the concession by the respondent was B well made.

In terms of s 272 of the Criminal Procedure and Evidence Act, the court is required to record a plea of not guilty if any of three situations become apparent at any stage before sentence is pronounced. The first situation is when the court, for any reason, entertains doubt that the accused is in law guilty of any offence to which he has pleaded guilty. The second situation C is where the court is not satisfied that the accused has correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based. Finally, the court is bound to alter the plea to one of not guilty if it is not satisfied that the accused has no valid defence to the charge.

In *S* v *Maseko* 1986 (2) ZLR 52 (S) it was held that an accused who wishes D to change a plea of guilty after verdict has been given must discharge an onus showing on a balance of probabilities that the plea was not voluntarily, understandingly and correctly made. In order to succeed, the accused only needed to show, on a balance of probabilities, that the plea was not voluntarily and correctly made. However, that position was significantly altered by the same court in *S* v *Matare* 1993 (2) ZLR 88 (S) when it was held that the E accused has no onus cast on him before his wish to change his plea can be granted. All that he is required to do is to give a reasonable explanation of why, in the first place, he has pleaded guilty to the offence charged. It is only when the court is satisfied that the explanation tendered by the accused is beyond a reasonable doubt false that the court can refuse to alter the guilty plea to one of not guilty. F

In the present case, once the accused made an application to change his plea before sentence, as he did, the court *a quo* was required to determine whether the explanation he gave for pleading guilty initially was, beyond reasonable doubt, false.

In *S* v *Matare (supra*) after discussing the different approaches dictated by G either the common law or the statutory provisions here and in South Africa, Gubbay CJ stated at 98B-99C:

> "Third, in my view, s 255A, construed in the context against which it was introduced to the Act, contains no indication of an intention on the part of the legislature to cast an onus on the accused. That this is so is evident from the following factors: H

Hungwe J

(1) The phrase 'if the court ... is in doubt whether the accused is in law guilty of the offence A to which he has pleaded guilty' in para (a), merely requires that a doubt alone, and not a probability, is sufficient to oblige the court to change the plea. No onus of proof needs to be discharged before this safety device becomes operational. See *S* v *Malili en 'n Ander supra* at 624A

(2) The phrase 'if the court ... is not satisfied that the accused has admitted B all the essential elements of the offence' in para (b) requires no more than that the accused reveals that he does not admit an essential element of the offence. See *S* v *Malili en 'n Ander supra* at 624C.

(3) The phrases 'if the court ... is not satisfied that the accused has ... correctly admitted all the essential elements of the offence' and '... has no valid defence to the charge', in paras (b) and (c) respectively, deal with the situation where the accused does not dispute any of the essential elements C of his guilt, but during the proceedings it becomes apparent that he has wrongly or mistakenly pleaded guilty. The court is then obliged to change the plea. The word 'satisfied' means that the court must have a reasonable doubt about the correctness of an admission or of the conviction it returned. See *S* v *Malili en 'n Ander supra* at 625F-I.

It is apparent to me that ss 255(2)(b) and 255A were enacted to provide greater D protection to the undefended accused by establishing an inquisitorial procedure, as were ss 112(1)(b) and 113 of the South African Act. See *S* v *Dingile supra* at 258B-G. Not only, therefore, is the placing of an onus of proof on the accused incompatible with such a procedure, it undermines the protection the accused enjoyed prior to 19 September 1975, when guilty-plea proceedings were framed in the adversarial mould. The court placed no onus on an accused who wished to change his plea; a reasonable doubt as to its correctness sufficed. If it became E apparent that an undefended accused had wrongly or mistakenly pleaded guilty the court was required to investigate the matter inquisitorially and, if

necessary, change the plea *mero motu*. See *S* v *Terblanche* 1971 (3) SA 231 (O) at 235C; *S* v *Hendriks* 1977 (4) SA 78(C) at 80F.

In sum, I can do no better than to repeat the words of van Zyl J in *S* v *Fourie supra* at 23h, that:

> '(there is) no more of a burden of proof in an application under s 113 than the burden F placed on the accused by the common law in these circumstances. In fact, in my respectful opinion it is even wrong to talk of an onus at all in these circumstances, because this is not like the ordinary case of the burden of proof. All that can be expected of an accused is to give an explanation or clarification of his change of plea, and, if the court is satisfied that it is a reasonable explanation on clarification, then the plea ought to be changed. G There is no question of a burden of proof that is discharged in such a case' (in translation)."

It is clear that the trial magistrate fell into error when he delved into the merits of the appellant's case in order to determine whether his application for a change of guilty plea ought to succeed. The question was not whether H the appellant's case, as explained by his counsel during submissions in

the hearing, carried with it any prospects of success. The issue remained A whether he had put forward an explanation for the guilty plea which, in the circumstances, was beyond reasonable doubt false. If an unrepresented accused states that he tendered the plea in the belief that he had no defence and it appeared, upon being counseled, that there is doubt as to whether the accused is indeed guilty of the offence charged, in my view, the application ought to succeed. B

In light of the above, I am of the view that the concession was well made. The appeal succeeds and the conviction is quashed. The sentence imposed in the court *a quo* is set aside. The matter is remitted back for trial *de novo* before a different magistrate.

BERE J concurred. C

Mutendi & Shumba, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners D

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[zRPz]MATANHIRE & ANOR v CHAPENDAMA & ANOR; CHAPENDAMA v MATANHIRE & ANOR 2014 (2) ZLR 15 (H)

Citation	2014 (2) ZLR 15 (H)
Case No	Judgment No. HH-334-14
Court	High Court, Harare
Judge	Mafusire J
Heard	19 & 27 May 2014; *CAV*
Judgment	3 July 2014
Counsel	First & second plaintiffs (in Case 1) (first & second respondents in Case 2), in person *R Matsika,* for the first defendant (in Case 1, applicant

in Case 2)
No appearance for second defendant in Case 1

Case Type Urgent application

Annotations No case annotations to date

Flynote

Contract – *breach – remedies – cancellation – when court may order cancellation – breach must be serious – cancellation will not be ordered for a trivial breach*

Contract – *performance – to whom performance may be made – payment by debtor to third* D *party – such third party a creditor of the creditor debtor discharged if creditor benefits thereby*

Headnote

The plaintiffs sold their Marondera property to the first defendant in terms of E a written deed of sale drawn up by a firm of legal practitioners and signed by the parties. The purchase price for the property was US$65 000. The defendant paid a deposit of $10 000 and then, after securing a mortgage, paid a further $50 000. The defendant paid the remaining US$5 000, but most not directly to the plaintiffs: part was paid to the Zimbabwe Revenue Authority for the capital gains tax; part was paid to the local F authority for outstanding rates as assessed by that local authority; and a smaller part was paid to a firm of lawyers as their bond cancellation fee and collection commission for the release of the title deed which they had been holding. The balance was paid into the second plaintiff's bank account. The property was transferred to the defendant but the plaintiffs refused to vacate.

The plaintiffs claimed that the defendant had breached the contract and sought G cancellation. They claimed that she had purported to manage their affairs by herself purporting to meet their capital gains tax and rates obligations. They said the payment to the lawyers, for the bond cancellation, had been a duplication because they themselves had already H paid that amount. They claimed that by paying directly to the revenue

authority and by collecting the capital gains tax clearance certificate A herself, she had prejudiced them in respect of their entitlement to apply for a roll-over of the purchase proceeds for the purposes of purchasing another property that the second plaintiff was buying from a third party. They also said that by paying for the outstanding rates, the defendant had prejudiced them in their entitlement to a discount on those rates.

The defendant, for her part, sought the eviction of the plaintiffs and holding B over damages. She had retrieved the duplicated payment from the lawyers and paid it to the plaintiffs.

Held, that the nub of the matter was whether by paying the outstanding $5 000, not directly to the sellers, but to those bodies to which the sellers had direct monetary obligations, the defendant had discharged her own obligations in terms of the deed of sale. In other words, by paying the plaintiffs' creditors for the conveyance of the property, had she discharged her C own obligations to them as her creditors for the balance of the purchase price? Generally speaking, the debtor's payment to his creditor's creditor does not discharge him from his obligation – but there are exceptions. If the creditor benefits from the debtor's payment to his D own creditor then the debtor is discharged.

Held, further, that in terms of the Capital Gains Tax Act, and subject to the exemptions therein, the seller of an immovable property is obliged to pay capital gains tax on the capital gain received by him on the sale of his property during the year of assessment. The conveyancer of the E property is obliged to withhold the capital gains tax from the purchase price and remit it to the revenue authority within three days of the date that he pays out the purchase price to the seller or transfers the property. The conveyancer becomes personally liable for the capital gains tax F if he fails to withhold and remit it. In terms of s 30A of the Act, no transfer of land will be registered in

the deeds office unless the capital gains tax has been paid. The plaintiffs' claim to a right to a roll-over of the purchase proceeds was a subterfuge. The time for them to have indicated their intention to apply for a roll-over was on the submission of the capital gains tax return and during the interview with the revenue authority. On both instances they had not done so. G

Held, further, that ultimately, the plaintiffs' claim was that they, and not the defendant, should have remitted the capital gains tax but that was no ground to repudiate the sale. Where there has been a breach of contract by reason of malperformance, rescission of the contract is more burdensome than specific performance. It is a more radical remedy. The court must strike a balance between the competing interests. Ultimately it makes H

Mafusire J

a value judgment. It must decide whether the breach is so serious that it is A fair to allow the innocent party to cancel the contract and undo all its consequences. Here, the sum involved was a mere 5 per cent of the purchase price. Even if the defendant had not been entitled to pay the tax directly to the revenue authority and was thereby guilty of malperformance, the breach would not have been one going to the root B of the contract. It would not have been one so serious as to warrant rescission. At best, the plaintiffs would have to be content with a claim for damages; but *in casu* the defendant's payments were proper and were made in discharge of her obligations to the plaintiffs.

Held, accordingly, that the defendant was entitled to the relief she sought.

Cases referred to C

C Pettigrew (Pvt) Ltd v *Cone Textiles (Pvt) Ltd* 1976 (1) RLR 293 (G); 1976 (3) SA 569 (R)

Marlin v *Moore* 1966 RLR 289

Singh v *McCarthy Retail Ltd* 2000 (4) SA 795 (SCA)

Van der Merwe v *Erasmus & Anor* 1945 (2) TPD 97 D

Legislation considered

Capital Gains Tax Act [*Chapter 23:01*], ss 21(2) & (2a), 22I(1), 30A

Urban Councils Act [*Chapter 29:15*], s 282

Case information

First & second plaintiffs (in Case 1) (first & second respondents in Case 2), in person E

R Matsika, for the first defendant (in Case 1, applicant in Case 2)

No appearance for second defendant in Case 1

Judgment

Mafusire J: The first and second plaintiffs in Case 1 above were husband and wife. F On 10 February 2012 they issued a summons under HC 1546/12 against the first defendant. The second defendant was cited as a nominal party. The plaintiffs claimed an order for the cancellation of a certain agreement of sale between themselves and the first defendant in respect of a certain G immovable property in Marondera (hereafter referred to as "the Marondera property" or simply "the property"). The plaintiffs also claimed an order directing themselves to reimburse the first defendant an amount in the sum of US$60 000. Finally, the action also sought an order for the cancellation of a certain deed of transfer over the Marondera property registered in the H name of the first defendant.

Mafusire J

Five days after the plaintiffs' summons, the first defendant, in Case 2 above, A applied in separate proceedings under HC 1703/12, for a declaratur and ancillary relief. For the declaratur she sought an order to the effect that she had paid the plaintiffs (respondents in Case 2) the full purchase price

for the Marondera property. As ancillary relief, she sought an order for the eviction of the plaintiffs from the Marondera property, plus holding over damages at the rate of US$500 per month from 15 December 2011 to the date of B eviction. She also sought an order that the plaintiffs pay all the utility bills in respect of the property from 15 December 2011 to the date of eviction.

Both proceedings were contested. Both parties claimed costs of suit. In November 2013 the two proceedings were consolidated. The costs would be in the cause. The matter came before me for trial on 19 May 2014. C Henceforth I shall refer to the plaintiffs as "Mr & Mrs Matanhire" or "the Matanhires" or "the sellers", and to the first defendant as "Mrs Chapendama" or "the purchaser".

Much of the factual background or the circumstances giving rise to the claims were common cause. Mr and Mrs Matanhire sold their Marondera property D to Mrs Chapendama in terms of a written deed of sale drawn up by a firm of legal practitioners and signed by the parties on 8 June 2011. The agreement was replete with grammatical and spelling errors. But in terms thereof, the purchase price for the property was US$65 000.

Clause 1 of the agreement said that the purchase price would be paid

> "… by a mortgage through COMMERCIAL BANK OF ZIMBABWE in full and E final settlement of the aforesaid amount" (*sic*).

Clause 2 said transfer would be effected by the purchaser's conveyancer after due compliance with all her obligations. The clause went on to provide for, *inter alia*, the modalities of registering the mortgage bond and the furnishing of proof of the mortgage by the purchaser. The clause ended by stating that the sellers would pay the capital gains tax within thirty days from the date F of notification to pay.

Clause 4 provided for breach. Either party would have the right to claim specific performance or to cancel the agreement without prejudice to the right to claim damages.

Clause 6 said the sellers would give vacant possession of the property G

> "…two months upon full payment of the purchase price" (*sic*).

Finally, clause 8, titled "ENTIRETY OF AGREEMENT", provided as follows:

> "The parties hereto acknowledge that this Agreement of Sale constitutes the entire contract between the Sellers and the Purchaser and no warranties, representations or conditions not recorded herein shall be binding and signed by the part" (*sic*). H

Mafusire J

Contrary to whatever had originally been agreed to, or had been intended in A terms of clause 8 above, the execution of the agreement of sale was anything but in terms of the written word. For example, upon signing, Mrs Chapendama paid the sellers US$10 000. By a written memorandum on that date the sellers acknowledged the payment as being part payment towards the purchase price. In terms of that written memorandum, the balance of B US$55 000 would be paid

> "…upon successful application of a mortgage loan with the Commercial Bank of Zimbabwe."

In terms of that written memorandum of acknowledgement of payment the sellers undertook to refund the purchaser the aforesaid part payment of C US$10 000 upon the transfer of the original purchase price of US$65 000 by the Commercial Bank of Zimbabwe ("CBZ" or "the bank") into the sellers' account.

Mrs Chapendama did secure the mortgage finance from the CBZ. But that was for only US$48 000, not US$65 000. She said it was the bank's policy to advance only 7 per cent of the mortgage amount applied for. An applicant D for mortgage finance had to provide the remaining 2 per cent. She did. On 3 August 2011 she deposited US$50 000 into Mrs Matanhire's bank account. With that, only US$5 000 of the purchase price remained outstanding.

Mrs Chapendama did pay the remaining US$5 000 between 29 August 2011 and 12 October 2011. But the payment was not made directly to the E Matanhires. Part, US$3 250, was paid to the Zimbabwe Revenue Authority ("ZIMRA") for the capital gains tax as per ZIMRA's assessment. Part, US$1 105.80, was paid to the Municipality of Marondera for the outstanding rates as assessed by that local authority. Part, US$ 410.00, was paid to a firm of lawyers, Mawere & Sibanda, as their bond cancellation fee and collection commission for the release of the title deed to the property. Mawere & F Sibanda had been holding the title deed on behalf of a financial institution from which

the Matanhires had previously obtained mortgage finance. Mrs Chapendama paid the remaining part, US$234.22, into Mrs Matanhire's bank account. That was on 12 October 2011.

On 3 August 2011 Mr and Mrs Matanhire had signed a special power of attorney to transfer the property to Mrs Chapendama. That had been the G day she had paid the US$50 000 into Mrs Matanhire's bank account. On 13 October 2011 the property was duly transferred to Mrs Chapendama under deed of transfer no. 4821/2011. On that day Mrs Chapendama gave the Matanhires two months' notice in writing to vacate the property. The Matanhires did not comply.

Mr and Mrs Matanhire's case was that Mrs Chapendama had breached H the

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agreement of sale. They said she had not paid the balance of the purchase price A of US$5 000. They did not recognise her payments to ZIMRA, Marondera Municipality and Mawere & Sibanda. They said she had purported to manage their affairs by herself purporting to meet their capital gains tax obligations to ZIMRA and their rates obligations to the Marondera Municipality. They said the payment to Mawere & Sibanda, for the bond cancellation, had been a duplication because they themselves had already paid that amount. B

The whole dispute centred on this amount of US$5 000, or, to be more precise, US$4 765.78, because US$234.22 had been paid to the Matanhires. They claimed that, by her paying directly to ZIMRA, and by her collecting the capital gains tax clearance certificate herself, Mrs Chapendama had prejudiced them in respect of their entitlement to apply for a roll-over of C the purchase proceeds for the purposes of purchasing another property that they were buying from a third party. They said in terms of the deed of sale they had 30 days within which to pay the capital gains tax upon being called upon to do so and that Mrs Chapendama had paid it prematurely and had collected the capital gains tax assessment herself.

It was common cause that on 14 October 2011 Mrs Matanhire alone, not the D two of them, had signed an agreement of sale of shares for the purchase of a flat on sectional title from a company called Grasmere Garden Flats (Pvt) Ltd. The purchase price was US$35 000.

The Matanhires further alleged that, by her paying for the outstanding rates to the Marondera Municipality, Mrs Chapendama had prejudiced them in E their entitlement to a discount on those rates in terms of a circular by that local authority that had been issued to all the rate payers. They said Mrs Chapendama had duped or tricked them into signing the power of attorney to transfer the property ahead of her paying the full purchase price.

All in all, Mr and Mrs Matanhire maintained that it had not been Mrs Chapendama's business to have assumed their obligations as sellers and F that she had not performed her side of the deal strictly in accordance with the written contract. They insisted that Mrs Chapendama was supposed to have secured mortgage finance from which they would have been paid their US$65 000 in one lump sum after which they would have refunded her the US$10 000 that she had paid in advance. For that reason, they said, they were entitled to repudiate the agreement. They said they were not obliged G to vacate the property, let alone pay any holding over damages. They would refund her the amount of US$60 000 as the total amount that they had received from her.

On her part, Mrs Chapendama maintained that she had been perfectly entitled to pay the capital gains tax directly to ZIMRA for the capital gains H

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tax clearance certificate which was part of the documentation required for A the registration of transfer. She pointed out that although the capital gains tax had been the sellers' obligation, the agreement of sale had not specified the manner of its payment and that therefore she had not been precluded from deducting it from the balance of the purchase price and effecting the payment herself.

Mrs Chapendama highlighted quite a number of other salient features regarding B the capital gains tax assessment and the capital gains

tax clearance certificate. On 3 August 2011, after she had already paid the US$10 000 and the US$50 000, both sides had appeared before the ZIMRA officers, albeit separately, for the customary

interviews that are conducted in preparation C for the issuance of the capital gains tax assessment. Mrs Chapendama said the Matanhires had said nothing about an intention to roll over. In Case 2 above, one Nanzelelo Mhlanga, a professional assistant employed by Mrs Chapendama's legal practitioners of record, had sworn to an affidavit. She said she had subsequently called on the ZIMRA offices to inspect the capital gains tax return that the Matanhires had filed. On it they had said nothing D about a roll over. She had inspected the notes of the ZIMRA official on the Matanhires' interview. Nothing had been noted about any roll over. On the contrary, Mr Matanhire had indicated that the capital gains tax would be paid on the balance of the purchase price.

To all this, the Matanhires' response had been that the payment of the capital E gains tax had been their responsibility; that they had not defaulted on it; that they had attended the ZIMRA interview separately and that therefore Mrs Chapendama or her lawyers could not speak on what had transpired at their own interview.

Mrs Chapendama said that, contrary to the Matanhires' claim that she had F paid the capital gains tax prematurely, she had in fact waited for over 30 days. She had paid it on 9 September 2011. She said the fact that she herself, and not the Matanhires, had collected the capital gains assessment was neither here nor there. The assessment for capital gains tax is not made on the collection of the assessment but on the information supplied on the capital gains return and at the interviews conducted by ZIMRA. Furthermore, and G at any rate, if the claim for a roll over had been genuine, the Matanhires had, in terms of the Capital Gains Tax Act [*Chapter 23:01*], six years from the date of payment to apply for a refund if they thought that the capital gains tax ought not to have been paid.

Finally, on the capital gains tax, Mrs Chapendama pointed out that the H alternative property that the Matanhires claimed to have bought had not been

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bought by them jointly but only by Mrs Matanhire and that the purchase A price had only been US$35 000. Therefore no right to a roll over would have applied in such circumstances.

Regarding the payment to the Marondera Municipality, Mrs Chapendama again maintained that she had made it properly. She said a rates clearance certificate is another document that is required for the registration of transfer. B She had made the payment for it only on 12 October 2011 after having waited for over two months. The period of the alleged discount offered by the Municipality of Marondera to its rate payers had since lapsed. The discount had only been for six months from January 2011 to June 2011.

Regarding the payment to Mawere & Sibanda, Mrs Chapendama said that C she had remitted the amount upon demand by those lawyers who had said they needed it to enable them to release the prior deed of transfer which was also part of the documentation for the registration of transfer. She said upon being advised subsequently that the amount had already been paid; and following an agreement by the parties and their legal practitioners on D a settlement out of court, Mrs Chapendama would retrieve the amount from Mawere & Sibanda and pay it to the Matanhires. On their part, the Matanhires would follow-up on ZIMRA and the Marondera Municipality on their alleged entitlements to a roll-over on the capital gains tax and the alleged discount on the rates respectively. Mrs Chapendama said on her part she had retrieved the payment to Mawere & Sibanda. She had tendered the E amount to the Matanhires. However, the Matanhires had reneged on their undertaking and had subsequently purported to repudiate the agreement.

Mrs Chapendama said her claim for holding over damages stemmed from clause 6 of the agreement. She said it gave her the right to vacant possession of the property two months after payment of the purchase price. The last bit of the purchase price had been paid on 12 October 2011. She had given F the Matanhires the notice to vacate on the following day. The two months had expired on 15 December 2011. The Matanhires had refused to vacate. The rate of US$500 per month as damages for holding over was based on written advice from a firm of estate agents. It had advised that the level of rentals for that kind of property would be US$550 per month. G

Mr and Mrs Matanhire both gave evidence. At the close of their case Ms *Matsika*, for Mrs Chapendama, applied for absolution from the instance. I dismissed the application, primarily on account of the fact that it was plain that the terms of the original written agreement had not been followed scrupulously. Mrs Chapendama had to explain why. H

Mafusire J

Mrs Chapendama gave evidence and closed her case. The parties opted to file A written closing submissions.

Plainly the Matanhires had no case. Their intransigence and persistence with their claims in the action and their defence in the application were manifestly ill-conceived.

There was no dispute that Mrs Chapendama had subsequently paid the B amount of US$500 that had remained outstanding on the purchase price. The nub of the matter was whether by paying that amount, not directly to the sellers, but to those bodies to which the sellers had direct monetary obligations, she had, in fact, discharged her own obligations in terms of the deed of sale. In other words, by paying the Matanhires' creditors for the conveyance of the C property, had she discharged her own obligations to them as her creditors for the balance of the purchase price? Plainly she had.

Generally speaking, the debtor's payment to his creditor's creditor does not discharge him from his obligation. But there are exceptions. If the creditor benefits from the debtor's payment to his own creditor, then the debtor is D discharged. In *C Pettigrew (Pvt) Ltd* v *Cone Textiles (Pvt) Ltd* 1976 (1) RLR 293 (G); 1976 (3) SA 569 (R), the main contractor applied for provisional sentence against the client or owner of the project in an amount of which over 97 per cent was money owed by the contractor to its sub-contractors. The client had paid those sub-contractors directly. The question was whether that direct payment by the client to the sub-contractors had discharged the client's E obligations towards the main contractor to the extent of those payments.

Whilst on the facts before it the court was not able to decide the issue, nonetheless it accepted the principle that such a payment would relieve the debtor from his obligations to the creditor. Beck J, at 297D-E, quoted with approval Pothier's *Obligations*, Part III, Chapter 1, Article 1 as follows:

> "It is not essential to the validity of the payment that it be made by the debtor, or F any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."

The learned judge also quoted from Voet 46.3.7 approvingly as follows:

> "I may not correctly pay the creditor of my creditor without the consent of my creditor, G except insofar as my creditor's affairs have been advantageously managed by me without his knowledge."

In terms of the Capital Gains Tax Act, and subject to the exemptions therein, the seller of an immovable property is obliged to pay capital gains tax on H the capital gain received by him on the sale of his property during the year

Mafusire J

of assessment. The conveyancer of the property is obliged to withhold the A capital gains tax from the purchase price and remit it to ZIMRA within three days of the date that he pays out the purchase price to the seller or transfers the property. ZIMRA may allow an extension of the three-day period for good cause shown. The conveyancer becomes personally liable for the capital gains tax if he fails to withhold and remit it. In terms of s 30A of the Capital Gains Tax Act, no transfer of land will be registered in the deeds B office unless the capital gains tax has been paid.

In terms of s 21(2) of the Capital Gains Tax Act, the seller of an immovable property, if it is his residential stand as defined, can elect, by applying to ZIMRA, to expend the whole or any part of the capital gain on the sale of that property, to purchase or construct another residential stand. In terms C of subs (2a) of s 21 that election must be made on the date when the seller submits the return for the assessment of the capital gain. In this case, Mr Matanhire submitted his capital gain assessment on 3 August 2011.

I am satisfied that the Matanhires' claim to a right to a roll over of the purchase proceeds was a subterfuge. It was probably an afterthought. I am satisfied with Mrs Chapendama's version of events on this. The time for D the Matanhires to have indicated their intention to apply for a roll-over was on the submission of the capital gains tax return and during the ZIMRA interview. On both instances they had not.

The capital gains tax assessment return is a prescribed document. As pointed out by Ms *Matsika*, under item 16 the seller of an immovable property is E required to indicate "Yes/No" to make his or her election to roll over the purchase proceeds. Mrs Chapendama's evidence was that the Matanhires had not. Neither had they made that indication during the interview. Furthermore, even by the time of the trial they were still within the six year period within which a seller of an immovable property who would have paid capital gains tax in circumstances in which he was not obliged to pay, or whose payment F had been excessive, would be entitled to apply to ZIMRA for a refund. Section 22I(1) of the Capital Gains Tax Act provides as follows:

> "If it is proved to the satisfaction of the Commissioner that any person has been charged with capital gains withholding tax in excess of the amount properly chargeable to him in terms of this Part, the Commissioner shall authorise a G refund in so far as it has been overpaid:
>
> Provided that the Commissioner shall not authorise any such refund unless a claim for it is made within six years of the date on which the tax was paid."

The plain truth is that the Matanhires just did not want to have anything to do with seeking a refund of the capital gains tax. After the apparent dispute had emerged the parties and their lawyers had agreed on a course of action H

Mafusire J

to resolve the matter amicably. Among other things, the Matanhires would pursue A the issue of the refund with ZIMRA. But they had subsequently reneged on it. On 1 February 2012 Coghlan, Welsh & Guest, their lawyers at the time, wrote to Mrs Chapendama's lawyers in the following terms:

> "Your letters dated 20 January 2012 and 27 January 2012 refer. We regret the late response. Our clients are adamant that they will not go to ZIMRA for rollover B verification. We have tried to convince them to do so but they remain adamant. We will revert to you once we find a way forward …"

Nothing can be plainer.

Even the claims by the Matanhires that they had been prejudiced by Mrs Chapendama's supposedly precipitous payment of the capital gains tax well C ahead of the deadline and by she herself collecting the resultant assessment had no merit. They had not paid the tax more than 30 days after it had become due. They had submitted the capital gains tax return on 3 August 2011. That was the day they had received the bulk of the purchase price which brought Mrs Chapendama's total payments to over 92 per cent of the purchase price. That was also the day that they had signed the special power of attorney to D pass transfer. Mr Matanhire said he had gone to ZIMRA offices to collect the capital gains tax assessment some two days later, but that he had been told that the purchaser had already collected it. Mrs Chapendama said Mr Matanhire could have just got a copy from ZIMRA or asked her for the original as he had been advised by ZIMRA. She had remitted the capital gains tax, through her conveyancer, only on 9 September 2011.

The payment by Mrs Chapendama to ZIMRA was intrinsically and inexorably linked E to her getting transfer of the property that she had purchased. It was in her interest that the Matanhires' obligations in that regard be discharged expeditiously. But since the amount was due anyway, there can be no question that the Matanhires' affairs had "…been advantageously managed…" [1]

Ultimately, Mr and Mrs Matanhire's claim was essentially that they, and not F Mrs Chapendama, should have remitted the capital gains tax. But that was no ground to repudiate the sale. Their situation is comparable to that of the purchaser in *Singh* v *McCarthy Retail Ltd* 2000 (4) SA 795 (SCA). Therein the purchaser had purported to repudiate an agreement of sale on the ground of an alleged breach of contract. The breach had allegedly stemmed from G the seller delivering, or causing it to be delivered, a certain Mercedes Benz motor vehicle from the supplier to the purchaser by having it driven under its own power instead of by road transportation carrier. The odometer had been disconnected. It had clocked a delivery mileage that was 760 km more

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than that displayed. But the difference in the mileage had not been the issue. A Olivier JA, after accepting a claim by the purchaser for the rectification of the contract, but discounting other claims by him, ultimately came to the conclusion at 803-804 that:

> "His real complaint, therefore, was not that the car was driven from King William's Town to Durban, but that it was not driven by himself. The appellant relied on B this solitary fact; he did not rely on any substantial damage to the vehicle due to its having been driven as explained. *The breach, in this form, does not justify rescission*" (my emphasis).

The breach in *Singh's* case was said to be no justification for the rescission of the contract because it was said to be not so serious. Monogrammed

Where there has been a breach of contract by reason of malperformance, rescission of the contract is more burdensome than specific performance. C It is a more radical remedy. The court must strike a balance between the competing interests. Ultimately it makes a value judgment. The test was set out by Olivier JA in *Singh's* case at 803F-G in the following terms:

> "I perceive the correct approach to be as follows: the test, whether the innocent party is entitled to cancel the contract because of malperformance by the other, D in the absence of a *lex commissoria*, entails a value judgment by the court. It is, essentially, a balancing of competing interests – that of the innocent party claiming rescission and that of the party who committed the breach. The ultimate criterion must be one of treating both parties, under the circumstances, fairly, bearing in mind that rescission, rather than specific performance or damages, is the more radical remedy. Is the breach so serious that it is fair to allow the innocent party to cancel the contract and undo all its consequences?" E

In casu the amount of the capital gains tax that Mrs Chapendama paid to ZIMRA in discharge of Mr and Mrs Matanhire's liability in respect of the transaction in question was in the sum of US$3 250. That was a trifling 5 per cent of the total purchase price. Even assuming that Mrs Chapendama had not been entitled to pay it directly to ZIMRA and would therefore have F been guilty of malperformance, the Matanhires would plainly not be entitled to rescission. Such a breach would not have been one going to the root of the contract. It would not have been one so serious as to warrant rescission. As stated by R H Christie *Business Law in Zimbabwe* 2 ed (Juta & Co Ltd 1998) at p 120, citing *Marlin* v *Moore* 1966 RLR 289 at 295-6:

> "…a trivial breach of a material term does not justify cancellation …" G

I adopt the test for seriousness of a breach of a contract as laid out in *Singh's* case, *supra*, at 803B-C. Olivier JA quoted approvingly from van der Merwe *et al Contract, General Principles* 1 ed (1993) at 255, as follows:

> "The test for seriousness has been expressed in a variety of ways, for example that the breach must go to the root of the contract, must affect a vital part or term H

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> of the contract, or must relate to a material or essential term of the contract, or that A there must have been a substantial failure to perform. It has been said that the question whether a breach would justify cancellation is a matter of judicial discretion. In more general terms the test can be expressed as whether the breach is so serious that it would not be reasonable to expect that the creditor should retain the defective performance and be satisfied with damages to supplement B the malperformance."

Mrs Chapendama was not, and in my view, would not have been, guilty of a substantial failure to perform. The payment to ZIMRA being a mere 5 per cent of the purchase price, I would not, in the exercise of judicial discretion, order rescission of the contract even if it had been that the payment had been improper. The Matanhires would have had to live with it and be content C with a claim for damages. But I hold that Mrs Chapendama's payment to ZIMRA was proper and that it was made in discharge of her obligations to the Matanhires.

The same goes for Mrs Chapendama's payment to the Municipality of Marondera for the rates clearance certificate. In terms of s 282 of the D Urban Councils Act [*Chapter 29:15*], the registrar of deeds will not register transfer of an immovable property unless a rates clearance certificate from the local authority with jurisdiction over the property is lodged with him, certifying that the rates for the relevant period have been paid. So it was in Mrs Chapendama's interest that the rates clearance certificate be issued expeditiously for the transfer of the property to be registered.

The Matanhires' claim that they were entitled to a discount on the amount of the E rates due for the period in question was not borne out by the evidence. Amongst the documents attached to their notice of opposition in a matter that had been brought by Mrs Chapendama in the magistrates court and which she had subsequently withdrawn, but which documents were part of Case 2 F above, was an undated circular from the Municipality of Marondera to all its rate payers. Among other things, the circular stated that of the balances on rates, water, refuse, supplementary and other charges

outstanding as at 31 December 2010, the council was now offering discounts over a six month repayment period. Among Mrs Chapendama's bundle of documents was a letter to her from the Municipality of Marondera dated 12 May 2012. The G letter advised that the council had offered that discount for six months only from January 2011 to June 2011. That is one of the reasons why I preferred Mrs Chapendama's version to that of the Matanhires,

Regarding the payment of US$410 to Mawere & Sibanda, again it was inexorably linked to the registration of transfer. Mrs Chapendama had every H reason to expedite the release of the prior deed of transfer. But when it was

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discovered that her payment had been a duplication the parties had agreed A on a course of action that entailed her retrieving the payment and tendering it to the Matanhires. She had done that. But the Matanhires had changed their mind. For that they could not possibly have any ground to cancel. At any rate, the amount paid to Mawere & Sibanda was a minuscule 0.6 per cent of the purchase price. B

Mrs Chapendama is entitled to judgment in her favour. Mr and Mrs Matanhire's behaviour has been quite callous. Not only did they receive Mrs Chapendama's money and use it to buy an alternative property for themselves, but also they refused to hand over to her the property that she had bought. She has been denied the enjoyment of that property for so long. It has been almost three years that they have kept her out. They have refused C to pay her anything. They now ought to pay. She is entitled to compensation in the form of holding over damages. The normal measure of holding over damages is the rental value of similar premises: *van der Merwe* v *Erasmus & Anor* 1945 (2) TPD 97 at 102.

Mrs Chapendama is entitled to damages for holding over from the day that she was entitled to vacant occupation of the property. This was 15 December 2011. D Amongst her bundle of documents was an e-mail exchange on 13 February 2012. In her evidence she stated that the e-mail was advice from a firm of estate agents called Bard Properties. They said the average rental for that kind of property was US$550 per month. That evidence was not challenged. Mrs Chapendama's claim herein is for US$500 per month. It is hereby granted. E

In the result I make the following orders:

1 The plaintiffs' claims in HC 1546/12 are hereby dismissed in their entirety.

2 The applicant's claims in HC 1703/12 are hereby granted as follows: F

2.1 It is hereby declared that the applicant paid the full purchase price for the property known as certain piece of land situate in the District of Marandellas, called Stand 427 Marandellas Township, measuring 2 215 m2 and originally held under deed of transfer no 9589/2002 but now held under deed of transfer no 4821/2011, otherwise known as 89 First Street, Paradise Park, Marondera ("the property"). G

2.2 The respondents, Mr Givemore Matanhire and Mrs Lois Matanhire, and all those claiming occupation through them, shall vacate the property within seven days of the date of this order and give vacant occupation of the same to the applicant or her authorised agent, failing which the Sheriff for Zimbabwe, or his lawful deputy, or H

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assistant deputy, duly assisted by the police if need be, shall be A authorised, empowered and directed to evict from the property the respondents and all those claiming occupation through them.

2.3 The respondents shall pay the applicant holding over damages at the rate of US$500 per month from 15 December 2011 to the date on which the respondents, and all those claiming occupation through B them, vacate the property and handover vacant occupation of the same to the applicant, or are evicted from the property.

2.4 The respondents shall pay all the rates, water, electricity and any other utility charges in respect of the property from 15 December 2011 to the date that they vacate the property.

2.5 The costs of suit in HC 1546/12 and HC 1703/12 shall be paid by C the respondents.

2.6 The respondents' obligation to make any payment in terms of this order is joint and several, the one paying the other to be absolved.

Wintertons, first defendant's legal practitioners in Case 1 and applicant's legal D practitioners in Case 2

1 *C Pettigrew (Pvt) Ltd v Cone Textiles (Pvt) Ltd supra* at 297F-G

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[zRPz]ROCK CHEMICAL FILLERS (PVT) LTD v BRIDGE RESOURCES (PVT) LTD & ORS 2014 (2) ZLR 30 (H)

Citation	2014 (2) ZLR 30 (H)
Case No	Judgment No. HH-339-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	1 July 2014; *CAV*
Judgment	9 July 2014
Counsel	*T R Tanyanyiwa,* for the applicant *I Mabulala,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Court – *High Court – jurisdiction – mining dispute – court having jurisdiction to determine dispute – no requirement to refer dispute first to mining commissioner*

Legal practitioner – *conduct and ethics – affidavits – practitioner signing* D *affidavit in absence of purported deponent – dishonourable and dishonest conduct*

Mines and minerals – *mining dispute – mining commissioner – referral of dispute to – whether such dispute must be referred to mining commissioner – right of complainant to approach High Court for relief* E

Headnote

While a mining commissioner has judicial powers, conferred upon him by s 346 of the Mines and Minerals Act [*Chapter 21:05*], to hold a court in any part of the mining district to which he is appointed and to determine disputes in the simplest, speediest and cheapest manner possible, and also to authorise a survey (s 353) for the purpose of ascertaining whether an F encroachment has occurred, the High Court still enjoys jurisdiction over such matters. An application to the High

Court arising out of a mining dispute cannot be defeated by a failure to refer the dispute to a mining commissioner. It is, however, important to note that it is within the province of the court to direct the mining commissioner to commission a survey. Indeed the mining commissioner to whom a complaint has been G made has a duty to investigate the complaint thoroughly.

Quite often legal practitioners indulge in the unfortunate and unbecoming behaviour of signing "affidavits" in their capacities as *ex officio* commissioners of oath, not only without satisfying themselves that an oath is taken but also in the absence of the "deponent". They do this H

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as a favour to colleagues racing against time. Not only is such conduct disdainful, A it is clearly dishonourable. It is the height of dishonesty for a commissioner to authenticate a signature he has not seen the signatory sign, but even worse for him to sign a blank document, hoping that the intended deponent's signature would be appended later. It is a serious dereliction of duty on the part of the commissioner of oaths. The deponent B must always appear before the commissioner and be duly sworn. His signature must be appended in the presence of the commissioner whose signature is an assurance to the court that all these procedures have been compiled with.

Cases cited C

BMG Mining (Pvt) Ltd v *Mining Commissioner, Bulawayo & Ors* 2011 (1) ZLR 74 (H)

Mazuva v Simbi; Simbi v Mazuva 2011 (2) ZLR 319 (H)

S v Hurle & Ors (2) 1998 (2) ZLR 42 (H)

Legislation considered D

Mines and Minerals Act [Chapter 21:05], ss 27, 31, 41, 345, 346 & 353

Case information

T R Tanyanyiwa, for the applicant

I Mabulala, for the respondents

Judgment

Mathonsi J: The applicant is a mining concern which is the registered owner of E certain mining claims known as Riverclay 101 located on Redfields Farm in Kwekwe District, where it mines barytes on 18 claims. The first respondent is also into mining and in that regard it was issued with a Special Prospecting Licence to prospect and search for any minerals, mineral oils and F natural gases in pursuance of which, on 15 May 2014, it gave a prospecting notice which it posted at a spot adjacent to the applicant's registered mining claims.

Upon prospecting and discovering barytes deposits, the first respondent gave a discovery notice and a registration notice demonstrating a clear intent to peg and register 130 barytes claims. A mining dispute then erupted as a result of the first respondent's activities. The applicant complains bitterly that its G hitherto successful and undisturbed mining activities are being threatened by the first respondent who, on 16 June 2014, set up mining machinery on mining claims adjacent to those it owns and commenced mining activities drilling underground into the applicant's mining claims and extracting barytes.

When the applicant's site manager confronted the first respondent, who had H second and third respondents on site, demanding that they cease operations,

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the applicant claims that they threatened violence and also claimed to have A "powerful people" behind them. A complaint to the mining commissioner yielded nothing. The applicant, however, does not state how the complaint was made and has not attached any documentation substantiating the complaint.

As attempts to reason with the first respondent's representatives have not been fruitful, and the mining commissioner has elected not to take any action, the B applicant says it has been forced to approach this court seeking provisional relief stopping the first respondent's mining activities. In making the approach, the applicant has not cited the mining commissioner and a significant *lacuna* exists in the papers on the nature and extent of the applicants' engagement with the mining commissioner.

I must state that the applicant filed a notice of withdrawal of the application C against the second respondent, who is said to be a consultant engaged by the first respondent to analyse barytes deposits found at the prospective mine. The first respondent is opposing the application. An attempt was made to file opposing affidavits on behalf of one Effie Zituta and Most Chikumba, the third respondent, but what was filed are unsigned statements which are surprisingly signed by a commissioner of oaths, Gift Maseko, complete D with his proud stamp of "Legal Practitioner, Conveyancer, Notary Public, Commissioner of Oaths."

It is extremely difficult to grasp what Maseko was signing for because what is glaringly omitted are the signatures of the deponents. Could it be that the E erstwhile commissioner of oaths who, as a legal practitioner, is an officer of this court, administered an oath and forgot to have the deponents append their signatures? I do not think so. Mr *Mabulala,* who appeared for the respondents, could not explain what had transpired but was content to say that he had accompanied his clients to the offices of the legal practitioners in question but did not go into the office to witness the swearing process. He F cannot escape that easily. Mr *Mabulala* is the one who prepared and filed the papers. He should have ensured that he was filing sworn statements and not participating in a circus.

Quite often in legal practice, legal practitioners indulge in this unfortunate and indeed unbecoming behaviour of signing "affidavits" in their capacities G as *ex officio* commissioners of oath, not only without satisfying themselves that an oath is taken but also in the absence of the "deponent", as a favour to colleagues racing against time. Not only is such conduct disdainful, it is clearly dishonourable. It is the height of dishonesty for a commissioner to authenticate a signature he has not seen the signatory sign, even worse for him to sign a blank document, hoping that the intended deponent's H

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signature would be appended later. What status has Mr Maseko's signature A as a commissioner on a document not signed at all?

It is a serious dereliction of duty on the part of the commissioner of oaths. The deponent must always appear before the commissioner and be duly sworn. His signature must be appended in the presence of the commissioner B whose signature is an assurance to the court that all these procedures have been compiled with: *S* v *Hurle & Ors (2)* 1998 (2) ZLR 42 (H) at 50F-G. The commissioner's conduct calls for censure.

I will therefore proceed as if no opposing papers have been filed on behalf of the respondents. Fortunately for the respondents, the applicant having proceeded by urgent application, they are entitled to be heard even without C filing opposition papers owing to the exigencies of the matter.

The plot that is developing in this matter exhibits a boundary dispute where the applicant complains of encroachment on its duly registered mining claims. Mr *Mabulala* submitted that the boundary dispute should have been referred to the mining commissioner for resolution, instead of burdening this court D without the involvement of the mining commissioner. He submitted further that the application lacks merit, given that the first respondent is entitled to prospect up to a radius of 300 metres from the posting point of its notice suggesting, while at the same time denying, encroachment that the first respondent can prospect onto the applicant's mining claims.

Mr *Mabulala* submitted further that recourse to the court of the mining E commissioner presented the applicant with an alternative remedy, thereby disentitling it from making this application. In addition, the first respondent has suggested that the parties enlist the services of surveyors to determine the boundaries, especially as the first respondent has a right in terms of its prospecting licence to prospect around the applicant's mining claims and is F in the process of registering its own barytes mining claims.

Mr *Tanyanyiwa,* for the applicant, insisted that this was not a boundary dispute but a clear case of encroachment and illegal extraction of a mineral belonging to the applicant by a party with no

mining rights whatsoever. On the complaint by Mr *Mabulala* that the interim relief that the applicant seeks G is final in nature and therefore unacceptable, Mr *Tanyanyiwa* urged me, if so disposed, to amend the relief to bring it in line, given that what the applicant submitted was a mere draft.

The first respondent admits that it has been drilling and excavating at the site since 16 June 2014. In terms of s 27 of the Mines and Minerals Act H [*Chapter* 21:05];

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> "(1) Subject to sections 21 and 368, every holder of a prospecting licence shall A be entitled to the following rights:
>
> (a) the right, subject to the provisions and limitations hereinafter contained, of prospecting and searching for any minerals, mineral oils and natural gases on land open to prospecting, *but not of removing or deposing of any mineral discovered* save for the *bona fide* purpose of having it assayed or of determining the nature thereof or with the permission of the mining B commissioner;
>
> (b) the right, subject to the provisions hereinafter contained, of pegging –
>
> (i) one block of precious metal claims; or
>
> (ii) one block of precious stones claims; or
>
> (iii) one block of base mineral claims.
>
> (2) *No drilling or excavation work whether at the surface or underground, shall*C*be undertaken by the holder of a prospecting licence*, save in the exercise of exclusive rights conferred on him by subsection (5) of section 41 or subsection (2) of section 42" (the emphasis is mine).

Section 41 allows the holder of a prospecting licence who desires to drill or excavate to post a prospecting notice on ground open to prospecting, while D s 42 provides that upon discovery of precious metals or precious stones, he shall mark the point of discovery by a peg. The first respondent says the drilling and excavation were conducted in accordance with these provisions. E

The question of a referral of the dispute to the mining commissioner must be considered in conjunction with the provisions of s 345(1) of the Act which provides:

> "Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original jurisdiction in every civil matter, complaint or dispute arising under this Act and if, in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to F a mining commissioner for investigation and report, the Court may make an order to that effect."

Therefore, while the mining commissioner has judicial powers conferred upon him by s 346 of the Act to hold a court in any part of the mining district to which he is appointed and to determine disputes in the simplest, speediest and cheapest manner possible, and also to authorise a survey (s 353), for the G purpose of ascertaining whether an encroachment has occurred, this court still enjoys jurisdiction over such matters. The application can therefore not be defeated by a failure to refer the dispute to a mining commissioner.

It is, however, important to note that it is within the province of this court to direct the mining commissioner to commission a survey. Indeed, the mining H

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commissioner to whom a complaint has been made, as was done by the applicant A in this case, has a duty to investigate the complaint thoroughly: *BMG Mining (Pvt) Ltd* v *Mining Commissioner, Bulawayo & Ors* 2011 (1) ZLR 74 (H) at 79G and *Mazuva* v *Simbi*; *Simbi* v *Mazuva* 2011 (2) ZLR 319 (H) at 325E.

To my mind, it should not be difficult to determine whether an encroachment onto B the applicant's mining claims has occurred. Those registered claims should be clearly marked with beacons easy to locate. If the first respondent's activities are being carried out within those claims, the first respondent should stop that immediately. There is, however, nothing preventing the first respondent from pursuing its endeavours in an area outside the marked C domain of the applicant in accordance with its prospecting licence but it cannot lawfully do so on registered claims as it is precluded by s 31 from doing so.

It would be safe to grant interim relief protecting the applicant's demarcated mining area from any interference while directing the mining commissioner to investigate the matter and compile a report. That way, the dispute may D be brought to a close.

Accordingly I grant the provisional order, as amended, for the interim relief which reads:

"INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the E following relief:

1. The first and third respondents or any of their agents and/or employees, or anyone acting on their behalf are hereby directed to forthwith cease all mining activities on the mining claims of the applicant known as Riverclay 101 on Redfields Farm, as demarcated on the regional map attached to the application, immediately upon service of this order.
2. The dispute over the boundaries of the applicant's mining claims is referred to F the mining commissioner for Gweru/Kwekwe who shall, within 14 days from the date of this order, commission a survey to identify and clearly mark the boundaries of the applicant's mining claims.
3. The mining commissioner shall prepare a report which shall forthwith be filed in the court record and in any event before the return date of G this provisional order."

Manase and Manase, applicant's legal practitioners

Mabulala and Dembure, respondent's legal practitioners

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[zRPz]TRUSTEES, SOS CHILDREN'S VILLAGE ASSOCIATION OF ZIMBABWE v BIN-DURA UNIVERSITY & ORS 2014 (2) ZLR 36 (H)

Citation	2014 (2) ZLR 36 (H)
Case No	Judgment No. HH-349-14
Court	High Court, Harare
Judge	Mafusire J
Heard	20 June 2014; *CAV*
Judgment	10 July 2014
Counsel	*I Mureriwa,* for the applicant *I Ndudzo,* for the first respondent *H Magadure,* for the third and fourth respondents Second respondent in person
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Interdict – *spoliation order – mandament van spolie – not the same thing – differences between the remedies*

Legal practitioner – *conduct and ethics – practitioner a witness to events forming the subject matter of litigation – legal practitioner not disbarred* D *from representing client in court proceedings – inadvisability of acting*

Property and real rights – *spoliation order – mandament van spolie – requirements for – peaceful and undisturbed possession – remedy not available in event of temporary disturbance of possession or a threat thereof – interdict – not the same as a mandament van spolie – differences between the remedies* E

Headnote

There is no rule to the effect that a lawyer is automatically disbarred from representing his client in court proceedings where he was a witness to events that subsequently form the subject matter of those proceedings or where he has filed an affidavit confirming his involvement or supporting F his clients version of events. Nonetheless, a lawyer who finds himself in that situation must consider seriously the wisdom of wearing two hats: that of being counsel for the client and that of being a witness for the client. It would be more prudent to let someone else conduct the court proceedings where the lawyer has been seriously involved in G the affairs of the client giving rise to the litigation. This is so to avoid a conflict situation. The lawyer should at all times avoid clouding his sense of judgment.

The remedy of spoliation or *mandament van spolie* is designed to restore at once possession which has been deprived unlawfully. The applicant must show that he was in peaceful and undisturbed possession of the H

Tsanga J

thing and was unlawfully deprived thereof. It is a quick remedy and its rationale A is to prevent anarchy in society. People must not resort to self help each time they want to recover things they consider belong to them and which may be in possession of another. The remedy is, however, only aimed at the recovery of lost possession. It does not lie where there has been a mere temporary disturbance of B possession or a threat that possession will be disturbed.

The *mandament van spolie* is a unique remedy that falls within a category of its own and should not be confused with an interdict. The most important difference between the *mandament* and an interdict is that the merits are not considered where the *mandament* is claimed, whereas the merits are C extremely important where an interdict is sought, in that a clear right has to be established

Cases cited

Beukes v *Crous* 1975 (4) SA 215 (NC)

Bon Quelle (Edms) Bpk v *Munisipaliteit van Otavi* 1989 (1) SA 508 (A)

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

Core Mining & Minerals Resources (Pvt) Ltd v *Zimbabwe Mining Development Corp & Ors* 2011 (1) ZLR 22 (H)

Kama Construction (Pvt) Ltd v *Cold Comfort Farm Co-op & Ors* 1999 (2) ZLR 19 (S)

Mankowitz v *Loewenthal* 1982 (3) SA 758 (A)

Muller v *Muller* 1915 TPD 28 E

Naidoo v *Moodley* 1982 (4) SA 82 (T)

Sebastian & Ors v *Malelane Irrigation Bd* 1950 (2) SA 690 (T)

Shoprite Checkers Ltd v *Pangbourne Properties Ltd* 1994 (1) SA 616 (W)

Tigon Ltd v *Bestyet Invstms (Pty) Ltd* 2001 (4) SA 634 (N)

van Rooyen en 'n Ander v *Burger* 1960 (4) SA 356 (O)F

Xsimet (Pty) Ltd v *Telkom SA Ltd* 2002 (3) SA 629 (C)

Case information

I Mureriwa, for the applicant

I Ndudzo, for the first respondent

H Magadure, for the third and fourth respondents

Second respondent in person G

Judgment

Mafusire J: On 13 June 2014 the applicant filed an urgent chamber application for an order of spoliation. The order was sought in respect of a farm called Glen Avilin Estate (hereafter referred to as "the farm"). What H triggered the application were the events that had occurred on the farm on

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12 June 2014. The applicant's version of events was set out in its founding A papers. Except for the fourth respondent, all the others filed opposing affidavits. I heard the application on 20 June 2014. I dismissed it with costs for lack of merit. The applicant has now sought written reasons for my decision.

The facts presented by the applicant in its founding papers were these. It is a private voluntary organisation. It looks after thousands of orphans and B other vulnerable children. For its operations, it used to rely mainly on donor support. However, that support had dwindled. It now relied increasingly on farming and other income generating activities being carried out on the farm. The applicant had been on the farm since 1983. However, on 12 June 2014, officials of respondents 1, 2 and 3 called the applicant's director, Gary Birditt, to come to the farm. He came in the company of the applicant's C counsel, Mr *Mureriwa*.

According to Mr Birditt it was apparent the respondents were planning a major event. There were too many government officials. Armed personnel were also present. A shed had been erected. Chairs and tables had been arranged. On enquiry, Mr Birditt had been advised that the farm had been allocated by government to the first respondent in terms of an offer letter. D The planned event was to officially hand over the farm to the first respondent.

Mr Birditt and Mr *Mureriwa* had protested. They said the intended takeover would be illegal. However, the respondents had remained resolute. The ceremony would proceed. Mr Birditt and the lawyer had left. On the following day the application had been filed. The order of spoliation was being sought E on the basis that at all relevant times the applicant had been in peaceful and undisturbed possession of the farm but that on 12 June 2014 the respondents had forcibly taken it over, leaving the applicant's employees and students on vocational training hopelessly wandering about. It was also alleged that the applicant's operations had ceased owing to the takeover.

In their opposing affidavits, the respondents strenuously denied that they had F despoiled the applicant. They maintained that the events of 12 June 2014 had merely been a symbolic ceremony for the purpose of handing over the ownership of the farm to the first respondent. Mr Birditt had been invited to the ceremony. He had come with his lawyer. However, both had left before the proceedings had even started. G

The respondents said it had been a peaceful ceremony. No force had been used or shown. Everybody had left after the proceedings had been concluded. The temporary shelter had been dismantled.

The respondents said the farm had been compulsorily acquired by Government in May 2002 in terms of the land reform programme. Over the years it had H

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become derelict due to neglect. The applicant's donors had dwindled. The farm A had become prone to illegal land invaders from the surrounding villages. On 10 February 2014 Government had officially allocated the farm to the first respondent. However, neither Government nor the first respondent had yet taken occupation. It was said an application to evict the applicant from the farm was pending. But guards had been posted to the farm for security. B They had been deployed in February 2014. The applicant had raised no issue over the presence of the guards. They interfered with no one.

At the hearing, more facts came to light. The applicant conceded the presence of the respondents' security guards on the farm since February 2014. It said at any given time there would be two

guards around. The applicant also conceded C that other than the security guards, none of the respondents' officials had remained on the farm. During submissions Mr *Mureriwa* said the application for spoliation was in fact predicated on the presence of those guards.

Before argument on the merits the respondents raised some points *in limine*. The first was that the matter was not urgent because a similar application had D been made in 2011 and that it had been dismissed. The second point was that the matter had become *res judicata* by virtue of that previous application. However, I dismissed both points. It was conceded that the application in 2011 had been in respect of a different farm altogether even though their circumstances seemed the same. With particular regard to the question of urgency I dismissed it because the first respondent had expressly conceded that E a spoliation application is generally urgent by its very nature. Furthermore, the application was predicated on the events of 12 June 2014. If the conduct of the respondents complained of amounted to spoliation then there would be no question that the matter was urgent.

The third point *in limine* was that Mr *Mureriwa* should be disqualified F from representing the applicant. He had been present at the scene. He had witnessed the events. According to the respondents' submissions, it was Mr *Mureriwa* himself who had in fact engineered the dispute. On top of that he had filed a supporting affidavit to the proceedings. He had become so intimately involved in the affairs of his client that his impartiality and sense of judgment had become compromised. Reference was made to G*Core Mining and Minerals Resources (Pvt) Ltd* v *Zimbabwe Mining Development Corporation and Ors* 2011 (1) ZLR 22 (H). Therein, the court had disbarred counsel for some of the respondents from representing them at the hearing. He had had extensive and intimate dealings on behalf of those respondents and had aligned himself so closely with their affairs. On top of that, those H respondents' affidavit had been commissioned by his firm.

Tsanga J

I dismissed the respondents' third point *in limine*. It was common cause that A Mr *Mureriwa* had questioned and challenged the respondents' presence on the applicant's farm on the day in question. He had filed an affidavit supporting Mr Birditt's version of events. Mr Birditt's affidavit had touched on the nature and extent of Mr *Mureriwa's* involvement.

However, I took the view that the nature and extent of involvement of Mr *Mureriwa* in the applicant's affairs on 12 June 2014 was in no way comparable B to that of counsel in *Core Mining and Mineral Resources*. In my view, there is no rule of thumb that says a lawyer is automatically disbarred from representing his client in court proceedings where he was a witness to the events that subsequently form the subject matter of those proceedings, or where he has filed an affidavit confirming his involvement and supporting C his client's version of events. Every case must depend on its own set of circumstances. Nonetheless, and in my view, a lawyer who finds himself in Mr *Mureriwa's* situation must consider seriously the wisdom of wearing the two hats: that of being counsel for the client and that of being a witness for the client. In my view, it would be more prudent to let someone else conduct the court proceedings where the lawyer has been seriously involved in the D affairs of the client giving rise to the litigation. This is so to avoid a conflict situation. The lawyer should at all times avoid clouding his sense of judgment.

In this matter, it is my earnest view that the precipitous manner in which Mr *Mureriwa* brought these proceedings betrayed the invidious position of his situation. On the merits, it seemed true that his sense of judgment had E somewhat been impaired. He had challenged the presence of the respondents' representatives on the farm on the day in question. The farm is somewhere in Shamva, some 10 km away from Bindura. On being rebuffed by the respondents' representatives Mr *Mureriwa* had rushed back to his offices in Harare, more than 80 km away. By the following day the urgent chamber application was all ready and complete. It was filed on 13 June 2014. F

In my view, the application was completely devoid of merit. No wonder during the proceedings the applicant shifted ground and sought to rely on facts that had not formed part of the application. It sought to rely on the presence of the security guards on the farm to found an act of spoliation. G

The remedy of spoliation or *mandament van spolie* is designed to restore at once possession that has been deprived unlawfully: see Silberberg and Schoeman's *The Law of Property* 5 ed para 13.2.1.2 at p 288. See also *Kama Construction (Pvt) Ltd* v *Cold Comfort Farm Co-operative & Ors* 1999 (2) ZLR 19 (S). The applicant must show that he was in peaceful and undisturbed possession of the thing and that he was unlawfully deprived of H

Tsanga J

such possession: *Kama Construction (Pvt) Ltd, supra,* and *Botha & Anor* v *Barrett*A 1996 (2) ZLR 73 (S) at p 79D-F.

Spoliation is a quick remedy. Its rationale is to prevent anarchy in society: *Muller* v *Muller* 1915 TPD 28 at 31. People must not resort to self-help each time they want to recover things they feel belong to them and which may be in the possession of another. In *Shoprite Checkers Ltd* v *Pangbourne Properties Ltd*B1994 (1) SA 616 (W) at 619H *per* Zulman J, the rationale was expressed this way:

> "All of this of course is based upon the fundamental principle that no man is allowed to take the law into his own hands and that no one is permitted to dispossess another forcibly or wrongfully and against his consent 'of the possession of property, whether movable or immovable' and that if he does so 'the Court will C summarily restore the *status quo ante* and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.'"

Spoliation is aimed only at the recovery of lost possession. It does not lie where there has been a mere disturbance of possession or a threat that possession will be disturbed: Silberberg and Schoeman *op cit* para 13.2.2 D at p 308. It implies a deprivation and not a mere disturbance of possession; para 13.2.1.3 (b) at 295. See also *van Rooyen en'n Ander* v *Burger* 1960 (4) SA 356 (O) at 363B-F.

I am alive to the fact that an illicit dispossession of a right, whether corporeal or incorporeal, can be protected by an order *mandament van spolie*: *Kama Construction (Pvt) Ltd, supra*, at 22. What is protected is the quasi-possession E of a movable or immovable incorporeal. Thus in *Sebastian & Ors* v *Malelane Irrigation Board* 1950 (2) SA 690 (T) a spoliation order was granted for the unlawful interruption of water supplies. In *Naidoo* v *Moodley* 1982 (4) SA 82 (T) a spoliation order was granted for the interruption of the flow of electricity. In *Beukes* v *Crous* 1975 (4) SA 215 (NC) and *Bon Quelle (Edms) Bpk*F v *Munisipaliteit van Otavi* 1989 (1) SA 508 (A) orders were granted to restore the right of passage, i.e. a servitude. In *Tigon Ltd* v *Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N) an order was granted restoring the name of a shareholder of a company back in the share register where such name had been removed unilaterally. Finally, in *Xsimet (Pty) Ltd* v *Telkom SA Ltd* 2002 (3) SA 629 (C) an order was granted to restore the applicant's G telephone connectivity and bandwidth system that the respondent, the service provider, had unlawfully terminated.

In casu the applicant was neither despoiled of the physical possession of the farm nor deprived of its right of possession of it. The brief presence of the respondents on the farm on 12 June 2014 was to hand over to the first H respondent symbolically the ownership, not possession, of the farm. The

Tsanga J

applicant's physical or mental possession of the farm was not taken away. A The applicant was still on the farm. On a balance of probabilities, I chose to believe the respondents' version of events. Once the symbolical handover was over the respondents had left. At worst, the ceremony was a *disturbance* of possession rather than a *deprivation* of it. Spoliation is not available in such circumstances.

Whether the applicant could interdict the respondents from coming onto B the farm before they had done so is besides the point. The event was over and done with by the time the applicant brought its application. There was no longer anything to interdict. But as it prepared its papers for the order of spoliation, it seems the applicant was somewhat confused on the choice of remedy. After laying out the foundation for a spoliation order it also went C on to lay out some foundation for an interdict. Among other things, the applicant alleged a *prima facie* right. It alleged an actual harm suffered; the absence of no other effective remedy; the balance of convenience being in its favour and the fear of an irreparable harm. All these are factors for an interlocutory interdict. In the result the applicant sought a provisional order the draft of which was clearly a hybrid. The final order sought an interdict. D The provisional order sought an order of spoliation.

In my view, the applicant's approach was defective. An order of spoliation is a final order. It does not have an interlocutory nature: see *Mankowitz* v *Loewenthal* 1982 (3) SA 758 at 767F-H. The two elements of spoliation, namely peaceful and undisturbed possession and the act of spoliation, have E

to be proved on a balance of probabilities. On this point the learned authors Silberberg and Schoeman, *supra*, para 13.2.1.3 at p 292 say:

> "These two facts have to be proved on a balance of probabilities: a *prima facie* case will not suffice, the *mandament van spolie* being a final order."

In a footnote, and after citing several case authorities on the point, the learned authors say: F

> "Kleyn [1] emphasises this aspect very clearly in his discussion of the *Aussenkehr* case. The *mandament* is a unique remedy that falls within a category of its own and should not be confused with an interdict. The most important difference between the *mandament* and an interdict is that the merits are not considered where the *mandament* is claimed, whereas the merits are extremely important G when an interdict is sought in that a clear right has to be established."

It is for the above reasons that I dismissed the application.

Tsanga J

Scanlen & Holderness, applicant's legal practitioners A

Mutamangira & Associates, first respondent's legal practitioners

Civil Division, Attorney-General's Office, legal practitioners for the third and fourth respondents.

1 D Kleyn (1989) 22 *De Jure* 154 (case note on *Ntshwaqela* v *Chrmn, Western Cape Regional Svcs Council* 1988 (3) SA 218 (C)).

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[zRPz]ZIMBABWE LAWYERS FOR HUMAN RIGHTS v MINISTER OF TRANSPORT & ORS 2014 (2) ZLR 44 (H)

Citation	2014 (2) ZLR 44 (H)
Case No	Judgment No. HH-353-14
Court	High Court, Harare
Judge	Mafusire J
Heard	11 July 2014; *CAV*
Judgment	14 July 2014
Counsel	*L Uriri,* with him *J Shekede* and *D Chimbga*, for the applicant Ms *K Warinda*, with her Ms *K Murefu*, for the first respondent *F Mutamangira*, with him *I Ndudzo*, and Mr *Mutevedzi*, for the second respondent
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Regulations – *validity – citation of wrong Act – regulations otherwise in order – regulations valid – unreasonableness – averment that fees charged under regulations unreasonably high – what person averring unreasonableness must show* D

Road traffic – *toll roads – increase in toll fees – validity of such increase – requirement for Minister to consult Minister of Finance – no requirement to consult stakeholders*

Headnote

The Toll Roads Act [*Chapter 13:13*] empowers the Minister of Transport to E declare, by regulation, any road to be a toll-road. By SI 39 of 2009 the Minister declared every route along the city to city trunk road network to be a toll road. Section 3 of the Act empowers the Minister to specify any person and to authorise such person to levy and collect tolls on vehicles using any toll-road. The authorised person is empowered to establish and erect on such roads toll-bars, toll-gates and other structures to facilitate F the levying and collection of tolls. The Minister may fix the amount of any toll after consulting the Minister of Finance.

On 4 July 2014 the Minister published the Toll Roads (Regional Trunk Road Network) (Amendment) Regulations, 2014 (No. 5) (SI 106 of 2014), which increased the toll fees across the board, in some cases by G 100 percent. The applicant, a human rights organisation, applied for an interdict for the setting aside of the statutory instrument. Its grounds for doing so were primarily that the margin of the increase in the toll fees was so unreasonable that no reasonable decision maker, properly applying his mind, could have arrived at such margin. The applicant also argued that the statutory instrument was invalid, because it purported to have H

been made in terms of s 6 of the Road Motor Transportation Act (which was cited A as *Chapter 13:13*, although the correct chapter number for that Act is 13:15). Finally, the applicant argued, the Minister had failed to consult the Minister of Finance in fixing the new toll tariff and also failed to consult all the stakeholders.

The respondents argued that, whilst the court had the power to review the B legislative function of the executive arm of government, the court was being asked to impugn something that was squarely within the exclusive domain of the executive. The court lacked the knowledge, training, expertise or the information necessary to challenge or judge such a function. The Minister's action in fixing or raising toll tariffs C was an executive and polycentric function. It was more than a mere administrative action of the type contemplated by the Administrative Justice Act [*Chapter 10:28*]. It was a legislative function, and it was debatable whether the court's traditional function of judicial review extended to the legislative function of the legislature.

Held that, the exercise of an executive prerogative is not necessarily an act the D validity of which is beyond the jurisdiction of the court. It is only those acts of state in respect of which the jurisdiction of the court is ousted that the court may not review. Such executive prerogatives are now very few and far between. Whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectation of the E citizens, the jurisdiction of the courts is not ousted. Certain acts of state that may be exercised by the President in terms of the Constitution are beyond the jurisdiction of the court, but even then, should the exercise of these prerogatives be done under unlawful conditions or be performed outside the law, the courts have a duty to review them. Section 68 of F the Constitution and the Administrative Justice Act were in most ways a mere codification of the traditional powers of the courts to review the exercise of the functions of the executive. The Act was merely an elaborate restatement of the rules of natural justice.

Held, further, that the citation of the wrong Act was an error that was so infinitesimal as to be inconsequential. It was practically a typing error, G a slip of the pen by the typist, or of the tongue by whoever may have dictated the contents. A law cannot be knocked down for such a minor mistake. There was no question that the Minister does have the power under s 6 of the

Tolls Roads Act to fix toll tariffs. All the other provisions of the SI seemed in order except for the erroneous reference to the Road H Motor Transportation Act.

Held, further, that on the alleged failure to consult the Minister of Finance, A the applicant produced no proof of such failure. He who alleges must prove. Further, the presumption of validity operated. An act regular on the face of it is valid until the contrary is proved. As to the failure to consult "stakeholders", the law did not make it obligatory for the Minister to consult anyone other than the Minister of Finance.

Held, further, that on the argument that the increase was unreasonable, the B obvious question was: unreasonable compared to what? Without some kind of empirical evidence, how could a court quantify unreasonableness?

Held, further, that the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and C implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

Cases cited D

Biowatch Trust v *Registrar, Genetic Resources & Ors* 2009 (6) SA 232 (CC)

Blair Atholl Homeowners Assn & Ors v City of Tshwane Metropolitan Municipality [2014] ZAGPPHC 161

Doctors for Life Intl v Speaker of the National Assembly & Ors 2006 (6) SA 416 (CC), 2006 (12) BCLR1399 E

Mankowitz v Loewenthal 1982 (3) SA 758 (A)

National Treasury & Ors v Opposition to Urban Tolling Alliance & Ors 2012 (6) SA 223 (CC)

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)

*Opposition to Urban Tolling Alliance & Ors v SA National Roads Agency*F*Ltd & Ors* [2013] 4 All SA 639 (SCA)

PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S)

Setlogelo v Setlogelo 1914 AD 221

Trustees, SOS Children's Village v Bindura University & Ors 2014 (2) ZLR 35 (H)

*Zindoga & Ors v Min of Public Svc, Labour & Social Welfare & Anor*G 2006 (2) ZLR 10 (H)

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 3 & 4(1)

Constitution of Zimbabwe 2013, ss 68 & 85 H

Mafusire J

High Court Rules 1971 (RGN 1047 of 1971), r 226 A

Road Motor Transportation Act [*Chapter 13:15*]

Toll Roads Act [*Chapter 13:13*], s 3(1)(c)

Toll Roads (Regional Trunk Road Network) (Amendment) Regulations 2014 (No. 5) (SI 106 of 2014)

Case information

L Uriri, with him *J Shekede* and *D Chimbga*, for the applicant B

Ms *K Warinda*, with her Ms *K Murefu*, for the first respondent

F Mutamangira, with him *I Ndudzo*, and Mr *Mutevedzi*, for the second respondent

Judgment

Mafusire J: The Toll Roads Act [*Chapter 13:15*] ("TORA") empowers C the Minister of Transport (hereafter referred to as "the Minister" or "the Minister of Transport") to declare, by regulation, any road to be a toll-road. In terms thereof a toll-road is a road declared to be a toll-road in terms of the regulations made by the Minister. By SI 39 of 2009, namely the Road Tolls (Regional Trunk Road Network) (Amendment) Regulations 2009 D (SI 39 of 2009), the Minister declared every route along the City to City Trunk Road Network as specified therein to be a toll road. The City to City Trunk Road Network, in terms of those regulations, are roads of the Regional Trunk Road Network that link cities within Zimbabwe. The Regional Trunk Road Network are roads linking countries within the Southern African Region.

Section 3 of TORA empowers the Minister to specify any person and to E authorise them to levy and collect tolls on vehicles using any toll-road. The authorised person is empowered to establish and erect on toll-roads toll-bars, toll-gates and other structures to facilitate the levying and collection of tolls. The Minister may fix the amount of any toll after consulting the Minister responsible for finance (hereafter referred to as the Minister of Finance).

In terms of SI 39 of 2009 the amounts fixed by the Minister as tolls at any tolling F point were US$1 for motor cycles; US$2 for light motor-vehicles, US$3 for minibuses, US$5 for buses; US$7 for heavy vehicles and US$10 for haulage trucks. These amounts seem to have been revised from time to time. As at 4 July 2014 there was no toll for motor cycles. As for the rest of the other motor vehicles the amounts were US$1 for light motor-vehicles, G US$2 for minibuses, US$3 for buses; US$4 for heavy vehicles and US$5 for haulage trucks.

On 4 July 2014 the Minister published SI 106 of 2014 namely Toll Roads (Regional Trunk Road Network) (Amendment) Regulations 2014 (No. 5) (hereafter referred to as SI 106 of 2014 or "the Regulations"). It increased H the toll fees across the board. In United States dollar terms the amounts

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went up to US$2 for light motor-vehicles, US$3 for minibuses, US$4 for A buses; US$5 for heavy vehicles and US$10 for haulage trucks. In a notice published on 6 July 2014 in a weekly newspaper, *The Sunday Mail*, (hereafter referred to as "the public notice") it was announced that the new toll fees would become effective from 11 July 2014.

It is SI 106 of 2014 that has sparked the litigation in this matter. On 9 July 2014 B the applicant filed an urgent chamber application for an interdict. For interim relief the applicant sought the order that pending the determination of its application for the setting aside of SI 106 of 2014, the second respondent (hereafter referred to as ZINARA), its officers, agents, employees or all such other persons acting for or through it be interdicted from implementing SI 106 of 2014. It was also sought as an interim relief the order that the public C notice be suspended. As final relief the applicant sought the setting aside of SI 106 of 2014.

The applicant is a not-for-profit human rights organisation duly established in terms of its constitution and capable of suing and being sued. Its core object is the fostering of a culture of human rights in Zimbabwe through D the observance of the rule of law. Its members are legal practitioners and law students. As for its *locus standi* to bring these proceedings the applicant relied on its direct and substantial interest in the matter. As owner of a number of motor vehicles in its own right, the applicant said SI 106 of 2014 equally applied to it as it does to all the other owners of motor vehicles in Zimbabwe. It said it is also an aggrieved person within the meaning of s 4(1) E of the Administrative Justice Act [*Chapter 10:28*] (AJA). This section gives power to apply to this court for relief to any person who is aggrieved by the failure of an administrative authority to comply with AJA.

The applicant also relied on s 85 of the Constitution of Zimbabwe (the Constitution). That section permits any person to approach a court for relief F in respect of an infringement of any of the fundamental rights or freedoms enshrined in the Constitution. Such a person can do so acting in their own interest. They can also do so acting in a representative capacity such as in the interests of a group; a class of persons; in the public interest or in the interest of its members.

The applicant's case was this. The Minister is an administrative authority G within the meaning of AJA. ZINARA is that person specified and authorised by the Minister in terms of TORA, *inter alia*, to

levy and collect tolls in respect of vehicles along toll-roads. The applicant said the Minister fixed the new toll in terms SI 106 of 2014 without first having consulted the Minister of Finance and that this was contrary to the provisions of s 3(1)(c) of TORA. H

2014 (2) ZLR p49

Mafusire J

The applicant accused the Minister allegedly of abusing the discretion and A power bestowed on him by charging exorbitant tolls. This was said to be contrary to public policy.

The gravamen of the applicant's case is aptly captured in paragraph 23.3 of the founding affidavit that was deposed to by one of its board members and B chairman of its finance committee, one Selby Vunganai Hwacha, a practising legal practitioner. He wrote:

> "The margin of the increase in the toll fees is so unreasonable that no reasonable decision maker properly applying his mind could have arrived at such margin. In this regard, it is pertinent to highlight that the national economy has not been performing well. There are fears that deflation may set in. There has been a record C number of company closures. Public entities are struggling to pay salaries. The economy is illiquid. Where are the members of the public expected to get the money to fund these ambitious toll fees?"

The applicant argued that toll gates and tolls were incepted in 2009. Five years on there has not been any meaningful improvement to the road system in the country. On 24 June 2014, the applicant, reacting to press reports on his D intention to increase the tolls, had written to the Minister, citing the Access to Information and Protection of Privacy Act [*Chapter 10:27*], basically demanding an account of the toll collections to date. Among other things, the applicant sought information on the total collections; a breakdown of the use to which those collections had been put; the names of the contractors E engaged for the installation and rehabilitation of the road infrastructure and network, and such other similar information. The applicant said there was no response to its letter.

Evidently, wishing to highlight the unreasonableness, oppressive and burdensome nature of the toll increase the applicant picked one toll-gate along the Harare-Mazoe Road. Beyond it are many families driving past it F every day on their way to and from work in Harare. With the new increase a motorist would need US$4 per day or US$120 per month or US$1 440 per year in toll-gate fees for a light motor vehicle. A haulage truck driver, at US$20 per day, would need US$600 per month or US$7 200 per year. These motorists would still need to maintain, fuel and licence their vehicles. G Yet, apart from tolls, the government does have numerous other sources of income to fund road construction and maintenance such as fuel levies, vehicle licencing fees, transit fees and several fines.

The applicant said SI 106 of 2014 was null and void for want of compliance with s 68 of the Constitution as read with s 3 of AJA. Section 68 of the H Constitution reads:

2014 (2) ZLR p50

Mafusire J

> **"68 Right to administrative justice**A
>
> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantially and procedurally fair.
>
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the rea son for that conduct. B
>
> (3) An Act of Parliament must give effect to these rights, and must –
>
> (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
>
> (b) impose a duty on the State to give effect to the rights in subsection (1) and (2); and
>
> (c) promote an efficient administration." C

Section 3 of the AJA reads:

> "**3 Duty of administrative authority**
>
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectation of any person shall – D
>
> (a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law, or if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and

(c) where it has taken the action, supply written reasons therefor within a E reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –

(a) adequate notice of the nature and purpose of the proposed action; and

(b) a reasonable opportunity to make adequate representations; and F

(c) adequate notice of any right of review or appeal where applicable."

Subsection (3) provides instances when an administrative authority may depart from the requirements of subsections (1) and (2). Section 4 provides for the relief against administrative authorities for breach of the Act. An aggrieved person may apply to this court for relief. The relief includes, *inter alia*, the G right to have the decision concerned set aside. The court can refer the matter back to the administrative authority for consideration or reconsideration. It can also give several other directions.

I heard the urgent chamber application on 11 July 2014. I was advised that SI 106 of 2014 had already become operational from mid-night on that day. H

Mafusire J

The respondents took two points *in limine*. I reserved judgment on them. I A proceeded to hear argument on the merits. I also reserved judgment. This now is my judgment on both the points *in limine* and on the merits.

The respondents' first point *in limine* was that the application was not urgent. Mr *Mutamangira*, for ZINARA, said by 24 June 2014 the applicant had B written to the Minister objecting to his intention to increase the toll. Thus, the applicant had become aware of the pending legislation by then. That should have been the time for it to have acted. It had not.

Mr *Mutamangira* also argued that SI 106 of 2014 had been published in the Government *Gazette* on 4 July 2014. Thus, it had automatically come into force at midnight on that day. The public notice in the *Sunday Mail* on 6 July 2014 C deferring the coming into operation of the regulation to 11 July 2014 had merely been an administrative action that did not detract from the fact that the regulation was already in force. Furthermore, and at any rate, even in terms of the public notice the implementation of the regulation had started at mid-night on 11 July 2014, i.e. the day of the hearing. Therefore, the applicant's intended injunction had come too late. The horse had already D bolted. To try and suspend it now would cause confusion and uncertainty to the public at large.

In response to the respondents' first point *in limine* aforesaid, Mr *Uriri*, for the applicant, countered that the clock on urgency could not possibly have started to tick on 24 June 2014 when the applicant had written to the Minister. E Nothing had been promulgated by then. Even after its promulgation on 4 July 2014, the Minister had, on 6 July 2014, consciously taken an administrative decision to defer the coming into operation of the regulation to 11 July 2014. 4 July 2014 had been a Friday. There had been a supervening weekend. 6 July 2014 had been a Sunday. The application had been filed on 9 July 2014. F There had been no significant delay. Among other things, it had been necessary for the applicant to collate the information and to prepare and present it properly.

Mr *Uriri* argued that it could not be said the horse had bolted. The harm complained of was of a continuing nature. He said each minute that the regulation was in force would give rise to a new cause of action.

I hereby dismiss the respondents' first point *in limine*. It amounts to nit-picking on G a matter of such public importance. I agree with the applicant's contention. It cannot be said the clock for urgency had started to tick around the time it had written to the Minister. The application is not about the Minister's failure or refusal to respond to the applicant's letter. It is about the H subsidiary legislation that the Minister had subsequently promulgated and

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Mafusire J

brought into force. At the time the applicant had written to him, the Minister A had not yet acted, or at least his action in the form of the regulation had not yet come into the public domain. It would have been premature for the applicant to have rushed to court at that stage to attack what was no more than a mere intention.

When the Minister did eventually act by publishing the Regulations it was B on the eve of a weekend. But even before that weekend was up, ZINARA, with the Minister's blessing, had already published the public notice to defer by one week the operation of the Regulations. That was more precious time for the applicant. It then launched its application on 9 July 2014. The delay was only two working days. In such circumstances it would be unreasonable and cruel to declare the applicant non-suited. C

Nor is it a case of the horse having bolted. Every day that the Regulations are in force the horse is bolting. Or it is a question of more of them bolting. The Regulations may have become a *fait accompli* on paper. But its effect on the ground is not. If the Regulations were the kind of harm against which the law invented the remedy of an interdict, then it is a continuing harm. For D as long as it is a continuing harm the applicant can invoke the assistance of the court.

The respondents' second point *in limine* was that there was no cause of action for me to sit in judgment. The argument was twofold. It ran like this.

Firstly, the applicant was, in effect, seeking a review of the Regulations. Such a review would have to be in the form of a court application on Form 29 as E prescribed by the High Court rules. The true nature of the present urgent chamber application was that it was one for an interdict *pendente lite*. An application *pendente lite* is an interlocutory application. It is one pending something, or a *lis*. But for the applicant, there was no other *lis* pending. It had filed no review application. The applicant was in effect seeking the F overturning of a law that was valid on the face of it. SI 106 of 2014 was valid until set aside. It is unprocedural for a court to overturn a valid law in summary fashion.

For the second leg of their second point *in limine*, the respondents said, as I understood them, and in my own words, there was no cause of action for me to sit in judgment because, whilst the court has the power to review the G legislative function of the executive arm of government, really what the applicant was urging the court to do was to impugn something that was squarely within the exclusive domain of the executive. The court lacks the necessary knowledge, the necessary training, the necessary expertise or the necessary information to challenge or judge such a function. The Minister's action in H

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fixing or raising toll tariffs was an executive and polycentric function. A Mr *Mutamangira* said that this was more than a mere "administrative action" of the type contemplated by AJA. It was a legislative function. He said available jurisprudence in this jurisdiction and beyond suggests that the matter is still an open question. It is debatable whether the court's traditional function of judicial review extends to the legislative function of the legislature.

Mr *Mutamangira* contended that the traditional test for an interlocutory interdict as B set out in the *locus classicus Setlogelo* v *Setlogelo* 1914 AD 221, over 100 years ago and which has been followed in numerous subsequent cases is in respect of interdicts between private individuals. It is not wholly applicable where the other party is the State and where the challenge is in C respect of its legislative power. Different considerations apply. He referred to the South African e-tolling cases: *National Treasury and Ors* v *Opposition to Urban Tolling Alliance & Ors* 2012 (6) SA 223 (CC); *Opposition to Urban Tolling Alliance & Ors* v *South African National Roads Agency Limited* 2013 (4) All SA 639 (SCA) (Judgment No. 90/2013 of the Supreme Court of Appeal of South Africa) and the yet to be reported *Blair Athol* case, D*Blair Atholl Homeowners Association & Ors* v *City of Tshwane Metropolitan Municipality* [2014] ZAGPPHC 161. The latter case was decided in the South African North Gauteng High Court in April this year. It was in respect of the power of a municipality to levy charges on homeowners in a township under the jurisdiction of the municipality.

Ms *Warinda* was more bullish. She would take no prisoners on this. There was no E cause of action for the court to decide, she argued. It was *impossible* for this court to sit to review a legislative function of the executive arm of government. What the Minister had done in promulgating SI 106 of 2014 was an exercise of a legislative function. This is a function different from the Minister's other administrative functions. She gave an example. A F dispute over mining concessions or mining claims first goes to the mining commissioner for determination. From there an appeal lies to the

Minister of Mines. In determining the appeal the Minister of Mines is exercising a purely administrative function. That is reviewable by the courts exercising their ordinary review powers. Not when the Minister is making regulations. He is now exercising delegated authority to make law. The courts have no G jurisdiction to review such a function.

To quash the respondents' second leg of their second point *in limine*, Mr *Uriri*, for the applicant, sprung an argument that neither formed part of its grounds of impeachment in the founding affidavit nor about which any notice had been given. He argued that it was a point of law which he could raise for the H first time at any time. It was also an argument meant to bury the respondents'

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objection on urgency which I have already dealt with. It was a point that A appeared *ex facie* the documents. It was this: SI 106 of 2014 was titled Toll Roads (Regional Trunk Roads Network) (Amendment) Regulations, 2014 (No. 5). Subsidiary legislation such as statutory instruments cites the author and the enabling Act under which they are promulgated. SI 106 of 2014 said:

> "IT is hereby notified that the Minister of Transport, Communication and B Infrastructural Development has, in terms of section 6 of the Road Motor Transportation Act [*Chapter 13:13*] made the following regulations –
>
> 1. …
> 2. …"

The reference to the Road Motor Transportation Act (ROMTRA) was a patent C error. The Minister's power to fix toll fees by regulations is prescribed by TORA, not ROMTRA. ROMTRA is not Chapter 13:13. It is Chapter 13:*15*. It is TORA that is Chapter 13:13. Mr *Uriri* said that this was unforgivable. The regulations were void *ipso jure*. The Minister had purported to act under a non-existent law. Under such circumstances there could be no presumption of validity. Both the purported legislative action of the Minister in coming up D with SI 106 of 2014 and his administrative function to postpone the start date of the regulation drew their life blood from a non-existent law. The court has an inherent power to remedy such an obvious illegality, Mr *Uriri* charged.

Regarding the argument that there was no review application, Mr *Uriri* contended that what was before me was a hybrid. It was, on the one hand, E an application for review which would be ventilated more fully on the return date. On the other, it was an application for an interim order on an urgent basis pending the return date. The interim relief sought the *suspension* of the regulation because of the patent irregularity in its making and the unreasonableness of its effect. The final order sought the *setting aside*, F permanently, of that regulation. There was no need to bring a separate review application. In terms of Order 32 of the High Court Rules one had a choice of procedure. One could bring an ordinary court application in Form 29 in non-urgent matters. In urgent matters such as this, one could bring an urgent chamber application for interim relief.

The respondents' two-legged second point *in limine* also touched on the G merits of the application. Disposal of that point would virtually dispose of the whole case. The parties seemed to concur. Much time and effort had been spent arguing the points *in limine,* particularly the second one. For the merits the parties were content to abide by their papers and their submissions on the points *in limine*. H

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The nub of the matter is, in my view, the extent to which the legislative function of A the executive arm of government is reviewable by the judicial arm of government under the doctrine of the separation of powers. But before I deal with this point as it relates to this particular matter I have to blow away the smoke that purports to screen off the real issue. Part of this smoke or cloud was the respondents' argument or insinuation that there B always ought to be some *lite* pending before one can bring an urgent chamber application for interim relief. It seems true that in the majority of urgent chamber applications the interim relief is sought pending the determination of some main dispute. An obvious example is where a provisional order is sought to stay the execution of a judgment pending the determination of an C application for the setting aside of that judgment.

However, in my view, the granting of relief on an interim basis cannot always be pending something. It cannot always be predicated on some other application having been filed of record

first. There is no such requirement in the Rules. Rule 226 of Order 32 only provides as follows: D

"**226. Nature of applications**

(1) Subject to this rule, all applications *made for whatever purpose* in terms of these rules or any other law, other than applications made orally during the course of 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; or

(b) as a chamber application, that is to say, in writing to a judge.

(2) An application shall not be made E as a chamber application unless –

(a) the matter is urgent and cannot wait to be resolved through a court application; or

(b) these rules or any other enactment so provides; or

(c) the relief sought is procedural or for a provisional order *where no interim relief is sought only; or* F

(d) the relief sought is for a default judgment or a final order where -

(i) …

(ii) …

(iii) …

(e) there are special circumstances which are set out in the application justifying G the application" (emphasis added).

In the present matter I have accepted the applicant's argument that what it placed before me was both the review application and the urgent application for interim relief. In terms of Order 32 an urgent chamber application must be H accompanied by, *inter alia*, a certificate of urgency. Except for a *mandament*

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van spolie which is itself a final order, where relief is granted in an urgent A chamber application it is invariably of a temporary or interim nature, because there would not have been enough time to canvass and ventilate the issues. See *Mankowitz* v *Loewenthal* 1982 (3) SA 758 (A) at 767F-H, and my recent judgment in *Trustees of the SOS Children's Village* v *Bindura University & Ors* HH-349-14*. At this stage the court is being asked to consider the matter in summary fashion. If it is satisfied that the applicant has made out a B*prima facie* case, the court can grant the interim relief. But it is not uncommon for that interim relief to be discharged on the return date when the matter has been considered more extensively and the issues canvassed and ventilated more properly. Therefore, I dismiss the first leg of the respondents' second point *in limine* for lack of merit. C

Ms *Warinda's* argument that it is *impossible* for a court to review the legislative function of government is a ghost. It was buried in 1985 in *PF-ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S). A three judge bench of the Supreme Court headed by Dumbutshena CJ held that the exercise of an executive prerogative is not necessarily an act the validity of which is D beyond the jurisdiction of the court. It is only those acts of State in respect of which the jurisdiction of the court is ousted that the court may not review. Such executive prerogatives are now very few and far between. Whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectation of the citizens, the jurisdiction of the courts is not ousted. Acts of state that may be exercised by the President, in terms of the E Constitution in respect of which the jurisdiction of the court is ousted include the appointment, accreditation, reception and recognition of diplomatic agents; the conclusion and ratification of international conventions, treaties or agreements; the proclamation or declaration of martial law or war, etc. Others include the granting of a pardon to convicted persons or the remission or suspension of their sentences, etc. Even then, the superior court said, should F the exercise of these prerogatives be done under unlawful conditions or be performed outside the law the courts have a duty to review them.

That now brings me to the nub of the matter. The applicant says its application is both a constitutional application and one for review of the Minister's action under AJA. As a constitutional application the applicant says that G in terms of s 68 of the Constitution it has a right to administrative conduct that is lawful, reasonable and proportionate and that is both substantively and procedurally fair. Mr *Uriri* submitted that by referring to a non-existent law when promulgating SI 106 of 2014, the Minister had subjected it to H

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conduct that was unlawful. Given the state of the economy, SI 106 of 2014 A was unreasonable. The margin of the toll increase was disproportionate.

Under the AJA, the applicant's case was basically that the Minister had failed to consult the Minister of Finance in fixing the new toll tariff. He also is said to have failed to consult all the stakeholders. In my view, a great deal of the applicant's submissions on the main point was wool over the eyes. B As the respondents contended, there was nothing constitutional about the application. That any person who thinks that their freedoms as enshrined in the Constitution have been infringed upon is entitled to approach the court for relief as provided for by s 85 of the Constitution was not the issue. That any person is entitled to administrative justice as spelt out in s 68 of the C Constitution and s 3 of AJA was also not the point. The respondents did not contest the applicant's right to approach the court as provided for in the Constitution and AJA. What they contested, on the merits, was a finding that the Minister's action in enacting SI 106 of 2014 was unlawful, unreasonable and substantively and procedurally unfair. They also contested a finding that the Minister had not consulted the Minister of Finance or that he was obliged D to consult anyone else other than that minister.

In casu, Mr *Uriri's* argument that SI 106 of 2014 is unlawful because it refers to a wrong Act of Parliament is illusory. Whilst the error is patently obvious, it is so infinitesimal as to be inconsequential. It practically was a typing error, a slip of the pen by the typist, or of the tongue by whoever E may have dictated the contents. A law cannot be knocked down for such a minor mistake. There is no question that the Minister does have the power under TORA to fix toll tariffs. There is no question that it is s 6 of TORA that empowers the Minister to make subsidiary legislation. TORA is Chapter 13:13 in the statute books. All the other provisions of SI 106 of 2014 seem perfect except the erroneous reference to ROMOTRA.

It is not every mistake that affects the validity of a law. Even some far more F serious mistakes or omissions than in the present matter have failed to upset an existing law. In the *Blair Atholl* case, *supra*, Murphy J said in para 36 of the judgment:

> "Even though the notice might have been invalid for want of compliance with the G time period, such procedural invalidity, in the face of substantial compliance and no notable prejudice, does not justify a declaration of invalidity with retrospective effect. Illegal acts can have factual consequences which in all other respects are lawful and have no on-going or prospective illegal effect. Sometimes invalid administrative action, in this case the non-compliance with a statutory procedure, must be allowed to stand in the interests of finality, pragmatism and practicality, especially when non-compliance is not material or prejudicial – *Chairperson,*H*Standing Tender Committee* v *JFE Sapela Electronics* 2008 (2) SA (SCA) para

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> 28. In such circumstances, a court in its discretion may decline to set aside the A invalid action …"

On this particular point the Minister is not being impugned for any procedural impropriety. He is being impeached for a typing error. This ground must fail.

The next ground of attack must also fail. Section 3(1)(c) provides that the Minister may fix the amount of any toll after consulting the minister B responsible for finance. The applicant says the Minister did not consult the Minister of Finance. The respondents say he did. Not only that, but also that he brought the whole matter to Cabinet for approval. The court is none the wiser. The law says he who alleges must prove. Furthermore, the presumption of validity operates. An act regular on the face of it is valid until the contrary is proved. The applicant just makes a bald allegation in para 23.1 of the C founding affidavit that there is no evidence that the Minister followed the procedures set out in s 3(1)(c) of TORA and that his failure to consult the Minister of Finance is fatal to the validity of SI 106 of 2014. But where is the evidence of non-compliance in the first place? The court cannot upset a law on mere conjecture.

One of the applicant's complaints on lack of consultation was that the D Minister, without consulting the general motoring public, promulgated SI 106 of 2014 which imposed punitive toll increases. But the law does not make it obligatory for the Minister to consult anyone else other than the Minister of Finance. Therefore, there is no valid complaint on this point.

The gravamen of the applicant's complaint is that against the dismal E performance of the national economy the toll increase is unreasonable, disproportionate and punitive. The complaint is also that instead of looking to tolls for road construction, rehabilitation and maintenance the Minister should

have considered other sources of funding like fuel levies. This argument brings squarely to the fore the doctrine of the separation of powers and the extent to which it may operate. F

In my view, the doctrine of the separation of powers in a constitutional democracy is such that the three arms of government, namely the legislature, the judiciary and the executive, have each exclusive domains of operation. They apply their training, if any, their experience, the information available G to them and all the other resources at their disposal to put out the best for the nation. One arm may not interfere with the other arms. But our constitutional democracy has a system of checks and balances. One arm may pry into and poke its nose in the other's domain. For example, the prerogative to sentence a convicted person to an appropriate term of imprisonment is that for the judiciary. What would amount to an appropriate sentence is for the court to H

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decide in its own discretion. But it is not always like that. The legislature can A "interfere" with the exercise of that discretion by imposing, through legislation, minimum or maximum penalties for specified offences. The executive can also "interfere". The President can pardon, commute or remit certain punishments imposed by the courts. Likewise, the judiciary plays an oversight role in making sure that as the legislature and the executive go B about executing their functions they do so lawfully or procedurally. A law promulgated unprocedurally or any other administrative function carried out without regard to the law will be knocked down by the judiciary or set aside. That is how the machinery of state functions.

If the applicant argues that something is unreasonable, the obvious question C is unreasonable compared to what? If something is disproportionate or punitive, in relation to what? Aren't these mere abstract concepts that defy precision? Without some kind of empirical evidence, how does a court quantify unreasonableness? One appreciates the applicant's example of a toll gate along the Harare-Mazoe Road with figures of $4 per day, $120 D per month and $1 200 per year for a light motor vehicle, and $20, $600 and $7 200 respectively for a haulage truck. But the respondents came up with their own set of figures to illustrate that tolls on Zimbabwe roads are the lowest in the region. As an example, they said that a motorist for a light motor vehicle will pay a total toll of only US$8 for a distance of 580 km from Harare to Beitbridge. Yet in South Africa he will pay almost double, E R196.50, for a similar distance from Beitbridge to Johannesburg. So again the court is none the wiser.

The South African so-called e-tolling cases dealt with objections to a toll project very similar to the applicant's objection herein. The cases were triggered by the implementation of e-tolling. There was a vigorous, organised F and protracted resistance. In a nutshell, e-tolling is the collection of tolls through electronic means. In one particular province it did away with the manual system of having toll-gates mounted along toll-roads as is the current situation in Zimbabwe. The implementation of e-tolling was preceded by massive consultations, advertisements, meetings, presentations and several submissions. Stakeholders such as car hire companies, consumer unions, G fleet owners and individual motorists organised themselves into a single body to thwart the move. SANRAL (South African National Roads Agency Limited), the equivalent of ZINARA here, had made budgetary presentations for the minister of transport who had then taken the matter up to Cabinet. SANRAL had obtained a loan for the massive project and the government H had stood guarantor for that loan.

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Opposition to e-tolling was predicated on a number of grounds. They included A the alleged unreasonableness of the massive cost and the impracticality of enforcement of payment. It was also suggested that the government could source funding for the project from elsewhere. The court cases were based on the provisions of the South African Constitution similar to those cited by the applicant herein. They were also based on the South African equivalent of AJA, called the Promotion of Administrative Justice Act ("PAJA"). B

The opposition failed. The judgment of the Constitutional Court of South Africa, in *National Treasury and Others* v *Opposition to Urban Tolling and Others, supra*, at para (63) cited with approval the following passage in the case of *Doctors for Life International* v *Speaker of the National Assembly and Others* 2006 (6) SA416 (CC), 2006 (12) BCLR1399; C

"(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the D concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

In paras 66 to 68, the court held as follows:

"[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power E or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict. F

[67] The harm and inconvenience to motorists, which the high court relies on, result from a national executive decision about the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud G or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

[68] Another consideration is that the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order. It bears repetition that a court H

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considering the grant of an interim interdict against the exercise of power within the camp A of government must have the separation-of-powers consideration at the very forefront."

I adopt the same approach in this case. I find nothing unprocedural in the way the Minister promulgated SI 106 of 2014. It was within his power to craft it. It was an action within the exclusive domain of the executive to decide how B road construction, rehabilitation and maintenance should be funded. Such a decision is manifestly policy-laden and polycentric. In my view, s 68 of the Constitution and AJA are in most ways a mere codification of the traditional powers of the courts to review the exercise of the functions of the executive. In my view, AJA is merely an elaborate restatement of the rules of natural justice. In *Zindoga & Ors* v *Minister of Public Service, Labour and Social*C*Welfare & Anor* 2006 (2) ZLR 10 (H), Patel J, as he then was, said at 13D-E:

"It is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time honoured precept of the common law embodied in the *audi alteram partem* rule *and now codified in the Administrative Justice Act* [*Chapter 10: 28*] (emphasis added).

D The courts exercise the powers of review within those bounds as have been developed through case law such as *PF-ZAPU* and the e-tolling cases referred to above. In my view, the applicant has failed to establish a proper cause of action for the court to determine.

With the view that I have taken I have found it unnecessary to consider in E any further detail the requirements for an interdict as set out in *Setlogelo* v *Setlogelo, supra*, and whether they apply in a matter such as this where the central question was the power of the court to review acts that are the exclusive prerogative of the executive arm of government. Suffice it to say that when I say the applicant has not established a cause of action I mean F that it has neither shown a *prima facie* right peculiar to it or its members, nor any well-grounded apprehension of an irreparable harm stemming from the actions of the Minister.

In the result the application is dismissed. Normally the costs of suit follow the event. But not always, especially in a matter of such public importance G as this. In one of the e-tolling cases aforesaid, *Opposition to Urban Tolling Alliance & Ors* v *SA National Roads Agency Ltd & Ors* [2013] 4 All SA 639 (SCA), the South African Supreme Court referred to the *Biowatch* principle enunciated in *Biowatch Trust* v *Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC), and refrained from ordering the costs of suit against the appellants despite the failure of their appeal. The court said the H*Biowatch* principle is that in constitutional litigation an unsuccessful party

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in proceedings against the state ought not to be ordered to pay costs lest A litigants may be discouraged to vindicate their constitutional rights. In this jurisdiction I would refer to what I would term the *Nyambirai* principle after the decision in the case of *Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S). The Supreme Court, in a constitutional application brought against the introduction of a compulsory scheme of national social security, refrained from ordering the applicant to bear the costs of suit notwithstanding that he B had lost. The court said the issue that the applicant had raised was important and controversial and that the proceedings that he had instituted had led to its resolution.

In the final result the application is dismissed, with each party paying their own costs. C

Wintertons, applicant's legal practitioners

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

Mutamangira & Associates, legal practitioners for the second respondent D

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[zRPz]MASENDEKE v CHALIMBA & ORS 2014 (2) ZLR 63 (H)

Citation	2014 (2) ZLR 63 (H)
Case No	Judgment No. HH-354-14
Court	High Court, Harare
Judge	Dube J
Heard	22 January 2014; *CAV*
Judgment	14 July 2014
Counsel	Mrs *D Mandaza*, for the plaintiff *RD P Drury*, for the defendants
Case Type	Exception
Annotations	No case annotations to date

Flynote

Delict – actio injuriarum – wrongful arrest – what must be pleaded – not necessary to C *plead malice or animus inuriandi*

Practice and procedure – summons – what summons should contain – need to outline grounds for claim and branch of law under claim is made – D *failure to do so – when different cause of action may be extracted from pleaded cause of action – need for facts pleaded to contain averments necessary to prove such other cause of action*

Headnote

The plaintiff claimed for damages arising out of her arrest and detention E by the police. The second, third, fourth and fifth defendants were the arresting details. The first defendant was alleged to have made a false report to the police that the plaintiff had kidnapped his minor daughters. The arresting details arrested the plaintiff in Bulawayo and drove her to a police station in Harare where she was detained for 24 hours. The plaintiff claimed that the police acted on a false and unlawful report F made by the first defendant and arrested her without good cause, that the arrest and subsequent were unlawful and that whilst under detention she was subjected to threats, insults and general humiliation. The plaintiff claimed damages for unlawful deprivation of liberty, pain, suffering, *contumelia* and humiliation.

The first defendant filed a request for further particulars, requesting clarity G on the plaintiff's cause of action against him. The plaintiff replied that her cause of action was the "false, wrongful and unlawful report" by the first respondent to the police. The first defendant excepted to the summons on the basis that the summons and declaration as read with the further particulars were bad at law and did not disclose a true and H concise statement of the nature, extent and grounds of the cause of action

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Tsanga J

as required by law. He also averred that the making of a report to the A police, whether false or otherwise, did not in itself lead to a civil action, and did not cause any harm or prejudice to the person reported against. Accordingly, the cause of action was not valid at law and did not exist in law. The first defendant also took issue with the plaintiff's reference in her heads of argument for the exception to her cause of action being "malicious deprivation of liberty". The first defendant submitted that, B as a result, he did not know what case he had to meet.

The plaintiff argued that she had set out the entire set of facts which formed the basis of the claim and that there was no obligation that the precise *actio* under which the claim was brought be set out in the pleadings. She further submitted the delict of malicious deprivation of liberty existed, C and committed where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant under a valid judicial process. The plaintiff further contended that the first defendant made improper use of State machinery through the police by making a false report.

Held, that r 11(c) of the High Court Rules requires that a summons should D contain a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action. The "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.

Held,, further, that the object of a summons is not merely to bring the defendant E before the court; it must also intimate to the defendant the nature of the claim or demand that the defendant is required to meet. It is insufficient to state in the summons merely the relief claimed. The summons must clearly outline the grounds on which the claim is brought and the branch of the law under which the cause of action arises, as well as the basis for F the relief sought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action.

Held, further, that the delict of "false, wrongful and unlawful report" does not exist in our jurisdiction. Malicious deprivation of liberty is a delict recognisable in our law. This cause of action was mentioned for the G first time in the plaintiff's heads of argument for the exception. The pleaded case was based on an unlawful deprivation of liberty; there was no reference to malicious deprivation of liberty. It was not pleaded in the summons and declaration or further particulars. The plaintiff did not plead malice in the making of the report and subsequent detention of the plaintiff but simply that the arrest was unlawful. H

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Held, further, that the practice of extracting a possible claim from a pleaded A cause of action which is sufficient to support a different cause of action is contrary to the principles guiding pleadings,

which require that a litigant bringing an action state concisely its cause of action. A party seeking such an indulgence is required to show the existence of special circumstances justifying such B departure from the rule of practice. Such departure from the rules may also be permitted if the applicant can show that the other party is unlikely to be prejudiced by such a request or at the cost of proper investigation into the emerging issue. This practice creates an exception to the rule that a litigant is required to state concisely the nature of its claim in the summons and declaration. In determining C whether there were special circumstances justifying the indulgence sought, the court had to consider whether the facts pleaded contained the averments necessary to prove a claim for malicious deprivation of liberty and whether the first defendant would suffer any prejudice were the court to grant the indulgence sought.

Held, further, that it is not necessary in cases involving arrests to plead malice D and the fact that the instigation was without reasonable and probable cause. The arrest itself is *prima facie* such an odious interference with the liberty of the citizen that *animus injuriandi* is thereby presumed, and no allegation of actual subjective *animus injuriandi* is necessary. In such an action the plaintiff need only prove the arrest itself and the onus E will then lie on the person responsible to establish that it was legally justified. Accordingly, although the delict was introduced at the heads of argument stage, the facts as outlined in the declaration were sufficient for the first defendant to plead. There was no need for the plaintiff to amend her summons and declaration. The first defendant would not suffer any F prejudice from this course of action as he had not yet pleaded. He could plead on the basis of the cause of action proposed.

Cases cited

Chifamba v *Mutasa & Ors* HH-16-08

Erasmus v *Slomowitz (1)* 1938 TPD 236

Ingram v *Min of Justice* 1962 (3) SA 225 (W)G

Masawi v *Chabata & Anor* 1991 (1) ZLR 148 (H

Moaki v *Reckitt and Colman (Africa) Ltd & Anor* 1968 (3) SA 98 (A)

Murphy v *Dir of C & E* 1992 (1) ZLR 28 (H)

Musundire v *OK Zimbabwe* 2012 (1) ZLR 292 (H)

Newman v *Prinsloo & Anor* 1973 (1) SA 125 (W)H

Tsanga J

Presidency Property Invstms (Pty) Ltd & Ors v *Patel* 2011 (5) SA 432 (SCA)A

Prinsloo v *Newman* 1975 (1) SA 481 (A)

Stambolie v *Commr of Police* 1989 (3) ZLR 287 (S); 1990 (2) SA 369 (ZS)

Thompson & Anor v *Min of Police & Anor* 1971 (1) SA 371 (E)

Tödt v *Ipser* 1993 (3) SA 577 (A)

Legislation considered B

High Court Rules 1971 (RGN 1047 of 1971), r 11(c)

Case information

Mrs *D Mandaza,* for the plaintiff

D P Drury, for the defendants C

Judgment

Dube J: The first defendant has brought an exception to the summons and declaration issued by the plaintiff under HC 345/12. The plaintiff's claim is for damages arising out of her arrest and detention by the police. The second, third, fourth and fifth defendants are arresting details in a criminal case against the plaintiff. The sixth and seventh defendants are cited as employers D of the second, third, fourth and fifth defendants and on the basis of vicarious liability. The salient facts of

this matter may be summarised as follows. On an unknown date the first defendant made a false report, or caused a false report to be made, to the effect that the plaintiff had kidnapped his minor daughters. Following this report, on 22 May 2011 the second, third and fourth E defendants approached the plaintiff at her home at 61 Cumberland Drive, Hillcrest, Bulawayo. They arrested the plaintiff on allegations of kidnapping the first defendant's children and drove her to Marlborough Police Station in Harare where she was detained from 22 May to 23 May 2011. The plaintiff claims that the police had acted on a false and unlawful report made by the first defendant and arrested her without good cause. She averred that the F arrest was unlawful and that the arresting details humiliated her by refusing to remove handcuffs off her to enable her to access and use toilet facilities during the journey to Harare. The plaintiff claims that the detention at Marlborough Police Station was unlawful and wrongful. She further claims that whilst under detention the second, third and fifth defendants wrongly subjected her to threats, insults and general humiliation. The plaintiff claims G damages in the sum of $150 000 for unlawful deprivation of liberty, pain, suffering, *contumelia* and humiliation.

Subsequent to the summons, the first defendant filed a request for further particulars. He requested clarity on the plaintiff's cause of action against him. In her response the plaintiff revealed her cause of action as the "false, H

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wrongful and unlawful report" by the first respondent to the police, to the effect A that plaintiff had committed a criminal offence by kidnapping the first defendant's children. Following this exchange, the first defendant excepted to the summons, on the basis that the summons and declaration as read with the further particulars were bad at law and did not disclose a true and concise statement of the nature, extent and grounds of the cause of action B as required by law. Secondly, he contended, the making of a report to the police, whether false or otherwise, does not in itself lead to a civil action, and does not cause any harm or prejudice to the person reported against. Therefore the cause of action was not valid at law and did not exist in law. The first defendant also took issue with the plaintiff's about turn in her heads C of argument on the exception, where she states her cause of action as being "malicious deprivation of liberty". The first defendant submitted that, as a result, the defendant does not know what case he has to meet.

The plaintiff insists that she has set out a clear cause of action against the first defendant. She submitted that the basis of her claim against the first D defendant is that he made a false report to Marlborough Police Station to the effect that the plaintiff had kidnapped his children. The police arrested her because of this false report and detained her and therefore he instigated the report against her. The plaintiff contended that the detention was wrongful and unlawful. The plaintiff insisted that reference to unlawful deprivation of liberty based on a false report by the first defendant ought to have been E a sufficient indicator of the case of malicious deprivation of liberty he was required to meet. The plaintiff further argued that the set of facts in the declaration formed the basis for a claim under the delict of malicious deprivation of liberty. The plaintiff argued that she has set out the entire set of facts which formed the basis of the claim and that there was no obligation F that the precise *actio* under which the claim is brought be set out in the pleadings. No authority was advanced for this proposition. The plaintiff further submitted the delict of malicious deprivation of liberty exists and is enforceable. She cited sentiments expressed by Neethling, Potgieter and Visser *Law of Delict* 6 ed (LexisNexis, 2010) at p 330, where the authors define the delict and remark that the delict is committed where the result G complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant under a valid judicial process. The plaintiff further contended that the plaintiff made improper use of State machinery through the police by making a false report. The court was also referred to *Musundire* v *OK Zimbabwe* 2012 (1) ZLR 292 (H) for H the proposition that the delict exists.

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The plaintiff's cause of action against the first defendant arises from the A fact that the first defendant caused her arrest, and that he made a false, wrongful and unlawful report of kidnapping to the police, resulting in the plaintiff's arrest and unlawful detention and triggering the events narrated in the plaintiff's declaration.

Rule 11(c) of the High Court Rules 1971 requires a party bringing an action B to state in its summons:

> "a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action."

The same principle is emphasized by I Isaacs *Beck's Theory and Principles of Pleading in Civil Actions* 3ed at p 22 where the learned author remarks as follows: C

> "the cause of action must be set out in such a way as to intimate to the defendant the nature of the claim he has to meet; hence the grounds on which the claim is brought should be stated."

See also *Erasmus* v *Slomowitz (1)* 1938 TPD 236.

*Herbstein and van Winsen Civil Practice of the Supreme Courts of South Africa*D 4ed by van Winsen, Cilliers, Loots & Dendy (Juta and Co Ltd, 1997) echo the same sentiments as follows:

> "the object of a summons is not merely to bring the defendant before the court; it must also intimate to the defendant the nature of the claim or demand that the defendant is required to meet. Consequently, it is insufficient to state in the E summons merely the relief claimed; the plaintiff must also set out what the cause of action is and on what it is based."

The term "cause of action" was defined in *Murphy* v *Director of Customs and Excise* 1992 (1) ZLR 28 (H) at 33E as follows:

> "The proper legal meaning of the expression 'cause of action' is the entire set of F 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."

Following on these principles, Makarau J in *Chifamba* v *Mutasa & Ors* HH-16-08 made the following remarks on the same subject:

> "The purpose of pleadings that is not only to inform the other party in concise G terms the precise nature of the claim they have to meet but pleadings also serve to identify the branch of the law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded for a claim to be sustainable under that action … This may appear trite but a number of matters coming before the courts seem to indicate that legal practitioners have abandoned the need to plead a cause of action by making necessary averments to sustain such an action." H

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In casu, the plaintiff's legal practitioner appears to have simply rehashed the A instructions he had received from his client in the declaration without making an attempt to precisely and concisely lay out the cause of action and the averments necessary to sustain such. Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that they plead what the law requires their clients to prove to sustain the B remedy they seek. Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such.

A litigant bringing an action is required to "set out the entire set of facts" forming the basis of the claim. He should set the cause of action relied on concisely in order to inform the other party of the claim he is required to C answer to. The summons must clearly outline the grounds on which the claim is brought and the branch of the law under which the cause of action arises as well as the basis for the relief sought.

In order to determine if the plaintiff has adequately pleaded his cause of action, the court will examine the claim brought, the branch of the law concerned and determine if every fact which is material to be proved has D been pleaded. The plaintiff's claim is a claim in delict. The delict of false, wrongful unlawful report was introduced in the further particulars. The basis of her claim against the first defendant is the "false, wrongful and unlawful report" by the first defendant to the police to the effect that she had kidnapped his daughters. The declaration does not outline with clarity that allegation. E There is nothing to suggest that the arrest was false, wrongful or unlawful. She does not dispute that she had kidnapped the children. However, the delict of "false, wrongful and unlawful report" is not actionable in our jurisdiction.

The claim pleaded in the summons is that of unlawful deprivation of liberty. The claim is based on allegations of unlawful arrest and detention. I will F not examine the essential elements of this delict as it is no longer pursued. The plaintiff is now pursuing the delict of malicious deprivation of liberty.

Malicious deprivation of liberty is a delict recognisable in our law. This cause of action is introduced for the first time in the plaintiff's heads of argument for the exception. The pleaded case is based on an unlawful deprivation of liberty and there is no reference to malicious deprivation of liberty. It was not G pleaded in the summons and declaration or further particulars. The plaintiff did not plead malice in the making of the report and subsequent detention of the plaintiff but simply that the arrest was unlawful. No attempt was made to amend the plaintiff's papers to reflect the new cause of action. I will now examine the plaintiff's argument that she has set out the entire set of facts H which form the basis of the claim for malicious deprivation of liberty and

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that there is no obligation under our law that the precise *actio* under which A the claim is brought be set out in the pleadings.

This subject was discussed in *Presidency Property Investments (Pty) Ltd & Ors* v *Patel* 2011 (5) SA 432 (SCA). The court dealt with a matter where a party sought to rely on a cause of action not explicitly pleaded and not apparent to the opposing party. Heher JA held as follows: B

> "The general principles governing the interpretation of pleadings have often been referred to by this court. See particularly *Stead* v *Conradie en Andere* 1995 (2) SA 111 (A) at 122A-I and the authorities there cited. It may well be that a putative claim may be winkled out of a clearly pleaded cause of action sufficient to support another barely discernible cause. This case probably provides such an instance. Such recognition of the concealed cause would be at odds with the object of pleading, *viz.* clear and precise definition of issues, and be an invitation C to misleading formulation of claims. As such the party seeking to rely on it will necessarily require special circumstances to persuade a court to come to his assistance. In the end, however, he will have no leg to stand on if recognition can only be afforded to the prejudice of the opposing party or at the cost of proper investigation into the emerging issue. This again in my view is such a case."

The practice of extracting a possible claim from a pleaded cause of action D which is sufficient to support a different cause of action is a practice contrary to the principles guiding pleadings which require that a litigant bringing an action state concisely its cause of action. A party seeking such an indulgence is required to show the existence of special circumstances justifying such departure from the rule of practice. Such departure from the rules may also E be permitted if the applicant can show that the other party is unlikely to be prejudiced by such a request or at the cost of proper investigation into the emerging issue. This practice creates an exception to the rule that a litigant is required to state concisely the nature of its claim in the summons and declaration.

In determining whether there are special circumstances justifying the F indulgence sought, the court will consider whether the facts pleaded contain the averments necessary to prove a claim for malicious deprivation of liberty and, secondly, whether the first defendant will suffer any prejudice were the court to grant the indulgence sought.

The requirements for the delict of malicious deprivation of liberty are as G follows:

(a) that the defendant set the law in motion (instigated or instituted the proceedings);

(b) that the defendants acted without reasonable and probable cause in instigating the arrest; H

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A (c) that the defendants acted with "malice" (or *animo injuriandi*).

The plaintiff alleges that the first defendant made a false report that she had committed a criminal offence. Neethling, Potgieter and Visser *Law of Personality* at p 133 deals with the requirement of instigation as follows:

> "In cases where the defendant himself lays the complaint leading to the infliction B of bodily restraint, the element of instigation is apparent."

Instigation of the arrest of the plaintiff leading to her detention is sufficiently alleged in the declaration. The second requirement of reasonable and probable cause was defined in *Prinsloo* v *Newman* 1975 (1) SA 481 (A) at 495 as follows:

> C "Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of the proceedings is justified."

The plaintiff avers that the report was false. There is no suggestion that the plaintiff was in proper custody of the children at the time of arrest. There is no averment that the first defendant did not have an honest belief founded D on reasonable grounds that the arrest was justified. I think, however, that because of the reference to a false report, it can be read from the facts that the first defendant did not have an honest belief that the arrest was justified.

The third requirement is that of malice**.** The term "malice" was discussed in *Moaki* v *Reckitt and Colman (Africa) Ltd and Anor* 1968 (3) SA 98 (A)E at 103G-104 E*,* a case involving a claim of malicious prosecution and the court remarked as follows:

> "The defendant must thus not only have been aware of what he or she was doing in instituting or initiating the prosecution, but must at least have foreseen the possibility that he or she was acting wrongfully, but nevertheless continued to act, reckless as to the consequences of his or her conduct (*dolus eventualis*). F Negligence on the part of the defendant (or, I would say, even gross negligence) will not suffice."

Case authority seems to suggest that it is not necessary in cases involving arrests to plead malice and the fact that the instigation was without reasonable and probable cause. In *Newman* v *Prinsloo & Anor* 1973 (1) SA 125 (W)G at 127, Margo J, relying on *Ingram* v *Minister of Justice* 1962 (3) SA 225 (W) at 227D, said the following,

> "In my view this is correct. All interferences with the liberty of the citizen are *prima facie* odious and it is for the person responsible to establish why in the particular circumstances such interference is legally justified: see *Theron* v *Steenkamp* 1928 CPD 429 at 432. The English law is similar: see *Clerk and Lindsell on Torts*H 11th ed at 293; *Dumbell* v *Roberts* [1944] 1 All ER 326 at 331 …"

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Similar sentiments were expressed in *Thompson & Anor* v *Minister of Police*A*& Another* 1971 (1) SA 371 (E) at 374H where Eksteen J, in dealing with the delict of wrongful arrest, remarked as follows:

> "The arrest itself is *prima facie* such an odious interference with the liberty of the citizen that *animus injuriandi* is thereby presumed in our law, and no allegation of actual subjective *animus injuriandi* is necessary (*Foulds* v *Smith* 1950 (1) SA 1 (A) at 11). In such an action the plaintiff need only prove the B arrest itself and the onus will then lie on the person responsible to establish that it was legally justified."

The same approach was also followed in *Masawi* v *Chabata & Anor* 1991 (1) ZLR 148 (H); 1991 (4) SA 764 (ZH) and in *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 287 (S); 1990 (2) SA 369 (ZS) where Gubbay JA (as he then was) remarked as follows: C

> "Plainly, the stated cause of action is alleged to be false arrest and imprisonment and not malicious arrest and detention. The two concepts give rise to different causes of action. They are separate and distinct species of wrongdoing. Under the former, the act of restraining the plaintiff's freedom is that of the defendant or his agent for whose actions he is vicariously liable. The arrest itself gives the right of action and it is unnecessary to establish either absence of reasonable D or probable cause or malice. All arrests are *prima facie* illegal, and the onus is upon the person who effected it to prove that the arrest was legally justified. An allegation of *animus injuriandi* was therefore not necessary."

In *Tödt* v *Ipser* 1993 (3) SA 577 (A), the court held that since conscious unlawfulness was not required for liability on the grounds of unlawful deprivation of liberty, that it was irrelevant whether the respondent had E thought that he had been entitled in law to act as he had.

Whilst these cases deal with different delicts arising from arrests, they deal with the state of mind of the defendant and whether it should be specifically pleaded. The import of these cases is that it is not necessary for purposes of pleadings to plead malice or *animus injuriandi* in cases involving claims arising out of arrests. F

All arrests are *prima facie* an interference with one's right to freedom of liberty and an allegation of *animus injuriandi* is therefore presumed in our law. This presumption arises from guarantees in our Constitution to the right to liberty. It was therefore not necessary for the plaintiff to outline facts in G its declaration disclosing absence of reasonable cause, probable cause or malice. My conclusion is that sufficient facts were pleaded to support the delict of malicious deprivation of liberty.

On the issue regarding the existence of special circumstances justifying the court's indulgence, I have considered that, although the delict was introduced at heads of argument stage, the facts as outlined in the declaration H

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are sufficient for the first defendant to plead. It does not appear to me that there is A a need for the plaintiff to amend its summons and declaration as it is accepted that a litigant can extract a possible claim from a pleaded cause of action to support a different cause of action. It does not appear that the first defendant will suffer any prejudice from this course of action as he not yet pleaded. The first defendant can proceed and plead on the basis of the B cause of action proposed. No other facts or details are required.

I am satisfied that the cause of action has been outlined in a manner that allows the first defendant to know what claim he is facing. As regards costs, I have considered that the plaintiff's case was not presented in the manner expected, thereby giving rise to this exception. I did not consider that the C first defendant was unreasonable in bringing this action. I find no basis for an award of costs against the first defendant.

In the result it is ordered as follows:

1. The first defendant's exception is dismissed.
2. Each party is to bear its own costs.

Muzangaza Mandaza & Tomana, plaintiff's legal practitioners D

Honey & Blanckenberg, first defendant's legal practitioners.

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[zRPz]CHIMAKURE & ORS v A-G 2014 (2) ZLR 74 (CC)

Citation	2014 (2) ZLR 74 (CC)
Case No	Judgment No. CC-6-14
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA & Guyava JA
Heard	30 October & 20 November 2013; 15 January 2014; *CAV*
Judgment	22 July 2014
Counsel	*Z T Chadambuka,* for the applicants *C Mutangadura,* for the respondent
Case Type	Rule *nisi* on constitutional invalidity
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights* C *– s 24(5) – party having shown that enactment not reasonably justifiable in a democratic society – rule nisi calling on responsible Minister to show cause why enactment should not be declared to be in contravention of Constitution – object of giving Minister such opportunity – review powers not given to executive* D

Headnote

The Constitutional Court issued a rule *nisi* pursuant to s 24(5) of the former Constitution, calling on the Minister of Justice to show cause, on the return day, why s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (publishing or communicating false statements E prejudicial to the State) should not be declared to be *ultra vires* s 20(1) of the former Constitution and accordingly invalid. The Minister had not been a party to the proceedings. Under s 24(5), the Minister had a right to be given an opportunity to persuade the court that, although s 31(a)(iii) of the Code infringed the fundamental right to freedom of F expression, it was reasonably justifiable in a democratic society.

On the return day no affidavit was filed by the Minister. What was filed was a lengthy document containing a critical review of the whole judgment of the court. The purpose of the document was to show that the court had misdirected itself in finding that s 31(a)(iii) had the effect of interfering with the exercise of the right to freedom of expression enshrined under G s 20(1) of the former Constitution, and that the court erred in holding the *prima facie* view that s 31(a)(iii) of the Criminal Code was not reasonably justifiable in a democratic society. There was no attempt to show the existence of factors, which were not brought to the attention of the court, consideration of which would have persuaded it not to accept H

Malaba DCJ

the *prima facie* view that the enactment was not reasonably justifiable in A a democratic society.

Held, that it was not the purpose of s 24(5) of the former Constitution to give to the Executive review powers over decisions of the court. The object of s 24(5) was to give the responsible Minister, who was not party to B the proceedings challenging the constitutional validity of an enactment, an opportunity to put before the court facts within his knowledge, and of which the court was unaware, with the view of persuading it not to find that the enactment is not reasonably justifiable in a democratic society. The reason is that the determination of the question of whether an enactment is reasonably justifiable in a democratic society requires C a court to take into account a variety of factors at play in a democratic society. Some of the factors may relate to the policy behind the enactment. The Executive is responsible for the formulation of legislative policy as adopted by the Legislature. It is because of this important position of the Executive in the formulation of legislative policy that a Minister may have knowledge of factors that show that the legislation is reasonably D justifiable in a democratic society. His task is to assist the court to arrive at a just decision on the question of the constitutional validity of the legislation. The fact that no affidavit was filed by the Minister meant that nothing said in the document satisfied the objective of s 24(5).

Legislation considered E

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 31(a)(iii)

Constitution of Zimbabwe 1980, ss 20(1) and 24(5)

Case information

Z T Chadambuka, for the applicants

C Mutangadura, for the respondent F

Judgment

Malaba DCJ: On October 2013 the court issued a rule *nisi* pursuant to s 24(5) of the former Constitution. The rule *nisi* called upon the Minister of Justice, Legal and Parliamentary Affairs ("the Minister") to show cause, on 20 November 2013, why s 31(a)(iii) of the Criminal Law (Codification and Reform) Act G [*Chapter 9:23*] (the Criminal Code) should not be declared to be *ultra vires* s 20(1) of the former Constitution and accordingly invalid.

The court had found that s 31(a)(iii) of the Criminal Code had the effect of interfering with the exercise of the right to freedom of expression. It found that the applicants had discharged the onus of showing that H s 31(a)(iii) of the Criminal Code was not reasonably justifiable in a

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2014 (2) ZLR p76

Malaba DCJ

democratic, society for the protection of the public A interest in public order or public safety.

The Minister had not been a party to the proceedings. Under s 24(5) of the former Constitution, the Minister had a right to be given an opportunity to persuade the court that although s 31(a)(iii) of the Criminal Code infringed the fundamental right to freedom of expression it was reasonably B justifiable in a democratic society.

On the return day no affidavit was filed by the Minister. What was filed was a lengthy document containing a critical review of the whole judgment of the court. The purpose of the document was to show that the court had misdirected itself in finding that s 31(a)(iii) of the Criminal Code had the effect of interfering with the exercise of the right to freedom C of expression enshrined under s 20(1) of the former Constitution. The object was to show that the court also erred in holding the *prima facie* view that s 31(a)(iii) of the Criminal Code was not reasonably justifiable in a democratic society. There was no attempt to show the existence of factors, which were not brought to the attention of the court, consideration of which would have persuaded it not to accept the *prima facie* view that the D enactment was not reasonably justifiable in a democratic society.

It was not the purpose of s 24(5) of the former Constitution to give to the executive, review powers over decisions of the court. The object of s 24(5) of the former Constitution was to give a Minister who was not party to the proceedings challenging the constitutional validity of an E enactment, the administration of which is his or her responsibility, an opportunity to put before the court facts within his or her knowledge, and of which the court was unaware, with the view of persuading it not to find that the enactment is not reasonably justifiable in a democratic society.

The reason is that the determination of the question whether an enactment F is reasonably justifiable in a democratic society requires a court to take into account a variety of factors at play in a democratic society. Some of the factors may relate to the policy behind the enactment. The executive is responsible for the formulation of legislative policy as adopted by the legislature. It is because of this important position of the executive in the formulation of legislative policy that a Minister may have knowledge G of factors that show that the legislation is reasonably justifiable in a democratic society. His or her task is to assist the court to arrive at a just decision on the question of the constitutional validity of the legislation.

The fact that no affidavit was filed by the Minister means that nothing said in the document satisfied the object of s 24(5) of the former Constitution. H

2014 (2) ZLR p77

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The matter was, however, postponed to 15 January 2014 to enable the A respondents to respond to the Minister's submissions. The rule *nisi* was extended to that date.

On 15 January 2014 Mr *Mutangadura* who represented the Minister, indicated that it was no longer the intention of the Minister to oppose the B confirmation of the rule *nisi.* There was, therefore, no need of hearing the applicants on the question of the confirmation of the rule *nisi.* The order of the court was reserved to allow the court time to prepare this opinion, to give guidance on what is expected of a Minister who is called upon by the court to show cause why an enactment, the constitutional validity of which is challenged, should not be declared to be in contravention of C a fundamental human right or freedom.

The order of the Court is as follows:

> It is order that s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] was in contravention of s 20(1) of the former Constitution and therefore void.

The respondent is to pay the costs of the main application as well as the costs D relating to the confirmation of the rule *nisi*.

CHIDYAUSIKU CJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA, PATEL JA and GUVAVA JA concurred.

Atherstone & Cook, applicant's legal practitioners E

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

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[zRPz]MAYOR LOGISTICS (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2014 (2) ZLR 78 (CC)

Citation	2014 (2) ZLR 78 (CC)
Case No	Judgment No. CC-7-14
Court	Constitutional Court, Harare
Judge	Malaba DCJ
Heard	11 July 2014; *CAV*
Judgment	22 July 2014
Counsel	*L Uriri* for the applicant *U Sakhe*, with him *A Moyo,* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Constitutional law – *challenge to constitutionality of a statutory provision – approach of court thereto – assumption that the legislation is constitutionally valid until the contrary is clearly established*

Interdict – *requirements for – prima facie right – need for proof thereof* D *– interdict cannot be granted against past invasions of a right or against lawful conduct – application for an interim order that certain legislation be suspended pending a decision of the Constitutional Court as to its constitutionality – application refused.*

Practice and procedure – *Constitutional Court – certificate of urgency –* E *founding affidavit – what needs to be set out therein*

Headnote

An interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right which needs to be protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict F against lawful conduct

It is only in exceptional circumstances and upon an application on a certificate of urgency signed by a legal practitioner that the Chief Justice will order that a constitutional matter should be heard on an urgent basis. A party seeking to be accorded such preferential treatment must set out in the G founding affidavit facts which distinguish the case from others to justify the granting of the order for an urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike.

The applicant contended that the respondent had assessed an amount of tax due to it which was excessive. In so doing, the applicant submitted that s 36 (1) of the Value Added Tax Act [*Chapter 23:12*] and s 69 (1) H

of the Income Tax [*Chapter 23:06*], upon which the respondent relied, A were contrary to ss 68(1) and 69(3) of the Constitution of Zimbabwe. These provisions relate to a taxpayer's fundamental rights of access to a court and to administrative justice, and were thus relevant to the question whether the amount of tax assessed was due and payable. For this reason, the applicant sought an interim order that the provisions of B the two Acts be suspended, pending a determination by the Constitutional Court of their constitutionality. It was the applicant's case that if the provisions were indeed unconstitutional, it would not be required to pay respondent the assessed tax before his appeal to the Fiscal Appeal Court could be decided.

Held, that any court faced with an application challenging the constitutionality of C a statutory provision is required to proceed on the assumption that the legislation is constitutionally valid until the contrary is clearly established. A finding has to be made first that there has been a contravention of a fundamental right or freedom. Until then, the legislation has legal force.

Held, further, that the application for an interim order suspending the provisions D of s 36(1) of the Income Tax Act [*Chapter 23:12*] and of s 69(1) of the Value Added Tax Act [*Chapter 23:06]*, pending the determination of their constitutionality by the Constitutional Court, must be dismissed with costs

Cases cited E

Airfield Invstms (Pvt) Ltd v *Min of Lands & Ors* 2004 (1) ZLR 511 (S)

Dilwin Invstms (Pvt) Ltd v *Jopa Eng Co (Pvt) Ltd* HH-116-98

MEC Development Planning & Local Govt, Gauteng v *Democratic Party* 1998 (4) SA 1157 (C)

Metcash Trading Ltd v *Commr, SA Revenue Svc & Anor* 2001 (1) SA 1109 (CC)F

Pickering v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71 (H)

Triple C Pigs & Anor v *Commr-General, ZRA* 2007 (1) ZLR 27 (H)

Satchwell v *President, Republic of SA & Anor* 2003 (4) SA 266 (CC)

Stauffer Chemicals v *Monsato Co* 1988 (1) SA 805 (T)

Rudolph & Anor v *CIR & Ors* 1994 (3) SA 771 (W)

Williams & Anor v *Msipha NO & Ors* 2010 (2) ZLR 552 (S) G

Zimbabwe Township Developers (Pvt) Ltd v *Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S)

Malaba DCJ

Legislation considered A

Constitution of Zimbabwe 2013, ss 68(1), 69(3), 85(1), 166(3), 167(2), (3) & (5)(a)

Income Tax Act [Chapter *23:06*], ss 69(1) & (2)

Value Added Tax Act [*Chapter 23:12*], ss 32, 36 & 48

Case information

L Uriri for the applicant B

U Sakhe, with him *A Moyo,* for the respondent

Judgment

Malaba DCJ: This urgent chamber application was placed before me because the Chief Justice was not available to hear it. The application raised two questions for determination. The first question is whether an C interim order suspending the operation of legislation compelling payment by a

taxpayer of the amount of tax liable to be paid, notwithstanding an appeal to the Fiscal Appeal Court or pending a decision of a court, should be granted pending the hearing and determination of the main application challenging the constitutional validity of the legislation by the full bench of the Constitutional Court. The second question is whether an order should D be made directing that the main application be heard on an urgent basis.

The facts which gave rise to the questions for determination are these. The applicant is a company incorporated under the laws of Zimbabwe carrying on the business of supplying transport services and selling of fuel. The respondent is an administrative authority established in terms of the E Revenue Authority Act [*Chapter 23:11*]. It is entrusted with the responsibility of assessing taxpayers for tax liability and collecting revenue due to the fiscus in terms of the Value Added Tax Act [*Chapter 23:12*]("the VAT Act") and the Income Tax Act [*Chapter 23:06*] ("the Income Tax Act").

The applicant has been a registered operator in terms of the VAT Act since F October 2010. As from 2010, the applicant has been supplying transport services to and purchasing fuel for sale at its service station from an entity called Sakunda Energy. It has always been aware of its obligation to charge value added tax on the invoices for the transport services supplied to Sakunda Energy. Instead of submitting returns of value added tax based on the invoices on the transport services supplied, the applicant set off the costs of G fuel purchased from Sakunda Energy against the invoices for the transport services and submitted returns for value added tax in respect of the balance.

The respondent commenced investigations into the tax affairs of the applicant in October 2013. Upon examination of the applicant's books of account, the respondent concluded that the applicant had under-declared the value H

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added tax charged on the invoices on transport services supplied to Sakunda A Energy, as a result of the setting off of the cost of fuel purchased against the value of the invoices for the transport services. The applicant was advised of the under-declaration on 11 December 2013. The respondent was of the view that the value added tax on the invoices was liable to be paid to the B fiscus regardless of the purpose for which transport services were supplied.

On 7 February 2014, the respondent issued the applicant with an assessment of value added tax liability in an amount of US$1 619 161.32, including penalties and interest. According to the respondent, it was what the applicant and Sakunda Energy were doing in their business transactions as revealed by the examination of books of account, which produced evidence of tax evasion.

The applicant was dissatisfied with the tax liability assessment, arguing that it did C not owe the whole amount of the value added tax assessed to be due and payable. On 27 February 2014, the applicant lodged a formal objection with the Commissioner against the correctness of the assessment in terms of s 32 of the VAT Act. The allegation was that the respondent had adopted D a wrong method of assessing the applicant's tax liability. The respondent was accused of having misunderstood the nature of the applicant's business operations. Correspondence was exchanged on the matter between the parties between 14 and 17 March 2014. The Commissioner disallowed the objection in respect of the assessment of value added tax liability on 13 May 2014. The applicant noted an appeal to the Fiscal Appeal Court against the correctness E of the assessment on 23 May 2014.

On 27 May 2014, the Commissioner reminded the applicant of its continuing obligation to pay the amount of the tax assessed to be due and payable, notwithstanding the noting of the appeal to the Fiscal Appeal Court. On 30 May 2014, the applicant's tax consultant simply expressed a view to F the respondent that it would be prudent to await the outcome of the appeal.

Concurrently with the review of the applicant's value added tax affairs, the respondent carried out an assessment of the applicant's income tax liability. The respondent assessed the applicant's income tax liability to be an amount of US$2 066 652.84, including penalties and interest. On 3 June 2014 it sent G to the applicant, a complete tax computation for both value added tax and income tax. The respondent threatened to put in place measures to recover the taxes in terms of s 48 of VAT Act should the applicant fail to pay the money voluntarily. It later appointed three of the applicant's bankers and Sakunda Energy as agents for the payment of the value added tax assessed H to be due and payable.

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On 5 June 2014, the applicant filed an application with the Constitutional A Court in terms of s 85(1) of the Constitution, challenging the validity of ss 36of the VAT Act and 69(1) of the Income Tax Act. The allegation is that the legislative provisions violated the applicant's fundamental right of access to the courts enshrined in s 69(3) and the right to administrative justice guaranteed under s 68(1) of the Constitution. The applicant sought, as the relief, a final order declaring ss 36 of the VAT Act and 69(1) of the B Income Tax Act to be *ultra vires* ss 68(1) and 69(3) of the Constitution and therefore void.

Simultaneously with the filing of the main application, the applicant filed the urgent chamber application seeking an order that the main application be heard on an urgent basis. It also sought interim relief in the following terms: C

> "INTERIM RELIEF GRANTED
>
> 1. Pending the hearing and finalization of Applicant's appeal in the Fiscal Appeal Court, Applicant's obligation to pay value added tax and income tax be and is hereby suspended.
> 2. Respondent be and is hereby ordered to forthwith provide written reasons D for its decision to compel payment of value added tax and income tax pending Applicant's appeal to the Fiscal Appeals Court."

Section 36 of the VAT Act provides:

> **"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 E 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 F of the Commissioner to be the date on which such excess was received, and amounts short-paid recoverable with penalty and interest calculated as provided in subsection (1) of section thirty-nine."

The obligation to pay the amount of tax assessed to be due and payable is imposed by s 38 of the VAT Act. G

Section 69 of the Income Tax Act provides:

> **"69 Payment of tax pending decision on objection and appeal**
>
> (1) The obligation to pay and the right to receive any tax chargeable under this Act shall not, unless the Commissioner otherwise directs and subject to such terms and conditions as he may impose, be suspended pending a decision on any objection or appeal which may be lodged in terms of this Act. H

Malaba DCJ

> (2) If any assessment or decision is altered on appeal, a due adjustment shall be made, A for which purpose amounts paid in excess shall be refunded and amounts short paid shall be recoverable."

The obligation to pay income tax assessed to be due and payable is imposed by s 71(1) of the Income Tax Act.

Mr *Sakhe,* for the respondent, took a point *in limine*. It is that s 167(5)(a) of B the Constitution makes provision for the making of rules of the Constitutional Court allowing a person to bring a constitutional matter directly to the Constitutional Court with or without leave of the Constitutional Court, when it is in the interests of justice to do so. He argued that the makers of the Constitution did not envisage a situation where a person alleging that a C fundamental right or freedom enshrined in Chapter 4 has been, is being or is likely to be infringed can approach the Constitutional Court for appropriate relief without first showing, on an application, that it was in the interests of justice to do so.

Mr *Sakhe's* contention is based on the fact that, whilst the Constitutional D Court has jurisdiction to decide only constitutional matters and those matters reserved for its exclusive jurisdiction under s 167(2) of the Constitution, it certainly is not the only court with jurisdiction to decide constitutional matters. The Supreme Court and the High Court have jurisdiction to decide constitutional matters.

Mr *Uriri* relied on the broad terms of s 85(1) of the Constitution giving any of E the persons listed under the section the right to approach "a court" alleging that a fundamental right or freedom enshrined in Chapter 4 has been, is being or is likely to be infringed. Mr *Sakhe's* contention finds support from a decision of the Constitutional Court of South Africa in *Satchwell* v *President of the Republic of South Africa & Another* 2003(4) SA 266 (CC).

Not only was the decision in *Satchwell supra* based on the construction of F s 167(6)(a) of the Constitution of the Republic of South Africa 1996, which has the same wording as s 167(5)(a) of our Constitution, it was arrived at in the light of s 38 which lists persons with the right to approach "a competent court" alleging infringement of a fundamental right or freedom in the same G manner as s 85(1) of the Constitution.

The fact that s 167(1)(a) of the Constitution defines the Constitutional Court as "the highest court in all constitutional matters" may suggest that its competence is to ensure the uniform application of law and equal justice to all on constitutional matters and should exceptionally decide the matter H as a court of first instance.

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Whatever the merits or demerits of Mr *Sakhe's* argument, there is no doubt that A it raises an important constitutional question. It is a matter for determination by the full bench of the Constitutional Court.

As a judge sitting in chambers, I have no competence to make a pronouncement on the matter. It is, after all, a constitutional matter. I now turn to decide the first question. It is important to mention that the purpose of these proceedings B is not to determine the correctness or otherwise of the tax assessments made by the respondent. That is the question to be determined by the Fiscal Appeal Court in the appeal lodged by the applicant. On the question before this court, the decision is that a case has not been made for the granting of the relief sought. The reasons for the decision follow:

There is no doubt that a judge of the Constitutional Court may grant C interlocutory relief by way of an interim order pending determination of a constitutional matter by the full bench of the court. Section 166(3) of the Constitution provide for interlocutory matters to be heard by one or more judges of the court. See *Williams & Anor* v *Msipha NO & Ors* 2010 (2) ZLR 552 (S) at 562H-563A.

The applicant seeks an order suspending the statutory obligation to pay the D amount of the tax it was assessed to be liable to pay to the fiscus, pending the hearing and finalization of the appeal in the Fiscal Appeal Court. It is in the heads of argument that the applicant reveals that the relief sought is an interim interdict. There is need to have regard to the substance and not the form of the relief sought. The fact that the applicant calls the order sought, E an interim interdict does not make it one.

The subject of the application is not the kind of subject matter an interdict, as a remedy, was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object F is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right.

It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about G to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct: *Airfield investments (Pvt) Ltd* v *Minister of Lands& Ors* 2004 (1) ZLR 511 (S); *Stauffer Chemicals* v *Monsato Company* 1988 (1) SA 805 (T); *Rudolph & Anor* v *Commissioner for Inland Revenue & Ors* 1994 (3) SA 771 (W). H

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The applicant accepted in the founding affidavit that the respondent acted lawfully A in enforcing the obligation to pay the tax notwithstanding the noting by it of the appeal to the Fiscal Appeal Court against the correctness of the assessment. It did not allege any unlawful conduct on the part of the

respondent which would justify the granting of an interdict. It also accepted that at the time the respondent put in place measures to collect the tax, the B provisions of ss 36 of the VAT Act and 69(1) of the Income Tax Act were binding on it. That means that the applicant had no *prima facie* right in existence at the time not to pay the amount of tax it was liable to pay to the fiscus. Sections 36 of the VAT Act and 69(1) of the Income Tax Act protect a duty, not a right.

The provisions are designed to remove any doubt in the mind of the taxpayer, as C to whether an appeal to the Fiscal Appeal Court, or a decision of a court, would have the effect of suspending the obligation to pay the tax assessed to be due and payable.

Sections 36 of the VAT Act and 69(1) of the Income Tax Act provide that the Commissioner may, by a directive in appropriate circumstances, give the D appeal to the Fiscal Appeal Court the effect they prohibit on the obligation to pay the assessed tax. The Commissioner may, in the exercise of discretion, and upon consideration of the facts presented to him by the taxpayer, direct that the obligation to pay the tax be suspended pending determination of the appeal by the Fiscal Appeal Court or pending a decision by a court of law.

Whilst ss 36 of the VAT Act and 69(1) of the Income Tax Act provide that E the occurrence of any of the specified events shall not suspend the taxpayer's obligation to pay the tax assessed to be due and payable, they at the same time create a remedy for the amelioration of possible financial hardships faced by an individual taxpayer. They give the Commissioner the discretionary power to suspend the obligation pending the determination of the appeal by F the Fiscal Appeals Court or pending the decision by a court.

Failure to fulfill an obligation may be due to a variety of circumstances. The legislature decided to place the responsibility of deciding whether or not the particular circumstances of a taxpayer, entitle him or her to a directive suspending the obligation to pay the assessed tax, on the Commissioner. G A court of law would be acting unlawfully if it usurped the discretionary powers of the Commissioner and ordered a suspension of the obligation on a taxpayer to pay assessed tax pending determination of an appeal by the Fiscal Appeal Court.

The effect of the interim order sought by the applicant, has a direct relevance H to the determination of the question whether the obligation imposed on

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a taxpayer to pay the amount of the tax assessed to be due and payable, A infringes the taxpayer's fundamental right of access to a court and the right to administrative justice enshrined in ss 69(3) and 68(1) of the Constitution respectively.

Mr *Sakhe* put the matter in its proper context. He said that what the applicant is seeking is an interim order suspending its statutory obligation to pay the B amount of the tax assessed to be due and payable pending an anticipated declaration by the Constitutional Court of constitutional invalidity of ss 36(1) of the VAT Act and 69(1) of the Income Tax Act. The question is therefore not whether the respondent is likely to act unlawfully in future so as to be interdicted. It is whether an interim order should, in the circumstances, be granted suspending the operation of provisions of Acts of Parliament pending the C hearing and determination by the Constitutional Court of the question of the constitutionality of the statutory provisions.

There is no basis on which the interim order sought may be granted, except the possibility relied on by the applicant that the existing legislation would be held unconstitutional. Any court faced with an application challenging D the constitutionality of a statutory provision, is required to proceed on the presumption that the legislation is constitutionally valid until the contrary is clearly established.

The principle of presumption of constitutional validity of legislation pending determination of the main application is an important limitation to the exercise of judicial power: *Zimbabwe Township Developers (Pvt) Ltd* v *Lou's Shoes*E*(Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382B-D. By observing the principle, due respect is accorded to the legislative branch of Government consistent with the fundamental principle of separation of powers. The task of the Constitutional Court is to declare legislation invalid only after thorough examination of the factual and legal issues. A finding has to be made first that there has been, a contravention of a fundamental right or freedom. F

The legal consequences of a decision by the Constitutional Court that a law, a regulation or some of their provisions, are unconstitutional are that they lose their legal force on the day of the publication of the Constitutional Court decision. Until then, the law, regulation or any provision has legal force.

An G impression should not be created in the minds of right thinking members of the public that the outcome of the hearing by the Constitutional Court of the question of constitutionality of legislation has been pre-determined.

Sections 36 of the VAT Act and 69(1) of the Income Tax Act are laws of general application. Although the applicant framed the interim order on the belief that it would affect its immediate interests only, the truth of it is that H

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the relief cannot be granted without bringing into question the efficacy of the A whole revenue collection system. The interim order would be suspending the operation of the statutory provisions for all taxpayers who are under the same continuing obligation to pay the assessed tax liability as the applicant. All such taxpayers would obtain relief from the statutory obligation premised on the presumed constitutional invalidity of the legislation contrary to s 167(3) B of the Constitution. The section makes it clear that only the Constitutional Court has the power to make the final decision whether an Act of Parliament is constitutional.

The order would create uncertainty and confusion about the status of the provisions of the Acts of Parliament. In *MEC Development Planning &CLocal Govt, Gauteng* v *Democratic Party* 1998 (4) SA 1157 at para. 61 the Constitutional Court of South Africa on a similar issue said:

> "It is sufficient to point out here that considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision."

Sections 36 of the VAT Act and 69(1) of the Income Tax Act make provision for D a remedy, compliance with which is designed to give effect to the protection of the fundamental rights the applicant claims have been infringed. See *Metcash Trading Ltd* v *Commissioner, South African Revenue Service and Another* 2001(1) SA 1109 (CC).

The fact that the statutory provisions give the Commissioner the discretionary E power to direct that the continuing obligation to pay the tax, be suspended pending an appeal to the Fiscal Appeal Court means that a mechanism was put in place to ameliorate financial hardships experienced by individual taxpayers as a result of the enforcement of the "pay now, argue later rule". F Suspension of the operation of the "pay now, argue later rule" can be decided and should be decided by the Commissioner. He cannot act *mero motu*. As the facts on which the Commissioner would exercise the discretionary power would be within the exclusive knowledge of the taxpayer, he or she must place them before the Commissioner.

In this case, the Commissioner was not formally requested by the applicant G to direct the suspension of the continuing obligation to pay the charged tax pending determination of the appeal by the Fiscal Appeal Court. No decision was made by the Commissioner on the matter. The respondent cannot be ordered to give reasons for a decision it did not make. The applicant merely expressed an opinion that it would be prudent for the respondent H not to demand payment of the tax pending determination of the appeal. The

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respondent cannot be ordered to give reasons for reminding the applicant A of its statutory obligation.

The decision on the second issue is that the facts ascertained have not established that the main application should be heard on an urgent basis. An order that a constitutional matter should be heard on an urgent basis is an extraordinary remedy designed to be granted in the clearest of cases. B

The principle of equality of treatment requires that a litigant whose case is pending hearing in a court must be subjected to the same procedure as is applied to others for the determination of the question whether his or her case is ready to be set down for hearing by the court. The decision that a case should be set down for hearing by the Constitutional Court is made by the Registrar. It is only in exceptional circumstances and upon an application on C a certificate of urgency signed by a legal practitioner, that the Chief Justice will order that a matter should be heard on an urgent basis.

A party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be D accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for an urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike.

The certificate of urgency should show that the legal practitioner carefully E examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual. See *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71 (H); *Dilwin Investments (Pvt) Ltd* v *Jopa Engineering Company (Pvt) Ltd* HH-116-98; *Triple C Pigs & Anor* v *Commissioner-General, Zimbabwe Revenue Authority*F 2007 (1) ZLR 27 (H).

An examination of the founding affidavit reveals that the applicant bases its claim for an order that the main application be heard on urgent basis on the allegation that the respondent wrongly assessed its tax liability. The allegation is that payment of the tax will destroy the applicant's business. G The applicant sees in the appeal before the Fiscal Appeal Court, or the constitutional proceedings a remedy that will secure for it, immediate release from the burden of having to pay tax, which it claims is not due to the fiscus.

The certificate of urgency gave as grounds for having the matter treated as urgent the tax recovery measures the respondent was about to put in place. H

Malaba DCJ

It also alluded to the need to prevent financial hardships the applicant would A suffer as a result of payment of the tax.

Paragraphs 5 and 6 of the certificate of urgency refer to the threatened tax recovery measures and their possible effects:

> "5. This collection is imminent and due to happen any time soon and if it B happens not only will the outcome of the appeal be rendered academic but the collection may quite literally destroy applicant's business in such a manner that applicant will never recover even if the appeal is successful. This is especially so given the huge amounts of money involved.
>
> 6. Whilst the need for respondent to be able to collect taxes efficiently and effectively is acknowledged, it is imperative that this honourable court clarify the constitutional issues that are raised by respondent's arbitrary C and summary procedures whose effects on small businesses such as that of applicant and indeed across Zimbabwe may be ominous and permanent."

Mr *Sakhe* argued that the applicant has not advanced any cogent reasons on the papers as to why the constitutional matter should be heard on an urgent basis. The certificate of urgency is clearly unhelpful. It does not D assist the court to decide whether or not to exercise its discretion in favour of the applicant. Not only does the certificate of urgency make bald and unsubstantiated allegations of imminent financial ruin befalling the applicant should the tax recovery measures be effected, some of the statements are false. It is making a false statement to say that by adopting the tax recovery measures the respondent is enforcing "arbitrary and summary procedures". E The respondent is authorized by the law to adopt the tax recovery measures.

What is clear from the applicant's papers is that it is intent on stopping altogether all efforts to make it pay the tax demanded by the respondent. The subjective desire for a remedy is not in itself a factor on the basis of which an order, affording a party the privilege of jumping the queue and have his or her matter heard ahead of other litigants in a similar situation, F can be granted.

The question of validity of ss 36 of the VAT Act and 69(1) of the Income Tax Act, which is the subject matter of the constitutional proceedings, is to be decided from the point of view of the Constitution. It cannot be determined by having regard to the legality of the conduct of the respondent. The effect G on the applicant's business of the tax recovery measures adopted by the respondent, would be irrelevant to the consideration of the question whether the statutory provisions are constitutionally valid or not. A legal basis has not been established for an order that the main application be heard on an urgent basis.

It is ordered that: H

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(1) The constitutional application challenging the validity of ss 36 of the A Value Added Tax [*Chapter 23:12*] and 69(1) of the Income Tax Act [*Chapter 23:06*] is not urgent.

(2) The application for an interim order suspending the obligation imposed on the applicant to pay the tax assessed to be due and payable pending the hearing of the appeal by the Fiscal Appeal Court or the constitutional matter filed in Case No. CCZ 41/14 be and is hereby dismissed. B

(3) The applicant is to pay the costs of the urgent chamber application.

Machingura Legal Practitioners, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners C

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[zRPz]PILIME & ORS v MIDRIVER ENTERPRISES (PVT) LTD 2014 (2) ZLR 91 (H)

Citation	2014 (2) ZLR 91 (H)
Case No	Judgment No. HH-367-14
Court	High Court, Harare
Judge	Zhou J
Heard	24 October 2013; *CAV*
Judgment	23 July 2014
Counsel	Mrs *D Mandaza*, for the plaintiff *RD P Drury*, for the defendants
Case Type	Opposed matter
Annotations	No case annotations to date

Flynote

Arbitration – *award – setting aside of – grounds – award contrary to public policy –* C *meaning – quantification of loss – need for quantification to be based on determinable figures – arbitrator accepting one party's figures without any basis for doing so – award set aside*

Headnote

It is undesirable to deal with labour disputes before arbitrators or the Labour D Court piecemeal. Such an approach, whereby an arbitrator or the Labour Court makes an award and sends the parties to try and negotiate the figures, failing which they then return for quantification, creates a multiplicity of cases. It even raises the issue of whether such an award is a final order E which is appealable, or only becomes final upon the parties agreeing on quantum or after the arbitrator has quantified the loss following disagreement between the parties. The result is that there may

be an appeal noted against the first part of the award as, on the face of it, it purports to be complete. When there is another award quantifying the loss to the employees, that aspect of the award is equally susceptible to F an appeal. Thus there may end up being more than one appeal in respect of what is in essence one dispute.

Labour procedures were meant to be as flexible and as informal as possible, but are now subject to the normal rules of procedure insofar as they result in orders (or awards) that are executable like orders of ordinary courts and are subject generally to the same rules relating to appeals. The time G has come for arbitrators and the Labour Court to give final awards or orders unless the parties themselves have asked for an opportunity to negotiate the terms of the orders or awards.

Not every fault or mistake of an arbitrator, be it of law or fact, would fall within the ambit of the expression "contrary to the public policy of G Zimbabwe", justifying the setting aside of the award. For it to qualify to

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Zhou J

fall within the meaning of that expression, the arbitrator's reasoning or A conclusion must go beyond mere faultiness or incorrectness, and must constitute 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 would be intolerably hurt if the award was upheld or enforced. An award that contravenes a fundamental principle of law would be contrary to the B public policy of Zimbabwe.

The concept of quantification of loss entails some assessment of the loss which is based on determinable factors. There can be no quantification when there is neither evidence nor a basis tendered to justify the figures being awarded. Where the amounts awarded by the arbitrator were not C based on any evidence or some other valid ground, but were awarded merely because the respondent did not put forward its own figures, such an approach would constitute a palpable inequity that subverts our concept of justice.

Cases cited D

American Friends Svc Cttee v *Chauke* S-1-12

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

Conforce (Pvt) Ltd v *City of Harare* 2000 (1) ZLR 445 (H)

UZ-UCSF Collaborative Research Programme in Women's Health v *Shamuyarira* 2010 (1) ZLR 127 (S) E

Pioneer Tpt (Pvt) Ltd v *Delta Corp & Anor* 2012 (1) ZLR 58 (H)

Walenn Hldgs (Pvt) Ltd v *LIoyd & Anor* 1996 (2) ZLR 383 (H)

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

Legislation considered

Arbitration Act [*Chapter 7:15*], s 36(3) F

Case information

B Nyamwanza, for the applicants

R Ranchhod, for the respondent

Judgment

Zhou J: This matter was instituted as a chamber application for registration G of an arbitral award in terms of s 98(14) of the Labour Act [*Chapter 28:01*]. The respondent filed opposing papers, hence the matter was referred to be dealt with as an opposed application. The arbitral award rendered by D Mudzengi is dated 20 November 2012. It reads as follows in the operative part thereof:

"In view of the above, below is my award:

1. Claimants deserved a salary increase after the probationary period. H

Zhou J

2. I therefore order that claimants be paid a salary increase for the period April 2012 A to July 2012 when their contracts were terminated.
3. I further order that claimants meet the respondent and negotiate for the post probation increase and that if (the) parties fail to reach an agreement, they can approach the arbitrator for quantification of the increases within 14 days of receipt of this award."

On 6 December 2012 the respondent noted an appeal in the Labour Court against B the award. Notwithstanding the noting of the appeal, the applicants approached the arbitrator for quantification of the increases awarded to them. At the hearing of the matter before the arbitrator, the respondent objected to the quantification on the basis that it had appealed against the award. There is a dispute regarding the position taken by the arbitrator, with the C respondents alleging that at an initial hearing the arbitrator had upheld the objection. That allegation is disputed by the arbitrator who states that there was no such hearing as alleged by the respondent. The arbitrator refers to a meeting of 19 December 2012. According to him that meeting never upheld the objection by the applicant. Accordingly, he proceeded to quantify the D figures on the basis that an appeal to the Labour Court does not suspend the operation of the award appealed against.

I have previously lamented the undesirable situation which is created by dealing with labour disputes before arbitrators or the Labour Court piecemeal. Such an approach, whereby an arbitrator or the Labour Court makes an award E and sends the parties to try and negotiate the figures failing which they then return for quantification, creates a multiplicity of cases. It even raises the issue of whether such an award is a final order which is appealable or only becomes final upon the parties agreeing on quantum or after the arbitrator has quantified the loss following disagreement between the parties. The result is that there may be an appeal noted against the first part of the award F as, on the face of it, it purports to be complete. That is what happened in the instant case. When there is another award quantifying the loss to the employees that aspect of the award is equally susceptible to an appeal. Thus there may end up being more than one appeal in respect of what is in essence one dispute. The stark reality which confronts the labour procedures is that while they were meant to be as flexible and as informal as possible they are G now equally subject to the normal rules of procedure insofar as they result in orders (or awards) that are executable like orders of ordinary courts and are subject generally to the same rules relating to appeals. In my view, the time has come for arbitrators and the Labour Court to give final awards or orders unless the parties themselves have asked for an opportunity to negotiate the H terms of the orders or awards.

Zhou J

In opposing the application for the registration of the award the respondent A objected *in limine* to the seeking of the relief through a chamber application. The respondent contended that the applicant should withdraw the application and institute the proceedings by way of a court application. At the hearing of the matter, Mr *Ranchhod* for the respondent did not make any submissions on that point. Order 32 r 229C specifically provides that the fact that an applicant has instituted a chamber application when he should have proceeded by B way of a court application shall not in itself be a ground for dismissing the application unless some interested party has or may have been prejudiced by the use of that procedure and such prejudice cannot be remedied by directions for the service of the application on that party, with or without an appropriate order of costs. In the instant case, the application was dealt with as an opposed application after the respondent filed opposing papers. Both C parties filed heads of argument. There was, therefore, no prejudice which was suffered by the respondent.

On the merits, the respondent opposes registration of the award on the ground that the award is contrary to the public policy of Zimbabwe. The respondent submits that no evidence was submitted by the applicants in support of the D figures claimed, which were accepted by the arbitrator.

The meaning of the expression "contrary to the public policy of Zimbabwe" is explained in the Act as well as in numerous judgments, and requires no further discussion. See art 36(3) of the First Schedule to the Arbitration Act [*Chapter 7:15*]; *ZESA* v *Maposa* 1999 (2) ZLR 452 (S) at 465C-466D; E*UZ-USF Collaborative Research Programme in Women's Health* v *Shamuyarira* 2010 (1) ZLR 127 (S); *Chanakira* v *Mapfumo & Anor* 2010 (2) ZLR 178 (H) at 182B-183B What is clear from the above authorities is that not every fault or mistake of the arbitrator, be

it of law or fact, would fall within the ambit of the expression "contrary to the public policy of Zimbabwe". See also *Conforce (Pvt) Ltd* v *City of Harare* 2000 (1) ZLR 445 (H) at 451B; F*Walenn Holdings (Pvt) Ltd* v *LIoyd & Anor* 1996 (2) ZLR 383 (H). For it to qualify to fall within the meaning of that expression the arbitrator's reasoning or conclusion must go beyond mere faultiness or incorrectness, and must constitute 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 would be intolerably G hurt if the award was upheld or enforced: *Pioneer Transport (Pvt) Ltd* v *Delta Corporation & Anor* 2012 (1) ZLR 58 (H) at 66B-E; *ZESA* v *Maposa (supra*) at 466F-467A. An award that contravenes a fundamental principle of law would be contrary to the public policy of Zimbabwe: *Chanakira* v *Mapfumo (supra*). H

Zhou J

In casu the applicants led no evidence to justify the figures which they claimed as A the salary increases to be awarded to them. The arbitral award does not postulate any basis for accepting the figures given by the applicants other than that the respondent did not suggest alternative figures. In the arbitrator's reasoning:

> "On the merits, the respondent has not suggested any figures apart from claiming B that claimants cannot just pluck figures from the air. In the absence of such figures, claimants' claim will succeed."

In *American Friends Service Committee* v *Chauke* S-1-12 the court was confronted with a case in which an award for damages had been given in the absence of evidence to prove the loss. At pp 2-3 of the judgment the C court remarked as follows:

> "The second issue for determination is whether or not the court *a quo* misdirected itself in confirming the award made by the arbitrator on the quantum of damages due to the respondent. The record shows that there was no evidence upon which the arbitrator based his award other than an unsubstantiated statement of claim by the respondent. The Labour Court accepted the claim on the basis that the appellant had not opposed it.
>
> D There can be no doubt that the Labour Court fell into error in coming to this conclusion as it is settled law that damages in these circumstances must be properly proved by the party seeking the same."

The concept of quantification of loss entails some assessment of the loss which is based on determinable factors. There can be no quantification when there is neither evidence nor a basis tendered to justify the figures being E awarded. In the instant case, the amounts awarded by the arbitrator were not based on any evidence or some other valid ground. They were awarded merely because the respondent did not put forward its own figures. Such an approach, in my view, constitutes a palpable inequity that subverts our conception of justice.

Based on the above, it seems to me that the award *in casu* is contrary to the F public policy of Zimbabwe and should, accordingly, not be registered for enforcement.

In the result, the application is dismissed with costs.

Mageza & Nyamwanza, applicants' legal practitioners G

Hussein Ranchhod & Co, respondent's legal practitioners

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[zRPz]WINDSOR TECHNOLOGY (PVT) LTD v MABUYAWA & ANOR 2014 (2) ZLR 96 (H)

Citation 2014 (2) ZLR 96 (H)

Case No Judgment No. HH-377-14

Court High Court, Harare

Judge Chigumba J

Heard 25 April 2014; *CAV*

Judgment 23 July 2014

Counsel In chambers; parties not in attendance

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Court – *High Court – jurisdiction – employment matter – arbitral award registered with High Court – award subsequently varied by consent and made an order of the Labour Court – High Court having no jurisdiction to deal with amended award* D

Employment – *arbitration – award – arbitral award registered with High Court – award subsequently varied by consent and made an order of the Labour Court – High Court having no jurisdiction to deal with amended award*

Headnote

The applicant and the first respondent were parties to an employment E dispute which became the subject of arbitration proceedings, and which culminated in an arbitral award being issued. The applicant noted an appeal against the arbitral award, to the Labour Court. The first respondent caused the arbitral award to be registered as an order of the High Court and instructed the deputy sheriff to attach property in execution. Various F movable goods were attached. Subsequently, the parties negotiated a settlement which culminated in the registration of a deed of settlement by the Labour Court. A dispute then arose about whether the applicant was entitled to deduct the sum assessed by the revenue authority as being due in income tax and pay it to the authority. With attachment of its property being imminent, the applicant approached the High Court for G a stay of execution pending a determination by the court as to whether the deed of settlement had been breached.

Held, that the High Court had no jurisdiction. Where a party has registered an arbitral award for purposes of execution with the High Court, and a deed of settlement is subsequently, by consent, entered into and registered as H

Chigumba J

an order of the Labour Court, which deed significantly alters the terms of A the arbitral award, then, in the event of any further dispute, the parties are back in the hands of the Labour Court. Their remedies lie with the Labour Court, unless the arbitral award, as varied, is registered again as an order of the High Court. Section 92C(3) of the Labour Act [*Chapter 28:*01] B allows the Labour Court to suspend the execution of its order pending its decision on an application to vary or rescind the order on grounds that it was obtained by a mistake common to both parties.

Cases cited

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

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

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

Keen v *Durban City Council* 1951 (2) SA 548 (N)

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

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

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

Walenn Hldgs (Pvt) Ltd v *Lloyd & Anor* 1996 (2) ZLR 383 (H)

Legislation considered E

Labour Act [*Chapter 28:01*], s 89, 92C(3), 92E, 98(2), (14) & (15)

Case information

In chambers; parties not in attendance

Judgment

Chigumba J: This application came before me via the urgent chamber book. After F perusing the papers filed of record, I formed the *prima facie* view that the applicant's remedies lay with the Labour Court, and I endorsed this preliminary view on the face of the application. I have now been asked to provide reasons for judgment, for purposes of appeal. These are the reasons:

The relief sought by the applicant was as follows: G

"TERMS OF FINAL ORDER SOUGHT

That execution of judgment granted under case number HC8258/13 in respect of applicant is stayed.

First respondent bears costs of this application on a legal practitioner and client H scale.

2014 (2) ZLR p98

Chigumba J

INTERIM RELIEF GRANTED A

In the interim pending a determination by the High Court as to whether the Deed of Settlement entered into between applicant and first respondent has been breached, execution of the judgment granted under case number HC 8258/13 be and is hereby temporarily stayed."

The background which gave rise to this matter is as follows. B

The applicant and the first respondent were parties to an employment dispute which became the subject of arbitration proceedings under case number LC/H/764/13, and which culminated in an arbitral award being issued on 16 September 2013. On 26 September 2013, applicant noted an appeal against the arbitral award, to the Labour Court. The first respondent caused the arbitral award to be registered as an order of the High Court, on 8 January 2014, C under case number HC 8258/13. The terms of the order were that the applicant pay USD$32 744.01 to the respondent, within one and a half months from the date of registration of the order. It was a further term of the order that the amount due would be paid minus statutory deductions.

On 22 January 2014, the first respondent instructed the second respondent D to attach property in execution. Various movable goods were attached. The removal of this property was due to take place on 27 January 2014. An urgent chamber application seeking stay of execution was filed under case number HC602/14. It appears to have been dismissed for lack of urgency. Subsequently, the parties negotiated a settlement which culminated in the registration of a deed of settlement by the Labour Court, on 18 February 2014. E The terms of the deed of settlement were that:

"The respondent hereby agrees to conditionally suspend executing the award and the writ thereof subject to the following terms:

(a) Appellant pay the sum of US$25 000 to the respondent. The US$25 000 will be paid as follows:

(i) payment of US$15 000 on or before 14 February 2014. F

(ii) payment of the balance of US$10 000 in three monthly and equal installments commencing on 28 February 2014 and ending 30 April 2014.

(iii) payment by the appellant of all Sheriff's fees and commission upon withdrawal of removal instructions to the Sheriff by the respondent. G

All payments must be made free of bank charges and bank commission.

(b) Appellant withdraws its appeal and application for stay pending in the Labour Court by 10 February 2014.

Further, in the event of any breach of the terms of this deed by the appellant, the whole amount of US$32 744.01 or the balance thereof shall become immediately due. The respondent will be entitled to

execute against the appellant's property H

2014 (2) ZLR p99

Chigumba J

for the recovery of the outstanding amount and all legal costs on the scale of attorney A and client."

On 11 February 2014, the Zimbabwe Revenue Authority (ZIMRA) issued a revenue authority retrenchment package directive in terms of which the sum of US$5 253 was assessed as the amount of income tax to be deducted from the settlement amount. On 14 February 2014, the applicant made an B initial payment of US$15 000 to the respondent, as agreed. On 28 February 2014, the applicant paid a further sum of US$3 300. On 6 March 2014, the applicant paid the income tax amount due to ZIMRA in the sum of US$5 253. On 27 March 2014, the applicant paid US$1 447 to the respondent. The applicant's legal practitioners had written to the respondent's legal C practitioners on 17 February 2014 and advised of the income tax assessment directive. On 7 March 2014 the respondent's legal practitioners wrote a letter to the applicant's legal practitioners in which they argued that the deed of settlement did not provide for the settlement of tax obligations. On 2 April 2014, the applicant was placed on terms to rectify its alleged breach of the terms of the deed of settlement by paying to the respondent the sum of D US$5 318.11, as well as Sheriff's costs, failing which the second respondent would be instructed to proceed with execution.

On 23 April 2014 this present application was filed, because the removal of the attached property was imminent, and the applicant was in danger of losing its commercial interests through the loss of its assets which had been E placed under attachment. The applicant denies having breached the terms of the settlement agreement by paying the Income Tax to Zimra and deduction the amount from the settlement sum.

The question that exercised my mind was whether the applicant had approached the right forum for the relief that it sought, in light of the fact F that the deed of settlement whose terms required elucidation was registered with the Labour Court, and not with this court. The arbitral award which had been registered by this court on 17 January 2014 had been overtaken and apparently superseded by the deed of settlement entered into before the Labour Court, on 16 February 2014. The deed of settlement provided for payment of US$25 000, as opposed to the US$32 000 provided for in the G arbitral award. The question for determination is this: in what circumstances may this court stay the execution of a deed of settlement which is registered with the Labour Court and which emanated from an arbitral award which was registered with this court but not executed?

In terms of s 89 of the Labour Act [*Chapter 28:01*]:

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

2014 (2) ZLR p100

Chigumba J

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

This section has been interpreted to mean that the Labour Court is cloaked with exclusive jurisdiction to deal with labour matters. The applicant had appealed to the Labour Court against the arbitral award. Had it not agreed to withdraw it in the deed of settlement, its appeal would have been determined in terms of s 92E which provides: B

"92E Appeals to the Labour Court generally

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

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

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

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*D 2005 (1) ZLR 275 (S), *DHL International Ltd* v *Madzikanda* 2010 (1) ZLR 201 (H), *Samudzimu* v *Dairibord Holdings Ltd* 2010 (2) ZLR 357 (H). The applicant, recognizing this point of law, had applied for stay of execution of the arbitral award in terms of s 92E(3) of the Labour Act. It withdrew the application for stay of execution in the deed of settlement. Neither the noting E of the appeal

against the granting of the arbitral award, nor the application for stay of its execution precluded the registration of the arbitral award for purposes of execution by the High Court. The law that governs registration of arbitral awards and the circumstances in which such registration can be opposed or resisted is clear, and settled, in this jurisdiction.

Greenland v *Zimbabwe Community Health International Research Project*F HH-93-13 at p 3 is authority for the proposition that:

> "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*]."

It is generally acknowledged in our law that a court should not interfere with G an arbitrator's award even where there has been a mistake. See Jacobs *Law of Arbitration in South Africa* at pp 128-129 where it is stated:

> "It has been held that a court should be very chary about interfering with an award on the ground that the arbitrators made a mistake. Such interference would be justified only where the arbitrators made a mistake in reducing to writing what H

> they had actually decided, and it should not take place where the mistake was as to the A consequences of what they decided. … [A] court has no jurisdiction to alter an award so as to accord with what the court thinks the arbitration tribunal actually decided, except in a limited sense, that is, to interpret the meaning of a word in an award where such word is not clear, by admitting evidence to determine the application of the word concerned to the facts of the arbitration."

The learned author relied on the decision in *Keen* v *Durban City Council* 1951 (2) SA 548 (N)B for this comment. See also *Walenn Holdings (Pvt) Ltd* v *Lloyd & Anor* 1996 (2) ZLR 383 (H) at 395-397. The grounds upon which a court may refuse to make an award an order of court are spelt out in the Model Law in art 36. The court may refuse to recognise or enforce an arbitral award only if the party against whom the award is invoked furnishes proof that:

(a) a party to the arbitration agreement was under some incapacity or the C agreement itself was not valid under the law to which the parties have subjected it or under the law of the country where the award was made; or

(b) it was not given proper notice of the appointment of the arbitrator or of D the proceedings or was otherwise unable to present its case; or

(c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission;

(d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not E in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties or it has been set aside or suspended by a court of the country in which or under the law of which the award was made; or

(f) the court finds that the subject matter of the dispute is not capable of F settlement by arbitration under the law of Zimbabwe or that the recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

The arbitral award in this case was registered without the appropriate challenge being mounted on any of the grounds set out in the Model Law. G Subsequent to its registration as an order of this court, the parties altered the terms of the arbitral award, and registered the new terms that they had agreed, as an order of the Labour Court. The arbitral award had been registered as an order of this court in terms of s 98(14) and (15) by virtue of it being a dispute referred to compulsory arbitration in terms of s 98(2) of the Labour Act, H which provides as follows:

> **"98 Effect of reference to compulsory arbitration under Parts XI and XII**A
>
> (1) …

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

Section 98(14) and (15) provides as follows:

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

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

The arbitral award could only be set aside by the High Court in terms of the Arbitration Act and s 36 of the Model Law as discussed above. That opportunity passed. The arbitral award was registered. Once the parties agreed to alter the terms of the arbitral award as registered, and replaced it with a deed of settlement, which they registered as an order of the Labour Court, in my view there was no longer any arbitral award to speak of. D

The parties' remedies had been placed squarely within the ambit and the jurisdiction of the Labour Court as provided for in s 89 of the Labour Act. The matter became a purely labour matter in which the Labour Court has exclusive jurisdiction. The interpretation of the wording of the deed of settlement was in the province of the Labour Court which registered the deed. E The Labour Act provided a very neat solution to the applicant's dilemma, in s 92C, which provides that:

"92C Rescission or alteration by Labour Court of its own decisions

(1) Subject to this section, the Labour Court may, on application, rescind or vary any determination or order – F

(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 a mistake common to the parties;

or

(c) in order to correct any patent error.

(2) … G

(3) Where an application has been made to the Labour Court to rescind or vary any determination or order in terms of subsection (1), the Labour Court may direct that –

(a) the determination or order shall be carried into execution; or

(b) execution of the determination or order shall be suspended pending the decision upon the application …". H

2014 (2) ZLR p103

Chigumba J

It is my considered view that, where a party has registered an arbitral award A for purposes of execution with the High Court, and a deed of settlement is subsequently entered into and registered as an order of the Labour Court, which deed of settlement significantly alters the terms of the arbitral award, by consent, then in the event of any further dispute, the parties are back in the hands of the Labour Court, and their remedies lie with the Labour Court, B unless the arbitral award, as varied, is registered again as an order of the High Court. Section 92C(3) allows the Labour Court to suspend the execution of its order pending its decision on an application to vary or rescind the order on grounds that it was obtained by a mistake common to both parties. In this case, the respondent mistakenly thought that the order registered with the Labour Court absolved it from liability to fulfill its statutory tax obligations. C The applicant mistakenly assumed that the respondent understood that it was under a legal obligation to pay income tax on the settled amount.

With all due respect to counsel for the applicant, from the papers filed of record, I fail to see any basis on which the High Court would interfere with the execution of an order which was registered as an order of the Labour D Court, and no longer registered as an order of this court, especially considering that, according to the deed of settlement registered with the Labour Court, execution of the writ had been stayed, by consent. The deed of settlement registered by the Labour Court was not and could not be construed to be an order of this court, merely because an arbitral award had previously been registered by this court. The arbitral award had been subsumed by the deed E of settlement, with the consent of the parties. The deed of settlement became disputed regarding interpretation of its salient terms. Neither the Arbitration Act nor the Labour Act countenances that

this court would have residual jurisdiction to interfere with the outcome of an inquiry into the meaning of the terms of an order of the Labour Court, merely because such an order F came to life on the back of an arbitral award that this court had registered for purposes of execution. This court may only interfere with an arbitral award in the limited ambit of the Model Law. No such circumstances exist here. The applicant's remedies clearly lay with the Labour Court, in s 92C, and approaching this court on an urgent basis in these circumstances was tantamount to an abuse of court process. For these reasons, the court declined G to hear the matter *ex parte* and endorsed that the applicant's remedies lay with the Labour Court.

Dube, Manikai & Hwacha, applicants' legal practitioners

Kadzere, Hungwe & Mandevere, respondents' legal practitioners H

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[zRPz]RUZENGWE NO & ORS v ZVINAVASHE 2014 (2) ZLR 104 (H)

Citation	2014 (2) ZLR 104 (H)
Case No	Judgment No. HH-356-14
Court	High Court, Harare
Judge	Chitakunye J
Heard	24 July 2014; *CAV*
Judgment	24 July 2014
Counsel	*J Dondo,* for the applicants *T M Kanengoni,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Trust – *trustee – continuing in office after period of appointment has expired* C *– effect – steps which may be taken to regularise his position*

Headnote

Where a trustee of a trust purports to stay in office beyond the period for which he was appointed, any decision made by him may be challenged and may indeed be invalid. This does not mean that he has no D*locus standi* in any matter brought on behalf of the trust: 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. However, his capacity to make valid decisions is limited by the fact that he has overstayed. He ought to regularise his stay in terms of the deed of trust. Alternatively, where E a trustee has overstayed and legally cannot make legally valid decisions, the option is to have the trustees appointed or re-

appointed by the High Court in terms of ss 7 and 9 of the Companies and Associations Trustees Act [*Chapter 24:04*].

Cases cited F

Baldwin v *Baldwin* 1967 RLR 289 (G)

Chizura v *Chiweshe* 2003 (2) ZLR 64 (H)

Diocesan Trustees, Diocese of Harare v *Church of the Province of Central Africa* 2009 (2) ZLR 57 (H)

Mhungu v *Mtindi* 1986 (2) ZLR 171 (S)

Trustees, Leonard Cheshire Homes Zimbabwe Central Trust v *Chite & Ors*G 2010 (1) ZLR 63 (H)

Legislation considered

Companies and Associations Trustees Act [*Chapter 24:04*], ss 7 and 9 H

2014 (2) ZLR p105

Chitakunye J

Case information

J Dondo, for the applicants A

T M Kanengoni, for the respondent

Judgment

Chitakunye J: The late Vitalis Zvinavashe, in a bid to ensure that his estate accumulated during his life time was properly administered during the last part of his life and after his death, decided to form a trust, namely Vitalis B Musungwa Gava Zvinavashe Trust (hereinafter referred to as "the Trust"). The beneficiaries of the Trust included himself, his wife, his children, who included the respondent, his mother and his late brother Francis Zvinavashe's children. On 25 February 2009 he executed a Notarial Deed of Donation and Trust (hereinafter referred to as "the Deed of Trust") in which the above was captured. On the same date he executed his last C will and testament. In that last will and testament (hereinafter referred to as "the Will") he appointed four trustees, who were the three applicants and the respondent. The respondent was nominated executor of the Will and administrator of the estate.

After the demise of the testator the respondent was duly appointed executor testamentary on 22 April 2009. In that capacity, he duly performed his function D and on 27 October 2009 the estate distribution account was confirmed by the Master of the High Court. In that account certain assets were transferred to the Trust in terms of clause 5.3 of the Will. The Trust is run and managed by a board of trustees. That board had the first applicant as chairman and the second applicant as secretary.

On 30 April 2012, the applicants filed this application. They alleged that the E respondent has usurped authority and administration of trust assets from the direction and control of the Trust and is administering trust assets without the direction and control of the board of trustees and, in so doing, is prejudicing the Trust and the Trust beneficiaries of their interest in the Trust. The applicants thus seek an order that the respondent, and any person who F draws authority from him, be interdicted from:

1. interfering with the day to day management of the Trust schools, namely Tynwald Primary School and Tynwald High School;
2. prohibiting any auditor appointed by the applicants from accessing the Trust schools' accounts and auditing such accounts;
3. harassing and /or dismissing any employees of the Trust or Trust schools G without authority of the board of trustees;
4. directly accessing any funds belonging to the Trust or Trust schools without lawful authority of the board of trustees.

In his opposition the respondent raised some points *in limine* in which H he challenged the *locus standi in judicio* of the applicants to bring this

Chitakunye J

application. The respondent contended that the first and second applicants A lack the requisite *locus standi in judicio* to bring this application, in that they were appointed to the office of trustee on 8 April 2009 for a period of three years. Three years have since lapsed and they have not been reappointed. He also contended that the applicants lack the requisite *locus standi in judicio* to bring this application as they do not have a resolution authorising them to bring the application as they did. He further contended that the matter is B*lis pendens,* in that he instituted proceedings in this court on 24 April 2012 for an order directing the second applicant to convene a meeting of the Trust to deal with the issues complained of in this application. Those proceedings are still pending. On the above issues the respondent contended that the application should be dismissed.

The applicants argued that their terms of office have not lapsed. They C submitted that the first and second applicants are trustees by virtue of their office and so are virtually there for their lifetime. If anything, the respondent is shooting himself in the foot as he is amongst those trustees whose terms are time framed.

In determining the question of *locus standi in judicio* it is imperative to bear D in mind the objectives of the trust. These are:

(a) to utilize the property of the Trust and the income of the Trust Fund for the maintenance and benefit of the beneficiaries;

(b) to invest the Trust Fund in such a manner as the Trustees for the time being shall deem fit; and E

(c) to do all such things which are incidental or conducive to the attainment of the above objectives.

It was in an effort to realise the above objectives that the deceased executed the deed of trust on the same day he executed the Will. Both documents contain a clause on the appointment of trustees. The deed of trust provides F for the duration of the appointments whereas the Will is silent on that aspect. The Will contains no other provisions on the tenure and future appointments of trustees. It is only in the deed of trust where such provisions are found.

I am of the view that the testator was mindful of the fact that a trust had been created in terms of the deed of trust and any aspects not contained in the Will were to be governed in terms of the deed of trust. I say so because G in the Will he does not purport to be creating a second trust but to be taking cognisance of the Vitalis Musungwa Gava Zvinavashe Trust. For instance, in clause 5.3 he states that:

> "I leave all my worldly belongings, moveable and immoveable, corporeal and incorporeal to the Vitalis Musungwa Gava Zvinavashe Trust, which is a trust for H

Chitakunye J

> the benefit of my wife, all my children, my mother and my late brother, Francis Pachedu A Zvinavashe's children."

I am of the view that, in interpreting the intention of the donor, sight must not be lost that he could not have been creating two distinct trusts on the same day with the same objectives but varying terms for the trustees; one to operate during his lifetime and the other after his demise. It can also not B be said that he intended the Trust created in terms of the Will not to outlive the lives of the trustees therein stated. Clearly the issue of appointment and tenure of trustees was to be in terms of the deed of trust.

On the contentious issue as to whether the applicants' term of office as trustees had lapsed it is pertinent to refer to the deed of trust document itself. Both sides C seemed to contend that only their trusteeship had not lapsed but that of the other parties' had lapsed. In this regard, in the founding affidavit the first applicant stated that:

> "The position that I hold as Chairman and Trustee, as well as that of the second applicant, are cast in stone in the Deed as the Deed specifically states that in my capacity as the accountant to the late General Zvinavashe and the second applicant D in his capacity as the Senior Partner of the law firm Mutumbwa, Mugabe and Partners we would be appointed as trustees for an indefinite period or, in any event, for the duration of our natural lives."

The respondent, on the other hand, contended that:

> ".. The appointment of the first and second applicants is not cast in stone. The Will did not appoint the applicant as chairman. Clause 5.5(iv) of the Will E provides for the appointment of any other firm of Chartered Accountants as may be decided by the other trustees. Further, and in any event, the Trust Deed does not in any way state that the applicant is the chairman and neither does it state that he is a life trustee.
>
> In any event, the Trust Deed provides for the tenure of office of the Trustees appointed upon the death of the 'donor'".

From the latter part of this statement one gets the impression that the F respondent believes that the tenure of office for three years was for those trustees appointed after the death of the donor and did not apply to trustees appointed during the donor's lifetime.

Clause 4 of the deed of trust, titled "Appointment of Trustees", provides that:

> "4.1 The first Trustees of the Trust shall be- G
>
> (a) Vitalis Musungwa Gava Zvinavashe (born 27/09/1943)
>
> (b) Margaret Mutamba Zvinavashe (born 03/03/1962)
>
> (c) Richard Musungwa Zvinavashe (born 29/03/1968).
>
> 4.2 The power of appointing the trustees shall vest in the trustees for the time being H of the trust.

Chitakunye J

> 4.3 Upon the death of the Donor the number of Trustees shall be increased to A a minimum of 5 and a maximum of 7, two of whom shall be respectively a lawyer and an accountant.
>
> 4.4 The lawyer shall be the Senior Partner or nominee of Mutumbwa Mugabe and Partners or their successors in title, and likewise the Accountant shall be the Senior Partner or nominee of the Donor's Accountants.
>
> 4.5 In the event that the number of Trustees has fallen below 5, the remaining B trustees shall have the right to appoint further Trustees.
>
> 4.6 Trustees shall hold office for a period of 3 years and they shall be eligible for re-appointment after the expiry of such term."

As can be noted, the Board of Trustees during the lifetime of the donor comprised three persons, namely the donor, his wife and his son Richard. The increase in the number of trustees was to occur after the donor's death. C Amongst the trustees to be appointed after the donor's death were:

(a) the senior partner or his nominee of Mutumbwa Mugabe and Partners; and

(b) the senior partner or his nominee of the donor's accountants.

In clause 5.5 of the Will the late Vitalis Zvinavashe appointed four trustees in these terms: D

> "I hereby appoint the under listed to be the Trustees of the Vitalis Musungwa Gava Zvinavashe Trust.
>
> (i) my wife Margaret Mutamba Zvinavashe;
>
> (ii) my son Richard Musungwa Zvinavashe;
>
> (iii) the Senior Partner for the time being or his or her nominee of E Messrs Mutumbwa Mugabe and Partners, legal practitioners or their successors in title.
>
> (iv) the Senior Partner for the time being or his or her nominee of Messrs Ruzengwe and Partners Chartered Accountants or their successors in title, or of any other firm of Chartered Accountants as maybe decided by the other Trustees." F

As already stated, in the Will no further details are provided save for the appointments.

The differences in the clauses pertaining to the appointment of trustees must be interpreted in a manner that does not create conflict. It is my view that, as the two documents were executed on the same date, albeit coming into G operation at different dates, the executor thereof was alive to the anomaly. The clear intention of the testator was that whilst he was alive only three trustees would run the Trust and upon his demise, two professional trustees would join the three trustees. In my view, these were to become the core trustees whose trusteeship he wished to always be present. It was in a bid to emphasis this that, in the Will, he specifically appointed the four trustees. H

Chitakunye J

The other trustees to meet the minimum number of 5 or maximum number of 7 A as per clause 4.3 of the deed of trust were to be appointed by the trustees for the time being of the Trust. It is clear from the submissions by the parties and documents filed of record that, apart from the four trustees appointed by the testator in his Will, two other trustees, namely Dr A P Zvinavashe and Mr K Zvinavashe, were appointed to make the number of trustees six. This B was in accordance with the provisions of the deed of trust.

The issue that arises is whether the term limits stated in clause 4.6 of the Deed of Trust are applicable to all or to some of the trustees. Clause 4.6 states that:

> "Trustees shall hold office for a period of 3 years and they shall be eligible for a re-appointment after the expiry of the term."

That sub-clause does not, in my view place, a distinction between the trustees. C The donor did not wish for such a distinction. To confirm this he provided for a definition of trustee for the purposes of the Deed of Trust. In this regard, clause 1 of the Deed of Trust states that:

> "Trustees shall mean the persons appointed as such under this Trust Deed, including the first trustees and the trustees thereafter appointed."

The first trustees are those appointed before his demise. See clause 4 of the D Deed of Trust. The argument that some trustees are not subject to the term limits is thus ill founded. Every trustee, in my view, was to serve for three years and thereafter be eligible for reappointment. The criteria for reappointment would of course take cognisance of the professional trustees E that the donor intended to always be part of the Board of Trustees. It is my view that had the donor intended that some of the trustees should be there for life without being subjected to re-appointment he could easily have stated so without any difficulties.

I thus conclude that no trustee had life tenure without being subjected to F re-appointment. All the trustees, as defined by the donor, were subject to a three-year term and eligible for re-appointment. What this means is that, unless a trustee has been re-appointed since their initial appointment, they have all overstayed.

The applicants argued that, notwithstanding clause 4.6 of the deed of trust, all trustees, the respondent included, continued in their positions after the G expiry of the three-year period and the respondent cannot rely on the said clause to claim that the applicants have no *locus standi in judicio* to bring the application. In that light, they argued that the office of trustee is lost only by:vacation; resignation; or removal.

Fortunately in this case clause 13 of the deed of trust provides that:

> "A Trustee shall vacate office if: H

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(a) he becomes of unsound mind or lunatic; or A

(b) he becomes insolvent; or

(c) he is prohibited to be a director of a company in terms of the Companies Act [Chapter 24:03]; or

(d) he or she is a minor; or

(e) there is any other reason which makes him or her unable to conduct duties B as a trustee."

Paragraph (e) may be taken to include a situation where one has overstayed in the office of trustee such that one's decisions are tainted with invalidity.

In *Trustees, Leonard Cheshire Homes Zimbabwe Central Trust* v *Chite & Others* 2010 (1) ZLR 631 (H) Uchena J had occasion to deal with the issue of trustees who had overstayed in office and during their period of overstay C had made appointments of other trustees and decisions to evict occupants of the trust's property. At p 645B-D the learned judge said:

> "This court cannot therefore, in order to give effect to the objectives of the Trust, interpret the deed of trust in a manner inconsistent with the limitations of the trustees' terms of office. The objective of the trust is for it to be managed, in D favour of disabled people, by people holding office in compliance with its provisions. … It is therefore my view that the court cannot disregard the trustees' failure to comply with the terms of their appointment in order to keep the trust in existence. The court would, if there are no lawfully appointed trustees, on application by interested parties, appoint new trustees who would continue to uphold the objectives of the trust and decide the way forward concerning the E eviction of the

> defendants. I cannot uphold invalid decisions made by trustees who no longer had the mandate to manage the affairs of the trust. ..."

The effect of overstaying is thus that the decisions made are susceptible to being challenged. They may in fact be invalid.

The next issue is whether the fact of overstaying deprives the applicants' F*locus standi in judico*. In *The South African Law of Trusts* by Tony Honoré, 2 ed (1976) at p 290 the learned author 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 trust*ee* and seeks confirmation of his status." G

In casu, the applicants have clearly stated the capacity in which they brought this application; it is one whereby they are administering the Trust and the issues pertain to the Trust. They also claim to be trustees in terms of the Will. I am of the view that they have *locus standi* in that regard. Their capacity to make valid decisions is, however, limited by the fact that they have overstayed. They ought to regularise their stay in terms of the deed of trust. H

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Sections 7 and 9 of the Companies and Associations Trustees Act A [*Chapter 24:04*] provides for the appointment of trustees by the High Court on the application by petition of persons therein mentioned. Section 7 states:

> "As often as by death, unsoundness of mind, resignation, failure to elect, absence from Zimbabwe or other cause, the trustees or any of them of any such company or the office-bearers or other trustees of any association, or of any association B which under section *five* is placed under this Act, become incapable of acting in the execution of the trust for such company or association, *it shall be lawful for any person who is a member of or interested in such company or association to apply, by petition to the High Court, for such order as he conceives himself entitled to,* and he may, by affidavit, give such evidence in support of such petition as he thinks fit, and may serve notice of such petition on such person or persons as he may think it needful or expedient to serve with such notice" C (emphasis is mine).

Section 9 further states that:

> "If in any case it happens that any immovable property has been granted or transferred to any unincorporated society or body established for religious, charitable or educational purposes by the name borne by such society or body, D and not through the instrumentality or intervention of office-bearers or other trustees acting for and representing such society or body*, it shall be lawful for any person who is a member of, or interested in, such society or body, to apply by petition in manner and form as in section* seven *mentioned for the appointment of trustees for such society or body;* and the court to which such petition is presented, proceeding in manner and form as in sections *seven* and *eight* mentioned, may if satisfied that the appointment of trustees to act for and E represent such society or body is expedient, appoint such trustees; and section *eight* shall in substance apply to the appointment of such trustees, and to the power of providing how new trustees shall be afterwards appointed, and to all other matters in section eight contained" (emphasis is mine).

As aptly noted by Uchena J in *Trustees, Leonard Cheshire Homes Zimbabwe Central Trust* v *Chite & Others supra* at 644G-H

> "Sections 7 and 9 provide for the appointment of trustees by the High Court to ensure F the continuation in existence of a trust. It is the trust that the law is interested in sustaining, and not decisions of trustees whose terms of office have expired or trustees appointed by persons who had no mandate to act for the trust. Section 7 covers the trustees' inability to act because of death, unsoundness of mind, resignation, failure to elect, absence from Zimbabwe or other cause."

The sections basically provide leeway for the appointment of trustees in G the circumstances alluded to. In a case where all trustees have overstayed and legally cannot make legally valid decisions, the option is to have the trustees appointed or re-appointed by the High Court.

I am of the view that from the manner in which the two professional trustees H are provided for in the deed of trust and in the Will, it is clear that they have

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a legitimate claim for reappointment. It was the desire of the donor that A the senior partner, or his nominee, of Mutumbwa, Mugabe and Partners or their successors in title will always be one of the trustees. Equally, it was his intention that the senior partner or his nominee of the donor's accountant, in this case Ruzengwe and Partners, shall always be a trustee. The first and second applicants happen to be the senior partners in the aforementioned B professional firms. In respect of the chartered accountant, there is provision for trustees to decide on any other firm of chartered accountants but that is in the event that the trustees for the time being decide to appoint other chartered accountants in place of Ruzengwe and Partners.

I am of the view that, by virtue of their apparent entrenched position, they have cause to seek to protect the trust. Thus, whilst they may not make valid C decisions, they can nevertheless approach the court for relief that is for the sustenance of the Trust.

The respondent also contended that the matter is *lis pendens* in that he instituted proceedings in this court on 24 April 2012 for an order directing the second applicant to convene a meeting of the Trust. He contended that that meeting was to deal with issues complained of in this application. The D basic requirements for a defence of *lis pendens* are that:

(i) the litigation is pending;

(ii) the other proceedings are between the same parties or their privies;

(iii) the pending proceedings are based on the same cause of action; and

(iv) the pending proceedings are in respect of the same subject matter. E

See *Diocesan Trustees, Diocese of Harare* v *Church of the Province of Central Africa* 2009 (2) ZLR 57 (H).

The fact that a party has established the above prerequisites is no guarantee that their wish will be granted. As noted in *Diocesan Trustees, Diocese of Harare supra* at 71D-E F

> "… even if a party satisfies all the requisites, the court still has discretion to order or refuse a stay of proceedings on the grounds of *lis alibi pendens*, and in the exercise of that discretion it will have regard to the equities and to the balance of convenience in the matter."

See also *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S); *Baldwin* v *Baldwin* 1967 RLR 289 (G); *Chizura v Chiweshe* 2003 (2) ZLR 64 (H). G

In casu, the applicants seek an order interdicting the respondent from doing acts which are prejudicial to the Trust and, in case No. HC 4380/12, the respondent seeks an order compelling the second applicant to convene a meeting of the board of trustees within 14 days from the date of the order. It is clear that the parties are essentially the same. Whilst the matters arise H

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from the occurrences in the administration of the Trust it is apparent that the A subject matter is not the same. The applicants seek to interdict the respondent as outlined above, whilst the respondent seeks to have the second applicant compelled to convene a meeting of the board of trustees. On that basis, I would say not all requisites have been met.

I am also of the view that, even if one were to argue that the requisites have B been met, the balance of convenience favours the granting of the interdict. The interdict is meant to stop the respondent from conducting himself in a manner that is prejudicial to the Trust. The respondent can still proceed without prejudice in prosecuting his application. The protection of the Trust's assets and reputation is of paramount importance, whilst the issue of trusteeship is C being litigated upon by the parties.

I thus conclude that the points *in limine* are not sustainable.

In this application the applicants seek an order interdicting the respondent from doing acts which are prejudicial to the Trust. The basic requirements for an interdict are:

(i) a clear right on the part of the applicant; and D

(ii) an injury committed or reasonably apprehended; and

(iii) the absence of any other satisfactory remedy available to the applicant.

As already alluded to, the applicants have an interest to protect the Trust. Their overstaying does not extinguish that interest. One would say that their interest stems from the fact that the Trust was

virtually left in their hands E as professionals. Both the Will and the deed of trust make it clear that they were to be trustees by virtue of their office. By virtue of that, I am of the view that the first and second applicants have shown a clear right. Clearly they are not expected to fold their hands as the Trust is burning just because their terms as trustees have not yet been renewed when, from the deed of F trust and the Will, the renewal was almost guaranteed.

On the question of suffering irreparable harm, it is apparent from the documents filed of record that after the donor's death the respondent duly administered the estate in terms of the Will. The first and second applicants' appointment as trustees was effected. Two other trustees were appointed to make a total of six trustees. The six trustees are virtually split three a side. G Such a scenario cannot be said to be for the furtherance or advancement of the objectives for which the Trust was created. Clearly such a split makes it difficult to administer the Trust.

In their founding affidavit the applicants detailed a number of transgressions they said were committed by the respondent. Though the respondent denied H some of the alleged transgressions, his explanations in denial served to

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confirm that it may be a situation of one faction of the Board of Trustees A doing their own thing without the unanimity of, or even participation of, everyone who believed they were still trustees. The respondent did not disclose in what capacity he did some of the acts he admitted to. Clearly, the danger of the respondent continuing to act as if he was still the administrator of an estate that has already been wound up and disregarding the board of trustees is real. In any case, as noted above, all the trustees overstayed and B whatever decisions they make are likely to be invalid and not for the benefit of the Trust. A continuation of such conduct can only be detrimental to the objectives of the trust.

The third requirement of absence of a suitable remedy is almost a foregone conclusion. There is no suitable remedy that would make good the prejudice C to the Trust and beneficiaries as a result of the respondent continuing acting as alleged. It is only proper that he be interdicted and those interested in the Trust take appropriate steps to ensure that trustees are re-appointed and proper structures are put in place for the realisation of the objectives for which the Trust was created.

Accordingly, I find that the applicants have established a case for the grant D of an interdict.

It is hereby ordered that the application be and is hereby granted in the following terms:

1. The respondent and any person obtaining authority through him be and is hereby interdicted from interfering with the day-to-day management E of the Trust schools, namely Tynwald Primary School and Tynwald High School.
2. The respondent and any person deriving authority through him be and is hereby interdicted from prohibiting any auditor appointed by the Board of Trustees from accessing the Trust Schools' accounts and auditing such accounts. F
3. The respondent refrain from harassing and/or dismissing any employee of the Trust or a Trust school without authority of the Board of Trustees.
4. The respondent and any person obtaining authority through him be and is hereby barred from directly accessing any funds belonging to the Trust or a Trust school without lawful authority of the Board of Trustees. G

Dondo & Partners, applicants' legal practitioners.

Nyika, Kanengoni & Partners, respondent's legal practitioners. H

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[zRPz]S v MUKWAMBUWE 2014 (2) ZLR 115 (H)

Citation	2014 (2) ZLR 115 (H)
Case No	Judgment No. HH-378-14
Court	High Court, Harare
Judge	Muremba J and Assessors
Heard	6 May 2014; *CAV*
Judgment	24 July 2014
Counsel	*E Nyazamba,* for the State *G Sithole,* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – culpable homicide (s 11) – causation – applicable tests for – causal link between the conduct of the accused and its consequences – foreseeability – what amounts to*

Criminal procedure – *witness – calling of by court – when court should do* D *so – should not call witnesses to build up case which prosecution has failed to establish*

Evidence – dying declaration – requirements for admissibility of dying declaration as evidence

Headnote

For the purposes of s 254(1) of the Criminal Procedure and Evidence Act E [*Chapter 9:07*], the requirements for the admissibility of a dying declaration are that:

(a) the person who made the statement must be dead at the time of the trial; and

(b) the trial must be for the murder or culpable homicide of the dead F person; and

(c) the statement must relate to the cause of the declarator's death; and

(d) at the time he made the statement, the declarant must have been dangerously ill and have been without hope of recovery; and

(e) the declarant must have been a competent witness.

In determining the question of causation for the purposes of s 11 of the Criminal Law G (Codification and Reform) Act [*Chapter 9:23*] (culpable homicide), two tests apply. Firstly there must be a causal link between the conduct of the accused and the consequence. The question is whether but for the accused's conduct would the consequence have occurred. This is referred to as the *causa sine qua non*. Secondly, there is the question H as to whether it was reasonably foreseeable that the accused's conduct

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would lead to that consequence. The causal link would not be broken A by a new cause that supervened after the accused had engaged in the conduct, provided it was reasonably foreseeable that the subsequent event would occur after the accused's conduct.

Instead of leading *viva voce* evidence from its witnesses, the State chose to have its evidence formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. As a result, some contentious B issues which went to the root of the case remained unanswered.

Held, that in terms of s 232 of the Act the court is empowered to call witnesses *mero motu* for the purpose of reaching a just decision. However, this power should be exercised sparingly. It is not the function of the court to build up a case which the prosecution has failed to establish. In a defended C case, the court can only call a witness in exceptional circumstances, such as if there is a conflict in the evidence which can be resolved by a witness who has not been called. To call, *mero motu*, the State witnesses whose evidence was formally admitted would have been tantamount to building up the case which the State had failed to build.

Cases cited D

S v *Buitendag* 1976 (1) RLR 345 (A)

R v *John* 1969 (2) RLR 23 (A)

S v *Nyamaro & Anor* 1987 (2) ZLR 222 (S)

Legislation considered E

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 11 & 47

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 232, 254(1) and 314

Case information

E Nyazamba, for the State F

G Sithole, for the accused

Judgment

Muremba J: The accused is charged with murder as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. It is alleged that on 11 August 2011 he assaulted his wife all over her body with a stick thereby causing her death. G

It is common cause that in the evening of the day in question a cousin of the accused, Charles Jokope, came to visit the couple at their home in Chingururu village, Chief Dotito in Mt Darwin. They had supper with him. After supper, they accompanied him to his home leaving their daughter Rumbidzai at home. Upon their return home at around 23:30, the two were involved in H

an argument. In its summary of evidence, the State alleges that the accused was A accusing the deceased of having an extra marital affair. On the other hand, the accused stated that they argued over $40 which the deceased was asking for from him.

It is common cause that the couple's daughter Rumbidzai Chibanda and B two neighbours, Rondina Chatava and Enara Kahwiti, were awakened by the deceased's screams as she was crying for help. They all went out only to find the deceased kneeling on a footpath groaning in agony. These three witnesses did not testify in court. Their evidence, as it appears in the State's summary of evidence, was formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chaptr* 9:07].

The three witnesses indicated that when they found the deceased groaning in C agony, the accused was standing a distance away holding a stick, threatening to further assault her. Rondina Chatava and Enara Kahwiti both said that they managed to restrain the accused. The three witnesses said that the deceased then crawled for about 40 metres and collapsed. They poured water on her D but she never rose again. She was ferried to Dotito hospital in a scotch cart.

The evidence of Tichaona Chirinhe, the investigating officer, was also formally admitted. He said that on 11 August 2011 at 03:30 he was assigned to investigate this case. He is stationed at Dotito police station. He ferried the deceased's body to Mt Darwin hospital where she was certified dead and E a post mortem was conducted. He also arrested the accused and recorded a warned and cautioned statement from him. On 14 August 2011, he recorded some indications which were made by the State witnesses and the accused at the scene. He also drew a sketch plan which was produced in court by consent. Two State witnesses, Rumbidzai Chibanda and Enara Kahwiti, confirmed having made indications to the investigating officer. Even the F accused made the same confirmation.

The State produced the accused's confirmed warned and cautioned statement. In that statement the accused said:

> "… I admit that I murdered the deceased. I struck her with a wooden stick after she had poured water on me. When she was running away, she fell on a rocky surface and managed to get up and started running away again as she cried, G 'I am hurt, I am dying.' I did not pursue her. I got into my bedroom and fell asleep. That is all."

The only oral evidence of the State came from Dr Gwagwa who examined the remains of the deceased on 12 August 2011. His conclusion was that death was due to a head injury secondary to assault with a blunt instrument. He H explained that there were two fractures on the deceased's body. One was on

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the right mandible which is the right jaw. The other was on the right temple. A The temple is the flat part of the head at the side of the forehead.

The post mortem report shows that the doctor recorded the history of the case. He recorded that the deceased died after being struck by a wooden stick on the head and body several times. In court, he explained that the fractures which were on the deceased were consistent with assault. Asked if B the deceased could have sustained such injuries from a free fall, the doctor said that it was possible if she was running and she fell on a rocky ground.

The doctor testified that apart from the two fractures that he observed on the right mandible and right temple, he did not observe any other injuries on the body of the deceased. The altercation between the accused and the deceased happened around 23:30. By 03:00, the deceased had died. The doctor said C that considering the time frame between the alleged assault and the death, if the deceased had been assaulted all over her body and the injuries were so serious as to cause death, he would have expected to see some abrasions, bruises, lacerations or bleeding under the skin. The body had no such injuries.

In denying the charge, the accused stated that on 11 August 2011 during the D day they (accused and deceased) went to Dotito business centre where they sold some oil and peanut butter and realised $40. That is the money that the deceased asked for as they were returning to their home from accompanying their nephew in the evening. She indicated that she wanted to use the money to buy some weaving baskets for resale. He said that he refused with the money, telling her that the money was for purchasing fertilizer. E

When they got into the kitchen, he asked the deceased for some tea but she replied to him by asking him if he was adamant in not giving her the money. Despite the accused's repeated explanation that the money was for buying fertilizer, the deceased did not relent on her request. Seeing that she was now angry, he left for the bedroom. She followed him. She was now railing. F He left for the kitchen again. As he was about to make tea for himself, she entered and said no one was going to make tea. She started to assault him. He stood up to go out. As he was going out, she took a tin of water which was on the fireplace and poured the water on his back.

The accused said that he ran out to the mulberry tree to remove his clothes G which were now wet. As he stood by the mulberry tree removing the clothes, the deceased came and started to assault him using her hands. In a bid to protect himself from further assault from the deceased, he picked up a stick from the ground and struck her twice with it on the legs. The deceased ran away towards their neighbours. The accused said that she probably thought that he was going to pursue her but he did not. As she reached the corner H

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of their bedroom she slipped and fell down. The accused said that their yard is very A rocky and she hit her head on a rock when she fell. She got up screaming that she had been injured. These are the screams that awakened their daughter and neighbours. She continued to run. He decided to follow her. He found her seated on a footpath with their neighbours, Rondina Chatava and Enara Kahwiti. They were about 40 metres away from the accused's B bedroom. He was still holding the stick in his hand. Enara Kahwiti took the stick from him as she thought that he wanted to assault the deceased. The deceased was still crying.

The accused said that, since he was still angry, all he asked for was the phone which the deceased had. He said that they were using one phone as a couple. C When it was given to him, he went to the kitchen where he made himself a cup of tea. He had not sustained any injury from the water that was poured on him because the water was not very hot. As he was still emotional, after having tea he went to the bedroom and slept for a while. When his emotions subsided he went looking for the deceased but to no avail. He returned to sleep. At around 3 a.m., the police came and arrested him. They took him D to Dotito police station where he was later advised that his wife had passed on. He said that the news of the death of his wife came as a shock to him. He was later taken to his home for indications.

The accused disputed that he assaulted his wife all over her body and on her head. He maintained that he only assaulted her twice with a stick on the legs. E Accused stated that the fractures that the deceased sustained on the mandible and temple were as a result of the fall and not as a result of an assault.

The accused produced the sketch plan which was drawn by the investigating officer. The sketch plan shows that the place where the deceased fell was a rocky surface.

Issues that are in dispute F

1. What was the cause of the altercation between the deceased and the accused?
2. What caused the death of the deceased?

The cause of the altercation

In its summary of evidence, the State indicated that the accused was accusing G the deceased of having an extra marital relationship. However, the State did not adduce any evidence to this effect. The formally admitted evidence of Rumbidzai Chibanda, Rondina Chatava and Enara Kahwiti is silent on the cause of the altercation.

As a result, the accused's version that the misunderstanding was over the H $40 that the deceased wanted remains undisputed.

Muremba J

The cause of the death A

The State alleges that the accused assaulted the deceased with a stick all over her body and this is what caused her death. In other words, the State said that the accused struck the deceased on the head with the stick thereby causing the fracture which caused the death of the deceased. However, the State did not adduce any evidence to prove the assault. None of the formally B admitted evidence of the three State witnesses, who attended to the deceased when she cried out for help, talks about the deceased having been assaulted by the accused. All that these witnesses said is that they saw the accused holding a stick threatening to further assault the deceased.

The evidence of the accused that he only struck the deceased twice with a stick on the legs also remains unchallenged. Again, the accused's evidence C that the deceased fell on a rocky surface as she was running away was not disproved by the State.

The doctor said that although he had written that death was due to a head injury secondary to assault with a blunt instrument, it was also possible for the deceased to have sustained the head injury from a free fall if she was D running and she fell on a rocky surface. The doctor wrote that the head injury was as a result of an assault because of the history that he had been given by the police. He had been told that the deceased had died after being struck with a wooden stick on the head and body several times. The doctor had not been told the version that the deceased had fallen on a rocky surface as she was running. It is a version that he heard of for the first time in court. E

This is a case which was not properly prosecuted. Instead of leading *viva voce* evidence from its witnesses, the State chose to have its evidence formally admitted in terms of s 314 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. As a result, some contentious issues, which go to the root of the case, remained unanswered. This is a case where the State ought to F have led evidence from the deceased's daughter and two neighbours who responded to the deceased's screams for help. They would have told us what the deceased told them before she died.

The accused said that the deceased cried out, saying that she was hurt and that she was dying. He also said that when he got to where the State G witnesses were with the deceased, the deceased was crying. This means that the deceased could still speak. We are convinced that the deceased is the person who told these witnesses that the accused had assaulted her on allegations that she was having an extra marital affair. This can be the only explanation why the State's summary of evidence says that the cause of the misunderstanding between the accused and the deceased were allegations H

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that the deceased was having an extra marital affair. Again, this is why the State A alleges that assault was the cause of death.

What the deceased told the witnesses might have been admissible as a dying declaration which is an exception to the rule against hearsay evidence.,

In terms of s 254 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] B a declaration made by a deceased person upon the apprehension of death is admissible as evidence when it would be admissible in English law. In English law, the requirements for admissibility of dying declarations are:

(1) the person who made the statement must be dead at the time of the trial;

(2) the trial must be for the murder or culpable homicide of the dead person;

(3) the statement must relate to the cause of the declarant's death; C

(4) at the time he made the statement, the declarant must have been dangerously ill and have been without hope of recovery;

(5) the declarant must have been a competent witness.

See John Reid Rowland *Criminal Procedure in Zimbabwe* (1997) at p 18-21.

In casu, at the time the deceased spoke with the witnesses, she had been seriously D injured. She made utterances that she had been hurt and that she was dying. She is said to have crawled for about 40 metres before collapsing. After that she did not speak again. Three and half-hours later she was dead. All these factors taken together might have met the requirements of admissibility E of a dying declaration.

If the deceased's daughter and the neighbours had testified they would have clarified a number of issues. Many questions remain unanswered and the following are just but a few examples. What are the utterances that the deceased made as she screamed for help? Did she indicate the cause of the F misunderstanding? Did she say what had caused the injuries on the head and face? What was the accused saying when they found him threatening to further assault the deceased? Was the deceased saying anything in response? At the scene, did the accused ever indicate what had happened between him and the deceased and how the deceased had been injured? How did they restrain the accused from further assaulting the deceased and how did they G disarm him of the stick? How and why was the deceased ferried to hospital without the involvement of the accused?

In terms of s 232 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the court is empowered to call witnesses *mero motu* for the purpose of reaching a just decision. The section reads as follows:

"The court – H

(a) may at any stage subpoena any person as a witness or examine any person A in attendance though not subpoenaed as a witness, or may recall and re-examine any person already examined;

(b) shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."

At some stage before writing this judgment, I felt inclined to call the State witnesses whose evidence had been formally admitted for the purpose of B having the above questions answered as I was of the view that that would enable us to reach a just decision. However, case authority states that this power should be exercised sparingly. In *S* v *Nyamaro and Another* 1987 (2) ZLR 222 (S) at

229-230, it was stated that it is not the function of the court to build up a case which the prosecution has failed to establish. C

In *S* v *Buitendag* 1976 (1) RLR 345 (A) it was held that in a defended case, the court can only call a witness in exceptional circumstances, such as if there is a conflict in the evidence which can be resolved by a witness who has not been called.

In casu, in view of the above cited case authorities the court realised that it D could not call the State witnesses whose evidence was formally admitted *mero motu* as this would have been tantamount to building up the case which the State had failed to build. As has been demonstrated above, there are too many unanswered questions and unresolved issues in the State case. Calling witnesses *mero motu* would have meant going beyond seeking clarification of issues. It would have meant that the court was now prosecuting the case E on behalf of the State.

The State failed to prove its allegation that the accused assaulted the deceased all over her body and that it is the assault which caused the death of the deceased. These assault allegations by the State are not consistent with the doctor's observations. Other than the two fractures on the face and on the F head, the rest of the body had no injuries in the form of bruises, abrasions, lacerations or bleeding under the skin. The doctor said that if the deceased had been assaulted all over her body, such injuries would have been evident on the deceased's body at the time of the *post mortem* examination. He said that since the deceased died about three and half hours after the onset of the alleged assault these injuries would not have resolved or disappeared by the G time the deceased died.

The State also failed to prove that it was the accused who inflicted the injury on the mandible and the fatal blow on the head of the deceased. It did not rebut the accused's explanation that the deceased fell on a rocky surface resulting in those two injuries. H

2014 (2) ZLR p123

Muremba J

With the undisputed evidence of the accused that the deceased fell on a rocky A surface and the possibility that the head injury could have been caused by a free fall on a rocky surface, it cannot be said that the State proved its case against the accused in respect of the murder charge. We find the accused not guilty of murder.

The question that then comes to mind is whether or not the accused can be B convicted of culpable homicide under the circumstances? To answer this question it is important to look at s 11 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] which deals with the issue of causation. The section reads:

> "(1) A person shall not be held criminally liable for a consequence unless the C person's conduct caused or substantially contributed to its occurrence.
>
> (2) A person's conduct shall be deemed to have caused or substantially contributed to a consequence for the purposes of subsection (1) if the conduct –
>
> (a) is the factual cause of the consequence, that is, but for the conduct the consequence would not have occurred; and
>
> (b) is the legal cause of the consequence, that is, the consequence –
>
> (i) was a reasonably foreseeable consequence of his or her conduct; or D
>
> (ii) was brought about by a new cause supervening after his or her conduct, which cause was itself a reasonably foreseeable consequence of his or her conduct."

My understanding of this section is that for a conviction to be sustainable E there must be two tests. The first test is the test for factual cause. There must be a causal link between the accused's conduct and the consequence. The question is whether but for the accused's conduct would the consequence have occurred? This is referred to as *causa sine qua non.* The second test is the test for legal cause. The question is whether it was reasonably foreseeable that accused's conduct would lead to that consequence? The causal link would F not be broken by a new cause that supervened after the accused had engaged in the conduct, provided it was reasonably foreseeable that the subsequent event would occur after the accused's conduct. See G Feltoe *Commentary on the Criminal Law (Codification and Reform) Act* [Chapter 9:23] at p 22.

The accused said that after he had struck the deceased twice on the legs she G ran away from him but he did not pursue her. He said that the deceased ran for a distance of more than 10 metres before she fell. Although it is clear that it is the accused who caused the deceased to run by

assaulting her, it cannot be said that it was reasonably foreseeable to the accused that if he assaulted the deceased she was going to run and fall on the rocks and get injured. There is no evidence that the accused was pursuing her when she H fell. This is a case which is distinguishable from the case of *R* v *John* 1969 (2) RLR 23 (A),

Muremba J

wherein the appellant was held responsible for the death A of his wife. The two had fought. When they broke apart the deceased ran off. She was six months pregnant. The accused picked up a hoe and pursued her. The deceased fell into a large pool of water and drowned. The accused was found guilty of culpable homicide. His appeal against conviction was dismissed on the grounds that he ought to have foreseen that there was some risk of death in his aggressive pursuit of the deceased. It was further held that B it should not have come as a surprise when the deceased either accidentally fell or deliberately ran into the pool.

As already stated above, in the present case there is no evidence that the accused was pursuing the deceased. As a result, the accused cannot be found guilty of culpable homicide either. C

The accused admits that he struck the deceased twice on the legs. He is found guilty of assault as defined in s 89 of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23].

National Prosecuting Authority, legal practitioners for the State D

Mushangwe & Company, legal practitioners for accused

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[zRPz]MADHATTER MINING COMPANY v TAPFUMA 2014 (2) ZLR 125 (S)

Citation	2014 (2) ZLR 125 (S)
Case No	Judgment No. S-51-14
Court	Supreme Court, Harare
Judge	Gwaunza JA, Gowora JA & Hlatshwayo JA
Heard	31 October 2013; *CAV*
Judgment	25 July 2014
Counsel	*T Magwaliba*, for the appellant *R Chingwena*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *Labour Court – decisions by – application of equitable principles – court's duty* C *to secure equity and social justice*

Employment – *wrongful dismissal – damages – duty of employee to mitigate loss by seeking other employment*

Practice and procedure – *judgment – judgment sounding in foreign currency – losses suffered* D *in local currency – how damages to be calculated*

Headnote

Where a person is wrongfully dismissed and successfully petitions the court for reinstatement or, where that is no longer possible for any reason, E damages in lieu of reinstatement, such damages would consist of salary arrears or wages for the relevant period, reckoned from the date of the wrongful dismissal, and may also include compensation for any loss of any entitlement which he was deprived of as a result of the wrong termination. Damages in lieu of reinstatement become due and are to be reckoned from the date of an employee's wrongful dismissal, not F from the date of reinstatement. Further, in relation to the period from and during which the damages are to be assessed, no distinction is made between the salary arrears and benefits, on the one hand, and damages proper, on the other. All must be assessed within the same period, albeit varying time periods and considerations peculiar to the assessment in question may apply.

The losses that a wrongfully dismissed employee might suffer would include G housing and transport allowances forfeited by virtue of his wrongful dismissal. Where the unlawful termination occurred before the employee could complete skills training, the fact that the training was not completed would constitute a lost opportunity that appropriately qualifies as a "loss" H for purposes of damages in lieu of re-instatement. The probabilities are

that, had he gone into the employment field armed with a skills-based A qualification, the employee would have been able to secure alternative (and better paying) employment within a reasonable time and probably in a shorter time than it might have taken him to secure any unskilled employment.

The employee is legally obliged to mitigate his loss by looking for a job from the date of his unlawful dismissal. B

In casu, the lower court ordered payment of damages in US dollars, although the loss took place during the period of hyper-inflation, when only Zimbabwe dollars were legal tender. The court ordered that the amount of Zimbabwe dollars assessed as damages should be converted at the official rate prevailing at the date of reinstatement. C

Held, that the court failed to consider whether the resultant United States dollar amount would have given true value, to the employee, of the damages that he was entitled to, a value that would neither over-compensate him, nor inadequately do so. At the time there were two main Zimbabwe dollar to United States dollar exchange rates in force, the official and the unofficial rates. The former rate had much smaller denominations compared to the D latter. Had the official rate been used to convert the Zimbabwe dollar amount awarded to the employee as damages, an inflated amount with no relationship to the appropriate and meaningful compensation due to him would have been the result. Such an outcome would clearly have been both unrealistic and a mockery of justice.

Held, further, that it is the Labour Court, not the Supreme Court, which is E endowed with jurisdiction to apply principles of equity in its determination of labour disputes. The Labour Court's jurisdiction to determine labour disputes on the basis, *inter alia,* of equity can be gleaned from the import of s 2A of the Labour Act [*Chapter 28:01*], which states that one of the purposes of the Act is to advance social justice and democracy by, *inter alia*, F securing the just, effective and expeditious resolution of disputes and unfair labour practices. The principles of equity and social justice, as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (e.g. G damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a change to the realisable currency. Equity would demand that a formula be found to give H

Gwaunza JA

effect to the employee's entitlement to payment of, and the employer's A obligation to pay, the debt in question.

Held, further, that the complexity of the exercise to compute the damages that should be awarded to the respondent in this appeal should not be under-estimated. The Labour Court should consider enlisting the services of an appropriately qualified expert in financial matters, in order to work B out a formula for calculating the damages in question. Such formula should give fair value, in USA dollars, to the damages, denominated in Zimbabwe dollars, that were awarded.

Cases cited

Ambali v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S) C

Fleximail (Pvt) Ltd v *Samanyau & Ors* S-21-14

Gauntlet Security Svcs (Pvt) Ltd v *Leonard* 1997 (1) ZLR 583 (S)

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

Madyara v *Globe & Phoenix Industries (Pvt) Ltd)* 2002 (2) ZLR 269 (S)

Makwindi Oil Procurement (Pvt) Ltd v *NOCZIM* 1988 (2) ZLR 482 (S); D1989 (3) SA 191 (ZSC)

Nzuma & Ors v *Hunyani Paper and Packaging* S-137-11

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

Legislation referred to

Labour Act [*Chapter 28:01*], ss 2A & 89(2)(c)(iii) E

Case information

T Magwaliba, for the appellant

R Chingwena, for the respondent

Judgment

Gwaunza JA: This is an appeal against the whole of the judgment of the F Labour Court given at Gweru on 13 January 2012.

The application in the court *a quo* was brought by the respondent against the appellant and was for quantification of damages following a consent order dated 20 September 2006. The terms of the order were:

1. That the appellant's termination of the respondent's contract of G employment on 11 February 2003 be set aside;
2. That the appellant would pay to the respondent all his arrear salaries and benefits together with interest at the legal rate to 30 September 2006;
3. That the appellant would pay to the respondent damages in lieu of reinstatement which must be agreed between the parties, failure of which H the matter would be set down for assessment;

Gwaunza JA

4. That each party would pay its own costs. A

The court *a quo* noted that on 14 November 2006 the appellant paid to the respondent, through his erstwhile legal practitioners, his arrear salary, benefits and interest for the period March 2003 to September 2006. Despite the respondent's assertion that the appellant had not paid him cash in lieu of leave, the court *a quo* found, based on schedule B to the papers before it, B that the appellant had in fact made payment in this respect, for the period December 2003 to September 2006. The court *a quo* accepted the appellant's argument that since the respondent was not going to work for the period in question, he was not entitled to a transport allowance as this was paid for a specific purpose. The court further accepted the argument that the respondent was not entitled to a housing allowance for that period. C

As negotiations between the parties had stalled by the end of 2007, the respondent proceeded to file an application for quantification of damages in lieu of reinstatement. He claimed 72 months' salary as damages, which he translated into an amount of US$50 000. The court *a quo* partially granted his application and ordered as follows: D

(i) that the appellant *in casu* pays the respondent 36 months' salary as damages in lieu of reinstatement on the basis of the September 2006 salary scale, which was Z$587 444 085.88 per month;

(ii) that the total amount be converted to US dollars using the exchange rate of Zimbabwe dollar to United States dollar equivalent obtaining on 30 September 2006; E

(iii) payment of interest at the prescribed rate from the date of the judgment to date of payment in full.

The court stated as follows in support of its determination that the respondent was entitled to damages in lieu of reinstatement:

> "This court takes judicial notice of the fact that the decline of the Zimbabwean F economy was at its peak during the period 2006-2009. Therefore, applicant's chances of securing alternative employment in that harsh economic turmoil were bleak. This was exacerbated by lack of professional qualifications. Consequently, I find that applicant is entitled to damages *in lieu* of reinstatement."

It is evident from the above that the learned judge *a quo* took the position that damages in lieu of reinstatement were to be reckoned from G September 2006 up to 2009. Thus according to the court, the damages became due to the respondent from 30 September 2006, the date upon which the appellant could have reinstated the respondent in terms of the consent order.

The appellant challenges this finding and the reasoning behind it and submits that any damages payable to the respondent must be reckoned from the date H

Gwaunza JA

of his unlawful dismissal, that is 11 February, 2003. The appellant argues as A follows in its heads of argument:

> "1. The court *a quo* erred in law, alternatively grossly misdirected itself, in fact such misdirection amounting to a misdirection in law, in finding that the respondent was entitled to damages for loss of employment, and such damages being 36 months in that:
>
> B 1.1 to the extent that by operation of law the obligation to seek alternative employment arises from the date of unlawful dismissal, *id est* 11 February 2003; and
>
> 1.2 to the further extent that by operation of law, the measure of damages is the period within which a wrongfully dismissed employee would have reasonably been expected to find alternative employment, such C period reckoned from the date of unlawful dismissal, *id est*, 11 February 2003; and
>
> 1.3 to the further extent that by our law back pay is an integral part of damages for loss of employment; and
>
> 1.4 to the even further extent that, on the facts the respondent had been paid back pay for the period up to September 2006, and
>
> 1.5 to the further extent that the court *a quo* found that the measure of D damages which would have been due to the respondent was 36 months, which thirty six months reckoned from 11 February, 2003 would have lapsed on 10 February, 2006."
>
> The legal obligation to pay damages had been satisfied."

Mr *Chingwena* for the respondent, on the other hand, agrees with the finding E and reasoning of the court *a quo* and argues that the dispute before the court was not one on the import or applicability of the judgments and trite authorities like *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), *Gauntlet Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S) and others. The dispute in his view concerned the correct interpretation of the consent order F agreed to by the parties, in particular, para 3 thereof. Mr *Chingwena* further argues that the appeal and indeed the application in the court below were premised on that order. In this respect, the following submission is made in the respondent's heads of argument:

> "... Analogous to the *Ambali* case, the parties agreed that respondent herein be remunerated back pay to the date of suspension. That is the import of the G order by consent. *Then, as from 1 October 2006 i.e. past 30 September 2006, respondent herein became entitled to damages in lieu of reinstatement*" (the emphasis is mine).

Flowing from this, it is the respondent's further contention that the question of mitigation arose as from 1 October 2006 since his contract of employment H had been "terminated" the previous day.

2014 (2) ZLR p130

Gwaunza JA

That the dispute falls to be determined within the four corners of the consent A order agreed by the parties is in my view beyond dispute. What is at issue is the parties' conflicting interpretation of paras 2 and 3 of the consent order. That dispute appears to me to be two-pronged. The first prong relates to the question of whether or not the salary arrears and benefits paid to the respondent encompassed any damages in lieu of reinstatement. Assuming that the damages were not included in the payments already made, the second B prong of the dispute relates to the period from which such damages are to be reckoned. In other words should it be 11 February, 2003, the date on which the respondent was unlawfully dismissed, or should it be 1 October 2006, the date on which the reinstatement (or payment of damages in lieu thereof) ordered by the court could have taken place?

The appellant takes the position that damages being an integral part of arrear C salary and benefits, the appellant had, by paying these to the respondent, discharged its obligation to pay damages for his loss of employment. It is also the appellant's argument that in any case such damages were to be reckoned from the date of the respondent's wrongful dismissal, that is, 11 February 2003. D

I find that the appellant's argument relating to the discharge of its obligation to pay the respondent damages for loss of employment is not supported by the terms of the consent order agreed between the parties. The order, in its paras 2 and 3, clearly distinguishes, and separates the payment of arrear salary and benefits on the one hand, and of damages in lieu of re-instatement E on the other. Such distinction could have been influenced by the fact that the calculation of arrear salary, benefits and interest would be premised on verifiable figures or amounts, while the assessment and *quantum* of damages was to be negotiated and agreed between the parties. Only if this failed would resort be had to the court. I do not find anything in the terms of the consent order in question, to suggest that the undertaking by the appellant, as set F out in para 2 of the consent order, was to pay the respondent a consolidated amount constituting salary arrears, benefits, interest *and* damages in lieu of reinstatement. Had that been the understanding of the parties, there would have been no need to add para 3. The fact that it was not only added but that it also specifically implored the parties to negotiate and reach agreement on G the assessment and *quantum* of the damages, in my view clearly suggests an exercise separate and distinct from that envisaged in para 2 of the order. The appellant has in any case not argued or shown that a specific part of the amounts of money paid to the respondent as arrear salaries and benefits represented damages. Nor has the appellant indicated how such an amount would have been arrived at. H

2014 (2) ZLR p131

Gwaunza JA

As correctly argued for the appellant, there is a plethora of case authorities that A have laid down the factors to be considered in assessing damages for wrongful dismissal. See for instance, *Ambali* v *Bata Shoe Co Ltd* and *Gauntlet Security Services Pvt Ltd* v *Leonard (supra).* These factors include the efforts taken by the respondent to mitigate his loss, whether or not such efforts yielded success and if so when that may have happened following B the loss of employment and how much the respondent could have earned and so on. The purpose of all these considerations would be to determine the extent, if any, to which the damages could be reduced. Since negotiations between the parties in relation, *inter alia*, to damages are said to have broken down, it follows that the factors that would normally have been taken into C account in assessing damages were not considered, negotiated nor agreed by the parties as required by para 3 of the consent order. In other words the parties failed to reach agreement on the *quantum* of damages. Accordingly, the appellant cannot be heard to say that the respondent was paid his dues in terms of damages in lieu of reinstatement.

In the result, the part of the dispute that relates to the payment of damages D for the respondent's loss of employment must be determined against the appellant and in favour of the respondent.

I will now consider the second prong of the dispute, which relates to the date from which the damages if any, due to the respondent in lieu of reinstatement, are to be reckoned. The respondent's interpretation of para 3 of the consent E order, which is captured in the excerpt quoted above, is that the obligation by the appellant to pay the respondent damages in lieu of

reinstatement arose from 1 October 2006, being the date when the appellant could have, but did not, reinstate the respondent. This is the argument that found favour with the court a quo, hence its order for the payment of 36 months' damages, reckoned prospectively from 1 October 2006. The appellant's position, on the other F hand, is that any damages outside of the salary arrears and benefits already paid to the respondent, must be calculated retrospectively from the date on which reinstatement was ordered, to the date of his wrongful dismissal. Since the answer to the question as to the correct date from which to reckon the assessment of damages due to the respondent, if any, is not apparent ex facie the stated terms of the consent order, I am satisfied that resort to and G guidance from established case authorities would be appropriate.

In this respect counsel for the appellant cited *Gauntlet Security (Pvt) Ltd* v *Leonard (supra*) where Gubbay CJ affirmed the position that an employee who has been wrongfully dismissed must not sit around and do nothing. He must mitigate his loss and accept any reasonable offer of alternative employment, such H employment to be sought and secured within a reasonable

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period of time. Failure to do so would result in a deduction made in respect A of the remuneration he would have earned from the substituted employment. Similarly, in *Ambali* v *Bata Shoe Co (supra)* it was held thus:

> "Where a person has been wrongfully dismissed (rather than wrongfully suspended) from his employment, and seeks damages rather than reinstatement he is entitled to be awarded the amount of wages or salary he would have earned had his contract not been prematurely terminated. He may also be compensated for B the loss of any benefit to which he was entitled, of which he was deprived as a result of the wrongful termination."

The appellant argues that the consent order agreed between the parties is not to be read differently in terms of its effect, from the principle of law established and confirmed in a long line of authorities on the subject of damages in lieu of reinstatement. C

The principle in question is set out in s 89(2)(c)(iii) of the Labour Act [*Chapter 28:01*] which states that damages may be awarded to the employee concerned as an alternative to his reinstatement or employment.

An analysis of the authorities referred to suggest to me as follows:

(1) a person is wrongfully dismissed; D

(2) he or she successfully petitions the court for reinstatement or where that is no longer possible for any reason, damages in lieu of reinstatement.

(3) such damages would consist of salary arrears or wages for the relevant period reckoned from the date of the wrongful dismissal and may also include compensation for any loss to which he was entitled, which he was deprived of as a result of the wrong termination. E

What is eminently clear from this analysis is that damages in lieu of reinstatement become due and are to be reckoned from the date of an employee's wrongful dismissal. Further, that in relation to the period from and during which the damages are to be assessed, no distinction is made between the salary arrears and benefits on the one hand, and damages proper on F the other. All must be assessed within the same period albeit varying time periods and considerations peculiar to the assessment in question may apply.

The respondent argues that damages in lieu of reinstatement must be reckoned prospectively from the date on which such reinstatement, by order of the court, could have taken place. By arguing thus, the respondent is effectively urging G this court to separate the periods during which salary arrears and benefits on the one hand, and any damages on the other, are to be assessed. As stated above, this approach would run counter to and does not find support in the law and established authorities on this subject. In particular, the approach that the respondent advocates and which the court *a quo* adopted, effectively suggests that until a dispute of this nature is finally resolved, no matter how H

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long it might take, the employee is not obliged to do anything to mitigate his loss. A The authorities are very clear on the point that the employee is legally obliged to mitigate his loss by looking for a

job from the date of his unlawful dismissal. See, for instance, *Madyara* v *Globe and Phoenix Industries (Pvt) Ltd* 2002 (2) ZLR 269 (S). The point is emphatically stressed in the following terms in *Ambali's* case (*supra*) at 418-419:

> "I think it is important that this court should make it clear, once and for all, that an B 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 alternative employment ... There are those also, 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 is pending they must preserve their unemployed status; that C if they look for and find a job in the meanwhile they will destroy their claim."
>
> It cannot be emphasised strongly that this is wrong. … *if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately"* (emphasis added).

The respondent argues further that because the respondent was not reinstated on 1 October 2006, the date of his wrongful dismissal was thereby "shifted" D from 11 February 2003 to 1 October 2006. This latter argument demonstrates that the respondent was cognisant of the need to reckon a claim for damages in lieu of reinstatement, from the date of wrongful dismissal.

I do not find merit in the respondent's contentions in this respect. The date of his wrongful dismissal was 11 February 2003. As a matter of fact, and E like any date that has passed, it is fixed in history and immutable. It is not capable of being shifted, even metaphorically. Thus the assessment of any damages which the respondent might have been entitled to could only be reckoned from 11 February 2003 up to the date of reinstatement.

I find in the result that the respondent has failed to prove a case for an F interpretation of para 3 of the consent order that is at variance with established law and case authorities on this matter. Accordingly, this part of the dispute must be determined in favour of the appellant.

I have determined that the parties failed to reach agreement on the *quantum* of damages and that the respondent was therefore not paid any such damages G in the manner set down in para 3 of the consent order. Having further determined that the assessment of such damages must be reckoned from the date of the respondent's wrongful dismissal that is 11 February 2003, what must be considered next is the question of how such damages are to be assessed. This is both in terms of the factors to be taken into account in this respect, and the appropriate formula to be employed in the actual H computation of the damages.

Gwaunza JA

Reckoning this period prospectively from 1 October 2006, the court A*a quo* determined that 36 months would have been a reasonable time for the respondent to find reasonable employment. The court *a quo* considered the same factors as would have been considered had the period in question been reckoned prospectively from 11 February 2003. Apart from the court's reference to the country's economic meltdown between the period 2006–2009 and the upturn in the economy after that, I find that its consideration of and B reasoning in relation to the appellant's obligation to show that the respondent earned or should have earned some money following his unlawful dismissal, remain valid and can be applied to the same effect to the period 11 February 2003 to 30 September 2006.

In casu the court *a quo,* significantly, noted the appellant's concession that C at some point before the date of reinstatement, the respondent had shown that he was not sitting idly by, but had properly taken the effort to find alternative employment. The appellant made this concession on the basis of the respondent's request for a referral letter made in 2004. As already stated, an employee is required to start looking for alternative employment from the date of the unlawful termination of his employment. As correctly stated by D the court *a quo,* no concrete evidence was placed before the court to prove that indeed the respondent was engaged in a lucrative transport business and therefore was earning much more than he would have earned had he not been dismissed. The court *a quo* in my view correctly found that such evidence was speculative. In the result the court's finding that the respondent was entitled to damages in lieu of reinstatement, cannot be faulted. E

Despite the fact that the court *a quo* prospectively calculated the relevant period for measuring the damages in question from September 2006, and not retrospectively from the same date, I do not find that the period of 36 months was justified on the facts. The respondent stated that he tried for a period of over three years to secure alternative employment, and did not succeed in F his efforts.

His evidence was that his efforts to secure employment that was related to his skills had been hampered by two main factors:

(i) that the appellant had terminated his employment before he could complete his three years training as a journeyman fitter and turner; and

(ii) that the Zimbabwe economy suffered "a contraction"' of between 59 and 74 percent between 2006 and 2010. G

The court *a quo* was persuaded by these arguments and took judicial notice of the fact that the decline in the Zimbabwean economy was at its peak during the period 2006-2009. While the inhibiting circumstance of not being professionally qualified was properly accepted by the court *a quo*, the same in my view cannot be said of the second argument, relating to the economic H

2014 (2) ZLR p135

Gwaunza JA

meltdown. I have determined that the relevant period for the assessment of any A damages suffered by the respondent is that from February 2003 to September 2006. This period, on the respondent's own evidence, came before the onset of the economic meltdown. My view is that during that period, even without professional qualifications, the respondent, with diligence, should have been able to secure some form of unskilled employment.

Having been paid his salary arrears and benefits for that same period and taking B these as part of his damages for the unlawful termination of his employment, it can be said that the remnant damages would relate to what is referred to in the *Ambali* case as compensation for any loss to which he was entitled, of which he was deprived as a result of the wrongful termination. I consider that C the loss suffered by the respondent should include the housing and transport allowances that he forfeited by virtue of his wrongful dismissal. In addition, I am persuaded that the unlawful termination of the respondent's employment before he could complete his three years of skills training, constituted a lost opportunity that appropriately qualifies as a "loss" for purposes of damages D in lieu of re-instatement. The probabilities are in my view high, that had he gone into the employment field armed with a skills-based qualification, the respondent would have been able to secure alternative (and better paying) employment within a reasonable time. Such time would have likely been shorter than the time it might have taken him to secure any unskilled employment. I find in the result that damages constituting 12 months' salary E would adequately compensate the respondent for the loss of his employment.

The court *a quo,* having determined the period for which in its view the respondent was to be paid damages in lieu of reinstatement, considered the parties' arguments on whether or not it was competent for the court to convert such damages from Zimbabwe dollars to United States dollars. F The court acknowledged the complexity of the issue, particularly in view of the fact that as of that date, the Supreme Court had not given guidance on the matter. The court *a quo* also correctly noted that the various cases that the respondent had cited in support of his argument for an assessment of the damages in United States dollars were "nowhere near the heart of the matter". In stating that these cases do not bar the court from making G judgments sounding in foreign currency, the court *a quo inter alia* relied on a passage from a High Court judgment, *Samanyau & Ors* v *Fleximail (Pvt) Ltd* 2011 (1) ZLR 527 (H).

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The first point to note, whatever the merits or demerits of the observations A in the *Samanyau* case, is that this was a High Court decision and this court is not bound by decisions of a lower court. Secondly, the decision has since been set aside on appeal, this court having determined that the High Court had no jurisdiction to hear the matter – a labour dispute – in the first place. The matter should have properly been determined by the Labour Court. Thirdly, and most importantly, the setting aside of the *Samanyau* judgment B has negated the court *a quo's* reliance on the *dictum* cited above. In other words, the basis given by the court for its order to convert the damages in lieu of reinstatement in this case, from Zimbabwe dollars to United States dollars, has been discounted. No other legal basis was pronounced for the court's order that the damages it awarded to the respondent in Zimbabwe dollars should be converted, firstly, to United States dollars and secondly, at C the specific rate prevailing at the end of September 2006. Nor did the court, it seems, apply its mind to the question of whether the resultant United States dollar amount would have given true

value, to the respondent, of the damages that he was entitled to. In other words, a value that would neither over-compensate the respondent, nor inadequately do so. These are in my D view pertinent considerations for any court that has to make a determination of this nature.

It should be noted that in 2006 there were two main Zimbabwe dollar to United States dollar exchange rates in force, *i.e.* the official and the unofficial rates. The former rate had much smaller denominations compared to the latter. It is quite possible that had the official rate prevailing in September 2006 been E used to convert the Zimbabwe dollar amount awarded to the respondent by the court *a quo* as damages, an inflated amount with no relationship to the appropriate and meaningful compensation due to him would have been the result. Such an outcome would clearly have been both unrealistic and a mockery of justice. F

This court, in two recent judgments that dealt with the same taxing question, remitted the cases to the Labour Court and gave directions as to how and why that court should determine the issue. The cases are *Fleximail (Pvt) Ltd* v *Samanyau & Ors* S-21-14 and *Nzuma & Ors* v *Hunyani Paper and Packaging* S-137-11. In the *Nzuma* case the court issued an order in these terms: G

> "The matter is remitted to the court *a quo* to exercise its equitable jurisdiction in determining the question of conversion of back pay into foreign currency, and the applicable rate."

The effect of the orders given in these two cases was to emphasize the position that it is the Labour Court – and not the Supreme Court – which is endowed with jurisdiction to apply principles of equity in its determination of labour H

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disputes. The Labour Court's jurisdiction to determine labour disputes on the A basis, *inter alia,* of equity can be gleaned from the import of s 2A of the Labour Act [*Chapter 28:01*], which is quoted in full below:

> **"2A Purpose of Act**
>
> (1) The purpose of this Act is to advance *social justice and democracy* in the workplace by –
>
> (a) giving effect to the fundamental rights of employees provided for under Part II; B
>
> (b) …
>
> (c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;
>
> (d) the promotion of fair labour standards; C
>
> (e) the promotion of the participation by employees in decisions affecting their interests in the work place;
>
> (f) *securing the just, effective and expeditious resolution of disputes and unfair labour practices.*
>
> (2) This Act shall be construed in such manner as best ensures the attainment D of its purpose referred to in subsection (1).
>
> (3) This Act shall prevail over any other enactment inconsistent with it" (my emphasis).

The principles of equity and social justice as well as the imperative for the Labour Court to secure the just and effective resolution of labour disputes, are all called into question when it comes to determining the basis and E formula for computing a debt (e.g. damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically or in a way that gives due value to the employee. The undeniable fact is that a debt is not wiped out by the mere fact that there has been a F change to the realisable currency. Equity would demand that a formula be found to give effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question.

Accordingly I will, *in casu*, do no more than be guided by the recent authorities on this matter that have been cited above.

In doing so, however, I will note that I fully appreciate and do not in any way G underestimate the complexity of the exercise to compute – from Zimbabwe to US dollars – and for value, the damages awarded to the respondent in this appeal. This is particularly so given the intermittent changes to the worth of the Zimbabwe dollar that were occasioned by the removal of zeros from that currency during the hyper-inflationary era of 2006-2009. I would accordingly H venture to suggest to the Labour Court that it considers enlisting the services

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of an appropriately qualified expert in financial matters, in order to work A out a formula for calculating the damages in question. Such formula should give fair value, in US dollars, to the damages, denominated in Zimbabwe dollars, that have been awarded to the respondent in this case.

In the result, I make the following order:

1. The appeal succeeds in part; B
2. Paragraphs (i) and (ii) of the order of the court *a quo* be and are hereby set aside and substituted with the following:
   (a) the appellant shall pay the respondent 12 months' salary as damages in lieu of reinstatement on the basis of the September 2006 salary scale which was Z$587 444 085.88 per month, calculated as at 30 September 2006; C
   (b) The damages shall be paid together with interest at the prescribed rate, from the date of the Labour Court judgment (13 July 2012) to the date of payment in full;
   (c) The amounts referred to in paragraphs (a) and (b), albeit computed in Zimbabwe dollars, shall be converted to foreign currency in the D manner and at the rate determined by the Labour Court in terms of paragraph 3 of this order,
3. The matter is remitted to the Labour Court for a determination, in the exercise of its equitable jurisdiction, of the question and the applicable rate of conversion into foreign currency, of the damages due to the E respondent in terms of paragraph 2 above.
4. Each party shall bear its own the costs.

GOWORA JA and HLATSHWAYO JA concurred. F

Danziger and Partners (Gweru), appellant's legal practitioners

Musunga and Associates, respondent's legal practitioners

1 *Kwindima* v *Mvundua* 2009 (1) ZLR 169 (H); *Makwindi Oil Procurement (Pvt) Ltd* v *NOCZIM* 1988 (2) ZLR 482 (S); 1989 (3) SA 191 (ZS)

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[zRPz]S v MUTERO v & ORS 2014 (2) ZLR 139 (H)

Citation	2014 (2) ZLR 139 (H)
Case No	Judgment No. HH-424-14
Court	High Court, Harare
Judge	Uchena J
Heard	30 June 2014; *CAV*
Judgment	28 July 2014
Counsel	No counsel supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure – *record – what record must show – plea of guilty – explanation of charge* C *and elements and accused's replies thereto – need to record fully what is said – verdict – failure to give reasons for verdict – a fatal irregularity – sentence – failure to give reasons for – not* D *necessarily a fatal irregularity*

Criminal procedure – *review – purpose of – High Court's constitutional duty to supervise lower courts – need for review matters to be dealt with expeditiously*

Headnote

Judges of the High Court have a constitutional duty to supervise the E magistrates courts and other subordinate courts. That supervision is confined to how they should apply substantive and procedural law, and can be done through review and appeal judgments. This ensures that there is no interference with their decision-making process. Administrative supervision is the responsibility of the administrative structure within and outside the F magistracy. It is imperative to ensure that the review system, which is aimed at providing a curb on any misdirected or arbitrary exercise of power, is administered efficiently and speedily. A magistrate should not live in fear of reviewing judges, constantly looking over his shoulder, but should regard the reviewing judge as the second member of a two man team. The reviewing judge is not there to criticise or nit-pick or G show off his knowledge; he is there to assist, as far as he is able, in the administration of justice and to ensure that accused persons receive fair treatment. The review system complies with s 165(3) of the Constitution, as it ensures judicial independence for magistrates by only allowing High Court judges, who are senior judicial officers, to confirm or correct H on review or appeal a magistrate's work, at the end of the proceedings,

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though in exceptional cases a judge can review proceedings before they A are finally determined. The judge's supervisory and review powers creates a buffer between a magistrate's judicial work and the supervisory role of purely administrative supervisory structures. Section 164 ensures that a magistrate's work is only interfered with by a constitutionally designated officer, exercising constitutionally conferred powers. B

The High Court and all who deal with the submission of criminal review records from lower courts must always remember that reviews must be dealt with urgently. Section 57 of the Magistrates Court Act requires magistrates to submit reviews for scrutiny or review within one week of the determination of the proceedings. Section 58(3)(b) of the Act requires regional magistrates to refer cases they are in doubt of to the C registrar of the High Court as soon as possible. Section 57(4) requires the Registrar to lay the review records before a judge in chambers "with all convenient speed". These requirements apply with equal force to cases which are referred for review in terms of s 29(4) of the High Court Act. Once the need for review is identified, the record of proceedings must urgently be called for by the judge or be urgently referred to the registrar D by the referring officer or person. The registrar must, as he should do in the case of normal reviews, "with convenient speed" place the record of proceedings, before a judge for review. Such records call for urgent attention because the convicted persons will already have been prejudiced because their cases will not have been referred for review in terms of s 57. They will already have suffered delays. E

The magistrates court is a court of record. Section 5(1) of the Magistrates Court Act provides that every magistrate's court "shall be a court of record." It is therefore imperative that a magistrate must record the proceedings as they progress. Failure to record proceedings is therefore a serious irregularity which affects the integrity of the proceedings. It is F not acceptable to rush through trials with a view to recording the rest of the proceedings retrospectively in chambers. It is inconceivable that a judicial officer can recall, while in his chambers, the details of each of several

rushed trials and accurately record what he failed to record during the proceedings. The integrity of a court record depends on the faithful and diligent record keeping by a judicial officer, if the proceedings are G not being recorded mechanically or by a short hand writer. If the judicial officer fails to do this, the trial becomes irregular and irredeemable. It must be set aside.

The recording of proceedings is of critical importance because no decision can be made in the absence of a record. The trial court itself must rely H

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on the record to arrive at a verdict. The scrutiny, review and appeal courts A also depend on the record to determine the validity of the trial magistrate's decision.

Where an accused person pleads guilty in the magistrates court, s 271(2)(a) and (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] B creates two different procedures through which pleas of guilty may be accepted and proceeded with. In terms of s 271(2)(a), the court can convict without putting the facts and elements to the accused. That section can, however, only be used if the court is satisfied that the sentence to be imposed does not include (i) imprisonment without the option of a fine; or (ii) a fine exceeding level three.

Where the court is of the opinion that the offence merits any of those punishments, C or if requested thereto by the prosecutor, it proceeds in terms of s 271(2)(b). The court must record all it will have done under that procedure. Section 271(3) requires the court to record the explanation of the charge and the essential elements of the offence; and any statement of the acts or omissions on which the charge is based referred to in D subparagraph (i) of that paragraph; and the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and any statement made to the court by the accused in connection with the offence to which he has pleaded guilty. A failure to record what s 271(3) says should be recorded is a fatal irregularity, because without such a record it cannot E be said that the accused understood the charge, the facts on which it is based and its elements. The accused is entitled to respond to the inquiry and to make any statement to the court in connection with the offence. One cannot comply with the provisions of s 271(3) by merely noting "facts read elements explained and canvassed etc". The record must F show how this was done and how the accused responded to the reading of the facts, explanation and canvassing of essential elements. It is the accused's responses which determine whether or not the accused's plea should be altered to one of not guilty in terms of s 272

The court must also follow and record the procedure on sentence as provided by subss (4) and (5). This record is what the reviewing judge will use G to determine whether or not the sentence is in accordance with real and substantial justice.

Failure to canvass special circumstances is a fatal irregularity as a court cannot impose a mandatory sentence without first complying with that procedure. The provisions of s 3(3) of the Gold Trade Act [*Chapter 21:03*] H and s 368(4) of the Mines and Minerals Act [*Chapter 21:05*] are

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couched in peremptory terms which makes failure to record or canvass A special circumstances a fatal irregularity.

Justice cannot be seen to have been done if a judicial officer pronounces his judgment without giving reasons as to how he came to that conclusion. A judgment in the mind of a judicial officer cannot satisfy a litigant. It does not enable a reviewing judge to determine whether or not real and substantial justice was done. Section 70 of the Constitution entitles any B person who has been tried for an offence, on payment of a reasonable fee prescribed by law, to be given a copy of the record of the proceedings within a reasonable time after judgment is delivered in the trial. The right to be given the record of proceedings includes the right to be given the court's judgment. The timing of the enforcement of the right to be given C the record of proceedings after the delivery of judgment reinforces the importance of giving reasons for judgment.

Failure to give reasons for sentence is a misdirection which warrants interference by the reviewing judge. However, such interference must be carefully considered as the sentence might be appropriate in spite of the magistrate's failure to give reasons for sentence. In some cases it D may be necessary to refer the case back to the trial magistrate for him to give reasons for

sentence. This must not be taken as an encouragement to magistrates not to give reasons for sentence. Failure to give reasons for sentence is not just a misdirection, it is a deliberately inefficient and negligent performance of duty which judges may refer to the E Chief Magistrate's office for disciplinary action to be taken. Sentences above 12 months can only be justified by the circumstances of each case, which must be stated in the reasons for sentences for that case. It will therefore not be acceptable for a judicial officer to not give reasons for sentence on the basis that the reasons for sentence are obvious. Even if they seem obvious to him, they may not be obvious to the accused, F society or the reviewing or appeal judges.

Cases cited

S v *Andeya* 1981 ZLR 35 (A)

S v *Antonio & Ors* 1998 (2) ZLR 64 (H) G

S v *Chirisa* 1989 (2) ZLR 102 (S)

S v *Davy* 1988 (1) ZLR 386 (S)

S v *Ismail* 1994 (1) ZLR 377 (S)

S v *Kachipare* 1998 (2) ZLR 271 (S)

S v *Makawa & Anor* 1991 (1) ZLR 142 (S)

S v *Manera* 1989 (3) ZLR 92 (S) H

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S v *Mbewe & Ors* 1988 (1) ZLR 7 (H) A

S v *Mugauri* HH-154-99

S v *Ndebele* 1988 (2) ZLR 249 (H)

S v *Sabawu* HH-189-94

S v *Tachiona & Anor* 1994 (2) ZLR 402 (H)

S v *Wilson* HH-125-94

Legislation considered B

Constitution of Zimbabwe 2013, ss 70, 164, 165(1), (2) & (3) & 171(1)(b)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 190, 271(2) & (3), 272 & 334(7)

Gold Trade Act [*Chapter 21:03*], s 3(3) C

High Court Act [*Chapter 7:06*], s 29(4)

Magistrates Court Act [*Chapter 7:10*], ss 5(1), 57, 58(1) & (3)(b), 60(1)

Mines and Minerals Act [*Chapter 21:05*], s 368(4)

Judgment

Uchena J: Twenty-eight records of criminal proceedings, from Guruve D and Mvurwi magistrates courts, were personally brought to my office by the Registrar of the High Court in May 2014. He requested me to review them with a view to providing guidance to magistrates. I commend him for the proactive approach to judicial administration. The state of the records calls for a thorough review and a teaching judgment to guide the magistracy.

The records were not brought to the Registrar as normal reviews, in the sense E that they were not submitted for review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*]. They were submitted for review by the provincial magistrate, Mashonaland Central, in terms of s 29(4) of the High Court Act [*Chapter 7:06*], which authorises a judge of the High Court, or the High Court, to review any criminal proceedings where there is an alleged injustice, F brought to his or its attention through any means. See *S* v *Wilson* HH-125-94 at p 6 and *S* v *Mugauri* HH-154-99 at p 1.

The request, for a teaching judgment, is justified by how these cases were handled by the trial magistrate. It is believed that the issues arising in these cases may be widespread and therefore have to be addressed by a teaching judgment. Judges of the High Court have a constitutional duty to supervise G the magistrate's courts and other subordinate courts. That supervision is, in my view, confined to how they should apply substantive and procedural law, and can be done through review and appeal judgments. This ensures that there is no interference with their decision-making process. Administrative supervision is the responsibility of the administrative structure within and H outside the magistracy. Section 171(1)(b) of the Constitution of Zimbabwe

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2013 provides for the High Court's supervision of the magistracy as follows: A

> "The High Court –
>
> (a) …
>
> (b) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions …"

The judge's supervisory role through the reviewing of certain cases from the magistrates court and other tribunals pre-existed the provisions of s 171(1)(b) B of the Constitution, which merely elevated it to a constitutional provision. In *Criminal Procedure in Zimbabwe* John Reid Rowland at p 26-4 to 26-5, commenting on the purpose of the review procedure, said:

> "The purpose of review is to ensure that every accused person who obtains a sentence above the laid down limit automatically enjoys an independent investigation of his conviction and sentence by a senior judicial officer, who C is enjoined to satisfy himself that the proceedings meet the requirement of being in accordance with substantial justice. In a society like Zimbabwe's, where the overwhelming majority of persons standing trial in the magistrates court are members of the less favoured section of the community, and on the whole unrepresented, it is imperative to ensure that the review system, which is aimed at providing a curb on any misdirected or arbitrary exercise of power, D is administered efficiently and speedily. A magistrate should not live in fear of reviewing judges, constantly looking over his shoulder, but should regard the reviewing judge as the second member of a two man team. The reviewing judge is not there to criticise or nit-pick or show off his knowledge; he is there to assist, as far as he is able, in the administration of justice and to ensure that accused persons receive fair treatment" (emphasis added). E

I entirely agree with the author's observations on the importance of administering the review system efficiently and speedily and on the role of a reviewing judge, and would add that, that role and the High Court's supervisory role, are aimed at maintaining a high standard of justice in the lower courts, as required by s 165(1), (2) and (3) of the Constitution, by properly guiding and supervising them through the supervisory and review F system. Section 165 of the Constitution provides as follows:

> "(1) In exercising judicial authority, members of the judiciary must be guided by the following principles –
>
> (a) justice must be done to all, irrespective of status;
>
> (b) justice must not be delayed, and to that end members of the judiciary must G perform their judicial duties efficiently and with reasonable promptness;
>
> (c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.
>
> (2) Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system. H

> (3) When making a judicial decision, a member of the judiciary must make it freely and A without interference or undue influence."

The review system complies with s 165(3), as it ensures judicial independence for magistrates, by only allowing High Court judges, who are senior judicial officers, to confirm or correct on review or appeal a magistrate's work, at B the end of the proceedings, though in exceptional cases a judge can review proceedings before they are finally determined. The judge's supervisory and review powers creates a buffer between a magistrate's judicial work and the supervisory role of purely

administrative supervisory structures. Section 164 of the Constitution provides for the independence of the judiciary as follows:

> "(1) The courts are independent and are subject only to this Constitution and the C law, which they must apply impartially, expeditiously and without fear, favour or prejudice.
>
> (2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore –
>
> (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
>
> (b) the State, through legislative and other measures, must assist and protect the courts D to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165."

Section 164 justifies the procedure followed by the Provincial Magistrate when E he sought the views of a reviewing judge on the manner the trial magistrate conducted proceedings in the 28 cases. It ensures that a magistrate's work is only interfered with by a constitutionally designated officer, exercising constitutionally conferred powers.

I will deal with the 28 records of proceedings in one review judgment, because F they all have common errors. It is also convenient to deal with them in one review judgment, so that the common errors are dealt with and corrected through one judgment which will provide easily accessible guidance to magistrates. I will deal with the errors under different subheads in respect of the affected cases.

Common errors G

The following errors were noted during the reviewing of the 28 records of proceedings:

1. Incomplete record keeping.
2. Mixing the application of the s 271(2)(a) and (b) procedures of the H Criminal Procedure and Evidence Act.

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3. Convicting accused persons without putting the facts of the case to the A accused.
4. Not explaining and canvassing essential elements.
5. Failing to separate trials when some of the jointly charged accused, plead guilty while others plead not guilty.
6. Not explaining and canvassing special circumstances. B
7. Not giving reasons for judgment.
8. Not giving reasons for sentence.
9. Failure to submit records for scrutiny or review in time and at all.

The allied problem C

There is an allied problem emanating from this court which should be commented on if this judgment is to achieve the dual objective of enhancing the review system and guiding magistrates.

The Provincial Magistrate's letter which accompanied these records is dated 5 April 2013 and was date stamped with his official date stamp on 8 April 2013. That presumably is the date on which it was dispatched from D Bindura. It could have been stamped and was kept at the station until a later undisclosed date. It was stamped by the Registrar of this court's date stamp on 23 October 2013. It was brought to my office, as already disclosed, in May 2014. The delays which occurred between 8 April 2013 and 23 October 2013, and 23 October 2013 and May 2014 has not been explained, yet they E contributed to the injustice suffered by the convicted persons whose records I am being asked to review more than 13 months after the discovery of the irregularities in the proceedings and several years after the determination of the proceedings.

This court and all who deal with the submission of criminal review records from lower courts must always remember that reviews must be dealt with F urgently. Section 57 of the Magistrates Court Act requires magistrates to submit reviews for scrutiny or review within one week of the determination of the proceedings. Section 58(3)(b) of the Magistrates Court Act requires regional

magistrates to refer cases they are in doubt of to the registrar of the High Court as soon as possible. Section 57(4) requires the Registrar to lay G the review records before a judge in chambers "with all convenient speed". These requirements apply with equal force to cases which are referred for review in terms of s 29(4) of the High Court Act. Once the need for review is identified, the record of proceedings must urgently be called for by the judge or be urgently referred to the Registrar by the referring officer or person. The Registrar must, as he should do in the case of normal reviews, H

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"with convenient speed" place the record of proceedings before a judge for A review. Such records call for urgent attention because the convicted persons will already have been prejudiced because their cases will not have been referred for review in terms of s 57. They will already have suffered delays. These records were not treated with the urgency they deserved. A period of 13 months lapsed before they were placed before me for review. This is B unacceptable. The urgency with which cases should be laid before a judge for review should not be turned into inordinate delays in the provincial magistrate's office, Registrar's office or judge's chambers. The Registrar and judges of this court should, in fact, be more sensitive to the need to urgently attend to reviews and timeously dispense justice so that we may C lead those we supervise by example. Section 165(1)(b) of the Constitution requires all judicial officers to be guided by the need to perform their duties "efficiently and with reasonable promptness", and a realisation that "justice must not be delayed." I must conclude this paragraph by emphasising the need to administer the review system efficiently and promptly.

The magistrate's *modus operandi* D

These cases were presided over by the same magistrate, whose record trail exhibits the *modus operandi* of a judicial non-conformist as demonstrated by how he dispensed justice at Guruve and Mvurwi magistrates courts. He totally disregarded procedural requirements on how a criminal trial should be conducted, leaving a conspicuous trail of injustice. The cases have now E been referred to this court for review.

The facts and irregularities of each case

[*The learned judge then examined each of the cases and the manner in which the proceedings had been recorded, and continued*:]

Record keeping F

The magistrates court is a court of record. Section 5(1) of the Magistrates Court Act provides that every magistrate's court "shall be a court of record." It is therefore imperative that a magistrate must record the proceedings as they progress. Failure to record proceedings is therefore a serious irregularity which affects the integrity of the proceedings. In all but two of the above G mentioned cases the magistrate did not keep a complete record of the proceedings. In some cases he only recorded the names of the officials, and the pleas, verdicts and sentences. In some cases, he did not even record the names of the officials, but recorded the pleas, verdicts and sentences. All cases involve sentences which can only be imposed in proceedings in terms H of s 271(2)(b) of the CP&E Act. In spite of that, the magistrate did not record

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that the facts were put to the accused, or that the elements of the offence A were explained to the accused and canvassed with the accused.

An impression is created by the partial recording of proceedings that the trials were rushed through, probably with an intention to record the rest of the proceedings retrospectively in chambers which was fortuitously never done. I say "fortuitously never done" because proceedings must be recorded B as the trial goes on. It is inconceivable that a judicial officer can recall while in his chambers the details of each of the several rushed trials and accurately record what he will have failed to record during the proceedings.

A further impression is created that the trial magistrate was in a hurry to complete trials without dispensing quality justice. Justice must not be compromised in an attempt to give an impression that one is working hard C through the purported completion of many cases. I say "purported completion of many cases", because these cases were not completed. They were merely rushed to a purported completion to the prejudice of the convicted persons and justice. A case is completed when the judicial officer and the officials he works with have done all the law requires them to do. The fact that they have done so should be evident from the record of proceedings. D

Reid Rowland *Criminal Procedure In Zimbabwe* at pp 16-39 to 16-40 said:

> "A full and comprehensive record should be kept of the trial. A failure to do so amounts to gross irregularity. The need for a full and comprehensive record is obvious: without one, how could any review or appellate tribunal assess the correctness of proceedings placed before it? … Where there is no mechanical E recorder or shorthand writer available, presiding judicial officers have a duty to write down completely, clearly and accurately everything that is said and happens before them which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or which does not give the real sense of what the witness says …"

I agree with the writer's observations and the comments by the judges in *S* v *Ndebele* F 1988 (2) ZLR 249 (H) and *S* v *Davy* 1988 (1) ZLR 386 (S), which he cited. The integrity of a court record depends on the faithful and diligent record keeping of a judicial officer if the proceedings are not being recorded mechanically or by a shorthand writer. If they fail to do so, the trial becomes irregular and irredeemable. It must be set aside.

In *S* v *Manera* 1989 (3) ZLR 92 (S) at 94F-G Gubbay JA (as he then was) said: G

> "It is, I think, necessary to impress upon all judicial officers and clerks of court that records of proceedings must be preserved with meticulous care. Rule 24(2) of the Supreme Court (Magistrates Court) (Criminal Appeal) Rules, 1979, published in SI 504 of 1979, places upon the clerk of the court the administrative responsibility of lodging the original record with the Registrar of the Supreme Court. It is his obligation to ensure that the complete record of the proceedings H

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> is so lodged. Consequently, if there is anything remiss with the record, the fault must be A visited upon the State and not upon the appellant."

While the above refers to the preservation of an existing record, it must be stressed that the trial judicial officer or his court officials (i.e. recorder or shorthand writer) must meticulously create the record of proceedings, as B one cannot preserve a non-existent record. The recording of proceedings is of critical importance because no decision can be made in the absence of a record. The trial court itself must rely on the record to arrive at a verdict. The scrutiny, review and appeal courts also depend on the record to determine the validity of the trial magistrate's decision.

In *Manera (supra*) the unavailability of the record led to the upholding of the C appeal and setting aside of the conviction and sentence. In the absence of a record of proceedings, it is impossible to ascertain whether the proceedings are in accordance with real and substantial justice. In most of the cases under review, the magistrate's recording of the proceedings is incomplete and neither accurate, meaningful nor clear. It is, in most of the cases, both meaningless and confusing. The convictions and sentences in case numbers D 2, 3, 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 18, 19, 22, 24, 25, 26, 27 and 28 must therefore be set aside.

The procedure under s 271(2)(a) and (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07***]**

In case numbers 2, 3, 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 18, 19, 22, 24, 25, 26, 27 E and 28 the trial magistrate proceeded without ensuring that the facts of the cases were read to the accused, understood by the accused and accepted by him. He also did not explain the essential elements of the offences to the accused, and canvass them with the accused. He purported to have proceeded in terms of s 271(2)(a), but imposed sentences above those permissible F under that procedure.

Section 271(2)(a) and (b) provides as follows:

> "(2) Where a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea –

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

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

(ii) a fine exceeding level three;

or deal with the accused otherwise in accordance with the law; H

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(b) *the court shall*, if it is of the opinion that the offence merits any punishment A referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor –

(i) *explain the charge and the essential elements of the offence to the accused* and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and B

(ii) *inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge* or by the prosecutor;

and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and C the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law:

Provided that, if the accused is legally represented, the court may, in lieu of the procedure provided in subparagraphs (i) and (ii), satisfy itself that the accused understands the charge and the essential elements of the offence D and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor by relying upon a statement to that effect by the legal representative of the accused.

(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2) **–**E

(a) *the explanation of the charge and the essential elements of the offence; and*

(b) *any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and*

(c) *the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and*

(d) *any statement made to the court by the accused in connection with the offence*F*to which he has pleaded guilty; shall be recorded"*(emphasis added).

The fact that the accused's answers must be recorded means one cannot comply with the provisions of s 271(3) by merely saying "facts read elements explained and canvassed etc". The record must show how this was done and how the accused responded to the reading of the facts, explanation and canvassing of essential elements. It is the accused's responses which G determine whether or not the accused's plea should be altered to one of not guilty in terms of s 272 of the CP&E Act.

Section 271(2)(a) and (b) creates two different procedures through which pleas of guilty may be accepted and proceeded with. In terms of s 271(2)(a), the court can convict without putting the facts and elements to the accused. H

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That section can, however, only be used if the court is satisfied that the A sentence to be imposed does not include –

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

(ii) a fine exceeding level three;

or the court may deal with the accused otherwise in accordance with the law. The court is guided by the permissible sentence. If a sentence exceeding the B above is envisaged the court must proceed in terms of s 271(2)(b).

Where the court proceeds in terms of s 271(2)(b) the court must record all it will have done under that procedure. Section 271(3) requires the court to record, the explanation of the charge and the essential elements of the offence; and any statement of the acts or omissions on which the charge C

is based referred to in subpara (i) of that paragraph; and the reply by the accused to the inquiry referred to in subpara (ii) of that paragraph; and any statement made to the court by the accused in connection with the offence to which he has pleaded guilty. A failure to record what s 271(3) says should be recorded is a fatal irregularity, because without such a record it cannot be said that the accused understood the charge, the facts on which it is based D and its elements. The accused is entitled to respond to the inquiry and to make any statement to the court in connection with the offence. The court must also follow and record the procedure on sentence as provided by subss (4) and (5) which provide as follows:

> "(4) The court may –
>
> (a) call upon the prosecutor to present evidence on any aspect of the charge; and E
>
> (b) with regard to sentence, hear any evidence, including evidence or a statement made by or on behalf of the accused.
>
> (5) Where an accused has been convicted in terms of this section, the prosecutor and the court may, whether or not he gives evidence, question him with regard F to sentence and, if the accused is represented by a legal practitioner, his legal representative may thereafter question him subject to the rules applicable to a party re-examining his own witness."

In view of the magistrates court being a court of record, it must record the above which the reviewing judge will use to determine whether or not the sentence is in accordance with real and substantial justice.

In terms of s 272 of the CP&E Act, the above mentioned inquiries may lead to G the court entertaining a doubt from the accused's answers as a result of which the accused's plea can be altered to one of not guilty. Section 272 provides as follows:

> "If the court, at any stage of the proceedings in terms of section *two hundred and*H*seventy-one* and before sentence is passed –

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> (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded A guilty; or
>
> (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
>
> (c) is not satisfied that the accused has no valid defence to the charge; B
>
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial."

This means the accused's answers and statements must be tested against the law on the offence charged, after which the court must assess whether or not the accused's plea makes him guilty in terms of the law. The accused's answers and statements also enables the court to assess whether or not the C accused has correctly admitted all the essential elements, the acts or omissions in respect of the offence charged and to be satisfied that the accused has no valid defence.

In these cases it is apparent that the magistrate could not have proceeded in terms of s 271(2)(a) because the sentences he imposed exceeds those which can be imposed under that procedure. His proceeding without complying D with s 271(2)(b), (3), (4) and (5), renders the proceedings fatally irregular.

The proceedings in the above mentioned case are therefore fatally irregular. They must be set aside.

Convicting accused persons without putting the facts of the case to the accused E

The above issue has been covered under the s 271(2)(b) procedure.

Not explaining and canvassing essential elements

The above has also been covered under the s 271(2)(b) procedure.

Failing to separate trials when some of the jointly charged accused, plead guilty while others plead not guilty F

Section 190 of the C P & E Act provides for the separation of trials as follows:

> "When two or more persons are charged in the same indictment, summons or charge, whether with the same offence or with different offences, the court may at any time during the trial on the application of

the prosecutor or of any of the accused, direct that the trial of the accused or any of them shall be held G separately from the trial of the other or others of them, and may abstain from giving a judgment as to any of such accused."

In case number 24, the trial court did not order a separation of trials even though the jointly charged accused persons had respectively tendered pleas of guilty and not guilty. It is trite that when one or more jointly charged accused persons plead guilty when others plead not guilty their trials should H

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be separated. See *S* v *Andeya* 1981 ZLR 35 (A). The record, because of the A judicial officer's failure to keep an accurate record, does not show whether the State or the accused persons applied for separation. If they did not, the magistrate could not have acted *mero motu*. See *S* v *Kachipare* 1998 (2) ZLR 271 (S). If such an application was made the court had a discretion. See *S* v *Ismail* 1994 (1) ZLR 377 (S), where it was held that the court has a discretion B which must be exercised judicially. This irregularity could therefore not have been a determinant one in view of our case law. I will not use it to set aside the case involved but it must be noted that had the magistrate's record of proceedings been complete and accurate it could have established the extent of the irregularities and whether or not they affected the attainment of real C and substantial justice.

Not explaining and canvassing special circumstances

In cases 14 and 19 the trial magistrate did not record the canvassing of special circumstances, nor did he canvass special circumstances, a procedure which is a prerequisite to the imposition or non-imposition of a mandatory sentence in terms of s 3(3) of the Gold Trade Act [*Chapter 21:03*] and s 368(4)(a) D and (b) of the Mines and Minerals Act [*Chapter 21:05*].

Failure to canvass special circumstances is a fatal irregularity, as a court cannot impose a mandatory sentence without first complying with that procedure. The provisions of s 3(3) of the Gold Trade Act and s 368(4) of the Mines and Minerals Act are couched in peremptory terms, which makes failure to E record or canvass special circumstances a fatal irregularity. Section 3(3) of the Gold Trade Act provides as follows:

"(3) Any person who contravenes subsection (1) shall be guilty of an offence and liable –

(a) if there are no special circumstances in the particular case, to imprisonment for a period of not less than five years or more than ten years; or

(b) if the person convicted of the offence satisfies the court that there are special F circumstances in the particular case why the penalty provided under paragraph (*a*) should not be imposed, which circumstances shall be recorded by the court, to imprisonment for a period not exceeding five years or a fine not exceeding level nine or twice the value of the gold that is the subject-matter of the offence, whichever is the greater, or to both such fine G and such imprisonment."

Section 368(4) of the Mines and Minerals Act provides as follows:

"(4) Any person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and liable –

(a) if there are no special circumstances in the particular case, to H imprisonment for a period of not less than two years; or

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(b) if the person convicted of the offence satisfies the court that there are special A circumstances in the particular case why the penalty provided under paragraph (a) should not be imposed, which circumstances shall be recorded by the court, to imprisonment for a period not exceeding two years or a fine not exceeding level ten."

The provisions of both sections are couched in peremptory terms as regards the canvassing and recording of special circumstances. The court in both B cases has to be satisfied of the existence of special circumstances before it can pass a sentence other than a mandatory sentence. The magistrate's failure to canvass and record the canvassing and finding on special circumstances is therefore fatal.

In *S* v *Mbewe & Ors* 1988 (1) ZLR 7 (H) at 11A-B Ebrahim J (as he then was) said: C

> "From a procedural point of view, a magistrate, having convicted a person for unlawfully possessing or trading in ivory, is obliged to record the special circumstances of the particular case before him. If this is not done this amounts to a misdirection rendering the sentence incompetent. See *Attorney-General* v *Jasi and Nharingo* S-2-87 (not yet reported)."

In view of the above, the sentences imposed in cases no 14 and 19 have to D be set aside.

Not giving reasons for judgment

In case numbers, 9, 10, and 26 the trial magistrate convicted the accused persons after conducting trials, but did not give his reasons for judgment. E

Justice cannot be seen to have been done if a judicial officer pronounces his judgment without giving reasons as to how he came to that conclusion. A judgment in the mind of a judicial officer can not satisfy a litigant. It does not enable a reviewing judge to determine whether or not real and substantial justice was done. Section 70 of the Constitution provides that: F

> "(4) Any person who has been tried for an offence has the right, on payment of a reasonable fee prescribed by law, to be given a copy of the record of the proceedings within a reasonable time after judgment is delivered in the trial."

The right to be given the record of proceedings includes the right to be given the court's judgment. The timing of the enforcement of the right to be given the record of proceedings after the delivery of judgment reinforces G the importance of giving reasons for judgment.

In *S* v *Makawa & Anor* 1991 (1) ZLR 142 (S) at 146A-D Ebrahim JA said:

> "In *S* v *Mapiye* S-214-88, the former Chief Justice dealt with a case in which the magistrate had omitted from the appeal record the evidence relating to a second charge on the charge sheet yet had convicted the appellant on both charges. It is instructive to quote the final paragraph of that judgment: H

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> 'To confirm the conviction on the second count, would, in my view, result in a failure A of justice. The omission to consider and to give reasons for convicting the appellant on count two is fatal to the prosecution case. *It is a gross irregularity*. Appeals are argued and decided on the contents of a certified record of the trial proceedings. If those contents are stored in the mind of the trial magistrate, they are not good enough' (my emphasis).
>
> Strictly speaking, this passage, and especially the sentence which I have taken the liberty of B [emphasising], is decisive as regards the disposition of this matter. Although there are indications in this case that the magistrate may have considered the case, *a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons. There is a gross irregularity in the proceedings.* See *R* v *Jokoniya* 1964 RLR 236 (G); *R* v *d'Enis* 1966 RLR 457 (A); C1966 (4) SA 214 (RA); and *Practice Note 4 of 1966 (Appellate Division)* 1966 RLR 755 (A)" (emphasis added).

Not giving reasons for sentence

In case numbers 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 25, 26, 27, and 28 the trial magistrate did not give reasons for D the sentences he imposed on the convicted persons. Failure to give reasons for sentence is a misdirection which warrants interference by the reviewing judge. However, such interference must be carefully considered as the sentence might be appropriate in spite of the magistrate's failure to give reasons for sentence. In some cases it may be necessary to refer the case back to the trial magistrate for him to give reasons for sentence. This, however, must E not be taken as an encouragement to magistrates not to give reasons for sentence. Failure to give reasons for sentence is not just a misdirection; it is a deliberately inefficient and negligent performance of duty which judges may refer to the Chief Magistrate's office for disciplinary action to be taken.

In *S* v *Antonio & Ors* 1998 (2) ZLR 64 (H) at 68A-F, Chinhengo J, commenting on the need for a judicial officer to give reasons for sentence, said:

> "That being the case, a judicial officer should give reasons in his judgment why he opts for F one form of punishment as against any other. It is not a judicious exercise of the sentencing discretion to sentence an accused person to a custodial term, or to payment of a fine or to the suspension of either of them on any condition or to community service without showing why he has settled on any of those forms of

punishment. In my opinion, to do so is a misdirection. It is a G misdirection because the sentencer will not have applied his mind to the most appropriate sentence. If he would have applied his mind to the question of sentence the clearest evidence of it is to reflect on the record the reason for his choice of sentence. The words of Young J in *R* v *Dematema* 1967 RLR 311 (G) at 316C-D are apposite. He said:

> 'The infliction of punishment is perhaps the most important and difficult H aspect of the exercise of judicial discretion. A sentence must always have a

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> rational content with no capricious element in it. The judicial officer must A take into account, and give proper weight to all relevant factors. As in the case of convicting the accused, so with punishing him where the justification of the sentence is not obvious, the judicial officer should give reasons for his decision. As a member of society the accused is entitled to be treated as a rational being and both society and the accused are entitled to know the justification for the punishment.'

It may be said that where an accused person is sentenced to imprisonment for B 12 months or more, the justification for the custodial sentence is more readily understood. In any case, the judicial officer gives his reasons for sentence, but the seriousness of the offence, generally stands out as the obvious justification for imprisonment. This is not so with non-serious offences. Once the sentence which may be imposed is less than 12 months, the obviousness of any particular punishment is less likely to be grasped by the accused or the society. There are C a number of options available to the judicial officer – a custodial term (which necessarily is a short one), the payment of a fine, community service and other conditions of suspension specified in s 358 of the Act. There must always be a justification of the sentence on which the judicial officer settles. As I have already stated, a failure to do so is a misdirection."

While I agree with Chinhengo J's reasoning on the need to give reasons for D sentence, I must stress that in many cases the justification for a sentence is not always obvious. Sentences above 12 months can only be justified by the circumstances of each case, which must be stated in the reasons for sentences for that case. It will therefore not be acceptable for a judicial officer to not give reasons for sentence on the basis that the reasons for sentence are obvious. Even if they seem obvious to him they my not be obvious to the E accused, society and the reviewing or appeal judges.

See also *S* v *Tachiona & Anor* 1994 (2) ZLR 402 (H) at 409D-E where Chatikobo J quoted *S* v *Sabawu* HH-189-94 where he had said:

> "But, before departing from the set guide lines, the facts warranting such departure must be established and placed on record." F

In *S* v *Chirisa* 1989 (2) ZLR 102 (S) McNally JA confirmed that failure to give reasons for judgment is a misdirection, but the appeal court is at large to assess sentence. He said at 106A-B:

> "I am prepared to leave open the latter question because the magistrate has omitted to provide his reasons for sentence as he is required to do in terms of Order V r 2(1)(a)(ii) of the Magistrates Court (Criminal) Rules 1966. This amounts to G a misdirection because we are effectively prevented from determining whether he misdirected himself or not.
>
> Accordingly we are free to make our own assessment of the appropriate sentence. Comparing the facts of the case and the personal circumstances of the appellant with those in similar cases we are satisfied that the usual sentence in such cases is a shorter period of imprisonment." H

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I agree that the review court or appeal court will be at large to assess the A appropriate sentence if the trial magistrate does not give reasons for sentence, but that is only possible if the mitigating and aggravating factors have been put on record. In most of the cases under review, the magistrate did not record the mitigating and aggravating factors. It is therefore not possible for me to assess sentences in those cases. I will however endeavour to assess B sentence in cases where sufficient information has been put on the records.

Failure to submit records for scrutiny or review in time and at all

The sentences imposed in each of the 28 cases calls for the automatic review or scrutiny of the proceedings. The clerk of court, contrary to the peremptory provisions of ss 57 and 58 of the Magistrates Court Act, did not submit the C records of proceedings for scrutiny and review. Some of these cases were finalised as long back as 2007. It is unacceptable for the clerk of court to file away

cases which should be referred to a regional magistrate or judge for scrutiny or review. Sections 57(1)(a) and (b) and 58(1)(a) and (b) provide for review and scrutiny as follows:

> "57(1) When any court sentences any person –
>
> (a) to be imprisoned for any period exceeding twelve months; or
>
> (b) to pay a fine exceeding level six;
>
> the clerk of the court shall forward to the registrar, not later than one week next after the determination of the case, the record of the proceedings in the case, together with such remarks, if any, as the magistrate may desire to append …"
>
> "58(1) Where any court, other than the court of a regional magistrate, sentences any person –
>
> (a) to be imprisoned for any period exceeding three months but not exceeding twelve months; or
>
> (b) to pay a fine exceeding level four but not exceeding level six;
>
> the clerk of the court shall forward to a regional magistrate, not later than one week next after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the magistrate may desire to append".

The magistrate in charge of a magisterial station must ensure that such records have been timeously forwarded for review or scrutiny. Efficient and timeous review record book checks should flush out such records. The trial magistrate should also ensure that his cases are send for scrutiny and review timeously as he signs the review and scrutiny covers. If these cases had been forwarded for review and scrutiny timeously, the prejudice caused by the inordinate delays would have been avoided. In view of the delays, caused by the non- submission of the records for review and scrutiny in terms of ss 57(1) and 58(1), irreparable prejudice has been caused to the accused persons. Most of

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them had already served their sentences when the records where submitted for review, in terms of s 29(4) of the High Court Act. Others completed their sentences when the records lay unattended at the High Court. These unfortunate miscarriages of justice could have been avoided.

Conclusion

Cases 1 and 7 are subject to appeals. They should not have been referred to this court for review. The appeal process should have been allowed to determine the fate of the proceedings. Where a convicted person exercises his right to appeal in terms of s 60(1) of the Magistrate's Court Act before the record of proceedings is submitted for review, his choice of procedure must be given effect by following the appeal process. His appeal should not be delayed by subjecting the proceedings to the review process he will have chosen not to follow, which will not finalise the case as it still has to go on appeal, whose decision is not bound by the findings of the reviewing judge. The records of proceedings in cases number 1 and 7 are therefore referred back to the court *a quo* which must urgently facilitate the processing of their appeals.

The proceedings in cases 2, 3, 4, 5, 8, 11, 12, 13, 14, 15, 16, 18, 19, 22, 24, 25, 26, 27 and 28 were not fully recorded. It is not possible to review them without the records of proceedings. They are hereby set aside.

The decision as to whether or not to subject the accused persons to trials *de novo* will be exercised by the Prosecutor-General.

In cases 9, 10, and 26 the trial magistrate conducted trials after which he convicted the accused persons and sentenced them. He however did not give reasons for judgment nor sentence. I have already said failure to give reasons for judgment is a fatal irregularity. The proceedings in cases number 9, 10, and 26 are therefore set aside. If the trial magistrate was still available I would have referred the cases back to him for him to give his reasons for judgment and sentence. In the circumstances, I have no other option besides setting aside the convictions and sentences and leaving the issue of whether or not the accused persons should be tried *de novo* to the discretion of the Prosecutor General. The convictions and sentences in case numbers 9, 10, and 26 are set aside.

In cases 6, 20 and 23, the trial magistrate, complied, with the requirements of proceedings in terms of s 271(2)(b) of the CP&E Act. He recorded the accused persons' mitigation and sentenced them without giving reasons for sentence. In view of the precedent in *S* v *Chirisa (supra*) I can assess

sentences for these cases. I must start by considering whether or not the sentences imposed by the magistrate met the justice of the cases. If they do I will confirm the sentences imposed. If not I will using the sentencing H

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information on the records consider what would be the appropriate sentence in A each case.

[The learned judge then dealt with these cases; what he said has, in part, been abbreviated:]

In case number 6, the trial magistrate in spite of his failure to give reasons for B sentence imposed a sentence which suits the offender. I cannot do any better. The offender does not deserve a reduction of the sentence imposed. I confirm the sentence imposed as being in accordance with real and substantial justice.

In case number 20, the accused person was properly convicted on two counts of stock theft. The magistrate did not finish recording the accused's explanation as to why the court had to find special circumstances why the mandatory C sentence should not be imposed. The establishment of whether or not there are special circumstances why a mandatory sentence should not be imposed is an important aspect of the trial. It plays a critical role in the sentencing of the offender. It is a stage which cannot be grossed over. Failure to properly follow that procedure is fatal to the sentencing of the offender. A sentence D imposed without compliance with that procedure must be set aside. It is not possible for a reviewing judge to himself assess sentence in the absence of the establishment of whether or not there are special circumstances.

The trial magistrate is no longer available to pass sentence on remittal. According to the provincial magistrate's letter he was discharged from the E service for misconduct involving failure to fully record trial proceedings and not giving reasons for judgment or sentence. The accused person pleaded guilty. His conviction is therefore beyond reproach. The record of proceedings must be referred back to the court *a quo* for the canvassing of special circumstances and passing of sentence. In terms of s 334(7) of the CP&E Act another magistrate can, on referral back of the case to the F court *a quo*, pass sentence on the accused. Section 334(7) of the CP&E Act provides as follows:

> "(7) If, in a magistrates court, sentence is not passed upon an offender forthwith upon his conviction or if, by reason of any decision or order of the Supreme Court or High Court, as the case may be, on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a magistrates court, or to pass G sentence anew in such court, any magistrate of that court may, in the absence of the magistrate who convicted the offender or passed the sentence, as the case may be, pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender."

In view of the trial magistrate's failure to fully record the canvassing of special circumstances the sentence imposed on the accused is set aside. The H case is referred back to the court *a quo* for another magistrate to canvass the

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special circumstances and pass sentence on the accused. The sentence the A accused has already served should be taken into consideration is assessing sentence afresh.

In case 23 the trial magistrate recorded the accused's plea in terms of s 271(2)(b) of the CP&E Act. The sentence imposed is within the magistrate's discretion. Even though the magistrate misdirected himself by not giving reasons for sentence, I am of the view that the sentence suits the offence and B the offender. I confirm the sentence imposed as being in accordance with real and substantial justice.

The proceedings in cases 17 and 21 satisfy the requirements of real and substantial justice. The trial magistrate fully recorded the s 271(2)(b) plea proceedings. The accused persons admitted the essential elements of the C offences charged. The trial magistrate gave satisfactory reasons for sentence and imposed sentences within his discretion. It seems to me the provincial magistrate merely referred them for review. The proceedings are therefore confirmed as being in accordance with real and substantial justice

Chiweshe JP agrees. D

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[zRPz]COME AGAIN MINES (PVT) LTD v PARKS AND WILDLIFE MANAGEMENT AUTHORITY AND ORS 2014 (2) ZLR 161 (H)

Citation	2014 (2) ZLR 161 (H)
Case No	Judgment No. HH-392-14
Court	High Court, Harare
Judge	Chigumba J
Heard	25 November 2013, 17 & 22 July 2014; CAV
Judgment	30 July 2014
Counsel	*E T Moyo*, for the applicant *S Bhebhe*, for the first respondent Ms *C T Kasere*, for the second and third respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Mines and minerals – *mining claim – mine situated in area subsequently designated as a national park – work carried out on such claim and ore extracted – whether Parks and Wildlife Authority entitled to levy fees* D *for continued operation on such mine*

Headnote

The applicant had been carrying on mining operations for several years in an area north-east of Harare, before that area was designated as a national park. The Parks and Wildlife Authority then demanded fees from the applicant for it to be allowed to continue its mining activities. E It claimed that it was entitled to do so in terms of the Parks and Wildlife Management Authority (Tariff of Fees) By-laws 2013. The applicant sought an order declaring that the fees were ultra vires the enabling legislation, being inconsistent with the provisions of ss 119 and 129A of the Parks and Wildlife Act [*Chapter 20:14*]. Section 119(2) prohibits mining within a national park except in terms of a permit issued by the F Minister of Environment or in accordance with any prospecting rights lawfully acquired in respect of the area before the date when such area became a national park.

Held, that s 119(2)(b) applied to the applicant's mining permits, which conferred mining rights on it and which were issued before the area was designated as a national park. Very wide discretion is placed in the G hands of the Authority in enacting the by-laws. The Authority may make by-laws fixing the fees to be paid for any authority, permit or licence issued or supplied in terms of the Act. There was no evidence as to what the terms and conditions of these registered claims were,

or what the fact of registration of the claims conferred on the applicant in terms of H mining rights. The application would be refused.

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* Editor's note: Section 119(1) of the Parks and Wildlife Act prohibits prospecting or A mining within a national park except (a) in terms of a permit issued by the Minister [of Environment] with the consent of the Minister of Mines or (b) in accordance with any prospecting rights lawfully acquired in respect of the area of the national park before the date when such area became a national park. Subsection (2) prohibits the acquisition or working of any mining location within a national park except (a) in terms of a written agreement between the Minister and the person concerned which B has been approved by the President or (b) in accordance with any mining rights lawfully acquired in respect of the area of the national park before the date when such area became a national park.

Section 129A(a) allows fees to be fixed for "any authority [or] permit … granted, issued or supplied in terms of this Act" (my emphasis), while para (b) allows the Authority to fix "a tariff of fees payable by persons prospecting, or working any mining location within the park area under a permit or agreement referred to in section 119". C

As the applicant's rights were granted under the Mines and Minerals Act before the area was designated as a national park, its rights were not granted under the Parks and Wildlife Act, nor was it mining in terms of a permit or agreement referred to in s 119.

Cases cited D

Africa Resources Ltd & Ors v *Gwaradzimba & Ors* 2011 (1) ZLR 105 (S)

ANZ v *Min of State for Information & Publicity & Ors* 2004 (1) ZLR 5 38 (S)

Bevcorp (Pvt) Ltd v *Nyoni & Ors* 1992 (1) ZLR 352 (S)

Est Ncube & Anor v *Mhlanga & Ors* HB-43-08 E

F Hoffman-La Roche & Co AG & Ors v *Sec of State for Trade & Industry* [1975] AC 295 (HL)

Hiltunen v *Hiltunen* 2008 (2) ZLR 296 (H)

Mangwiza v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (S)

Registrar-General of Elections v *Combined Harare Residents Assn & Anor* 2002 (1) ZLR 84 (S) F

Legislation considered

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

Mines and Minerals Act [*Chapter 21:05*], s 253

Parks and Wildlife Act [*Chapter 20:14*], ss 119 & 129A G

Parks and Wildlife Management Authority (Tariff of Fees) By-laws 2013 (SI 5 of 2013)

Case information

E T Moyo, for the applicant

S Bhebhe, for the first respondent

Ms *C T Kasere*, for the second and third respondents H

Chigumba J

Judgment

Chigumba J: The mining sector in this country has since time immemorial provided A a source of livelihood for many. It has gained notoriety in recent memory for the rising propensity, amongst its patrons and practitioners, to engage in illegal mining activities, with news reports of one mining town where illegal gold panners, known as "*makorokoza*", are alleged to have dug tunnels underneath the town's buildings and compromised the buildings' B structural integrity, all in the name of mining. It is therefore important that the correct message be sent to all mining

practitioners that the courts will not countenance, condone or sanction self-help or defiance of Acts of Parliament designed to regulate this industry, for whatever reason.

This is an application for a declaratur made in terms of s 14 of the High Court C Act [*Chapter 7:06*]. The relief that the applicant is seeking is as follows:

1. It be and is hereby declared that the fees fixed by the first respondent under Part IX of the Parks and Wildlife Management Authority (Tariff of Fees) By-laws, 2013 are *ultra vires* the enabling legislation to the extent that they are inconsistent with the provisions of s 129A of the Parks and Wildlife Act [*Chapter 20:14*] and are therefore unlawful, void D and unenforceable.
2. The applicant shall not be liable to pay the fees prescribed by the tariff fixed by the first Respondent in terms of Part IX of the Parks and Wildlife Authority (Tariff of Fees) By-laws 2013 for exploitation of products in E the park area.
3. The first respondent be and is hereby ordered and directed to allow and permit the applicant unhindered access to its mining claims within the precincts of Mfurudzi Safari Area and to remove any ore mined therefrom.
4. The first respondent shall refrain from interfering with the lawful F operations of the applicant upon its mining claims within the said Mfurudzi Safari Area.
5. The first respondent shall pay the applicant's costs of suit.

The applicant is in the business of mining and is a holder of certain rights title and interests in some mining claims known as Come Again Reefs 4, 5, G 9,10,11,12 and Mzingwe 5 situated in the Mfurudzi Safari Area of Shamva District. The first respondent is a statutory body established in terms of the Parks and Wildlife Act [*Chapter 20:14*]. The second respondent is the Minister responsible for the Department of Parks and Wildlife. The third respondent is the Minister responsible for mines who, together with the second respondent, has no direct or substantial interest in the matter and H has been cited in a nominal capacity.

Chigumba J

The applicant averred, in its founding affidavit, that its abovementioned A mining claims are located within the boundaries of land belonging to the first respondent, which land is secured and protected in terms of the Parks and Wildlife Act. Access to this land is restricted. The applicant averred that it produced 50 tonnes of gold ore from its various mining claims and piled it up against Come Again Reef 4. It alleged that the first respondent's officers and B personnel, particularly the warden of Mfurudzi Safari Area, have unlawfully refused to allow the applicant to remove its ore from the mine, with threats of violence, on the basis that the applicant owes some levies to the warden.

The applicant averred further, that, the warden has failed or neglected to produce an assessment of what is due, or to indicate the basis for charging the fees. The applicant alleged that it had to litigate in case HC1696/13 C before it was referred to Part IX of Parks and Wildlife Management Authority (Tariff of Fees) By-laws as the basis of the claim for fees by the warden. The applicant alleged that, to date, it has not been advised of the amount due and owing to first respondent and it has not been given an invoice for payment. The applicant contended that the By-laws are *ultra vires* the enabling legislation, the Parks and Wildlife Management Act [*Chapter 20:14*], and D are consequently void *ab initio*.

The applicant averred that in terms of the Parks and Wildlife Management Act, the first respondent is authorized to make regulations fixing fees payable by persons working on any mining location within the park area for:

(a) clearing of land, per hectare of land cleared; E
(b) backfilling on abandonment;
(c) forfeiture or cancellation of the mining location;
(d) removal of rock from any quarry within the park area.

It contended that, in the tariff of fees, the first respondent exceeded the power F conferred by statute and purported to charge fees for exploiting products within the park area and charging fees for prospecting permits per claim per month and undertaking mining activities. The applicant denied that it was involved with the clearing of land or that it is liable for any backfilling fees or that it has abandoned, forfeited or cancelled any mining claims. It disputed that it is liable to the first respondent for any fees that may lawfully G be charged in terms of the Parks and Wildlife

Management Act. The applicant denied that the first respondent is entitled to charge fees for "exploitation of products within the park area".

In its opposing affidavit, the first respondent raised a point *in limine* that the application for a declaratur and mandamus was defective because it was H

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vague and embarrassing. This is because of the applicant's reference to the Parks A and Wildlife Management Act, which, is nonexistent, the Act is known as the Parks and Wildlife Act [*Chapter 20; 14*]. The second point raised is that the applicant's alleged failure to quote the relevant section that it alleged to have been over-broadened by the first respondent's By-laws rendered the application incompetent. The third preliminary point raised is that the B applicant has dirty hands and ought to purge that before it is allowed to bring this application. The first respondent contended that, until such time as the applicant has paid the outstanding fees, it ought not to be heard.

In regard to the merits of the matter, the first respondent averred that Mfurudzi was designated a national park in terms of the Parks and Wildlife Act which, C in s 129A, authorizes the making of by-laws to prescribe fees, resulting in the promulgation of the Parks and Wildlife Management (Tariff of Fees) By-laws, on 18 January 2013. It contended that, for as long as the applicant carried out mining activities in this area, it was obliged to pay the prescribed fees in terms of the by-laws. It contended that payment of the prescribed fees was a prerequisite to carrying out mining activities in the national park D area. The first respondent admitted that it has denied the applicant access to its mining claims until such time as the prescribed fees are paid. It attached a schedule which shows that the applicant was charged a total US$28 000 in terms of the by-laws, as at 18 January 2013. The first respondent contended that it is entitled to charge fees for

> "… entering any area or part of the park area, doing anything within the park area or part of it, E any authority, permit, licence, register or return granted, issued or supplied in terms of this act or any regulations made thereunder",

as well as "the removal of rock from any quarry within the park area". It denied that the fees which had been prescribed by the by-laws were *ultra vires*F s 129A of the Parks and Wildlife Act.

The issue that falls for determination is whether the fees charged by the first respondent in terms of the by-laws are *ultra vires* s 119 of the Parks and Wildlife Act, and if so, whether the applicant is entitled to the relief that it seeks.

The law G

At the hearing of the matter the first respondent persisted in its three points *in limine,* and abided by its heads of argument in support of its contention.

The first respondent submitted that the application is fatally defective because the founding affidavit does not state, with clarity and precision, that which H the applicant alleges, and relies on *Mangwiza* v *Ziumbe & Anor*

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Chigumba J

2000 (2) ZLR 489 (S)[1] *a*s authority for this proposition. The first respondent also A relied on *Hiltunen* v *Hiltunen* . The first respondent's grievance is that the applicant refers to a non-existent Act and fails to particularise the relevant section of such Act in the founding affidavit, a fact which embarrasses the respondent. The court must decide whether this omission renders the application fatally defective as submitted by the first respondent, which relies on *African Resources Ltd & Ors* v *Gwaradzimba NO & Ors to support its* B *position. Counsel for the applicant argued, correctly in my view, that in the African Resources* case *supra* the deficiencies in the founding affidavit were not held to render the application fatally defective. In fact, the Chief Justice was of the view that the defects in the founding affidavit could attract an order for costs *de bonis propiis,* if an appropriate application for such costs C is made, and the reference was to the inclusion of irrelevant material, by the legal practitioner, which made the affidavit unnecessarily voluminous. The applicant relied on *Bevcorp (Pvt) Ltd* v *Nyoni & Ors*1992 (1) ZLR 352 (S) at 356 where Korsah JA stated that

> "While I agree that the founding papers were in a confused mess, I prefer to leave the matter open as to whether that alone was enough to justify the dismissal of D the instant application by way of motion

> proceedings. I accept, unreservedly, that there may be cases where the founding papers are so incomprehensible as to warrant dismissal of the application.

It submitted that the founding affidavit was not so incomprehensible as to warrant dismissal of the application for that reason alone. The applicant cited the relevant Act and submitted that it is identifiable. I found that argument E persuasive.

The second point *in limine* raised by the first respondent related to the dirty hands doctrine, the applicant's blatant admission that it had approached this court for relief without paying the prescribed fees, being the source of the first respondent's ire, or discontent. Both parties concurred in their F

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Chigumba J

A heads of arguments that one of the leading cases on this doctrine is the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information & Publicity & Ors , in which the applicant, the publisher of a newspaper, sought to challenge the constitutionality of several provisions of the Access to Information and protection of Privacy Act [Chapter 10:27*], (AIPPA) and regulations made under that Act. It was held that the applicant B had to obey the law first then challenge its constitutionality. It was held further, that

> "it was not correct to say that the principle of 'dirty hands' only applies to those litigants whose conduct lacks probity or honesty and to those litigants whose conduct is tainted with moral obliquity, such as fraud or other forms of dishonesty. The mere fact that the applicant had disclosed to the court its defiance of the law C was totally inadequate to purge the applicant's contempt of the law."

The applicant's submission that the inference that it is disdainful of the law can be rebutted by a reasonable explanation as to why it failed to comply with the law, is, in my view to be taken with a pinch of salt, as it is not sustained by the *ratio decidendi* in the *Associated Newspapers* case. My reading of that D case is that it is distinguishable from the one under consideration because the applicant in that case had mounted a constitutional challenge at the Supreme Court where it sought an order to impugn the offending Act.

In any event, the Chief Justice alluded to the fact that the applicant in that case could have exercised the option to challenge the constitutionality of E AIPPA before the deadline for its registration in terms of the Act, and thus avoided the predicament of being in open defiance of the law it sought to be impugned while the Act was extant. With all due respect to counsel for the applicant, I do not read the *Associated Newspapers* case to be an authority for the proposition that, one can come to equity with dirty hands provided there is a reasonable explanation for the failure to purge one's contempt. The F first respondent referred the court to *F Hoffman-La Roche & Co AG & Ors* v

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Chigumba J

Secretary of State for Trade & Industry , and I am in wholehearted agreement A *with its submission that the applicant has dirty hands. The applicant must obey and argue afterwards.*

I should have followed the approach taken by the court in the *Associated Newspapers* case *supra* where the point *in limine,* relating to dirty hands, succeeded and the court held that, since the applicant was operating outside B the law, it would decline to hear the applicant on the merits, and only do so once the applicant had submitted itself to the law. However, the applicant in this matter had already addressed this court on the merits and in my view, the issue is so clear that it would be a waste of the court's time to have the matter before it again for disposition on the merits, at some date in the future. I will proceed to give my view on the merits of the matter for that reason. C

Turning to the merits of the matter, the applicant seeks a declaratory order, in terms of s 14 of the High Court Act **[***Chapter 7:06***]** which provides as follows:

> **"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 D such determination".

Section 119 of the Parks and Wildlife Act provides for prospecting and mining activities carried out in safari areas. It reads:

"**Prospecting and mining**

(1) *No person shall prospect and mine in terms of the Mines and Minerals Act* [*Chapter 21:05*] (my emphasis) within a national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park except –

(a) in terms of a permit issued by the Minister with the consent of the Minister of Mines; or

(b) in accordance with any prospecting rights lawfully acquired in respect of the area of the national park, botanical garden, sanctuary, safari area or recreational park before the date when such area became a national park, botanical reserve, botanical garden, sanctuary or recreational park.

(2) No person shall acquire or work any mining location in terms of the Mines and Minerals Act [*Chapter 21:05*] within a national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park except–

(a) in terms of a written agreement between the Minister and the person concerned which has been approved by the President; or

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(b) in accordance with any mining rights lawfully acquired in respect of the area of the national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park before the date when such area became a national park, botanical reserve, botanical garden, sanctuary or recreational park.

(3) Notwithstanding this Act, a person prospecting or working any mining location in terms of subsection (1) or (2) may do anything necessary for those purposes within the national park, botanical reserve, botanical garden, sanctuary, safari area or recreational park concerned, subject to the terms send conditions of the relevant permit or agreement or in accordance with the mining right, as the case may be.

(4) Notwithstanding this Act, a person may pick any specially protected indigenous plant or indigenous plant where the picking is necessary for the working of any mining location and in accordance with the exercise of mining rights lawfully acquired in terms of the Mines and Minerals Act [*Chapter 21:05*]"

Section 129A of the Parks and Wildlife Act provides that:

"Subject to subsections (4) and (5), the Authority may, on the recommendation of, or after consultation with, the Director General, make by-laws –

(a) fixing appropriate fees to be paid for –

(i) entering any area or part of the park area;

(ii) doing anything within the park area or any part of it;

(iii) using any article or facility provided within the park area or any part of it;

(iv) any authority, permit, licence, register or return granted, issued or supplied in terms of this Act, or any regulations made thereunder.

(b) fixing, subject to subsection (5) a tariff of fees payable by persons prospecting, or working any mining location within the park area under a permit or agreement referred to in section one hundred and nineteen, in respect of –

(i) the clearing of land in connection with such activity, per hectare of land cleared;

(ii) the backfilling, on abandonment, forfeiture or cancellation of the mining location, of shafts, open surface workings and excavations posing a danger to the safety of persons and wild life;

(iii) the removal of rock quarry within the park area."

Part IX of the Parks and Wildlife Management Authority (Tariff of Fees) By-laws, 2013, provides:

"*Note.*–

1. The fees fixed for each permit is chargeable regardless of whether any products to which the permit relates is collected.

Mining Permits

Notes.–

(a) miners with established mines within Parks and Wildlife Estates will be charged US$15 000 per claim per quarter to undertake such activities…"

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Chigumba J

According to s 253 of the Mines and Minerals Act [*Chapter 21: 05*] (prohibition A of disposal of minerals when royalty or returns, etc., have not been lodged):

> "(1). If the miner of a registered mining location fails to pay any royalty due in respect of such location the mining commissioner may issue an order prohibiting the disposal of any minerals or mineral-bearing products from such location or from any other location which is being worked by the miner, whether or not the miner has failed to pay any royalty due in respect of the other location, until all B outstanding royalty has been paid or until an arrangement has been made which is acceptable to the mining commissioner for the payment of such royalty".

The law and the facts

The applicant is the holder of seven mining claims. The claims were registered in September 1994 and February 1995. They were inspected on C 28 February 2012 and an inspection fee of US$2 800 was levied by the acting assistant mining commissioner. In the founding affidavit there is no averment as to the *nature* of the relevant permit or agreement that governs these mining claims. It is implied that the applicant is working various mining locations within the Mfurudzi Park area. This should be done subject to the terms and conditions of the relevant permit or agreement. In its heads of argument, the D applicant submits that it is lawfully working a mining location and holds rights conferred by a permit validly given by the third respondent. This brings the applicant squarely within the ambit of s 119(2) of the Parks and Wildlife Act, whose terms are set out above.

Section 119(2)(b), in my view, applies to the applicant's mining permits E which conferred mining rights on it and which were issued before the area was designated as a national park. The permits were issued in terms of the Mines and Minerals Act. What are the terms and conditions of the permits held by the applicant? In my view, that aspect was not addressed in the applicant's papers. The applicant seeks to rely on the provisions of s 119(3) as the basis for its averment that the regulations are *ultra vires* the parent F Act. Section 119(3) states:

> "Notwithstanding this Act, a person prospecting or working any mining location in terms of subsection (1) or (2) may do anything necessary for those purposes within the national park … subject to the terms and conditions of the relevant permit or agreement or in accordance with the mining rights, as the case may be". G

The applicant attached a letter to its papers, in which the acting assistant mining commissioner confirmed that it was the proud owner of seven registered mining claims. We are not told what the terms and conditions of these registered claims are or what the fact of registration of the claims confers on the applicant in terms of mining rights. We are not told what the terms and conditions of those mining rights are. H

Chigumba J

Section 119(2) expressly prohibits the working of mining rights in a national park A area, except in terms of an agreement or mining rights lawfully acquired. I will presume, based on the evidence that the applicant acquired and registered seven mining claims, that the act of registration conferred certain mining rights on it. It is my finding that there is nothing in the applicant's papers which constitutes *prima facie* evidence of the exact terms and conditions of B the applicant's mining rights. The importance of determining the applicant's mining rights becomes clearer when one reads s 119(3), which confers power on a person working a mining location in a national park, to do anything necessary for those purposes "subject to the terms and conditions of the relevant permit". What is clear from the provisions of s 119 is that the different rights to work a mining location in a national park area are C conferred on miners, in terms of the Mines and Minerals Act.

The Tariff of Fees By-laws came into being because s 129(A) of the Parks and Wildlife Act provides for the powers of the authority to make by-laws fixing a tariff of fees payable by persons working within a national park area.

The applicant's contention is that only para (b) of s 129A is applicable to it. D The reasoning appears to be that this is so because that is the paragraph that expressly refers to fees payable by persons working a mining location. It is my view that this reading of s 129A is piecemeal and erroneous. What is required is a wholesale reading of all the provisions of s 129A. In my view, very wide discretion is placed in the hands of the Authority in enacting the E by-laws. The Authority may make by-laws fixing the appropriate fees to be paid for any authority, permit or licence issued or supplied in terms of the Act. We have already established that the applicant's mining rights were conferred in

terms of the Mines and Minerals Act, as read with s 119 of the Parks and Wildlife Act. The fact that para (b) of s 129A(b) refers specifically to s 119 does not mean that all mining rights provided for by s 119 should F only be governed by the provisions of para (b).

My reading of para (b) of s 129A is that it provides for the making of by-laws that relate to permits or agreements or mining rights conferred in terms of s 119, when it comes to issues of clearing land, backfilling, and removal of rock. This is not to say that these permits, agreements, or mining rights conferred in terms of s 119 are exempt or excluded from being charged G the appropriate fees for entering the park area or doing something there or using any facility there as provided for in para (b) of by s129A. My reading of paras (a) and (b) of s 129A is that they are not mutually exclusive. The Authority is given power to fix appropriate fees in relation to all those activities. It is not expressly stated that mining rights conferred in terms of H s 119 are only subject to the fees which will have been fixed in terms of para

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Chigumba J

(b) of s 129A. The Authority is given discretion to fix appropriate fees to A be paid for anything and everything that happens in the national park area. The only fetter appears to be the requirement that the Authority seeks the recommendation of, or consults, the Director General.

The last issue for consideration is whether the first respondent is entitled to bar the applicant from accessing the Mfurudzi National Park and exercising its rights in terms of its permit for the reason that the applicant has failed to B pay the prescribed fees for working a mine in a safari area?

The applicant was charged US$4 000 per claim, totalling US$28 000 for his seven claims. The applicant's mining rights are subject to the Mines and Mineral Act, which provides in s 253(1) that:

> "If the miner of a registered mining location fails to pay any royalty due in respect C of such location the mining commissioner may issue an order prohibiting the disposal of any minerals or mineral-bearing products from such location or from any other location which is being worked by the miner … until all such outstanding royalty has been paid …"

The evidence before the court is that the applicant was issued with various verbal orders prohibiting it from disposing of its mineral-bearing products D because of the nonpayment of outstanding fees and levies. The applicant, in its letter dated 1 March 2012 to the mining commissioner, states that some of its claims have lapsed because the warden at Mfurudzi National Parks is charging an enormous amount for illegal levies that it cannot afford. Reference was made to entrance fees. The Tariff of Fees By-laws set a fee for E the conduct of mining activities by established mining companies US$15 000 per claim per quarter to undertake such activities. It is my considered view that nothing in those by-laws prohibits the Authority from levying other fees or charges as well as, or in conjunction with, the fixed fee per quarter for undertaking mining activities.

I hold the further view that, had the applicant provided the terms and conditions F of its mining rights which it acquired in terms of s 119 of the Parks and Wildlife Act, which were clearly acquired subject to the Mines and Minerals Act, then the court would have been better placed to determine whether the applicant was being charged any "illegal levies". Based on the evidence before the court, the applicant has not been charged any illegal levies. The G applicant must pay. The first respondent is entitled to prohibit the applicant from disposing of mineral-bearing products. If the terms and conditions of the applicant's mining rights permit the first respondent to charge entrance fees then, in the absence of payment by the applicant of those fees, it is not entitled to demand entry. H

Chigumba J

For these reasons, the applicant is not entitled to the relief that it seeks. A Accordingly, the application is dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners

Kantor & Immerman, first respondent's legal practitioners

Civil Division of the Attorney General's office, second and third respondent's B legal practitioners

1 Where, at p 492, Sandura JA said:

1 Where, at p 492, Sandura JA said:
"in application proceedings the cause of action should be fully set out in the founding affidavit … that principle was laid down many years ago in cases such as *Coffee, Tea and Chocolate Co Ltd* v *Cape Trading Co* 1930 CPD 81."

2 2008 (2) ZLR 296 (H) at 301, where Makarau JP (as she then was) said:
2 2008 (2) ZLR 296 (H) at 301, where Makarau JP (as she then was) said:
"in application proceedings, it is to the founding affidavit that the court will look for the cause of action being alleged by the applicant and the evidence that the applicant has to sustain such a cause of action…an applicant must stand or fall by his founding affidavit and the facts alleged therein because those are the facts which the respondent is called upon either to affirm or deny".

3 2011 (1) ZLR 105 (S) at 115E, where Chidyausiku CJ said:
3 2011 (1) ZLR 105 (S) at 115E, where Chidyausiku CJ said:
"The cause of action is very poorly defined in this application. The applicants did not set out the impugned sections of the Act in the founding affidavit …"

4 2004 (1) ZLR 538 (S) at.548B-C, where Chidyausiku CJ stated:
See also *Estate Ncube & Anor* v *Mhlanga & Ors* HB-43-08 at 3 where Ndou J said
And see Registrar General of Elections v Combined Harare Residents Association & Anor 2002 (1) ZLR 83 (S) at 107A, where Chidyausiku CJ said:
4 2004 (1) ZLR 538 (S) at.548B-C, where Chidyausiku CJ stated:
"This court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law…"
See also *Estate Ncube & Anor* v *Mhlanga & Ors* HB-43-08 at 3 where Ndou J said
"Nobody is above the law. Once the applicant complies with the law, he will be afforded the same protection that is accorded to all law abiding citizens. The ball is in the applicant's court to submit to the law and thereafter approach the court with clean hands".
And see Registrar General of Elections v Combined Harare Residents Association & Anor 2002 (1) ZLR 83 (S) at 107A, where Chidyausiku CJ said:
"…the statutory instrument is the law in force until such time as it shall have been struck down by a court of competent jurisdiction as being invalid…until such an adjudication there is a presumption in favor of the validity of the statutory instrument…".

5 [1973] 3 All ER 945 (CA) at 955f-g, where Lord Denning stated:
5 [1973] 3 All ER 945 (CA) at 955f-g, where Lord Denning stated:
"They argue that the law is invalid, but unless and until these courts declare it to be so, they must obey it. They cannot stipulate to an undertaking as the price of their obedience. They must obey and argue afterwards."

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[zRPz]S v NCUBE & ANOR 2014 (2) ZLR 174 (S)

Citation	2014 (2) ZLR 174 (S)
Case No	Judgment No. S-58-14
Court	Supreme Court, Bulawayo

Judge Ziyambi JA, Garwe JA and Hlatshwayo JA

Heard 4, 6 and 8 May 2014; *CAV*

Judgment 30 July 2014

Counsel *N Donga,* for the first appellant
R Ndlovu, for the second appellant
T Makoni, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal law – general principles – degrees of participation – accomplice – dissociation from common purpose – what steps accused must take before can be held to have dissociated himself from acts of principal perpetrator D

Criminal law – defences – defence of the person or self defence – requirements – resisted attack must be unlawful – lawfulness of a citizen's arrest – right to exercise moderate force in making a citizen's arrest

Headnote

For the purposes of s 253 of the Criminal Law (Codification and Reform) Act E [*Chapter 9:23*], which deals with defence of the person or self defence, one of the cardinal requirements thereof is that the resisted attack must be unlawful. The defence cannot succeed in circumstances where burglars are confronted and ordered to surrender on pain of death because that would not be an unlawful attack. A citizen's arrest is perfectly lawful. F

Under s 200 of the Act, an accomplice shall not be guilty of a crime committed by an actual perpetrator if, before the crime has been committed, the accomplice voluntarily desists from further incitement of, conspiracy with, or authorization or assistance to the actual perpetrator and either (a) renders wholly ineffective his previous incitement, conspiracy, G authorization or assistance; or (b) gives warning of the crime to a police officer or other person with authority to prevent the commission of the crime, in sufficient time to enable the police officer or other person to prevent its commission. In terms of s 199, an accomplice who fails to effectively withdraw is guilty of foreseeable additional crimes committed by the actual perpetrator. H

In respect of the defence of dissociation from a crime, a last-minute withdrawal A on its own is insufficient to exculpate a secondary party from the main charge. That party must do more for the defence of "withdrawal" to succeed. He must "countermand" or "repent" the original instruction or understanding. The withdrawing party must literally "step on the lit fuse" in order to successfully dissociate from a conspiracy to blow up B a building with dynamite. The ultimate decision whether a person's dissociation from a common purpose can serve to exculpate him for crimes committed by the group after dissociation is a value judgment, but a number of factors relevant to the inquiry have emerged from the case law. These factors need to be weighed in the balance by the court in C reaching an equitable decision on whether dissociation is legally effective or not. Much will depend on the circumstances: on the manner and degree of the accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of the disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The greater the D accused's participation, and the further the commission of the crime has progressed, then much more would be required of an accused to constitute an effective dissociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible E and just value judgment.

Where a person has merely conspired with others to commit a crime, but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose.

The two appellants went to a school during the course of the night with the common F intention of stealing therefrom. They armed themselves with knives and also carried tools and equipment to assist in breaking into the premises. After gaining entry, they stole various items which they loaded into a bag. They were seen doing so, however, by the deceased, G who was a teacher at the school and, arming himself with an axe, he went to investigate. The deceased ordered the first appellant to surrender but, refusing to do so, he ran off. The deceased gave chase and was eventually able to apprehend him. Using the blunt end of his axe he instructed the first appellant to lie down. This he did, but he suddenly produced a knife from his pocket and stabbed the deceased in the abdomen, killing him. H In the meantime, the second appellant seized his opportunity to escape

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Hlatshwayo JA

and ran off in a different direction. Both appellants were later arrested. A At their trial, they were charged with murder, convicted and sentenced to death. On automatic appeal to the Supreme Court, it was submitted on behalf of the first appellant that the State had failed to disprove the defence of the person; in other words that he was acting in self defence. The second appellant submitted that the State had failed to establish the basis of common purpose to warrant his conviction for the murder of B the deceased by the first appellant. In this regard, it was argued on his behalf that by running off, he had disassociated himself from the murder. Both appellants argued that extenuating circumstances existed which warranted the non-imposition of the death penalty.

Held, that the right of the deceased to exercise moderate force to effect a C citizen's arrest had not been exceeded so as to constitute an unlawful attack. In the result, the first appellant's defence of self defence must fail.

Held, further, that the second appellant's defence to the charge must also fail. For his defence of disassociation or withdrawal to succeed he would have had to have countermanded the original instruction or understanding that existed with the first appellant. This he had not done by simply running D away from the scene and his conviction for murder was still justified on the basis of common purpose.

Held, further, that the appeals against the death sentences must be dismissed. The trial court correctly found the first appellant guilty with an actual intent and there were no extenuating circumstances. As far as concerned E the second appellant, although, contrary to the findings of the trial court, his intention to kill was constructive, he was a co-principal offender and his belated disassociation was fortuitous and not unequivocal.

Cases cited

S v *Beahan* 1991 (2) ZLR 98 (S); 1992 (1) SACR 307 (S)F

S v *Musingadi* 2005 (1) SACR 395

S v *Ndebu & Anor* 1985 (2) ZLR 45 (S)

S v *Sumani & Anor* HH-75-2000

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 199, G 200 & 253

Case information

N Donga, for the first appellant

R Ndlovu, for the second appellant

T Makoni, for the respondent H

Hlatshwayo JA

Judgment

Hlatshwayo JA: The appellants, Enock Ncube (hereinafter "the first appellant") A and George Moyo ("the second appellant"), aged 37 and 24 years respectively at the time of commission of the offence, were found guilty of murder with actual intent and after the trial court found no extenuating circumstances, were both sentenced to death. This matter has come before this court by way of automatic appeal against both conviction and sentence.

B The allegations against the appellants are that on 23 June 2006, at about 22:00, they, acting in common purpose, proceeded to Phakama Secondary School, Plumtree, with the intention to commit the offence of housebreaking with intention to steal and theft. They armed themselves with knives and also carried tools for breaking in viz, screwdriver, crow bar, lamp and a box of C matches. On arrival at the school they broke into the administration block and while inside, lit a lamp and loaded stolen items into a bag. The stolen items included a solar panel, solar chargers, stapler and pens.

The appellants were spotted by the deceased, a teacher, who was arriving at the school at that time. The deceased rushed to the school quarters where he alerted Bakani Nduna Ndlovu, who is also a teacher. The deceased armed D himself with an axe and went to investigate followed by Bakani Ndlovu.

On arrival the deceased ordered the appellants to surrender and come out. The first appellant, instead of surrendering, immediately bolted out of the administration block while carrying the stolen property loaded in a bag. E The deceased gave chase and managed to catch up with the first appellant and, in the process, the first appellant dropped the bag containing the loot and continued to flee. The deceased followed in hot pursuit and, after about 100 metres, he caught up with the first appellant again but the appellant wiggled out of the deceased's grip by removing his own black leather jacket leaving the deceased holding it. However, the deceased did not give up the F chase and, after about another 150 metres, he "cornered" the now tired first appellant and ordered him to lie down. The first appellant, according to his own testimony, pretended to comply with the order, but suddenly drew out his okapi knife from his back pocket, opened it and stabbed the deceased once on the lower abdomen and deceased fell down and died on the spot. The first appellant went back to retrieve the stolen loot but, hearing footsteps G of other people, gave up and escaped.

In the meantime, the second appellant had seized the opportunity presented by the bolting out of the first appellant and ran away from the scene in a different direction evading or outpacing Bakani Ndlovu in the process.

A post mortem examination of the deceased concluded that the cause of death H was (a) haemorrhagic shock (b) intra-abdominal bleeding (c) stab wounds,

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and (d) assault. The stab wounds are listed in the report under "marks of A violence" as (a) stab wound right arm (5 x 2cm) and (b) left abdomen (3 x 2 x 10cm).

Three main contentions were advanced on behalf of the appellants, namely that:

(a) The State did not disprove the defence of person (self-defence) advanced by the first appellant B

(b) The State did not establish the basis of common purpose to warrant the conviction of the second appellant for the murder of the deceased by the first appellant.

(c) Extenuating circumstances existed in the matter warranting the non-imposition of the death penalty. C

We shall examine each one of them in turn below.

Self defence

One of the cardinal requirements for the success of the defence of person or, in this case self-defence, is that the resisted attack must be unlawful. See s 253 of the Criminal Law (Codification and Reform) Act D [*Chapter 9:23*] (hereinafter called the "Criminal Code"). The confronting of

burglars and ordering them to surrender on pain of death is not an unlawful attack. Similarly, the subsequent concerted chasing after the first appellant in order to effect a citizen's arrest is perfectly lawful. Mr *Donga,* for the first appellant submitted that the fact that the deceased chased the first accused while armed with an axe for about 250 metres and could have struck him with it even E after he had dropped the loot, entitled the first appellant to exercise his right of self-defence. This contention, however, must be weighed against proven facts. In doing so, care must be taken to balance the first appellant's version of events surrounding the case against facts and probabilities, given that he is the sole witness of what transpired and beneficiary of any exaggeration on his part. The court *a quo,* therefore, did not misdirect itself in treating F his evidence with caution, having found him to be an untruthful witness.

The fact that the deceased was armed with an axe is not contested. One can go so far as to say that it was perfectly prudent and lawful on the deceased's part to be so armed in confronting burglars at night who may well be armed with lethal weapons and in fact turned out to be carrying knives. However, G the evidence does not show a reckless use of the axe by the deceased. First, he calls out for the burglars to surrender and come out but the first appellant ignores this and bolts out of the room with the loot. He gives chase and hits the fleeing burglar with a stone or some other non-lethal weapon he happened H

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upon but avoiding using the axe. When the first appellant continues to flee, he A grabs him by the leather jacket, which the burglar wriggles out of and escapes. When he finally has to use the axe, the deceased opts to use the non-lethal end of the axe, even according to the first appellant's own testimony. Yet still, in the final confrontation, when the first appellant is "cornered", the deceased does not hack him down with the axe which he could easily B have done. Rather, he again orders him to surrender, to lie down, which he pretends to do, but suddenly draws out a knife and stabs the pursuer.

Therefore, the court *a quo* did not misdirect itself in disbelieving the first appellant since his version of events either did not tally with the facts or was exaggerated for his own benefit. For example, while the first appellant C maintained that he stabbed the deceased only once, the post-mortem report established that the deceased was stabbed twice on the right arm and the left abdomen. Penultimately, while the first appellant testified that he was unaware that he had killed his pursuer, he still had the gall to turn back to try and retrieve the loot and only retreated when he heard footsteps of other D people. Finally, the injuries he claims to have sustained from the attack by the pursuer were found by the court *a quo* more likely to have been sustained in some fall in his bid to escape.

It is clear, therefore, from the above discussion, that the lawful exercise of the right of defence of property including the right to use moderate force to E effect a citizen's arrest were not exceeded by the deceased so as to constitute an unlawful attack entitling the first appellant to self-defence. Thus, the court *a quo*, in my view, correctly rejected this defence.

Common purpose

The position in our law pertaining to the doctrine of common purpose was F summarized by Garwe J (as he then was) in the case of *S* v *Sumani & Anor* HH-75-2000 at pp 11-12thus:

> "The position is now settled that where accomplices break into premises with a weapon known to all and the weapon is used in the murder of a victim all would have at least a constructive intent to kill – see *S* v *Nyathi* & *Ors* S-52-95. In *S* v *Chareka & Anor* S-40-93 two accused acting in concert had a firearm in their G possession. The second accused was found guilty of murder with constructive intent. In *S* v *Ngulube & Anor* S-112-93 the Supreme Court held that the first appellant should have been found guilty of murder with constructive intent on the basis that being aware that his accomplice was armed with a lethal weapon he must have appreciated and foreseen the possibility of his colleague resorting to the use of the weapon to kill in furtherance of their common objective to H effect the robbery.

> In this case it is clear accused 1 must have, at the very least, been aware that A accused 2 would resort to the use of the axe in order to successfully effect the robbery."

Mr *Ndlovu,* for the second appellant, sought to argue that the second appellant's *mens rea in casu* was restricted to the planned housebreaking with intent to steal and theft. He submitted that when they were surprised by the deceased wielding an axe and standing at the door of the school B building and demanding that they should come out, the second appellant never produced a knife or any weapon to attack or frighten the deceased. Instead, his decision was to escape under cover of darkness. When the first appellant had bolted out of the building with the bag laden with stolen items and the deceased chased after him, so the submission went, the appellant did C not join in the chase to attack the deceased or rescue the first appellant. The second appellant simply walked out of the building and out of the school and proceeded to his homestead.

However, the above submission misses the point, which is the age old question whether the second appellant, by so-doing, sufficiently disassociated himself D from the original common purpose. Was it legally effective withdrawal for him merely to run away? Or did he have to do more for the chain connecting him to the subsequent actions of the first appellant to be broken; for instance by surrendering himself as demanded by the deceased or otherwise try to avert the danger that he had created by association?

In *S* v *Ndebu & Anor* 1985 (2) ZLR 45 (S) McNally JA quoted English and E American case law to the effect that a last-minute withdrawal on its own was insufficient to exculpate a secondary party from the main charge. Such a party must do more for the defence of "withdrawal" to succeed. He or she must "countermand" or "repent" the original instruction or understanding. The withdrawing party must literally "step on the lit fuse" in order to successfully dissociate from a conspiracy to blow up a building with dynamite. F

This vexed question pertaining to the sufficiency of a "withdrawal" from a common purpose was dramatized in William Shakespeare's play, *King Richard III,* where two murderers are sent by the king to murder his brother, Clarence. The second murderer seems to have a change of heart at the last minute, vainly tries to prevent the killing by warning Clarence to look behind him G as the first murderer moved in to stab him. The remorseful second murderer further distances himself from the crime by refusing his share of the reward, but in the eyes of the playwright they both remain murderers.

In *S* v *Ndebu & Anor supra* the appellants were convicted of murder and sentenced to death. During the course of housebreaking at a dwelling known H

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to be occupied at the time, the appellants were surprised by the householder. A The second appellant not in possession of a firearm, immediately fled and had already run some distance away before he heard the sound of gunshot fired by second appellant which killed the deceased. It was observed (at page 50F-G) as follows regarding the liability of the unarmed second appellant:

> "I will content myself in this case by saying that on the facts I am not at all B satisfied that the second appellant dissociated himself from the murder. He had gone along with a common intention to commit housebreaking and theft, and if necessary armed robbery. He had taken part actively in the break-in, and had himself then cut the telephone wires. He knew and appreciated the risk that if someone in the house woke up the firearm might have to be used to subdue the residents or to effect an escape. He was there participating when precisely that C situation arose. As it happened he was so placed that he could run away. But by that stage what he did was no longer material. The reason for that is clear. The risk which he deliberately took was not related to what he himself might do but what his armed companion might do if challenged or cut off. He had linked his fate and his guilt with that of his armed companion. The mind that needed changing was not his but his companion's. His constructive intention to kill depended on a decision by his companion".

After examining case law in South Africa and Zimbabwe on this subject, the D following conclusion is drawn by Jonathan Burchell in *Principles of Criminal Law* 4ed p 491:

> "The ultimate decision whether a person's dissociation from a common purpose can serve to exculpate him or her for crimes committed by the group after E dissociation is a ***value judgment***, but a number of ***factors*** relevant to the inquiry have emerged from the case law. These factors need to be weighed in the balance by the court in reaching an equitable decision on whether dissociation is legally effective or not"(emphasis in the original text).

Comrie AJA in *S* v *Musingadi*, 2005 (1) SACR 395 (SCA) summarized some of the factors relevant to a dissociation inquiry as follows:

> "[M]uch will depend on the circumstances: on the manner and degree of the accused's F participation; on how far the commission of the crime has proceeded; on the manner and timing of the disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime ... The greater the accused's participation, and the further the commission of the crime has progressed, then much more would be G required of an accused to constitute an effective dissociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment."

Gubbay CJ in *S* v *Beahan* 1992 (1) SACR 307 (S) at 324 [1] opined that where "a person has merely conspired with others to commit a crime, but has not H commenced an overt act toward the successful completion of that crime,

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a withdrawal is effective upon timely and unequivocal notification to the A co-conspirators of the decision to abandon the common unlawful purpose".

The Criminal Code now states the position of the withdrawing accomplice in s 200 as follows:

> **"200 Withdrawal from crime by accomplice**
>
> An accomplice shall not be guilty of a crime committed by an actual perpetrator B if, before the crime has been committed, the accomplice voluntarily desists from further incitement of, conspiracy with, or authorization or assistance to the actual perpetrator and either–
>
> (a) renders wholly ineffective his or her previous incitement, conspiracy, authorization or assistance; or,
>
> (b) gives warning of the crime to a police officer or other person with authority C to prevent the commission of the crime, in sufficient time to enable the police officer or other person to prevent its commission."

In the present case the manner and degree of participation of the second appellant was not that of a subordinate, but that of a co-principal offender. Both appellants were armed with knives for the clear purpose of warding off any challenge to their enterprise of unlawful entry and theft. This is D highlighted in the second appellant's confirmed warned and cautioned statement where he states:

> "What I know is that I left home with Enock Ncube carrying knives. Enock had his and I had my own and further we had tools".

The knives in their possession were not essential for the purpose of unlawfully E breaking into the school administration block as they only needed a screwdriver and a crowbar which they used for that purpose. Therefore, the court *a quo* did not err in accepting that if the knives were surplus to what the appellants required to complete their housebreaking endeavour then their possession was for the sole purpose of quashing any resistance should such opposition arise. And it did arise in the form of the deceased demanding their surrender F and submission and doggedly pursuing the first appellant.

The purported withdrawal by the second appellant occurs when the crime is all but completed and is purely fortuitous. The bolting away by his co-offender and the deceased's chasing after him, gives the second appellant the perfect opportunity to slip away. Given the degree to which the offence G had progressed, more was expected of the second appellant if he desired to dissociate from the common purpose. He could have surrendered himself and/or called upon his co-offender to do the same or assisted in the retrieval and handing over of the stolen property. He could have warned the deceased that the first appellant was armed, that he should not pursue him that he himself was surrendering and would be able to identify the fleeing party. In H

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short, as was said in *Ndebu*, had he disarmed or dissuaded his companion or A protected the challenger in some way, he might perhaps have purged his constructive intention.

Once more, the Criminal Code in s 199 makes an accomplice who fails to effectively withdraw guilty of foreseeable additional crimes committed by B the actual perpetrator.

Accordingly, the trial court correctly found that the first appellant was guilty of murder with actual intent. However, as the line of authorities quoted above show, the second appellant who was not at the actual scene of the murder can be found guilty only of murder with constructive intent. Mr *Makoni,* for the respondent correctly conceded as much in his heads of argument.

Extenuation C

The court *a quo* made a finding that there was no extenuation in relation to both appellants having convicted both of murder with actual intent. It reasoned as follows:

> "I find that the accused were sober. They planned to commit this offence, armed D themselves with knives, screw driver in order for them to use in the housebreaking. Resistance came their way and one of the knives was used."

The court below did not misdirect itself in so finding, having dismissed the first appellant's version pertaining to the chase and the injuries he supposedly E suffered. However, the correct verdict for the second appellant as posited above is murder with constructive intent. Nonetheless, case law shows that an accomplice who fails to dissociate himself from a common purpose, although convicted of murder with constructive intent, may still be liable to be sentenced to death.

It was submitted that the court *a quo* should have found extenuation with respect F to the second appellant and sentenced him to up to 20 years' imprisonment, based on a comparison with the *Ndebu* case *supra* where the death sentence was substituted with a sentence of 15 years' imprisonment for the unarmed accomplice.

However, the *Ndebu* case is distinguishable from the present one. In *Ndebu*, G extenuation was found in that the withdrawing accomplice played a subsidiary role and abandoned the common purpose timeously. In the present case, the second appellant did not play a subordinate role, as he was in fact a co-principal offender and his belated dissociation was fortuitous and not unequivocal, taking advantage, as he did, of the pursuit of his accomplice H by the deceased to make good his own escape.

Hlatshwayo JA

Disposition A

The appeal against conviction and sentence in relation to the firstappellant is dismissed. The appeal against conviction by the second appellant succeeds to the extent of the court *a quo'*s verdict of guilty of murder with actual intent being set aside and substituted with his being found guilty of murder with constructive intent. However, the second appellant's appeal against sentence is without merit and is hereby dismissed. B

ZIYAMBI JA and GARWE JA concurred.

Lazarus & Sarif, first appellant's legal practitioners

R Ndlovu & Co, second appellant's legal practitioners

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

1 Editor's note: See also 1991 (2) ZLR 98 at 121E

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[zRPz]MOYO v NKOMO (TSHOLOTSHO NORTH ELECTION PETITION APPEAL) 2014 (2) ZLR 185 (S)

Citation	2014 (2) ZLR 185 (S)
Case No	Judgment No. S-67-14
Court	Supreme Court, Harare
Judge	Gwaunza JA, Garwe JA & Guvava JA
Heard	26 July 2014; *CAV* 26 July 2014; *CAV*
Judgment	30 July 2014
Counsel	*T Hussein,* for the appellant *L T Biti,* for the respondent
Case Type	Election petition appeal
Annotations	No case annotations to date

Flynote

Election – *election petition – form of – must follow exact requirements of Electoral Act and rules made thereunder – petition not conforming to such requirements fatally defective – trial of election petition – nature* D *of process – disposal of petition on procedural points raised in limine – trial nonetheless regarded as having taken place*

Headnote

The respondent having been declared the winner for the election in which the appellant was also a candidate, the appellant brought a petition before the E Electoral Court in terms of s 167 of the Electoral Act [*Chapter 2:13*]. He sought an order declaring that the respondent had not been duly elected and ordering that a by-election be held. At the hearing of the petition the court *a quo* upheld the points *in limine* raised by the respondent and held that the petition filed by the appellant was fatally defective and of no force and effect for want of compliance with r 21(e) and (g) F of the Electoral (Application, Appeals and Petitions) Rules 1995. The appellant appealed, on the grounds that (a) the dismissal of the petition without a trial was in contravention of s 171 of the Act, which makes a trial mandatory; and (b) the court *a quo* erred at law in finding that the form of the petition adopted by the appellant was not in compliance with the Act and Rules. He argued that in the court *a quo* a trial neither G commenced nor was it concluded, as the matter had been determined on preliminary points and that the order of the court *a quo* was therefore not competently made. He also argued that the petition that he filed in the court *a quo* substantially complied with the relevant provisions of the Act and the Rules, r 21 of which in part states that "An election petition H shall be generally in the form of a court application ..." Accordingly, a

petition can properly take the form of a court application as set out in A form 29 of the High Court Rules.

Held, that a trial is a process that consists of pleadings (which are adjectival and procedural) and substance (which is the oral hearing where *viva voce* evidence is led). Further that, as part of any trial, a court is enjoined to hear arguments on points *in limine,* if any*,* and may dispose of the B matter purely on those points. As is evident from the joint pre-trial conference minute, both parties appreciated this possibility. Indeed at the commencement of the hearing before the court *a quo* the parties made submissions on the preliminary issues raised. The court was, after that, required to make a determination on these issues and properly proceeded to do so.

Held, further, that while an ordinary court application does not require C that the petitioner's cause of action or relief be set out within the said document, an election petition is required by r 21 to state the grounds relied on to sustain the petition and the exact relief sought. Rule 21 is not only specific and peremptory but it also clearly and adequately sets out the requirements regarding the form and content of a petition. D Specifically, the grounds relied on and the exact relief sought must *all* be apparent *ex facie* the petition. There is no provision for these details to be substantiated in supporting affidavits or other attachments to the petition**.** The Electoral Court is a creature of statute. It cannot operate beyond or outside the provisions of the enabling statute and the rules E made thereunder. A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else.

Judgment of MAKONESE J in *Moyo v Nkomo (Tsholotsho North Election*F*Petition*) 2014 (1) ZLR 79 (H) upheld.

Cases cited

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

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

Legislation considered

Electoral Act [*Chapter 2:13*], s 171(1) & (3)

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

Gwaunza JA

High Court Rules 1971 (RGN 1047 of 1971), r 33 A

Case information

T Hussein, for the appellant

L T Biti, for the respondent

Judgment

Gwaunza JA: This is an appeal against the entire judgment of the Electoral Court, B Bulawayo, handed down on 31 January 2014.

The brief facts of the matter are as follows. The appellant was a candidate for the National Assembly seat for Tsholotsho North Constituency in Matabeleland North Province in the harmonised elections held on 31 July 2013. He was a nominee of the ZANU (PF) political party. The respondent was also a C candidate for the same seat representing the MDC-T political party. The respondent was declared the winner of the National Assembly election in respect of the said constituency. The appellant was not satisfied with this outcome and filed a petition in terms of s 167 of the Electoral Act [*Chapter 2:13*] ("the Act"). Among other relief measures, the appellant sought an D order in the following terms:

1. That the respondent was not duly elected as the representative of Tsholotsho North Constituency as declared on 1 August 2013 by the Zimbabwe Electoral Commission, and
2. That the said election be set aside and a by-election held within 90 days E of the order.

At the hearing of the petition the court *a quo* upheld the points *in limine* raised by the respondent and issued an order in the following terms:

> "1. The Electoral Petition filed by the petitioner in this case is fatally defective and is of no force and effect for want of compliance with Rule 21(e) and F (g) of the Electoral (Application, Appeals and Petitions) Rules, 1995.
>
> 3. The Applicant's Petition is hereby dismissed with costs.
>
> 4. The Respondent Roseline Nkomo be and is hereby declared duly elected member of the National Assembly for the Tsholotsho North Constituency.
>
> 5. The Registrar is hereby directed to proceed in terms of s 171(3)(a)(ii) of G the Electoral Act [*Chapter 2:13*]."

Dissatisfied with the judgment of the court *a quo*, the appellant noted an appeal to this court and raised a number of grounds of appeal which may be summarised as follows:

1. The dismissal of the petition without a trial was in contravention of H s 171 of the Electoral Act, which makes a trial mandatory;

2. That the court *a quo* erred at law in finding that the form of the petition A adopted by the appellant was not in compliance with the Electoral Act and Rules.

The appellant accordingly seeks an order that:

(i) The appeal be allowed.

(ii) The order of the court *a quo* be set aside and substituted with an order to B the effect that the points *in limine* raised by the respondent be dismissed with costs and the matter referred to trial before a different judge of the Electoral Court.

Before the hearing in the court *a quo* the parties agreed on the issues to be determined by the court and these were set out in a joint pre-trial conference minute dated 13 December 2013. Among such issues were two preliminary C matters, one being whether the petition conformed to the provisions of the Act and relevant Rules. As already indicated the court *a quo* found that the petition did not comply with r 21(e) and (g) of the Electoral (Applications, Appeals and Petitions) Rules SI 74A of 1995 ("the Rules").

The appellant challenges this finding on the two grounds mentioned above. D He contends, firstly, that it is contrary to s 171(1) & (3) of the Act, which requires that such a determination be made only at the end of a trial. Secondly he submits that in any case, the petition that he filed complied substantially with the requirements of the Act and Rules. The section reads as follows:

> "(1) An election petition shall be *tried* by the electoral court in open court E
>
> (2) …
>
> (3) *At the conclusion of the trial* of an election petition, the electoral court shall determine whether the respondent was duly elected or whether any, and if so, what, person other than the respondent was or is entitled to be duly elected ..." (emphasis supplied)

The appellant argues on the basis of these provisions that in the court *a quo*F a trial neither commenced nor was it concluded, as the matter had been determined on preliminary points. It is the appellant's further argument that the order of the court *a quo* was therefore not competently made.

We find merit in the submissions made by Mr *Biti* for the respondent that a trial is a process that consists of pleadings (which are adjectival and procedural) and substance (which is the oral hearing where *viva voce* evidence is led). G Further that, as part of any trial, a court is enjoined to hear arguments on points *in limine,* if an*y,* and may dispose of the matter purely on those points. As is evident from the joint pre-trial conference minute, both parties appreciated this possibility. Indeed at the commencement of the hearing before the court *a quo* the parties made submissions on the preliminary issues raised. The H

court was, after that, required to make a determination on these issues and A properly proceeded to do so.

In contending that the petition that he filed in the court *a quo* substantially complied with the relevant provisions of the Act and the Rules, the appellant specifically cites r 21 which in part states that:

> "An election petition shall be generally in the form of a court application ..." B

The appellant further argues that since "court application" is not defined in the Rules, resort must be had to r 33 of the High Court Rules, 1971 which defines a court application. On the basis of this definition, the appellant submits that a petition can properly take the form of a court application C as set out in Form 29 of the High Court Rules. This is despite the fact that Form 29 does not have a provision that requires that the petitioner's cause of action or relief be set out within the said document.

While this may be true of ordinary court applications, we find that sight must not be lost of the rest of r 21 which provides, *inter alia,* that an election petition *shall state*:

"(a) … D

(b) …

(c) …

(d) …

(e) the grounds relied on to sustain the petition

(f) …

(g) the exact relief sought by the petitioner."

In our view r 21 is not only specific and peremptory but it also clearly and E adequately sets out the requirements regarding the form and content of a petition. Specifically, the grounds relied on and the exact relief sought must *all* be apparent *ex facie* the petition**.** There is no provision for these details to be substantiated in supporting affidavits or other attachments to the petition**.** There is accordingly, in our view, no merit in the contention F made on behalf of the appellant that there is no specific provision relating to petitions nor that r 33 of the High Court Rules should be adopted as the default rules in this respect.

It is not in dispute that the form and content of the appellant's petition did not conform to the format set out in r 21(e) and (g). The petition set out in very brief terms, three grounds on the basis of which he sought the relief G outlined in his draft order. Its petition ended with the following;

"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"

This latter part of the petition suggests that the appellant, erroneously in our view, took the H view that a petition can also properly be called a "Notice."

2014 (2) ZLR p190

Gwaunza JA

The court *a quo* considered, but was not persuaded by, Mr *Hussein's* submission A that, taken together with the other supporting documents attached to it, the petition that was filed substantially satisfied the requirements of r 21. The court found, as stated on p 4 of its judgment, as follows:

"I am of the view that if the framers of the law intended to provide that the petition shall be accompanied by an affidavit and supporting documents, this would have been stated in clear and unambiguous terms…. B

The express provisions of the law allow a petitioner to lodge a petition in terms of the laid down procedure … Whilst it may be convenient for the applicant to present a petition with brief grounds set out in what he refers to as the "notice" accompanied by an affidavit and other supporting documents, this does not become in my view the form prescribed by statute …" C

The reasoning of the court *a quo* in our view cannot be faulted. It reinforces the position at law, that our Electoral Court is a creature of statute. It cannot operate beyond or outside the provisions of the enabling statute and the rules made thereunder. The reasoning also finds support in a plethora of cases in the Electoral Court and this court, some of which were cited in the respondent's heads of argument. The remarks made in *Hove* v *Gumbo (Mberengwa West Election Petition Appeal)* 2005 (2) ZLR 85 (S) are particularly pertinent in D this respect. At 92A the court stated as follows:

"A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else"

The court also cited with approval remarks in the Indian case of E*Sahu* v *Singh & Anor* (1985) LRC 31 at page 39 that:

"The rights arising out of elections, including the right to contest or challenge an election are not common law rights. They are creatures of statutes 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 F within the framework of that law and cannot travel beyond it"

In the result we are satisfied that a trial was properly held in accordance with s 171(1) and (3) of the Act. It follows that the determination by the court *a quo* was proper. This appeal therefore lacks merit and must fail.

It is accordingly ordered as follows: G

"The appeal be and is hereby dismissed with costs"

GARWE JA and GUVAVA JA concurred

Hussein Ranchod & Co, appellant's legal practitioners

Phulu & Ncube, respondent's legal practitioners

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[zRPz]SUPERBAKE BAKERIES (PVT) LTD v RUMTOWERS SECURITY (PVT) LTD 2014 (2) ZLR 191 (S)

Citation	2014 (2) ZLR 191 (S)
Case No	Judgment No. S-74-14
Court	Supreme Court, Bulawayo
Judge	Gwaunza JA, Garwe JA & Guvava JA
Heard	28 July 2014; *CAV*
Judgment	30 July 2014
Counsel	No appearance for the appellant *N Mlala*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure – *summary judgment – when may be granted – claim for damages for breach of contract such a claim never unarguable* – D *summary judgment should not be granted for damages*

Headnote

The respondent obtained summary judgment against the appellant after the latter cancelled a contract under which the respondent provided security services for the appellant. The sum claimed fell into two parts: half was for the charges for the three months immediately before the cancellation, and E the balance was for damages in lieu of three months' notice of termination. The appellant appealed against the order for summary judgment.

Held, that summary judgment is an extraordinary remedy which is granted to a party so that a matter may be determined expeditiously where a defendant has entered appearance to defend for the purpose of delaying the proceedings. The special procedure was conceived so that a *mala fide*F defendant might be summarily denied, except under onerous conditions, the benefit of the fundamental principle of the *audi alteram partem* rule. So extraordinary is the invasion of the basic principle of natural justice that it will not be lightly resorted to. It will only be granted in

circumstances where it is established that the plaintiff's claim is clearly G unarguable both in fact and in law. In respect of the first half of the claim, the appellant acknowledged its indebtedness, except for a portion which it had already paid, so summary judgment in the reduced sum would be granted. However, damages for breach of contract could not properly be awarded in an application for summary judgment, because, in terms of the contract, the precise amount of damages must be proved. In addition H to what was stated in the agreement, it is part of our law that a plaintiff

Guvava JA

who seeks damages must take into account any necessary expenditure he A would have incurred pursuant to the contract. It should be pointed out that damages by their nature do not easily lend themselves to determination in a summary judgment. Damages are never Aunarguable@. Leave to defend in respect of that portion of the claim should have been granted.

Case referred to B

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

Case information

No appearance for the appellant

N Mlala, for the respondent C

Judgment

Guvava JA: This is an appeal against the whole judgment of the High Court, Bulawayo, dated 22 February 2011 granting summary judgment against the appellant in the sum of US$6 000.

The facts that were common cause in this matter were as follows. On 16 February, 2007 the appellant and the respondent entered into an agreement D in terms of which the respondent offered security services to the appellant for a fee. In terms of the agreement the respondent provided the appellant with security guards to guard its premises 24 hours a day. The respondent provided three security guards during the day who worked a twelve hour shift and two security guards during the night for the remaining 12 hours. E

On 30 June 2009 the appellant summarily cancelled the agreement. The respondent issued summons claiming a total of US$6 000. Of that amount US$3 000 was for services rendered during the months of April, May and June 2009. The remaining US$3 000 was claimed as damages in lieu of three months' notice of termination of the agreement. F

The appellant entered an appearance to defend and filed a plea in which it denied liability. The appellant opposed the claim on three grounds. It stated in its plea that in terms of the agreement between the parties, payment was to be made in Zimbabwe dollars. It argued that there was no agreement between the parties that required it to make any payment in United States G dollars. The appellant also submitted that it had been incorrectly cited as defendant in view of the fact that there was no company called Superbake Bakeries (Pvt) Ltd. Finally it submitted that it had no obligation to pay the money claimed as the respondent's security guards had stolen goods from its premises. H

Guvava JA

The court *a quo* found that the respondent's claim was unassailable and A granted summary judgment in the sum claimed. The appellant, dissatisfied with the judgment, noted an appeal to this court.

At the hearing of the appeal, the appellant was in default although it had filed heads of arguments and had been served with a notice of set down at the last known address following the renunciation of agency by its erstwhile B legal practitioners.

The matter was dealt with on the merits, reliance being placed on r 36(4) of the Supreme Court Rules 1964 which provides as follows:

> "Where, at the time of the hearing of an appeal, there is no appearance for the appellant, and no written arguments have been filed by him, the court may dismiss C the appeal and make such order as to costs

as it may think fit …"

In casu, the appellant's heads of argument had been filed of record. My interpretation of r 36(4) is that where an appellant fails to appear after filing heads of argument, the court is not precluded from hearing and determining the appeal on the merits.

In my view, there are two issues that arise for determination in this appeal. The D first issue is whether the appellant, as cited, has the requisite *locus standi* to prosecute the appeal. The second is whether the court *a quo* was correct in granting summary judgment in the aggregate sum of US$6 000.

On the first issue, I am of the view that the court *a quo* improperly relied on r 8C of the High Court Rules for its decision that the appellant, as cited, E had the requisite *locus standi*.

Rule 8C provides as follows:

"Subject to this Order, a person carrying on the 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 F any such proceedings."

It is evident from a reading of this rule that it applies only to associations and not corporate bodies. In its responding affidavit in the court *a quo*, the appellant referred to itself as "Harambe Holdings (Pvt) Ltd" trading as "Superbake Bakeries (Pvt) Ltd". This was a bald statement which was not in any way substantiated, an aspect that appears to have escaped the attention G of the court *a quo*. I am of the view, however, that since the appellant itself appeared to accept that it was a separate legal entity, there is nothing on the papers to suggest that the appellant is not such a body, capable of suing and being sued. My view, therefore, is that it had the requisite *locus standi*.

The second issue was whether the court *a quo* correctly granted summary H judgment in the sum of US$6 000 and in particular whether the respondent

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Guvava JA

was entitled to summary judgment where the damages claimed arose from A an alleged breach of contract.

Summary judgment in terms of Order 10 of the High Court Rules, 1971, is an extraordinary remedy which is granted to a party so that a matter may be determined expeditiously where a defendant has entered appearance to defend for the purpose of delaying the proceedings. The special procedure B of summary judgment was conceived so that a *mala fide* defendant might be summarily denied, except under onerous conditions, the benefit of the fundamental principle of the *audi alteram partem* rule. So extraordinary is the invasion to the basic principle of natural justice that it will not be lightly resorted to. It will only be granted in circumstances where it is established that the plaintiff's claim is clearly unarguable both in fact and in law. In C*Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) the headnote states:

"Where a plaintiff applies for summary judgment against a defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good *prima facie* defence."

It is evident from the papers that the appellant acknowledged its indebtedness D to the respondent in the sum of ZAR27 600 by letter dated 29 June 2009. The appellant claimed that it had paid the sum of ZAR2 400. The parties appear to have proceeded on the basis that one US dollar was equivalent to ZAR 10.

I am satisfied on the basis of the appellant's own admission that on the first part of the claim for services rendered it owed an amount of ZAR27 600. Accordingly summary judgment ought to have been granted in the sum of E US$2 760 and not the US$3 000 that was awarded.

On the second part of the claim it is apparent that the respondent was claiming damages for breach of contract. Contrary to the finding by the court *a quo*, I am of the view that such damages cannot properly be awarded in an application for summary judgment. This is because the damages must be F proved. In clause 9 of their agreement the parties agreed that in the event that the appellant terminated the services rendered to it by the respondent, the latter would be entitled to claim "as genuinely pre-estimated liquidated damages, 75% of any charges that the appellant might have been liable to pay." This was to be for the period equivalent to the required notice period or "the remaining period of the contract, whichever was applicable". G

It is therefore evident that the respondent was required to place before the court evidence to prove the damages claimed. On the basis of clause 9 of the agreement, it was incumbent upon the respondent to establish the following:

" (i) The basis upon which the damages it claimed constituted 'genuinely pre-estimated liquidated' damages; H

2014 (2) ZLR p195

Guvava JA

(ii) whether the amount claimed constituted 75% of such damages, and A

(iii) the period the respondent considered applicable, between the period of 'due notice of termination' and the 'remaining period of the contract'".

In the absence of this evidence, I find that the respondent did not prove the damages in the sum of US$3 000 that it claimed and was awarded by the court *a quo*. The court took the view that it could simply take the period B required for notice in lieu of notice and multiply the monthly service charges of US$1 000 by three and award damages in the sum of US$3 000. There is no indication that the court *a quo* applied its mind to clause 9 of the agreement at all. On this basis I find that the court *a quo* misdirected itself.

Further, notwithstanding clause 9 of the agreement, it is part of our law C that a plaintiff who seeks damages must take into account any necessary expenditure he would have incurred pursuant to the contract. It should be pointed out that damages by their nature do not easily lend themselves to determination in a summary judgment. Damages are never "unarguable". It has already been stated that this is an extraordinary remedy which is not readily granted unless it has been established that a plaintiff's claim is clear D both in fact and in law.

I do not find that in this case the appellant's claim for damages meets these stringent conditions.

Before concluding, I believe it is necessary to comment on the claim by the appellant that it was forced to cancel the agreement owing to thefts perpetrated E by the respondent's guards on the premises of the former. An examination of the papers before me shows that the allegation was not substantiated in any way. It is not clear who is alleged to have stolen the property. There is no evidence of what was stolen or the value stolen. The opposing affidavit which should have contained this information merely referred to the plea F and it thus remained a bald assertion which in my view does not merit any serious consideration. It is clearly not a defence that this court can accept.

Accordingly, I make the following order:

1. The appeal succeeds in part.
2. The order of the court *a quo* be and is hereby set aside and substituted G with the following:
   "(i) Summary judgment in the sum of US$2 760 be and is hereby granted in favour of the applicant.
   (ii) The respondent be and is hereby granted leave to defend the claim for damages in the sum of US$3 000.
   (iii) The respondent shall pay the costs of this application." H

2014 (2) ZLR p196

Guvava JA

3. The appellant shall pay the costs of this appeal. A

GWAUNZA JA and GARWE JA concurred.

Bvekwa Legal Practitioners, appellant's legal practitioners

Cheda & Partners, respondent's legal practitioners B

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[zRPz]S v NDZOMBANE 2014 (2) ZLR 197 (S)

Citation	2014 (2) ZLR 197 (S)
Case No	Judgment No. S-77-14
Court	Supreme Court, Bulawayo
Judge	Ziyambi JA, Hlatshwayo JA and Mavangira AJA
Heard	28 July 2014; *CAV*
Judgment	30 July 2014
Counsel	*P Mvundla,* for the appellant *W Mabaudhi,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *expert evidence – value to be attached to – should not detract from court's own capabilities and responsibilities – evidence presented in affidavit form – when expert witness should be called to give oral* D *evidence*

Headnote

The appellant killed the deceased, his own brother, by decapitation with a sharpened axe. What remained unclear at the close of the defence case was what had motivated the appellant to commit such a gruesome murder. Unconvinced by the appellant's explanation for his conduct, the E court ordered an examination of the appellant by two doctors in terms of the Mental Health Act [*Chapter 15:12*]. The two doctors, three months after the commission of the offence, found some evidence of mental defect and recommended that the appellant be referred to a psychiatrist. Some seven months later, the psychiatrist carried out her first of several assessments from which she concluded that the appellant was not F labouring under any mental illness at the time of the commission of the offence. Her evidence was admitted in affidavit form. The appellant's mother submitted an affidavit to the psychiatrist, giving information about strange behaviour on the part of the appellant.

Held, that the apparently motiveless, odd and bizarre murder should G have alerted the defence counsel, prosecution and the court – but more so the defence counsel – to the possibilities of mental or emotional fragility on the part of the appellant. While the court *a quo* did institute the procedures for the mental examination of the appellant, the final consideration of the psychiatric report still left a lot to be desired. However, the defence counsel woefully failed to heed the clanging alarm bells. He should H have interviewed the appellant's family, friends, co-workers and former

employers, in an attempt to discover whether the appellant had any history A of strange behaviour. The appellant's mother's account was effectively a footnote in the psychiatrist's report.

Held, further, that it was necessary to hear *viva voce* evidence from the psychiatrist, from the mother of the appellant and from any other relevant person. The psychiatrist would have had to explain to the court the basis for her affirmative finding that from 2010 onwards the appellant no B longer suffered from any mental illness, especially in the light of the fact that she accepted that the appellant had suffered from some "psychotic disorder" between 2007 and 2008.

Held, further, that s 278 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] allows the production of medical reports from doctors in affidavit C form. However, the court has the discretion in terms of s 280 to order that the doctor be summoned to give oral evidence at the trial. The court may also send written questions to the expert who is enjoined to reply thereto. The interrogation through oral testimony of expert evidence given on affidavit is necessary to avoid the error of treating such evidence as gospel truth or divine revelation. D

Held, further, that expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. It is not the mere opinion of the expert witness which is decisive, but the expert's ability to satisfy the court that, because of his or her special skills, training and experience, the E reasons for the opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion, and must not be overawed by the proffered opinion and simply adopt it without questioning or testing it against known parameters. The expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in F drawing inferences from the evidence. The court can only do this well if it requires the expert witness to give oral evidence in the clarification and elucidation of an affidavit that is otherwise technically dense and incomprehensible, contradictory or inadequate in all respects except the conclusion. A court errs when it merely adopts the conclusions of an expert report without exercising its mind on it by, for example, calling G for oral testimony or drawing the necessary inferences from the evidence.

Cases cited

Menday v *Protea Assurance Co Ltd* 1976 (1) SA 565 (E)

S v *Anock* 1973 (1) RLR 154 (A) H

Hlatshwayo JA

S v *Mukombe* 1991 (1) ZLR 135 (S) A

S v *Sulpisio* A-104-71

S v *Taanorwa* 1987 (1) ZLR 62 (S)

S v *Zuma* 2006 (2) SACR 257 (W)

Legislation considered B

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

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 278 & 280

Case information

P Mvundla, for the appellant

W Mabaudhi, for the respondent

Judgment

Hlatshwayo JA: The appellant was convicted of murder with actual intent by the C High Court sitting at Hwange on 5 July 2013.

It was not in dispute that on 26 April 2011 the appellant killed the deceased, his own brother, by decapitation with a sharpened axe. What, however, remained unclear at the close of the defence case was what had motivated D the appellant to commit such a gruesome murder. Unconvinced by the appellant's explanation for his conduct, the court ordered an examination of the appellant by two doctors in terms of the Mental Health Act [*Chapter 15:12*]. The two doctors, on 22 July 2011, three months after the commission of the offence, found some evidence of mental defect and recommended that E the appellant be referred to a psychiatrist. Some seven months later, on 17 February 2012, the psychiatrist carried out her first of several assessments from which she concluded that the appellant was not labouring under any mental illness at the time of the commission of the offence. Placing reliance on the findings of the psychiatrist, the trial court convicted the appellant of murder with actual intent and sentenced him to death, after finding that

there F were no extenuating circumstances. The appellant has now approached this Court on automatic appeal against both conviction and sentence.

The facts of this case are bizarre. The two brothers – the deceased and the appellant – aged 31 and 27 years respectively at the time of the commission of the offence, had a disagreement over the sharing of groundnuts, with the G deceased claiming that the appellant had taken a greater portion of the nuts. The deceased then proceeded to chastise the appellant with a switch as if he was a child. The appellant says that this humiliating treatment infuriated him. Nonetheless, he carried on with the day's task of herding cattle, with the events of the morning apparently forgotten. However, upon seeing his brother in the evening, the appellant claims that his anger was reignited. After H they had retired for the night, the appellant woke up, sharpened an axe and

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decapitated the deceased in his sleep. The only witness who was called by A the State, Nobantu Mabhena, aunt to both the deceased and the appellant, maintained that the brothers had never fought, not even on the fateful day, and generally lived peacefully together. She could not say that the appellant was a violent person, although she speculated that he could have acquired some violent streak from his stay in South Africa. B

This apparently motiveless, odd and bizarre murder should have alerted the defence counsel, prosecution and the court – but more so the defence counsel – to the possibilities of "mental or emotional fragility" on the part of the appellant as was observed in *S v Mukombe* 1991 (1) ZLR 138 (S) at 139. Commendably, the court *a quo* did institute the procedures for the mental examination of the appellant, but the final consideration of the psychiatric C report still left a lot to be desired, as will be shown below. However, the defence counsel woefully failed to heed the clanging alarm bells. The defence counsel should have interviewed "the appellant's family, friends, co-workers and former employers, in an attempt to discover whether [the appellant] had any history of strange behaviour," as was said in the *Mukombe* case *supra.*

As it turned out, the crucial evidence of the appellant's "mental and emotional D fragility" appears in his mother's affidavit submitted to the psychiatrist as follows:

> "During childhood he used to isolate himself, being shy person. Went to school up to Grade 7, was good student, failed to further his education due to financial problem. Went to Republic of South Africa to look for job and in 2007 was hit E by gangsters and suffering from head trauma, hospitalised for some time due to head trauma. After discharge in 2007, displayed mental disturbance, was said to wander about and eating from street bins. The friends brought him back to Zimbabwe. He was talking to himself, smiling into space. I took him to hospital, United Bulawayo Hospital, but the doctor did not send him for treatment for mental problem, they wanted to see him displaying mental problem, only gave him Paracetamol for headache. I sent him to father (as we divorced) and I don't know F what happened to him during his stay with his brother only heard that he axed his brother and hid the corpse away in the bush."

Now, the mother was never called to testify at the trial, even after the above testimony had come to light with the production of the psychiatrist's affidavit. Had she been called, her evidence could have been weighed by the court side by side with the expert conclusion of the psychiatrist. But as it is, her G evidence is as good as a footnote in the psychiatrist's report. The Russian-trained psychiatrist – one of the very few in the whole country – Dr Elena Poskotchinova concluded her affidavit as follows:

> "In my opinion there is no evidence of mental illness or mental retardation at present. He was mentally stable at the time of crime and responsible for his H

> action, probably he got head trauma in 2007 [result of EEG confirmed moderate to high A amplitude *posterior dominant alpha*] and had psychotic behaviour in 2007 – 2008. But since 2010 there is no evidence of mental disorder (OPD cards confirm only pain on old suture line by doctor from United Bulawayo Hospital)".

However, the psychiatrist was not called to give *viva voce* evidence – her evidence being just formally and routinely admitted into the record. After B her evidence was read into the record, the learned trial Judge just expressed gratitude to the psychiatrist and proceeded straight away to judgment, in which he observed in this regard as follows:

> "The court referred the accused to be examined by a psychiatrist to ascertain his mental state in the light of the bizarre manner in which the murder was committed. Dr Elena Poskotchinova's report was produced. The psychiatrist C concluded that there was no evidence of mental illness or mental retardation at present on accused. The accused was mentally stable at the time of the crime and responsible for his action. He is fit to stand trial. The accused waited for deceased to fall asleep. He sharpened the axe and then struck deceased firstly on the head followed by several blows on the neck to the extent of chopping the head off to ensure that he was dead. The accused is therefore guilty of murder D with actual intent."

It was submitted that it was incumbent on the court *a quo* to conduct an inquiry through the calling of oral evidence from the psychiatrist who examined the appellant. I agree. It was necessary to hear *viva voce* evidence from the psychiatrist, from the mother of the appellant and any other relevant person. E The psychiatrist would have had to explain to the court the basis for her affirmative finding that from 2010 onwards the appellant no longer suffered from any mental illness, especially in the light of the fact that she accepted that the appellant had suffered from some "psychotic disorder" between 2007 and 2008. There are more questions which remained unanswered because of this oversight, such as whether considering the lapse of seven months F between being seen by the two doctors and the appellant's assessment by the psychiatrist evidence of mental defect that had been observed by the doctors could have disappeared? Whether, in the light of the two doctors' observation in 2011, the psychiatrist's affirmative assessment that from 2010 onwards the appellant suffered no mental illness was sustainable? What was it that the two doctors observed post 2010 which necessitated the referral G to a psychiatrist if not some mental defect? And as regards the appellant's previous mental infirmity, the psychiatrist could have helped shed light on whether the possibility existed for an illness induced by the noted head injury to recur even be it only temporarily.

Section 278 of the Criminal Procedure and Evidence Act (CPEA) allows H the production of medical reports from doctors in affidavit form. However,

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Hlatshwayo JA

the court has the discretion in terms of s 280 to order that the doctor be A summoned to give oral evidence at the trial. The court may also send written questions to the expert who is enjoined to reply thereto. As is observed in G Feltoe's *Judges' Handbook For Criminal Cases* 1 ed, 2009 Legal Resources Foundation p 71.

> "It will be necessary to use the power to ask the doctor to give oral testimony when the original affidavit is inadequate and the court is unable to arrive at a B just decision on the basis of this report. If the information is very scanty or vital information is omitted, or the information in the report seems to be contradictory, this power should be exercised. But if it contains all the necessary information there will be no need to summon the doctor. *S* v *Anock* 1973 RLR 154 (A); *S* v *Sibanda* A-10-72; *S* v *Melrose* 1984 (2) ZLR 217 (S)."

The interrogation through oral testimony of expert evidence given on C affidavit is necessary to avoid the error of treating such evidence as gospel truth or divine revelation. Expert opinion evidence is admitted to assist the court to reach a just decision by guiding the court and clarifying issues not within the court's general knowledge. In *Mandy v Protea Assurance Co. Ltd* 1976 (1) SA 565 at 569 it was stated that it was not the mere opinion of the expert witness which is decisive but his or her ability to satisfy the D court that, because of the special skills, training and experience, the reasons for the opinion expressed are acceptable. However, in the final analysis, the court itself must draw its own conclusions from the expert opinion and must not be overawed by the proffered opinion, and simply adopt it without questioning or testing it against known parameters. E

In *S v Zuma* 2006 (2) SACR 257 at 263 the court held that the expertise of a professional witness should not be elevated to such heights that sight is lost of the court's own capabilities and responsibilities in drawing inferences from the evidence. And, in my view, the court can only do this if it requires the expert witness to give oral evidence in the clarification and elucidation F of an affidavit that is otherwise technically dense and incomprehensible, contradictory or inadequate in all respects except the conclusion. A court errs when it merely adopts the conclusions of an expert report without exercising its mind on it by, for example, calling for oral testimony or drawing the necessary inferences from the evidence.

Did the trial court therefore, misdirect itself in accepting the expert evidence G of the psychiatrist in the manner it did? It appears to me that the trial court below did err in this regard. However, I am

of the considered view that the misdirection was not of such magnitude as to vitiate the conclusion that it reached on conviction. The psychiatrist's affidavit taken in its totality shows that an assistant clinical psychologist, N T Mpofu, who examined the H

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appellant also concluded that the "patient does not show any sign of mental A illness, and was stable at the time". The same conclusion was reached when the appellant was examined at a clinic as an outpatient in July 2010. The mother's quoted evidence also shows that when she took the appellant to hospital on suspicion of mental illness the doctors discounted it and instead treated him for an ordinary headache. The psychiatrist also set out cogent B reasons for her conclusion, thus:

> "When examined by me the accused appeared to be free from any acute psychotic symptoms. He was full oriented in all aspects, calm, cooperative. Denied any type of hallucination and did not display any symptom of delusional behaviour. No decline in memory or intellect. Denied alcohol abuse in past. Admitted his crime of killing his brother, said the brother had spanked him like a child early C morning on the day of the crime. He complained that accused was eating too much peanuts. "I was angry and after that axed him as punishment," he has insight into his mental illness. According to staff report: No evidence of unpredictable behaviour since admission."

Accordingly, the trial court's decision on conviction cannot be interfered with. However, there are consequences for the court's failure to have the D psychiatrist and other witnesses called as well as the unquestioning manner in which it adopted the expert report as already mentioned. The consequences are that the possibility remains open of the appellant having been labouring under some form of diminished responsibility or "partial mental disorder or defect" as it is termed in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter called the "Criminal Code").

E "Partial mental disorder or defect" is defined in s 217 of the Criminal Code as "mental disorder or defect … the effect of which is not such as to entirely deprive the person suffering from it of the capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation."

In terms of s 218 if at the time a crime is committed the capacity of the F person committing it

> "is diminished on account of acute mental or emotional stress, or partial mental disorder or defect, such diminished responsibility shall not be a defence to the crime, but a court convicting such person shall take it into account when imposing sentence upon him or her for the crime."

McNally JA in *S v Taanorwa* 1987 (1) ZLR 62 (S) quoted Beadle CJ in G*S v Sulpisio* A-104-71 (not reported) thus:

> "A man may not be certifiable under the Mental Disorder Act [now the Mental Health Act] and he may not be mentally disordered within the meaning of the criminal law, but nevertheless his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may H not be relevant in considering the verdict, may be very relevant indeed in

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> determining whether or not, in a case such as this, a proper sentence should be A the death sentence. If the court was satisfied that the appellant suffered from some unusual state of mind, such as having a genuine persecution mania or that he was suffering from diminished sense of responsibility at the time when he committed the offence, this would be a most important factor to be taken into consideration in deciding what the appropriate sentence should be."

In *S v Mukombe* 1991 (1) ZLR 135 (S) at 141, where a psychiatric examination B had not been carried out it was held as follows:

> "Finally it is pointed out that even if it is not possible to obtain meaningful background information on the appellant, and the psychiatric evidence is inconclusive, the trial court may nevertheless come to the conclusion, on the stark facts as they presently exist, that the appellant's mental condition warrants a finding of diminished responsibility." C

In my respectful view, the court in the *Mukombe* case *supra* may have gone too far in suggesting, as it did, that where no meaningful background information on the appellant's mental health can be obtained and consequently the psychiatric evidence is inconclusive, a finding of diminished responsibility may still be made on the mere "stark", bizarre or inexplicable nature or execution of the offence. In the present case, however, the difficulty perceived D in the *Mukombe* scenario does

not arise. The bizarre facts in the present case led to the production of a psychiatric report which contained useful background information on the appellant's health. We have already noted that, while the psychiatric report concluded that the appellant was legally responsible for his actions, the uncritical manner in which the report was adopted left the E possibility open that the appellant might have been suffering from some form of diminished responsibility, which affected his moral blameworthiness. Accordingly, the trial court should have found extenuating circumstances on the basis of appellant's diminished responsibility.

In assessing the appropriate sentence, it must be noted that the appellant showed contrition for the callous murder of his brother, blaming his actions F on the anger he felt after he had been humiliatingly chastised by the deceased. The appellant fully confessed his crime and did not seek to minimize his culpability, even where he could easily have done so, for example, by insisting on a version of events that placed the provocation in space and time closer to the murder. This saved the court's time and must count in his favour. It was submitted on behalf of the appellant that a sentence of a term G of imprisonment in the range of 20 years would meet the justice of the case. However, I am of the view that in the light of the weighty mitigatory factors already noted the appropriate sentence should be 15 years.

Accordingly, the appeal succeeds in part. The conviction of murder with actual intent is upheld. However, the sentence of death is set aside, as there H

Hlatshwayo JA

has been a finding of extenuating circumstances, and substituted with the A following:

> "The accused is sentenced to a term of 15 (fifteen) years' imprisonment."

ZIYAMBI JAand MAVANGIRA AJA concurred.

D W Mhiribidi & company, appellant's legal practitioners B

National Prosecuting Authority' Office, respondent's legal practitioners

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[zRPz]CHIHOTA v MUNYARIWA & ORS 2014 (2) ZLR 206 (H)

Citation	2014 (2) ZLR 206 (H)
Case No	Judgment No. HH-418-14
Court	High Court, Harare
Judge	Mathonsi J
Heard	31 July 2014
Judgment	31 July 2014
Counsel	*R Fambisayi,* for the applicant *B Makururu,* for the first respondent. Second and third respondents in default
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Practice and procedure – *interpleader proceedings – competing claims in* C *respect of goods under judicial attachment – duties of sheriff in regard thereto – referral of the claim by a third party to the judgment creditor before commencing interpleader proceedings – sheriff not entitled unilaterally to remove goods*

Headnote

The first respondent obtained judgement against the third respondent and D issued a writ against the third respondent's property. The first respondent instructed the Sheriff to execute against the third respondent's property, whereupon the Sheriff placed under attachment certain items of property at a certain stand in Gweru. Those goods were later claimed by the applicant who had visited that stand, which was where he kept his equipment, E and found that the locks had been changed. He also found the writ of execution and the notice of attachment showing that his equipment had been attached. At the instance of the Sheriff, the applicant instituted interpleader proceedings which he expected the Sheriff to issue out of the court in order to resolve the conflicting claims. He delivered the process F to the Sheriff and paid the requisite fee to enable the issuance of the interpleader application. He was laying a claim on all the property that had been attached. Instead of staying execution, the Sheriff telephoned the messenger of court and instructed him to forthwith remove the property and put it in storage. This was duly done.

Held, that where goods under judicial attachment are claimed by a party G who is not the judgment debtor, such claim must first be investigated before execution proceeds. Ideally, the sheriff should refer the matter to the judgment creditor and enquire whether he is prepared to admit the claim or not. If he is, the matter should end there and the goods should be released from judicial attachment. If the judgment creditor H

2014 (2) ZLR p207

Mathonsi J

A does not admit the claim, then the conflicting claims will have to be resolved in terms of Order 30 of the High Court Rules 1971 (RGN 1047 of 1971) which sets out the procedure to be followed in interpleader proceedings. In terms of r 205A(2), in regard to conflicting claims with respect to property attached in execution, the Sheriff has the right of an applicant and the execution creditor has the right of a claimant. In terms B of r 206(2), where the claim relates to a thing capable of delivery, the applicant must tender the subject matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct. It is for the registrar, perhaps after taking into account the exigencies of a particular matter, C to give directions as to how the goods should be dealt with. It is wrong for the Sheriff to proceed *mero motu* to remove goods that are being claimed without even seeking an input from the judgment creditor and without the specific directions of the registrar.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 205A(2) & 206(2) D

Case information

R Fambisayi, for the applicant

B Makururu, for the first respondent.

Second and third respondents in default E

Judgment

Mathonsi J: The first respondent obtained judgement against the third respondent and issued a writ in the sum of $11 821.12 against the third respondent's property on 14 May 2014. In pursuance thereof the first respondent instructed the Sheriff of this court to execute against the third F

respondent's property, whereupon the Sheriff placed under attachment certain items of property found at No. 6484 Sumatra Road, Shamrock Park, Gweru. This was on 7 July 2014.

In terms of the notice of seizure dated 7 July 2014, the items attached were "now under judicial attachment" and the goods were to be sold *in situ*. Those goods were later claimed by the applicant who says that it was only G fortuitous that on 16 July 2014 he had visited the business stand where he kept his equipment, being 6484 Sumatra Road, Shamrock, Gweru and found that the locks had been changed. He also found the writ of execution and the notice of attachment showing that his equipment had been attached. In locking the premises and putting a chain at the main entrance the Sheriff H was effectively evicting him from the premises.

2014 (2) ZLR p208

Mathonsi J

At the instance of the Sheriff, the applicant says he instituted interpleader A proceedings which he expected the Sheriff to issue out of the court in order to resolve the conflicting claims. On 22 July 2014 he delivered the process to the Sheriff and paid the requisite $388 to enable the issuance of the interpleader application. He was laying a claim on all the property that had been attached.

Instead of staying execution, the Sheriff telephoned the messenger of court B in his presence and instructed him to forthwith remove the property and put it in storage. As a result the property was removed on 28 July 2014 and is now in storage in spite of a letter of protest written by the applicant's legal practitioners on 24 July 2014.

It would seem that the Sheriff's office is now wallowing under this unfortunate misconception that where goods that have been placed under judicial C attachment are claimed by a third party, the Sheriff must move with indecent haste to remove those goods and place them in storage before instituting interpleader proceedings. It is a misconception that not only betrays a closed mind but also an unfortunate trait indeed. What it achieves is an inconvenience of gigantic proportions which is as unacceptable as it is not borne by logic and common sense. D

Where goods are claimed by a party who is not the judgment debtor, such claim must first be investigated before execution proceeds. Ideally, the Sheriff should refer the claim to the judgment creditor and enquire whether the judgment creditor is prepared to admit the claim or not. If the judgment creditor admits the claim, the matter should end there, as the goods should E be released from judicial attachment.

In the event that the judgment creditor does not admit the claim, then two conflicting claims over the goods arise, bringing into play the provisions of Order 30 of the High Court Rules 1971. That Order sets out the procedure to be followed in interpleader proceedings. In terms of r 205A(2), in regard F to conflicting claims with respect to property attached in execution, the Sheriff shall have the right of an applicant and the execution creditor shall have the right of a claimant.

In terms of r 206(2), where the claim relates to a thing capable of delivery the applicant shall tender the subject matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the G thing in question as the registrar may direct.

In my view, it is sufficient for the Sheriff to render a return of service to the registrar signifying that the goods being claimed have been placed under judicial attachment. The effect of a judicial attachment is to place the goods so attached under the wings of the court and any person who places those H

2014 (2) ZLR p209

Mathonsi J

goods outside that ambit acts unlawfully and in contempt of the court. It is for A the registrar, perhaps after taking into account the exigencies of a particular matter, to give directions as to how the goods should be dealt with.

To my mind, it is extremely uncanny for the Sheriff to proceed *mero motu* to remove goods that are being claimed without even seeking an input from the judgment creditor and without the specific directions of the registrar. B Practically, it unnecessarily increases execution costs even when it may well be that the claim for the goods is well grounded. Rule 211 makes it clear that where an interpleader notice is issue by a defendant, proceedings in that action shall be stayed pending a decision upon the interpleader, unless the court otherwise orders.

By parity of reason, where the claim is made by a third party, the execution must C be stayed to allow for an investigation into the claim and a decision on the interpleader.

I am therefore satisfied that a good case has been made for the interim relief sought. Accordingly the provisional order is granted the interim relief of which is:

"INTERIM RELIEF GRANTED D

Pending determination of this matter, the applicant is granted the following relief:

1. The second respondent is restrained and interdicted from removing applicant's property in execution until the hearing and determination E of the interpleader proceedings.
2. In the event that the property has been removed, the second respondent is directed to forthwith release that property to the applicant.
3. Notwithstanding that, it is confirmed that the goods shall remain under judicial attachment."

Mhaka Attorneys, applicant's legal practitioners F

Guni & Guni, first respondent's legal practitioners

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[zRPz]OKEY v CHIEF IMMIGRATION OFFICER & ANOR 2014 (2) ZLR 210 (H)

Citation	2014 (2) ZLR 210 (H)
Case No	Judgment No. HH-400-14
Court	High Court, Harare
Judge	Muremba J
Heard	28 July 2014; *CAV*
Judgment	4 August 2014
Counsel	*L Mauwa,* for the plaintiff Ms *T S Musangwa,* for the defendants
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – right to personal liberty (s 49) – detention without trial – permissible where authorised by law and for just reasons – detention of prohibited person in terms of Immigration Act – not a contravention of s 49* D

Immigration – *prohibited person – who is – person in Zimbabwe in contravention of Immigration Act – such person a prohibited person and not entitled to stay in Zimbabwe – detention of such person pending removal from Zimbabwe – no need for him to have committed any offence before being detained – such detention not in contravention of s 49(1) of Constitution* E

Headnote

The applicant, a Nigerian citizen, had been detained by the immigration authorities pending deportation from Zimbabwe. He had been in Zimbabwe since March 2004. He got married to a Zimbabwean citizen, the marriage being solemnised in terms of the Marriage Act [*Chapter 5:11*]. F Following the marriage, the applicant's wife made an application for the applicant to be granted a residence permit. He was issued with a residence permit for one year; when it expired, it was extended for another two years. However, the applicant's wife died almost a year before the expiration of his residence permit. G

After the death of his wife and when his residence permit was about to expire, the applicant made an application to the first respondent to renew his residence permit. Instead of the applicant being granted two year permits, the first respondent started to grant him 30 day or 60 day permits. After about a year the application to renew his residence permit was completely refused by the first respondent, who did not furnish him with the reasons H

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for the refusal. After the expiry of the residence permit, the applicant married A his late wife's sister, again in terms of the Marriage Act.

The applicant argued that by virtue of being married to a Zimbabwean citizen he had the right to remain in Zimbabwe. He further argued that the first respondent had no right to refuse the application for a residence permit without furnishing him with the reasons for refusal. B As a result, the applicant challenged the refusal to grant him the permit by the first respondent. He sought an order setting aside the refusal to renew the residence permit, his application being granted in default. The respondents applied for rescission of the order, but that application was still to be heard.

It was argued that the applicant's arrest was arbitrary, contemptuous and in C violation of the existing court order. There is no basis for the first respondent to declare the applicant a prohibited person as he had not committed any offence. It was further submitted that by virtue of being married to a Zimbabwean citizen, the applicant now fell in the bracket of persons who are not prohibited persons in terms of s 15(1) of the D Immigration Act [*Chapter* 4:02]. By virtue of his second marriage, the applicant was protected by s 12(1)(a) of the Immigration Regulations, 1988 and the provisions of the Immigration Act.

The first respondent argued that the permit which was issued to the applicant following his first marriage was one issued to an alien on the strength E of a marriage to a Zimbabwean citizen. Such a permit is terminated by a decree of divorce, death of the citizen spouse or in situations where the alien becomes prohibited. When the applicant applied for a permit following the death of his first wife but before his second marriage, there was no basis whatsoever for the renewal of the permit. The applicant now became a prohibited person and had done nothing to regularise his F status, even after his second marriage. He had not formally been declared a prohibited person by the Minister of Home Affairs.

Held, that although the applicant had not formally been declared a prohibited person, he became one by remaining in Zimbabwe without a permit in contravention of s 29(1)(a) of the Immigration Act . Under s 14(1)(i) G of the Act, any person who has entered or remained in Zimbabwe in contravention of the Act is a prohibited person. Upon becoming a prohibited person, the applicant should have left Zimbabwe. Section 17(1)(a) of the same Act disentitled him to remain in Zimbabwe. Although under s 15(2)(d) a person who is married to a Zimbabwean citizen shall not be a prohibited person, in this case his status of being a prohibited H person preceded his second marriage. The subsequent marriage did

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not reverse the status of a person who had become a prohibited person A before the marriage.

Held, further, that if, as here, a person becomes a prohibited person by operation of law, the court has no power to reverse that status. Even the Minister of Home Affairs is not empowered by s 14(7) of the Act to revoke a prohibited person's status which is acquired in terms of B s 14(1)(i). In any event, the court order obtained earlier did not give any instructions to the respondents, either to issue the applicant with a permit to enable him to remain in Zimbabwe or to interdict the first and second respondents from removing the applicant from Zimbabwe while he regularised his stay. Nor did the order mean that the first respondent was obliged to issue a permit, irrespective of whether or not the applicant C met the requirements for one.

Held, further, that the power under s 8(2) of the Act to detain a person pending removal did not depend on the person having been convicted of any offence, nor did it violate s 49(1) of the Constitution. That section does not make it a requirement that in every case where a person is deprived of his liberty he ought to have been charged with a criminal offence D and that there ought to be a trial. There can be instances where a person is deprived of his liberty without trial in terms of s 49(1)(b), but such deprivation should not be arbitrary or without just cause. Where there is deprivation of personal liberty without a criminal charge having been preferred, the deprivation should be authorised by law or be in compliance with the law or it should be for reasons that are just in their substance. E This means that the substantive validity of a decision to detain a person must be considered.

Held, further, that here, there was just cause in depriving the applicant of his personal liberty. His detention was not arbitrary because it was done in terms of s 8(2)(a) and (b) of the Immigration Act. He was a prohibited F person who refused to leave Zimbabwe after the expiration of his spousal residence permit. When the decision to refuse him the permit was set aside by the court, he did not, for nearly two years, regularise his position.

Cases referred to G

Edwards v *Chief Immigration Officer* 2000 (1) ZLR 485 (S)

Legislation considered

Constitution of Zimbabwe 2013, s 49(1)(a) & (b)

Immigration Act [*Chapter 4:02*], ss 8(2)(a) & (b), 9(1), 14(1)(i), (4), (6) & (7), 15(1)& (2)(d), 17(1)(a) & 29(1)(a) H

2014 (2) ZLR p213

Muremba J

A Immigration Regulations 1998 (SI 195 of 1998), s 12(1)(a)

Case information

L Mauwa, for the plaintiff

Ms *T S Musangwa,* for the defendants

Judgment

Muremba J: The applicant is a Nigerian citizen. He was arrested on 29 May 2014 B at Kilimanjaro Restaurant in Harare for being in Zimbabwe illegally in contravention of the Immigration Act [*Chapter* 4:02]. After his arrest, he was placed in custody at Harare Remand Prison pending his deportation to his home country. Although he is in detention pending deportation, he has not been charged with any criminal offence. He has not appeared before any C court of law. His deportation can happen at any time.

This is what has prompted the applicant to make the present application which seeks the following relief:

> "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:
>
> (a) The first respondent shall immediately and forthwith release the applicant from custody pending regularisation of his papers or status in Zimbabwe.
>
> (b) Costs of suit.
>
> INTERIM RELIEF GRANTED
>
> Pending the discharge or confirmation of this provisional order, Applicant is E granted the following relief:
>
> (a) The first respondent shall immediately and forthwith release the applicant from custody pending regularisation of his papers or status in Zimbabwe.
>
> (b) Costs of suit"

At the hearing, para (a) of the final order was amended to read as follows.

"That you show cause to this Honourable Court why a final order should not be made in F the following terms:

(a) The first respondent shall comply with the court order in case number HC 368/11."

Mr *Mauwa* made the following submissions. The applicant has been staying in Zimbabwe since March 2004. He got married to a Zimbabwean citizen by G the name of Zerpheria Galioa and they solemnised their marriage in terms of the Marriage Act [*Chapter 5:11*] on 29 June 2004.

Following the solemnisation of their marriage, Zerpheria Galioa made an application for the applicant to be granted a residence permit. The applicant was issued with a residence permit for one year, from 27 September 2005 to 27 September 2006. Upon its expiration, it was extended for another two H

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years to 27 September 2008. However, his wife died on 2 October 2007, A almost a year before the expiration of his residence permit.

After the death of his wife and when his residence permit was about to expire, the applicant made an application to the first respondent to renew his residence permit which was due to expire on 27 September 2008. Instead of being granted two year permits, the first respondent started to grant him B 30 day or 60 day permits. In September 2010 the application to renew his residence permit was completely refused by the first respondent who did not furnish him with the reasons for the refusal.

The applicant's counsel submitted that due to good relations which existed between the applicant and his in-laws, he was given his late wife's sister as a new wife. They started staying together in July 2010 and on 26 October 2010 C the two solemnised their marriage in terms of the Marriage Act [*Chapter 5:11*]. The marriage certificate in question was attached to the application.

The applicant's counsel argued that by virtue of being married to a Zimbabwean citizen the applicant had the right to remain in Zimbabwe. He further argued that the first respondent had no right to refuse the applicant's application for D a residence permit without furnishing him with the reasons for refusal. As a result, the applicant challenged the first respondent's refusal to grant him the permit, in this court in case number HC 368/11. The application was granted in default as the first respondent and the then Co-Ministers of Home Affairs, who were the second respondents, did not attend the hearing. The default judgment was granted on 26 October 2011 and it reads: E

"It is ordered by consent that:

1. The decision by the first and second respondent in refusing to issue a resident permit to the applicant and declaring him a prohibited person in terms of the Immigration Act, be and is hereby set aside.
2. The respondents to bear the costs of suit." F

It is common cause that the respondents filed an application for rescission of the default judgment under case number HC 11427/11. However, that application is still pending. Mr *Mauwa* argued that since the application for rescission has not yet been granted what it means is that the default judgment is still in force and it is the one which authorises the applicant to stay in the country pending regularisation of his papers. G

Mr *Mauwa* further argued that the applicant's arrest on 29 May 2014 was arbitrary, contemptuous and in violation of the existing court order. It was submitted that there is no basis for the first respondent to declare the applicant a prohibited person as he has not committed any offence. It was further submitted that by virtue of being married to a Zimbabwean citizen, the applicant now H

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falls in the bracket of persons who are not prohibited persons in terms of s 15(1) A of the Immigration Act [*Chapter 4:02*]. A further argument that was made was that, by virtue of his second marriage, the applicant is protected by s 12(1)(a) of the Immigration Regulations, 1998 and the provisions of the Immigration Act. Mr *Mauwa* argued that the applicant's fundamental right to liberty in terms of s 49 of the Constitution of Zimbabwe has been B violated as he has been put in

prison without trial and without having been charged for any criminal offence. In short, the applicant wants to be released from prison pending regularisation of his stay in Zimbabwe.

The respondents filed a notice of opposition to the application. The first respondent is the one who deposed to the opposing affidavit which was C adopted by the second and third respondents. The first respondent argued that the permit which was issued to the applicant following his first marriage to Zerpheria Galioa was clearly denoted "spouse", meaning that it is issued to an alien on the strength of a marriage to a Zimbabwean citizen. He attached the permit in question. He further stated that such an application is made by the citizen spouse on behalf of the alien spouse. The citizen spouse would D be asserting his or her rights as a citizen of this country to stay with his or her alien spouse. He went on to attach the application which was made by Zerpheria Galioa on 26 July 2004 for a residence permit on behalf of the applicant who was now her husband. Following that application the applicant was granted a residence permit.

The first respondent submitted that this type of permit (a spousal residence E permit) is terminated by a decree of divorce, death of the citizen spouse or in situations where the alien becomes prohibited. He said that in respect of the applicant, the death of Zerpheria Galioa terminated the permit. As such the applicant was supposed to apply for a new permit on some other basis F or ground if he preferred to remain in Zimbabwe.

The first respondent stated that after the death of Zerpheria Galioa, the applicant made an application to renew his spousal residence permit. The first respondent attached the application in question. It is dated 17 September 2008. The first respondent said that the application failed for the sole reason that there was no basis whatsoever for the renewal of the permit as his wife G had died. At that time the applicant had not contracted his second marriage to Rosemary Galiao. The refusal was communicated to the applicant by way of a letter dated 13 September 2010. That letter was attached to the notice of opposition. The letter notified the applicant that his application had been refused in terms of s 29(2)(b) of the Immigration Regulations, 1998. The H letter further advised the applicant to bring this notification letter together

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with his passport to the nearest immigration office to finalise on his departure A arrangements.

The first respondent argued that after the letter of notification, the applicant's stay in Zimbabwe was now illegal, as he was now a prohibited person. He no longer had a valid status in Zimbabwe. It was submitted that it is a legal requirement that an alien should maintain a valid status all the time, yet since B October 2010 up to the time of his arrest on 29 May 2014, the applicant was in this country illegally. He did not seek to regularise his status but went on to institute a marriage with Rosemary Galiao and sought remedies in court.

The first respondent also submitted that even after his second marriage, no fresh application was made by the applicant's new spouse for the applicant to be granted a spousal residence permit. C

The first respondent submitted that they had taken note of the High Court order which was granted in default, which order they have applied to have rescinded. He said that in terms of s 14(4) of the Immigration Act [*Chapter 4:02*] it is a peremptory requirement that in declaring a person a prohibited person, there must be written notification to the affected person to that effect. D In the applicant's case no such written notification was ever made and as such the applicant was never declared a prohibited person by the Minister of Home Affairs. There was, therefore, no need for the court order to set aside the decision to declare the applicant a prohibited person as that declaration was non-existent.

The first respondent submitted that, in a letter dated 15 October 2010, E the Department of Immigration wrote to the applicant's erstwhile legal practitioners, Kantor and Immerman, explaining why the applicant had been denied the residence permit. In that letter, which is attached to the notice of opposition, it was explained that since the applicant's marriage to Zerpheria Galioa had been dissolved by a natural act of death and that since there had F been no children born out of the marriage, the applicant had no legal claim for a spousal residence permit. The first respondent said that letter did not state that the applicant had been declared a prohibited person.

The respondents argued that they do not understand the court order to authorise the applicant to stay in the country pending regularisation of his papers. Their argument is that for four years the applicant was in this country G illegally and never sought to regularise his stay. As it is, although

there is a court order which set aside the refusal to grant the applicant a permit, the applicant is still a prohibited person by operation of the law. He cannot remain in the country. His detention is lawful given that it is for purposes of removal. It was further argued that if the applicant wants to regularise his H

2014 (2) ZLR p217

Muremba J

stay he can either do it while he is in prison in Zimbabwe or from outside the A borders of Zimbabwe.

I had occasion to look at the file of case number HC 368/11 in which the applicant obtained the default judgment. It is clear that, although the applicant obtained an order setting aside the decision to declare him a prohibited person, B the applicant was never declared a prohibited person by the Minister of Home Affairs. In terms of s 14(6) of the Immigration Act, if the Minister declares a person to be a prohibited person he shall cause written notice thereof to be transmitted to the immigration officer. This means that for a person who has been declared to be a prohibited person there has to be written proof. In case number HC 368/11 such proof is non-existent.

I am inclined to agree with the respondents that the applicant was never declared C a prohibited person by the Minister, but he became a prohibited person by operation of the law when his permit expired. It is common cause that from 13 September 2010, which is the time his application to renew his spousal residence permit was refused, he had no legal authority to remain in Zimbabwe. That is the time that he should have departed from Zimbabwe. D Despite communication on two occasions from the first respondent that he should submit himself to the nearest immigration office with his passport to make departure arrangements, the applicant did not comply.

By remaining in Zimbabwe without a permit, the applicant contravened s 29(1)(a) of the Immigration Act which says that an alien shall not remain E in Zimbabwe unless he is in possession of a permit permitting him to remain in Zimbabwe. Therefore, he became a prohibited person in terms of s 14(1)(i) of the said Act. Section 14(1)(i) states that any person who has entered or remained in Zimbabwe in contravention of this Act or a repealed Act whether or not he has been prosecuted for such contravention is a prohibited F person. Upon becoming a prohibited person, the applicant should have left Zimbabwe. Section 17(1)(a) of the same Act disentitled him from remaining in Zimbabwe.

Instead of leaving Zimbabwe, he went on to get married to a Zimbabwean citizen. It is interesting to note that he solemnised his second marriage on 26 October 2010, just 11 days after the Department of Immigration had written G to applicant's erstwhile legal practitioners, Kantor and Immerman, explaining to them why their client had been denied the spousal residence permit. In that same letter, which is dated 15 October 2010, the Department of Immigration highlighted that the applicant's status in this country was now irregular and that as the applicant's legal practitioners they were supposed to make the H necessary arrangements with their office for the applicant's departure.

2014 (2) ZLR p218

Muremba J

The argument by the applicant's counsel that, by virtue of the applicant's A second marriage to a Zimbabwean citizen, the applicant now has a right to remain in Zimbabwe in terms of s 12(1)(a) of the Immigration Regulations 1998 (SI 1995 of 1998) and in terms of s 15(1) of the Immigration Act is, in my view, not correct. Section 15 of the Immigration Act specifies persons or classes of persons who are not regarded as prohibited persons. Under s 15(2)(d) B thereof, it is stated that a person who is married to a Zimbabwean citizen shall not be a prohibited person. I hold the view that the argument that the applicant is protected under s 15(2)(d) by virtue of his second marriage is not correct because his status of being a prohibited person preceded that marriage. At the time the applicant entered into his second marriage, he was already a prohibited person. The subsequent contraction of a marriage C does not reverse the status of a person who had become a prohibited person before the marriage. Otherwise this would open floodgates to prohibited persons under s 14 of the said Act to illegally enter Zimbabwe and find a Zimbabwean citizen to marry so that they are not removed from Zimbabwe.

In *Edwards* v *Chief Immigration Officer* 2000 (1) ZLR 485 (S) the appellant, D a British national, had been convicted of remaining in Zimbabwe without a permit to do so. In terms of s 14 of the

Immigration Act she thereby became a prohibited person. Attempts were made to remove her from Zimbabwe but she refused to leave. Instead, she went on to marry a Zimbabwean citizen. By virtue of her marriage, she sought an order declaring that she was entitled to remain in Zimbabwe. She lost the case in the High Court and made an E appeal to the Supreme Court. Gubbay CJ had this to say at 489E-490A:

> "Thus the actuality of being a prohibited person at the date of her marriage to a citizen of Zimbabwe effectively disqualified the appellant from becoming a non-prohibited person under para (d) to s 15(2) of the Act. A contrary interpretation would give rise to the ability of a prohibited person to evade the restriction against entry or removal from Zimbabwe by marriage to a Zimbabwean citizen. It would F defeat the predominant purpose behind immigration laws, which is to protect the State in the interests of its citizens by the control and supervision of aliens who seek to enter and remain within the country. The point is underscored by the following illustrations. Suppose a foreign prostitute, who under para (f) to s 14(1) of the Act is a prohibited person, were to enter the country illegally and marry a citizen of Zimbabwe. It would be absurd to suggest that by such marriage G she would receive the protection of s 15(2)(d) against removal from the country. Or take the situation of an alien who enters Zimbabwe lawfully but thereafter commits theft – an offence specified in Part I of the Schedule to the Act. While serving a sentence of imprisonment and so before being removed as a prohibited person, she marries a Zimbabwean citizen. Obviously the provisions of s 15(2) would be inapplicable and thus not result in the eradication of her classification. H

2014 (2) ZLR p219

Muremba J

> Accordingly, I share the view of the learned judge that the appellant's marriage did not A enable her as of right, and without the grant of the relevant permit, to remain living in this country."

In casu it was after his second marriage that the applicant approached this court challenging the refusal by the first respondent and the second respondent to renew his spousal residence permit following the death of his first wife. A B default judgment was granted in his favour. The judgment set aside the two respondents' refusal to issue the applicant with a residence permit and the decision that declared him a prohibited person. By virtue of that judgment, the applicant is arguing that he is entitled to stay in Zimbabwe and to be released from prison to enable him to regularise his papers. That judgment C has not yet been rescinded but I would like to point out that in my view if a person becomes a prohibited person by operation of the law as has happened to the applicant in the present case, the court has no power to reverse that status. Even the Minister of Home Affairs is not empowered by s 14(7) of the Immigration Act to revoke a prohibited person's status which is acquired in terms of s 14(1)(i).

After the default judgment was granted on 26 October 2011, the applicant did D not make any application to the first respondent in order to regularise his stay. The current application does not have such proof. At the hearing, the applicant's counsel produced two letters which emanated from his law firm. One was a letter dated 30 November 2011. It was addressed to the E first respondent giving him two days to regularise the applicant's status in compliance with the court order or risk being sued for contempt of court. The second one dated 2 August 2012 was addressed to the Co-Ministers of Home Affairs asking them to compel the first respondent to regularise the applicant's stay in compliance with the court order.

The first part of the default judgment simply sets aside the first and second F respondents' decision in refusing to issue a residence permit to the applicant. Other than that the judgment does not give any instructions to the respondents. The judgment does not order the first respondent to issue the applicant with a permit to enable him to remain in Zimbabwe. Further, the judgment does not interdict the first and second respondents from removing the applicant G from Zimbabwe while he regularises his stay.

In the absence of an order which instructs the first respondent to issue the applicant with a permit, it is not proper to assume that the order compels the first respondent to issue the applicant with a permit. I would go by the respondents' argument that after obtaining the default judgment, the applicant H ought to have lodged a fresh application for a permit with the first respondent.

2014 (2) ZLR p220

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In that regard, the first respondent was obliged to consider the applicant's A application afresh since their earlier decision not to grant him a permit had been set aside. This does not, in my view, mean

to say that the first respondent was obliged to grant the fresh application even if the applicant did not meet the requirements. If he did not meet the requirements, the application could still fail. There is no basis for the applicant to argue that the court order should be interpreted to mean that the first respondent was obliged to give B the applicant a permit irrespective of whether or not he met the requirements. The court order did not take away the first respondent's right to exercise his discretion on whether or not to grant the fresh application. Instead of making demands through letters, the applicant should therefore have lodged a fresh application to the first respondent for a permit in order for him to regularise C his stay. It was futile for the applicant's lawyers to think that they could compel the first respondent to issue the applicant with a residence permit on the basis and strength of a court order which did not give instructions to the first respondent to issue the applicant with a permit.

On 29 May 2014 the applicant was arrested and placed in prison pending D deportation. It is not in dispute that he was not charged with an offence. The argument by his counsel that his detention without trial is in contravention of s 49 of the Constitution of Zimbabwe does not, in my view, hold water. The first respondent argued, which argument I agree with, that by virtue of s 8(2)(a) and (b) of the Immigration Act he is empowered to remove or cause to be removed from Zimbabwe any prohibited person and pending such removal E he is empowered to detain the person. The section reads:

> "(2) Subject to subsections (5) and (6), an immigration officer may –
>
> (a) subject to subsection (3), remove or cause to be removed from Zimbabwe any prohibited person; and
>
> (b) pending the completion of arrangements for the removal of a person in F terms of paragraph (a) and such removal, subject to section *nine*, detain that person."

Section 9(1) of the same Act which deals with detention of persons states:

> "Subject to subsection (2), a person may be detained in terms of section *eight* in a prison, police cell or other convenient place."

The Immigration Act does not make it a requirement that every person who G has entered or remained in Zimbabwe unlawfully must be prosecuted. Section 14 thereof, which specifies prohibited persons, states under s 14(1)(i) that any person who has entered or remained in Zimbabwe in contravention of this Act or a repealed Act, whether or not he has been prosecuted for such contravention, is a prohibited person. H

Muremba J

All that is required in terms of s 8(2)(a) and (b) for a person to be detained is for A that person to be a prohibited person. It matters not that that person has not been charged with a criminal offence. *In casu* the first respondent argued that he did not see the benefit of having the applicant prosecuted. His office had handled his file since 2005. Other than contravening the Immigration Act by remaining in Zimbabwe after his permit had expired, B the applicant had not committed any other criminal offence. Section 8(2)(a) and (b) of the Immigration Act is not *ultra vires* s 49(1) of the Constitution. Section 49 (1) reads:

> "(1) Every person has the right to personal liberty, which includes the right –
>
> (a) not to be detained without trial; and
>
> (b) not to be deprived of their liberty arbitrarily or without just cause." C

The section makes it clear that the right to personal liberty does not include a right not to be imprisoned or detained at all but rather not to be imprisoned or detained without trial, arbitrarily or without just cause. The use of the word "includes" tells us that the right to personal liberty at the very least D incudes the right not to be detained without trial, not to be deprived of liberty arbitrarily or without just cause. The "and" comes after the semi colon. This means that ss 1(a) and 1(b) must be read disjunctively or separately.

This means that the section does not make it a requirement that in every case where a person's liberty is deprived that person ought to have been charged with a criminal offence and that there ought to be a trial. It is clear E from a reading of this section that there can be instances where a person's liberty is deprived without trial in terms of s 49(1)(b) but such deprivation of liberty should not be arbitrary or without just cause. In other words, in instances where there is deprivation of personal liberty without a criminal charge having been preferred, the deprivation thereof should be

authorised F by law or be in compliance with the law or it should be for reasons that are just in their substance. This means that the substantive validity of a decision to detain a person must be considered.

In the present case there was just cause in depriving the applicant of his personal liberty. His detention is not arbitrary because it was done in terms of s 8(2)(a) and (b) of the Immigration Act. He is a prohibited person who G refused to leave Zimbabwe after the expiration of his spousal residence permit. When the decision to refuse him the permit was set aside by the court on 26 October 2011, he did not for one year and nine months regularise his papers. The two letters that were written by his lawyers were of no consequence since they were just ordinary letters and not applications. More so, the last H letter was written on 2 August 2012. From that time up to the time of his

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arrest the applicant was just sitting. If he really meant to regularise his stay A and if he genuinely believed that the first respondent was under an obligation to issue him with a permit in compliance with the court order, he should have carried out his threat to sue for contempt of court, but he did nothing. Under the circumstances the applicant had ample time to regularise his stay if he wanted to. His inaction shows that he wanted to continue staying in Zimbabwe illegally. He cannot ask to be released from prison in order B to regularise his stay now. In any case the court order did not interdict the first and second respondents from removing the applicant from Zimbabwe pending the regularisation of his stay.

The application has no merit and as such it is dismissed with costs.

Mugomeza & Mazhindu, applicant's legal practitioners C

National Prosecuting Authority, respondents' legal practitioners

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[zRPz]S v MUSUMHIRI 2014 (2) ZLR 223 (H)

Citation	2014 (2) ZLR 223 (H)
Case No	Judgment No. HH-404-14
Court	High Court, Harare
Judge	Tsanga J
Heard	
Judgment	5 August 2014
Counsel	*R Murambatsvina*, for the applicant *I Muchini*, for the defendant
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – rape – evidence – of complainant – C credibility – need to avoid reliance on what "ideal" rape victim would do – need to consider cultural context and inhibitions placed on victim*

Headnote

In assessing the prospects of success on appeal in cases involving rape, it is D necessary that such cases are looked at, not just from the perspective of the person who has been convicted of rape, but also from the lens of the complainant who has experienced the rape. This is even more so in cases where the alleged rape has taken place between parties who are known to each other, as it is precisely in such cases that the administration of E justice can be hampered. In such situations, applicants for bail more often than not, when convicted, seek to take advantage of the fact that the two were known to each other: the conduct of their victims may generally fall short of the standard that society has so relentlessly crafted in terms of the expected behaviour of its ideal rape victim. She must F scream – very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim. If she knows her assailant she instantly loses credibility and the understanding is that she was not raped. It is the duty of the court to assess an application for bail pending appeal in rape cases unfettered by such dangerous myths which can clearly threaten the quest for substantive justice.

Research on cultural inhibitors to reporting gender-based violence and sexual G assault indicates that silence cannot be equated with acquiescence. Fear of lack of support from the family, fear of the consequences that might befall the complainant, which may include being totally blamed for the event, being thrown out of the home, or being forced to marry the rapist H are some of what keeps many women from not reporting. With women

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often held culturally as custodians of what is deemed to be appropriate A sexual conduct, and with the responsibility for sexual restraint being placed on a woman's shoulder, regardless of her age or power imbalances, it is understandable that a complainant may fail to report even when she was now free of the sexual assault.

The requirements to be met by a rape complainant should therefore not be B divorced from the cultural context that might contribute heavily to swift action not being pursued. A young girl who has been raped may not make a voluntary report because her cultural context makes it difficult for her to do so without being re-victimised. She may fail to report without delay as expected by the law, because in her lived reality she has no idea if she will receive support or condemnation, if not eternal C damnation. She may not report to the first person she could reasonably be expected to report for fear of being reduced to a liar and a tease. It is these realities that must therefore, with equal measure, inform the scrutiny of the likely prospects of an appeal in a rape case.

Cases referred to D

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

R v *C* 1955 (4) SA 40 (N)

S v *Makanyanga* 1996 (2) ZLR 231 (H)

Case information

R Murambatsvina, for the applicant E

I Muchini, for the defendant

Judgment

Tsanga J: This is an application for bail pending appeal in a matter where applicant was convicted of rape under s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 15 years' F imprisonment, of which four years were suspended on the usual conditions

of good behaviour, leaving an effective sentence of 11 years' imprisonment. He has appealed against both conviction and sentence and hereby applies for bail pending determination of the appeal.

Factually, the 47-year-old applicant is said to have raped a 16-year-old complainant after she had come to fetch water at a water point located on his G homestead. She was a form three school pupil and known to him in family circles, the two being supposedly related. He was found guilty of having perpetrated a single count of rape, using threats to kill her. A witness, one Efa Chigwedere, had stumbled upon them in the act and report having seen the applicant making coital movements. The applicant maintained in his H

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evidence that he did not rape her but had merely embraced her and that she was A in fact his girlfriend.

In summary, the grounds on which the appeal has been lodged are that the investigation officer did not attend the scene of the crime; that the medical affidavit contains information that the wounds were still fresh when it was carried out two weeks after the event; and that the rape report itself was B only made after rumours had circulated that the applicant and complainant were seen embracing each other. Another ground is that the applicant and complainant are not closely related, as was indicated in sentencing him. As regards sentence, it is contended that it is too harsh, manifestly excessive and induces a sense of shock. This is taking into consideration that the applicant C is a first offender.

Acknowledging that upon conviction the presumption of innocence no longer prevails, the applicant has laid out the main principles applicable in cases of bail pending appeal. These include the likelihood of absconding in light of the sentence imposed; the prospects of success of the appeal; the right of applicant to individual liberty; and the likely delay before the appeal is heard.

In its response the State's view is that the intended appeal is reasonably arguable D and that doubt exists that the sexual intercourse may have been consensual. According to the State, this is in light of the victim's failure to take the opportunity to scream and explain that a rape was in progress to the witness Efa Chigwedere who stumbled upon them. Also highlighted is E the complainant's failure to make a report soon after the rape to any person whom she may have reasonably been expected to make a complaint. *R* v *C* 1955 (4) SA 40 (N); *S* v *Makanyanga* 1996 (2) ZLR 231 (H) and *S* v *Banana* 2000 (1) ZLR 607 (S) were referred to. It is also the State's view that the report of the complainant may not have been properly admitted. Like the applicant, it also critiques the medical report which did not clarify whether F the injuries were consistent with a sexual assault which it says was three and a half weeks old. The State's view is also that the bail conditions are sufficient to allay fears of abscondment.

In assessing the prospects of success in bail applications pending appeal in cases involving rape, it is necessary that such cases are looked at, not just from the perspective of the bail applicant who has been convicted of rape, G but also from the lenses of the complainant who has experienced the rape. This is even more so in cases were the alleged rape has taken place between parties who are known to each other, as it is precisely in such cases that the administration of justice can be hampered. In such situations, applicants more often than not, when convicted, seek to take advantage of the fact that the two H were known to each other. The conduct of their victims may generally fall

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short of the standard that society has so relentlessly crafted in terms of the A expected behaviour of its ideal rape victim. She must scream – very loudly. She must show evidence of physical resistance. She must be battered and bruised if she is a genuine victim. If she knows her assailant, she instantly loses credibility and the understanding is that she was not raped. It is the duty of the court to assess an application for bail pending appeal in rape cases unfettered by such dangerous myths which can clearly threaten the B quest for substantive justice.

Research done in Zimbabwe through WLSA on cultural inhibitors to reporting gender based violence and sexual assault indicates that silence cannot be equated with acquiescence. Fear of lack of support from the family, fear of the consequences that might befall the complainant, which may

range from C being totally blamed for the event, being thrown out of the home to being forced to marry the rapist are some of what keeps many women from not reporting. See Alice Armstrong *Culture and Choice: Lessons from Survivors of Gender Violence in Zimbabwe* (WLSA, Harare, 1998) pp 126-128.

Having carefully examined the applicant's grounds of appeal in light of the D facts, and the State's response in light of applicable principles to be taken into account, I am of a different view regarding the prospects of success of this appeal. At the core of the definition of rape, in terms of s 65, is sexual or anal intercourse by a male person with a female person who has not consented to it. The applicant's first ground of appeal is that the investigation officer did not attend the crime scene. The evidence of the investigation officer is of course E useful in any criminal investigation. However, this does not appear to be a case where the case turned in any way on the attendance by the investigation officer to the place where the rape took place. Also the investigation officer stated that the applicant was not at home when he visited. The fact that he says he did not see the toilet appears is neither here nor there, looking at the F definition of rape and the factors that led to the conviction of the applicant.

The second ground on which the appeal has been filed touches on the medical report done on 12 May. The rape took place on 28 April so the report was done some 16 days after the commission of the offence. It was not three and half weeks later as alleged by the State in its response. The applicant's contention is that the report contains information that the wounds were still fresh. The G reason why I see little prospects of success on this ground is that the report does not at all describe the wounds as fresh but refers to "bruising (healing) with redness." To reject findings on bruising on the grounds of elapsed time appears to suggest that rape victims must adhere to an assumed stereotype regarding the nature and healing of their wounds. Failure to fit a stereotype H

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is unlikely to be a basis for tampering with the findings of the court below when A the evidence itself does not appear to point to a consensual sexual act.

The third ground which the appeal has been lodged is that the report was not instaneous and that the report and allegations were only made to run away from reprimand. Again, I see little prospects of success on appeal of the facts B if this case are examined objectively, shorn of myths that surround the kind of behaviour that constitutes the "good rape case" or what the "ideal rape victim" would have done under the circumstances. The evidence on record also appears to suggest that threats and use of force were used to engage in the sexual act. It is therefore certainly not outside the realm of possibility that a 16 year old threatened with force would be overcome with fear and C that her inaction would be largely due to this.

This is a case that pits a 47 year old man against a 16 year old school girl. Her failure to scream when she saw the said witness, Efa Chigwedere, needs to be viewed in this context. With women, often held culturally as custodians of what is deemed to be appropriate sexual conduct, and with the responsibility for sexual restraint being placed on a woman's shoulder, regardless of her D age or power imbalances, it is understandable that the complainant failed to report to Efa Chigwedere even when she was now free of the sexual assault. The requirements to be met by a rape complainant as set out in *S* v *Nyirenda* HB-86-03 should therefore not be divorced from the cultural context that might contribute heavily to swift action not being pursued. A young girl who E has been raped may not make a voluntary report because her cultural context makes it difficult for her to do so without being re-victimised. She may fail to report without delay as expected by the law because in her lived reality she has no idea if she will receive support or condemnation, if not eternal damnation. She may not report to the first person she could reasonably be expected to report for fear of being reduced to a liar and a tease. It is these F realities that must therefore with equal measure, inform the scrutiny of the likely prospects of an appeal in a rape case.

The fourth ground of appeal is that the complainant and applicant were not closely related and that the relations were not clearly explained. The record reveals that the reasons for sentence are captured as: the seriousness of the G offence; the age difference of 31 years between the accused; and the close relationship between the two. It was therefore not just that they were said to be closely related. It was therefore a combination of factors that influenced sentence. However, the sentence for a single count does seem to be on the high side and may indeed attract a reduction on appeal. Nonetheless this appears to be a case where applicant will serve a custodial sentence which H is unlikely to be affected by any delay in hearing the appeal.

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In light of all of the above, the application for bail pending appeal is hereby A dismissed.

Nyikadzino Simango Legal Practitioners, applicant's legal practitioners

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[zRPz]NYAMHUKA & ANOR v MAPINGURE 2014 (2) ZLR 229 (H)

Citation	2014 (2) ZLR 229 (H)
Case No	Judgment No. HH-425-14
Court	High Court, Harare
Judge	Tsanga J
Heard	8 & 14 August 2014; *CAV*
Judgment	18 August 2014
Counsel	*S Hashiti*, for the applicants *T Magwaliba,* for the respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Practice and procedure – *judgment – default judgment – rescission of – default due to faulty* C *service – judgment void, irrespective of merits*

Headnote

At the core of its nature, a default judgment is granted on the basis of failure D to plead or failure to defend. It is a result of non-observance of procedural considerations. The facts of the matter will not have been properly contested in a default judgment. Simply put, it is a judgment which is not on the merits. Consequently, it operates on shaky ground should the defendant seek to challenge it on the basis of it having been improperly E obtained, as the case may ultimately have to be heard on its full merits.

Among the reasons that can form the basis of challenging a default judgment is that it has been improperly obtained, because service in terms of the rules was faulty. Proof of proper service is obviously necessary in averting such a claim. Also, if the reason for challenging the regularity of a default judgment is that it was improperly taken due to defective F service, then such a judgment would ultimately be considered void in an application for its rescission and would, of necessity, be set aside. Its contents would be immaterial.

Cases cited

Blue Ranges Estate (Pvt) Ltd v *Muduviri & Anor* 2009 (1) ZLR 368 (S) G

Diocese of Harare v *Church of the Province of Central Africa & Anor* 2008 (1) ZLR 139 (S)

Magiviza v *Ziumbe* 2000 (2) ZLR 459 (H)

Mudzimuunoera Apostolic Church Bd of Trustees v *Mudzimuunoera Apostolic Church, Guruve Division & Anor* HH-92-10

Mushambadzi v *ZESA Staff Pension Fund* 2002 (2) ZLR 205 (S) H

Tsanga J

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), rr 241, 242 & 449

Case information

S Hashiti, for the applicants

T Magwaliba, for the respondent

Judgment

Tsanga J: This is an urgent application for stay of execution of a default B judgment granted in favour of the respondent on 23 July 2014. The default judgment against which the stay of execution is sought essentially gave the respondent exclusive use of certain church premises to the exclusion of the applicants. It had its deeper roots in an ongoing struggle for legitimacy and control of Church of God Prophecy following the death, in April 2014, of their father who was its founder. A separate matter on the leadership of the C church is pending in HC 3499/14. The parties to the urgent application are all siblings with the first and second applicants, being brother and sister, on the one hand, and the respondent being the other sister opposing them.

The circumstances leading to the default judgment are these. It is the applicant's averment that following their father's death, the first applicant D was the one appointed interim leader and subsequently Bishop of the church by the church elders. Dissatisfied with this turn of events, on the basis that her father had always indicated that she should be the leader of the church after his death, and having been barred by the applicants from the church, the respondent brought an urgent application before this court for reinstatement to E the church in May 2014. This urgent application under which the respondent sought an interim relief for the return of the keys of the temple and offices of the Church of God of Prophecy in Highfield pending finalisation of the case, was deemed not to be urgent. Thereafter the respondent contends that she elected to have the matter handled by way of an ordinary application in chambers. It is this ordinary chamber application which the applicants, in F this urgent application, say was never served upon them and under which a default judgement was granted in favour of the respondent.

The applicants have filed an application for rescission of judgment on the basis that the order that was granted to the respondent was granted in error, as the judge had been made to believe that the chamber application that was G before him had been served on the applicants and that they were in wilful default. At the core of the applicants' argument, as advanced through their counsel Mr *Hashiti,* is that where a judgment is susceptible to rescission it ought to be stayed since failure to do so would result in the enjoyment of fruits that are subject to reversal and, as such, are yet to be fully realised. Acknowledging the fact that the full merits of their application for rescission H

Tsanga J

are yet to be determined, they base their application on having made a *prima facie*A case for rescission. They draw strength on the sentiments expressed in *Mudzimuunoera Apostolic Church of Trustees* v *Mudzimuunoera Apostolic Church-Guruve Division & Anor* HH-92-10 where Makarau J, as she then was, stated as follows in similar factual circumstances:

> "That this court has power to stay the execution of its judgment is trite. The staying of B execution of judgment for whatever reason is a separate exercise of discretion by the court. It is not granted for the mere asking, as it seeks to suspend or defer enjoyment of a legal right or benefit upheld by the court in the judgment. It is therefore to be granted only if it is not in the interests of justice that such right or benefit be enjoyed by the respondent. The rationale for the position appears to be that once a litigant has been successful and has obtained 'fruits' from the C preceding litigation, such litigant should not be deprived of such fruits unless it is not in the interests of justice that they immediately enjoy the 'fruits' … It is clearly not in the interests of justice that the respondent enjoys fruits of litigation which may be reversed on appeal for review or may be set aside after the determination of an application for rescission."

The urgent application for stay is also founded on their assertion of undue D hardship and irreparable harm that will occur if the order granted in default is carried into execution notwithstanding the application for rescission, since their congregants would not be able to worship in the building where they celebrate their religious beliefs. In recognition of the fact that the respondent will equally face hardship from the stay of execution, the applicants rest E their application on an amended provisional order in which they will, in the interim, enjoy access to the premises in equal measure with the respondent's faction pending the determination of the application for rescission. In support of this standpoint they cite *Diocese of Harare* v *Church of the Province of Central Africa & Anor* 2008 (1) ZLR 139 (S) regarding shared access among F the disputants.

The respondent, on the other hand, vehemently objects to the application for stay of execution. Through her counsel, Mr *Magwaliba,* at the very core of her objection to the application for stay as being incompetent is the assertion that the applicants were at all times aware of the application that was brought before the judge in chambers. This is because they had been served G with the urgent application which subsequently changed into an ordinary chamber application. The respondent's assertion is that when the matter was deemed not urgent, she was still free to pursue it using normal routes since the dispute itself remained alive. On this basis, the respondent's position is correctly stated. She was thereafter still free to pursue the matter other than H by way of urgency. However, what is in dispute is whether the respondent

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thereafter bore no other obligation to serve the matter on the applicants in A whatever new form it subsequently took.

Central to Mr *Magwaliba*'s submission on behalf of the respondent's argument is that, having served the applicants with the notice of the urgent chamber application through their lawyers, there was no need thereafter to serve the same application as an ordinary chamber application. Effectively, as the argument is framed, the respondent's opponents were aware of the matter. B Therefore, according to this line of reasoning, when the judge was made aware of service having been effected when the respondent sought a default judgement, reference to service was to the urgent chamber application. As far as the respondent holds, it was the duty of the applicants to respond to the urgent application served which they had been notified of. It is also the C respondent's standpoint that the rules of court do not impose any obligation to serve the same matter twice. Furthermore, the respondent argues that following the granting of the order the applicants wrote to the judge who had granted the default judgement requesting that he exercise his discretion in terms of r 449 to reverse this order. It is argued that since a response is yet to be given to that letter, it is irregular on the part of the applicants to D launch this action for stay.

Also, at the heart of their resistance to the applicants' quest for stay, is that the order granted was in the form of a final order as it was a spoliation order and cannot be followed by some other proceeding. It is averred that the applicants cannot seek to counter the spoliation order. In addition, they E query the final order sought on the grounds that it is at the very heart of the leadership dispute that is pending before this court. It is their view that no competent order is sought on the return date since the matter of leadership is *lis alibi pendens*. It is also asserted that what the applicants seek is an interdict when the facts in their founding affidavit do not support the grounds for an interdict. *Magwiza* v *Ziumbe* 2000 (2) ZLR 459 (H) is cited in support F of the assertion that a cause of action must be fully spelt out in the founding affidavit. In light of all the above, the respondent seeks a dismissal of the applicants' quest for a stay of execution on the basis that a stay is not granted for the mere asking but can only be granted where some compelling fact entitles the judge to move. It is the respondent's view that nothing in this case compels such movement. G

In my view, the first issue to be addressed is whether the applicants' letter seeking that the judge who granted the default judgement invokes r 449 of the High Court Rules 1971, precludes them at this point from moving on with their urgent chamber application pending his response. The relevant part of the r 449 is couched as follows: H

2014 (2) ZLR p233

Tsanga J

> **"Correction, variation and rescission of judgments and orders**A
>
> (1) The *court or a judge* may, in addition to any other power it has, *mero motu* or upon application by any party affected, correct, rescind or vary any judgment or order –
>
> (a) that was erroneously sought or erroneously granted in the absence the nay party affected thereby; or
>
> … B
>
> (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 had notice of the order proposed" (emphasis added).

The letter was written to the judge in chambers on the last day of the court's C second term. The judge to whom the letter was addressed was currently not on duty and therefore he may not even have been aware at this point that an exercise of his discretion under r 449 had been sought. If this urgent application had been placed before me during term time when the judge would have been available it would, in my view, make perfect sense to ask the applicants to obtain his response since r 449 is clear regarding his D powers to rescind provided the other side has notice of the proposed order. However, he is not available and will most likely only have sight of the letter when the third term commences at the beginning of September. In the meantime, an application for rescission of the order has been made and, in addition, an urgent application for stay of execution has been sought. It E would, in my view, defeat the whole basis of an urgent application were I to pedantically insist that the wheels of justice should grind to a halt pending commencement of the third term, when the whole basis of retaining a core of masses of judges on duty during vacation is precisely to ensure that the cogs of justice keep running, particularly in cases of urgency. The route F which the applicants have now taken, which is to make an application for rescission in terms of r 449, is also a proper one, save to say that it clearly behoves the applicants to bring to the attention of the judge that following the letter written to him on the last day of term, they have since opted for a court application for rescission.

The second issue to be decided is whether the applicants have made out a *prima*G*facie* case for rescission, since the issue of stay of execution hinges essentially on this point. In assessing a failure to comply with procedural considerations, the rules of court are the necessary backdrop for determining whether conduct by one party fell short of the stipulated rules. The court file itself also helps in assessing whether any necessary time limits were H given and whether they expired unobserved by the defendant. Scheduled

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2014 (2) ZLR p234

Tsanga J

time frames within which action is to be taken are generally given so as to A ensure expeditious resolution of matters.

It is common cause that all chamber applications must be served on all interested parties. That much the applicants and the respondent are in agreement. Rule 242 of the High Court Rules, 1971 is couched as follows:

> **"242 Service of Chamber applications**B
>
> (1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had the notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following …"

The section then lists the applicable circumstances which both sides agree are not relevant to the case in point. The form used for urgent chamber applications C is Form 29 B, which again both sides agree was utilised in terms of r 241.

Rule 241(1) on form of chamber application is couched as follows:

> "(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies: D
>
> Provided that where a chamber application is to be served on an interested party it shall be in Form 29 with appropriate modification."

The distinctive characteristic of Form 29B is that it sets out, in summary form, the immediate nature of the basis of the urgency in an urgent application. Indeed, many urgent applications have, at their hearing, faced hiccups as a E point *in limine* is often raised by a respondent regarding failure to adhere to rules regarding the use of that form. The respondents often express annoyance at having to grope for the nature of urgency which should, in reality, be immediately apparent on the face of the document without having to resort to the certificate of urgency and the founding affidavit. F

This form does not contain any *dies induciae* since an urgent matter, if deemed urgent, is set down for hearing as a priority upon notification to the other side. Once a matter is deemed not urgent, then if pursued by the applicant, it is heard following applicable rules under the normal procedure chosen. It is with regard to procedural due process after a matter is deemed not urgent G that the applicants and the respondents differ in their interpretation of the rules. The applicants aver that once the urgent chamber application became an ordinary chamber application, a different form, that is Form 29 as set out in the proviso to r 241, was the requisite form to be utilised. It gives the respondents a time frame of 10 days to respond. They were never served the ordinary chamber application in this form. H

2014 (2) ZLR p235

Tsanga J

Counsel for the respondent takes the view that, having served the urgent A chamber application, then r 242, which exempts service where a party already has previous notice of the order sought applies. However Form 29 was clearly not used.

Counsel for the respondent concedes that there was tailoring of the draft B order to suit an ordinary chamber application, but he is steadfast that there was no need for re-service.

I am cognisant that, with an application for rescission pending, what is required of me at this point is a simple assessment of whether the applicants have a *prima facie* case that justifies a stay of execution of the order obtained by C the respondent. On the face of it, the applicants seem to have a point. I say this because the urgent application that changed into an ordinary chamber application procedurally became another case altogether. It obtained a new case number and was allocated afresh to a judge as an ordinary chamber application. It was a new application that called for notification to the other party, and Form 29 which has a *dies induciae* ought to have been D used. Procedural due process dictates that the other side be notified. The respondent's argument that the matter immediately became an ordinary chamber application is also not supported by the facts on record. From the correspondence on record in the applicable file, it appears to have initially wormed its way to the unopposed roll where queries were raised before it landed on a different judge as an ordinary chamber application. That the E new ordinary chamber application was not served as such is not disputed. The reasons for not so doing, in my view, appears to rest on quicksand. The applicants have made out a *prima facie* case based on the non-observance of procedural due process regarding the service of the ordinary application. They could not know without notification the details of the new case, the time F frame within which they had to respond to the application if they wished to oppose it or to whom it is has been allocated, since they had not been notified.

The argument that what was granted was a final order becomes problematic where the order is potentially void, due to non-observance of procedural due process, and is likely to be set aside. Moreover, the order was obtained by G way of a default judgment. As was stated in *Blue Ranges Estate (Pvt) Ltd* v *Muduviri & Another* 2009 (1) ZLR 368 (S) at 379:

> "Many orders which are final in form are in fact interlocutory, whilst some which are interlocutory in form are in fact final and definitive orders. The test is whether the order made is of such a nature that it has the effect of finally determining the issue or cause of action between the parties such that it is not a subject of H any subsequent confirmation or discharge."

2014 (2) ZLR p236

Tsanga J

The order *in casu,* obtained precariously through a default judgment, is already A being challenged and can hardly be claimed to have disposed of the matter to finality. At the core of its nature, a default judgement is granted on the basis of failure to plead or failure to defend. It is a result of non-observance of procedural considerations. The facts of the matter will not have been properly contested in a default judgement. Simply put, it is a judgment which is not on the merits. Consequently, it operates on shaky ground should the defendant B seek to challenge it on the basis of it having been improperly obtained as the case may ultimately have to be heard on its full merits.

Among the reasons that can form the basis of challenging a default judgment is that it has been improperly obtained because service in terms of the rules is faulty. Proof of proper service is obviously necessary in averting such a C claim. Also, if the reason for challenging the regularity of a default judgment is that it was improperly taken due to defective service, then such a judgement would ultimately be considered void in an application for its rescission, and would of necessity be set aside. Its contents would be immaterial. Thus *in casu* the respondent's arguments regarding the nature of the judgment and the rights it accords would fall away for consideration at this point where D there is a *prima facie* case for rescission on the basis of defective service.

I now turn to the nature of the provisional order sought. The respondent's primary objection is that the final order seeks to dispose of the matter in the pending case on the leadership issue. Also, the respondent objects to the interim relief sought on the basis that it is in the form of an interdict, when E neither a clear right nor a *prima facie* right was averred to by the applicants in their papers. As stated in *Mushambadzi* v *ZESA Staff Pension Fund* 2002 (2) ZLR 205 (S) *,* referred to by counsel for the respondent, with regard to a temporary interdict, the following must be established:

(a) a right which though *prima facie* established is open to some doubt; and

(b) a well-grounded apprehension of irreparable injury; and F

(c) the absence of any other remedy; and

(d) the balance of convenience favours the applicant.

That the applicants have a *prima facie* case at least for the rescission of the judgment has already been established. The urgent application cannot be G looked at piecemeal or in isolation to its other related matters that inform the dispute. Though under dispute, the applicants already had a *prima facie* right in that they are the ones in possession of the church by virtue of the first applicant having been declared head of the church prior to the obtainment of the default judgment and pending determination of the leadership matter. I do not think that the applicants are overreaching in their application for H

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of a temporary interdict founded on a *prima facie* right. Moreover, the fact that A the judgment purporting to divest these *prima facie* rights is likely to be voided is at the heart of the urgent application.

What stands to be decided is whether the provisional stay of execution as reconstituted by the applicants to accommodate the respondents ought not B to be granted because the final order encroaches on a pending matter, that is the determination of the leadership dispute. An urgent application is basically brought to determine a provisional order as a matter of urgency. What has to be decided in this urgent application is the provisional order and not the final order, although of course both have to be examined for any glaring inconsistencies that would prevent the granting of a provisional order.

As emphasised by Ziyambi JA in the *ZESA* case *supra* at p 207, the High Court's C power to stay execution is generally pending the application for rescission of judgment or the happening of some event such as the hearing of an appeal or the hearing of an interpleader or so on. The concern in the *ZESA* case *supra,* when both the provisional and final orders were examined, was D that no application for rescission was pending. *In casu* there is an application for rescission pending as well as one for the determination of the leadership dispute. There is therefore nothing to stop the respondent from challenging the grant of a final order in the terms sought by the applicants whilst these matters are still pending.

Key to the granting of a provisional order for stay of execution is the E minimisation of irreparable loss. The gravity of the injury to be suffered if the relief sought is not granted is equally of significance. Comparative hardship to either party is also key. The varied order does not seek a

return to the *status quo* that antedated the default judgement. Instead, it seeks to accommodate the respondent. The applicants varied their order because what F they initially sought would have resulted in the respondent sustaining the same loss of rights as the applicants themselves have apparently suffered as a result of the default judgement. In assessing whether the provisional order as varied that is sought is competent, I do so alive to the possibility that my interlocutory assessment of a *prima facie* case may ultimately be different from the decision that is granted in the application for rescission. Given this G possibility, clearly an order which seeks to minimise any harm to the legal rights of each of the parties ought to be favoured.

In my view, pending the determination of both these matters what has to be avoided is an outcome which fuels more "punching" and "counter punching". Each party in this matter has already engaged litigation in full force. Already H four court matters have been filed in the few months since the death of the

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founder. None have as yet been determined on the merits. Each party has its A own story of victimisation by the other and its own reasons for resistance. Efforts to get the parties to bargain on interim access were strongly resisted by the respondent in particular fearful of her followers reactions to what would no doubt appear to them as a loss of "a bird in hand".

No doubt, in so far as the parties have opted to use a court-centred strategy B to resolve their internal disagreements, ultimately a final court decision will have to be made on the opposing claims. In church disputes of this nature, where both sides are ultimately competing for power and legitimacy pending the full determination of any matter, the nature of stay that the court grants is of significance. Any provisional order in such circumstances when deemed appropriate to grant, must, in my view, be one which desists from making C a decision that can be taken, even remotely, as a reflection of the truth of the competing claims. Any pronouncement in the provisional order will undoubtedly affect the behaviour of parishioners on the ground. It is, in my opinion, more so for this reason that pending any final determination of the matter at an interim juncture, an equal protection approach should form the D backdrop of the temporary outcome. An accommodative interim arrangement avoids taking a conclusive and authoritative stance on any pending matter. Having concluded that the applicants appear to have a strong *prima facie* case for rescission, a stance that does not run counter to each party's exercise of its religious freedom is the only sensible option, otherwise there may be irreparable injury. Since this is what is sought in the provisional order, my E view is that it should be granted. The balance of convenience favours the applicants.

Accordingly, a provisional order is granted to the applicants as prayed for in the following terms:

1. Pending the hearing of the rescission of the default judgment handed F down on 23 July 2014 by Mafusire J it is ordered that:
   (a) the applicants and the respondent shall share the Headquarters of the church at no. 8679 Mangwende Drive, Highfield, Harare during alternative periods as follows:
      (i) the respondlr_inent to occupy the Headquarters on Mondays, G Wednesdays, Fridays and Sunday Mornings between the hours of 07:00 to 12:00;
      (ii) the applicants will occupy the Headquarters on Tuesdays, Thursdays, Saturdays and Sundays between the hours of 14:00 to 19:00; H

      (iii) each faction of the Church loyal to the applicants and the respondent A has to honour and abide by its allocated slot. In the event of any breach the Officer-in-Charge, ZRP Machipisa, is hereby authorised to assist the Deputy Sheriff to enforce the observance of the time slots.
   (b) The keys to the Headquarters are to be restored to the caretakers and B or /wardens who are directed to observe the time slots in paragraph (a) above.
2. The applicants and the respondent are to have equal peaceful and undisturbed access to House No. 1096, Mutarazi Close, Houghton Park, the house of their late father Bishop Kenneth Nyamhuka whenever the C need arises.
3. Both parties are to keep peace towards each other and to refrain from threatening each other.

4. Each party shall bear its own costs.

Mushonga, Mutsvairo & Associates, applicants' legal practitioners D

Danziger & Partners, respondent's legal practitioners

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[zRPz]S v MASEKO & ANOR 2014 (2) ZLR 240 (H)

Citation	2014 (2) ZLR 240 (H)
Case No	Judgment No. HH-433-14
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	6 August 2014; *CAV*
Judgment	19 August 2014
Counsel	*K Maeresera*, for the applicant *R Chikosha*, for the respondent
Case Type	Bail appeal
Annotations	No case annotations to date

Flynote

Appeal – *criminal matter – suspension of portion of sentence relating to* C *community service and restitution – refusal by trial magistrate to suspend such punishments pending appeal – appeal against such refusal – may be heard on same basis as appeal against refusal to grant bail*

Criminal procedure (sentence) – *community service – suspension of – appeal* D *to High Court from a decision of a magistrate refusing to suspend community service pending appeal – such appeal may be heard by a single judge of the High Court sitting as a bail court*

Headnote

The appellants were convicted of fraud and sentenced to a period of E imprisonment, part of which was suspended on conditions relating to future good behaviour and restitution, and part on condition that they performed community service. They applied for the suspension of the community service and payment of restitution pending appeal. Their application was rejected by the magistrate and they appealed to the High Court. The issue was whether such an appeal should be heard by a single F judge, as a bail application, or by bench of two judges, like other appeals.

Held, that this appeal was akin to an appeal where bail has been refused by a magistrate. Community service forms part of the sentencing options in our jurisdiction. It is a form of restriction imposed on an accused person who has been found guilty of committing an offence. When an G accused person seeks suspension of the sentence of community service, all he is

saying is that the court should suspend the operation of the sentence of community service until his appeal is determined. Equally so when he is seeking suspension of payment of restitution. At this stage the court is not dealing with the substantive appeal; it is merely looking at whether an appeal court is likely to set aside the conviction H

2014 (2) ZLR p241

Matanda-Moyo J

and sentence. Community service must be treated as a deprivation of liberty, A just like imprisonment. Where an appeal is made from a decision of the magistrates court, refusing an application for the suspension of community service, pending an appeal, such an appeal may be determined by a single judge of the High Court, sitting as a bail court, rather than by two judges thereof, sitting as a full court of appeal.

Case cited B

S v *Gumisai & Ors* HH-177-12

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 63

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 121(2)(b) C

Case information

K Maeresera, for the applicant

R Chikosha, for the respondent

Judgment

Matanda-Moyo J: This is an appeal against a magistrate's decision refusing to D suspend the operation of sentence pending determination of an appeal.

The brief facts are that the appellants were tried and convicted of fraud in contravention of s 136 of the Criminal Law (Codification and Reform) Act [*Chapter* 9:23]. They were sentenced to 24 months' imprisonment of which 6 E months were suspended on good behaviour. A further 8 months' imprisonment was suspended on condition of restitution. The remaining 10 months were suspended on condition applicants complete 350 hours of community service at ZRP Mabelreign and ZRP Primary School respectively. The appellants applied for the suspension of community service and payment of restitution F pending appeal. The application was heard by a magistrate on 19 June 2014. The application was dismissed, leading to them filing this appeal. The appeal was set down before a judge in the bail court. The question for determination is whether such an appeal is determinable by a single judge hearing a bail application or whether the appeal should be determined as a proper appeal set down before two judges of the High Court.

It is common cause the High Court is sitting as an appeal court in determining G whether the trial magistrate erred in denying appellants the relief sought.

The appellant submitted that an appeal of this nature should be heard in the same manner as that which is heard after a decision made in terms of s 63(b)(i) of the Magistrates Court Act, that is where an accused person appeals H against the granting of bail pending appeal by a magistrate. An accused

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2014 (2) ZLR p242

Matanda-Moyo J

person whose bail has been refused has a right of appeal in terms of s 121 A of the Criminal Procedure and Evidence Act and such appeal is heard in the bail court.

I am of the view that this appeal is akin to an appeal where bail has been refused by a magistrate.

Community service forms part of the sentencing options in our jurisdiction. B It is a form of restriction imposed on an accused person who has been found guilty of committing an offence. When an accused person seeks for suspension of the sentence of community service, all the accused is saying is that the court should suspend the operation of the sentence of community service until

his appeal is determined. Equally so when he is seeking suspension of payment of restitution. I can liken this process to bail pending appeal. I say C so after carefully scrutinising s 63 of the Magistrates Court Act [*Chapter 7:10*] which provides;

> **"63 Execution of sentence of imprisonment, fine or community service not suspended pending review or appeal unless bail is granted**
>
> The execution of any sentence of imprisonment or a fine or community service shall not be suspended by: D
>
> (a) …
>
> (b) the noting of an appeal referred to in section sixty;
>
> unless –
>
> (i) …
>
> (ii) in the case of community service, an application is granted by E the magistrate to suspend the operations of the sentence pending determination of the appeal."

The above provisions appear under the same heading, meaning the two fall in the same class and the procedures used in dealing with such applications are the same. F

Section 21 of the Criminal Procedure and Evidence Act [*Chapter* 9:07] deals with appeals regarding bail application. Section 121(2)(b) provides:

> "(2) An appeal in terms of subsection (1) against a decision of –
>
> (a) …
>
> (b) a magistrate, shall be made to *a judge of the High Court"* (my own emphasis). G

I understand the above section to be referring to appeals against a magistrate's decision made in terms of s 63 of the Magistrates Court Act cited above. Such appeals lie to a single judge of the High Court.

At this stage the court is not dealing with the substantive appeal. The court is merely looking at whether an appeal court is likely to set aside the conviction H

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and sentence. (Community service and restitution form part of sentence). This is A not the sort of appeal to be determined by two judges of the High Court. As reiterated above, this appeal is akin to an appeal against refusal of bail by a magistrate.

I share the same views as expressed by Mathonsi J in *S* v *Gumisai & Others*B HH-177-12, that is, that community service is a deprivation of liberty just like imprisonment. The bail court is thus the right court to entertain such an appeal. Obviously, this type of appeal, as an appeal against refusal of bail by a magistrate, must be speedily resolved. If treated as an ordinary appeal there is a real likelihood that by the time the appeal is heard, the appellants would have completed the punishment. This is just a reprieve between the C present and the time the appeal is heard so as to avoid punishing individuals whose appeals enjoy good prospects of success.

Accordingly the bail court is the proper court to deal with such appeal. The court has powers to rehear the application afresh. Since the application is not opposed, and rightly so, I hereby grant the order sought as follows:

> The performance of community service and payment of restitution by the D appellants be and is hereby suspended pending determination of the appeal in case No. CA 515/14.

Maeresera & Partners, appellant's legal practitioners

Prosecutor-General's Office, respondent's legal practitioners E

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[zRPz]GUARDIAN SECURITY (PVT) LTD v GLOBAL INSURANCE (PVT) LTD 2014 (2) ZLR 244 (H)

Citation	2014 (2) ZLR 244 (H)
Case No	Judgment No. HH-434-14
Court	High Court, Harare
Judge	Mafusire J
Heard	11, 12, 13 June & 1 July 2014; *CAV*
Judgment	20 August 2014
Counsel	*E T Moyo,* for the plaintiff *C Kwirira*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Insurance – *cover note – effect of – whether insured is protected when cover note issued – premium – payment of – failure to pay premium in part or in full – does not necessarily relieve insurer of obligation to protect insured – depends on wording of contract* D

Headnote

In insurance law a cover note, or certificate of insurance, is part of the contract of insurance. It provides temporary cover until a detailed proposal has been accepted or until the insurer has accepted the insured's proposal. The general practice is that the cover note is issued by the insurer's E agent. A cover note records the receipt of a premium from the insured. In consideration the insurer agrees to insure him for the period stated in the note. Once a cover note has been issued, it creates a binding insurance for the period of time specified in it. The temporary cover invariably takes effect at once, since its object is to give immediate protection pending the decision of the insurer and the issue of the policy. Where an insurer F issues cover notes and releases them to the insured, it assumes risk. It would be liable to third party claims in terms of Part IV of the Road Traffic Act [*Chapter 13:11*].

Generally, a contract of insurance is vitiated by the non-payment of the premium. A premium is generally a condition precedent to the existence of G the contract. *Prima facie*, the *quid pro quo* for a premium is an indemnity. The reverse is also true: *prima facie*, the *quid pro quo* for an indemnity is the premium which has been paid. The premium is the consideration required of the insured in return for which the insurer undertakes his obligations under the contract of insurance. There is no rule of law to the effect that there cannot be a complete contract of insurance concluded H

Mafusire J

until the premium is paid. It has been held in several jurisdictions that the A courts will not imply a condition that the insurance is not to attach until payment, though whether or not a contract of insurance will attach only upon payment will depend on the exact terms of the parties' agreement. Where the agreement clearly states that the prior payment of the premium is a

condition precedent to the protection or cover sought B by the insured, then, until such payment is made, the policy will be of no effect in protecting the insured.

Cases referred to

African Guarantee & Indemnity Co Ltd v *Couldridge* 1922 CPD 2

Joel Melamed & Hurwitz v *Cleveland Ests (Pty) Ltd*; *Joel Melamed & Hurwitz* v *Vorner Invstms (Pty) Ltd* 1984 (3) SA 155 (A)C

National Employers' Mutual General Ins Assn Ltd v *Myerson* 1938 TPD 11

Wood's Trustees v *SA Mutual Life Assurance Soc* (1892) 9 SC 220

Case information

E T Moyo, for the plaintiff

C Kwirira, for the defendant D

Judgment

Mafusire J: The defendant was an insurance company. The plaintiff sued it for US$58 189, this being the replacement value and cost of repairs in respect of two vehicles which had been involved in accidents. The plaintiff claimed that it was insured by the defendant in respect of those vehicles. The E first vehicle had been declared a write-off. Its insured value was $55 000. The second vehicle would cost $3 189 to repair. It was those two amounts that made up the claim for $58 189.

The defendant repudiated the claim. The basis was that the plaintiff had not paid the full premium due for the period in question for the plaintiff's ten F vehicles insured with it. The plaintiff argued that it had.

The one and only issue separating the parties was whether the plaintiff's vehicles that had been insured with the defendant at the time had been on a single contract of insurance or on separate contracts for each of them. In other words, did each of the vehicles have separate policies as the plaintiff G contended, or were all the vehicles treated as one package on a single policy as the defendant argued? If each vehicle was a separate contract, then the plaintiff might have paid the premium due for those two vehicles in full. But if all the vehicles were one package, then the plaintiff's premium was probably underpaid. How such confusion would arise over what ordinarily would be an elementary aspect of any contract of insurance will become H apparent shortly.

Mafusire J

The plaintiff's story was told by its one and only witness, Mr Alois Mavhurere A (Mavhurere). He was the transport manager at the time. He said it was his business to ensure that the plaintiff's vehicles were properly insured.

The defendant's story was told by two witnesses: Mr Member Murasiranwa and Ms Dorothy Shamba (Shamba). At the time they were branch manager and agent respectively. B

There was a great deal of convergence in the two stories. Thus most facts were common cause. They were these. Sometime in 2012 the defendant canvassed for business from the plaintiff. Shamba and one other person, a Ms Mboko (Mboko) from the defendant, visited Mavhurere. Mboko was a relative of the plaintiff's chief executive officer. But Mavhurere would deal with Shamba . At the time Shamba had just been engaged as an insurance C agent. So she was still a novice in the insurance business. At his request Shamba quoted Mavhurere for ten vehicles. Subsequently, a contract of insurance was concluded between the two. The plaintiff made some payments. They amounted to $1 320. The defendant issued, among other things, cover notes for all ten vehicles covering the period of insurance. It was from the beginning of February 2012 to the end of May 2012. The accidents happened D in May 2012. Thus, it was still during the subsistence of the contract.

The plaintiff submitted a claim. The defendant arranged with an insurance assessor to assess the extent of the damage. The one vehicle was declared a write-off. As regards the cost of repairs for the other vehicle, the assessor agreed on a certain figure. Several quotations had been received

from various E panel beaters. The assessor authorised the repairs. Later on the defendant repudiated the plaintiff's claim on the ground that the premium for all the ten vehicles had not been paid in full.

On the contentious issues, the plaintiff's case was this. Due to its difficult financial situation at the time it could not afford to insure all the vehicles at F the same time. Mavhurere said it was his agreement with Shamba that the plaintiff would insure each vehicle separately. No cover note would become binding until such time that the plaintiff would have paid for it. Despite the number of vehicles on Shamba's quotation the plaintiff had already been insured with other insurance companies. Insurance for third party cover cost $30 per term with other insurance companies. But the defendant's rates G were $35. To secure the plaintiff's business Shamba had offered to pay the difference in order to make the defendant's rates competitive.

In the plaintiff's bundle of exhibits were copies of three receipts of payments by the plaintiff to the defendant. The amounts were $1 000 on 17 February 2012; $105 on some date in February 2012 that I could not make out, and $215 on H

Mafusire J

20 February 2012. In addition, the plaintiff produced a copy of a diary page which A was marked exhibit 1(B). The date on that page was 17 February 2012. It had two inscriptions on it in long-hand. The first had been crossed out. It was like this: "~~HANDEDOVER FOUR HUNDRED DOLLARS ONLY FOR BMW REG. No ACG 0122 COMPREHENSIVE INSURANCE COVER TO DOROTHY (GLOBAL INSURANCE)~~". The second inscription, which was B not cancelled, and which formed a material part of the plaintiff's case, read: "HANDEDOVER EIGHT HUNDRED AND TWENTY FIVE DOLLARS FOR 2 x VEHICLES INSURANCE (COMPREHENSIVE) REG NO ABT 0813 & ABT 0725 SIGNED (indecipherable signature) 63 – 1282891 E 47".

The vehicle described in the second inscription as ABT 0725 was one of C the two involved in the accidents. It was the one that had been declared a write-off. It was the one the replacement value of which was US$55 000. Mavhurere said the document was proof that the plaintiff had insured each of its vehicles separately.

Shamba admitted signing exhibit 1(B). It was her national identity number D that was written on it. But she denied she had signed the document any time in February 2012. She maintained it was sometime in May 2012. She said Mavhurere had called her to his office. At that time the plaintiff had already made three payments for the insurance policy. The payments had been in tranches: $1 000, US$105 and $215. She said Mavhurere explained that the E plaintiff wanted the signed documents for its records. She had insisted on some written confirmation. Mavhurere had promised to send her an e-mail. But he never did. Instead, three days after signing exhibit 1(B) Mavhurere had phoned to inform her about the accident.

The totality of the defendant's evidence was that the plaintiff had a pre-existing F motor policy with the defendant in respect of one car. The new business concerning the ten cars was just an upgrade. The plaintiff was adding more cars to that policy. After the new contract an endorsement had been sent to the plaintiff which, among other things, itemised the vehicles covered, the type of cover, the insured value for each and the third party limit. Because of its challenging financial situation the plaintiff had been allowed to pay the G premiums quarterly. Furthermore, it was given the latitude to pay an amount as a deposit to actualise the contract. The deposit was $1 000. It was paid on 17 February 2012. However, the plaintiff would be required to pay the balance of the quarterly premium soon thereafter. Shamba had made several phone calls to Mavhurere for the balance of the premium. However, despite H promises the plaintiff had never paid.

Mafusire J

It was also the defendant's evidence that after the accidents the plaintiff had A requested a copy of the endorsement document. The defendant had delivered it. The defendant said it is standard procedure to engage an insurance assessor to assess the damage to the insured vehicle once a claim has been submitted. In this case when the defendant checked its records and discovered that the premiums had been outstanding it repudiated the claim. In the insurance industry there is no contract of insurance where the premium has not been B paid or where it has been paid only in part.

The defendant dismissed exhibit 1(B). Among other things, it said it was an informal document that nobody recognised. Furthermore, the information on it was false. The plaintiff had not paid $825 on 17 February 2012 or at any time. The amount the plaintiff had paid on 17 February 2012 was $1 000. C There was a receipt to back that up. The defendant said exhibit 1(B) was an attempt by Mavhurere to reconstruct the contract. There had been no individual contract for individual vehicles but a globular policy for such of the plaintiff's fleet as had been insured with it.

I have considered the evidence as a whole. The plaintiff's case is limping. D The defendant's case reads better. Evidently Shamba was a rookie. The defendant's counsel concedes as much in his closing submissions. She confused issues. She was somewhat careless. For example, her quotation for the ten vehicles was undated. The figures on the premiums paid and the premiums due did not add up. On being pressed, she started saying she had E submitted two quotations: the first that did not have the payments by the plaintiff, and the second that reflected the payments by the plaintiff. But still her figures have been difficult to reconcile.

Shamba undoubtedly blundered. The copy of the endorsement document that she said she sent to the plaintiff after the conclusion of the contract was dated 17 July 2012. That was well after the accident and even after the F plaintiff had already issued summons. She said the date was a systems error. But there was more. There was no consistency on the cover notes particularly in relation to the exact date when the period of cover had begun in February 2012. Some cover notes had 1 February. One had 3 February. Most had 4 February. One had no date at all. G

To cap it all was exhibit 1(B). There was no conceivable reason why Shamba signed that document when she had not been given that kind of money by the plaintiff. Apparently she had never concerned herself with the date on which she had signed the document until in cross-examination when the plaintiff's counsel was tearing into her. There was also no record of delivery of any of H

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the documents that she said she had delivered to the plaintiff. These included the A endorsements and the policy document.

However, in spite of Shamba's blunders I still find the defendant's case the more plausible. On the standard of proof in civil cases the plaintiff's counsel has in his closing submissions made reference to *Joel Melamed and*B*Hurwitz* v *Cleveland Estates(Pty) Ltd*; *Joel Melamed and Hurwitz* v *Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A). A trial in a civil case involves finding facts or inferences of facts by balancing probabilities and selecting a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion may not be the only reasonable one.

Shamba might have confused matters in her dealings with the plaintiff. However, C I have not seen or read anything sinister in her conduct. The plaintiff's strongest point was exhibit 1(B). But viewed against the totality of the evidence it was its weakest. The plaintiff did not pay $825 on 17 February 2012 or at any time. It is curious that the document purported to D apportion the false payment to two vehicles. One of them happened to be one of the two involved in the accidents. Why would the plaintiff require this particular record only once and not in respect of all the payments that it made? Why was that kind of endorsement not made on the actual receipt of payment? What sounds plausible is that Mavhurere tried to take advantage of Shamba, a novice. I find it probable that in spite of the diary date on that E document, Shamba signed it in May 2012 after the accident. The document was an attempt by Mavhurere to reconstruct the contract of insurance to read retrospectively that there were separate contracts for separate vehicles instead of a globular contract for the whole fleet.

In insurance law a cover note, or certificate of insurance, is part of the contract F of insurance. It provides temporary cover until a detailed proposal has been accepted or until the insurer has accepted the insured's proposal; see Gordon and Getz *The South African Law of Insurance* 3 ed at pp 134-135. The general practice is that the cover note is issued by the insurer's agent. *MacGillivray & Parkington on Insurance Law* 8 ed discuss some characteristics of a cover note in Chapter 4. They say in paras 283-293 that a cover note records the G receipt of a premium from the assured. In consideration the insurer agrees to insure him for the period stated in the note. Once a cover note has been issued it creates a binding insurance for the period of time specified in it. The temporary cover invariably takes effect at once since its object is to give immediate protection pending the decision of the insurer and the issue H of the policy.

Mafusire J

In this case when the defendant issued those cover notes and released them A to the plaintiff, it had assumed risk. It would be liable to third party claims in terms of Part IV of the Road Traffic Act [*Chapter* 13:11]. Mavhurere claimed that his agreement with Shamba was that even though the cover notes had been released to him as one block, the plaintiff would hold onto them until it had paid for each. They would only come into force one by one upon payment. In the meanwhile they would remain invalid. B

In my view, that kind of story is ludicrous. If the plaintiff had insured its vehicles with other insurance companies, all Mavhurere needed to do was to reject or return Shamba's cover notes. He did not. Instead he went on to licence the ten vehicles using Shamba's cover notes. But be that as it may, none of this proves whether or not the defendant insured the plaintiff's C vehicle individually or as a package. What it helps show is that Mavhurere was not being truthful.

I also find it incredible that Shamba would have offered to pay part of the premium for the plaintiff, allegedly so that it did not have to pay more than it would if it had insured elsewhere. Shamba denied it. In my view, only in D kindergarten would such a story probably make sense.

Since it was common cause that the plaintiff was already insured with the defendant in respect of one vehicle, what makes sense is that when Mboko successfully canvassed for more business, the defendant simply endorsed the existing policy by adding the extra nine. E

It is customary for a policy document to have a schedule attached to it, among other things, specifying the vehicles covered and the amounts of the premiums. In the present case, the plaintiff produced a policy document with another insurance company as proof that it had insured some of its vehicles elsewhere. However, this does not detract from the fact that the plaintiff F had contracted with the defendant in respect of the ten vehicles in question. In fact, the defendant produced two of its own schedules. The one was titled "MOTOR PRIVATE POLICY SCHEDULE". It was dated 11 August 2011. It had one vehicle on it. The defendant explained that it had been the schedule attached to the original policy document sent to the plaintiff when the defendant had insured the first of the plaintiff's vehicles way back then. G The second schedule was titled "MOTOR PRIVATE *ENDORSEMENT* NUMBER 1" (my emphasis). The significance of this is that the second schedule, as the title says, was simply an endorsement. The defendant said it was what was delivered to the plaintiff upon the conclusion of the new contract. That makes sense. H

Mafusire J

Generally a contract of insurance is vitiated by the non-payment of the premium. A A premium is generally a condition precedent to the existence of the contract. In *National Employers' Mutual General Insurance Association Ltd* v *Myerson* 1938 TPD 11 it was stated that *prima facie* the *quid pro quo* for a premium is an indemnity. In my view, the reverse should also be true. *Prima facie* the *quid pro quo* for an indemnity is the premium which has been B paid. *MacGillivray & Parkington (supra*), in paras 890 and 891, define the premium as the consideration required of the assured in return for which the insurer undertakes his obligations under the contract of insurance. They say there is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid. They also say that it has been held in several jurisdictions that the courts will not imply a condition C that the insurance is not to attach until payment.

In my view, whether or not a contract of insurance will attach only upon payment will depend on the exact terms of the parties' agreement. In *Myers*' case above, the insurance was expressly made conditional upon the prior payment of the premium. Until such payment was made, the policy was of D no effect in protecting the plaintiff. See also *Wood's Trustees* v *SA Mutual Life Assurance Society* (1892) 9 SC 220, and *African Guarantee & Indemnity Co Ltd* v *Couldridge* 1922 CPD 2.

In the present case, I find that the agreement between the parties was plainly that there was an indivisible contract of insurance in respect of the E plaintiff's ten vehicles that were insured with the defendant. I also find that it was plainly the agreement that the prior payment of the premium was a condition precedent to the protection or cover sought by the plaintiff. Among other things, Shamba would not issue any cover notes until Mavhurere had paid some deposit. He paid $1 000 on 17 February 2012. Only thereafter did things start to happen. Mavhurere also said in his evidence that it was F his understanding that only those cover notes that he would have paid for would

become binding from the date of payment. This means that he clearly understood that payment of the premium was a condition precedent to the enjoyment of cover.

The plaintiff was in breach of the policy of insurance between the parties by failing to pay the full premium that was due for the period of cover. As a G result the contract was vitiated. The defendant was entitled to repudiate. In the premises the plaintiff's claim is hereby dismissed with costs.

Scanlen & Holderness, plaintiff's legal practitioners

Magwaliba &Kwirira, defendant's legal practitioners H

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[zRPz]S v WEALE & ANOR 2014 (2) ZLR 252 (H)

Citation	2014 (2) ZLR 252 (H)
Case No	Judgment No. HH-440-14
Court	High Court, Harare
Judge	Hungwe J & Mavangira J
Heard	3 September 2013; *CAV*
Judgment	20 August 2014
Counsel	*H H Mukonoweshurao*, for the first appellant *Y A Jogee*, for the second appellant
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – culpable homicide – liability – accident on boat – master of vessel responsible for ensuring compliance with regulatory provisions and for driving the boat – whether other members of crew can be held liable for deaths caused by master's breaches* D

Statutes – *Inland Waters Shipping Act [Chapter 13:06] – master of vessel – responsibility for loading of vessel and ensuring compliance with regulatory requirements – accident resulting in deaths of passengers deaths due to failure to comply with requirements – master liable* E

Headnote

The two appellants had been jointly charged, along with two other persons, with culpable homicide, following an accident in which a boat capsized and 11 of the passengers drowned. The boat was overloaded, carrying three times as many passengers as it was allowed to. No life jackets were carried on the boat. The particulars of negligence relied on by the F State were that: (a) the passengers were not supplied with life-saving appliances; (b) the boat was carrying more passengers that required (over-loaded); and (c) failure to keep the boat under proper control.

The appellants worked for the owner of the boat, but contended that neither was in command of the boat, and the second appellant was not even on the boat when the accident occurred. The first appellant had, it was G found, announced to the passengers that he was the captain, although in fact he was not the driver of the boat. The second appellant was found liable on the basis that he had helped overload the boat.

Held, that the simple question was whether, other than the captain or master of a boat or ship, anyone else could be held criminally liable for a boating accident. The principle *nullum crimen sine lege*, which underpins the H

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principle of legality in our criminal law, has gradually crystalized into an A immutable principle of law in every civilized society. This principle, which has been adopted in the criminal codes of several countries, is aptly captured in the statement that "a deed can be punished only if its criminality had been lawfully provided prior to its commission." Any decision on whether the appellants are guilty of a crime ought to be made B within the strict confines of the applicable law at the time. The State preferred charges of culpable homicide, relying on specific particulars of negligence. The State did not refer to the Inland Waters Shipping Act [*Chapter 13:06*] or the regulations made thereunder.

Held, further, that in terms of s 2 of the Act, the definition of "master" is a C person having command or charge of a vessel. A person employed in a vessel, other than a master, is termed "crew". In view of the length of the boat, s 42 of the Inland Shipping Regulation 1971 (RGN 832 of 1971) required one life jacket to be carried for each person legally on board. The responsibility of ensuring compliance with the loading capacity lay with the person in charge, who, in the present case, was the master D or captain of the boat. This person was the person sailing or driving the boat. Naturally, he would be liable for any failure to keep it under proper control. The allegation of failure to keep the boat under proper control applied to him, but could not apply to the appellants.

Held, further, that besides considering the common law concepts on culpable E homicide, the magistrate ought to first have regard to the law governing inland shipping vessels. The statutory provisions would have directed him as to who was primarily responsible for what, as set out in the Act and regulations, and then apply, if he had to, the concepts governing negligence against those individuals who bore the legal or criminal responsibility in such situations. Had he carried out this exercise, he F would have realised that, as the law stands, only the master or captain or person in charge is criminally liable for any mishap on a water body. The person in charge is legally obliged to ensure that the number of people carried did not exceed the legal limit (s 39 of the Regulations). He decides if there has been compliance with the law before the boat G sets sail. He is knowledgeable on the law governing the vessel. Such a vessel would not venture into the water without his permission. If he is not, for any reason, satisfied about the mechanical fitness of the vessel, he has the power to cancel the trip onto the water. Therefore he, and only he, bears all the responsibility for the safety of both the passengers and the crew. The concept of foreseeability in negligence could hardly H be applicable where it could be intertwined with the nebulous concept

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Hungwe J

of common purpose. These two concepts have different requirements A in respect of *mens rea*. There would have been a requirement to allege common purpose, if all crew members were criminally liable, in order to secure a conviction for culpable homicide in a boating accident. This would be near impossible. Even upon a proper application of the concept of foreseeability, the court *a quo* had to be satisfied that it was reasonably foreseeable to both appellants that their conduct would result B in the death of the deceased persons. In other words, there had to be a causal connection between the acts or omissions of the appellants and the death of the deceased persons. The evidence was just not there.

Cases referred to C

R v *John* 1969 (2) RLR 23 (A); 1969 (2) SA 560 (RA)

Legislation considered

Zimbabwean legislation

Inland Waters Shipping Act [*Chapter 13:06*] , s 2

Inland Waters Shipping Regulation 1971 (RGN 832 of 1971), ss 39, 41, 42 D

International instruments

Universal Declaration of Human Rights, art 11(2)

Case information

H H Mukonoweshurao, for the first appellant E

Y A Jogee, for the second appellant

Judgment

Hungwe J: The two appellants were convicted of culpable homicide as defined in s 49(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. They were each sentenced to an effective five years' imprisonment. They appeal against both conviction and sentence. The charges upon which F the two appellants were convicted of arose from the death of 11 people who died when the boat they were riding in capsized. At the trial, in the court *a quo,* the appellants were jointly charged with two others. These two others are Latif Ameer, the owner of the boat, who appeared as the first accused, and Enock Yolani Zulu, under whose command and control the boat was and the owner of this boat, who appeared as the second accused. G

In their notice and grounds of appeal the appellants raised among other grounds, the following grounds of appeal.

Regarding the first appellant, the court misdirected itself in holding that he was the captain of the boat, disregarding the evidence led by the State that, in respect of the size of the boat in question, the person who drives the boat H

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is the captain of that boat and is responsible for loading and for the safety of A its passengers. As for the second appellant, having remained on land he could not possibly be responsible for the accident which caused the death of the deceased persons.

Secondly, the definition for the term "master" in the Inland Waters Shipping Act B [*Chapter 13:06*] ("the Act") excluded the appellants.

Thirdly, the appellants were not in command of the boat and as such were not, at law, criminally liable for the deaths of those on board.

Fourthly, there was no evidence linking the appellants to the death of the deceased persons. The court *a quo* erred in finding that the appellants owed a duty of care towards the deceased persons, and, therefore responsible for C their deaths by reason of their actions.

There are other several grounds of appeal filed in an amended notice and grounds of appeal which amount to an amplification of the above grounds.

The State, in response, relied on the following passage from the reasons for D judgment given by the trial magistrate:

> "It is also apparent that accused number 3 (second appellant) loaded the boat which has a carrying capacity of seven but loaded it with a total of 21 passengers and he was receiving the fares and arranging the people to sit in a manner that the boat would accommodate them all. It is apparent that of the 19 passengers or excluded accused number 2 and 4 (first appellant) none of them were provided with life jackets. It is also apparent that accused number 4 (first appellant) E indicated to the passengers that he was the captain of the boat. This then places a duty of care on him to the passengers. If the boat had not been overloaded and all passengers had life-saving materials these deaths might not have occurred. These accused persons embarked on a trip when it was getting dark which is prohibited by law … Gross recklessness has been proved against the accused number 2, 3 and 4."

This appeal raises a simple question and this question is whether, other than F the captain or master of a boat or ship, anyone else can be held criminally liable for a boating accident? In order to answer that question, it is important to consider the common law position regarding culpable homicide. It is

trite that in criminal law, a crime is conduct which common law or statute law prohibits and expressly or impliedly subjects to a punishment which is G remissible by the State alone and which the offender cannot avoid by his own act once he has been convicted. Over the years the principle *nullum crimen sine lege*, which underpins the principle of legality in our criminal law, and, loosely translated means, no penalty without a law. This principle has gradually crystalized into an immutable principle of law in every civilized H society. This principle, which has been adopted in the criminal codes of several

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countries, is aptly captured in the statement that "a deed can be punished A only if its criminality had been lawfully provided prior to its commission." It is enshrined in art 11(2) of the United Nations Universal Declaration of Human Rights in the following terms:

> "No one shall be guilty of any penal offence on account of any act or omission which did not constitute a penal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the B time the penal offence was committed."

Therefore any decision on whether the appellants are guilty of a crime ought to be made within the strict confines of the applicable law at the time. The State preferred charges of culpable homicide. In doing so, it set out to prove that the appellants were guilty of the crime of culpable homicide, relying on C specific particulars of negligence. For some unstated reason, the State did not invoke the Inland Waters Shipping Act or the regulations made thereunder. This proved to be a fatal omission as I will demonstrate hereunder.

The particulars of negligence set out in the charge sheet were that:

(a) the passengers were not supplied with life-saving appliances;

(b) the boat was carrying more passengers that required (over-loaded); and D

(c) failure to keep the boat under proper control.

The law regulating the operation, licensing and maintenance of the type of boat in question in Zimbabwe is the Inland Waters Shipping Act and the Inland Waters Shipping Regulation 1971 (RGN 832 of 1971) ("the Regulations"). E In terms of s 2 of the Act, the definition of "master" is a person having command or charge of a vessel. A person employed in a vessel other than a master is termed "crew" in terms of the same section. Section 41 of the Regulations provide that "no person in charge of a vessel shall permit on board such vessel persons in excess of the number permitted." In order to establish the number of passengers permitted on the boat in question, one F refers to s 42 of the Regulations, which provide that "a vessel of not more than 15 metres in length overall shall carry one life jacket for each person on board that vessel." Evidence led during trial is that the boat was less than 15 metres in length and therefore not obliged in law to carry a life jacket per person legally on board. The owner of the boat was in terms of the law obliged to ensure that his boat complied with the law in this regard. Thus G since the maximum carrying capacity for the boat was seven, the owner of the boat was obliged to ensure that at least it had seven life jackets on it.

From the above, it is clear to me that the responsibility of ensuring compliance with the loading capacity lay with the person in charge, who, in the present case, is the master or captain of the boat. This person, on the evidence, was H

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one Enock Yolani Zulu, who has not appealed his conviction. Enock Yolani Zulu A was the person sailing or driving the speed boat. Naturally, he would be liable for any failure to keep it under proper control.

The third particular of negligence applied particularly in respect of Zulu as the driver and master of the boat or person in charge of the boat in terms of B the regulations. This particular of negligence could not possibly apply to the two appellants as they were neither in charge nor in physical control of the boat. It would appear that the trial court reasoned that because the first appellant had announced in the boat or to those on board that he was the captain, therefore, he was in charge. This reasoning is flawed as it ignores the provisions of both the Act and the Regulations. In his reasons for judgment, C the magistrate does not seem to have given a thought to either the Act or the Regulations. The fact is that, besides considering the common law concepts on culpable

homicide, he ought to first have regard to the law governing inland shipping vessels. The statutory provisions would have directed him as to who was primarily responsible for what, as set out in the Act and Regulations, and then apply, if he had to, the concepts governing negligence against those D individuals who bore the legal or criminal responsibility in such situations. In my view, had he carried out this exercise, he would have realised that, as the law stands, only the master or captain or person in charge is criminally liable for any mishap on a water body.

The person in charge is legally obliged to ensure that the number of people E carried did not exceed the legal limit (s 39 of the Regulations). He decides if there has been compliance with the law before the boat sets sail. He is knowledgeable on the law governing the vessel. Such a vessel would not venture into the water without his permission. If he is not, for any reason, satisfied about the mechanical fitness of the vessel, he has the power to cancel the trip into the water. Therefore he, and only he, bears all the responsibility F for the safety of both the passengers and the crew. That this is the practice is confirmed by the recent Italian shipwreck of the *Costa Concordia*. Only the captain of this ocean liner is facing prosecution. Besides the master (or captain), everyone else on the boat or ship is, by law, considered crew, whether they claim otherwise or not. The reasoning is simple. Crew members G perform different tasks on the ship or boat. That may or may not contribute to the safety of the passengers. As such, the law has deemed it appropriate to impose criminal responsibility to one person who is the person in charge of the vessel. The directional beam of negligence, in its various facets, can easily be traced to, or away from, that person. The concept of foreseeability in negligence could hardly be applicable where it could be intertwined with H the nebulous concept of common purpose. These two concepts have different

requirements in respect of *mens rea*. There would have been a requirement A to allege common purpose, if all crew were criminally liable, in order to secure a conviction for culpable homicide in a boating accident. This would be near-impossible.

The position for the second appellant is even more tenuous. He was not on the boat when the accident occurred. The court found him guilty on the basis that he helped to overload the boat, therefore, he was just as guilty as B the person who permitted the overloading. This reasoning ignores the clear provisions of the Regulations which state that the person in charge of the vessel is responsible for the safety of the passengers. That person can be identified as the person licensed as master or captain or person in charge of the ship or boat. Such a person cannot, by any stretch of imagination, C be that person who oversees the loading and then remains behind as it sets sail. Clearly, the basis for liability found by the court *a quo* was that he acted in common purpose with the master and the other crew members. As I have demonstrated, the statutory provisions regulating inland shipping in Zimbabwe do not permit the application of the doctrine of common purpose.

Even upon a proper application of the concept of foreseeability, the court D*a quo* had to be satisfied that it was reasonably foreseeable to both appellants that their conduct would result in the death of the deceased persons. In other words, there had to be a causal connection between the acts or omissions of the appellants and the death of the deceased persons. See *R* v *John* 1969 (2) RLR 23 (A); 1969 (2) SA 560 (RA). It was not, in my view, established E that the conduct of the appellants was the proximate cause of the death of the deceased persons. Even if one were to assume that the court *a quo* was correct to determine the matter on the basis of common law on culpable homicide, the evidence is just not there. What is present is vast and copious amounts of speculation as to how the appellants contributed to the death of the deceased. F

In the result, therefore, I find that the court *a quo* erred in failing to consider and apply the provisions of the Inland Waters Shipping Act and the regulations made thereunder when it assessed the evidence during trial. Had it done so, it would inevitably found that only the person in charge of the boat was criminally liable for this boating accident. That person is Zulu. The appellants were entitled to be found not guilty and to be acquitted. G

That therefore is the order of this court. In the result I make the following order:

The judgment of the court *a quo* is substituted with the following;

> "Accused 3 and 4 are found not guilty and acquitted." H

Hungwe J

MAVANGIRA J concurred. A

H H Mukonoweshuro & Partners, first appellant's legal practitioners

Yaqub Ali Jogee, second appellant's legal practitioners

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[zRPz]S v CHINGURUME 2014 (2) ZLR 260 (H)

Citation	2014 (2) ZLR 260 (H)
Case No	Judgment No. HH-454-14
Court	High Court, Harare
Judge	Bere J
Heard	13 November 2013; *CAV*
Judgment	20 August 2014
Counsel	Counsel details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Evidence – *single witness – approach to be taken – cautions to be observed* D *before convicting on the evidence of a single witness*

Headnote

There is need to exercise extreme caution when one has to rely on the evidence of a single witness in order to guard against possible deception in the whole process. The right to convict on the evidence of a single credible witness, stated without qualifying words in s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], should not be regarded as putting the evidence of one witness on the same footing in regard to the cogency of the evidence of more than one. E

Although the evidence of one witness may, in any particular case, be more convincing than that of a number, it remains true that, given the same apparent quality of the witnesses, the more there are, the more reason there is to accept their story. It is not a mere rule of thumb that, if there are two or more witnesses to the same facts, their version can be checked F against each other to see if they have given honest and accurate evidence. Elements of corroboration may of course appear from the circumstances; the fact that an accused person has given no evidence may be an element. The apparent reluctance to accept easily the evidence of a single witness is demonstrated by the proviso to s 269, which renders it incompetent for the court to rely on such evidence in respect of certain offences G specified therein. Even in other offences like assault, our

courts have espoused the need to exercise caution when dealing with the evidence of a single witness. The courts should avoid the "boxing match" approach: the tendency, especially in assault cases, to throw the two protagonists into the ring with the magistrate as referee. At the end of the bout the H

Bere J

magistrate awards points for demeanour and probability, and names the A winner, who is usually the complainant.

Cases cited

R v *Ditshego* 1932 OPD 164

S v *Mlambo* 1994 (2) ZLR 410 (S)

R v *Mokoena* 1956 (3) SA 81 (A)B

S v Temba S-81-91

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 269

Judgment

Bere J: The accused was charged with the crime of robbery as defined in s 126 C of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded not guilty and the trial that followed led to the accused's conviction and sentence to five years' imprisonment, with one year and three months suspended on certain conditions, leaving the accused to undergo a prison D term of three years and nine months.

It is the conviction of the accused that has caught my attention. The accused was convicted on the single evidence of the complainant, Hlomayi Innocent, whose allegations were to the effect that the accused robbed him of his Nokia 2 cellphone which had in it an "8 gig memory card". The complainant put E the value of his cellphone at US$70 and nothing was recovered.

In convicting the accused, the magistrate was persuaded by what she regarded to be the credibility of the complainant. The court *a quo* relied on the ratio espoused in the case of *R* v *Mokoena*1956 (3) SA 81 (A) and went on to reason as follows:

> "The complainant made it abundantly clear to the court that the accused person F is the one who committed the offence and that, at the time the offence was committed, he could see properly. The offence was committed in broad daylight, so the court has no reason to doubt that the complainant saw properly. In addition, there was physical contact between the complainant and the accused person so the court can safely rely on the evidence of the complainant to the effect that he saw clearly what happened when the offence was committed. The demeanour of the complainant was also quite convincing. The evidence G was clear and satisfactory in every material respect and, as such, the court can safely rely on the uncorroborated evidence of the single competent and credible State witness – see *Mokoena* 1956 (3) SA 81 (A) at 85-86. The complainant also remained quite adamant and consistent during cross-examination by the accused. No material inconsistencies were brought out and as such the court can safely rely on the evidence of the complainant despite that it is uncorroborated – H*S* v *Nduna & Anor* HB-48-03. In addition the accused person had no *bona fide*

Bere J

> defence because during cross-examination of the complainant he never disputed A meeting the complainant on the day in question…".

There can be no doubt that the magistrate correctly identified the correct *general* legal position in handling the evidence of a single witness. I emphasise *general,* as it is clear to me that authorities are unanimous that there is need to exercise extreme caution when one has to rely on the evidence of a single B witness in order to guard against possible deception in the whole process. The need to exercise caution in dealing with the evidence of a single witness was highlighted by Fagan JA in *R* v *Mokoena supra* where, at 86D-G, the learned judge of appeal expanded on the views expressed by

de Villiers JP in *R* v *Ditshego* 1932 OPD 164*,* one of the many cases which were subsequently dealt with after the *Mokoena* case. C

Fagan JA put the caution in the following words:

> "The learned Judge President was enumerating factors to which the court should direct its mind when weighing the cogency of incriminating evidence and uttering what may well be a useful warning that the right to convict on the evidence of a single credible witness, stated without qualifying words in the section, should not be regarded as putting the evidence of one witness on the same footing in regard D to the cogency as the evidence of more than one. Although … the evidence of one witness may in any particular case be more convincing than of a number, it remains true that, given the same apparent quality in the witnesses, the more there are the more reason there is to accept their story. It is not a mere rule of thumb. If there are two or more witnesses to the same facts their version can be checked against each other to see if they have given honest and accurate evidence. E Elements of corroboration may of course appear from the circumstances; the fact that an accused person has given no evidence may be an element (see *R* v *van der Poel* 1941 TPD 319). But in the absence of such factors it is right to bear in mind the cautionary remarks of de Villiers JP, in the above mentioned case (cf. *R* v *Bellingham* 1955 (2) SA 566 (A) at p 569)."

In our law the sufficiency of the evidence of a single witness is recognised F by s 269 of the Criminal Procedure and Evidence Act [*Chapter* 9:07]. But I must emphasise that that recognition is not without qualification. In my view, the apparent reluctance to accept easily the evidence of a single witness is demonstrated by the proviso to s 269, which renders it incompetent for the court to rely on such evidence in respect of certain offences specified G therein. Even in other offences like assault, our courts have espoused the need to exercise caution when dealing with the evidence of a single witness. In this regard, I am reminded of the condemnation of the "boxing match approach" in assault cases by McNally JA in *S* v *Temba* S-81-91 at 1-2 where the learned judge of appeal, with the unanimous concurrence of the full bench, decried the approach in the following terms: H

2014 (2) ZLR p263

Bere J

> "The third unsatisfactory feature is that the State case was supported by only one A witness – the complainant himself. The events took place outside a beerhall and there must have been other witnesses. We know for a fact that there were two other people involved in the fracas. Even though the complainant professed not to know them, it would surely have been an easy matter for the police to find out who they were. They would then have been either co-accused or witnesses B for one side or the other.
>
> I have drawn attention before to the tendency of prosecutors and investigating officers to adopt what I have called the 'boxing match approach' to criminal prosecutions. By this I mean the tendency, especially in assault cases, to throw the two protagonists into the ring with the magistrate as referee. At the end of the bout the magistrate awards points for demeanour and probability, and names the winner, who is usually the complainant. One suspects that the unspoken C reasoning behind the conviction is 'why would the police have charged the accused if he was not the guilty one?'
>
> This is a very dangerous approach, more especially in assault cases. The reason is obvious. A physical struggle between two people always has a cause. Each party will almost invariably give a different cause for the struggle. It is almost D impossible to decide without evidence from by-standers, which version is true. But it is even more complicated than that. Usually neither version is entirely true. Each party will tend to minimise his own role and exaggerate that of his opponent. So it is not just a question of who is telling the truth, but how much of the truth is being told by each of them".

The magistrate based his conviction of the accused on the credibility of E the complainant as a single witness and went further to allege that, in his assessment, the accused had no *bona fide* defence owing to, *inter alia,* the way he cross-examined the complainant.

It is settled in our law that as much as is reasonably possible the trial court's findings on credibility of witnesses must not be disturbed unless there are F compelling reasons in doing so. The instructive remarks made by Gubbay CJ in *S* v *Mlambo* 1994 (2) ZLR 410 (S) at 413 are apposite in this regard. I am unable to avoid the temptation to re-state the reasoning in that case and it was summed up in the following words:

> "The assessment of the credibility of a witness is *par excellence* the province of the trial court and ought not to be disregarded by the appellate court unless G satisfied that it defies reason and common sense".

It is against this background that I shall now proceed to deal with the judgment of the trial court, bearing in mind the two mutually destructive positions adopted by the complainant as a single witness and the accused, also as the single witness, in his case. The accused pleaded and maintained H his innocence throughout the trial. The complainant was adamant that the

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accused robbed him of his cellphone at Copa Cabana "in full broad daylight", A (to borrow the phrase used by the magistrate).

With due deference to the trial court, I note that there are several unsatisfactory features of this case, from the way the investigations were carried out right up to the manner the limited evidence presented was assessed by the trial court.

For starters, the charge sheet, which I presume must have been read to the B accused, averred that the accused had stolen from the complainant a cellphone and cash amounting to US$70. The State summary made reference to the accused having stolen from the complainant a "Nokia x 2" valued at US$170. When the complainant testified in court, his evidence was to the effect that the accused stole from him his cellphone, whose value he put at US$70 and that nothing was recovered. There was no attempt by either the prosecutor or C the magistrate to try and reconcile the evidence of the complainant with both the charge sheet and the State outline. It is a tempting conclusion to make that there was no appetite to seek clarification because both the magistrate and the prosecutor had conspired to disbelieve the story told by the accused even before he had started giving evidence.

Many other related challenges arise from the casual manner in which D the prosecutor led the evidence-in-chief. I am unable to imagine that the investigating officer would have imagined that the complainant had either his cellphone, or his cellphone and cash, stolen from him, whose value was either US$70 or US$170. It is only logical to conclude that this information must have emanated from the complainant. Now, if the complainant is E capable of providing such conflicting evidence to the police, the prosecutor and the magistrate, how then does the magistrate have the nerve to conclude that the complainant was a credible witness in all material respects? I am unable to follow the reasoning or the rationale of such characterisation of the complainant's evidence.

The problems of this case do not end with the unsatisfactory nature of the F complainant's unclear position. It goes much further than that. The evidence on record suggests that the robbery is alleged to have occurred in broad daylight at a place popularly referred to as Copa Cabana, a hub of both business and social activities in the City of Harare. To the ordinary citizen of Harare, this place is one of the busiest and ever congested parts of the city. G

The complainant alleged that, when he had a scuffle with the accused, this was in full view of other bystanders, some of whom mistakenly assaulted him for a thief. Common sense dictates that there must have been many people who witnessed what exactly happened, other than the two "protagonists", that is, the complainant and the accused. In fact, the magistrate actually H

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noted in his judgment that there was a mob that assaulted the complainant and A that the complainant had to be rescued by a police officer. Why, in such circumstances, would the prosecution be content to rely on the "boxing match approach" type of prosecution and, in the process, the magistrate in turn complements or sanitises that shoddy approach in prosecution by trying B to hide behind the alleged credibility of the complainant?

Is this not one of those apparent situations where both or either of the two witnesses might be tempted to give the court a tailored version of what actually transpired? It is worthy noting that the magistrate specifically noted and accepted that the accused was a vendor selling, among other things, air time. He provided call services from "his cellphone and that the issue which C set the events into motion is that the complainant was asking the accused why his wife made a call from the accused's phone". The accused stated in his defence outline that because of the many people who use his cellphone to make calls upon request, he would not be able to recognise them individually. Contrary to the findings of the magistrate that the accused had no *bona fide*D defence, I in fact read the accused's explanation to be a *bona fide* one.

It is clear that the complainant was concerned with his wife's use of the accused's cellphone. Because of this, both the complainant and the accused were involved in a scuffle which resulted in the complainant being assaulted by a "mob". Such a scenario, in my view, would provide the complainant with E ammunition or motive to lie against the accused in order to nail him because of the humiliation the complainant suffered at the hands of the accused.

All this boils down to is that the magistrate was supposed to exercise caution in dealing with the complainant's testimony and not to accept his evidence hook, line and sinker. Clearly the complainant had a motive to lie or exaggerate his testimony against the accused because of his misunderstanding with the F accused, coupled with the assault he was subjected to by the mob which had mistaken him for a thief. Despite that this was a robbery case, the principles set out by McNally JA (*supra*) would equally apply in this case.

I note, through my several years of experience, that it is easy to glorify the credibility of a witness in the witness box and the temptation might be difficult G to resist for many magistrates, particularly where one has to determine the outcome of a case based on the evidence of a single witness. One suspects that the unspoken reasoning behind all this is because it is the easy way out for a magistrate who is conscious of his vantage position at that stage of the proceedings. The magistrate is fully conscious at that stage that he or she H occupies a unique position in dealing with the witness and that the review

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or appeal court will not be able to enjoy that same opportunity as he or she A had. The temptation to therefore abuse that opportunity is great.

This court finds itself in the most unenviable position of having to completely disregard the stated credibility of the complainant in this case as found by the magistrate. This is so because, as already highlighted, notwithstanding the favourable impression made upon the magistrate by the complainant, B there is overwhelming evidence pointing to the contrary. It is also clear from the evidence as contained in the record that the adverse conclusion made against the accused by the magistrate is not borne out by the evidence that was presented in court, and such findings were unfair to the accused who, strictly speaking, was not expected to prove his innocence but merely to cast doubt on the State case. C

In conclusion, I wish to point out that because of the strong position held by the State, particularly in the investigation and subsequent prosecution of an accused in a criminal case, the State is obliged to carry out exhaustive investigations. It has the machinery to do so and it should not expect to be rewarded with a conviction after carrying out shoddy investigations like what happened in this case. D

This conviction was clearly not safe, hence my order on 14 November 2013 to order the immediate release of the accused.

The decision of the court *a quo* is set aside. The accused is found not guilty and acquitted.

Mawadze J concurs. E

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[zRPz]MUPAPA v MANDEYA 2014 (2) ZLR 267 (H)

Citation	2014 (2) ZLR 267 (H)
Case No	Judgment No. HH-443-14
Court	High Court, Harare
Judge	Tsanga J & Chitakunye J
Heard	4 July 2014; *CAV*

Judgment 27 August 2014

Counsel Applicant in person
E Danga, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – national objectives – legal aid (s 31) – meaning of section – does not mean provision of counsel in every case – Declaration of Rights – right to equal protection of the law (s 56) – access to basic legal information and advice – one* D *method of ensuring equal protection of the law – how such access may be achieved*

Legal aid – *meaning of – limits to State's duty to provide legal aid – basic legal advice and assistance – one method of achieving equal protection of the law – how such advice and assistance may be obtained*

Headnote

The appellant, an elderly widow, lost her appeal against an eviction order. She E and her late husband purported to buy a portion of an expropriated farm which had been allocated to the respondent. The court, having found that the sale was unlawful (as would have been any lease, in view of the conditions on which the respondent was given an "offer F letter" in respect of the farm), considered the question of whether, with proper legal advice, she and her husband would not have entered into the arrangement at all.

Held, that the facts of this case could not escape judicial commentary in so far as they brought to the fore the inadequacies and limitations of the G nature of the State's role in the provision of legal assistance to those who most need it. The appellant's problem emanated from a deeper source: the lack of legal information that would protect members of the public from such transactions in the first place. Cases such as this, where an unrepresented litigant would clearly have benefitted from legal assistance in the form of legal information in making a proper decision regarding H their matter in the initial instance, are all too evident from appeals.

2014 (2) ZLR p268

Held, further, that legal aid is constitutionally mandated as a national objective A by s 31 of the Constitution – at least more narrowly in the form of legal representation in civil and criminal matters for the needy. Furthermore, the Legal Aid Act [*Chapter 7:16*] has over the years served to regulate what exists in terms of legal aid as provided for by the State. However, it is of limited reach population-wise. In addition, the Magistrates Court (Civil) Rules 1980 provide in Order 5 that "any person desiring to sue B or defend as a pauper may apply to the court *ex parte*, either in writing or *viva voce* for leave to do so". The applicant must lack means and have a *prima facie* case. This provision, however, seems to be severely underutilised, presumably because few members of the public are even aware of its existence. Even though litigants can save time and money C through legal assistance, the reality is that this is an area that remains underfunded and severely restricted in terms of reach to the needy. The clerk of court and magistrates have some duty to promote utilisation of the provision.

Held, further, that the obligation to provide legal aid, if understood in its broader sense, does not mean that counsel should be provided in every D case. This would be impractical in our context. In terms of s 56(1) of the Constitution, "all persons are equal before the law and have a right to equal protection and benefit of the law". Equal protection and benefit from the law cannot take place where there is lack of knowledge of most laws. Giving meaning to this provision requires that the State thinks "outside E the box" and draws on grounded experiences from our own contextual realities to craft sound approaches to addressing obstacles that stand in the path of achieving the goal of "equal protection and benefit of the law". What compounds the need for legal aid in this broader, rather than a narrower sense, in our case is that the bulk of the people, especially in the rural areas, are unfamiliar with the state laws. F

Held, further, that access to legal information and advice centres, as a clearly thought out country-wide initiative, would help to appraise the needy of the legal standing of their cases and would go a considerable way in addressing the right to equal protection before the law through at least the provision of legal information a basic minimum. Organisations G that provide knowledge on formal laws through legal information and advice (which include among them NGOs such as the Legal Resources Foundation, which works through advice centres and paralegals in selected parts of the country), lack nationwide geographical reach because of the very limited resources at their disposal. H

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Held, further, that had legal information and assistance been easily A accessible, the appellant's husband in the initial instance would have had an opportunity to fully canvass the legal status of the agreement that he sought to enter into, and its non-legality would have been pointed out and so prevented the fundamental and dire consequences in the form of loss of a home for the widow and her family. If media reports are anything B to go by, cases of this nature (subletting of resettlement land and even purported sales) seem to be fairly rampant, despite the legal position relating to resettlement land and the clear content of the conditions that accompany offer letters. Given the significance of agricultural land for rural communities, this could therefore be one of the issues, among a C myriad of other critical knowledge areas, where the State can provide input in terms of a nationwide legal information outreach. If the appellant herself had had access to legal advice and legal information on the full import of the offer letter she would have saved herself court battles.

Cases referred to

CFU & Ors v *Minister of Lands & Ors* 2010 (2) ZLR 576 (S) D

McGregor v *Saburi & Ors* 2011 (1) ZLR 262 (H)

Legislation considered

Constitution of Zimbabwe 2013, ss 31, 56(1) & 72(4)

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 5 r 1 E

Case information

Applicant in person

E Danga, for the respondent

Judgment

Tsanga J: This is an appeal against the whole judgement of a decision of F the magistrate in Bindura ordering the eviction of the appellant, a widow, from land allocated to the respondent through an offer letter from the Ministry of Lands under the Land Reform Programme. The appellant essentially takes umbrage with the magistrate's failure to recognise rights she claims her late husband acquired from a sub leasing arrangement with the respondent, which she claims amounted to a sale.

The fuller facts are as follows. Subsequent to being granted an offer letter in G 2004 for the land described as Plot No 10 Rietbok Vlei Bindura, the respondent, who was the plaintiff in the court below, apparently entered into a sub-contracting arrangement with the appellant's husband for a period of three years. This was sometime in October 2010. It is not disputed that H following this arrangement the deceased and the appellant uprooted from

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Mt Darwin to Bindura to carry out their farming endeavours. However, the A appellant's husband died in mid-2011 before the expiry of the three year term. According to the respondent, following this unhappy turn of events, an agreement was reached whereby the appellant would see through the contractual period and would vacate the land at the end of June 2013. It was the respondent's

contention in the court below that the appellant later refused to vacate the piece of land at the time of reckoning. Consequently it B was this failure that led to the respondent instituting the eviction proceedings in the court below as plaintiff.

The appellant founded her refusal to vacate the piece of land on the grounds that her late husband had in fact purchased the land from the respondent for the sum of US$10 000. C

The respondent denied the sale but confirmed having entered into a contract farming arrangement. What the record contained regarding the purported transaction was a letter in Shona, submitted as part of the respondent's evidence. It captured the agreement between the respondent and the appellant's late husband. The court translated version reads as follows: D

> "Contract farming agreement: Plot No 10 Riet Bok Vlei
>
> This is an agreement entered into between George Mandeya and Benjamin Mupapa agreeing to farm together.
>
> Each one of them must pay $400 for their farming activities. Balance $100.
>
> Both of them will use the offer letter for the farm to access loans or farm inputs."

The original is signed and dated by George Mandeya in his capacity as E owner of the farm and Benjamin Mupapa. It also bears the signature of two witnesses. The court's translated agreement to terminate that followed her husband's death and which the respondent says was entered into with the appellant and dated 26 August 2013 reads as follows:

> "Agreement to terminate contract farming of 20/09/10. F
>
> This is an agreement between George Mandeya Family and Deria Mapapa
>
> Agreed that Mupapa family vacate farm No.10 on 30 June 2013."

The original is signed by both parties, with appellant having affixed an "X" as her signature. It also bears the signatures of three witnesses.

In ordering the eviction, the trial magistrate dealt with the subcontracting G arrangement and the purported sale. Though not making any finding on whether there was indeed ever a sale, she did reason that such a sale would be illegal as the land belongs to the State and is not subject to sale. She also reasoned, based on the offer letter, that the court will frown upon those who sell or purport to enter into a contract of farming without the blessing of the Ministry of Lands. She opined that the correct route regarding the purported H

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sale would be for the matter to be fully investigated by the Ministry of Lands A officials in order for appropriate measures to be taken. Her finding in favour of the appellant's eviction was primarily based on the rights of the holder of an offer letter, which rights she found belonged to the respondent. She thus ordered the eviction with each party paying their own costs.

The appellant, an unrepresented litigant, brought this appeal against the decision B of the magistrates court on grounds that can be crystallised as follows from the detail that she provided as the basis of her grievance:

1. That the magistrate erred in admitting evidence on who the owner of the land was. That the court had no jurisdiction to deal with the question of land by virtue of the Constitution.
2. That the appellant and her family were on the land by virtue of a sale C agreement.
3. That the magistrate erred in disregarding the evidence that the respondent had surrendered his offer letter exemplified by the offer letter being in the appellant's hands.
4. The magistrate erroneously delved into the land ownership dispute by D considering the offer letter to be the basis of the judgement.
5. The appellant indicated throughout the trial that her husband was swindled of US$10 000 as a purchase price when the respondent knew fully well that the land could not be sold.
6. That the magistrate was not sufficiently investigative given that the E future of appellant's entire family was at stake.
7. The magistrate misdirected herself in adopting a harsh order (i.e. eviction) instead of referring the matter to the Ministry of Lands to determine the matter.

In light of the above, the appellant's prayer is for the judgment of the magistrate F to be quashed and the order of eviction to be set aside.

The issues raised from the above grounds overlap in terms of what ought to be addressed. They are those that deal with the offer letter and its standing in light of the factual circumstances that ensued following its granting. These are grounds 1, 3 and 4 above. The magistrate's jurisdiction or alleged lack thereof is also canvassed here. These issues will be addressed under the theme of the "standing of the offer letter". Then there G are grounds 2 and 5 which deal with the sale. These will be canvassed under the theme of the "legality of the sale". Finally are grounds 6 and 7 which allege the magistrate's failure to act justly in light of the factual realities brought before the court. These H will be dealt with under the condensed theme of equality before the law.

Tsanga J

The judgment also addresses the deeper implication of this theme given that A the appellant was a self-actor – a factor which had a significant bearing on the bringing of the matter in the initial instance and its subsequent appeal.

(a) The issue of jurisdiction and the standing of the offer letter

With regards to the averred lack of constitutional jurisdiction on the part of the magistrate to handle such matters, s 72(3)(c) of the Constitution is to the effect B that it is only the acquisition of agricultural land by the State for stipulated purposes which may not be challenged on the grounds of discrimination in terms of s 56 of the Constitution. Section 72(4) and (5) vests such land in the State and articulates the processes for cancelling title. In terms of s 72(6) an Act of Parliament may make it an offence for any person without lawful authority to possess or occupy agricultural land or state land. C

The Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] is the Act that grants the acquiring authority, being the relevant Minister responsible for land, the right to redistribute land through an offer letter, a permit or a land settlement lease. As elaborated in *Commercial Farmers Union & Ors* v *Minister of Lands and Rural Resettlement & Ors* 2010 (2) ZLR 576 (S) at 591E: D

> "The Minister has unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to choose".

The status and rights of a permit holder is one that was also fully clarified E in the above case. As stated by Chidyausiku CJ in that judgment at 591G:

> "Having concluded that the Minister has the legal power or authority to issue an offer letter, permit or land settlement lease, it follows that the holders of those document have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease."

He further clarified thus at 592G: F

> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the rights of possession and occupation on it. *The holders of offer letters or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights as may be applicable in each particular case*" (my emphasis). G

Drawing on the above case, in *McGregor* v *Saburi & Ors* 2011 (1) ZLR 262 (H) at 267B Chiweshe JP also elucidated as follows on the status of a permit holder:

> "The holder of an offer letter has authority granted by the owner of the land that is the State, to occupy and utilise the land in question. He has a right and a H

Tsanga J

> legitimate interest to access the property. That right is enforceable against any other A person who may seek to deprive him of it or frustrate his enjoyment of the same. The holder of an offer letter is perfectly entitled to seek an eviction order against persons who may illegally be in occupation of such property. He may not however take the law into his own hands and act without a court order. *The offer letter confer upon its holder the* locus standi *to approach the courts*B*for appropriate relief, contrary to the applicant's assertions.* In my view the right to evict illegal occupiers is not limited to the State or responsible Minister as the applicant would have us believe, it extends to the beneficiaries as well."

It is therefore not true that the magistrates courts lack jurisdiction to entertain such matters altogether. Their role in addressing disputes relating to title issued by the relevant Ministry is one that has clear support in case law. C*In casu* the magistrate in no way sought to act as an acquiring authority but merely sought to confirm the standing of the permit holder in accordance with the law. Applying and interpreting the law is what courts do when they are faced with a dispute. This role should in no way be confused with usurping powers that they may not have in terms of a particular legislation. D The magistrate simply made a pronouncement on the standing and rights of the permit holder that arise from being the holder of an offer letter. The magistrate did not misdirect herself in taking into account evidence of who the owner was and neither did she breach the Constitution in any way by hearing this case. Therefore the fourth ground of appeal, that the magistrate erroneously delved into the land ownership dispute by considering the offer E letter to be the basis of the judgment, also holds no merit in the face of the above role of the courts, inclusive of magistrates courts, in such disputes.

The argument that the offer letter exchanged hands as a consequence of a private transaction lacks foundation in law. The legal reality is that agricultural land acquired for resettlement remains constitutionally vested F in the State (s 72(4) of the Constitution). As such, the offer letter, permit or resettlement lease cannot be the subject of transfer by any purported holder since the latter has nothing to sell. The offer letter does not change hands by virtue of an illegal transaction. The offer letter can only be taken away by the acquiring authority and issuer of the relevant document. Accordingly, G there was again no misdirection on the part of the magistrate in basing her judgment on the offer letter.

(b) Legality of the sale

The appellant also appealed on the grounds that the magistrate failed to take into account that they were on the land by virtue of an agreement of H sale and that $10 000 had been paid. The conditions that are attached to the

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offer letter are very clear on what cannot be done by its holder. Paragraph A 1(c)(i) states as follows:

> "1. The offer is subject to the following conditions:
>
> (a) …
>
> (b) …
>
> (c) (i) that you shall not cede, assign or make over any right or obligation or B sublet or part with possession or grant any form of right of occupation in respect of this farm or part thereof without the prior written consent of the Minister, and …"

There is no evidence that the respondent had received any such authority from the Minister to cede, assign or sublet and therefore the contract farming arrangement itself with the deceased's husband was clearly illegal. With C reference to the payment of $10 000, the record from the court below reveals that the appellant was far from being consistent in her assertion of this claim. While she stated in her plea that the respondent was given $10 000 as purchase price, the record of proceedings also reveals that in her evidence in chief she stated that her deceased husband had told her he had negotiated the payment of eight beasts and that he was told not to reveal the sale since D it was illegal. Furthermore, although she had told the court that she had documentary evidence to prove the purchase, she later told the same court when asked to produce this evidence that she could not find the bag with this vital piece of information which she had brought to court that day. She stated that what she wanted was for the respondent to return the money paid. She E however also wanted the respondent to take responsibility for transporting her back to where they had come from. To compound this unsatisfactory situation, the evidential value of her explanation was further limited by its hearsay nature, as much of it was what she had alleged she had been told by her late husband. She was herself never a part of the transaction. The nature and limitations of hearsay evidence are little understood by civil litigants, F thereby highlighting the often limited understanding of the operation and import of our general laws by the general populace.

During the appeal, her unrepresented status made it necessary still to gain insights from her into the purported transaction. Her explanation, for which she was aided in articulating by a male relative who had come with her to G court, was that her husband had told her that they had bought

the land. She also claimed that the letter on record was a mere façade and did not capture what in fact took place. Her break down of the $10 000 was that US$2500 constituted the value of five cows that were paid to the respondent under the agreement. The balance of US$7500 was made up of losses suffered as a result of uprooting from Mt Darwin to Bindura, given that several trips H

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were undertaken as part of the move. There were discrepancies with what is A captured in the appeal record, where she had told the court that eight cows had been paid and also where she had said that US$10 000 had been paid as cash. It is evident that no amount of $10 000 ever exchanged hands. As such, the ground of appeal that alleges that the magistrate failed to take into account her assertions that this amount had been paid therefore holds B no water. Whatever the real nature of the transaction that took place would indeed be for the Ministry's investigation at the appellant's behest if it is serious about curbing subletting and subterraneous sale practices of land allocated under the land reform programme. This however does not in any way make the magistrate's articulation on the offer letter as it presently C stands an inaccurate one.

(c) Equal protection before the law

The appellant also appealed on the grounds that the magistrate was not sufficiently investigative, given that the future of the appellant's entire family was at stake. She also stated that the eviction order was unduly harsh and D that the proper action would have been to refer the matter to the Ministry of Lands. Since the appellant was unrepresented, it was the court's duty to give force to the constitutionally mandated equal protection before law by according practical meaning to her day in court. There is no evidence that the court below failed to do this. The difficulty for the appellant is that her issue stood on quicksand from a legal point of view. No matter how seemingly E harsh the judgment is, there was no misdirection on the part of the magistrate in ordering that the appellant be evicted from the respondent's land since from case law, the rights of an offer letter holder are very articulate. Given that the offer letter had not at any time been withdrawn by the Ministry of Lands there is no basis for the averment that it was for the relevant Ministry F to determine the order.

The magistrate's opinion that the sale aspect would best be investigated by the relevant Ministry is evidence that she recommended an investigative approach with the family's interests in mind. The magistrate could simply have ended with an expression of the legal position but went further to try and find a possible way out of the quagmire the appellant found herself in.

Much as the appeal itself lacks merit in the face of the substantiated and G adjudicated legal position on the rights of a permit holder, its facts cannot escape judicial commentary in so far as they bring to the fore the inadequacies and limitations of the nature of the State's role in the provision of legal assistance to those who most need it. Her problem appears to emanate from H a deeper source which is the lack of legal information that would protect

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members of the public from such transactions in the initial instance. Cases A such as this, where an unrepresented litigant would clearly have benefitted from legal assistance in the form of legal information in making a proper decision regarding their matter in the initial instance, are all too evident from appeals.

Legal aid is constitutionally mandated as a national objective by s 31 of the B Constitution, at least more narrowly in the form of legal representation in civil and criminal matters for the needy. Furthermore, the Legal Aid Act [*Chapter 7:16*] has over the years served to regulate what exists in terms of legal aid as provided for by the State. However, it is of limited reach population wise. In addition, the Magistrates Court (Civil) Rules 1980 provide in Order 5 that

> "any person desiring to sue or defend as a pauper may apply to the court *ex parte*, C either in writing or *viva voce* for leave to do so".

The applicant must lack means and have a *prima facie* case. This provision however seems to be severely underutilised, presumably because few members of the public are even aware of its existence. Even though litigants can save time and money through legal assistance, the reality is

that this is D an area that remains underfunded and severely restricted in terms of reach to the needy. The clerk of court and magistrates have some duty to promote utilisation of provisions.

Yet more significantly, the obligation to provide legal aid, if understood in its broader sense, does not mean that counsel should be provided in every E case. This would be impractical in our context. In terms of s 56(1) of our Constitution, "all persons are equal before the law and have a right to equal protection and benefit of the law". Equal protection and benefit from the law cannot take place where there is lack of knowledge of most laws. Giving meaning to this provision requires that the State thinks outside the box and F draws on grounded experiences from our own contextual realities to craft sound approaches to addressing obstacles that stand in the path of achieving the goal of "equal protection and benefit of the law". What compounds the need for legal aid in this broader rather than a narrower sense in our case is, that the bulk of the people especially in the rural areas are unfamiliar with the state laws. G

There are different entry points for providing assistance. Access to legal information and advice centres as a clearly thought out, country wide, initiative would help to appraise the needy of the legal standing of their cases and would go a considerable way in addressing the right to equal protection before the law through at least the provision of legal information a basic minimum. H

2014 (2) ZLR p277

Tsanga J

Organisations that provide knowledge on formal laws through legal information A and advice, which include among them NGOs such as the Legal Resources Foundation (LRF), which work through advice centres and paralegals in selected parts of the country, lack nationwide geographical reach because of the very limited resources at their disposal.

In casu, had legal information and assistance been easily accessible, the B appellant's husband in the initial instance would have had an opportunity to fully canvass the legal status of the agreement that he sought to enter into and its non-legality would have been pointed out. The need is more so given that the move in this case has turned out to have fundamental and dire consequences in the form of loss of a home for the widow and her family. C If media reports are anything to go by, cases of this nature of subletting of resettlement land and even purported sales seem to be fairly rampant despite the legal position relating to resettlement land and the clear content of the conditions that accompany offer letters. Given the significance of agricultural land for rural communities, this could therefore be one of the issues, among a myriad of other critical knowledge areas, where the State can input in terms D of a nationwide legal information outreach. If the appellant herself had had access to legal advice and legal information on the full import of the offer letter she would have saved herself court battles.

Disposition

In the final analysis, our overall finding is that the appeal fails in law and E on merit on each of the grounds raised. Unlike the appellant who appeared as a self-actor, the respondent was represented by the Legal Aid Directorate and has therefore incurred minimum costs.

In the circumstances, the appeal is accordingly dismissed with no order as to costs.

CHITAKUNYE J concurred. F

Legal Aid Directorate, respondent's legal practitioners

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[zRPz]S v HALL 2014 (2) ZLR 278 (H)

2014 (2) ZLR p278

Citation 2014 (2) ZLR 278 (H)

Case No	Judgment No. HH-446-14
Court	High Court, Harare
Judge	Hungwe J & Bere J
Heard	30 January 2014; *CAV*
Judgment	27 August 2014
Counsel	*J Samukange*, for the appellant *I Muchini,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – kidnapping (s 93) – elements – private person detaining employee overnight on suspicion of theft – such detention constituting an attack on and an infringement of the personal liberty of the employee – offence committed*

Criminal procedure (sentence) – *offences under Criminal Law Code – kidnapping – prison sentence almost unavoidable – factors to consider*

Headnote

The appellant, a company director, had left his wallet, which contained a large amount of cash, in the company vehicle he had been driving before an evening meeting at the company premises. Because that vehicle had a problem, he was given a lift home after the meeting by a fellow director. In the meantime, the complainant, who was a security guard employed at the company's premises, had found the wallet and took it into the office for safekeeping. The appellant, realising that his wallet was missing, went back to the premises. Upon his arrival, the complainant announced that he knew what the appellant was looking for. The appellant ordered the complainant into the office, together with two other security guards. Inside, the appellant started to count the money, before stating how much he expected to find. After the process he announced that US$1 200 was missing. He ordered that the complainant be searched immediately. The complainant was stripped, frisked and searched in a most humiliating manner. Everyone present was asked to search everywhere for the money. The complainant protested his innocence and asked to be taken to the police as he proclaimed his innocence. The appellant's co-directors also urged him to report the matter and leave the police to deal with the complainant. The hour long search yielded nothing. The complainant was then ordered to dress. Upon being satisfied that the search would

not yield anything, the appellant ordered that the complainant be taken into the workshop and be locked up for the night. The next morning, upon being released from the workshop, the complainant was driven to another part of the premises by the appellant. The appellant later learnt that in fact no money had gone missing in the first place.

The appellant was subsequently charged with and convicted of kidnapping and assault and sentenced to a separate term of imprisonment on each count. On appeal, it was argued that since the complainant was expected to perform his duties around the premises in which he was confined that night till 8 a.m. the following morning, his detention was not unlawful. In any event, the appellant was entitled to effect a citizen's arrest and take steps to recover his stolen property. As such, the appellant acted under a claim of right in effecting such an arrest.

Held, that deprivation of free bodily movement is at the heart of the crime of kidnapping or unlawful detention. The crime constitutes an attack on and an infringement of the personal liberty of the individual. By being confined inside a locked workshop overnight, the complainant D suffered a serious deprivation of his liberty. Since the complainant was detained on the orders of the appellant, it was the appellant who was legally liable for any infringement of the complainant's liberty. When performing his guard duties, the complainant exercised free will as to his movement on such duties. On the other hand, once confined to the E locked workshop against his will, he clearly could not be free to do that. He was virtually held against his will and imprisoned. Ordinarily, an employee is free to exercise the freedom of movement even if it is circumscribed to a certain area of his jurisdiction. The same cannot be said of someone who is locked up against his will inside a workshop which he was guarding prior to losing his freedom. Once the freedom F to move was lost, the right to liberty was infringed and the crime of kidnapping was committed.

Held, further, that the appellant's claim that he had acted under a claim of right in effecting a citizen's arrest could not withstand scrutiny. Whatever good faith he may have had when he initially "arrested" the G complainant was destroyed and betrayed by his subsequent behaviour. He was not effecting a citizen's arrest so could not rely on the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The Act permits an arrest by a private person where a First Schedule offence has been committed in that person's presence (s 27); or where the person is involved in an affray (s 28) or such other circumstances as set out in H ss 28, 29, 30, 31 and 31A. Where a private person effects an arrest in

terms of the Act, he is enjoined to bring the arrested person to a police A station as soon as possible (s 32). He is not entitled to detain his suspect unless such detention is closely connected to bringing the suspect to a police station. The factual circumstances will determine whether such detention can be so construed. The complainant's detention was not for the purposes of bringing him to the police station.

Held, further, that a custodial sentence is generally unavoidable for kidnapping, B though there is a wide possible variation in seriousness between one instance of kidnapping and another. At the top of the scale comes the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than eight years' imprisonment or thereabouts. Where violence C or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often rise as a sequel to family tiffs or lovers' disputes, and seldom require anything more than 18 months' imprisonment, and D sometimes a great deal less. Among factors deemed as aggravating are the following; degree of planning or premeditation, number of perpetrators, vulnerability of victim, duration of loss of liberty, using, brandishing, threatening with or possession of weapons, other offence(s) committed, sophisticated concealment, unpleasant circumstances of detention, such E as degradation, effect upon victim, effect upon persons other than the person kidnapped, particularly family, other offence(s) committed, sinister motive, such as terrorist background, any ransom involved, threats intended to discourage victim from reporting the offence and so on.

Held, further, that here, the assault and the kidnapping had been committed during the same time. They were both committed with one dominant F intent, which was to punish the complainant for stealing cash. Although a distinct and separate *mens rea* was required for each of these two offences, the offences were so closely linked as to justify an approach which served to reduce the net effective sentence. The court ought to have ordered the two sentences to run concurrently, to give an effective sentence of 18 months' imprisonment. G

Cases referred to

Allan v *Min of Home Affairs* 1985 (1) ZLR 339 (H)

R v *D* [1984] AC 778

R v *Dzokamshure* [2009] 1 Cr App R (S) 112 H

Hungwe J

R v *Long* 1970 (1) RLR 1 (A) A

R v *Spence & Thomas* [1983] 5 Cr App R (S) 413

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

S v *Dzimuri* & Ors 1997 (2) ZLR 27 (H)

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

Legislation considered B

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

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 27 & 32

Case information

J Samukange, for the appellant

I Muchini, for the respondent C

Judgment

Hungwe J: The appellant was convicted on two counts, namely contravening s 93(1)(a) of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*] ("the Criminal Law Code" or "the Code") (kidnapping) and assault as defined in s 89(1)(i)(c) of the Code. He was sentenced, in respect of count one, to 24 D months' imprisonment of which six months' imprisonment was suspended for five years on the usual conditions of good behaviour. In respect of count two, the appellant was sentenced to 12 months' imprisonment of which six months' imprisonment was suspended for five years on the usual conditions of good behaviour. He appeals against both conviction and sentence on both counts. The facts upon which the appellant was found guilty are largely E common cause or not in serious dispute. These were set out by the trial court as follows.

The complainant was employed as security guard by a company in which the appellant was a director. On the night of the events leading to the allegations for which the appellant was eventually convicted, the appellant was driving F an open-sided truck. Its contents could not be otherwise secured. While the appellant was in a lengthy meeting with fellow directors, the complainant noticed that the truck had developed a puncture. When this meeting ended around 22:30, the appellant emerged from the meeting. The complainant then drew the appellant's attention to the flat wheel. The appellant was given a ride home by one of his fellow directors. As was routine, the complainant G checked the truck and found a wallet on the back seat. To secure it he took it to their change-room. He also decided to establish its contents. He found cash and decided to count it. On the other side of these events, the appellant noticed that he had lost his wallet and decided to go back in search of it. Upon arrival he summoned the guards on duty by sounding his horn. The H complainant decided to respond to the alarm as he suspected that the appellant

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had returned. He had recorded the fact of his find but had not finished counting A when he decided to attend to the alarm raised. Upon arrival the complainant announced that he knew what the appellant was looking for. The appellant ordered the complainant into the office together with two other security guards. Inside, the appellant started to count the money before stating how much he expected to find. After the process he announced that US$1 200 was missing. The complainant was his immediate suspect. He ordered that B the complainant be searched immediately. The complainant was stripped, frisked and searched in a most humiliating manner. This included being asked to bend down as a beam of light was focussed on his buttocks in the nude. Everyone present was asked to search everywhere for the money. The complainant protested his innocence and asked to be taken to the police. C The hour-long search yielded nothing. The complainant was then ordered to dress up during the search. Upon being satisfied that the search would not yield anything the appellant ordered that the complainant be taken into the workshop and be locked up for the night. The next morning, upon being released from the workshop, the complainant was driven to another part of the harbour by the appellant. The appellant later learnt that in fact no money D had gone missing in the first place.

These facts remain largely undisputed by the appellant.

Section 93 of the Criminal Law Code which creates the offence charged defines kidnapping or unlawful imprisonment thus:

"93 Kidnapping or unlawful detention

(1) Any person who –

(a) deprives an adult of his or her freedom of bodily movement, intending to cause such deprivation or realising that there is a real risk or possibility that such deprivation may result; or

(b) not being the lawful custodian of the child concerned –

(i) deprives a child of his or her freedom of bodily movement, intending to cause such deprivation or realising that there is a real risk or possibility that such deprivation may result; or

(ii) detains or keeps a child, intending to deprive the child's lawful custodian of his or her control over the child or realising that there is a real risk or possibility that such deprivation may result;

shall be guilty of kidnapping or unlawful detention and liable –

A. to imprisonment for life or any shorter period, except in a case referred to in subparagraph B; or

B. where the kidnapping or unlawful detention was committed in the mitigating circumstances referred to in paragraph (b) of subsection (3), to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.

Hungwe J

(2) An accused may be convicted of kidnapping or unlawful detention –

(a) whatever the manner in which the accused deprived the adult or child of his or her freedom of bodily movement or the lawful custodian of his or her control, whether by the use of threats or force or by the use of fraudulent misrepresentation or otherwise; and

(b) whatever the period over which the accused deprived the adult or child of his or her freedom of bodily movement or the lawful custodian of his or her control.

(3) In determining an appropriate sentence to be imposed upon a person convicted of kidnapping or unlawful detention, and without limitation on any other factors or circumstances which a court may take into account –

(a) a court shall regard it as an aggravating circumstance if –

(i) the kidnapping or unlawful detention was accompanied or motivated by the demand of a ransom for the safe return of the adult or child; or

(ii) the kidnapping or unlawful detention was accompanied by violence or the threat of violence;

(b) a court shall regard it as a mitigating circumstance if, in the case of the kidnapping or unlawful detention of a child, the accused is a parent of or closely related to the child and the kidnapping or unlawful detention was not accompanied by violence or the threat of violence".

Deprivation of free bodily movement is at the heart of the crime of kidnapping or unlawful detention. The crime constitutes an attack on and an infringement of the personal liberty of the individual. See *R* v *Long* 1970 (1) RLR 1 (A); *S* v *Masuku & Anor* 1989 (3) ZLR 33 (S); *S* v *Dzimuri* & Ors 1997 (2) ZLR 27 (H); *R* v *D* [1984] AC 778. There is no doubt in my mind that, by confining the complainant inside a locked workshop overnight, the complainant suffered a serious deprivation of his liberty. By any test, it is incontestable that, as the complainant was detained on the orders of the appellant, it is the appellant who is legally liable for any infringement of the complainant's liberty.

Mr *Samukange* urged the court to find that since the complainant was expected to perform his duties around the premises in which he was confined that night till 8 a.m. the following morning, his detention was not unlawful. In any event, the argument went, the appellant was entitled to effect a citizen's arrest and take steps to recover his stolen property. As such the appellant acted under a claim of right in effecting such an arrest.

I am not persuaded by counsel's argument. The argument is superficial and ignores the essence of the crime of kidnapping which I have set out above. When performing his guard duties, the complainant exercises free will as to his movement on such duties. On the other hand, once confined to the locked workshop against his will, he clearly cannot be free to do that. He is virtually held against his will and imprisoned. Ordinarily, an employee

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Hungwe J

is free to exercise the freedom of movement even if it is circumscribed to a A certain area of his jurisdiction. The same cannot be said of someone who is locked up against his will inside a workshop which he was guarding prior to losing his freedom. Once the freedom to move is lost, the right to liberty is infringed. Therefore, the crime of kidnapping, in my respectful view, is committed. In *Allan* v *Minister of Home Affairs* 1985 (1) ZLR 339 (H) at 346 Reynolds J observed: B

> "Since time immemorial the liberty of the individual had been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost 800 years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson – 'The God who gave us life also gave us liberty at the same time.'" C

In light of the above, the appellant's claim that he had acted under a claim of right in effecting a citizen's arrest cannot stand scrutiny. Whatever good faith he may have had when he initially "arrested" the complainant was destroyed and betrayed by his subsequent behaviour. The complainant asked to be taken to the police, as he proclaimed his innocence. The appellant's co-directors, the evidence shows, also urged him to report the matter and D leave the police to deal with the complainant. Despite all this, the appellant had firstly subjected the complainant to severely humiliating and degrading treatment and assault before locking him away and going home to sleep. The evidence shows clearly that the appellant was bent on exacting some sort of punishment for the perceived theft of the money the complainant had found inside the appellant's motor vehicle. He was not effecting a citizen's arrest. E He therefore cannot rely on the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Criminal Procedure Code"). The Criminal Procedure Code permits the arrest by a private person where a First Schedule offence has been committed in that person's presence (s 27); or where the person is involved in an affray (s 28) or such other circumstances as set out F in ss 28, 29, 30, 31, 31A. Where a private person effects an arrest in terms of the Criminal Procedure Code, he is enjoined to bring the arrested person to a police station as soon as possible (s 32). He is not entitled to detain his suspect unless such detention is closely connected to bringing the suspect to a police station. The factual circumstances will determine whether such a detention can be so construed. I am not persuaded that the complainant's G detention was for the purposes of bringing him to the police station. The appellant did not argue that it was. He argued that he was entitled to detain the complainant. I disagree.

As for the conviction on the second count, in my view, there is sufficient uncontroverted evidence upon which he could have been convicted of a H

2014 (2) ZLR p285

Hungwe J

more serious charge of indecent assault. He was lucky to get away with A a conviction only for assault. I therefore dismiss the appeal against both convictions in that regard.

Regarding sentence, I find no fault in the reasoning adopted by the magistrate. The penalty provisions in s 93 above make it clear that upon conviction, a custodial sentence is unavoidable. The magistrate emphasised the high B moral blameworthiness of the appellant as justifying a custodial sentence.

In *S* v *Masuku (supra*) the appellants had agreed to give four schoolgirls a lift in their open truck from Bulawayo to the girls' school at Matobo Mission. On the way the appellants made advances to the girls, but their advances were rejected. The appellants then informed the girls that they would not stop at C the Mission, as agreed, for fear of army patrols in the area, and requested the girls to accompany them to the second appellant's communal land home where they would drink, dance and sleep until the next morning, when they would be taken to the school. When they got near the Mission they drove past the gate without stopping. The girls, believing that they were going to be transported to the second appellant's home with some evil intent, jumped D off the moving truck as it passed the school, sustaining minor injuries in so doing. The appellants were convicted of kidnapping. The appellants' sentence of 12 months' imprisonment of which five months were suspended for five years on appropriate conditions was upheld on appeal.

In *S* v *Chitiyo* 1987 (1) ZLR 235 (S) the appellant had been convicted of a E number of crimes including armed robbery (four counts), attempted armed robbery (two counts), kidnapping (two counts), contravening s 48 of the Road Traffic Act 1976 (two counts). On appeal, his two sentences on kidnapping were ordered to run concurrently.

In one English case, *R* v *Dzokamshure*[2009] 1 Cr App R (S) 112, the F appellant's six-month relationship with a woman had ended. Months later he went to her home, broke his way in, punched

her, dragged her out and forced her into her car. Another man was seated therein. The appellant drove the car on the motorway and prevented her from answering a call on her mobile phone. Eventually he stopped on a slip road and allowed her to get out. The appellant was of previous good character. He had tendered a G guilty plea. The victim had indicated that that she did not want him to serve a custodial sentence and was unwilling to give evidence. A sentence of 18 months' imprisonment was upheld on appeal.

In another English case, *R* v *Spence and Thomas*[1983] 5 Cr App R (S) 413, it was held that there is a wide possible variation in seriousness between one H instance of kidnapping and another. At the top of the scale comes the carefully

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planned abductions where the victim is used as a hostage or where ransom A money is demanded. Such offences will seldom be met with less than eight years' imprisonment or thereabouts. Where violence or firearms are used, there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often rise as a sequel to family B tiffs or lovers' disputes, and seldom require anything more than 18 months' imprisonment, and sometimes a great deal less. Among factors deemed as aggravating are the following; degree of planning or premeditation, number of perpetrators, vulnerability of the victim, duration of loss of liberty, using, brandishing, threatening with or possession of weapons, other offence(s) C committed, sophisticated concealment, unpleasant circumstances of detention, such as degradation, effect upon the victim, effect upon persons other than the person kidnapped, particularly family, other offence(s) committed, sinister motive, such as terrorist background, any ransom involved, threats intended to discourage the victim from reporting the offence and so on.

Applying the principles set out in these cases, especially *Chitiyo (supra*), D I find that the court *a quo* ought to have considered that the two offences had been committed during the same time. They were therefore so closely linked to each other as they both were committed with one dominant intent, which was to punish the complainant for stealing cash. Although a distinct and separate *mens rea* is required for each of these two offences, the offences E were so closely linked as to justify an approach which served to reduce the net effective sentence. The court ought to have ordered the two sentences to run concurrently. As such the sentence is liable to be interfered with on that basis.

In the result, the sentence imposed on the appellant is set aside and the following imposed: F

> "Count 1: 24 months' imprisonment of which six months' imprisonment is suspended for five years on condition the accused is not within that period convicted of an offence involving the deprivation of personal bodily movement for which he is sentenced to imprisonment without the option of a fine. Effective sentence: 18 months' imprisonment. G
>
> Count 2: 12 months' imprisonment of which six months' imprisonment is suspended for five years on condition the accused is not, during that period, convicted of any offence involving an assault on the person of another for which he is sentenced to imprisonment without the option of a fine. Effective sentence: six months' imprisonment. H

The sentence in count 2 is to run concurrently with that in count 1." A

BERE J concurred.

Venturas & Samukange, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners B

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[zRPz]BANGA & ANOR v ZAWE & ORS 2014 (2) ZLR 288 (H)

Citation	2014 (2) ZLR 288 (H)
Case No	Judgment No. S-54-14
Court	Supreme Court, Harare
Judge	Malaba DCJ, Gwaunza JA, Gowora JA, Patel JA & Hlatshwayo JA
Heard	6 November 2013; *CAV*
Judgment	8 September 2014
Counsel	*T Mpofu*, for the appellants *T Magwaliba*, for the first respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Property and real rights – *spoliation order – requirements for – need for* C *applicant to show he was present on or otherwise in possession of property at time of alleged dispossession*

Headnote

The legal requirements for a *mandament van spolie*, which the applicant D must prove on a balance of probabilities, are that (a) the applicant was in peaceful and undisturbed possession of the thing; and (b) he was unlawfully deprived of such possession. "Unlawful deprivation" means that the respondent deprived the applicant of possession forcibly and wrongfully, against his consent. The valid defences against a spoliation E claim include: (a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and (b) the dispossession was not unlawful and therefore did not constitute spoliation.

"Possession" has been described as a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by F a person and a person's mental attitude towards the thing. Whether or not a person has physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact. In spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the *status quo ante* pending G the determination of the dispute between the parties. A lease agreement or an alleged "caretakership" agreement do not constitute a valid basis to establish possession. It is necessary for the applicant to establish that he was present on or otherwise in possession of the premises in question on the day of the alleged spoliation. If he was not in possession of the premises at the relevant time, he could not be unlawfully dispossessed. H

Gwaunza JA

Cases referred to A

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

Kama Construction (Pvt) Ltd v *Cold Comfort Farm Co-op & Ors* 1999 (2) ZLR 19 (S)

Case information

T Mpofu, for the appellants

T Magwaliba, for the first respondent B

Judgment

Gwaunza JA: This is an appeal against the entire judgment of the High Court, Harare, which was handed down on 20 March 2012. In that court, the first respondent *in casu* brought an urgent application against the present C first appellant and two others for an interim spoliation order.

The brief facts of the matter are as follows:

Since 2004, the first respondent occupied and used, for business related to poultry, a part of the farm known as Plot 4 Sun Valley, Borrowdale, also referred to as Welston Farm. It is not in dispute that the first respondent D did not own the farm in question but occupied and used the part on which fowl runs were located, initially in terms of what he referred to as a lease agreement, and later in terms of an alleged "caretakership" agreement with the Government. Neither of these documents was tendered into evidence. On 11 November 2011, the Provincial Administrator for Harare Metropolitan Province addressed a letter to the first respondent, directing that he vacates E the premises in question to allow full use of the farm by the legal owner thereof. On 28 February 2012, the present appellant, purporting to act in terms of a power of attorney granted in his favour by the registered owner of the farm, who is the second appellant in this case, put chains and new locks on to the gate leading to the farm in question, thereby effectively locking the F respondent out and barring him from entering the premises. The first appellant also placed security guards by the same entrance. It is not disputed that, on or soon after the day of the alleged spoliation, the respondent unsuccessfully sought to effect delivery of a consignment of chicks on to the disputed premises. The appellants alleged, and the first respondent denied, that he vacated the premises in question of his own accord following receipt of the G letter from the Provincial Administrator for Harare Metropolitan Province, and in any case before the date of the alleged spoliation.

The first respondent's efforts to enlist the assistance of the police to regain entry onto the premises were futile, a circumstance that prompted him to file the urgent application that led to the High Court order now being appealed H against.

Gwaunza JA

The court *a quo* found in favour of the first respondent and issued an order A in the following terms:

> "In the result, an interim order is granted on the following terms:
>
> 1. The second and third respondents restore undisturbed possession of Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm to the applicant within one hour of the granting of this order.
> 2. The second and third respondents remove all chains and locks on the gate B leading to the farm, within one hour of the granting of this order.
> 3. Should the first, second and third respondents fail to restore undisturbed possession of Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm to the applicant within one hour of the granting of this order, then the fourth and fifth respondents are hereby ordered to restore applicant's quiet use and undisturbed possession and to seek the assistance of a locksmith if necessary. C
> 3(a) In the event that the intervention of the fourth and fifth respondents is necessary, the second and third respondents be and are hereby ordered to pay the fourth respondent's costs.
> 4. That second and third respondents and all those claiming occupation of Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm through them be and are hereby interdicted from interfering with the applicant's D quiet and undisturbed enjoyment and possession of the premises."

The appellants' appeal is premised on a number of grounds which may be summarised as follows:

1. The court *a quo* misdirected itself by granting a final order for the occupation and use of the entire property known as Plot 4 Sun Valley, E Borrowdale, Harare (Welston Farm) when the applicant therein had only sought provisional relief in respect of the chicken runs situated on that property;

2. The court *a quo* erred in finding that the legal requirements of a spoliation order had been met; and F
3. The court *a quo* erred in determining crucial factual issues in the face of material disputes of fact.

These grounds of appeal will be considered in light of the evidence before, and the reasoning of, the court *a quo*.

1. Whether the court *a quo* misdirected itself by granting a final order for the occupation and use of the entire property known as G Plot 4 Sun Valley, Borrowdale, Harare (Welston Farm) when the applicant therein had only sought provisional relief in respect of the chicken runs situated on that property

The appellants argue that, in not restricting its order to the portion of the property in question on which the first respondent ran fowl runs, the court H

Gwaunza JA

a quo had misdirected itself by granting relief that was not sought from it. A Specifically, it is argued that the court effectively granted occupation and use of the whole farm to the first respondent, thereby barring others who lawfully had a right to occupy and use the rest of the farm.

There is merit in the appellants' arguments. The first respondent, in the court B*a quo*, initially attached to his papers a draft provisional order which sought spoliatory relief pertaining to the whole of the farm, that is, Plot 4 of Sun Valley, Borrowdale. However in his answering affidavit, he stated as follows:

> "I therefore continue to pray for an order in terms of the amended draft order."

Page 46 of the record contains a document entitled "Amended Provisional Order". The provisional spoliation order that the first respondent now sought C related to:

> "the portion of Plot 4 Sun Valley, Borrowdale, also referred to as Welston Farm where the fowl runs are and any portion which the applicant previously had control of and access to ..."

Evidently the first respondent narrowed his claim to encompass only the part D of the farm that he had access to and used for running his poultry breeding operations. The learned judge *a quo,* however, and with no explanation tendered, cited and granted the relief sought by the first respondent, as set out in the original discarded draft provisional order. Additionally and contrary to the provisional nature of the order prayed for, the learned judge granted a final order. The result, as correctly submitted for the appellant, was that E the court *a quo* –

> "not only restored possession of the fowl runs, but also gratuitously awarded the first respondent, in a final order, the entire property, including portions he hitherto did not possess or have access to."

There can be no doubt that this evinces a clear misdirection on the part of F the *court a quo*.

I find accordingly that the order of the court *a quo* was, in the respects alleged, incompetent. In any case, even had the court *a quo* properly confined its order to the relief sought by the first respondent, the latter would still have had to confront the crucial hurdle of disproving the appellant's main ground G of appeal, as indicated below.

2. Whether or not the requirements of a mandament van spolie were met

In determining this issue the judge *a quo* correctly cited the leading case of *Kama Construction (Pvt) Ltd* v *Cold Comfort Farm Co-operative and Ors*H 1999 (2) ZLR 19 (S) and listed the legal requirements for a *mandament*

Gwaunza JA

van spolie set out therein, which the applicant must prove on a balance of A probabilities.

These are that:

(i) the applicant was in peaceful and undisturbed possession of the thing; and
(ii) he was unlawfully deprived of such possession. B

In *Botha and Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79E, also cited by the learned judge *a quo*, the court qualified "unlawful deprivation" to mean that the respondent deprived the applicant of possession "*forcibly and wrongfully against his consent".*

The court *a quo* went on to list the valid defences against a spoliation claim, among them that: C

(i) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and

(ii) the dispossession was not unlawful and therefore did not constitute spoliation.

The argument has been advanced *in casu* on behalf of the appellants that the D first respondent, having previously and of his own accord vacated the premises, was in fact not in possession thereof, peaceful or otherwise, on the day in question. Possession being an essential element in spoliation proceedings, I find it necessary to first consider whether or not the facts established that the first respondent was in possession of the disputed premises at the relevant time. Should I so find, I would then consider whether such possession was E peaceful and/or undisturbed.

According to Silberberg and Schoeman *The Law of Property* 2 ed at p 114:

> "'Possession' has been described as a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by a person and a person's mental attitude towards the thing. … whether or not a person has F physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact".

It is trite that in spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the status *quo ante* pending the determination of the dispute between the parties. This principle is clearly stated thus by Silberberg and G Schoeman *op cit* at pp 135-136:

> "… the applicant in spoliation proceedings need not even allege that he has a *ius possidendi: spoliatus ante omnia restituendus est …* All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession … It is not sufficient to make out only a *prima facie* case …" H

Gwaunza JA

The evidence *in casu* shows that the first respondent relied on a number of A documents and circumstances in his attempt to prove his entitlement to, and the fact of his having been in, possession of the premises in question. These were:

(a) a lease agreement, not tendered into evidence and which had long since expired, entered into with one Mr Laing in 2004, the year in which he B allegedly took possession of the disputed premises;

(b) a "caretakership" agreement with the Government which, again, was not tendered into evidence;

(c) that prior to the date of the alleged spoliation, he had brought chicken C feed onto the premises;

(d) that he was on the disputed premises "every day" until 28 February 2012, the day of the alleged dispossession, and still had workers there; and

(e) that on or about the day itself, he had sought, albeit unsuccessfully, to effect delivery into the fowl runs of some 120 000 chicks.

The court *a quo* was persuaded that the first respondent was indeed in D possession of the premises in question at the time of the alleged spoliation, and that he had, therefore, been unlawfully dispossessed. The basis of such conclusion is apparent from the following excerpt at p 4 of the judgment of the court *a quo*:

> "The applicant explained that he occupied the property in question by virtue of a lease he E entered (*sic)* with the first respondent …. I do not think that the applicant is expected to give a better answer than that …"

It is evident that the court *a quo* premised its conclusion that the first respondent was in possession of the disputed premises on his claim to a *ius possidendi*, that is, the right of possession. This is clearly a misapprehension F of the applicable principle authoritatively enunciated by Silberberg and Schoeman, above. On the basis of this principle, the lease agreement in question and the alleged "caretakership" agreement with the Government that the first respondent sought to rely on, do not

constitute a valid basis to establish possession on the day of the alleged spoliation. In any case, the appellants do not dispute that the first respondent, for a number of years prior G to the alleged spoliation, had access to and use of the premises in question.

The first respondent, as indicated in paras (c)-(e) also, correctly, sought to rely on factual evidence to show that he was in possession of the disputed premises on the day of the alleged dispossession. He attached to his answering affidavit Annexure "C", which appears to be an invoice dated 20 January 2012, H suggesting the purchase of chicken feed to be delivered to "Sun valley,

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Gwaunza JA

B'dale". The appellants, however, disputed the prior delivery of chicken feed A to the premises as claimed by the first respondent. Their evidence was that the premises in question were completely devoid of anything belonging to him that may have pointed to his possession thereof on the day in question.

I find that the invoice referred to, on its own, is insufficient to establish that the delivery of the chicken feed was in fact effected to the disputed premises. B No supporting affidavit from another person attesting to such delivery has been filed. I take the view, in the light of this inconclusive evidence, that what the first respondent alleges can at best be taken as *prima facie*, not definitive, evidence of a claim to possession. I am satisfied it falls short of the requisite standard for possession, as set down in the authority cited above. C

It is the first respondent's further assertion that he was on the premises in question "every day", including the date of the alleged dispossession. He uses strong words to deny that he ever vacated the premises. He explains in his answering affidavit that his chicken business was run in staggered phases, where periods of time separated the various stages of the chicks' development, for instance, the period between "harvesting" of grown chickens and the D delivery of a new batch of chicks. A possible implication of this is that the first respondent and/or his workers may have stayed away from the premises during periods when there was little or no business activity underway. While this seems to contradict his assertion that he was on the premises "every day", it also, significantly in my view, reinforces the contention by the appellants that, at the time of the alleged spoliation, neither he nor his workers and any E equipment of his were on the disputed premises.

The appellants insist that the first respondent had taken all his equipment and other assets and vacated the premises well before the date of the alleged dispossession. They contend this was in pursuance of a directive for him to do so, which was issued by the Provincial Administrator for Harare Metropolitan F Province. It is not in dispute that this directive was contained in a letter to the first respondent dated 11 November 2011, which among other things called upon the first respondent to "take away your equipment locked in these shades (*sic*) by you". It was after this event, the appellants further contend, that "it was noticed" that vandals had started destroying infrastructure and other assets on the premises, a circumstance that had prompted them to put G chains and locks on the gate to the farm and place guards by the gate, as a way of "securing" the premises in question.

Beyond stating that he was on the farm "every day", including the day of the alleged spoliation, and that he had workers on the premises, the first respondent has not tendered any other evidence to substantiate this assertion. H

Gwaunza JA

A He does not explain where he was at the time of the actual spoliation. Nor how the appellants were able, without any resistance from him nor any of his workers, to change keys and locks to the premises and to the main gate, effectively barring him from entering the premises. His claim, disputed by the appellants, to have workers resident on the premises has also not been backed up with any other evidence. Other sworn evidence might have helped B to shed light on exactly how the alleged spoliation was carried out, who was present when it happened and whether any resistance, by or on behalf of the first respondent, had been put up against such a move. As already indicated, spoliation involves the element of dispossessing a person forcefully without his or her consent. C

In the light of this, I find merit in the appellants' argument that the court *a quo,* in holding that the first respondent had been wrongfully dispossessed, misdirected itself when it stated as follows on

page 6 of the judgment:

> "The defence raised by the respondent is that there was no unlawful dispossession. However, this does not appear to be supported by the surrounding facts. One would have expected there to be proper handover of the property to the respondents" D

It hardly needs emphasis that the very nature of spoliation entails a defended, forceful and unlawful operation carried out in circumstances far removed from the situation where an applicant peacefully hands over the disputed "thing" to the spoliator. In other words, had the first respondent "properly" handed over the disputed premises *in casu*, there would have been no question of E his having been dispossessed.

The appellants do not dispute that there was an attempt by the first respondent to deliver a consignment of chicks on or about the day of the alleged dispossession. However, like his evidence regarding the delivery of chicken feed, I find that the first respondent failed, on the basis of an attempt to deliver a consignment of chicks to the premises, to establish, to F the required legal standard, that he was present or otherwise in possession of the premises in question on the day of the alleged spoliation. His absence from the premises may have been due to him having previously vacated the place altogether. Or it could have happened within a period during which there were no business operations going on there. In either case, the fact remains that the first respondent was, at the relevant time, not in physical G possession of the property in question. As for his mental attitude concerning physical control, or *detentio,* of the premises, I find that whatever concept of such control he might have entertained in his mind did not find expression in events on the ground. He left no indication on the premises, for instance skeleton staff, that he or at least his business was still physically present H thereon. The probabilities, in my view, favour a finding in support of the

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appellants' contention that the first respondent had relinquished possession A of the premises on some unknown occasion, before the date and time of the alleged spoliation.

In the final result, it is the finding of this court that the first respondent failed to discharge the *onus* that he bore, to prove the compound referred to by the cited authority, of a physical situation and of a mental state involving the B physical control or *detentio* of the thing, that is the premises in question, *at the time of the alleged spoliation.* Accordingly, not having been in possession of the premises at the relevant time, he could not have been unlawfully dispossessed. In view of the fact that the alleged possession has not been proved, it follows that the need to qualify it as either peaceful or undisturbed falls away. C

There is therefore merit in the second ground of appeal cited above, and it is upheld.

I am in the final analysis satisfied that the appellants proffered valid defences to the first respondent's claim for a spoliation order.

It should be pointed out that there is, on record, a substantial amount of D evidence to suggest that the first respondent's past possession of the premises in question was neither peaceful nor undisturbed. This evidence is however no longer relevant in view of the finding made that the first respondent was not in possession, peaceful or otherwise, of the premises in question at the time of the alleged dispossession.

Since I consider the finding of this court on the competency of the order E appealed against and also on whether or not spoliation was proved to be dispositive of this appeal, I do not consider it necessary to address the other grounds of appeal given by the appellant.

Accordingly, I make the following order.

1. The appeal be and is hereby allowed. F
2. The order of the court *a quo* is set aside and substituted with the following:

   "The application be and is hereby dismissed with costs."
3. The first respondent shall bear the costs of this appeal.

MALABA DCJ, GOWORA JA, PATEL JA and HLATSHWAYO JA concurred. G

Advocates of Zimbabwe, appellants' legal practitioners

Advocates Chambers, first respondent's legal practitioners

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[zRPz]S v NCUBE 2014 (2) ZLR 297 (H)

Citation	2014 (2) ZLR 297 (H)
Case No	Judgment No. HB-128-14
Court	High Court, Bulawayo
Judge	Takuva J & Makonese J
Heard	17 March 2014; *CAV*
Judgment	11 September 2014
Counsel	*N Nkala*, for the appellant Miss *N Ngwenya,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *sexual cases – child witness – approach to be taken to – unlikelihood of child* C *making serious allegation without any basis – children's fantasies normally coloured by ordinary experiences*

Headnote

The dangers inherent in children's testimony have been said to be the following: D (a) that children's memories are unreliable, particularly for detail; (b) that children are egocentric and not likely to consider the effect of their statements on others, particularly school children; (c) that, children are highly suggestible; (d) that children have difficulty in E distinguishing fact from fantasy; (e) that children make false allegations, particularly of sexual assault; and (f) that children do not understand the duty to tell the truth.

While the evidence of child witnesses must be approached with caution, such caution must be a creative or positive caution, where a judicial officer uses knowledge of psychology or other relevant disciplines in order F to maximize the value of such testimony. Psychological research has established that young children do not fantasize about being raped and other unusual horrific occurrences, but that their fantasies and play are characterized by their ordinary daily experiences. It is highly unlikely for very young complainants to make serious allegations without any G basis at all. There is certainly no psychological research or medical case study material which suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Unusual fantasies are seen by psychiatrists as highly suspicious: the cognitive and imaginative capacities of three-year-olds do not enable them to describe H anal intercourse and spitting out ejaculate, for instance. Such detailed

descriptions from small children, in the absence of other factors, should A be seen as stemming from the reality of the past abuse rather than from the imagination.

Cases cited

S v *Machowe* S-14-99 B

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

S v *Mundowa* 1998 (2) ZLR 392 (H)

S v *Mavundura* 2002 (1) ZLR 598 (H)

S v *Musasa* 2002 (1) ZLR 280 (H)

S v *Ramushu* S-25-93

S v *Sibanda* S-55-94 C

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 232

Case information

N Nkala, for the appellant

Miss *N Ngwenya,* for the respondent D

Judgment

Takuva J: This is an appeal against conviction and sentence. The appellant appeared before a regional magistrate facing a charge of contravening s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded not guilty but was nevertheless convicted and sentenced to 18 years' imprisonment of which four years' imprisonment was suspended for five E years on condition that he does not, within this period, commit an offence of a sexual nature.

The facts of this case can be summarised as follows. The appellant and the complainant were living together in Sizinda, Bulawayo. The appellant is the complainant's maternal grandfather. On a date unknown to the prosecutor, F the complainant was sleeping on a sofa at the appellant's home when he proceeded to where the complainant was and had sexual intercourse with her once. The appellant's wife was in Botswana at that time.

On 5 August 2011 the complainant's parents took the complainant to Alice Sibanda, her paternal aunt. A couple of days later when the aunt was G bathing the complainant she noticed that "all the flesh was out". She asked the complainant what had happened and she said it was "grandfather". Alice Sibanda then informed the complainant's parents that "she was now opened". The complainant's father suggested that a report be made at Western Commonage Police Station. The police referred the complainant to Mpilo Hospital for medical examination. The appellant was subsequently arrested. H

As indicated above, the appellant being aggrieved by the conviction and sentence A has appealed to this court on the following grounds:

"1. Ad conviction

1.1 The court *a quo* erred in dismissing the application for recalling of State witnesses because it felt that there were no exceptional circumstances warranting that the application be granted in favour of the appellant. This B adversely affected the appellant's right to a fair trial and denied him the opportunity to place a strong defence to the State's case.

1.2 The court *a quo* erred in upholding the evidence of the complainant over that of the appellant simply because it felt that the complainant's evidence was more credible and the conflicting statements made were a result of the complainant's young age, when her evidence was

materially different and C at variance with that of the other State witnesses, thus casting doubt on the guilt of the appellant.

1.3 The court *a quo* erred by ignoring the evidence of the accused's witness that the widening of the complainant's anus could have been caused by the insertion of a ball point barrel for the purposes of curing the complainant's appetite or the insertion of a spoon as asserted by the complainant, which D evidence was not rebutted by the State.

1.4 The court *a quo* erred in relying on the evidence of the first State witness to the effect that the complainant was now open when in actual fact the medical report shows that all her front was intact.

1.5 The court *a quo* erred in failing to consider the sour relations between the appellant and the complainant's paternal grandparents which could have E reasonably precipitated the institution of these allegations as the crime was discovered by the complainant's grandmother with the complainant not showing signs of rape and failing to report the matter to anyone.

2. Ad sentence

The sentence imposed is on the higher side and induces a sense of shock in that:

(a) appellant is a first offender and there is a need to reform rather than destroy F him;

(b) appellant is of an old age and the chances of him serving a long imprisonment are numerical if not nil."

The dangers inherent in children's testimony were set out in *S* v *Sibanda* S-55-94 to be the following:

(a) children's memories are unreliable, particularly for detail; G

(b) children are egocentric and not likely to consider the effect of their statements on others, particularly schoolchildren;

(c) children are highly suggestible;

(d) children have difficulty in distinguishing fact from fantasy;

(e) children make false allegations, particularly of sexual assault; and H

(f) children do not understand the duty to tell the truth. A

In *S* v *Musasa* 2002 (1) ZLR 280 (H) it was held that while the evidence of child witnesses must be approached with caution, such caution must be creative or positive caution where a judicial officer uses knowledge of psychology or other relevant disciplines in order to maximize the value of such testimony. Psychological research has established that young children B do not fantasize about being raped and other unusual horrific occurrences but that their fantasies and play are characterized by their ordinary daily experiences. It is highly unlikely for very young complainants to make serious allegations without any basis at all. See also *S* v *Machowe* S-14-99 and *S* v *Madzomba* 1999 (2) ZLR 214 (H) at 222, where it was said in respect of rape allegations made by a five year old, 20 months after the abuse: C

> "It is, of course, quite possible that a child of so tender age can make, without much thought, generalized and damaging allegations against the only person at the place she is to be removed. That must, however, be balanced against the consideration why and whether a girl of so tender an age could make so serious an allegation against the appellant and Abias if nothing of the sort had taken place. The fact of the matter is that her hymen was found missing which tended to confirm her evidence that she had been sexually abused." D

J R Spencer and Rhona Flin, in their book *The Evidence of Children: The Law and the Psychology* 2 Ed (Blackstone Press Ltd, 1993) at pp 317-318 made the following observation:

> "There is certainly no psychological research or medical case study material which E suggests that children are in the habit of fantasizing about the sort of incidents that might result in court proceedings; for example, observing road accidents or being indecently assaulted. Children's fantasies and play are characterized by their daily experience and personal knowledge, and unusual fantasies are seen by psychiatrists as highly suspicious: 'The cognitive and imaginative capacities of three – year – olds do not enable them to describe anal intercourse and spitting out ejaculate, for instance. Such detailed descriptions from small children, in F the absence of other factors, should be seen as stemming from the reality of the past abuse rather than from the imagination'."

I now deal with the grounds of appeal *seriatim,* bearing the above legal principles in mind.

The first ground relates to the court *a quo's* refusal to recall the complainant and Alice Sibanda to enable the defence counsel to "re-crossexamine" G them. The court has a discretion to recall a witness who has already given evidence for further examination or cross-examination – see Hoffmann & Zeffertt *South African Law of Evidence* 3 ed (Butterworths, 1981) at p 368. See also s 232 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

In dealing with this request the court *a quo* stated: H

2014 (2) ZLR p301

Takuva J

> "… counsel for the accused did not also submit on a particular point/s that warranted A the recalling of the witnesses. The application sought by the defence was to some extent to start the trial again. If the application was premised on a particular area that needed clarification, perhaps the court could have arrived at a different view. In the court's view, the application lacked merit and accordingly it was dismissed."

I agree with this observation entirely. In seeking to have the complainant recalled B the defence counsel relied on three issues. Firstly, he wanted "clarification" on the complainant's evidence that when she was raped her grandmother (appellant's wife) and one Cynthia were present. Counsel wanted that issue clarified because, in his view, "it was highly unlikely that the accused would commit such a grave crime in the presence of the two C witnesses." Surely there was nothing that required clarification here. Counsel was at large to call these two witnesses if he so wished. Secondly, he wanted the witness recalled because it was "unclear as to how many people were present during the rape". It is common cause that the complainant stated that when the appellant raped her, his wife, her grandmother, was present. Later she said it occurred when the grandmother was in Botswana. This issue, in D my view, could not have been resolved by recalling the complainant. Rather it required evidence in rebuttal from the appellant or his wife. Thirdly, he argued that it was necessary to recall the complainant because "when the complainant was asked why she did not tell anyone from the record there *is no answer. It is necessary to find out why she did not report."* (my emphasis) E In my view there was no need to have the witness recalled so that a question is repeated *ad infinitum.*

As regards Alice Sibanda, the thrust of the defence was that the witness' answers were unsatisfactory. Recalling becomes necessary where subsequent witnesses mention facts not mentioned by the first witness, being facts the witness could or should have mentioned in his or her testimony. The rationale F is to afford the first witness an opportunity to comment on that evidence. Where the focus is on the fact that the witness' evidence is unsatisfactory on material respects, then there are other options of dealing with it. For these reasons, the first ground of appeal is without merit and is hereby dismissed.

The second ground of appeal is anchored on alleged contradictions in the G complainant's testimony. The following were cited as examples:

(i) that she initially said her grandmother was in Botswana when she was raped, only to change later and said she was present. Dealing with this issue the court *a quo* stated the following; "In my opinion, it was bound to happen that there could be some conflicting statements from *a very*H*young child like the complainant because of her age*. Even adults also

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2014 (2) ZLR p302

Takuva J

give evidence like [that]. However, what is important is whether or not A the conflicting statements are fatal to the State case …" I may add that a close reading of the record does not reveal a material contradiction because the complainant said she was raped "many times". It is quite possible that on one of those occasions the grandmother was in Botswana. In any case, it is common cause that the grandmother was away in Botswana at some point during the relevant period. B

(ii) that complainant failed to describe what she uses her private parts for but managed to describe the act of rape. The court *a quo* said this about the complainant;

> "She had difficulties in answering questions and the State counsel asked her to make use of the dolls in the Victim Friendly Court. She was asked C to pick a doll and she did pick a *female doll*. She was asked to show the back where she was raped and she *touched the anus of the doll.* She was also asked to pick a doll that *represented her grandfather and she picked it.* She was asked to show how her grandfather had raped her. She went on to *remove the female doll's pants.* She went on

> *to make the doll lie on top of the female doll and the penis was touching on the female doll's vagina.* D She told the court that her grandfather did that *many times.* She was also asked to show the court how the accused had raped *her at the back.*She made the *female doll lie on its stomach* and let the *male doll lie on top of the female doll.* She said this was also *done several times* …" (my emphasis)

In my view, this graphic demonstration illustrates a clear and glaring picture of what was done to her. In view of the fact that we are dealing E with a six-year-old child, it is neither here nor there that she said she did not "use her tobacco for anything". It is highly unlikely that the complainant would give such a vivid illustration if this was not stemming from her past abuse. These acts are unusual occurrences that cannot be attributed to the complainant's daily experience and personal knowledge. F

(iii) That the complainant wrongly misconstrued the administering of the medicine with rape. This submission is without merit in that the record shows that these are two distinct events that could not be confused with each other, because the appellant used a spoon to administer the muti while he used his penis to rape her. She did not say the spoon was inserted into her anus. For these reasons, I find that the second ground G of appeal is without merit and it is hereby dismissed.

The third ground is interwoven with the second and my view on the second ground equally applies.

As regards the fourth and fifth grounds, it is not correct to say that the court *a quo* solely relied on the first State witness' testimony to convict the appellant. H

2014 (2) ZLR p303

Takuva J

The basis of the conviction is the complainant's evidence supported by the A medical report. More importantly, the finding that the complainant was abused per anus is unassailable. The complainant identified the appellant as her assailant. It is lame, in my view, to argue that the complainant falsely incriminated the appellant at the instigation of her grandmother because the latter did not ask a leading question. Further, the court was alive to the danger B of relying on young witnesses. At p 40 of the record it stated:

> "There is no doubt that evidence of minor children has *to be treated with care* because they can easily be manipulated. Where a child stood firm in cross-examination then there is no reason to doubt the evidence. On the other hand, it is also impossible for a child to describe in detail an event of a sexual nature if she did not experience it … Taking the abuse into consideration, this court is C persuaded to believe the evidence of the complainant. *If any other boy or man* had abused her, it is the court's opinion that the complainant *could have just named that person.* The court came to that conclusion because it *did not find any motivation on the part of the complainant to lie.* Taking into account her age, the court does not believe that the complainant understood that what was done to her is a crime" (my emphasis).

In respect of the alleged sour relations, I agree with the State counsel's D submission that even though there might have been sour relations between the appellant and the complainant's paternal grandparents, there is no evidence on record to suggest that the complainant was spoon fed to falsely incriminate the appellant. In my view, the fact that the complainant's evidence E and that of her paternal grandmother does not dovetail is a strong indication that they did not rehearse in order to falsely implicate the appellant. For example, whereas the grandmother referred to "flesh" protruding from the "tobacco", the complainant referred to her anus and vagina. Consequently, these grounds are dismissed for want of merit.

Ad sentence F

The sentence was attacked on the grounds that; it is on the higher side and induces a sense of shock in that (a) appellant is a first offender who should be reformed. (b) appellant is of "an old age" who should be sentenced to a lesser term of imprisonment.

The golden rule is that issues of sentence are the domain of the trial court and an G appellate court will not normally interfere with the sentence imposed by the court *a quo* unless the sentence imposed by the court *a quo* is manifestly excessive as to induce a sense of shock or is vitiated by an irregularity or misdirection. See *S* v *Ramushu* S-25-93; *S* v *Mundowa* 1998 (2) ZLR 392 (H) and *S* v *Mavundura* 2002 (1) ZLR 598 (H). *In casu,* there is no misdirection H or irregularity.

2014 (2) ZLR p304

Takuva J

What I find as an aggravating feature in this matter is that the appellant is A the complainant's grandfather who had resided with her for two years and was *in loco parentis*. Instead of protecting the complainant from abuse, the appellant abused her. Offences of this nature are prevalent and expose young children to extreme trauma and incurable diseases. *In casu*, the doctor found that there was a "reflex anal dilatation" which basically means that the anus had widened in response to some pressure. He also concluded that B anal penetration was very likely. Such physical damage to a six year old girl has far reaching consequences on her childhood development. For these reasons, the trial magistrate was correct in regarding lengthy imprisonment as being appropriate.

I accordingly would dismiss the appeal in its entirety. C

MAKONESE J concurred

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[zRPz]MPOFU v DELTA BEVERAGES (PVT) LTD 2014 (2) ZLR 305 (H)

Citation	2014 (2) ZLR 305 (H)
Case No	Judgment No. HB-131-14
Court	High Court, Bulawayo
Judge	Takuva J
Heard	22 January & 20 August 2014; *CAV*
Judgment	11 September 2014
Counsel	*K Ngwenya,* for the applicant No appearance for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – right not to* C *be tried again in respect of act for which previously convicted or acquitted (s 70(1)(m)) – such right not applicable to civil proceedings arising out of same act*

Criminal procedure – *plea – autrefois acquit or autrefois convict – applicability – plea* D *only applies to subsequent criminal proceedings arising out of same facts – not applicable to civil proceedings, including disciplinary proceedings in employment cases*

Employment – *disciplinary proceedings – offender already acquitted by criminal court on same facts – not a bar to institution of disciplinary* E *proceedings under code of conduct*

Headnote

The applicant and a fellow employee, who were both employed by the respondent, were alleged by the respondent to have committed fraud and forgery in the course of their duties. They were arrested and F prosecuted on those charges but at the end of the trial were acquitted. The applicant returned to work but was served with a notice of suspension from work in terms of the respondent's code of conduct. He was then instructed to attend a disciplinary hearing on the same facts on which he had been acquitted by the magistrate. At the hearing, the applicant's G legal practitioner immediately argued that it was incompetent for the disciplinary committee to try the applicant for an offence in respect of an act or omission for which he had been previously acquitted on the merits and that for committee to do so would amount to a violation of s 70(1)(m) of the Constitution of Zimbabwe 2013. That provision states that any person accused of an offence has the right not to be tried for an H offence in respect of an act or omission for which he has previously been

pardoned or either acquitted or convicted on the merits. The applicant and A his legal practitioner then left the hearing and the committee proceeded, in their absence, to find the applicant guilty of the disciplinary offences charged. The applicant then applied for the proceedings to be set aside and the question of whether there had been a breach of s 70(1)(m) referred to the Constitutional Court.

Held, that in terms of s 4 of the Criminal Procedure and Evidence Act B [*Chapter 9:07*], the institution of a criminal action does not preclude a party from instituting a civil action against the same party in the criminal proceedings despite the issues being dealt with in the criminal matter being the same as those in the civil matter. The defences of *autrefois acquit* or *autrefois convict* only apply to a second criminal prosecution C and not to civil proceedings based on the same facts. An act or omission can result in numerous causes of action: criminal, civil, delictual, etc. The protection afforded in s 70(1)(m) relates to acts or omissions in the same category or of the same nature. Any other interpretation would result in an absurdity, in that it would render civil disputes generally and labour laws specifically dependent on outcomes in criminal prosecutions. This D is undesirable in a legal system where the burden of proof is different. A contract of employment arises from the employer/employee relationship. The parties' rights are governed by the Labour Act [*Chapter 28:01*] and a code of conduct. Proceedings in terms of codes of conduct are civil in nature and are totally permissible in terms of s 4 of the Criminal Procedure and Evidence Act. The application was therefore frivolous E and vexatious and would not be referred to the Constitutional Court.

Case referred to

Chawasarira Transport (Pvt) Ltd v *RBZ* 2009 (2) ZLR 112 (H)

Legislation considered F

Constitution of Zimbabwe 2013, ss 70(1)(m), 85(1) & 175(4)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 4

Case information

K Ngwenya, for the applicant

No appearance for the respondent G

Judgment

Takuva J: This is an application in terms of s 85 (1) of the Constitution of Zimbabwe Amendment (No. 20). The section reads:

> **"85 Enforcement of fundamental human rights and freedoms**
>
> (1) Any of the following persons, namely – H

> (a) any person acting in their own interests; A

(b) any person acting on behalf of another person who cannot act for themselves;

(c) any person acting as a member or in the interests of a group or class of persons;

(d) any person acting in the public interest;

(e) any association acting in the interest of its members; B

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief including a declaration of rights and an award of compensation."

The applicant alleges that his rights enshrined in s 70(1)(m) of the Constitution C have been violated by the respondent. The section reads:

"70 Rights of accused persons

(1) any person accused of an offence has the following rights –

(a) to be presumed innocent until proven guilty;

(b) to (l) [not relevant]…

(m) not to be tried for an offence in respect of an act or omission for which they D have previously been pardoned or either acquitted or convicted on the merits.

(n) …"

The facts of this matter are as follows:

The applicant is employed by the respondent as a driver/salesman stationed E at Bon Accord Plant in Bulawayo. On 15 August 2013, respondent made a report to the police alleging that applicant and one Liberman Mguni had committed fraud and forgery in the course of their duties. Applicant and his workmate were arrested and prosecuted on two counts of contravening ss 136 and 137 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], F that is, fraud and forgery respectively.

At the conclusion of the trial, the two were acquitted on both counts. The applicant returned to work but was served with a notice of suspension from work in terms of section 11 subsection 11.1(b) of the respondent's employment code of conduct (2003). The reason for the suspension was to enable the G respondent to carry out investigations into the alleged forgery and fraud.

On 13 November, 2013, the applicant was served with a notice to attend a disciplinary hearing on 18 November 2013 on the same facts he had been acquitted of by the magistrate. The disciplinary proceedings eventually commenced on 28 November, 2013 and the applicant's legal practitioner immediately raised an objection, arguing that it was incompetent for the H disciplinary committee to try the applicant for an offence in respect of an

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act or omission for which he had been previously acquitted on the merits. A The applicant's legal practitioner submitted that to do so would amount to a violation of s 70(1)(m) of the Constitution of Zimbabwe.

The disciplinary committee dismissed this point *in limine,* leading to the applicant and his legal practitioner walking out and the hearing proceeded in their absence. The applicant then filed this application praying for an order B that his trial by the respondent on the same charge, facts and allegations as those that he had been acquitted of on the merits is a violation of s 70(1)(m) of the Constitution of Zimbabwe. Further, he prayed that the proceedings against him instituted by the respondent on 28 November 2013 be set aside.

The broad issue to be determined here is whether or not the constitutional issue raised by the applicant should be referred to the Constitutional Court C in terms of s 175(4) of the Constitution. The subsection states:

"175 Powers of courts in constitutional matters

(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may, and if so requested by any party to the proceedings, must refer the matter to the Constitutional Court *unless he or she*D*considers the request is merely frivolous or vexatious*" (my emphasis).

In casu, the request is frivolous and vexatious for the following reasons:

In terms of our law, the institution of criminal action does not preclude a party from instituting a civil action against the same party in the criminal proceedings, despite the issues being dealt with in

the criminal matter being E the same as those in the civil matter – see s 4 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which states:

> "4. Neither a conviction nor an acquittal following any prosecution shall be a bar to a civil action for damages at the instance of any person who may have suffered any injury from the commission of any offence." F

Put differently, the defences of *autrefois acquit* or *autrefois convict* only apply to a second criminal prosecution and not to civil proceedings based on the same facts. These proceedings are distinct in that in criminal trials, the object is to punish the offender, while in civil actions it is to compensate or provide redress to the injured party – see *Chawasarira Transport (Pvt) Ltd* v *Reserve Bank of Zimbabwe* 2009 (2) ZLR 112 (H). G

An act or omission can result in numerous causes of action namely criminal, civil, delictual etc. Therefore, the protection afforded in s 70(1)(m) relates to acts or omissions in the same category or of the same nature. Any other interpretation would result in an absurdity in that it would render civil disputes generally and labour laws specifically dependent on outcomes in H

Takuva J

criminal prosecutions. This is undesirable in a legal system where the burden of A proof is different.

Further, a contract of employment arises from the employer/employee relationship. The parties' rights are governed by the Labour Act [*Chapter 9:07*] and code of conduct proceedings are civil in nature which are totally permissible in terms of section 4 of the Criminal Procedure and Evidence Act.

For these reasons, the application is dismissed without an order of costs. B

Mabhikwa, Hikwa & Nyathi applicant's legal practitioners

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[zRPz]NCUBE v DUBE 2014 (2) ZLR 310 (H)

Citation	2014 (2) ZLR 310 (H)
Case No	Judgment No. HB-132-14
Court	High Court, Bulawayo
Judge	Takuva J
Heard	16 May, 2 June & 21 August 2014; *CAV*
Judgment	11 September 2014
Counsel	Ms *N Dube* for the plaintiff First defendant in person No appearance for second and third defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Administration of estates – *surviving spouse – who is – woman married under customary law when husband's marriage under Marriage Act still extant – cannot be declared surviving spouse*

Customary law – *marriage – effect – marriage taking place while one party* D *still married to another person under Marriage Act – customary law marriage not valid for purposes of administration of estates*

Headnote

The plaintiff issued summons against the defendants claiming an order declaring her as the sole surviving spouse of L. Her claim was based E on the fact that, at the time of L's death, the first defendant had already commenced divorce proceedings against him. Further, she claimed that the first defendant had been separated from L for more than 12 years during which she and L were living as husband and wife. They had married under customary law, despite the fact that L and the first defendant were still married in terms of the Marriage Act [*Chapter 5:11*]. F

Held, that the real issue was this: what is the legal status of a customary law marriage contracted when either of the parties was married to someone else in accordance with the Marriage Act? Under s 68(3) of the Administration of Estates Act [*Chapter 6:01*], once a party is married in terms of the Marriage Act, any subsequent "marriages" are invalid. A customary law marriage can only co-exist with a monogamous marriage G where the former precedes the latter and not *vice-versa*. Any purported marriage between the plaintiff and L was invalid for the simple reason that it was preceded by a marriage contracted in terms of the Marriage Act. Consequently, she could not be declared the surviving spouse to L. H

2014 (2) ZLR p311

Takuva J

Cases referred to A

Chinho v *Chinho & Ors* 2006 (2) ZLR 163 (H)

Zawaira v *Nyamupfukudza & Ors* 2011 (2) ZLR 375 (H).

Legislation considered

Administration of Estates Act [*Chapter 6:01*], s 68(3) & (4) B

Case information

Ms *N Dube* for the plaintiff

First defendant in person

No appearance for second and third defendants

Judgment

Takuva J: The plaintiff issued summons against the defendants, claiming an C order declaring her as the sole surviving spouse of the late Leonard Dube who died on 18 June 2012. The plaintiff's claim is based on the fact that at the time of the deceased's demise the first defendant had already commenced divorce proceedings against Leonard Dube. Further, the plaintiff claimed D that the first defendant had been separated from Leonard Dube for a period in excess of 12 years, during which the plaintiff and Leonard Dube were living as husband and wife.

The first defendant entered appearance to defend and filed a plea in which she averred that at the time of his death, Leonard Dube was still married to E her in terms of the Marriage Act [*Chapter 5:11*]. She stated that the plaintiff was engaged in an adulterous relationship with the deceased and that this contributed significantly to the break-up of the marriage relationship between the deceased and the first defendant.

Subsequently a pre-trial conference was held and the sole issue for F determination was whether or not the plaintiff should be declared the surviving spouse of the late Leonard Dube instead of the first

defendant.

The plaintiff opened her case by giving *viva voce* evidence, the thrust of which was as follows:

1. that she was customarily married to Leonard Dube in 2000 and lived G with him as husband and wife until his death in 2012.
2. that Leonard Dube had under case number HC 5734/99 instituted divorce proceedings against the first defendant although those proceedings were left incomplete due to Leonard Dube's death. She stated that at the time of Leonard Dube's death he and the first defendant were living apart, H pursuing divergent lives.

2014 (2) ZLR p312

Takuva J

3. that since 2000 the plaintiff was, for all intents and purposes, the late A Leonard Dube's spouse and they acquired assets without the first defendant's input.
4. that the first defendant has no lawful claim to the assets acquired in the last 12 years of the deceased's life with the plaintiff as his wife.
5. that the first defendant cannot only now and after Leonard Dube's death B assert any rights to be his wife for purposes of inheriting his assets.

The plaintiff called a number of witnesses in a bid to prove that she was customarily married to Leonard Dube and that at the time of his death, she was living with him as husband and wife. It was further contended that during that period they acquired both immovable and movable property. The C immovable property was registered in Leonard Dube's name.

The defendant gave evidence in support of her pleadings. She also called numerous witnesses in support of her case. Her evidence is simply that she married Leonard Dube in 1972 and their marriage was blessed with fourteen children. She first met the plaintiff at St Peters where the plaintiff D was married to one Mr Mhlanga who was the first defendant's neighbour. Subsequently she claimed that the plaintiff worked as a maid for her and the late Leonard Dube. She denied that the plaintiff was customarily married to her late husband. It was her testimony that at the time her husband died they had reconciled and he had agreed to withdraw the divorce case. According to her, the plaintiff should not be declared as the surviving spouse because E she did not have a marriage certificate to prove that she was lawfully married to the late Leonard Dube.

The issue that arises from these facts is purely legal: *viz.* what is the legal status of a customary law marriage contracted when either of the parties was married to someone else in accordance with the Marriage Act [*Chapter 5:11*]? F

The answer in my view lies in statute law, namely, the Administration of Estates Act [*Chapter 6:01*]. Section 68(3) of the Act states:

> "A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act [*Chapter 5:07*] and any G reference in this part to a spouse shall be construed accordingly:
>
> Provided that such a marriage *shall not be regarded as valid for the purposes of this Part if when it was contracted, either of the parties was married to someone else in accordance with the Marriage Act*[*Chapter 5:11*] or the law of a foreign country under which persons are not permitted to have more than one spouse" (my emphasis). H

2014 (2) ZLR p313

Takuva J

This section is crystal clear in its meaning. It does not give the court any A discretion on the matter. Its import is that once a party is married in terms of the Marriage Act, any subsequent "marriages" are invalid. A customary law marriage can only co-exist with a monogamous marriage where the former precedes the latter and not *vice versa* – see s 68(4) of the Act, which states:

> "A marriage contracted according to the Marriage Act [*Chapter 5:11*] or the law B of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this part even if when it was contracted either of the parties was married to someone else in accordance with customary law, whether or not that customary-law marriage was solemnized in terms of the Customary Marriages Act [*Chapter 5:07*]:
>
> Provided that for the purposes of this Part, the first-mentioned marriage shall C be regarded as a customary law marriage."

See *Chinho* v *Chinho & Ors* 2006 (2) ZLR 163 (H).

In casu, any purported marriage between the plaintiff and Leonard Dube is invalid for the simple reason that it was preceded by a marriage contracted in terms of the Marriage Act. Consequently, the plaintiff cannot be declared D the surviving spouse to the late Leonard Dube.

During the trial, both parties continuously strayed into issues relating to property rights over movable and immovable assets acquired by the late Mr Dube and the plaintiff. It was pointed out to the parties that this court was faced with the narrow issue regarding the status of the marriage between the plaintiff and the late Leonard Dube. For this reason the court did not E venture into the question of whether or not property acquired by the late Mr Dube and the plaintiff without the first defendant's input can be considered as matrimonial property. A related question is whether or not the plaintiff's children with the late Leonard Dube can be beneficiaries to his estate. See for example *Zawaira* v *Nyamupfukudza & Ors* 2011 (2) ZLR 375 (H).

Accordingly, the plaintiff's claim is dismissed with costs. F

Moyo & Nyoni, plaintiff's legal practitioners

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[zRPz]RITENOTE PRINTERS (PVT) LTD & ANOR v A ADAM & CO (PVT) LTD 2014 (2) ZLR 314 (H)

Citation	2014 (2) ZLR 314 (H)
Case No	Judgment No. HH-460-14
Court	High Court, Harare
Judge	Chigumba J
Heard	3-6 June 2014; *CAV*
Judgment	10 September 2014
Counsel	*E Hamunakwadi,* for the plaintiffs *E R Samukange,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Delict – *Aquilian action and actio injuriarum – distinction between – liability for – single wrongful act causing patrimonial loss and personal harm – need for both causes of action to be pleaded need to plead wrongfulness and fault – even if defendant's action wrongful, fault must be proved –* D *defendant acting in ignorance of law and on advice of legal practitioner – no fault shown*

Headnote

The first plaintiff claimed damages arising from its alleged "unlawful, wrongful and malicious" eviction from two premises that it was leasing from the defendant. It claimed that it suffered damages due to loss of trade. The E second plaintiff, a director of the first, claimed that, as a result of the unlawful eviction of the first plaintiff by the defendant, he suffered from chronic depression and was unable to run the affairs of the first plaintiff as he had done since its inception. In previous litigation, the defendant had obtained an eviction order in the magistrates court against the first F plaintiff. Not realising that, the first plaintiff having noted an appeal, that leave to execute the eviction order was necessary, the defendant had the plaintiff evicted [*] .

Held, that when the civil law should punish one person for wrongful or blameworthy conduct which causes harm to another question depends on the meaning of "wrongful", "blameworthy conduct" and "harm. The G two main types of loss for which compensation can be claimed under the law of delict are wrongs of substance, leading to financial loss, and wrongs to personality, leading to sentimental loss. Wrongs of substance are

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Tsanga J

wrongs which cause tangible harm, such as injury to a person including A psychological harm, damage to property and harm to economic interests. Not every harm suffered by a person is actionable in the field of delict. A person can only sue successfully in delict if the law of delict recognizes that there is legal liability for that type of harm. Most delictual actions in our system require proof of fault, either intention or negligence. The B Aquilian action requires proof of either intention or negligence. The most important actions in our law of delict include the Aquilian action (*actio legis Aquiliae)* and the *actio injuriarum.* The Aquilian action provides a remedy for what are known as wrongs of substance. The *actio injuriarum* provides a remedy for wrongs to personality, a remedy for sentimental C loss or intangible harm.

Held, further, that part of the difficulty with the plaintiffs' claim was the failure to separate and recognize the differences between these two separate causes of action in the law of delict. Neither the summons nor the declaration expressly separated the Aquilian action from the *actio injuriarum* as causes of action, each of which has different requirements. D The first plaintiff's remedies lay in the Aquilian action, and the second plaintiff's in the *actio injuriarum.*

Held, further, that in order to determine the wrongfulness of any given conduct, the court must make a value judgment based on, among other things, the current convictions of the community as to what is fair, just and equitable. Wrongfulness and fault are separate and distinct requirements of the E*actio legis Aquiliae.* Both must be pleaded and proved: it must be proved that the defendant caused harm either intentionally or negligently. The requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner, while the enquiry into fault focuses on the legal blameworthiness or reprehensible state of F mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was.

Held, further, that it was wrongful of the defendant to evict the first plaintiff G unlawfully. The illegality, according to the judgment of the Supreme Court, stemmed from the fact that the defendant ought to have exhausted its remedies before the magistrates court and made an application for execution pending appeal. The defendant's *prima facie* wrongful conduct appeared to be based on ignorance of the law and reliance on the advice of its legal practitioner. Although wrongfulness was specifically pleaded H (and there was no need to prove it because the Supreme Court had already

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Chigumba J

pronounced on the issue, and declared the first plaintiff's eviction to have A been unlawful), the element of fault was neither specifically pleaded, nor proved. Both the magistrates court and the High Court acted under a misapprehension of the law, and so no blame could be laid at the door of the defendant, which accepted the advice of its legal practitioner. Proof of fault would have required evidence of more than wrongfulness or unlawfulness, or consequential harm; it would have required evidence B of intention or negligence to establish a reasonable inference of liability.

Cases referred to

Border Timbers v *ZRA* 2009 (1) ZLR 131 (H)

Musadzikwa v *Min of Home Affairs & Anor* 2000 (1) ZLR 405 (H) C

Nyaguse v *Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H)

Case information

E Hamunakwadi, for the plaintiffs

E R Samukange, for the defendant

Judgment

Chigumba J: In what circumstances should the civil law punish one person D for wrongful or blameworthy conduct which causes harm to another? The answer to this question depends on the meaning that has been attributed to the phrases: "wrongful", "blameworthy conduct", and "harm". This is a case in which the first plaintiff is claiming damages arising from its alleged "unlawful, wrongful and malicious" eviction from two premises that it was leasing from the defendant. The first plaintiff claims that it suffered E damages due to loss of trade. The second plaintiff claims that, as a result of the unlawful eviction of the first plaintiff by the defendant, he suffered from chronic depression and was unable to run the affairs of the first plaintiff as he had done since its inception. We must determine whether the eviction of the first plaintiff from the defendant's premises was unlawful and wrongful as F alleged. We must also determine whether the second plaintiff suffered from chronic depression as a result of the alleged unlawful eviction. If both these questions are answered in the positive, our last order of business will be to determine the quantum of damages due to either or both plaintiffs, if any.

The plaintiffs averred, in the declaration, that, on 1 November 2010, the G defendant 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 result of the aforesaid eviction, they suffered losses by reason H

Chigumba J

of failure to trade from those premises 147 Mbuya Nehanda road for the period A ranging from first November 2010 to date, and from Winston House from first November 2010 to 29 June 2011. The plaintiffs' claim was founded on *injuria,* and on consequent damages arising there from, such as loss of business, and chronic depression arising as a result of defendant's conduct.

On 24 September 2012, the defendant entered appearance to defend. The B defendant's plea on the merits was to deny causing 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, and defendants prayed C for dismissal of the action together with costs on a higher scale. The plaintiffs replicated on 13 February 2013, and reiterated that they clearly pleaded fault on the part of the defendants. 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 plaintiffs' summons and declaration disclose a cause of D action at law?
2. Whether or not the second and third defendants have been erroneously joined to the present matter?
3. Whether or not defendants acted negligently, unlawfully and wrongfully E in evicting the first plaintiff?
4. Whether plaintiffs sufficiently set up a cause of action warranting the dismissal of the exception to which the defendants have pleaded over?

The second and fourth issues were disposed of in a separate judgment that is reported under a different case number. The ratio of that judgment is that F the directors of the defendant had been erroneously joined to the proceedings as being liable in their personal capacities. The court ordered

that they be removed as parties to the proceedings, because no application had been made to pierce the corporate veil, and there was no justification for piercing the corporate veil. The merits of the exception were not determined by the court. It was held that the exception was not properly before the court, because the G defendant pleaded over to the merits at the same time, putting paid to the claim that it was unable to plead because the summons and declaration did not disclose a cause of action. This trial commenced to determine two issues, whether or not the plaintiffs' summons and declaration disclose a cause of action at law, and whether the defendant acted negligently, unlawfully, and H wrongfully in evicting the first plaintiff.

Chigumba J

Plaintiff's case A

Mr John Kanokanga, the second plaintiff, gave evidence at the trial on his own behalf and on behalf of the first plaintiff, a duly registered company that he is a director and shareholder in. He told the court that he is 52 years old and has been running businesses since 1987. He chronicled his vast experience in business for the benefit of the court. The second plaintiff testified that, when he took over Copyworld, it was a booming business, the first photocopying B bureau in this country, with the largest equipment for photocopying. It had eighty employees and considerable profit margins. It had two branches in Bulawayo and three in Harare. It had a delivery truck and motor vehicles as assets of value. The witness told the court that he expanded the business by introducing litho printing of textbooks, calendars, and invoice books. He C stated that first plaintiff recapitalized and bought new equipment and replaced the photocopiers from analogue with digital ones. He told the court that first plaintiff was generating so much business that it bought two motorbikes for deliveries and five smaller motor vehicles for use by its executives. The second plaintiff tendered an evaluation of first plaintiff which was prepared by consultants named Njana (Pvt) Ltd on 1 May 2012. D

According to the evidence tendered, the first plaintiff's fixed assets as at 1 May 2012 were valued at US$424 000. Its net value was pegged at US$610 912. Its debtors owed it US$82 209.50. A schedule was entered into evidence, which showed the income generated by the first plaintiff for the twelve months preceding its eviction by the defendant, from E November 2009 to October 2010. The first plaintiff generated US$1 375 166 in total during the twelve month period. The second plaintiff testified that he had prepared the schedule of income, with the help of his children, and that he had relied on bank statements, which were attached to plaintiffs' bundle of documents, at record pp 213-316. The court was satisfied, after being taken entry by entry through the bank statements, that the statements were F the source of the schedule of income prepared by the second plaintiff. The court was satisfied, that the second plaintiff was telling the truth when he testified that, according to the bank statements filed of record, first plaintiff's income which was banked in the period November 2009 to October 2010 was US$808 000, and that the income which came in as cash amounted to US$580 000, bringing the total income generated in that period to G US$1 300 000. He told the court that this income was generated by six branches of the first plaintiff. The Mandela branch, on Mbuya Nehanda Street, brought in an income of US 109 280 during that period. Divide that by twelve, its income comes to US$9 106.80 per month. The Winston branch, on Leopold Takawira Street, brought in US$88 892. Divide that by twelve months and H

Chigumba J

its average monthly income comes to US$7 407.08. The second plaintiff told the A court that first plaintiff's combined income for the twelve month period was US$1 375 166.

The second plaintiff told the court that he had a cordial relationship with Mr Musa Adam, a director of the defendant, for a very long time, which B included numerous business transactions and leases of multiple properties, to such an extent that he considered this gentleman a brother, and a friend. Their cordial relationship spanned a period of 20 years, until Mr Adam brought in his son, Tariq Adam, to run the affairs of the defendant. He told the court that trouble started in 2009, when Mr Musa Adam decided to turn C the premises at 147 Mbuya Nehanda Street into 15 offices.

The witness testified that as a result of this plan he was advised that the first plaintiff could not continue to carry on its business as usual whilst renovations were being done. Negotiations ensued, which, so the second plaintiff testified, culminated in a written agreement that the first plaintiff

vacate the premises within two months. More trouble arose when the second plaintiff refused to D vacate the premises and insisted that the defendant provide the first plaintiff with an alternative premises to operate from.

In 2009, under case numbers HC 649/09 for the premises on Mbuya Nehanda Street and HC2624/09 for the premises on Leopold Takawira Street, the defendant sued the first plaintiff out of the High Court for its eviction. The E second plaintiff told the court that the litigation proceeded to trial stage, whereupon the defendant withdrew both matters without tendering any explanation. Three months after withdrawing the High Court actions, fresh proceedings were brought, out of the magistrates court, under case numbers 15121/10 and 15122/10. The defendant initially claimed arrear rentals in the F sum of US$70 000, which was later abandoned to claim a total US$4000, presumably to bring the two claims within the monetary jurisdiction of the magistrates court. The magistrates court issued two court orders for the first plaintiff's eviction on 25 September 2010, which prompted the plaintiff to note an appeal, then to apply for stay of execution to avoid being evicted. Its application for stay of execution was dismissed by the magistrates court. G The reason for dismissal was that when the appeal was noted, the eviction orders had been automatically suspended so the application before the court was superfluous. The first plaintiff then applied to the High Court which refused to stay execution on an urgent basis. The plaintiff then appealed to the Supreme Court against the High Court order which declined to stay H execution.

Chigumba J

Under Supreme Court case number SC 15/11, the plaintiff's appeal was A allowed, on 31 May 2011. The second plaintiff told the court that, according to his understanding, the Supreme Court found that the High Court was wrong when it upheld the eviction orders and the refusal to stay execution order of the magistrates court, which was based on a wrong interpretation of the law. The Supreme Court ordered that the first plaintiff be restored to the premises, pending the determination of its appeal against eviction. As B part of the eviction process, a Nashua photocopier and two motorbikes were attached and removed by the messenger of court. The second plaintiff told the court that the first plaintiff was restored to the Leopold Takawira branch after eight months, but never restored to the Mbuya Nehanda branch, because the defendant demolished that building on being served with a copy of the C Supreme Court order. The second plaintiff told the court that the eviction of the first plaintiff was malicious and wrongful because it was done without the authority of a court order, and because the messenger of court was instructed by the defendant to evict the first plaintiff without notice, the eviction was done forthwith.

The second plaintiff testified that, during the hearing at the Supreme Court, D the defendant had told the court that it proceeded with eviction because it was misled by its lawyers. He said that a lawyer acts on its client's instructions, not the other way round. For that reason, the second plaintiff feels that the defendant should be brought to book. The second plaintiff tendered a statement which shows that storage charges in the sum of US$15 580 are E currently due to Ruby Auctions who have had their two motorbikes in storage since the eviction, and US$3 463 for the storage of the Nashua photocopier. The witness told the court that, as a result of the action of the defendant in demolishing the building after being served with the order for restoration by the Supreme Court, he caused contempt of court proceedings to be instituted against Mr Tariq Adam, the manager of the defendant under case number F HC 717/12. The second plaintiff told the court that he withdrew the application for contempt of court against Tariq Adam out of sentimental reasons; he remembered his friendship with Mr Musa Adam.

The second plaintiff told the court that he decided to be at peace with himself and with the world. He said that he was diagnosed with depression, chronic G depression which left him plagued with feelings of committing suicide. The second plaintiff told the court that he is still suffering from chronic depression, and is under doctor's orders to avoid stressful situations such as going to work full time. He tendered a letter from Dr Chibanda dated 31 July 2012, who is a mental health specialist which confirms that he was depressed and suicidal. The witness told the court that he has seen Dr Chibanda twice a year H

Chigumba J

from 2011 to date, and tendered proof that he was on anti-depressants and A insomnia sleeping tablets. He said that his depression mainly stemmed from the fact that he had been in business for a

long time, and was now unable to fend for his family, which left him feeling useless and hopeless. When he was invited to advise the court why he was claiming so much money in damages, the second plaintiff became emotional and the court had to adjourn B because he became incapacitated and could no longer speak. He was sobbing uncontrollably into his handkerchief.

When the trial resumed, the second plaintiff testified that the basis of his claim of US$25 000 for *injuria* was that the evictions were a personal affront to him and an embarrassment to a person of his social standing. He testified C further that the basis of his claim for loss of trade was that, as a result of the evictions, the first plaintiff did not trade for eight months until it was restored to the premises in June 2011. He said that the Winston house branch made US$88 892 in the twelve months preceding the eviction, and would have made US$60 000 in the eight months that it failed to trade. He told the court that first plaintiff was never restored to the Mbuya Nehanda branch and that D he could have claimed more, taking into consideration that the branch earned US$109 280 in the twelve months preceding the eviction. He stated that he could claim loss of income for this branch for 2011, 2012, and 2013 to date.

The second plaintiff said that he blames the defendant and the wrongful evictions for the loss of future earning capacity, which he pegged at E US$4 million dollars, based on the retirement age of 65 and the number of years that he could have earned US$1 375 166 per year had he not been incapacitated by his illness. Evidence was tendered that, as at 11 September 2013, the second plaintiff was indebted to Watershed College in the sum of US$10 000 for his son's school fees. The witness told the court that he had received death threats from police officers whom he charged with being corruptly induced F by officers of the defendant to scare him. Finally, because of the protracted legal battles that are seemingly never-ending, the witness told the court that he owes a small fortune in outstanding legal fees.

During cross examination, the second plaintiff told the court that first plaintiff never had rent arrears as alleged by the defendant. He admitted G that it later transpired that the money that he had been remitting to Messrs Bherebende Legal Practitioners for the rent may not have been forwarded to the defendant. He admitted that the High Court dismissed the application for stay of execution and upheld the order of the magistrates court in which it declined to grant stay of execution. The witness accepted that the defendant evicted the first plaintiff on the basis of the orders of those two courts. On H the issue of the action taken to recover the goods attached by the messenger

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of court on eviction, the second plaintiff admitted that no action was taken, A other than to present the order of the Supreme Court to that office, to no avail. The witness admitted that he had agreed to vacate the branch at 147 Mbuya Nehanda Street, by September 2009, and that is why his income schedule shows no income from September 2009 to October 2010, the time of the eviction. He admitted that he had agreed that the first plaintiff vacate the premises, in order to enable the defendant to renovate the premises. The B witness told the court that he sold the first plaintiff's assets and liabilities to a company called Colourprinters which was set up by two of his senior managers, and that, from the date of the sale, the first plaintiff ceased to exist. Finally, the witness told the court that the negligence that he is imputing to the defendant in evicting the first plaintiff was based on the fact that the defendant failed to get an order allowing it to execute pending appeal, that C this was wrongful, and that it caused the unlawful eviction of the first plaintiff.

The court was unable to accept the veracity of the plaintiff's evidence regarding the status of the Mbuya Nehanda branch lease at the time of the eviction. The second plaintiff prevaricated, he became agitated, and the court formed the impression that he was being untruthful. He was not a reliable D witness on that issue and, because of his capacity to become emotionally charged, distorted some of the evidence that would have been useful to his case. Clearly the parties agreed that the Mbuya Nehanda branch needed renovations. Clearly the second plaintiff testified in his evidence in chief that the parties had agreed that the first plaintiff would vacate these premise by September 2009 to pave the way for renovations. The second plaintiff E testified that he refused to vacate by the agreed date, and insisted that the defendant provide him with alternative premises to operate from. Clearly the City of Harare, from the evidence led, had condemned that building. The court was not satisfied that applicant was in legal occupation as the time of the alleged eviction. He was a *mala fide* possessor, having reneged F on his undertaking to vacate the premises in September 2009. To prove that point, the plaintiff's income schedule shows that no income was generated by that branch from September 2009 to the date of eviction in November 2010. The court

concluded that the second plaintiff's hysterics and histrionic behavior stemmed from a layman's lack of knowledge of the concept of occupation. There was no cogent evidence of another agreement as to the G lease or occupation as alleged by the plaintiff.

The second witness to testify on behalf of the plaintiffs was Mr Richmond Charugwa, a qualified chemical engineer who told the court that he has known the second plaintiff since 2002. The witness testified that he sold some lithographic printers to the first plaintiff. He assisted the first plaintiff's H

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transition from analogue to digital machines, and to A2 machines. He testified A that, by November 2010, the business had become very lucrative and the first plaintiff had a large market share, and employed more than sixty people. The witness told the court that some of the machines were damaged in the process of moving around after the eviction. He said that the second plaintiff became withdrawn, lost weight, and became addicted to religion, after the B eviction. Under cross examination, the witness confirmed that he had no knowledge of the eviction or its cause. The court found this witness credible.

The plaintiffs' third witness was Mrs Doreen Asher, who told the court that she was employed by the first plaintiff as an administrator to the CEO (Chief Executive Officer), the second plaintiff, from 16 January 2009. She said C that the first plaintiff was the biggest printing company at that time, with a registered trademark, providing services to most government departments and to Non-Governmental Organizations. The witness told the court that the evictions of November 2010 were negligent, unlawful, and wrongful, and done in a bad manner. She said that first plaintiff was reinstated by the Supreme Court but before they could move back in the defendant demolished D the building at 147 Mbuya Nehanda Street. She placed the blame on the defendant's conduct, and blamed the plaintiff's failure to generate sufficient income on the eviction, because she said Mbuya Nehanda had housed the biggest branch and brought in the most income. Lastly, she told the court that the second plaintiff became depressed after the evictions, and appeared unable E to function, coming late to work, taking copious amounts of medication, and playing religious music all day. She tendered the agreement of sale between first plaintiff and Copyworld, of which she is a director, dated 31 May 2012, into evidence at R29-44 of plaintiff's bundle. She confirmed that the second plaintiff took about USD$80 000 and a few items of furniture, and that no money exchanged hands for the sale of the business. She said that the F second plaintiff literally gave the business away. During cross examination this witness told the court that, at the time of the eviction, first plaintiff was occupying a small portion of the premises at Mbuya Nehanda Street, and not generating any income. She told the court that Copyworld was now defunct. The court had no reason to disbelieve this witness; she was calm and confident in the witness stand, but her credibility was colored by her G obvious sympathy towards the second plaintiff, her former boss.

The plaintiffs' last witness was Dr Patrick Mhaka, a specialist psychiatrist with an MB ChB in medicine and surgery and a DMH Masters in mental health, medicine and psychiatry. He told the court that he knows the second plaintiff and was aware of his treatment by Dr Chibanda, who was currently H out of the country.

The witness told the court that chronic depression is an illness of mood and A mental psychiatric illness characterized primarily by a depressed mood where someone feels low, is unable to sleep or sleeps all the time, has reduced appetite, has weight loss, gain, has reduced energy levels, and is unable to concentrate, has loss of libido, fells helpless, hopeless and worthless, and suicidal. He confirmed that the second plaintiff was found to have all of these symptoms, and referred to Dr Chibanda's letter of 31 July 2012. The witness B told the court that the second plaintiff was prescribed with an antidepressant (Cilift) and a sedative (Lorazepam).

Dr Mhaka told the court that the second plaintiff has not responded at all to the medications prescribed for him, a fact that confirms his diagnosis, that he is chronically depressed. He said that the second plaintiff's symptoms C now included recurrent anxiety. As a result of the chronic depression, the second plaintiff cannot work, or cope with even the simplest task that requires him to make a decision; he is now handicapped and disabled. Under cross examination, the doctor stated that there are a number of stressors that can trigger depression, and agreed that the diagnosis

relies heavily on what D the patient says, although there are diagnostic tools that are used when the diagnosis is made. The plaintiffs then closed their case. The court's opinion of this expert witness is that he is indeed very knowledgeable about the subject of depression. There is no doubt that the second plaintiff's diagnosis is correct. However, from the evidence that was led, the court struggled to find a connection between the onset of the second plaintiff's depression, E and its progression to a chronic state, to the unlawful eviction of the first plaintiff. There was an implied connection to the timing of the onset of the second plaintiff's condition to the time of the eviction. The court would have benefitted from other evidence such a testimony by family members as to whether there were no other triggers of depression in the second plaintiff's personal life, at the time. F

Defendant's case

Mr Tariq Adam testified on behalf of the defendant. He told the court that the reason for the eviction was that first plaintiff was in arrears with rentals for both premises, and that these arrears have not been recovered, to date. He said that litigation is currently pending under case number HC 804/13 G to recover the outstanding rentals.

The witness testified that defendant obtained a court order from the magistrates court to evict the first plaintiff from the two premises, and that the High Court upheld the orders, and that this was the basis of the eviction. He denied foreseeing the possibility of harm to the first or to the second plaintiff. The H

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witness told the court that the defendant was not negligent in any way in A procuring the eviction. He denied being motivated by malice, and said that it was purely business; the first plaintiff was no longer discharging its liability to pay rent. The witness told the court that the defendant did not owe the plaintiffs any money, as claimed in the summons or at all. He denied causing the second plaintiff's depression, and stated that he was just doing his job as B defendant's manager. He said that he did not foresee the possibility that the eviction was unlawful because of the court orders which allowed defendant to evict the first plaintiff. The witness told the court that the messenger of court lied on the return of service that defendant destroyed the building at 147 Mbuya Nehanda Street, after being served with a copy of a notice to C reinstate the first plaintiff. The court found it difficult to accept the plaintiff's version that a whole building with many floors was demolished overnight. This witness's evidence fits the explanation given by Doreen Asher (the plaintiffs' third witness) who told the court, during cross examination, that the first plaintiff was in occupation of a reduced portion of the previous leased premises at the date of the eviction. The first plaintiff voluntarily D occupied the front of the building, while the back was being systematically demolished. At the time of the eviction, part of the building had already been demolished. In my view, based on the evidence, at the time of the proposed restoration, eight months after the eviction, it is possible that only a small portion of the front of the building was still standing.

During cross examination Tariq Adam told the court that the defendant had been E represented by Mr Tavenhave, a legal practitioner, who had misled the defendant and given it incorrect legal advice about the legality of executing the eviction orders of the magistrates court. He referred to a letter which was filed of record, in which he had complained to the Law Society about this lawyer's conduct of this matter, especially since the Supreme Court F then found that the eviction was unlawful, because the defendant ought to have applied for leave to execute pending appeal before proceeding. Mr Tariq Adam said that he did not deal with the legal issues on a day to day basis, but simply let Mr Tavenhave do his job, the assumption being that, as a lawyer, he knew best about the law. He said he merely followed his lawyer's advice, although he admitted that a lawyer should act on his client's G instructions. He denied instructing Mr Tavenhave to act unlawfully. There was nothing in the demeanour of this witness which led me to suspect or to believe that he was not being candid with the court. He remained cool under vigorous cross examination by counsel for the plaintiffs. He appeared unruffled. He did not shift his position in any material respect. His evidence H was accepted by the court.

The defendant's second witness was Mr Musa Adam. He is Tariq Adam's A father, and the former manager of the defendant's properties. He interacted with the second plaintiff directly over a period

of 20 years, and oversaw the lease agreement between the first plaintiff and the defendant in respect of 147 Mbuya Nehanda Street, and the 109 Leopold Takawira Street premises. He told the court that the defendant sought the first plaintiff's eviction from these premises because of arrear rentals. He said that it was agreed between B himself and the first plaintiff that the second plaintiff would vacate 147 Mbuya Nehanda Street by September 2009 because the defendant intended to renovate those premises. It was after the second plaintiff refused to honour the agreement to vacate that eviction proceedings were commenced against the first plaintiff. The witness denied any intention to cause harm to C the plaintiffs, and denied harboring malicious intentions against them. He emphasized that he has always had a cordial relationship with the second plaintiff (a fact which the second plaintiff alluded to in his examination in chief). He said that during the eight month period between the eviction and the order for restoration, the building at Mbuya Nehanda Street was being demolished. He reiterated that the eviction was done on the strength of two D court orders, from the nagistrates court and from the High Court.

During cross examination, Mr Musa Adam denied that the parties entered into a verbal agreement that first plaintiff remain on the premises after September 2009, the agreed date to vacate the premises. He stated that the building was being demolished while some of first plaintiff's equipment E was in some of the front rooms (this was corroborated by the evidence of Doreen Asher). He said that the building was demolished from the rear to the front. The witness was not shaken in his assertion that, at the time that the order for restoration was issued by the Supreme Court, the building had been demolished. He postulated that the Deputy Sheriff was misleading the court when he filed a return of service that the building was demolished F within 48 hours of service of the notice of restoration. The witness insisted that as far as he knew, the eviction was handled by the defendant's legal practitioner, whose advice they relied on, and that at no time did he instruct the legal practitioner to proceed with eviction contrary to the law. He denied that he was aware that it was unlawful to proceed with the eviction because G an appeal had been noted. He denied being advised that it was necessary to apply for an order for execution pending appeal. Despite vigorous cross examination, the witness denied instructing defendant's legal practitioner to proceed with eviction despite the noting of an appeal, and despite the absence of an order for execution pending appeal. He told the court that defendant's lawyer handled legal proceedings, and that, all he knew was H

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that they had an order for eviction from the magistrate's court, which had been A upheld by the High Court. Mr Musa Adam is an elderly gentleman. The court believed his testimony. He did not prevaricate. He remained calm under vigorous and at times abrasive cross-examination. He did not falter or change his testimony. The court believed that, to him, the eviction took place in the normal course of business. There was nothing personal about B it, or malicious, or illegal.

The defendant then closed its case.

The law

> "The law of delict is a branch of private law falling under the law of obligations. It deals with civil wrongs as opposed to criminal wrongs… The word delict is C derived from the Latin word *delictum,* meaning a wrong. In England and America the term used for what we call a delict is a tort, derived from the Latin word *tortuous,* meaning twisted or wrong. A delict has been defined as:
>
> (a) A civil wrong to an individual for which damages can be claimed for compensation and for which redress is not usually dependant on a prior contractual undertaking to refrain from causing harm.
>
> (b) An unlawful blameworthy act or omission which causes damage to a person or his or D her property, or injury to personality and for which a civil remedy for recovery of damages is available.
>
> (c) A breach of a general duty imposed by law giving rise to a civil action at the suit of the injured person." [1]

In other texts, a delict has been defined as: E

> "a wrong which can be redressed by civil proceedings…such a wrong exists whenever the defendant's wrongful and blameworthy conduct causes harm to another in the form of either patrimonial loss or an infringement of an interest or personality". [2]

The Supreme Court has already found that the first plaintiff was evicted F unlawfully by the defendant. Can damages be claimed for compensation to redress this wrong to the first plaintiff and

to the second plaintiff in the circumstances of this case? Firstly, the elements of the delict must be established:

> "The two main types of loss for which compensation can be claimed under the law of delict are wrongs of substance leading to financial loss and wrongs G to personality leading to sentimental loss. Wrongs of substance are wrongs which cause tangible harm, such as injury to a person including psychological harm, damage to property and harm to economic interests … not every harm suffered by a person is actionable in the field of delict. A person can only sue

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> successfully in delict if the law of delict recognizes that there is legal liability A for that type of harm." [3]
>
> "Most delictual actions in our system require proof of fault … proof of either intention or negligence. The Aquilian action requires proof of either intention or negligence. The most important actions in our law of delict include the Aquilian action (*actio legis Aquiliae)* and the *actio injuriarum.* The Aquilian action provides a remedy for what are known as wrongs of substance. The B*actio injuriarum* provides a remedy for wrongs to personality, a remedy for sentimental loss or intangible harm." [4]

It is my view that part of the difficulty with the plaintiff's claim is the failure to separate and recognize the differences between these two separate causes of action in the law of delict. Neither the summons nor the declaration expressly separates the Aquilian action from the *actio injuriarum* as causes C of action. The summons merely says that the plaintiffs' claims are based on *injuria.* Neither the summons nor the declaration pleads the two causes of action separately. They clearly have different requirements. Clearly the first plaintiff's remedies lie in the Aquilian action, and the second plaintiff's in the *actio injuriarum.*

I propose first to consider whether the requirements of the Aquilian action D were fulfilled. The general evidential rule that applies to all civil actions is that the plaintiff must prove his claim on a balance of probabilities, and a defendant must prove his defence on a balance of probabilities. There are four elements which the plaintiff must prove on a balance of probabilities in an Aquilian action, the wrongfulness requirement, the patrimonial loss requirement, the fault requirement, and the causation requirement: E

(a) There must be some conduct on D's part (i.e. the act or omission, which the law of delict recognizes as wrongful).

(b) The conduct must have led to physical harm to person or property and thereby to financial loss, or have caused purely financial loss which does not stem from any physical harm to person or property. F

(c) D must have inflicted the patrimonial loss negligently or intentionally.

(d) There must be a causal link between D's conduct and the loss." [5]

The wrongfulness requirement

This requirement operates as a valve that controls or regulates the scope G of actionable negligence. It has been held that, in order to determine the wrongfulness of any given conduct, the court must make a value judgment

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based on, among other things, the current convictions of the community as to A what is fair, just and equitable. [6] It has also been held that wrongfulness and fault are separate and distinct requirements of the *actio legis Aquiliae. Finally, both fault and negligence must be pleaded and proved. Applying these various requirements to the circumstances of the case before the court, I find that, based on the current convictions of our community of what is* B *fair, just and equitable, it was wrongful of the defendant to evict the first plaintiff unlawfully. The illegality, according to the judgment of the Supreme Court, stemmed from the fact that the defendant ought to have exhausted its remedies before the magistrates court and made an application for execution pending appeal. The defendant's prima facie* wrongful conduct appears to C be based on ignorance of the law, and reliance on the advice of its legal practitioner. Having said that, it is clear that although wrongfulness was specifically pleaded, and there was no need to prove it because the Supreme Court had already pronounced on the issue, and declared the first plaintiff's eviction to have been unlawful, the element of fault was neither specifically pleaded, nor proved.

The fault requirement D

It must be proved that the defendant caused harm either intentionally or negligently. [9] At pp 2-3 of *Nyaguse* v *Skinners supra*, the court had this to say:

> "The distinction between wrongfulness and fault is very ably elucidated by Neethling, Potgieter & Visser *Law of Delict* at pp 29, 113, and 143. According to E the learned authors, the requirement of wrongfulness entails proof of a harmful result occasioned in a legally reprehensible or unreasonable manner. On the other hand, the enquiry into fault focuses on the legal blameworthiness or reprehensible state of mind and conduct of the defendant. While wrongfulness is determined by reference to public policy or the legal convictions of the community, fault is determined by reference to the foreseeability and preventability of harm by the defendant in the circumstances in which he actually was. In other words, F wrongfulness relates to the reprehensibility of the harmful conduct, while fault is concerned with the blameworthiness of the defendant himself. It is clear, therefore, that wrongfulness and fault are distinct legal concepts requiring specific and separate proof in order to sustain a delictual claim under the *lex Aquiliae*."

In the circumstances of the case before the court, the fault requirement was G not specifically pleaded. It was implied in the pleadings that the defendant's blameworthy conduct was in its failure to appreciate the vagaries of the

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Magistrates Court Act [*Chapter 7:10*] and its rules. The defendant's witnesses A testified that they were led to believe, by their legal representative, that it was legally proper to evict the first plaintiff on the basis of the refusal by both the magistrates court and the High Court to grant the first plaintiff a stay of execution. This evidence was accepted by the court. There was no evidence that the defendant instructed or aided and abetted a deliberate flouting of B the law by their legal representative. The plaintiffs did not plead that the defendant's fault lay in relying on an act of incompetence or ignorance of the law on its part, or on the part of its legal representative. In the absence of this averment in the summons and declaration by the plaintiffs, their case must fall short of the onus of proof required in a civil trial. On a balance of probabilities, the plaintiffs are found to have failed to fulfill the requirement C to specifically plead and prove the fault requirement. The plaintiffs have failed to plead the manner of the defendant's blameworthy conduct which resulted in the unlawful eviction. If regard is had to the judgment of the Supreme Court, both the magistrates court and the High Court operated under a misapprehension of the law and of the operation of the Magistrates Court Act. D

What fault or blame can then be laid at the door of the defendant, which accepted the advice of its legal practitioner that two different courts had sanctioned the eviction? In my view, even if the element of fault had been specifically pleaded, it could not have been proven, for this reason. Proof of fault would have required evidence of more than wrongfulness or E unlawfulness, or consequential harm; it would have required evidence of intention or negligence to establish a reasonable inference of liability. From the evidence adduced at trial, there was no deliberate infliction of harm, with full knowledge that the eviction would result in harm. There is no evidence before the court that proceeding to evict the first plaintiff on the back of two court orders was an unreasonable manner to proceed in on the part of the F defendant. There is no evidence before the court, that an average reasonably careful Zimbabwean would not have proceeded to act in a similar manner if placed in the same shoes as the defendant at the time.

In *Border Timbers* v *ZRA supra* at 141B-H, Makarau JP (as she then was) stated that: G

> "It appears to me that the plaintiff may have proceeded under the incorrect belief that wrongfulness is similar to and the same as *culpa* and that pleading wrongfulness on its own suffices to satisfy the requirements of the Aquilian action. It is not. The two are separate requirements that have to be satisfied in each suit although the evidence led to prove one may be used to prove the other. I can do no better than associate myself with the observations of Scott JA in H

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> *Gouda Boerdery Bpk* v *Transnet Ltd* 2005 (5) SA 490 (SCA) when he had the following to A say in para 12 starting on p 499:
>
> 'It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable. But

the issue of wrongfulness is more often than not uncontentious as the plaintiff's action will be founded B upon conduct which, if held to be culpable, would be *prima facie* wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the C plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in *Kruger* v *Coetzee*, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a reasonable D person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the E issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted*, it is important* F *not to overlook the distinction between negligence and wrongfulness*' (the emphasis is mine)."

Disposition

It is common cause that the eviction of the first plaintiff by the defendant was subsequently declared to be unlawful by the Supreme Court. The G question that the court had to determine was whether this unlawful and consequently wrongful act gave rise to liability which was actionable and in respect of which it would be appropriate to redress the wrongful eviction by an appropriate order as to damages. This court has found that the first plaintiff failed to discharge the evidentiary burden upon it to prove all the four elements of the Aquilian action on a balance of probabilities. Although H the element of wrongfulness was specifically pleaded, and did not require

proof, the court had difficulty with the evidence regarding the element of A fault. This element was neither specifically pleaded nor proved. There was no averment of intention or negligence. The evidence adduced failed to show such blameworthy conduct, on the part of the defendant, which would have justified a finding that the defendant failed to take reasonable care, and proceeded to cause the eviction of the first plaintiff in circumstances where an average landlord would not have proceeded to evict a tenant. The plaintiffs' B summons and declaration consequently did not disclose a cause of action at law, and there was insufficient evidence that the defendant acted negligently in evicting the first plaintiff. If the first plaintiff's claim was not proved, it follows that the second plaintiff's claim is not sustainable.

In the result, the plaintiffs' claim is dismissed with costs. C

Hamunakwadi, Nyandoro & Nyambuya, plaintiffs' legal practitioners

Venturas & Samkange, defendant's legal practitioners

* See *Ritenote Printers (Pvt) Ltd v Adam & Co Anor* 2010 (2) ZLR 544 (H) and *Ritenote Printers (Pvt) Ltd v Adam & Co Anor* 2011 (1) ZLR 521 (S). – Editor.

1 G Feltoe *A Guide to the Zimbabwean Law of Delict* (2012)

2 Wille's *Principles of South African Law* (1991)

3 G Feltoe *op cit* p 1

4 G Feltoe *op cit* p 8

5 G Feltoe *op cit* p 8

6 *Musadzikwa* v *Minister of Home Affairs and Anor* 2000 (1) ZLR 405 (H)

7 *Nyaguse* v *Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H)

8 *Border Timbers* v *ZRA* 2009 (1) ZLR 131 (H)

9 *Nyaguse* v *Skinners supra*; G Feltoe *op cit* p 12

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[zRPz]AIR ZIMBABWE (PVT) LTD & ANOR v NHUTA & ORS 2014 (2) ZLR 333 (S)

Citation	2014 (2) ZLR 333 (S)
Case No	Judgment No. S-65-14
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Patel JA
Heard	18 November 2013; *CAV*
Judgment	15 September 2014
Counsel	*L Uriri*, for the appellants *T Mpofu*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Aviation – *Air Zimbabwe Corporation – successor company to – whether more than one successor company could be formed – other companies subsequently formed in Air Zimbabwe "stable" – not successor companies to Air Zimbabwe Corporation and not enjoying protection of State* D *Liabilities Act [Chapter 8:14]*

Headnote

The first respondent was a former employee of Air Zimbabwe Holdings (Pvt) Ltd, the second appellant. An award for outstanding wages and benefits had been made in his favour. He had subsequently, in September 2012, E registered the award as an order of the High Court. He proceeded to execute and the disputed assets were attached by the Deputy Sheriff. They were released after promises were made to pay the first respondent, but when those promises were not fulfilled the assets were attached again. The assets belonged to the second appellant, by whom the first respondent was employed.

The appellants brought an application in the High Court, seeking the release of the F seized assets. They alleged that, by virtue of the provisions of s 8 of the Finance (No. 2) Act, 2012, as read with the State Liabilities Act [*Chapter 8:14*], the attachment of the appellants' property to satisfy debts owed by either the first or the second appellant was in violation of the law and therefore

illegal. Section 8, they argued, was enacted with the G sole purpose of protecting, from attachment or execution, the property of the appellants as the successor companies of the Air Zimbabwe Corporation. The section referred to the Corporation "or any successor company". The appellants' argument was that the word "any" was meant to convey that any company formed by the shareholder or Board of the H National Airline would automatically enjoy the immunity provided and

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that the second appellant is such a successor company and would enjoy A the immunity. The judge *a quo* rejected this contention. On appeal:

Held, that it was clear from ss 2, 3 and 9A of the Air Zimbabwe Corporation (Repeal) Act, 1998 that only one successor company was contemplated by the Legislature. Had the appellants' contention to the contrary been correct, the Legislature would have expressed itself in words which lent B themselves clearly and unambiguously to the meaning contended for by the appellants. It was not the intention of the Legislature to extend such immunity to an indeterminate number of companies some shareholders or Board somewhere could think of floating.

Case cited C

Shah v *Air Zimbabwe Corporation* 2010 (2) ZLR 94 (H)

Legislation considered

Air Zimbabwe Corporation (Repeal) Act 1998, ss 3, 4, 5 & 9A

Electricity Act [*Chapter 13:19*], s 68

Finance (No 2) Act 2012, s 8 D

High Court Rules 1971 (RGN 1047 of 1971), rr 205A & 241

State Liabilities Act [*Chapter 8:14*], s 5

Case information

L Uriri, for the appellants

T Mpofu, for the respondents E

Judgment

Ziyambi JA: This is an appeal against a judgment of the High Court dismissing with costs an urgent application brought by the appellants for the release from 'attachment and execution' of certain motor vehicles and other assets attached by the second respondent ("the Deputy Sheriff") on the appellants' premises on 12 April 2013. F

The background

The first and second appellants are companies duly incorporated according to the laws of Zimbabwe, whose registered office and principal place of business is situated at the Harare airport. The first respondent is an ex-employee of the second appellant. Sometime in October 2010, an arbitral award for outstanding G salary and benefits was made in his favour. No appeal was lodged against the decision of the arbitrator and the award was registered with the High Court on 5 September 2012. On 19 October 2012 he caused to be issued a writ of execution on the strength of which the Deputy Sheriff attached and removed twenty-nine vehicles which were found on the appellants' premises at the Harare airport. The appellants alleged that interpleader notices were filed to H

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"safeguard the claimants' interests, which notices are still pending". Indeed, it A appears that interpleader proceedings in the name of the first appellant as claimant and the first respondent as judgment creditor were commenced in the High Court on or about 15 November 2012 and not

concluded. (I pause here to observe that in terms of the High Court Rules, interpleader proceedings in respect of property attached in execution are required to be brought by B the Deputy Sheriff, as applicant, and the person(s) claiming ownership of the attached property as claimant(s). See r 205A which provides:"(2) In regard to conflicting claims with respect to property attached in execution, the Sheriff or Deputy Sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant".).

The appellants further alleged that in December 2012, s 8 of the Finance (No.2) C Act, 2012 ("the Finance Act") was enacted with the sole purpose of protecting, from attachment or execution, the property of the appellants as the successor companies of the Air Zimbabwe Corporation and that following this enactment, and in February 2013 the first respondent released the attached D motor vehicles subject to the appellants paying to the Deputy Sheriff storage fees which had accumulated in the sum of US$10 000. The appellants were therefore surprised when, on 12 April 2013, the Deputy Sheriff returned with the same writ of execution and attached the same motor vehicles which had previously been released from attachment. They alleged that by virtue of the provisions of s 8 of the Finance Act, as read with the State Liabilities Act E [*Chapter 8:14*], the attachment of the appellants' property to satisfy debts owed by either the first or the second appellant is in violation of the law and therefore illegal. In the premises, they urged the court to intervene as a matter of urgency to prevent the removal of the assets, set for 22 April 2013 for public auctioning, and so put an end to the illegality perpetrated F by the respondents. Failure by the court to intervene and save the attached motor vehicles would result in paralysis of the business operations of the first appellant in a dispute to which it is not a party. It is of interest to note here that, notwithstanding the alleged urgency, the application was filed on 22 April 2013, the day scheduled for the removal of the attached property, and served on the first respondent the following day at 4.20 pm.

In opposing the application the first respondent raised two preliminary issues. G Firstly, that the matter was not urgent and, secondly, that the application was defective by reason of its non-compliance with r 241 (1) of the High Court Rules, which requires the applicant to set out the facts of his application in Form 29B. No mention was made of the second issue in the judgment and H it is not raised in the notice of appeal.

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With regard to the first point raised *in limine,* it was averred by the first A respondent that the appellants had shown no satisfactory reason, whether in the certificate of urgency or their founding affidavits, as to why the matter should be heard as a matter of urgency. In particular, there was no disclosure as to when the alleged urgency arose, regard being had to the fact that the writ was issued on 19 October 2012; that when the Finance Act on which the appellants rely was enacted in December 2012, no action was taken by the B appellants; and that the appellants had concealed from the court an earlier attempt by the Deputy Sheriff, on 10 April 2013, to attach their property before the actual attachment took place on 12 April. In addition, there was no explanation from the appellants as to why they failed to file this application before 22 April 2013. In the premises, the urgency was self-created. C

As to the merits of the matter, the first respondent averred that the property attached belonged to the second appellant ("Air Zimbabwe Holdings") which was not protected by the provisions of the Finance Act, such protection having been afforded only to the first appellant ("Air Zimbabwe"). While admitting that he had ordered the Deputy Sheriff to release the attached motor vehicles, D it was averred that the release was not on account of the provisions of the Finance Act but was in consequence of a tender by Air Zimbabwe Holdings of a payment plan in terms of which the latter promised to pay the debt owed to the first respondent in agreed instalments. When that commitment was not honoured, the Deputy Sheriff was instructed to re-attach and remove the goods formerly released, hence the attempt at attachment on 10 April 2013. E

The learned judge having heard the matter dismissed it on the basis that it lacked both urgency and merit. The following grounds of appeal were relied on by the appellants:

Grounds of appeal F

1. The court *a quo* erred in declining to hear and determine the matter on an urgent basis by the exercise of its discretion in the matter on a wrong premise, such wrong premise amounting to

an irregular exercise of judicial discretion.

2. The court *a quo* erred in not holding that, upon a proper construction of s 9A of the Air Zimbabwe Corporation (Repeal) Act, 1998, as inserted G by s 8 of the Finance (No.2) Act, 2012, both appellants are successor companies to the Air Zimbabwe Corporation.
3. The court *a quo* erred in not holding that judicial attachment and sale in execution of any property belonging to either of the appellants is proscribed by s 9A of the Air Zimbabwe Corporation (Repeal) Act, H

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1998, as read with the provisions of s 5(2) of the State Liabilities Act A [*Chapter 8:14*]

The first ground of appeal makes no sense, because the court *a quo* did not decline to hear the matter. Indeed, having found that the matter was not urgent it nevertheless proceeded to hear and determine it on an urgent basis. In so B doing, the court *a quo* contradicted itself. What it should have done once a finding of lack of urgency was made, was to strike or remove the matter from the roll of urgent matters and not proceed to hear the merits for, once a hearing has taken place and a decision made on the merits, the question of urgency becomes irrelevant. For this reason a determination on the first ground of appeal would be unnecessary. Suffice it to say that no wrong premise C was disclosed to this court (and indeed none was apparent on perusal of the judgment) and the evidence on the record adequately supports the finding of the learned Judge that any urgency there was self-created. The second and third grounds of appeal raise the issue whether Air Zimbabwe Holdings is a successor company of Air Zimbabwe Corporation as contemplated in D s 9A of the Air Zimbabwe Corporation (Repeal) Act , 1998 ("the Repeal Act"). If it is, then it would follow that the attachment of its property by the Deputy Sheriff was illegal.

It was the appellants' contention before this court, as before the court *a quo,* that the word *any* was meant to convey the meaning that any company formed E by the shareholder or Board of the National Airline would automatically enjoy the same immunity provided by the amendment and that, in the premises, Air Zimbabwe Holdings was such a successor company as would enjoy the immunity. The learned judge rejected this contention. At p 6 of the judgment he said:

> "I do not accept that it was the intention of the legislature to extend such immunity F to an indeterminate number of companies some shareholders or board somewhere could think of floating. I do not see the provisions of the amending section aforesaid as granting the power to anybody, let alone some shareholder or board of directors somewhere, to create a successor company, let alone several of them, to the defunct Corporation. The words used in the amendment are '… *or any successor company*'. The word '*company*' is used in the singular. I do not G accept applicants' argument that the use of the pronoun 'any' before the noun 'company' transformed the word 'company' from the singular to 'companies' in the plural. A reading of the whole amendment leaves me in no doubt that it was intended to refer to one successor company. If it was meant to refer to more than one company, the legislature could have easily used plurals so that that portion of the amendment would have read '… *or* ***all*** *successor compan****ies***', or '… H*or any* ***of*** *the successor compan****ies***'" (emphasis is contained in the judgment).

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The correctness of the learned judge's ruling becomes evident when the A legislative history is considered. The Repeal Act was brought into operation on 8 May 1998. Its purpose, as set out in the preamble, was

> "to provide for the dissolution of Air Zimbabwe Corporation and the transfer of its functions, assets, liabilities and staff to a *company formed for the purpose*; to provide for the repeal of the Air Zimbabwe Corporation Act [*Chapter 13:02*]; and to provide for matters connected with or incidental to the foregoing" (the B emphasis is mine).

Section 3 of the Repeal Act provides:

> **"3. Formation of a successor company**
>
> Subject to this section, the Minister shall take such steps as are necessary under the Companies Act [*Chapter 24:03*] to secure the formation of *a company*C limited by shares, which shall be *the successor company* to the Corporation for the purposes of this Act:
>
> Provided that, if *such a company* has been incorporated for the purpose before the date of commencement of this Act, the Minister may, by notice to the Corporation, direct that t*hat company* shall be *the successor company* to the Corporation for the purposes of this Act" (emphasis provided). D

Section 4 of the Repeal Act makes provision for the shareholding of the successor company and s 5 for the transfer of assets and liabilities of the Corporation to the successor company. The company nominated by the Minister in terms of s 3 was Air Zimbabwe (Pvt) Ltd. See *Shah* v *Air Zimbabwe Corporation*2010 (2) ZLR 94 (H). Kudya J stated as follows at 96-97: E

> "Section 3 of the Repeal Act mandated the Minister of Transport and Energy to secure the formation of a company limited by shares in terms of the Companies Act [*Chapter 24:03*] to succeed the Corporation. If such a company was in existence before the commencement of the Act, the Minster was empowered to notify the Corporation and direct the company to become the successor to the Corporation. The company he nominated as the successor company, Air Zimbabwe (Private) Limited, was already in existence by the time the F Repeal Act was published. It had been incorporated on 20 November 1997."

On 28 December 2012 the Finance Act amended the Repeal Act by inserting a new s 9A. Section 8 of the Finance Act provided:

> **"8 New section inserted in Act No.4 of 1998**
>
> (1) The Air Zimbabwe Corporation (Repeal) Act, 1998 is amended by the G insertion of the following section after s 9-
>
> **'9A Legal proceedings against Corporation or Successor Company**
>
> The State Liabilities Act [*Chapter 8:14*] applies with necessary changes to all legal proceedings against the Corporation or any successor company.'
>
> (2) Subject to subsection (3), the amendment effected by subsection (1) applies to all legal proceedings against the Corporation or successor company (as those H

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> terms are defined in s 2 of the Air Zimbabwe Corporation (Repeal) Act (No.4 of 1998)), A that were commenced or completed before the date of commencement of this Act.

The term "successor company" was defined in s 2 of the Repeal Act as follows:

> "'successor company' means the company referred to in section *three*."

It admits of no doubt, therefore, that the legislature clearly had in mind one B successor company. It is also clear that had the appellants' contention to the contrary been correct, the legislature would have expressed itself in words which lend themselves clearly and unambiguously to the meaning contended for by the appellants. As submitted by Mr *Mpofu* by way of illustration, the Air Zimbabwe Corporation was only one of the many companies which C were unbundled. Similar provisions were made in legislation repealing the Electricity Act. For example s 68 of the Electricity Act [*Chapter 13:19*] provides:

> **"68 Formation of successor companies**
>
> (1) The Minister shall, not later than six months after the fixed date, take such D steps as are necessary underthe Companies Act [*Chapter 24:03*] to secure the formation of one or more of the following companies limited by shares, which shall be the successor company or successor companies to the Authority –
>
> (a) a company to take over the electricity generation plants of the Authority;
>
> (b) a company to take over the transmission system of the Authority;
>
> (c) a company to take over from the authority the distribution and supply of E electricity;
>
> (d) such other companies as the Minister may approve;
>
> (e) a company to hold the shares of the State in the companies referred to in paragraphs (a) to (d)."

Clearly, then, the learned judge's finding that Air Zimbabwe Holdings is not the successor company referred to in s 9A of the Repeal Act is unassailable. F It follows, therefore, that the property of Air Zimbabwe Holdings is not protected from execution by the statutory provision.

As to the ownership of property attached, it was alleged by the appellants that that property belonged to Air Zimbabwe and not to Air Zimbabwe Holdings. In support of this allegation a number of registration books were attached to G the appellants' papers. The learned Judge determined this issue as follows:

> "The applicants alleged that the attached assets did not belong to Air Zimbabwe Holdings against which Nhuta had a judgment, but belonged to Air Zimbabwe which not only was not indebted to Nhuta but also the assets for which are immune from attachment. But not a shred of evidence was placed before me that the assets belonged to Air Zimbabwe. During argument it was contended from H the bar that the evidence of ownership was in the interpleader proceedings. It

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> will be remembered that until I had requested a copy of the pleadings in those A proceedings, none had been placed before me. No case reference number had been given. Nonetheless, having perused those papers I find that Air Zimbabwe laid claim to 20 out of 29 of the attached vehicles and to one motor cycle. As proof of ownership of those vehicles some registration books were copied and attached. From those registration books about six of the vehicles were in the name of '*Air Zimbabwe Corporation*' which could be either or both of the applicants according to their argument that both are successor companies. The B rest of the vehicles were in the name of '*Air Zimbabwe*' which again could mean either or both of the applicants. At any rate emblazoned on every registration book was a '*WARNING*' that read '*This registration book is not proof of legal ownership'* (my emphasis)."

I find no fault with the above reasoning. It is trite that registration books are not proof of ownership. In any event, the appellants have, still open to C them, the option of pursuing the interpleader proceedings in which the issue of ownership can properly be ventilated and determined.

The appeal, for the reasons set out above, lacks merit and is hereby dismissed with costs.

GARWE JA and PATEL JA concurred D

Mutumbwa Mugabe & Partners, appellants' legal practitioners

Matsikidze & Mucheche, respondents' legal practitioners E

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[zRPz]B (A JUVENILE) v MINISTER OF PRIMARY AND SECONDARY EDUCATION AND OTHERS 2014 (2) ZLR 341 (H)

Citation	2014 (2) ZLR 341 (H)
Case No	Judgment No. HH-476-14
Court	High Court, Harare
Judge	Mafusire J
Heard	8 September 2014; *CAV*
Judgment	15 September 2014
Counsel	*S Hofisi* for the applicant. *T O Dodo* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Administrative law – *audi alteram partem rule and legitimate expectation doctrine – application – limits – flexible tenets – fairness overriding factor in determining whether a person has legitimate expectation to* D *be heard –*

legislative and constitutional recognition and endorsement of rule and doctrine

Costs – *no order as to costs – civil application – poor presentation of papers*

Education – *pupil – discipline – application of audi alteram partem rule and legitimate expectation doctrine – no requirement for formal trial – pupil* E *entitled to be heard – fairness the overriding consideration*

Headnote

"The legitimate expectation doctrine … simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi judicial body … Fairness is the F overriding factor in deciding whether a person may claim a legitimate entitlement to be heard" (*dicta per* Gubbay CJ in *Health Professions Council* v *McGown* 1994 (2) ZLR 392 (S) at 394 applied).

Consequent upon disturbances at a high school, the applicant, who was a fourth form student at the school, was suspended from the school for 16 days G for his alleged part therein and subsequently expelled. Alleging that the school authorities had violated the rules of natural justice and had denied him the opportunity of explaining his part in the disturbances, the applicant sought an urgent application setting aside his expulsion from the school and his reinstatement thereat. His founding papers, which were poorly prepared, disclosed that he had been asked to submit a report to H the police, which he did. One of the school teachers had been present

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as he wrote down his report. After that every student was interviewed A by some school teachers and a minister or priest, and was then that the applicant was served with a letter suspending him from school for two weeks. When he returned after the period of suspension, he was served with a letter of exclusion.

An urgent chamber application was brought to reverse the decision and to B allow the applicant back into the classroom. This was on the basis that the school had not followed the requirements governing the expulsion or "exclusion" of students from schools, as set out in Education (Disciplinary Powers) Regulations 1998 (SI 362 of 1998) and the Education (Enrolment and Exclusion) Regulations 1998) (SI 363 of 1998). The applicant's main argument, though, was that, in expelling him, the school had violated C the rules of natural justice and s 69(2) of the Constitution, in that not only had it failed to accord him a fair and public hearing, but also that he was expelled on grounds which were materially different from those set out in the suspension letter.

The respondents averred that the applicant had been accorded a fair hearing. He had been given an opportunity to present his side of the story on D more than one occasion. It was not a requirement of the rules of natural justice that there be a formal hearing in all cases or that witnesses be made available for cross-examination. They conceded that the period of suspension should not have been for more than seven days, but said that the letter was in fact one expelling the applicant. They said that basic E ground for suspension and expulsion of the applicant was misconduct of a serious nature as contemplated by s 8(1) of SI 362 of 1998, in that he had been guilty of violent behaviour and destruction of school property.

Held, that the *audi alteram partem* rule is basic to our jurisprudence and now, in s 69(2), forms one of the fundamental human rights and freedoms provided in the Constitution. Section 68 provides for the right to F administrative justice. The Administrative Justice Act [*Chapter 10:28*], which predates the current Constitution, is one Act that seeks to give effect to the rights and freedoms enshrined in the Constitution on the *audi alteram partem* rule and its extension, the "legitimate expectation" doctrine. The content and practical application of the *audi alteram*G*partem* rule and the legitimate expectation doctrine, as expressed in the Constitution and the Administrative Justice Act, are no different from the way the courts have consistently treated them in the past. The rule and the doctrine are products of judicial activism that were meant to fill up a lacuna in the law. The legitimate expectation doctrine simply extended the principle of natural justice beyond the established concept H

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that a person was not entitled to a hearing unless he could show that some A existing right of his had been infringed by the quasi-judicial body. Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard.

Held, further, that the *audi alteram partem* rule and its extension, the legitimate expectation doctrine, are flexible tenets, whose proper limits B are not precisely defined. The advent of the new constitution and the Administrative Justice Act [*Chapter 10:28*] has not altered the position. A formal hearing, culminating in a formal penalty are not always absolute pre-requites. A formal charge that is followed by a formal hearing, culminating in a formal verdict and a formal penalty, are not always C absolute pre-requisites.

Held, further, that the letter of suspension was invalid. It purported to suspend the applicant from the school for a period of 16 days whereas the relevant statutory instrument only allowed for an investigative period of no more than seven days. In any event, the whole so-called disciplinary process by the school failed to measure up to the basic tenets of the *audi* rule or D the legitimate expectation doctrine. There was no modicum of fairness in the whole process. The letter of suspension accused him of vandalizing certain items of school property and of engaging in hostile behaviour towards the school authorities. The expulsion letter accused him of inciting and masterminding the strike. He was expelled for reasons that he had not been suspended for or charged with. That was a violation of E the *audi* rule and the legitimate expectation doctrine.

Held, further, that pending the proper investigation by the school of the alleged case against him, and, if necessary, the proper conduct of a disciplinary process, the applicant was entitled to resume normal classes.

Held, further, that in the light of the poor presentation of his case, there F would be no order as to costs.

Cases cited

Administrator, Tvl & Ors v *Traub & Ors* 1989 (4) SA 731 (A)

Affretair (Pvt) Ltd v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

Chataira v *ZESA* 2001 (1) ZLR 30 (H) G

Dube v *Chrmn, PSC & Anor* 1990 (2) ZLR 181 (H)

Health Professions Council v *McGown* 1994 (2) ZLR 329 (S)

Kanonhuwa v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H)

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

Metsola v *Chrmn, PSC & Anor* 1989 (3) ZLR 147 (S)

Schmidt & Anor v *Sec of State for Home Affairs* [1969] 1 All ER 904 (CA) H

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Taylor v *Min of Education & Anor* 1996 (2) ZLR 772 (S) A

Legislation considered

Constitution of Zimbabwe 2013, ss 68, 69(2) and 75

Education (Disciplinary Powers) Regulations 1998 (SI 362 of 1998), s 8

Education (Enrolment and Exclusion) Regulations 1998 (SI 363 of 1998) B

Case information

S Hofisi for the applicant.

T O Dodo for the respondent

Judgment

Mafusire J: This was an urgent chamber application. The founding papers were shoddy. Among other things, the certificate of urgency did not quite explain why the matter was said to be urgent. Both that and the affidavits C by the applicant and his father were replete with grammatical and spelling errors. The founding affidavit in particular lacked chronology. It was difficult to make out the sequence of events. The relief sought in the draft provisional order was incompetent.

The application was opposed. However, none of the respondents had filed D opposing papers by the time of the hearing. They said the application had been served on them late. This was true. The application had been filed on 4 September 2014, a Thursday. Having noted the situation of the applicant and the nature of the grievance, I had, in spite of the state of the papers, arranged an urgent set down. I heard the matter on the following Monday, 8 September 2014. I reserved judgment and indicated that I would try E and deliver the judgment on the following Thursday, 11 September 2014. Meanwhile, I granted the applicant's application to amend the draft order. I also granted blanket permission to any of the parties, if they so wished, to file any further documents for consideration by me before I made up my mind. The applicant filed an amended draft provisional order and some heads of argument. None of the respondents filed anything. F

Briefly the situation was this. The applicant had been a form four student at Mutambara High School, the fifth respondent (hereafter referred to as "*the school"*). He had first been suspended. Subsequently he had been expelled on the ground that he had masterminded and incited a strike that had occurred at the school sometime in June 2014 and that he had vandalised school property. G

The urgent chamber application was effectively to reverse the decision of the school and to install the applicant back into the classroom. This was on the basis that the school had not followed the rules and regulations governing the expulsion or "exclusion" of students from schools. Those rules and regulations are SI 362 of 1998 (Education (Disciplinary Powers) H

Regulations, 1998), (hereafter referred to as "SI 362 of 1998"), and SI 363 of A 1998 (Education (Enrolment and Exclusion) Regulations, 1998) (hereafter referred to as "SI 363 of 1998").

SI 362 of 1998 governs "expulsions". SI 363 of 1998 governs "exclusions". In its expulsion letter the school used the word "exclusion". It relied on some government circular identified as Policy Circular No. P. 35 of 1998. B The applicant argued that the school was not supposed to "exclude" him in terms of SI 363 of 1998 because, in terms of it, exclusion of a student from a school should be on the basis that the student has been found to be "ineducable" following proper medical advice, and that this had not been the case in his situation. It was also argued that circular P. 35 of 1998 was not C law and was therefore of no force or effect. The circular was not produced.

It was also argued on behalf of the applicant that, contrary to the provisions of s 8(1) of SI 362 of 1998 which permit a school to suspend a pupil for misconduct of a serious nature for a period not exceeding seven days to allow for investigations, the school had suspended the applicant for sixteen days.

The applicant's main argument though was that in expelling him the school had D violated the rules of natural justice and s 69(2) of the Constitution, in that not only had it failed to accord him a fair and public hearing, but also that he was expelled on grounds which were materially different from those set out in the suspension letter. It was argued that, from the suspension letter, the applicant had been suspended for:

> "… vandalising school property i.e. school gates; stoning the deputy Head's house; E breaking Hostel and dining window panes" and "engaging in hostile behaviour to the school authorities".

Yet from the expulsion ("exclusion") letter the applicant had been expelled for:

> "… mastermind[ing] the strike on 29/06/2014 and vandaliz[ing] school property", F and also that he had "… incited students to stone the D/H's house and destroyed lights and window panes. He also destroyed school gates".

From the founding papers, the applicant's version, in my own words, and as I understood it, was this. On the day in question, some school guard had broken up an apparently harmless argument between the applicant and his friends. As he had run away he had been overpowered by another guard. This G other guard had assaulted him and taken him to the boarding master. The boarding master had proceeded to beat him up with a broomstick. After that the boarding master had ordered him to go and make a report of what had happened to the school authorities. However, the applicant had declined for fear of jeopardising the school guard's employment! It was during the time H the applicant was with the boarding master that some students had chased

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one of the school guards out of the school hostels or dormitories. applicant A had not been part of that crowd. It was also during that time that the other students had engaged in violent behaviour, destroying school property in the process.

The applicant's chronology was very difficult to follow. What I could make out though was that following the disturbances of the day, lessons had been B suspended on the following day, 30 June 2014. On 1 July 2014 applicant had been asked to submit a report to the police. He did. One of the school teachers had been present as he wrote down his report. The applicant was then given police authority to be examined in hospital.

On 5 July 2014 there was what the applicant called a "roll call" at the school. Every student was interviewed by some school teachers and a minister or C priest. On 7 July 2014 he was served with the letter of suspension. Among other things, he would not attend school until 23 July 2014. That was a period of sixteen days.

The applicant said he returned to the school with his father on 23 July 2014 thinking that that would be the date for the disciplinary hearing. Instead, he D was served with the letter of "exclusion". The letter was dated 16 July 2014. The applicant appealed to the second respondent. However, efforts by his legal practitioners to get some documents from the second respondent to use in the appeal hearing, the date of which was still to be given, had failed.

The applicant's father filed a supporting affidavit. It largely concerned itself with the communication to him by the school authorities when the applicant E had been suspended, and the fruitless efforts made by the fourth respondent, the headmaster of the school, to assist in finding the applicant an alternative place at another school.

On that basis the applicant sought a provisional order in the following terms:

"TERMS OF FINAL ORDER F

i. Exclusion under Circular No. P 35 of 1999 be and is hereby set aside.

ii. Costs shall be in the cause

INTERIM RELIEF SOUGHT

1. Pending the resolution of this matter by the second respondent it is ordered that: G

(i) The respondents be and are hereby compelled to allow applicant to enter upon the fifth respondent School for purposes of education until the second respondent determines the matter.

2. The respondents are hereby interdicted from in any way negatively interfere (*sic*) with the applicant's education, more particularly in that the respondent (*sic*) be and are hereby barred from: H

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(a) Separating the applicant from his classmates. A

(b) Otherwise prohibiting the applicant from using the fifth respondent (sic) hostels where he was residing prior to his exclusion.

(c) In any other way discriminating against the applicant pending the determination of the appeal by the second respondent.

3. The fourth and fifth respondents to bear cost (*sic*) of suit."

The amended draft provisional order read as follows: B

"TERMS OF FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms;

i. The exclusion made by the fourth respondent should not be set aside for C non-compliance with SI 362 and 362 (*sic*) of 1998 and in the event that the court finds it was due under the authority of a law.

INTERIM RELIEF SOUGHT

1. Pending the resolution of this matter by the second respondent it is ordered that:

(i) The respondents be and are hereby ordered to allow the applicant to D enter upon the fifth respondent School for purposes of education until the second respondent determines the matter.

2. The respondents are hereby interdicted from in any way negatively interfere (*sic*) with the applicant's education, more particular (*sic*) in that the respondent be and are hereby barred from:

(a) Restraining the applicant from attending lessons and enjoying other amenities at school E just like any other student.

3. The fourth and fifth respondents to bear the cost (*sic*) of suit."

The respondents opposed the relief sought on the ground that the applicant had been accorded a fair hearing. Mr *Dodo*, for the respondents, extensively relied on *Chataira* v *ZESA 2*001 (1) ZLR 30 (H), and the other cases cited F therein. *Chataira's* case concerned a dismissed employee. It was held that it is not necessary that *viva voce* evidence be led at a disciplinary hearing into allegations of misconduct against an employee. The court also held that the employee must be shown any statements or documentary evidence that is produced at the hearing, but that he cannot insist that the persons who made G the statements be called for cross-examination.

The respondents' case was that the applicant had been given an opportunity to present his side of the story on more than one occasion: before the police where one of the school teachers had been present, and during the "roll call". It was not a requirement of the rules of natural justice that there be a formal H hearing in all cases or that witnesses be made available for cross-examination.

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The respondents conceded that the suspension for 16 days, instead of A seven, was an error, but said that the error was harmless. The respondents also conceded that the reference to "exclusion" in the expulsion letter was a mistake and said that the applicant had been expelled in terms of SI 362 of 1998. They argued that after suspending the applicant the school had carried out investigations which included receiving witnesses' statements. Two copies of statements by some female students were produced during B the hearing. They were dated 5 July 2014, i.e. two days before the date of suspension. They basically adverted to the occurrence of the strike at the school on the day in question, and the presence of the applicant amongst the group of students engaged in violent behaviour at the girls' hostels.

The respondents argued that the school had reached the decision to expel C the applicant on 15 July 2014, which decision had been communicated to the applicant on 23 July 2014.

Finally, the respondents argued that the reasons for the expulsion had been the same as those for the suspension and that there was no question of the applicant having been expelled for reasons different from those for which he D had been suspended. They said the basic ground for suspension and expulsion of the applicant was misconduct of a serious nature as contemplated by s 8(1) of SI 362 of 1998, in that he had been guilty of violent behaviour and destruction of school property.

The applicant directed argument on whether the applicant had been "expelled" E in terms of SI 362 of 1998 or "excluded" in terms of SI 363 of 1998. Mr *Hofisi*, for the applicant, submitted that the letter of expulsion referred to "exclusion" and that, therefore, the school had acted wrongly because, among other things, the applicant had not been shown to be ineducable, and that there had been no medical evidence to back that up.

Evidently, "expulsion" or "exclusion" was, in this case, a matter of semantics. F The reality of the matter was that the applicant was expelled. The use of the wrong term or form in the letter of expulsion does not detract from the substance of the action taken. "Exclusion" in terms of SI 363 of 1998 refers to exclusion or removal of a pupil enrolled at a government school by the Secretary for Education for reasons relating to incorrect information in the pupil's application; the proximity of the pupil or its parents to another G government school established after the date of enrolment and providing the same instruction as that for the pupil's standard or grade, or where the pupil is found to be ineducable following a medical examination.

Of course, none of those applied to this case. The fifth respondent was not a government school. The applicant had not been removed by the Secretary H

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for Education. The reasons for his removal had nothing to do with any incorrect A information, or otherwise, on his enrolment form, or the proximity of his place of stay to another government school. He was not found to be ineducable. Undoubtedly, the school meant to expel in terms of SI 362 of 1998. So the only question is whether or not the school followed the law.

SI 362 of 1998 does not provide the actual procedure or mechanics of expelling a student who is guilty of misconduct of a serious nature. Section 8 reads as follows:

> **"Suspension and expulsion**
>
> 8.(1) The head of a Government or non-Government school may, if he deems it desirable, suspend a pupil who is suspected of misconduct of a serious nature, for a period not exceeding seven days, while the matter is investigated.
>
> (2) If, in the opinion of the head of a Government or non-Government school, a pupil at that school has been guilty of misconduct of a serious nature which merits his expulsion, the head may expel such pupil.
>
> (3) Where the head has decided to expel a pupil in terms of section (1), he shall give the parent or pupil notice, in writing, of the date when expulsion is to take effect, and shall state the reasons for his decision to expel the pupil.
>
> (4) A parent to whom notice has been given in terms of subsection (2) may, within fourteen days of the notice, appeal in writing to the Secretary, whose decision shall be final.
>
> (5) The head of a Government or non-Government school who expels a pupil in terms of this section shall forthwith forward a report to the Secretary, setting out the full circumstances and his reasons for expelling that pupil."

In my view, a school that wishes to expel a pupil in accordance with SI 362 of 1998 must follow the rules of natural justice. One of those rules is the *audi alteram partem* (hereafter referred to as "the *audi* rule").

The *audi* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is basic to jurisprudence. In *Dube* v *Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H), Ebrahim J (as he then was) said that the rule is often termed a rule of natural justice. In *Taylor* v *Minister of Education & Anor* 1996 (2) ZLR 772 (S), Gubbay CJ stated at 780A-B:

> "The maxim *audi alteram partem* represents a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits are not precisely defined."

Earlier on, in *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S), the same learned judge, then a judge of appeal, had expressed himself on the same point at p 154 as follows:

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> "The *audi* maxim is not a rule of fixed content, but varies with circumstances. In its fullest extent, it may include the right to be apprised of the information and reasons underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses … The criterion, as I have noted, is one of fundamental fairness and for that reason the principles of natural justice are always flexible. Thus, the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations."

In the *Chataira* case, *supra*, at p 32A-B Smith J stated as follows:

> "Domestic tribunals are entitled to follow their own procedures and are not bound by the ordinary rules of evidence, as long as their procedures do not conflict with the rules of natural justice."

The *audi* rule requires public officials, judicial and quasi-judicial officers, and really, anyone entrusted with the power to make decisions, or the power to take action affecting others adversely, to exercise such powers fairly. In *Kanonhuwa* v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H), as with *Chataira, supra*, the rule was extended to the realm of private contracts between a private individual and a private entity. In all cases, fairness is the overriding consideration.

In my view, the *audi* rule has now found expression in the statutes. It now forms one of the fundamental human rights and freedoms in the current Constitution of Zimbabwe. Section 69 of the Constitution reads:

> **"69 Right to a fair hearing**
>
> (1) …
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

(3) Every person has the right of access to the courts, or to some other tribunal or forum establish by law for resolution of any dispute. F

(4) …"

Section 68 of the Constitution provides for the right to administrative justice. It says every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Any person whose right, freedom, interest or legitimate G expectation has been adversely affected by administrative conduct is entitled to be given promptly and in writing the reasons for such conduct. The section then behoves Parliament to enact legislation to give effect to these rights.

Even though the Administrative Justice Act [*Chapter 10:28*] predates the current Constitution, in my view, it is one such Act of Parliament that seeks H

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to give effect to the rights and freedoms enshrined in the Constitution on the *audi*A rule and its extension, the "legitimate expectation" doctrine.

Mr *Hofisi* argued that cases like *Chataira* and others that were decided before the advent of the current Constitution have to be read subject to the Constitution because the rights and freedoms enshrined therein are now B justiciable at a constitutional level. That may be so. However, it seems to me that the content and practical application of the *audi* rule and the legitimate expectation doctrine, as expressed in the Constitution and the Administrative Justice Act, are no different from the way the courts have consistently treated them in the past.

In my view, the *audi* rule and the legitimate expectation doctrine are C products of judicial activism that was meant to fill up a lacuna in the law; see the reference to the 1988 American Journal of Comparative Law (by Prof Robert E Riggs) in *Administrator, Transvaal and Ors* v *Traub and Ors* 1989 (4) SA 731 (A).

In England Lord Denning MR, in *Schmidt and Anor* v *Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), at p 909, coined the legitimate D expectation doctrine as follows:

> "… an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without E hearing what he has to say."

In South Africa, in the 1980s, the doctrine was adopted in *Traub's* case above. Corbett CJ, after an examination of the authorities in England, Australia, New Zealand and elsewhere, said at p 760:

> "The question which remains is whether or not our law should move in the direction taken by English law and give recognition to the doctrine of legitimate F expectation, or some similar principle. The first footsteps in this direction have already been taken in certain Provincial Divisions (see the case quoted above). Should this Court give its *imprimatur* to this movement; or should it stop the movement in its tracks?"

Later on, at p 761D, the learned Chief Justice answered the question as follows:

> "In my opinion, there is a similar need in this country."

In Zimbabwe, in the 1990s, the doctrine was adopted in *Health Professions*G*Council* v *McGown* 1994 (2) ZLR 329 (S) and subsequent cases such as *Taylor, supra,* and *Kanonhuwa, supra*. In *McGown's* case Gubbay CJ stated as follows at p 334:

> "In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply H extended the principle of natural justice beyond the established concept that a

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> person was not entitled to a hearing unless he could show that some existing A right of his had been infringed by the quasi-judicial body… Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard…".

See also *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), *per* McNally JA, at 21C-D.

As observed by the Supreme Court in *Taylor's* case above, the *audi* rule, and B its extension, the legitimate expectation doctrine, are flexible tenets. Their proper limits are not precisely defined. In my view, the advent of the new Constitution and the Administrative Justice Act has not altered the position. In my view, a formal charge that is followed by a formal hearing, culminating in a formal verdict and a formal penalty, are not always absolute pre-requisites. C The exigencies of the matter should determine the situation. In *Taylor's* case, the learned Chief Justice made the following remark at 778A-B:

> "I did not understand Mr *Nherere* to suggest that in this sort of case there was need for a hearing in any formal sense, that is, an oral hearing. All that was required and sought by the appellant was simply an opportunity to submit written representations; to be able to put his side of the story with regards to D the transfer affecting him."

At page 784 he went on to say:

> "Pickering AJ was at pains to stress that fairness is the true guide to the circumstances in which a public official is required to afford a hearing. It is this concept, he said, that operates as a limiting factor to ensure that the legitimate E expectation doctrine does not stray beyond its proper bounds. I am in respectful agreement that it is helpful to look at the situation from the stand point of fairness and reasonableness."

In the present case, I have been at pains to understand when exactly, or even roughly, it may be said that the applicant was accorded some opportunity to F defend himself to the charges that were levelled against him and in respect of which he was eventually expelled. It seems that the first time that he was asked to submit a report was on 1 July 2014. But neither party explained what it is he was to submit a report on. I can only surmise that it was on the disturbances that had occurred at the school two days before. What was common cause though was that the request for the applicant to submit a G report had come from the police. One of the school teachers only happened to have been present when the applicant was writing his report. Mr *Hofisi* said the police were investing the crime aspect arising from the disturbances and that this should not be mixed up with the civil investigations required in respect of the disciplinary aspect of the matter. H

Mafusire J

I do not accept that the request by the police to the applicant on 1 July 2014 to A submit a report, and what happened thereafter, measured up to the *audi* rule or the legitimate expectation doctrine. It was not the disciplinary authority that asked for the report. Furthermore, the request was not made for the purposes of carrying out civil investigations into the disturbances. It was to investigate a possible crime. At that stage the applicant had not yet B been charged with any wrong.

The applicant was then served with a letter of suspension on 7 July 2014. The period of suspension was sixteen days, and not seven days as required by SI 362 of 1998. I do not accept Mr *Dodo's* contention that the lengthy period of suspension was a harmless oversight. Every citizen of Zimbabwe C has a right to education in terms of s 75 of the Constitution. Therefore, any law or conduct that may be in conflict with this Constitutional right has to be trimmed to conform, set aside or struck down altogether. In my view, the letter of suspension was invalid for want of compliance with the law.

If the letter of suspension served on the applicant by the school was invalid, D it follows that the investigations that followed, if any, hung on nothing. In my view, the import of s 8(1) of SI 362 of 1998 is that you suspend in order to investigate. Therefore, "you can't put anything on nothing and expect it to stay there. It will collapse": see *McFoy* v *United Africa Co* [1961] 3 All ER 1169 (PC) at 11721.

But in case I am wrong that the letter of suspension served on the applicant E was invalid, it seems to me that the whole so-called disciplinary process by the school failed to measure up to the basic tenets of the *audi* rule or the legitimate expectation doctrine. Fairness is the overriding consideration in any such process.

In my view, there was no modicum of fairness in the whole process. Here F are my reasons. It seems that the first time that the applicant got to know that the school was pinning on him the responsibility for *some* aspects of the disturbances of 29 June 2014 was when he had been served with the letter of suspension on 7 July 2014. I say "*some*" aspects of the disturbances because, whichever way one construes it, and contrary to the respondents' contention, that letter did not tell the applicant that he was being suspected G of inciting and masterminding the strike, as was stated

in the expulsion letter. The suspension letter accused him of vandalizing certain items of school property that were specified therein. It also accused him of engaging in hostile behaviour towards the school authorities.

In my view, whilst destruction of school property by a single individual is H bad enough, it is potentially far more disastrous if carried out by a whole

Mafusire J

student body or a group of them. Thus, it is quite a serious accusation to say A the applicant incited and masterminded the strike. I was not told the extent of the damage in the present case. But it seemed common cause that it was considerable. If it was damage suffered at the hands of many, it was unfair to pin it all on the applicant alone and expel him for that reason without hearing his side of the story. Therefore, I consider that, to a significant extent, the applicant was expelled for reasons that he had not been suspended for B or charged with. That was a violation of the *audi* rule and the legitimate expectation doctrine.

The applicant was suspended on 7 July 2014. He would not attend school until 23 July 2014. I believe his legitimate expectation must have been that on that date he would either resume classes or face trial, i.e. the disciplinary C hearing. Instead, he came back on the day only to be served with the letter of expulsion. As said already, that letter contained more serious accusations than the letter of suspension. The applicant says when he arrived at the school he had been called for some "deliberations" with some teachers, whom he named, during which he had been asked to submit another report. He did not explain what these "deliberations" were or what the report was on. D Mr *Dodo* said that those "deliberations" constituted the disciplinary hearing. But that cannot be. The respondent had already taken the decision to expel the applicant on 15 July 2014. That is what Mr *Dodo* himself said. Furthermore, the letter of expulsion itself was dated 16 July 2014. Undoubtedly, the school had made a decision already. Therefore, the applicant's right to be heard was violated on this basis as well. E

I am satisfied that the applicant has established a *prima facie* case. The appropriate relief should be one enabling him to attend classes in the normal manner pending the proper investigation by the school of the alleged case against him, and, if necessary, the proper conduct of a disciplinary process. The applicant's appeal before the second respondent was said to be pending. F But if the purported disciplinary process was fatally flawed, it means that the purported expulsion was invalid. In that event the appeal process was hanging on nothing. I award no costs because the applicant's case was badly presented. Furthermore, the relief granted in terms hereof, is only of a temporary nature. It is as follows: G

> Pending the proper conduct of investigations by the fifth respondent into the disturbances that occurred at the fifth respondent school in or about June 2014 and July 2014, and pending the conduct of any disciplinary processes, if any, arising out of such disturbances, the third, fourth and fifth respondents shall forthwith allow and permit the applicant to resume normal classes, lessons or tuition, boarding and H

Mafusire J

> any or all normal school activities and all normal life at, or with, the fifth A respondent. There shall be no order as to costs.

V Nyemba & Associates, applicant's legal practitioners

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

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[zRPz]SAGANDIRA v MAKONI RURAL DISTRICT COUNCIL 2014 (2) ZLR 356 (S)

Citation	2014 (2) ZLR 356 (S)
Case No	Judgment No. S-70-14
Court	Supreme Court, Harare
Judge	Malaba DCJ, Garwe JA & Omerjee AJA
Heard	19 March 2013; *CAV*
Judgment	16 September 2014
Counsel	*B Magogo*, for the appellant *A Zeure*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *employee – transfer of – when employer entitled to transfer* C *employee – transfer as a punitive measure – only lawful if employee found guilty of misconduct following proper disciplinary proceedings*

Headnote

The appellant was employed by a rural district council, and was stationed D in the town of Rusape, where her family also had a business. She was married and had dependent children. There had been a history of absenteeism on her part, and eventually the council told her that she was to be transferred to a small mining village some 50 km away. Her duties there were not specified. She did not go, and was charged with disobedience to a lawful order and dismissed. Her appeals to an arbitrator E and to the Labour Court failed. On appeal to the Supreme Court, she argued that the order to transfer was punitive and therefore not lawful; that she was not consulted before the decision to transfer her was made; and that the council's chief executive officer was an interested party: he was the complainant, charged the appellant, set the matter down, prosecuted and chaired the meeting before finding the appellant guilty F of misconduct, in violation of the *nemo judex* principle.

Held, that at common law, an employer has the right to unilaterally vary the terms of employment, such as the duties being done by the employee and the location of work or department. This may be necessary, *inter alia*, to re-organise the operations of the employer or to facilitate disciplinary G investigations, provided always that such variation is not substantially different from the contract job description or does not result in the substantial downgrading of the status and dignity of the employee or is in breach of a legitimate expectation of the employee. However, an employer, whatever the circumstances, has no right to invoke a transfer as a punitive measure outside of the disciplinary framework, although a H

Garwe JA

transfer can be ordered as part of the penalty imposed on an employee found A guilty of misconduct. Once the respondent had formed the opinion that the appellant was misconducting herself, a disciplinary hearing should have been held to determine whether she was in fact guilty. Whilst the appellant admitted being absent on the occasions cited in the correspondence, she never admitted at any stage that she did not have B a lawful excuse. If it was found that the appellant had no lawful excuse to be absent, she could have, as part of the penalty, been

transferred to any other department of the appellant. In proceeding to transfer the appellant in the manner it did, the respondent fell foul of the *audi alteram partem* principle. It found the appellant culpable without holding any C disciplinary proceedings and in the result imposed, as a penalty, an order that the appellant transfers to a place some fifty kilometres away where transport was difficult. The inference that this transfer was punitive, or intended to be a punishment, was inescapable.

Held, further, that whilst transfers effected in the ordinary course of operations are appropriate, transfers that are punitive, based purely on perceived D misconduct on the part of the employee, are not acceptable as they are unlawful. A punitive measure can only be predicated on a proper finding of culpability following proper disciplinary proceedings.

Cases referred to

Chimenya v *Associated Textiles Ltd* S-201-94 E

Director of Works & Anor v *Nyasulu & Ors* 2002 (1) ZLR 658 (S)

Case information

B Magogo, for the appellant

A Zeure, for the respondent F

Judgment

Garwe JA: This is an appeal against the decision of the Labour Court dismissing, with no order as to costs, an appeal against an arbitral award upholding the dismissal of the appellant from her employment with the respondent.

In order to appreciate the issues that fall for determination in this appeal, it is G necessary to set out in some detail the background giving rise to the present proceedings.

The appellant was employed by the Makoni Rural District Council, ("the respondent"). She was stationed at the council offices in Rusape. She was H married and had children. Her family was running a business in Rusape.

Garwe JA

Her problems with the respondent appear to have started on or about 9 October A 2003, when she absented herself from work and allegedly used a council computer to transact personal business. By letter dated 10 October 2003, the appellant wrote a letter to the council treasurer in the following terms:

> "… I am sorry for using council computer for private business documents and absence from work. I had valid reasons which I had shared and had been given permission by the Deputy Treasurer, Mrs S Mtisi, that my child, Fadzai B was not feeling well …"

On 11 October 2003, the council treasurer wrote to the appellant accepting the apology but warning her not to do the same thing and to ensure that leave days are authorised by the Chief Executive Officer of council before such leave was taken. C

On 14 October 2003, Mrs Mtisi, the deputy council treasurer, wrote to the appellant denying that she had ever authorised her to go away.

It is not clear what happened thereafter but on 31 March 2004, the appellant wrote a letter to the chief executive officer. The letter was in the following terms: D

> "I apologise for all what I did wrong. I promise to be trustworthy, not to be lazy, not to tell lies and to notify my immediate supervisor whenever I will be going out. I will be very grateful if you consider my apology."

In the meantime the appellant had been transferred from the finance department to the health department. Both of these departments are located within the Rusape town council area. E

On 3 February 2005, one C.Z Doto, a community sister, wrote to the appellant asking her to write a report on her absence from duty without approval. By letter dated 4 February 2005, the appellant responded in the following terms:

"I apologise that I was absent from duty on 3 February 2005. What happened is, I received an emergency at about 4 to 12 in the evening that my uncle was F seriously ill at Honde Valley and I had to collect him to Harare.

I left a note at home that maybe my line 091 807 018 will not have network that Mr Sagandira will report of the emergency at my workplace …"

On 8 February 2005, the appellant held a meeting with the respondent's chief executive officer, E M Pise. Following that meeting, Mr Pise wrote to the appellant as follows: G

"Reference is made to my meeting with you over your failure to report for work and absconding from duty. You have the habit of leaving office without authority and we believe you need to be relocated out of Rusape.

You are therefore advised that you have been transferred to Inyati Mine with effect from 14 February 2005 …" H

Garwe JA

On 11 February 2005, the appellant responded to the above letter expressing her A disappointment at the turn of events. In the letter the appellant stated:

"I have noted with great displeasure that my excuse for attending the funeral was unaccepted and that your decision to transfer me to Inyathi Mine was based on false allegations. You were informed that I went out for business instead of the said illness that later turned into a funeral …

Chief, as you have already concluded, I have no objection to your instruction that I be B transferred to the above mentioned station. You have all the rights to give whatever punishment you think is worthy. May I point to you that I am going to Inyati Mine with groaning because I don't see where I wronged you. You have on several times tried to be on a fault finding mission on my performance of duty but your efforts have been in vain because the truth shall set me free.

The truth about my transfer if I may put it across to you is that your advisors are not C happy with my husband's business and in all instances they think whenever I go out they think I would have gone to manage my private business yet I will be attending to crucial social problems ….

You did not bother to seek audience with me to verify the validity of the allegations against me and because of this I strongly feel that you want to get rid of me from D this organisation. Because by transferring me to Inyati Mine you know that I will lose contact with my family and this may lead to the disintegration of my family and to make my children suffer and look miserable during my absence.

Once again I want to reiterate that I am not pleased to go to Inyati Mine although I am going to comply with your instructions."

It is common cause the appellant did not report at Inyati on 14 February 2005. E Instead she wrote what she called an appeal against the transfer. In the "appeal" she stated that the chief executive officer had "no basis to punish" her as the allegations were baseless and malicious. She also stated that it was government policy that couples should not be separated to reduce the incidence of HIV, minimise costs and obviate separation.

On the same day Mr Pise wrote back to the appellant in the following terms: F

"… You are hereby advised that your appeal has been dismissed as evidence from your file clearly indicates that you have failed to work at our headquarters. …

We want to hear that you have taken up your position at Inyati today 14/02/2005 …"

Following a further appeal for him to reconsider his decision to transfer her, the chief executive officer on the same day wrote to the appellant advising G of council's decision to suspend her, without pay, pending a hearing to take place on 21 February 2005. The suspension was said to be in terms of s 12B(2)(b)(i) and (ii) as read with s 35 of the Council Conditions of Service.

On 21 February 2005, the appellant appeared before what was termed a works council hearing. The hearing committee consisted of Mr Pise, who H was chairman, Mr J Mugari, a member of the workers' committee, Miss N

Garwe JA

Bofu, a council employee charged with minuting the proceedings and the A appellant. In its determination, the committee remarked:

> "It has been proved beyond any shadow of doubt that Mrs D Sagandira has the habit of defying authority and the cases of absence from work without permission point to this and in addition her failure to transfer to Inyati Mine when instructed to do so, so (*sic*) is another case in point. It is not in dispute that Mrs D Sagandira failed to follow instruction to transfer. She at first agreed to transfer and later B changed her mind. It should be pointed out that they operate a family business within Rusape where she frequently goes leaving the office unattended. She has been transferred before from the Finance Department and this did not help. She has remained stubborn and does not want to obey orders. Given the above, the said employee is dismissed with effect from 14 February 2005 …"

Dissatisfied, the appellant took the matter up with a labour officer who C referred the matter to an arbitrator. The arbitrator upheld the dismissal. The appellant then appealed to the Labour Court. The Labour Court found that her failure to transfer to Inyati Mine amounted to disobedience. The court also found nothing wrong with the composition of the disciplinary authority. In the result, the court dismissed the appeal with no order as to costs. It is against that order the appellant now appeals to this court. D

In her grounds of appeal, the appellant attacks the decision of the court *a quo* on the basis that the court misdirected itself and erred in three respects. Firstly, that the court *a quo* failed to appreciate that the order to transfer was punitive and therefore not lawful. Secondly, that the appellant was not consulted before the decision to transfer her was made. Thirdly, that the chief E executive officer was an interested party; he was the complainant, charged the appellant, set the matter down, prosecuted and chaired the meeting before finding the appellant guilty of misconduct in violation of the *nemo judex* principle.

In her heads of argument, the appellant submitted that the decision to transfer her was not an ordinary transfer decided by an employer in order to F maximise operational efficiency. The transfer was to punish her on account of perceived misconduct on her part and in particular absenteeism. As no hearing to determine the misconduct was conducted, the transfer in these circumstances was unlawful. Further her personal circumstances were not taken into account. Inyati Mine is 50 kilometres from Rusape. The mine itself is no longer operational and the greater portion of the road to the mine G is on gravel. Further it was the chief executive officer of the respondent who decided to transfer her on account of perceived misconduct. He dismissed her appeal against the transfer. When she did not report for duty at Inyati Mine on 14 February 2005, it was him who suspended her and arranged for the hearing to take place on 21 February 2005. On the date of hearing it was H

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him who chaired the disciplinary hearing. It was also he who announced the A verdict and the penalty of dismissal. In these circumstances, he became judge, jury and executioner. The *nemo judex* principle having been violated, the proceedings were accordingly vitiated.

In its submissions, the respondent rejected the suggestion that the transfer B was unlawful. That the appellant had absented herself from duty without authority was common cause. In the circumstances the respondent was within its rights to transfer the appellant as there is no law which makes it mandatory for an employer to hold a disciplinary hearing first before taking such a course. Considering the appellant's conduct which was well documented, the decision to transfer her cannot in these circumstances be C said to be unlawful. In the respondent's opinion, the chief executive officer exercised restraint. Whilst he had the power to suspend the appellant and institute disciplinary proceedings, he decided, instead, to transfer her to Inyati Mine some 50 kilometres away. Whilst it was known that the appellant was married, she could commute. The appellant was better off being relocated than being dismissed. In the circumstances, the respondent submitted that D the transfer cannot be described as unlawful.

Taking into account the submissions made by both parties, it seems to me that there are three issues that arise for determination, although the second and third issues depend on the resolution of the first. The first issue is whether the transfer was in the circumstances, unlawful. If it was, then that is the end E of the matter and this appeal must be decided in favour of the appellant. In the event that a finding is made that the transfer was lawful, the issues that would follow are whether, firstly, the decision to transfer her is unlawful on account of the failure by the respondent to consult her and take into account her personal circumstances. Secondly, whether the involvement of F the respondents' chief executive officer in the proceedings violated the *nemo judex* principle. I proceed to consider the first issue.

Before doing so, it seems to me pertinent to note that, on the papers, it is not clear in what capacity exactly the appellant was to be employed at Inyati Mine. It is also not clear what operations the respondent had at the mine. However, before the penalty of dismissal was pronounced during the G disciplinary hearing, the works committee chairperson present exhorted the respondent to reconsider its decision to transfer the appellant to Inyati Mine and instead transfer her to other council departments within Rusape or, alternatively, to other council offices at Nyazura or Headlands which were nearer and situated along the main tarred road where transport was H not a problem.

Garwe JA

I revert to the question whether the transfer of the appellant was, in the A circumstances, unlawful.

In terms of the common law, an employer has the right to unilaterally vary the terms of employment, such as the duties being done by the employee, the location of work or department. This may be necessary, *inter alia*, to re-organise the operations of the employer, to facilitate disciplinary investigations, provided always that such variation is not substantially B different from the contract job description or does not result in the substantial downgrading of the status and dignity of the employee or is in breach of a legitimate expectation of the employee: M Gwisai *Labour Employment Law in Zimbabwe, Relations of work under Neo-Colonial Capitalism* p 78.

A temporary transfer to facilitate investigations into possible criminal activities C is lawful: *Chimenya* v *Associated Textiles Ltd* S-201-94.

In *Director of Works & Anor* v *Nyasulu & Ors* 2002 (1) ZLR 658 (S) the respondents, who were employed as farm managers by the City of Harare, received warning letters from the appellant based on allegations of unsatisfactory performance of their duties. They refused to sign the letters D as they were not sure what the consequences of signing would be. Their immediate supervisor regarded their failure to sign as disrespectful.

Subsequently the respondents received letters transferring them elsewhere in the service of the council. The respondents applied to the High Court for an order setting aside the transfers on the basis that the transfers were punitive. The High Court agreed and set the transfers aside. The City of E Harare unsuccessfully appealed against that determination.

In dismissing the appeal this court, *per* Ziyambi JA, remarked at p 662H-663:

> "I am in respectful agreement with both conclusions reached by the learned judge. It is, therefore, my view that the learned judge was correct in holding that the rules of natural justice had not been complied with in that the respondents were F not afforded a hearing before the punitive measures of warnings and transfers were taken against them …"

And at 665A, the learned judge of appeal continued:

> "As the learned judge remarked, even if the penalty of transfer had not been imposed the appellants would have had an entitlement to be heard before the issue of the letters of warning." G

The authorities to which attention has just been drawn emphasise two important principles in our labour law. These are, firstly, that an employer does have the authority to transfer an employee in order, *inter alia,* to enhance operational efficiency or to facilitate investigations. Secondly, an employer, whatever the circumstances, has no right to invoke a transfer as a punitive measure H

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outside of the disciplinary framework. It must always be remembered that a A transfer can be ordered as part of the penalty imposed on an employee found guilty of misconduct.

In this case, there can be no doubt that the respondent, and, in particular its chief executive officer, believed that the appellant was guilty of absenteeism. B The appellant had indeed been moved from the Finance Department to the Health Department for that reason. That transfer was within council premises in the same town. No-one complained. The transfer to Inyati Mine was different. This was a transfer of a married woman with school-going children. The transfer obviously necessitated her being away from her husband and, in particular, minor children. Inyati Mine is 50 kilometres from Rusape. C It is not easily accessible. Whilst it was once a bustling mining centre, its operations as a mine ceased years ago. Transport to and from Inyati Mine, mostly on a gravel road, is not easy. It is not even clear on the papers what position the appellant was to assume on reporting for duty there

or where she was to stay. Whilst the decision to transfer her was made, no detail is apparent on the papers as to what was to happen once she got there.

In my view, once the respondent had formed the opinion that the appellant was D misconducting herself, a disciplinary hearing should have been held to determine whether she was in fact guilty. After all, whilst the appellant admitted being absent on the occasions cited in the correspondence, she never admitted at any stage that she did not have a lawful excuse. At one stage she E made it clear she had gone to Honde Valley to collect a sick uncle whom she took to Harare. The uncle subsequently died. When she absented herself in order to attend the funeral, she was regarded as being absent without lawful excuse and was made to write a report on such absenteeism.

In a situation such as that in which the respondent found itself, proper F disciplinary proceedings should have been conducted. In the event that it was found that the appellant had no lawful excuse to be absent, she could have, as part of the penalty, been transferred to any other department of the appellant. In proceeding to transfer the appellant in the manner it did, the respondent fell foul of the *audi alteram partem* principle. It found the appellant culpable without holding any disciplinary proceedings and in the G result imposed, as a penalty, an order that the appellant transfers to a place some fifty kilometres away where transport was difficult. The inference that this transfer was punitive, or intended to be a punishment, is inescapable.

It seems to me an opportune time to emphasize that whilst transfers effected in the ordinary course of operations are appropriate, transfers that are punitive, H based purely on perceived misconduct on the part of the employee, are not

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acceptable as they are unlawful. A punitive measure can only be predicated A on a proper finding of culpability following proper disciplinary proceedings.

I am satisfied that the order that the appellant transfers to Inyati Mine was, in the circumstances of this case, punitive, and therefore unlawful.

Further, I am satisfied that, given the appellant's circumstances, her personal wishes, and views should have been taken into account before the ultimate B decision to relocate her some fifty kilometres away at some disused mine premises was made. See *Director of Works & Anor* v *Nyasulu & Ors (supra*).

In view of the above conclusion, it becomes unnecessary to consider whether the disciplinary committee was properly constituted.

In the result, the appeal must succeed. It is accordingly ordered as follows: C

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and in its place the following substituted:

   "(a) The decision of the arbitrator of 3 November 2006 confirming the dismissal of the appellant is set aside. D

   (b) It is ordered that the appellant be reinstated to her position with the respondent without loss of salary or benefits. Should re-instatement no longer be possible, the respondent is to pay to the appellant such damages as may be agreed upon or, that failing, as are, upon application, quantified by this court.

   (c) he respondent is to pay the costs of the appeal." E

MALABA DCJ and OMERJEE AJA concurred.

Sinyoro & Partners, appellant's legal practitioners

Warara & Associates, respondent's legal practitioners F

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[zRPz]JAMBGA v ETHIOPIAN AIRLINES 2014 (2) ZLR 365 (H)

Citation	2014 (2) ZLR 365 (H)
Case No	Judgment No. HH-481-14
Court	High Court, Harare
Judge	Dube J
Heard	17 & 19 March & 26 June 2014; *CAV*
Judgment	17 September 2014
Counsel	*T Marume,* for the plaintiff *D L L Morgan*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Aviation – *air carrier – liability – lost or damaged baggage – when carrier liable for more than the minimum compensation stipulated in Warsaw Convention – carrier acting recklessly and with knowledge of probable damage – liable for full compensation for damaged baggage –* D *consequential or punitive damages – not provided for by Convention – carrier only liable for foreseeable damages*

Headnote

The plaintiff claimed against an airline for the cost of three television sets which she had bought in China and was bringing back to Zimbabwe for E re-sale. She had checked them in as part of her baggage. The sets did not arrive at the same time as she did, but a few days later, and when they did arrive they were damaged beyond repair. She also claimed consequential damages for loss of business and profit, being the loss of profits on 48 weekly trips to China. Her position was that if the televisions had not been damaged, she would have made more profits by buying and F selling more television sets. The airline offered compensation in terms art 22(1) of the Warsaw Convention, which amounted to a little over a fifth of what was claimed for the sets, and denied any liability for more than the minimum provided in art 22(1) or for consequential damages.

The evidence was that the normal procedure when baggage is checked in is that the baggage is examined for any damage and other irregularities on G checking in. If such exist, the passenger is advised and given "limited release" tags which are fixed to the baggage. The purpose of these tags is that the passenger does not hold the airline liable in the event of damage to the baggage or its contents. The passenger is usually asked to sign for any damage or irregular baggage. If the baggage is not properly H packaged, the limited release tag is placed on the baggage. In this case,

the plaintiff was not asked to sign a limited release tag in spite of what A the airline staff considered to be inadequate packaging for the goods, nor did the items have "fragile" stickers placed in them by the airline. On the facts, there was no doubt that the baggage was mishandled while in the care of the airline, resulting in the sets being damaged.

Held, that art 22 creates strict liability for loss, delay or damage of passenger baggage. Where checked baggage is damaged lost or destroyed, the B airline is automatically liable to compensate the passenger. The liability is premised on the presumption that the damage was caused by an

occurrence during the carriage. The article limits liability of a carrier for baggage to 250 francs per kg which translates to $20 per kg, up to a maximum of 90 kg. Under arts 20 and 21 there are two defences C available to the airline: that the damage was caused wholly or partially by the passenger's negligence or that it took all necessary and available measures to avoid the damage. The carrier must establish these defences.

Held, further, however, that under art 25, there is no limit to liability if the passenger can show that the damage to the baggage was caused deliberately or recklessly by the airline. The burden of proving wilful D misconduct rests on the plaintiff. There has been debate and divergent views over whether the test to be applied in determining "recklessness and … knowledge that damage would probably result" is an objective or subjective test, but the majority view seems to be that the test should be subjective. With the objective test, a carrier is liable if it could not E fail to be aware of the risk, whilst the subjective test requires actual knowledge. "Wilful misconduct" in this context means a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realisation of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. F

Held, further, that in this case, the defendant airline, being aware of the risks attached to checking-in televisions sets, did not take all reasonable measures to avoid the damage. The airline staff observed the poor packaging and failed to take remedial action. Their focus seemed to be simply on avoiding liability in the event of damage to the televisions. G They placed a "limited release" tag on the baggage without explaining the reasons for this action and without notifying the plaintiff. A limited release tag not brought to the notice of the passenger or signed or acknowledged by her could not be binding on her. The staff, aware of the nature of goods they were dealing with, passed the televisions for checking in without fragile tags and so exposed the televisions to H

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damage. They acted recklessly and with knowledge that damage would A probably result.

Held, further, that the burden is on the carrier to prove contributory negligence of the passenger in terms of art 21 to be exonerated from liability. Where the carrier does not know what or who caused the damage, it cannot prove contributory negligence, which in any event was not pleaded.

Held, further, that there is a divergence of views in international law about the B award of consequential damages arising from a carrier's wilful misconduct, but the preferable view is that whilst the language of the Convention does not limit the amount of damages recoverable, its language does not allow for recovery of punitive damages. To recover C special damages, the damages must be a foreseeable consequence of the alleged breach. The claim for consequential damages *in casu* must fail.

Cases referred to

American Samoa Govt ex rel *Jerry Langford* v *Hawaiian Airlines Inc*D CA No 37-88

Cohen v *Varig Airlines* 62 AD 2d 324 (1978)

Grey v *American Airlines* 227 F 2d 282 (1955)

Hadley v *Baxendale* (1854) 9 Exch 341

Harpalani v *Air India, Inc* 634 F Supp 797 (ND Ill 1986)

Hill v *United Airlines Inc* 550 F Supp 1048 (D Kan 1982)

Merck & Co v *Swiss Air Tpt Co Ltd* 19 Av Cas (CCH) 18, 190 (SDNY 6 Dec1985) E

Peralta v *Continental Airlines Inc* No. C 98–1252 MJJ, 1999 WL 193393 (ND Cal 30 March 1999)

SS Pharmaceutical Co Ltd & Anor v *Qantas Airways Ltd* (1988) 22 F NSWLR 734, [1985] 1 Lloyds Rep 319

Legislation considered

Zimbabwean legislation

High Court Rules 1971 (RGN 1047 of 1971), rr 104 & 116

*International instruments*G

Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention) 1929, arts 20, 21, 22 & 25

Case information

T Marume, for the plaintiff

D L L Morgan, for the defendant H

Dube J

Judgment

Dube J: This case involves the international law of carriage by air. The plaintiff A issued summons claiming payment of US$8 475, being the cost of three 42 inch television sets damaged on the defendant's flight and consequential damages for loss of business and profit for a period of six months.

The brief facts surrounding this dispute may be summarised as follows. The plaintiff is in the business of commodity broking. She flies to China to buy television sets and brings them back to Zimbabwe for resale. On or about B 24 May 2010, the plaintiff travelled from China to Zimbabwe. When she arrived in Zimbabwe, her three 42 inch television sets were missing. Two of the televisions arrived two days later and another some four days later. All were extensively damaged. The plaintiff claims $8 475, being the total cost of the damaged televisions, and US$250 000 in consequential damages C for loss of business and profit. She claims loss of profits on 48 weekly trips to China. Her position is that if the televisions had not been damaged, she would have made more profits by buying and selling more television sets. The plaintiff alleged that the damage to the television sets resulted from an act or omission by the defendant and its employees in that the televisions were mishandled. The plaintiff contends that her claim for the cost of the D televisions and consequential damages falls under the exception given by the Warsaw Convention under art 25.

The claim was defended. The defendant acknowledged that the plaintiff travelled from China on its airline. The defendant denies that it is liable to pay the total cost of the televisions as well as consequential damages. E The defendant alleges that the damages were due to the plaintiff's failure to properly package the televisions. The defendant contends that there was a risk of damage to the televisions because there were gaps in the timber crating surrounding the cardboard boxes. The defendant alleged that she pressed the defendant to accept her goods as packaged because she was F anxious to get the televisions home after a five month delay. It denies that the defendant's staff recklessly exposed the plaintiff's televisions with knowledge that damage would probably result. That it was not foreseen that there might be a probability of heavy turbulence crashing items of cargo into each other. The defendant has offered to pay compensation in terms of art 22 of the Warsaw Convention. It offers $20 per kg of the total weight G of the three television sets which was accepted to be 90 kg, fixing the limit at $1800. The defendant argued that the limit of liability under the Warsaw Convention was inapplicable to consequential damages and fixed a limit on liability, however it arose.

The following issues were referred to trial: H

Dube J

1. Whether or not the plaintiff's television sets were properly packaged to A avoid damage thereto.
2. The extent of the damage to the plaintiff's television sets
3. Whether there was a claim for consequential damages and if so the amount thereof
4. Whether the restriction of liability under the Warsaw Convention applied B to consequential damages.

The plaintiff testified in her own case. She testified as follows.

She is in the business of buying and selling televisions. Sometime in December 2009 she bought three 42 inch television sets. When she arrived C at the airport in China, she was told that the flight was full and she was referred to the cargo department. The goods would be sent to Zimbabwe.

When she reached Zimbabwe she discovered that the goods had not been sent as she was required to pay for them first in China. Christmas holidays were approaching and she did not go back to China then as schools were also opening and she had no money. She waited until May to collect the D televisions when she went to China. The televisions were in the custody of the defendant from December 2009 to May 2010.

She travelled back to China in the company of her sister Sheila Chibvuuri. They boarded the plane back from China on 24 May with six televisions, using the defendant's airline. Her three 42 inch televisions were checked in E her name. When she landed in Harare her three television sets were missing. She discovered that the televisions had not arrived and she made a report. Two of the televisions arrived two days later and another on the fourth day. She reported them as lost baggage. When the televisions arrived, they were broken and opened. They were now in a sack. The televisions are still with the defendant. She testified that the fact that she missed her goods on arrival F is evidence that the defendant was negligent in handling her property. The witness also testified that the televisions were properly packaged in their original packaging and placed in wooden crates. Each television was in its crate. She maintained that the televisions were properly packaged. If the manager at the China airport had any issue with the packaging, he was going to reject the televisions and not check them in. She engaged him resulting G in him accepting the television

The witness testified that she was not advised that the televisions had been placed on limited release baggage. She never signed or ticked the tag, nor was it brought to her attention. The airline just accepted the goods. She claims $8 475 for the three televisions. She also claims consequential damages on H the basis that if she had this money in May 2010, she would have gone back

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to China and done other orders. She claims loss of profit on 48 weekly trips to A China. She was unable to sell the televisions and get capital to fund tickets and purchases of more televisions resulting in the lossof profit. The defendant is liable for her losses between December 2009 and May 2010 as the television sets were with the defendant's agent in China. She had an order for more televisions which she failed to satisfy. She claims $250 000. She factored in B airfares, duty payable and accommodation in China in coming up with her claim for damages. The defendant through a letter dated 18 November 2010 admitted to have mishandled her property. The witness was generally a good witness although she was emotional and a bit argumentative; she gave her evidence in a satisfactory manner. She remained consistent with her story.

The defendant called Sitshengiso Penelope Machaka as its first witness. She is C a supervisor at the defendant's Harare office. She deals mainly with ticketing and reservations. She testified that carrying baggage with large glassware carries a risk as it can be damaged on transportation. The televisions in issue had a limited release tag placed on them by the airline. This means that if they are damaged during carriage, the airline is not liable. The airline can pay an amount limited to $20 per kg. This is in line with art 22 of the D Warsaw Convention. If the passenger is negligent, then the airline has no obligation to pay in terms of the convention. The airline also looks at the packaging of the damaged goods in deciding whether or not to pay.

Her view was that the large cardboard carton which contained each television E set was not sufficient packaging and protection for the 42 inch televisions. The crates in which the televisions were placed had intermittent gaps between the wooden slats or little planks on each side of the televisions; this was not sufficient protection and the possibility that the televisions would be damaged was there. The televisions had perforations as a result of the damage. All the three televisions sets were cracked on the screens. The damage could F have been due to free movement of the televisions in the boxes, depending on where they are secured on the plane. The packaging could also have contributed. It was the responsibility of the passenger to ensure that the televisions were secured. She was liable for her own goods. The plaintiff should have alerted the checking staff that she was carrying fragile goods and fragile tags could have been placed on the boxed televisions. The boxes G did not have fragile stickers.

The plaintiff's sister boarded the same plane and her three televisions were also damaged. She reached the conclusion that all six televisions were damaged because they were not properly secured in the boxes. If the property was damaged it meant that it was not properly packaged. H

Dube J

Under cross examination, the witness acknowledged that the airline accepted A mishandling the plaintiff's property. The witness did not deny that the airline's manager in China was advised that the goods were fragile. The witness conceded that the fact that the televisions did not arrive on schedule is an indicator that the goods were mishandled. She insisted that the packaging which also involved the use of bubble kaylite on the side of the televisions did B not fully fill or occupy the boxes and was inadequate. She testified that it was possible that at the time of acceptance of televisions the staff may have been satisfied that the televisions were properly packaged. The witnesses refused to comment on whether or not the issue of the property being inadequately packaged was an afterthought as an investigation had been carried out and the C airline did not state this fact in its letter of 18 November 2010 to the plaintiff.

The witness was called simply to outline procedures and her evidence was general in nature. She was at times evasive and refused to comment on most issues put to her. She was not a very confident witness and seemed unsure of the answers she gave.

The next witness to be called by the defendant was Fundisai Rimayi. He is a D transportation agent based at the Harare Airport. His duties entail dealing with clients and baggage. He outlined the procedures followed when baggage is checked in. His evidence was that the baggage is examined for any damage and other irregularities on checking in. If such exist, the passenger is advised and given limited release tags which are fixed to the baggage. The purpose of the limited release tag is so that the passenger does not hold the airline E liable in the event of damage to the baggage or its contents. The passenger is usually asked to sign for any damage or irregular baggage. If the baggage is not properly packaged, the limited release tag is placed on the baggage.

He testified that it is not safe to accept a television in its original packaging because if the television shifts this may result in damage to it. They discourage F passengers from checking in televisions as large as 42 inches because they cause handling problems. It is preferable to let them go to cargo where there is proper handling of baggage. If checked in, the conveyor belts cause the televisions to shift. The airline recommends that, when transporting televisions, passengers should put cushions against the screens to protect them and avoid G impact during the flight. His comment on the use of wooden crates was that it was up to the passenger to protect his baggage and that the crate used by the plaintiff was not adequate protection to the television because the strips of wood left room for objects to penetrate the box. His opinion was that the televisions may not have been properly packaged as the perforations show that something hit the boxes. His further view was that if all the televisions H were damaged, including those belonging to the plaintiff's sister, that this

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may be a packaging issue. The fact that the televisions arrived later may be A due to the fact that the flight was full and the televisions were put on the next flight. He maintained that clients are usually advised of these arrangements and that this does not amount to mishandling. He explained that if baggage is left behind at the transit side and not loaded, that constitutes mishandling. He also testified that the delay in the arrival of the televisions was due to the peak season. Most of the flights were full resulting in shortage of space B and the three day delay. That delay was reasonable.

Under cross-examination, the witness explained that the plaintiff was required to sign the limited release tag. That tag is evidence that the items were accepted in the condition they were in. He maintained that the televisions could have been damaged as a result of poor packaging, as the wooden packaging left C spaces. When it was suggested to him that their head office had confirmed mishandling of the televisions, the witness did not dispute that there was mishandling and conceded that the fact that there was damage was on its own mishandling.

When asked in re-examination what he made of the fact that all six of the D televisions were broken, he, although hesitant in his response, answered that it is rare that all six televisions belonging to the sisters would be damaged as happened here. The witness was called to explain procedures that are followed when baggage is checked in and his evidence was also general and procedural in nature. He was not present when the goods were received for check-in by the defendant's staff in China. E

It is common cause that the plaintiff travelled on Ethiopian Airlines and that her television sets delayed in arriving and arrived extensively damaged. It was also not disputed that the three televisions were packaged in wooden crating with slats or open spaces. The plaintiff did not make any arrangement with the defendant for the televisions to remain behind. On arrival, the televisions

F were badly damaged. The plaintiff was not made to sign the limited release baggage tag and the defendant admitted to have mishandled the plaintiff's property. The parties agreed that the amount or any direct loss suffered by the plaintiff arising out of any damage to the televisions is subject to the limit set out in the Warsaw Convention.

One of the boxes that housed one of the televisions was brought to court G by the defendant. It was accepted by both parties that the damage to the televisions was similar in all cases. The parties agreed that the screens of the televisions were extensively shattered. The court observed that the box had about three perforations. A perforation of about three centimetres long was observed. Two other perforations were superficial. It appeared as if the H

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box had been pierced by a sharp object. The evidence reveals that plaintiff's A televisions were packed in their original cardboard boxes anchored by kaylite or styrofoam type packing, bubble wrappers and placed in wooden cages with open spaces.

The defendant suggested that the televisions were not properly packaged B and suggested that cushions should have been placed in the boxes to cushion the televisions from damage arising when the televisions moved in the box. The plaintiff was required to pack the televisions in such a manner that they could safely be carried without damaging them. Cushions would obviously have acted as extra padding and prevented damage. The televisions were not adequately packaged. A television is a fragile item which is required, C when checked in, to be labelled with a fragile handle with care sticker. This rule still applies whether the baggage is properly packaged or not. It was the plaintiff's responsibility to ensure that the televisions were marked with fragile tags. The plaintiff was required to notify the airline of the nature of goods she was carrying so that the airline could take necessary steps in handling the baggage. When the plaintiff reached the airport in D China, she approached the defendant's manager and discussions took place between the parties resulting in the airport staff checking in the televisions. Once the plaintiff advised the airline staff that she intended to check in the televisions, they were required to put "fragile" stickers on the televisions. The defendant's manager at China, being aware of the risks attendant to checking in the televisions without the fragile stickers, accepted the televisions E without such. The defendant's manager checked in the televisions without fragile stickers with the knowledge that damage would probably result. He recklessly exposed plaintiff's goods with knowledge that damage would probably result. If fragile stickers had been placed on the televisions, there is no doubt that they would have been handled with better care and would F not have been mixed with the ordinary baggage. The damage resulted from an omission on the part of the defendant's employees.

The plaintiff was given a "limited release" tag which was placed on one of the tickets. The plaintiff did not sign the tag. A "limited release" tag is placed on baggage that will not be accepted as baggage unless the tag is attached to the baggage and is signed by the customer. The airline will in G those circumstances accept no liability for loss, delay or damage. The tag used by the defendant is a sticker titled "limited release" with the details of the customer and a portion or box where the customer was supposed to tick. The airline staff failed to ensure that the tag was signed or ticked by the passenger. It was not shown that the plaintiff was already aware or became H aware of the system of limited release tags. The implications of the tag were

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not explained to her. The fact that the passenger was a regular user of the A airline and should have known of the need to sign the tag does not absolve the defendant from liability. The defendant cannot escape liability for damage to the televisions as it did not comply with the requirements of international rules for the carriage of goods by air. Thus ensure that the limited release tag was brought to the attention of the passenger and duly signed. B

This matter was investigated by the airline and in their letter to the plaintiff, they acknowledged mishandling the televisions. I do not agree with the defendant's submission that the defendant's apology for mishandling of plaintiff's goods refers to the delays in arrival of the goods. This fact is not specifically mentioned in the letter. This is not what the defence witnesses said in their evidence. In fact they avoided commenting on the letter. The C defendant does not allude to the allegation that the goods were not properly packaged in that letter. It is surprising that the defendant would only

now, at trial stage, allege that the televisions were not properly packaged. This clearly is an afterthought. It is unlikely that the airline would fail to recognise that the televisions were improperly packaged in their investigations. The fact that they mishandled the televisions is supported by the fact that three other D televisions belonging to the plaintiff's sister were also damaged in the same flight. Another point is that the defendant does not have an official explanation regarding the delay in the arrival of the televisions. None of the witnesses called by the defence alluded to the actual cause of the delay and gave divergent views of the cause of the delay and damages. This is indicative of the fact E that the investigations carried out were not comprehensive. The televisions were expected to have arrived on the same flight with the passengers. The fact that they arrived 3 days later is suggestive of mishandling.

The Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Hague Protocol 1955, is the First Schedule to the Carriage by Air Act F [*Chapter 13:04*], hereinafter called the "Warsaw Convention". The Convention regulates liability for international carriage of persons, luggage or goods by aircraft for reward.

Article 22 of the Convention limits the liability of a carrier and reads as follows: G

> "(1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seized of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. H

Dube J

> (2)(a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited A to a sum of two hundred and fifty francs per kilogram, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or B consignor's actual interest in delivery at destination".

Article 25 reads as follows:

> "(1) The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge C that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment".

My understanding of art 22(2)(a) is that it creates strict liability for loss, delay or damage of passenger baggage. Where checked baggage is damaged, lost or destroyed, the airline is automatically liable to compensate the passenger. D The liability is premised on the presumption that the damage was caused by an occurrence during the carriage. The article limits liability of a carrier for baggage to 250 francs per kg which translates to $20 per kg to a maximum of 90 kg. The airline may not raise defences that it took reasonable care of the baggage or that the damage was not its fault. There is no limit to liability if the passenger can show that the damage to the baggage was caused deliberately E or recklessly by the airline. There are two defences available to the airliner. The first is that the damage was caused by passenger fault or that it took all reasonable measures to avoid the damage. These defences are created in Articles 20 and 21 as follows:

> "Article 20
>
> The carrier is not liable if he proves that he and his servants or agents have taken all F necessary measures to avoid the damage or that it was impossible for him or them to take such measures."
>
> Article 21
>
> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions G of its own law, exonerate the carrier wholly or partly from his liability."

Article 25 provides an exception to the limitation. It provides that the liability specified in art 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier. Article 25 (1) of the Warsaw Convention allows for full recovery without limitation where the plaintiff proves that the H defendant acted or omitted to act with intent to cause damage or recklessly

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and with knowledge that damage would probably result. It removes the ceiling A on compensatory damages. The burden of proving wilful misconduct rests on the plaintiff. There has been debate and divergent views over whether the test to be applied in determining "recklessness and with knowledge that damage would probably result" is an objective or subjective test. The majority view seems to be that the test should be subjective. With the objective test, a carrier is liable if it "could not fail to be aware of the risk", whilst the B subjective test requires actual knowledge. In *SS Pharmaceutical Co Ltd and Anor* v *Qantas Airways Ltd* (1988) 22 NSWLR 734, [1985] 1 Lloyds Rep 319, the case involved pharmaceutical products that were damaged when left exposed to rains,the court considered the interpretation of art 25 and the meaning of the term "recklessly and with knowledge that damage would C probably result". The court concentrated on the meaning of "recklessness" as it had not been shown that there had been an intentional act on the part of the airline staff. The court held that art 25 required more than carelessness or recklessness and that at the time of the reckless behaviour, the carrier or its agents were required to know that the reckless conduct would cause damage and nevertheless decided to proceed. In *Grey* v *American Airlines*D 227 F 2d 282 (1955) at 285 (*certiorari* denied 350 US 989 (1956)), the court defined wilful misconduct as

> "a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realisation of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." E

I am swayed by the subjective test. My view is that the person handling the baggage must have knowledge that damage would probably result from his actions or an omission on her part. It must be shown that he omitted to do what he knew he was required to do, or that his actions were carried out regardless of the consequences, without caring what the results would be. F The facts support a finding of wilful misconduct on the part of the defendant.

I do not accept that the airline being attendant to the risks attached to checking-in televisions sets took "all reasonable measures to avoid the damage". The airline staff observed the poor packaging and failed to take remedial action. Their focus seemed to be simply on avoiding liability in the future and avoiding G liability in the event of damage to the televisions. They placed a limited release tag on the baggage without explaining the reasons for this action and without notifying the passenger. A limited release tag whose subject has not been brought to the notice of the passenger or signed or acknowledged by her cannot be binding on her. The defendant, being aware of the nature of goods they were dealing with, passed the televisions for checking in without H

Dube J

"fragile" tags. The defendant's staff omitted to ensure that fragile tags were placed A on the televisions and hence exposed the televisions to damage. They checked in the televisions with the knowledge that the televisions were not properly packaged and did so "recklessly and with knowledge that damage would probably result". The defence witnesses testified that the televisions would have been handled with better care if fragile stickers had been placed B on the televisions. Despite being seized with this knowledge they authorized check in of the televisions as ordinary baggage and without the tags. The airline staff omitted to do what was required of them when they accepted the televisions and they appreciated the dangers involved in accepting 42 inch televisions for checking in, without fragile tags. They did not care what the C result would be. The defence witnesses testified that the proper course to take would have been to send the televisions by cargo where they could have been better handled or stick fragile tags on the televisions. The delay in the arrival of the televisions and the defendant's failure to explain the delay in the arrival of the televisions is suggestive of something having gone wrong in the transportation of the televisions. None of the defence witnesses was able D to give an official account of the delay in the arrival of the televisions. The televisions arrived extensively damaged and there is no adequate explanation for the damage. When one has regards to the extent of the damage and the number of televisions damaged in one flight, one would not be wrong in concluding that the airline was reckless in the manner in which it handled E the televisions. The defendant compounds the issue by admitting that it mishandled the property. The defence that it took all reasonable steps to avoid the damage does not avail the airline. No evidence was led to show that the defendant pressed the defendant to accept her goods as packaged because she was anxious to get the televisions home after a five

month delay. There F were allegations during the trial that the plaintiff contributed to the damage caused to the televisions because of the defective packaging. The burden is on the carrier to prove contributory negligence of the passenger in terms of art 21, in which case it will be exonerated from liability. In the *Encyclopaedia of International Law* by Phillip Forsang Ndikum, the following remarks on contributory negligence appear on p 119:

> "Where the carrier does not know what or who caused the damage, it cannot prove G contributory negligence, the carrier must prove the cause of the damage as must be done under Article 20."

The airline has not been able to point to the actual cause of the damage. The defence of contributory negligence is therefore not available to it. The H court has also considered that contributory negligence was not pleaded and

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Dube J

cannot be relied on as a defence. The defendant has fallen foul of Order 15 A r 104 which reads as follows:

> "The defendant or plaintiff, as the case may be, shall raise in his pleading all matters which show the action or claim in reconvention not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take B the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, prescription, release, payment, performance or facts showing illegality, either by statute or common law."

The defendant is also required in terms of r 116 to set forth concisely the nature of his defence and deal with all the allegations in the declaration. This position is restated in *Herbstein & van Winsen Civil Practice of the High Courts of South Africa* 5 ed by Cilliers, Loots and Nel at p 565 where C they state as follows:

> "Every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading with sufficient clarity to enable the opposite party to reply to it".

A defendant wishing to rely on a defence of contributory negligence must D state clearly and concisely a statement of the material facts upon which he relies on in his pleadings. This will enable the other side to know which case he has to meet and that way the other is not taken by surprise. The defendant was required to plead and prove contributory negligence and it has failed to do that. It cannot rely on that defence. The plaintiff has proved wilful misconduct on the part of the carrier and the provisions of the Convention E that limit liability do not avail it. The plaintiff is entitled to compensatory damages and to the full cost of the televisions.

Two receipts produced show that one television was bought in 2009 and the date of the other receipt for the two televisions is given in Chinese. Each television was bought for Chinese yuan 4 550. The total cost of the three is F given in United States dollars as $8 475, which means that each television cost $2 812.50. An issue arose regarding the exchange rates used. The plaintiff uses an exchange rate of 18 March 2014 to convert the yuan to the US dollar. The defendant has taken issue with the fact that the plaintiff converted the currencies at the time of the hearing of this matter. In cases where litigation involves a determination of exchange rates, the decisive rate of exchange is G the rate on which the liability is determined or rate on the date of judgment and not the rates prevailing on the date on which the claim arose. This matter was argued a month ago and I have not been furnished with today's rates. It is just and equitable that the court uses the rates prevailing at the time of trial. The plaintiff's actual conversion of the currencies was not put into issue. H

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The plaintiff claims consequential damages for loss of profits. The plaintiff's A claim is for incidental or related damages and is based on the fact that she is in the business of buying and selling televisions. She claims that she lost profits during the period when the televisions remained in China and after the damage. The televisions cost $8 475 and she usually made a 10 per cent profit on each television. She had a number of orders and she was going to B sell the televisions for $2 500 each. The plaintiff testified that, if she had this money in May 2010, she would have gone back to China and made other orders. She claims $250 000 for a period of 48 weeks.

I am required to consider whether the Warsaw Convention allows recovery of consequential damages. For uniformity in the regulation of international C law, I do not have to consider whether domestic law creates a remedy for the plaintiff. The Convention itself does not specify the types of damages recoverable. Consequential damages, sometimes defined as special damages, are indirect damages that ensue as a consequence of an initial act or harm complained of. These do not occur directly or immediately from the act complained of.

There is a divergence of views in international law concerning the D appropriateness of awards of consequential damages arising from a carrier's wilful misconduct. In *Harpalani* v *Air India, Inc* 634 F Supp 797 (ND Ill 1986), the plaintiffs were bumped from Air India which failed to arrange a flight to their destination for six days and they sought compensatory as well E as punitive damages. They argued that art 25 creates authority for punitive damages awards in cases where a passenger establishes that damages occasioned by a delay in transportation were caused by a carrier's wilful conduct. The defendant argued that art 25 provides no authority for punitive damages awards and merely removes the Convention's ceiling on liability for compensatory damages where plaintiffs prove a carrier's wilful misconduct. F The court discussed the propriety of a claim of consequential damages under art 25. The court held, firstly, that the language of the Convention does not allow for punitive damage awards and that only arts 17 to 19 create a basis for carrier liability and that they limit liability to compensatory damages. These articles allow for recovery of damages arising out of damages, destruction and loss to cargo or baggage, damages sustained in the event of death or G wounding to passengers and delays in the carriage of passengers, goods or cargo. Secondly, it held that there is nothing that indicated that the signatories of the Convention intended to allow punitive damage awards but that their intention was to ensure minimum adequate compensation. Thirdly, it held that no court has ever awarded punitive damages under the Convention even H in cases of wilful misconduct; courts have based damages awards on actual

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losses and have not awarded punitive damages. The court relied on A*Merck and C*o v *Swiss Air Transport Co Ltd* 19 Av Cas. (CCH) 18, 190 (SDNY Dec 6, 1985) for this approach. This case involved a claim to recover the full value of experimental vaccines damaged by an airline's wilful conduct. I have not been able to find a full text of this case. The court in *Harpalani* declined to follow *Hill* v *United Airlines Inc* 550 F Supp 1048, 1055-56 (D Kan 1982) where the court suggested that the Convention does permit B punitive damages awards. The court found that the court did so in *obiter dicta* and without carefully examining the authority for punitive damages. The facts in the Hill case were that the plaintiffs claimed punitive damages arising from an alleged misrepresentation to the effect that all flights had been cancelled when in fact none had been cancelled. As a result they failed C to connect to their intended destinations. The court dismissed the case for improper venue. The court went on to remark that art 25(1) creates an exception to the defendant's limited liability and might entitle plaintiff to recover actual punitive damages. That comment was *obiter dicta*. The court did not fully interrogate the implications and effect of art 25 and did not in fact make an award of consequential damages. Its reasoning for coming up D with this remark remains unclear. My view is that the court in *Harpalani* was justified in refusing to follow it. In *American Samoa Govt* ex rel *Jerry Langford* v *Hawaiian Airlines Inc* CA No 37-88, a case involving a claim for loss of baggage and consequential damages, the court held that the Warsaw Convention contains no language limiting the amount of damages to the value E of the lost or damaged baggage or to foreseeable damages and that it allows recovery of consequential damages. Whilst it may be true that the language of the Convention does not limit the amount of damages recoverable, its language does not allow for recovery of punitive damages. The court was also of the view that the common law requirement of "foreseeability" of consequential damages enunciated in *Hadley* v *Baxendale* (1854) 9 Exch 341 F was not applicable to Convention cases. In *Peralta* v *Continental Airlines Inc* No. C 98–1252 MJJ, 1999 WL 193393 (ND Cal March 30, 1999), the court declined to make an order for consequential damages on the basis that the airline had no knowledge of the financial reasons for plaintiff's travel to Costa Rica. The court held that, in order for plaintiff to recover special G damages, the damages must be a foreseeable consequence of the alleged breach. In *Cohen* v *Varig Airlines* 62 AD 2d 324 (1978), the plaintiff sued for recovery of the full value of luggage checked in and subsequently lost by the defendant and consequential damages for mental and emotional suffering and inconvenience arising. The plaintiff argued that the limitation of liability provisions of the Convention were inapplicable because of Varig's H

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wilful misconduct in the handling of the luggage. The court refused to grant A consequential damages and held that there was no authority that sanctions a recovery of damages for mental distress and physical inconvenience in cases of loss or mishandling of luggage. In a dissenting judgement, Lupiano JP held that in light of the Convention's silence as to the elements of damages to be recovered, consequential damages were not recoverable.

The setting provided for by the Convention is that of a contract between carrier B and passenger and ordinary specified compensatory damages are recoverable. The Convention specifies the nature of injuries that an airline can be held accountable for. The Convention does not specify allowable elements of damages flowing from the listed injuries in arts 17 to 19. It does not appear C that the drafters of the Convention intended that passengers be enabled to recover consequential damages otherwise they would have specifically provided for these damages. The language of the Warsaw Convention and specifically art 25 does not permit recovery of consequential damages. The claim for consequential damages is disallowed.

As regards costs, the Convention provides that a court may award costs to a D claimant, unless the carrier made an offer within six months of the loss or at least six months before the before the beginning of any legal proceedings which the claiming party has failed to beat. The defendant offered compensation in terms of the Warsaw Convention at the pre-trial stage. This was not a straightforward claim. I do not think that the defendant was unreasonable in defending this matter. I will allow ordinary costs.

In the result it is ordered as follows: E

1. The defendant is ordered to pay the sum of $8 475.
2. Interest at the prescribed rate from date of demand to the date of full payment.
3. Costs of suit.

Matsikidze and Mucheche Legal Practitioners, plaintiff's legal practitioners

Coghlan, Welsh and Guest, defendant's legal practitioners

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[zRPz]MASHONGANYIKA & ANOR v PFUTE & ORS 2014 (2) ZLR 382 (H)

Citation	2014 (2) ZLR 382 (H)
Case No	Judgment No. HH-492-14
Court	High Court, Harare
Judge	Uchena J
Heard	27 May & 9 September 2014; *CAV*
Judgment	18 September 2014
Counsel	Miss *P Muchemwa,* for the applicant *B Chizengeya*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – citation of document, statute or authority – knowingly misstating contents – breach of ethics*

Will – *interpretation – general principles to be followed – rectification – when will may be rectified in terms of statutory and common law – principles* D

Headnote

In interpreting a will, the court must look at all the provisions of the will in order to arrive at the testator's intention. Any particular clause must be interpreted in conformity with the testator's intention as a whole for the court to understand the clause in light of the general scheme E or idea underlying the will as a whole. The testator's will should not be rectified or varied, if his intention can be implemented without rectification or variation. The court is not there to write a will for the testator but to interpret and give effect to the testator's intention. The purpose of interpreting a will is to ascertain the intention of the testator from the words he used in the will. In the interpretation of a will, if a F word or expression is capable of bearing more than one meaning, the court must attach to it the meaning which will make it valid rather than invalid, or will make sense instead of nonsense, or according to which the beneficiaries will benefit rather than be placed under an obligation or prejudiced. G

In interpreting a will the court must bear in mind the dominant provisions and clauses which must be given full effect, unless it appears from the rest of the will that the testator wished to qualify it.

In terms of s 20(1) of the Wills Act [*Chapter 6:06*], a testator's will can be rectified in consequence of – H

(a) a clerical error, which must clearly be identified as such. The court should A not lightly impute an error where it cannot be identified with certainty; or

(b) a failure to understand the testator's instructions, which failure must be based on the will being so worded as to be too difficult or impossible to understand. Minor difficulties must be overcome by B giving effect to the testator's apparent intention gleaned from the scheme or idea underlying the will as a whole; or

(c) a failure on the part of the testator to appreciate the effect of the words he used in the will. The testator must have used words which the context of the will proves to have not been intended. In addition C to these specific statutory powers, s 20(2) allows the court to have regard to the common law.

Under the common law, the courts would be prepared to sanction a departure from the terms of a will in exceptional circumstances. It is not possible to draw up an exhaustive list of the circumstances in which the courts would be prepared to so, but they have been prepared to do so where one or D more of the following circumstances existed: (a) where the circumstances rendered the fulfilment of the testator's intentions practically impossible or utterly unreasonable; (b) where the strict enforcement of the testator's directions would have resulted in a failure of the testator's bequests or otherwise resulted in the testator's intentions being defeated; (c) where the machinery detailed in the will for carrying out the testator's intentions E had failed or was likely to fail, or the his directions could be carried out only with serious loss to the estate; (d) where the necessities of a case demand a departure from the will; or (e) where the testator had based the dispositions on mistaken assumptions about the his assets or liabilities.

A legal practitioner has a duty to give correct and accurate information to F the court, and should never knowingly give it incorrect information or advice or knowingly misstate the contents of a document, statute or like authority.

Cases referred to

In re *Bergh* Ex p *Hesse* (1890) 7 SC 305 G

Ex p *Bosch* 1943 CPD 369

Brown v *Estate Dickinson & Ors* 1919 AD 457

Cuming v *Cuming & Ors* 1945 AD 201

Ex p *Dawoodji NO* 1961 (2) SA 170 (SR)

Ex p *Dittman NO* 1919 OPD 103

Ex p *Executors Estate Gray* 1920 WLD 116 H

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Ex p *Estate Kemp* 1946 NPD 319 A

Ex p *Melle & Ors* 1954 (2) SA 329 (A)

Neveling's Executor v *Neveling's Executor & Ors* (1909) 26 SC 196

Estate Villet v *Estate Villet* 1939 CPD 152

Legislation considered B

Wills Act [*Chapter 6:06*], ss 5(3)(b) & 20(1) & (2)

Case information

Miss *P Muchemwa,* for the applicant

B Chizengeya, for the respondent

Judgment

Uchena J: The late Hellen Marange was a responsible mother who, through C her will dated 18 March 1997, provided for her three children the applicants and the first respondent. She bequeathed to the first respondent her house number 6 Umfuli Close. To the applicants she bequeathed a house she was going to buy or was to be bought by the administrators of her estate, from the money which was to be in her savings accounts and her pension, after her death. She did not live long enough to fully achieve what she willed for D the applicants neither did she earn and save enough to achieve that objective after her death. She, however, like the good mother she was, strived towards achieving her objective for the applicants. On 2 May 2002, she bought stand number 14985 Ruwa in the applicants' names. She obviously intended to build a house on it, to achieve what she had willed for the applicants. She E unfortunately did not do so as death took her away before she achieved her objective.

Long after her death on 12 July 2007 and the winding up of her estate on 5 December 2008, the applicants, who share the same surname and fate, teamed up against the first respondent, their half- sister, to whom their late mother F bequeathed number 6 Umfuli Close. They applied for a peace order against her and she also applied for a peace order against them. Both applications were granted leaving both sides armed with a peace order against the other. Those legal battles were fought in the magistrates court over the occupation of 6 Umfuli Close. Ownership prevailed over occupancy. The applicants left 6 Umfuli Close, to go and stay with their grant mother in Epworth from G which they made the current application. The first respondent remained at 6 Umfuli Close, which has been transferred into her name.

The applicants have in this application applied for the nullification of their mother's will, or alternatively its rectification, leading to the order they prayed for to the following effect: H

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a. That house number 6 Umfuli Close Wilmington Park, Cranborne, be and is A hereby registered in the names of the first and the second applicants and the first respondent.
b. That the second respondent be and is hereby ordered to administer the estate properties left by the late Helen Marange to the benefit of the B applicants until they reach the age of 25 years.

c. That the three surviving children of the deceased who are the first and the second applicants and the first respondent be and are hereby ordered to utilize equally the benefits of house number 6 Umfuli Close, Wilmington Park, Harare.

d. That the first and the second respondents bear the costs of suite. C

The applicants therefore seek a two pronged remedy: the nullification of the will which would lead to intestate succession from which they hope to obtain a fairer distribution of their late mother's estate; alternatively, they seek the court's interpretation and rectification of the will which will lead to a rectification/variation of their late mother's will, the setting aside of the D winding up of their late mother's estate, and its redistribution.

The first respondent opposed the applicants' application arguing that the will is valid, and was correctly complied with by the administrator (the second respondent).

Invalidity of the will E

Miss *Muchemwa* for the applicants submitted that the late Hellen Marange's will is a nullity because s 5(3)(b) of the Wills Act [*Chapter 6:06*] provides as follows:

> "(3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of –
>
> (a) … F
>
> (b) any person to receive any property, maintenance or benefit from the testator's estate in terms of any law or any award or order of court …"

She submitted that the will, though it provided for the applicants' accommodation, was not at its implementation capable of providing accommodation for the applicants as 6 Umfuli Close had been bequeathed to G the first respondent and the estate had no funds from which a second house could have been bought.

Mr *Chizengeya* for the first respondent in response submitted that the circumstances relied upon by the applicants' counsel do not justify the nullification of the deceased's will. A reading of the will as a whole indicates H that the deceased had made provision for the applicants' accommodation.

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She did not make any provision or disposition which operates so as to vary A or prejudice the rights of the applicants to receive any property, maintenance or benefit from the testator's estate in terms of any law or any award or order of court;

In terms of clauses 5 and 6 of her will the deceased bequeathed a house and other properties to the applicants. It is therefore not possible to nullify the will as its provisions do not contravene s 5(3)(b) of the Wills Act. B

Rectification or variation of the will

Miss *Muchemwa* argued more persuasively for the rectification or variation of the provisions of the deceased's will on the basis that when the deceased died her estate had no funds to enable the administrator to buy a house for the applicants and to carter for their maintenance until they attained the age of C 25 years. She relied on the provisions of clause 8 which provides as follows;

> "I hereby direct that no monies shall be paid to my children until they attain the age of twenty five (25) years, provided that they attain the age of twenty five (25) years as aforesaid all monies and assets bequeathed to them out of my estate shall vest in my Administrators and such administrators shall administer such monies and assets in their absolute and entire discretion and the interest or any D portion of and fruits thereof of the amount due to them shall be utilised from time to time by such Administrators towards the maintenance and education and general well being of them and after they attain the age of twenty five (25) years shall be paid to them."

Miss *Muchemwa* submitted that the second respondent did not comply with clause 8 of the will, as he stopped administering the estate before all the E children of the testator attained the age of 25 years. She also submitted that in terms of clause 8 the administrator's involvement should end after they will all have attained the age of 25 years. The applicants have not yet attained that age. She further submitted that all the assets of the deceased's estate should be pooled together and be used for their benefit until the youngest child attains the age of 25 years. F

Mr *Chingeya* for the first respondent submitted that the testator's will was complied with by the second respondent, therefore the applicants' application should be dismissed with costs. He submitted that according to the will each child inherits and manages his or her bequeathed property on attaining the age of 25 years. He further submitted that the testator gave assets to each child G which should be used in his or her favour and that the assets bequeathed to one child should not be used for the benefit of other children.

This calls for a careful interpretation of the will, to bring out the testator's intention on the issues raised by the parties. The court must look at all the provisions of the will in order to arrive at the testator's intention. Clause 8 H

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must thus be interpreted in conformity with the testator's will as a whole for the A court to understand it in light of the general scheme or idea underlying the will as a whole: Ex p *Bosch* 1943 CPD 369 at 386, Voet 28.5.13 and 34.5.4, *Neveling's Executor* v *Neveling's Executor and Others* (1909) 26 SC 196. The testator's will should not be rectified or varied, if her intention can be implemented without rectification or variation. The court is not there to B write a will for the testator but to interpret and give effect to the intention of the testator. The purpose of interpreting a will is to ascertain the intention of the testator from the words she used in her will: *Cuming* v *Cuming and Others* 1945 AD 201 at 206, In re *Bergh* Ex p *Hesse* (1890) 7 SC 305 at 308.

Clause 8 of the testator's will is not elegantly worded. In several sentences C it refers to "they" and "them" in reference to the administration of her estate pending the attainment of the age of 25 by her children. It leaves an ambiguous impression as to when the children will receive their respective inheritance. This led to Miss *Muchemwa* arguing that they will all get their inheritance when the youngest child attains the age of 25 years. On the other hand, it led to Mr *Chingeya* arguing that each child should get what was D bequeathed to him or her when he or she attains the age of 25 years. In the interpretation of a will, if a word or expression is capable of bearing more than one meaning, the court must attach to it the meaning which will make it valid rather than invalid or according to which it will make sense instead of nonsense or according to which the beneficiaries will benefit rather than be placed under an obligation or prejudiced: *Brown* v *Estate Dickinson and Others*E1919 AD 457 at 466 and 469; *Estate Villet* v *Estate Villet* 1939 CPD 152 at 156; Voet 34.5.4 and 28.7.30.

In this case, clause 8 would not make sense if it is construed to mean that the first respondent though now aged 25 cannot inherit 6 Umfuli Close until her youngest sibling attains the age of 25 years. The giving of the age limit at F 25 would not make sense as it will not benefit the two elder siblings in spite of their having attained the prescribed age. I will therefore find that each child will inherit her or his inheritance on attaining the age of 25 years. The transfer of 6 Umfuli Close to the first respondent can therefore not be reversed.

The pooling of assets suggested by Miss *Muchemwa* does not make sense as it G interferes with the clear and dominant provisions of clause 6 which specifies what each child will inherit. The pooling together of the bequeathed assets will have the effect of diminishing them before they are inherited. It will also prejudice the first respondent as she is the only one whose immovable inheritance remained in the estate as the testator after executing the will bought a stand in the names of the applicants, which does not for that reason H fall under the deceased's estate nor the administration of the Administrator.

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Clause 8 must therefore be interpreted as meaning that the Administrator A shall administer each child's inheritance until that child attains the age of 25 years. The administrator's discretion must therefore be exercised in respect of each child's bequeathed assets and their respective fruits.

The legislature, in appreciation of the law on interpretation of wills, prescribed the limited circumstances in which the court can rectify the testator's will. In terms of s 20 of the Wills Act the testator's will can be rectified – B

> "(1) If an appropriate court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of –

(a) a clerical error; or

(b) a failure to understand the testator's instructions; or

(c) a failure on the part of the testator to appreciate the effect of the words used C in the will;

the appropriate court may order that the will shall be rectified by the insertion, deletion or substitution of any words so as to carry out the testator's intentions.

(2) Subsection (1) shall not be construed as limiting in any way the power of an appropriate court under any other law to order the rectification of a will."

Miss *Muchemwa* for the applicants submitted that the court should rectify the D testator's will in terms of s 20 and grant the alternative orders prayed for in their draft order. Mr *Chingeya* submitted that s 20 does not apply to this case.

First and foremost, the court must be satisfied that, the testator so expressed herself, that her intentions cannot be carried out, in consequence of –

(a) a clerical error which must clearly be identified as such. The court E should not lightly impute an error where it cannot be identified with certainty.

(b) a failure to understand the testator's instructions which must be based on the will being so worded as to be too difficult or impossible to understand. Minor difficulties must be overcome by giving effect to the F testator's apparent intention gleaned from the scheme or idea underlying the will as a whole.

(c) a failure on the part of the testator to appreciate the effect of the words he or she used in the will. The testator must have used words which the context of the will proves to have not been intended.

These limitations are intended to prevent unnecessary interferences with the G testator's will. Miss *Muchemwa* for the applicants submitted that the court has, in terms of s 20(2) of the Wills Act, broader powers to rectify a will. That is a correct interpretation of s 20(2), which reads as follows:

"(2) Subsection (1) shall not be construed as limiting in any way the power of an appropriate court under any other law to order the rectification of a will." H

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Subsection (2) of s 20 authorises the court to rectify the provisions of a will in A terms of any other law. It merely preserves the rectification permissible under any other law, which must be identified. Miss *Muchemwa* relied on Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* 2 ed where the authors on pp 491- 492 said:

"It is only in exceptional circumstances that the courts are prepared to relax the general B rule that the terms of a testator's will are not to be varied. It is not possible to draw up an exhaustive list of the circumstances in which the courts would be prepared to sanction a departure from the terms of a will. Reference to decided cases reveals, however, that the courts have been prepared to do so where one or more of the following circumstances existed:

(1) Where the circumstances rendered the fulfilment of the testator's intentions C practically impossible or utterly unreasonable.

(2) Where the strict enforcement of the testator's directions would have resulted in a failure of the testator's bequests or otherwise resulted in the testator's intentions being defeated.

(3) Where the machinery detailed in the will for carrying out the testator's intentions had failed or was likely to fail, or the testator's directions could D be carried out only with serious loss to the estate.

(4) Where the necessities of a case demand a departure from the will.

(5) Where the testator had based the dispositions on mistaken assumptions about the testator's assets or liabilities."

I must with disappointment comment on the applicant's counsel's misleading E quotation of the above passage. In her heads of argument, after purporting to quote within opening and closing quotation marks, she inaccurately quoted the conditions under which a court can rectify a will under conditions 1, 2, 4 and 5, and I believe deliberately omitted condition 3 which is very important for the determination of this case. I would have been misled if I had not F insisted on getting a copy of the book which is not in either the High Court or the Supreme Court libraries. I had to call counsel for both parties back to court to ask if they could lend me the book for purposes of finalising my judgment. They came on 9 September 2014 and Miss *Muchemwa* for the applicant availed the book for my use. I am grateful for that assistance, but disappointed by the unethical attempt to mislead

the court. A legal practitioner G has a duty to give correct and accurate information to the court, and should never knowingly give it incorrect information or advice or knowingly misstate the contents of a document, statute or like authority. See B D Crozier *Legal Ethics: A Handbook* for *Zimbabwean Lawyers* pp 14 to 15.

I have checked the authorities relied on by the authors and am satisfied H that the circumstances there mentioned are part of our common law which

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I am entitled to rely on in determining whether or not I should rectify the A testator'swill.

Subsection (2) of s 20 of the Wills Act permits the court to rectify a will in terms of any other law. This means any other law on rectification of wills applicable in Zimbabwe without exception. Normally when a statute enacts laws which formerly were regulated by common law; it alters that common B law, leaving it inapplicable. Subsection (2) preserves the operation of our common law on the circumstances on which the court can vary or rectify a will. As the South African law referred to above is part of our common law, this court can rely on it in determining whether or not it can rectify the testator's will.

The provisions of clause 8 were not capable of being fully implemented at C the time of the deceased's death and the administration of her estate because her estate had no capacity to buy a house for the applicants nor pay the administrator till each child attains the age of 25 years. She had, however, in her lifetime bought them a stand which they own in equal shares. She initially wanted to buy it in her name but changed her mind and bought it in the applicants' names. It is, however, a vacant stand which cannot accommodate D them. If she had developed the stand, the provisions of her will would have been satisfied. The administrator seems to have done the best he could in the circumstances. He distributed the two properties to the deceased's children according to the will. However, he inadvertently included the applicants' stand in Ruwa which because it was bought in their names and registered E in their names could not have been part of their late mother's estate. He did not wait until they all attained the age of 25 years. The applicants are now aged 22 and 23 respectively. They are according to the will, not yet entitled to administer their own inheritance. The deceased's estate should, in respect of what was bequeathed to them, still be under the administration of the second respondent. That lends credence to the applicants' application for F rectification of the will, which can however not be in their favour as will be determined below.

The alternative orders sought

The applicants' prayer for the alternative orders discussed above will now be considered in view of my finding that in terms of s 20(1)(c) of the G Wills Act if a testator fails to appreciate the effect of the words used in the will, the appropriate court may order that the will shall be rectified by the insertion, deletion or substitution of any words so as to carry out the testator's intentions. In this case the testator made provisions for the administration of her estate until her youngest child attains the age of 25, without appreciating the cost to her H

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estate which she provided should pay the executor's and administrator's fees. I A also found that the testator's will can be rectified under the five conditions mentioned in *The Law of Succession in South Africa*. The third circumstance which states that a will can be rectified "where the machinery detailed in the will for carrying out the testator's intentions had failed or was likely to fail, or the testator's directions could be carried out only with serious loss to B the estate", is of particular importance in this case: Ex p *Dittman NO* 1919 OPD 103; Ex p *Executors Estate Gray* 1920 WLD 116; Ex p *Estate Kemp* 1946 NPD 319; Ex p *Dawoodji NO* 1961 (2) SA 170 (SR).

Transfer of No. 6 Umfuli Close into the applicants' and the first respondent's names.

In their alternative prayer, the applicants seek an order transferring Number 6 C Umfuli Close into their and the first respondent's names.

Clauses 5 and 6 are clear as to what the testator bequeathed to the applicants and the first respondent and what would happen if she failed to buy a house for the applicants. A house was to be bought for them, from her savings and D pension. She however anticipated that eventuality by buying them a stand. She must have done that in appreciation of her financial circumstances. She had willed a house to the applicants and seems to have been striving for that objective through the buying of the stand. Unfortunately she left no means from which the stand could be developed.

The provisions of clause 6 are clear as to what each of her children was to E inherit. The first respondent was to inherit stands 9627 and 9628 known as 6 Umfuli Close, one third of cash residue and one third of household goods, furniture and personal effects. The applicants were to inherit one third of cash residue, one third of household goods, furniture and personal effects and 50 percent of the second house. The deceased was resolute about bequeathing 6 F Umfuli Close to the first respondent, in spite of her then inability to buy the second house. It is therefore an inalterable clause of the will. In interpreting a will the court must bear in mind the dominant provisions and clauses which must be given full effect unless it appears from the rest of the will that the testator wished to qualify it. In Ex p *Melle and Others* 1954 (2) SA 329 (A) at 334B-E, Centlivres CJ discussed this principle as follows:

> "Before proceeding to discuss the meaning of the will it will be convenient to refer to G certain principles which are applicable in the interpretation of wills. In Re *Estate van Aardt* 1925 CPD 250 at 255, Watermeyer J said;
>
> 'The principle that full effect should be given to the dominant clause which bequeaths the legacy or institutes the heir and that its effect should not be modified nor its meaning strained because there are other clauses in H the will which apparently, require this to be done, unless it is quite clear

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> from these other clauses that the testator so intended, seems to have been A recognised and acted on in a number of decisions in our courts ... See Voet 34.5.4, where he says:
>
> *"Ac si quae videatur contrarietas aut pugna esse, distinctio contrarietas, quoad ejus fiere potest, in concordiam redigenda est."'"*

A reading of clauses 5 and 6 makes the bequeathing of 6 Umfuli Close to the first respondent a dominant provision. It was bequeathed to the first B respondent when the testator was fully aware that the applicants were not to benefit from it. She was also aware that the applicants could only benefit from a house she was to buy or was to be bought by the administrators of her estate. During her lifetime she bought the applicants a stand they own in equal shares, proving that she intended to give the first respondent more than the applicants as had also been clearly spelt out in clause 6. The request for C the transfer of 6 Umfuli Close into the applicants' and the first respondent's names therefore cannot be granted. It would have the effect of reversing the testator's dominant intent of giving more to the first respondent and end up giving more to the applicants who will end up with equal shares with the first respondent in 6 Umfuli Close and half shares in the Ruwa stand. The D testator's clear intention was for the applicants to have half equal shares in a house she was to buy which she partially fulfilled by buying them the stand, while the first respondent was to have two stands which constitute 6 Umfuli Close.

Continued administration of the estate E

The testator in clause 12 provides for the entitlement of the executors and administrators to charge and be paid fees from her estate. This, in view of the penury of the deceased's estate, presents serious challenges to the continued administration of her estate till the youngest child attains the age of 25 years. In my view, the administrator had no option besides quickly being released from administering the estate. The estate's penury justifies rectification F of the deceased's will by altering the need for her estate to continue to be administered until the applicants attain the age of 25 years. It makes that provision of the will incapable of being fulfilled. There is simply no money nor assets to be administered nor the means from which the administrator can be paid. An order that the estate be reopened will further impoverish G the estate and diminish the beneficiaries' inheritance. This will prejudice the applicants and leave them in deeper penury. The court should accept that the administrative machinery which was to administer the testator's estate until each child attained the age of 25 years has failed. See Ex p *Kemp* 1946 NPD 319 at 322-323. The continued use of the administrator will thus, cause serious loss to the estate and the bequeathed inheritance of the beneficiaries. H

Uchena J

That part of clause 8 must thus be rectified by deleting the requirement that the A estate be administered till the youngest child attains the age of 25 years.

Equal utilizationof the benefits of 6 Umfuli Close

It is clear that the deceased, as spelt out in clause 8 of her will, wanted all her children to be looked after by her estate until they each attained the age of B 25 years. She as already found wanted each child's inheritance in her estate which she had apportioned to them to be administered by an administrator till he or she attained the age of 25. Her intention on that aspect is clear but is no longer capable of being implemented because there is no money to achieve that directive. I have already found that the will has to be rectified to release the administrator from carrying out that directive. I have already found C that the testator did not intent to give the applicants any benefit in Umfuli Close. She made separate provisions for them which she partially fulfilled.

There is therefore no justification for the alternative orders sought. In the result the applicants' application is dismissed with costs.

Legal Resources Foundation, applicant's legal practitioners D

Chizengeya and Partners, first respondent's legal practitioners

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[zRPz]DEPUTY SHERIFF HARARE v KINGSLEY & ANOR 2014 (2) ZLR 394 (H)

Citation	2014 (2) ZLR 394 (H)
Case No	Judgment No. HH-507-14
Court	High Court, Harare
Judge	Bere J
Heard	14 July 2011; *CAV*
Judgment	24 September 2014
Counsel	*T Mpofu*, for the claimant *L Uriri*, for the judgment creditor
Case Type	Application for constitutional referral
Annotations	No case annotations to date

Flynote

Constitutional law – *Declaration of Rights – referral of alleged breach to Constitutional Court – current legal framework sufficient to deal with concerns raised by applicant – application for referral refused*

Family law – *husband and wife – matrimonial property – matrimonial home – registration of in name of husband – not a bar to wife seeking* D *to claim ownership*

Headnote

The sheriff had attached an immovable property registered in the name of the judgment debtor in this matter. The property, which was registered in the name of the judgment debtor, was the matrimonial home of the E judgment debtor and his estranged wife, the applicant. She was living at the property. Divorce proceedings were pending. She claimed a right to the property and the sheriff instituted interpleader proceedings. The applicant then sought to have the matter referred to the Constitutional Court on a number of grounds, including the right to protection of the law and protection against discrimination. F

Held, that the application was frivolous and vexatious. The current legal framework in this country is sufficient to deal with the applicant's concerns. While the law relating to the right of a wife to the matrimonial estate, as determined by the principles of family law, and the rights of her husband in the same property as determined by the principles of the G law of property has been described as unsatisfactory, there is a plethora of cases which show that the mere registration of a property in the name of a particular spouse is no bar to the court making an appropriate order contrary to such registration, as where, for example, it is shown that the information in the Deeds Office is not reflecting the correct situation as regards the actual ownership of the particular property. H

2014 (2) ZLR p395

Bere J

The civil processes currently in force in this country could be invoked to A protect the applicant's situation if she can demonstrate entitlement to the attached property. This could be achieved even through the filed interpleader proceedings.

Cases referred to

Lafontant v *Kennedy*2000 (2) ZLR 280 (S) B

Menezes v *McGaili* 1971 (2) SA 12 (C)

Muswere v *Makanza*2004 (2) ZLR 262 (H)

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

Nyamweda v *Georgias* 1988 (2) ZLR 422 (S)

Takafuma v *Takafuma*1994 (2) ZLR 103 (S) C

Young v *van Rensburg*1991 (2) ZLR 149 (S)

Legislation considered

Constitution of Zimbabwe 2013, s 175(4)

Case information

T Mpofu, for the claimant D

L Uriri, for the judgment creditor

Judgment

Bere J: This application for referral to the Constitutional Court follows hotly on the heels of an interpleader notice filed by the Deputy Sheriff, E Harare following his attachment of several movables and one immovable property, *viz*, house no. 36 Devon Road, Avondale, Harare (registered in the name of the judgment debtor) in execution of a judgment granted in favour of the judgment creditor.

Apparently, the judgment debtor was at the time of this application an F estranged husband to the claimant in the interpleader proceedings. For ease of reference I shall refer to the claimant as the applicant and the judgment creditor as the respondent.

The applicant and the judgment debtor solemnized their marriage on 11 February 2000 and they have one minor child born on 26 November 2000. G The applicant alleged that she stays at the

attached immovable property and regards it as her matrimonial home where she is currently residing together with her minor child. It is the attachment of this matrimonial house which has caused much anxiety and apparent uncertainty on the part of the applicant which has prompted her to launch this application for referral of her concerns H to the Constitutional Court of Zimbabwe.

2014 (2) ZLR p396

Bere J

The applicant alleged that prior to the institution of the proceedings against A the judgment debtor by the respondent she had already commenced divorce proceedings against her estranged husband and that in those proceedings she was in terms of s 7 of the Matrimonial Causes Act [*Chapter 7:13*] claiming *inter alia* the now attached matrimonial house as well as other movable properties.

From what the applicant alleges, it is clear that the immovable property is B registered in the deeds office of Zimbabwe in the name of her estranged husband, the judgment debtor. On the morning of the hearing of the interpleader application, the applicant decided to temporarily shelve that hearing in preference for this application in terms of s 24(2) of the then Constitution of this country which has been imported into the current Constitution as C s 175(4). In terms of this section I am enjoined to refer the matter to the Constitutional Court unless I consider the request to be merely frivolous or vexatious. I was urged to consider referring the following questions to the Constitutional Court. To avoid distortion of the issues I propose to quote *in extenso* the issues as captured by Mr *Mpofu* for the applicant on page 3 of the applicant's heads of argument: D

> "The question for referral
>
> 1.6. The following are the questions whose referral is sought;
>
> (a) Whether the common law position which fails to recognize the proprietary rights of a woman (or any spouse as the case may be) in the property for the time being registered in the name of the husband E (or the other spouse) is inconsistent with the provisions of section 18 of the Constitution and therefore void.
>
> (b) *A fortiori*, whether the common law rule in question and in view of the patently unjust position that it creates amounts under the circumstances to law as contemplated by the Constitution and is a basis upon which applicant can be disenfranchised.
>
> (c) Whether the sale in execution of the property in question by the second F respondent interferes with applicant's right to a livelihood which right is taken in the sweep of section 12 of the Constitution
>
> (d) Whether the surrounding circumstances of the matter establish a contravention of section 15 of the Constitution and therefore invalid."

A number of cases were sampled for me in the heads of argument where G focus on the relation of a wife to property registered in the sole name of her husband has assumed center stage. One such case which has evidently influenced the initiation of this application is the decision by Makarau J (now JA) in *Muswere* v *Makanza*2004 (2) ZLR 262 (H) at 262-263 where the learned judge lamented the apparent discord between the legal position at present as regards the right of a wife to the matrimonial estate, as determined by the principles of family law and the rights of her husband in the same property as determined H

2014 (2) ZLR p397

Bere J

by the principles of the law of property. The head note to this case will suffice to A bring to light the concerns which exercised the mind of the learned judge. The head note is as follows:

> "The parties to this case, a married couple, had lived in their matrimonial home for many years. The property was registered in the sole name of the husband. B Without seeking his wife's approval, he sold the property to another person and moved back to his rural area. The wife refused to join him and remained in the house. The buyer sought an order for her eviction, while she sought an order setting aside the sale and declaring her to be co-owner of the property.
>
> *Held,* that the law regarding the legal relation of a wife to property registered in the sole name of her husband is unsatisfactory and palpably unjust. Whoever has C his name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over that land. This individualistic approach is not realistic in a marriage which is the union of two people and, in most cases, the merging of their wealth generation capacities for mutual benefit. It is not uncommon for married couples to jointly acquire property during the subsistence of the marriage and to jointly acquire land D in unclear ratios of contribution towards that acquisition. It is not uncommon, as

> occurred here, that the land will be registered in the name of one of the spouses, usually that of the husband. In a marriage, it is usual to refer to property acquired during the marriage as 'joint' property while the marriage subsists. On the termination of the marriage through divorce or death, the principles of both family law and the law of inheritance recognise the joint matrimonial estate, which is then distributed as between the spouses, regardless of whose E name appeared on the deed conferring title to the land or property. However, the law of property does not recognize the existence of the matrimonial estate. A wife cannot stop her husband from selling the matrimonial home or any other immovable property forming the joint matrimonial estate if it is registered in his sole name, even if she contributed directly and indirectly towards the acquisition of that property. Anachronistic as it is, the legal position at present is the right F of a wife to the matrimonial estate, as determined by the principles of family law, are inferior to the rights of her husband in the same property as determined by the principles of the law of property."

Whilst accepting the practical challenges highlighted by Mr *Mpofu* in this case, Mr *Uriri* who appeared for the respondent was strongly opposed to the referral of the matter to the Constitutional Court.

Mr *Uriri* argued that to accommodate the contingent rights of the applicant in the G manner suggested by Mr *Mpofu* would be to set a very dangerous precedent in the property regime in this country. Such an approach would trigger numerous claims by those in the mould of the applicant against financial institutions who would have advanced financial assistance on the H basis of title deeds in their possession and held as security, so the argument

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went. It was also further argued that the Deeds Registry Act would be severely A undermined and in fact rendered nugatory by what counsel reasoned was an attempt by the applicant to complicate property rights in this country.

The tragedy in this application, in my view, is the impression created by the applicant's counsel that our courts have blindly or religiously accepted that registration of title in the Deeds Office signifies conclusive ownership or B entitlement to that property. With respect, there is a plethora of cases which show that the mere registration of a property in the name of a spouse is no bar to the court making an appropriate order contrary to such registration. This has been the position where it has been demonstrated that the information in the Deeds Office is not reflective of the correct situation as regards the actual ownership of the particular property. The Supreme Court in this country has C clearly not stood aloof in this regard.

Even though, as said in *Takafuma* v *Takafuma*1994 (2) ZLR 103 (S), the registration of an immovable property in the Deeds Office is not a mere matter of form, a party is entitled to claim back his or her share if it can be shown that the registered party was a mere nominee in respect of the share D being claimed back. Thus for example, in *Lafontant* v *Kennedy*2000 (2) ZLR 280 (S), even though the Supreme Court criticized the ground of her claim and the state of her pleadings, the court nevertheless authorized the transfer to the ex-wife of the ex-husband's share in a jointly owned immovable property after the ex-wife had shown that the registration into their joint E names had been done for convenience only and that the ex-husband had not contributed to its purchase.

In *Nyamweda* v *Georgias* 1988 (2) ZLR 422 (S),even though the property had been registered in the name of the ex-mistress to circumvent difficulties posed by the requirements of the building society that had funded the purchase, F the full bench of the Supreme Court accepted that the ex-mistress was a mere nominee or agent when the property had been registered in her name and it allowed the transfer to the rightful owner. See further *Young* v *van Rensburg*1991 (2) ZLR 149 (S). The list is endless. In *Menezes* v *McGaili* 1971 (2) SA 12 (C) at 14 the court reasoned that where transfer is tainted by *mala fides* or fraud it can be reversed, reaffirming that registration does not G necessarily lead to conclusive ownership of the registered property. Even in the *Muswere* case (*supra*) the court was fully alive to the fact that –

> "whoever has his or her name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over that land". H

Coming back to the application before me, it occurs to me that the civil processes A currently in force in this country can be invoked to protect the applicant's situation if she can demonstrate entitlement

to the attached property. This can be achieved even through the filed interpleader proceedings which have nothing to do with the Constitutional Court. Our current Constitution B speaks to no discrimination against women in their quest to acquire any property and those who find themselves in the situation of the applicant or potentially in her situation must be encouraged to be proactive in pushing for their joint registration on properties with their spouses or husbands in deserving circumstances and not to wait to deal with a crisis, as is happening in this case.

In my view, the thrust must not be to spend time lamenting or bemoaning the C perceived disharmony between the current common law position and the proprietary rights of women who find themselves in the position of the applicant or in the *Muswere* case. The thrust must instead be to sensitise or conscientise these women and even men to be wary of their proprietary D rights, particularly in a matrimonial set up. They must be taught to fully appreciate the importance of ensuring joint registration of property in order to adequately protect themselves.

In the *Muswere* case and the instant case, if joint registration had been effected, the concerned women would have adequately protected themselves E because the title deeds would have shown that the property was jointly owned, thereby making both disposal and attachment respectively without the wife's involvement difficult if not impossible.

I have had to reflect on this application for several months. Even as I write this judgment I am unable to locate any traces of logic in the nature of the order which the Constitutional Court would be asked to make. I cannot F imagine the Constitutional Court being asked to make a pronouncement that effectively interferes with the smooth conclusion of a judicial process initiated by the respondent, or to make a pronouncement that seeks to regulate the proprietary rights of an individual in a matrimonial set up. People cannot be forced to assert their right by an order of court. I am reminded of the old G adage, quoted in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290E:

> "*Vigilantibus non dormientibus jura subveniunt* – the law will help the vigilant and not the sluggard".

Those who worry about proprietary rights in a matrimonial set up must be proactive. They must do the right things in time in order to enjoy maximum H protection of our legal processes as they currently stand.

Bere J

Having reflected on the application for referral, I am unable to accede to it A for I regard it as both frivolous and vexatious. The current legal framework in this country is sufficient to deal with the applicant's concerns.

The application is accordingly dismissed with costs.

Manase and Manase, applicant's legal practitioners B

Atherstone and Cook, respondent's legal practitioners

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[zRPz]MANGENJE v TBIC INVESTMENTS (PVT) LTD & ANOR TBIC Investments (Pvt) Ltd & Anor v Mangenje 2014 (2) ZLR 401 (H)

Citation	2014 (2) ZLR 401 (H)
Case No	Judgment No. 510-14
Court	High Court, Harare
Judge	Mafusire J

Heard 24 September 2014

Judgment 24 September 2014

Counsel No counsel details supplied

Case Type Chamber application

Annotations No case annotations to date

Flynote

Court – *judicial officer – recusal – grounds for – when judicial officer may be deemed to be automatically barred – apprehension of bias – need for apprehension to be based on true facts – approach to be taken by judicial officer to application – normal procedure for dealing with* D *application – duties of counsel*

Headnote

In the context of judicial proceedings, recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest, or if he has E conducted himself in such a way that he could be regarded as having become, directly or indirectly, a party to the proceedings. In the latter event, the maxim *nemo judex in sua causa* (no one shall be judge in his own cause) requires that he should recuse himself. He is automatically barred by operation of the law. But even where the judge is not automatically disqualified, he must still recuse himself upon application by a reasonable F litigant who reasonably apprehends a possibility of bias on the part of the judge. The apprehension of the reasonable person has to be assessed in the light of the true facts. Incorrect facts which an applicant takes into account have to be ignored. In determining the possibility of bias, there is no difference between whether one does so from the point of G view of the court seized of the challenge or from the point of view of the reasonable litigant.

When the recusal of the judicial officer from a case is sought, only that judicial officer can decide that application in the first instance. If recusal is refused and that decision is wrong, it can always be corrected H on appeal. In a sense, therefore, and contrary to the general rule, the

judicial officer becomes judge in his own cause. It seems an inevitable A exception to the general rule.

There are a number of reasons for that. The first is that judges have a duty to sit and decide cases before them and in which they are not disqualified. They should not too readily accede to suggestions of bias or other interest in the matter, because by doing so they might encourage parties B to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

Secondly, by reason of their training, experience, conscience and intellectual discipline, it must be assumed that judges are able to administer justice without fear or favour, and capable of judging a particular controversy C fairly on the basis of its own circumstances. It must be assumed that they are able to disabuse their minds of any irrelevant personal beliefs and predispositions. Furthermore, on being appointed, every judge takes and subscribes to the judicial oath "… to do right to all manner of people after the laws and usages of Zimbabwe, without fear or favour, affection or ill-will". There is a presumption that judges will carry out D their oaths of office, and that is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high.

Thirdly, it is in the general interest of the judiciary and the public for an individual judicial officer to recuse himself where a litigant perceives a reasonable apprehension of bias. The judicial officer should not unduly E take a recusal application as a personal affront. However, while the judicial

officer considering the alleged bias must be reasonable, the perception or apprehension of bias must itself also be reasonable. An apprehension of bias that is whimsical or morbid cannot be a ground for seeking recusal.

Fourthly, in all cases of automatic disqualification or of reasonable F apprehension of bias, there must be a link, direct or indirect, between the judicial officer and one of the parties to the litigation.

Before an application for recusal is made, the judicial officer should be informed of the fact and the grounds of the application to avoid embarrassment and to give him the time and opportunity to give his side G of the story and for facts to be verified before the formal application is made. The usual procedure is that counsel for the applicant seeks a meeting in chambers with the judge in the presence of his opponent. The grounds of recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being H

Mafusire J

refused by the judge the applicant would, if so advised, move the application A in open court.

A litigant and his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned. If counsel's duty to his client demands it, he must launch the application courageously and without B fear of personal consequences. If the thing must be done, it must be done without timidity. Should counsel have a scintilla of doubt whether his application be contempt, he should seek the assistance of experienced counsel, not necessarily at his client's expense.

Cases referred to C

ANZ (Pvt) Ltd & Anor v *Diamond Ins Co (Pvt) Ltd* 2001 (1) ZLR 226 (H)

Council of Review, SA Defence Force, & Ors v *Mönnig & Ors* 1992 (3) 482 (A)

Re *JRL:* Ex parte *CJL* (1986) 161 CLR 342 (HCA)

Leopard Rock Hotel Co (Pvt) Ltd & Anor v *Walenn Construction (Pvt) Ltd*D 1994 (1) ZLR 255 (S)

Mahlangu v *Dowa & Ors* 2011 (1) ZLR 47 (H)

President of the Republic of SA & Ors v *SA Rugby Football Union & Ors* 1999 (4) SA 147 (CC)

R v *S (RD)* (1997) 118 CCC (3d) 353

S v *Collier* 1995 (2) SACR 648 (C)

R v *Gough* [1993] 2 All ER 724 (HL) E

S v *Mutizwa* 2006 (1) ZLR 78 (H)

US v *Morgan* 313 US 409 (1941)

Judgment

Mafusire J: Case 1 above is a chamber application for directions in terms F of r 15(9) of the Supreme Court Rules. That rule reads:

> "The preparation of a record under the provisions of rules 22 and 34 shall be subject to the supervision of a registrar of the High Court. The parties may submit any matter in dispute arising from the preparation of such record to a judge of the High Court who shall give such directions thereon as justice may require."

Case 2 is an application for my recusal from Case 1 on the ground that I G will not determine Case 1 impartially, allegedly because I have displayed bias towards the applicant, the respondent in Case 2 (hereafter referred to as "Mangenje").

(a) Background facts

Mangenje was the successful party in the two cases under HC 601/11 and H HC 9527/11 that I heard together in September 2013. To avoid confusion

Mafusire J

I shall henceforth refer to the two cases aforesaid as "the two main cases", A or simply, the "main cases".

Following my judgment on 30 October 2013 in the main cases, the two respondents in Case 1, the applicants in Case 2 (hereafter referred to as "TBIC Investments" and "Chidawanyika" respectively), appealed to the Supreme Court. A dispute arose between the parties as to whether B the registrar of this court should include or exclude from the record of appeal certain two documents. The first of those documents was an interlocutory chamber application that TBIC Investments had allegedly filed in or about May 2012 (hereafter referred to as "the interlocutory chamber application"). That was about one year and some two or three months before I heard the main cases. The interlocutory chamber application sought an order that a C certain supplementary affidavit that Mangenje had filed in one of the two main cases be expunged from the record.

The second of those documents about which the parties are at loggerheads was a supplementary affidavit by TBIC Investments (hereafter referred to as "the supplementary affidavit by TBIC Investments"). It was allegedly filed D in June 2013, allegedly in response to a certain affidavit that had been filed by the registrar of deeds in one of the two main cases.

It is alleged that the assistant registrar of this court responsible for the preparation of the records of appeal had in his first draft included the supplementary affidavit by TBIC Investments. He had then invited the parties' E legal practitioners to come and inspect the draft record in terms of subrule (8a) of r 15 aforesaid. It is alleged that Mangenje's attorney had objected to the inclusion of the supplementary affidavit by TBIC Investments. The assistant registrar had allegedly dropped it. The attorney for TBIC Investments and Chidawanyika had protested the exclusion of, not only the supplementary affidavit by TBIC Investment, but also the interlocutory chamber application. F There was a deadlock. The assistant registrar referred the matter to me for directions. I called the parties for a meeting in my chambers. I wanted to understand the nature of their dispute. I saw them on 27 January 2014.

In chambers Mr *Gama*, for TBIC Investments and Chidawanyika, took the point that the referral of the matter to myself by the assistant registrar had G been unprocedural and, at any rate, premature, in that firstly, an application for directions in terms of r 15(9) of the Supreme Court Rules is made by the parties, and not the registrar; and secondly, that there were discussions that were underway between the parties, which in all likelihood would settle the issues, including that relating to the disputed documents. H

Mafusire J

Without going into details about the irregularity or otherwise of the referral of the A dispute to me by the assistant registrar, the parties, with my guidance, agreed on a certain course of action which, it was felt, would expedite the matter. I proceeded to endorse it on the result sheet. It was as follows:

1. That Mr *Gama* would submit certain documents to the assistant registrar B by not later than close of business on Friday, 31 January 2014;
2 That thereafter the parties would meet before the assistant registrar to discuss and resolve any outstanding issues;
3. That if any issues remained unresolved then the matter would be referred to a judge for directions;
4. That the application for directions, if made, should be by the parties or one of C them, via the assistant registrar.

I have gathered from the papers that the parties resolved some of the outstanding issues but remained deadlocked on the two documents aforesaid. On 17 April 2014 Mangenje filed Case 1. It had no draft order. The matter was placed before Bere J. The honourable judge directed that a draft order D be filed. Meanwhile, Mr *Gama* had taken formal objection, both by letter, and through the opposing affidavits by his clients, that in the absence of a draft order, Case 1 was defective and should therefore not be considered. But, apparently in response to the direction by Bere J, Mangenje's attorney had proceeded to file a draft order.

Both parties filed supplementary affidavits, heads of argument and E supplementary heads of argument. However, Bere J did not determine the matter. He felt I was best suited to deal with it owing to my prior involvement and therefore intimate knowledge of it. It made sense. I obliged. But on perusal of the record I was distracted by the coarseness of the language in the F papers filed of record. On 25 July 2014 I issued a complaint and an interim directive to the parties' attorneys in the following terms:

> "4. I have looked at the matter briefly. I am disturbed by the tone of the documents placed before me. They are intemperate. They are scurrilous. They are full of buffoonery. They display a disturbing mutual lack of respect for, and courtesy to, the respective legal practitioners and the court. They distract G attention from the main issue.
>
> 5. Both sets of affidavits from the applicant and the respondents are essentially hearsay. Legal practitioners have used their clients to take indecent digs at each other. Very little of the 'facts' purportedly ascribed to the clients is within their personal knowledge, information or belief. The central issue is in respect of procedural matters over which clients have little or no H knowledge of.

Mafusire J

> 6. I will not determine the matter in its present state. But I realize that it has A been outstanding for far too long.
>
> 7. In the circumstances, I hereby direct in the interim, that the parties should file supplementary affidavits deposed to either by their legal practitioners or their counsel who appeared before me when I heard the main matter in 2013. I recall that Advocates *D O'Chieng (sic*) and *R Goba* appeared. The supplementary affidavits should deal with what transpired in court on the day of the hearing concerning the production and/or admissibility of the B disputed documents.
>
> 8. There are allegations and counter-allegations that the disputed documents had been or had not been part of the records that I dealt with at the time. There are allegations and counter-allegations that there was an application, on the day of the hearing, to admit one or other of the documents. There are allegations and counter-allegations that I admitted one or other of them. C The supplementary affidavits should deal with all these aspects.
>
> 9. I also require an affidavit from the Registrar or his Assistant. It must deal with what documents comprised the two records when they were placed before me *at the time*. Among other things, the Consolidated Indices to those two records should be informative."

I then went on to give deadlines for the filing of the further affidavits. D

The parties complied. In addition to a supplementary affidavit by himself, on 6 August 2014 Mr *Gama* wrote to proffer some form of apology for the coarse language but also directed attention to an earlier letter of his dated 18 July 2014. That letter had not been brought to my attention. I called for it. In it Mr *Gama* had sought my recusal from Case 1 on the ground that, E since I had determined the main matters, justice demanded that another judge should handle the application. I refused to recuse myself on the ground that no cogent reason had been advanced. Mr *Gama* wrote back on 3 September 2014 to say he would now make a formal application for my recusal. He filed it two weeks later.

Naturally, I have to determine Case 2 first. If I find that I have to recuse F myself then Case 1 will have to be referred to another judge. But if I refuse to recuse myself I will proceed to determine it.

(B) Case 2: Application for recusal

(i) Summary of the law on recusal G

In the context of judicial proceedings, recusal is the stepping aside, or disqualification of a judicial officer from a case on the ground of personal interest in the matter, bias, prejudice, or conflict of interest. Recusal is a rule of natural justice: see *Council of Review, South African Defence Force, & Ors* v *Mönnig & Ors* 1992 (3) 482 (A) at 491E-F and *President of the Republic*H

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of South Africa & Ors v *South African Rugby Football Union & Ors*A1999 (4) SA 147 (CC) at 168D-E. No man should be judge over his own cause, or *nemo judex in sua causa*.

In *Associated Newspapers of Zimbabwe (Pvt) Ltd & Anor* v *Diamond Insurance Co (Pvt) Ltd* 2001 (1) ZLR 226 (H) at 236D-F, Hlatshwayo J, as B he then was, put it as follows:

> "Where a judicial officer has such an interest, be it financial, personal or whatever else, in the outcome of a case before him, or has conducted himself in such a way, that he could be regarded as having become, directly or indirectly, a party to the proceedings, the maxim *nemo judex in sua causa* (no one shall be judge in his own cause) requires that he should recuse himself. He is automatically barred by operation of the law. But even where the judge is not automatically C disqualified, he must still recuse himself upon application by a reasonable litigant who reasonably apprehends a possibility of bias on the part of the judge."

See also *S* v *Mutizwa* 2006 (1) ZLR 78 (H) and *Mahlangu* v *Dowa & Ors* 2011 (1) ZLR 47 (H).

I highlight certain aspects of the rule on recusal. When you are a judge or D judicial officer, and your recusal from a case is sought, only you can decide that application in the first instance. If you refuse recusal and that decision is wrong, it can always be corrected on appeal: *President of RSA supra* at 169D. In essence, therefore, and contrary to the general rule, you become judge over your own cause. It seems an inevitable exception to the general rule. There are a number of reasons for that. One, judges have a duty to sit E and decide cases before them and in which they are not disqualified. They should not too readily accede to suggestions of bias or other interest in the matter. It was put this way by the High Court of Australia in Re *JRL:* Ex parte *CJL* (1986) 161 CLR 342 (HCA) at 352E-F, a case quoted with approval by the Constitutional Court of South Africa in the *President of RSA supra* at 176B-C,and by Hlatshwayo J in *Associated Newspapers supra* at 233C-E:

> F "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearances of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

Two, by reason of their training, experience, conscience and intellectual G discipline, it must be assumed that judges are able to administer justice without fear or favour, and capable of judging a particular controversy fairly on the basis of its own circumstances. It must be assumed that they are able to disabuse their minds of any irrelevant personal beliefs and predispositions: *President of RSA supra* at 177D-E; also *Mahlangu supra*H at 50C-F, and *United States v Morgan* 313 US 409 (1941) at 421 (quoted

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in *President of RSA, supra* at 172G-H). Furthermore, on being appointed, A every judge takes and subscribes to the judicial oath "… to do right to all manner of people after the laws and usages of Zimbabwe, without fear or favour, affection or ill-will": see *Associated Newspapers supra* at 232D-F. There is a presumption that judges will carry out their oath of office, and that is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high: *R* v *S (RD)* (1997) 118 CCC (3d) 353 (quoted B at p 172E–F in *President of RSA*).

Three, it is in the general interest of the judiciary and the public for an individual judicial officer to recuse himself where a litigant perceives a reasonable apprehension of bias. The judicial officer should not unduly take a recusal application as a personal affront. It is one of the fundamental human rights C and freedoms enshrined in our Constitution. Section 69(2) of the Constitution says that in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent *and impartial* court, tribunal or other forum established by law.

However, while the judicial officer considering the alleged bias must be reasonable, the perception or apprehension of bias must itself be reasonable D also. So, in my view, an apprehension of bias that is whimsical or morbid cannot be a ground for seeking recusal. In *S* v *Collier* 1995 (2) SACR 648 (C) an application for the recusal of a magistrate on the ground that he was white was refused. In *R* v *Mutizwa supra*, recusal sought on the basis that the presiding magistrate had a reputation for imposing stiff sentences was E refused. In *Associated Newspapers supra,* an application for recusal by one set of shareholders in a newspaper printing and publishing company on the ground that the presiding judge had been a former temporary editor and columnist allegedly of a rival newspaper or competitor was refused on the basis that the applicant had not established any link between the judge and the other party in the main application who also happened to be a F co-shareholder in the newspaper printing and publishing company. Finally, in *President of RSA supra*, recusal based on alleged professional and/or political and/or family ties

between most of the justices of the Constitutional Court of South Africa and the appellant, who happened to be the the sitting president of the country, was refused. G

Four, in all cases of automatic disqualification or of reasonable apprehension of bias, there must be a link, direct or indirect, between the judicial officer and one of the parties to the litigation: *Associated Newspapers supra* at 239E-F. In *Mahlangu*, the judge's recusal was sought on the basis that she was married to a member of the police force. The alleged link was that the respondents were also members of the police force. The judge's husband H

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had little or no day to today dealings with the respondents who were either his A superiors or subordinates. Recusal was refused.

(ii) Applicants' case for recusal

The initial ground for recusal proffered by Mr *Gama* in his first letter on the point was that since I had determined the two main cases, justice demanded B that another judge determine Case1, i.e. whether or not the disputed documents should be part of the record of appeal. That was hardly saying I was or would be biased. That was no ground for seeking recusal.

In fairness to him, Mr *Gama*, in his letter, requested that I grant him and Mr *Makonyere* audience in my chambers so that he could provide further information. That is the correct approach. Before an application for recusal C is made, the judicial officer should be informed of the fact and the grounds of the application to avoid embarrassment and to give him the time and opportunity to give his side of the story and for facts to be verified before the formal application is made: *Associated Newspapers supra*. In *President of RSA supra* at 177H-I the Constitutional Court of South Africa put it as follows:

> "The usual procedure in applications for recusal is that counsel for the applicant D seeks a meeting in chambers with the judge or judges in the presence of her or his opponent. The grounds of recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open Court."

In casu, Mr *Gama* having made the formal application for my recusal from E Case 1, what are his grounds? Basically, it is that I have already prejudged the matter. It is said it is inconceivable that in Case 1 I will find that the supplementary affidavit by TBIC Investments was part of the record when I determined the two main cases; or that it was before me; or that an application for that affidavit had been made and turned down with no reasons being F proffered. And what is Mr *Gama's* evidence for saying this? Or, if it is his clients' apprehension that I will be biased, is it a reasonable apprehension?

A representative of TBIC Investments, one Killian Kapaso (hereafter referred to as "Kapaso") was made to sign an affidavit. Paragraphs 8 and 9 of my 25 July 2014 interim directive were duplicated *in toto*. It will be remembered that this was the directive in which I had, *inter alia*, condemned the injudicious G language of the parties in the papers filed of record and had pointed out, *inter alia*, that there had been allegations and counter-allegations that an application had been made and had been refused to admit one or other of the documents. Having condemned the respective parties' affidavits as hearsay evidence, I had then called for supplementary affidavits by the parties' legal H practitioners or their counsel together with that of the assistant registrar to

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testify on what exactly had transpired in court and what the consolidated A indices to those records showed in respect of the documents that comprised the records of the two main cases.

Mr *Gama* complains I should not have called for the supplementary affidavits. First, through Kapaso, he elevates Mangenje to a "… highly educated man" and then says Mangenje was in court on the day that I heard the two B matters. It is argued that it was not hearsay what Mangenje had said in his affidavit. It is alleged that Mangenje had said in his affidavit that counsel for TBIC Investments and Chidawanyika had applied for the admission of the supplementary affidavit by TBIC Investments but that I had turned down that application. Yet, Mr *Gama* then argues, at the start of the hearing I had accepted a supplementary affidavit by the registrar of deeds. Therefore, I C was being selective, because what was good for the one should have been good for the other.

It is also argued that in the meeting in my chambers on 27 January 2014 when I had enquired whether counsel had in fact made the application to admit the supplementary affidavit by TBIC Investments, both Mr *Gama* and Mr *Makonyere* had said yes. Therefore, Mr *Gama* argues, in the D face of Mangenje himself and his own attorney, both saying that such an application had been made, what then was the purpose of me calling for further supplementary affidavits if not to seek support for a pre-conceived notion that would commend itself to me? What was the purpose of asking the assistant registrar to refer to the consolidated indices to the two main E cases if not to suggest that the affidavit by TBIC Investments had not been part of the record? That conduct by myself, it is argued, leads a lay litigant to reasonably arrive at the conclusion that I have already taken the position that the affidavit by TBIC Investment was not before me when I heard the two main cases on 19 September 2013.

That, in a nutshell, is Mr *Gama's* case for my recusal. F

(iii) Analysis of the applicants' case for recusal

In *President of RSA supra*, the Constitutional Court of South Africa acknowledged that a litigant and his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and that the propriety G of their motives should not lightly be questioned. In *Associated Newspapers supra* at 232B, Hlatshwayo J said:

> "The learned author, E A L Lewis *Legal Ethics*, put the matter as follows:
>
> 'Though the attorney must attend to his client's reasonable belief that the Bench is not impartial, if he does not share that belief he should seek to persuade the client to his own way of thinking; but while thus again H

> emphasising the need for the utmost extreme caution the writer would add that if A duty to his client demands it he must launch the application courageously and without fear of personal consequences. If the thing must be done, it must be done without timidity. Should the attorney have a scintilla of doubt whether his application be contempt he should seek the assistance of experienced counsel, not necessarily at his client's expense.'"

I agree. I do not lightly question Mr *Gama*'s motive for seeking my recusal from B Case 1. But by calling for supplementary affidavits I had hoped to communicate to the attorneys – and I did spell it out – that they should not have got their clients to say things that could not possibly have been within their personal knowledge or information. For example, the affidavits by the clients were referring to correspondence and communication between their C respective attorneys as if they themselves had written or received them. They were referring to communication from, or invitations by, or interactions with, the assistant registrar as if they themselves had been directly involved. They were referring to an inspection of the record of appeal and to the raising of certain objections. In Mangenje's case, the record was eventually endorsed D after the assistant registrar had dropped the disputed documents. In Kapaso's case, the record would not be endorsed until the documents were restored. It was as if the parties themselves, not their attorneys, had been directly involved.

The parties were referring to what oral application had, or had not, been made in court as I heard the two main cases. They were referring to what exchanges I had had with counsel over the two disputed documents as if they E themselves had appeared in person. So I called for affidavits by the persons that had been directly involved. I would not be asked to determine a matter on the allegations of persons that had been seated at the back benches.

Mr *Ochieng*, Mangenje's counsel, did file a supplementary affidavit following my interim directive. Curiously, none by Mr *Goba* was filed. I had hoped that F my enquiry to the attorneys during the meeting in my chambers in January 2014 whether such an application to admit the supplementary affidavit by TBIC Investments had indeed been made and my subsequent directive for supplementary affidavits, to include specific reference to the indices, would spur the parties to reflect closely and present accurate information.

The application for my recusal is predicated on a serious falsehood on a crucial G aspect of Case 1. Whether Mr *Makonyere* and/or his client thought that Mr *Goba* did apply to have the supplementary affidavit by TBIC Investments admitted during the hearing of the two main cases, and whether Mr *Gama* and his clients believe that to be the case, does not in the least alter the fact no such thing happened. There was no such application. I was actually surprised H when it was brought to my attention that it was being said that I had refused

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an application for the admission of that affidavit. It was unbelievable to find A the following in Mr *Gama*'s own supplementary affidavit:

> "22. With the greatest respect, I was unable to understand why Advocate Goba was not given a chance to prove that the affidavit had been served.
>
> 23. I was in attendance together with a director and the managing director of TBIC.
>
> 24. To tell the truth, I did not see his Lordship making any effort to locate B TBIC's affidavit in the record, neither did the court ask Advocate Goba to furnish it with a copy of the affidavit."

With respect, to *apply for*, and *to refer to*, are not the same thing. With respect to Mr *Gama*, Mr *Goba* made no application to admit any document. He meant *to refer* to some affidavit. Mr *Ochieng* sprang up and objected. He said the document that Mr *Goba* meant to refer to had not been served on C Mangenje. On my part, in spite of their volume, I had painstakingly gone through the two records in the two main cases in preparation for the hearing, not once, but for each time that the matters had been set down. There had been two abortive sittings before, if I recall properly. None of the two disputed documents had been in either of the records. If they had been filed months D in advance of the hearing as alleged, still they had not been made part of the records that I dealt with. It was only after the dispute on those documents was referred to me that I saw them for the first time.

What transpired on the date of the hearing was this. Counsel for the registrar of deeds, Mr *Chimuriwo*, applied, right at the outset, to have the supplementary E affidavit by his client formally admitted. It had been part of the record. There had been filed together with that affidavit a formal written notice that such an application would be made at the hearing. There had been no objection to Mr *Chimuriwo's* application. I admitted the affidavit by consent.

Mr *Ochieng* then moved for the applicant's case. When his turn came, Mr *Goba* moved for the case of those of the respondents whom he represented. F Sometime during his submissions he referred to some affidavit. Mr *Ochieng* objected. I enquired as to where that affidavit was. Mr *Goba* said it had been filed some time before the hearing. He was waiving some document as he spoke. I said there was no such document on file and that he could not refer to it if it was not part of the record. There was no further ado. Mr *Goba* simply moved on to next point. None of the parties, let alone the court, G referred to this afterwards.

Mr *Ochieng's* description of the incident in his supplementary affidavit portrays the position more accurately. He wrote:

> "8. I recall that during the course of the hearing, my friend Goba advanced a submission in support of which he referred to the contents of an affidavit. H

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> I cannot remember what the submission was, only that I found it difficult to A follow because I could not remember reading the averments that he mentioned. I then quickly looked through the record and could not find the affidavit. Thinking that I might have overlooked it somehow, and believing that he likely had a better knowledge of the record than I, I turned to my instructing attorney, Mr Makonyere, to confirm the position.
>
> 9. Mr Makonyere was sitting behind me in the very first row of the gallery. I do not B expect that I actually spoke to him, but would have simply shrugged quizzically. He would likely have shrugged back or shaken his head to indicate that he knew no more than I. I then rose to object, saying that my learned friend was referring to material that I could not locate in the record and should not be permitted to do so.
>
> 10. His Lordship seem to share my own recollection of the record, as he said words to C the effect 'Yes, I was about to query that too. Mr Goba, where in the record is this affidavit?' I[n] reply, Mr Goba only described it by reference to its date and the name of the deponent and was unable to direct his Lordship to the relevant page in the record. His Lordship then invited me to develop my objection, and I said that I could take it little further than to repeat that the affidavit to which my friend referred formed no part of the record with which I was briefed and not unless it was in his Lordship's D record should he be permitted to proceed.
>
> 11. Unable to find the affidavit in the record, his Lordship upheld the objection. My learned friend did not persist in or even complete the submission that he had begun, and he then continued with his

address without further reference to the affidavit."

The test for apprehension of bias is an objective one. The onus of establishing it E rests on the applicant. In the present case, the apprehension or perception of bias is predicated on false facts. The apprehension of the reasonable person has to be assessed in the light of the true facts [1] . Incorrect facts which an applicant takes into account have to be ignored. In determining the possibility F of bias, there is no difference between whether one does so from the point of view of the court seized of the challenge or from the point of view of the reasonable litigant. It was said by Lord Goff in *R* v *Gough* [1993] 2 All ER 724 (HL) at 735, a passage quoted with approval in *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 277A-B that:

> "Since, however, the court investigates the actual circumstances, knowledge of such G circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has

> been imputed and the impression derived by the court, here personifying the A reasonable man."

No link, direct, or indirect, has been shown between Mangenje and myself. The nearest that has been inferred or insinuated is that I have been selective in my treatment of the litigants. As I have shown, this apprehension is based on untrue facts. Therefore it is unreasonable. In the circumstances, there is B no basis for seeking my recusal in Case 1. The application in HC 8211/14, Case 2 above, is hereby dismissed with costs.

(C) Case 1: Application for directions

(i) The Interlocutory Chamber Application

Not a single case has been made out for the inclusion, into the record of C appeal, the interlocutory chamber application that allegedly had been filed in May 2012, allegedly seeking an order to exclude from the record a certain supplementary affidavit by Mangenje. The two main cases had been filed under references HC 601/11 and HC 9527/11. It appears the interlocutory chamber application was filed under a different case number altogether.

May 2012 was a good one year and some five months before I heard the D two main cases. There is no indication whatsoever what was done after the interlocutory chamber application had allegedly been filed. Thus, unless, someone made the effort to physically marry the court record for which the interlocutory chamber application had been opened with those of the two main cases, the matters would, in all probabilities, have remained separated. E

A chamber application commences by way of an entry in the chamber book in terms of r 241(1) of the rules of this court. It has to be served on interested parties, unless it is one in respect of which 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. But this is merely directory or permissive, F and 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 the word "shall" means it is peremptory that the registrar acts with expedition.

Once the registrar has submitted the papers to him, the judge must consider G the papers without undue delay. 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. H

It seems that a party that sleeps on his application in a court application, as A opposed to a chamber application, may not have it set down. There is an elaborate procedure set out in the rules as to what a party seeking set down of a court application should do. However, in a chamber application, it seems that where a party has filed it the application must automatically B proceed to determination.

However, even though the rules cast the duty on the registrar and the judge to ensure that a 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 C follow up on his application. The law helps the vigilant, not the sluggard. In the present case, there is no indication whatsoever what follow-up action was taken after the interlocutory chamber application had allegedly been filed. No one is saying anything about this. And, as I have pointed out in Case 2 above, that document was not part of the record when I determined the two main cases. Therefore it cannot be made part of the record of appeal.

(ii) The Supplementary Affidavit by TBIC Investments D

It is said that this affidavit was filed some three months before I heard the two main cases. But again, as I have demonstrated in Case 2 above, it was also not part of the record when I determined those cases. Therefore, it also E cannot be made part of the appeal record.

However, I direct a different course in respect of this affidavit. Evidence has been placed before me that that affidavit had been lodged with, and date-stamped by, the registrar on 17 June 2013. It was filed in the court record bearing the reference number HC 601/11, i.e. one of the two main cases. There is some evidence that the affidavit had been served on the Civil Division of F the Attorney-General's Office and Mangenje's attorneys on 17 June 2013 and 19 June 2013 respectively. Thus, even though no one has told me what became of the affidavit, in the normal course of events it ought to have been part of the record when I heard the two main cases on 19 September 2013.

Rule 15(5) 0f the Supreme Court Rules reads:

> "The record shall contain an index of the names of witnesses whose evidence is included G in the record and all proceedings and documents which are included in the record. *In addition* there shall be a list of evidence, proceedings *and documents omitted from the record.* Such index and such list shall appear at the beginning of the record" (my emphasis).

In the final analysis therefore, I direct that the supplementary affidavit H by TBIC Investments in HC 601/11, more accurately described as "1st

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Respondent's Affidavit in Response to 4th Respondent's Affidavit", and A which was attached to a document titled "Notice of Filing 1st Respondent's Affidavit in Response to Chief Registrar of Deeds' Affidavit", be omitted from the record of appeal proper, but that it be included on the list of the evidence, proceedings and documents omitted from the record, which list must appear at the beginning of the record. B

(d) Disposition

Cases 1 and 2 above, namely HC 3244/2014 and HC 8211/2014 respectively, are hereby disposed of as follows

(i) Case 1: HC 3244/2014

1. The registrar of this court, or his assistant responsible for the preparation C of the records of appeal, shall:
   1.1 exclude from the record of appeal altogether, a certain chamber application which is Annexure "OA7" to the Respondents' opposing papers in HC 3244/14, which was prepared and signed by Madzivanzira, Gama & Associates on 30 April 2012 and issued D with this court on or about 2 May 2012, referring to case number HC 9527/11, but which does not appear to have been allocated a case number,
   1.2 omit from the record of appeal proper, the supplementary affidavit by TBIC Investments in HC 601/11, more accurately described E as "1st Respondent's Affidavit In Response to 4th Respondent's Affidavit", and which was attached to a document titled "Notice of Filing 1st Respondent's Affidavit in Response to Chief Registrar of Deeds' Affidavit", but shall include it on the list of the evidence, proceedings and documents omitted from the appeal record, and which list must appear at the beginning of that record. F
2. There shall be no order as to costs.

(ii) Case 2: HC 8211/2014

The application for my recusal from Case 1 (HC 3244/2014) is hereby dismissed with costs. G

Gama & Partners, applicant's legal practitioners in Case 1, respondent's legal practitioners in Case 2

Robinson & Makonyere, respondents' legal practitioners in Case 1, applicants' legal practitioners in Case 2 H

1 *President of the Republic of South Africa v South African Rugby Union* 1999 (4) SA 147 (CC)

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[zRPz]S v MUMPANDE & ORS 2014 (2) ZLR 417 (H)

Citation	2014 (2) ZLR 417 (H)
Case No	Judgment No. HB-146-14
Court	High Court, Gweru
Judge	Moyo J & Assessors
Heard	17, 18, 19 & 22 September 2014; *CAV*
Judgment	25 September 2014
Counsel	*M Shumba*, for the State *R Ndlovu*, for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law – *general principles – degrees of participation – accomplice – who is an accomplice – mental and physical elements necessary – person witnessing a crime and doing nothing to prevent it – not per se* D *an accomplice*

Headnote

An accomplice is a person who, with the necessary mental state, aids, abets, counsels or assists in a crime either before or during its commission. His liability is based on the fact that he gives assistance to the principal offender, knowing or foreseeing the possibility that the principal offender E is going to commit a particular crime. The physical elements of an accomplice's liability are that he gives some form of assistance, either before the crime (e.g. he supplies the means to commit the crime) or at the time of the crime (e.g. standing lookout).

The mental element of the liability of an accomplice is dependent on proof F that he rendered assistance and that he had the intention to assist in the commission of the crime which was actually committed by the principal. The extent of the liability of the accomplice hinges upon his

intention, actual or legal, in regard to what is done by the principal offender. The accomplice should be liable to be convicted of the same offence with which the principal is charged; facts must be present that show that the G accomplice could also be convicted of that offence. A person does not become an accomplice merely by witnessing an act and taking no steps to prevent it.

Two requirements must therefore be satisfied for a person to be labelled an accomplice: (a) there must be evidence that the person intended to aid H or promote the underlying offence and (b) there must be evidence that

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the person actively participated in the crime by soliciting, aiding or A agreeing to aid the principal.

Cases referred to

Commonwealth of Pennsylvania v *Rega* 933 A 2d 997 (2007)

Korrell v *The State* 253 SW 3rd 405 (2008)

MacDonald v *The King* [1947] 2 SCR 90 (SCC) B

Morris v *The Queen* [1979] 2 SCR 1041 (SCC)

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

S v *Mokoena* 1956 (3) SA 81 (A)

S v *Sauls & Ors* 1981 (3) SA 172 (A)C

Case information

M Shumba, for the State

R Ndlovu, for the accused

Judgment

Moyo J: The three accused persons face a charge of murder. The allegations against them are that on 3 January 2008, they assaulted Oliver Nyagondo in a case where accused 1 was a complainant and accused 2 and 3 were his D companions on the day in question. It is also the State's allegations that Oliver Nyagondo subsequently died on 10 January 2008 at Gweru General Hospital as a result of the injuries he had sustained in this assault.

[The court then considered the evidence in detail, and continued:]

The next question then is whether this witness is in fact an accomplice witness. E

An accomplice is defined by G Feltoe *Guide to Zimbabwe Criminal Law* (2005 edition) as a person who with the necessary mental state, aids, abets, counsels or assists in a crime either before or during its commission.

His liability is based on the fact that he gives assistance to the principal offender knowing or foreseeing the possibility that the principal offender is F going to commit a particular crime. The physical elements of an accomplices liability are that he gives some form of assistance either before the crime (e.g. he supplies the means to commit the crime) or at the time of the crime (e.g. standing lookout).

The mental element of the liability of an accomplice is dependent on proof G that he rendered assistance and that he had the intention to assist in the commission of the crime which was actually committed by the principal. The extent of the liability of the accomplice hinges upon his intention, actual or legal, in regard to what is done by the principal offender. The accomplice should be liable for the same offence with which the principal is charged. In other words facts must be present that show that the accomplice could also H

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be convicted of the offence with which the principal is charged. I now turn to the A English authorities on the legal definition of an accomplice.

In *MacDonald* v *The King* [1947] 2 SCR 90, the Supreme Court of Canada gave various scenarios of the legal definition of the term "accomplice" and they are as follows:

> "an accomplice is one who knowing and in a common indent with the principal offender, B unites in the completion of a crime";

and

> "that to determine if a witness is an accomplice ask this question – could witness have been indicated under the wide provisions of the criminal code for the offence with which the person has been convicted or is being tried?"

Other definitions given in the same case are: C
"an accomplice is a party to the crime himself, who assists in or is a partner of the crime"

and

> "Every person who knowingly, deliberately co-operates with or assists or even encourages another in the completion of a crime is an accomplice."

In *Korrell* v *The State* 253 SW 3rd 405 (2008), the Court of Appeals of Texas D offered this description:

> "An accomplice is an individual who participates with a defendant before, during, or after the commission of the crime and he acts with the requisite culpable mental state further that, the accomplice witness's participation must involve E an affirmative act that promotes the commission of the offence with which the defendant is charged. There must be sufficient evidence to connect the alleged accomplice to the criminal offence as a blameworthy participant."

In *Morris* v *The Queen* [1979] 2 SCR 1041 (SCC) Ritchie J of Canada's Supreme Court stated thus:

> "A person does not become an accomplice merely by witnessing an act and taking no F steps to prevent it."

In *Commonwealth of Pennsylvania* v *Rega* 933 A 2d 997 (2007) the Supreme Court of Pennsylvania had this to say:

> "An accomplice is one who actively and purposefully engages in criminal activity and is criminally responsible for the criminal actions of his/her co-conspirators G which are committed in furtherance of the criminal endeavour".

Accordingly, two prongs must be satisfied for a person to be labelled an accomplice. First, there must be evidence that the person intended to aid or promote the underlying offence.

Second, there must be evidence that the person actively participated in the H crime by soliciting, aiding or agreeing to aid the principal. Further, a person

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Moyo J

cannot be an accomplice simply because based on evidence that he knew A about the crime or was present at the crime scene. There must be some additional evidence that the person intended to aid the commission of the underlying crime, and then aided or attempted to aid."

From all these definitions it is clear that the accomplice must physically from his actions and mentally from his intentions be one with the accused B person. The accomplice should also be chargeable with the same offence with which the accused is charged. We now move to analyse the facts before is to see if Stanslaus Mudyara can be found to an accomplice witness. Our view is that he is not for the following reasons:

[The court then set out its reasons, and continued:] C

Having assessed the defence case and stated the problems this court has with regard thereto, I now turn to the aspect of a single witness's testimony and the dangers attendant there to so as to sufficiently warn myself of the risks attendant thereto. In terms of s 269 of the Criminal Procedure and Evidence Act, it is competent for a court to connect on the uncorroborated evidence of a single competent and credible state witness. In *S* v *Mokoena* 1956 (3) SA 81 (A)D at 85-86, it was laid down that the uncorroborated evidence of a single witness should only be relied upon if the evidence was clear and satisfactory in every material respect slight imperfections would not rule out reliance on that evidence but material imperfections would. The court stated that single witness evidence

should not be ruled upon where for example E the witness ahs an interest adverse to accused or has made a previous inconsistent statement, has given contradictory evidence, or had no proper opportunity for observations. In *S* v *Sauls and Others* 1981 (3) SA 172 (A), the court stated that there was no rule of thumb to be applied when deciding upon the credibility of a single witness testimony. The court must weigh the evidence and consider merits and demerits. It must then decide whether it F is satisfied that the testimony is truthful, despite any shortcomings, defects or contradictions in it.

This approach was followed in Zimbabwe cases such as *S* v *Banana* 2000 (1) ZLR 607 (S).

[The court then considered the evidence of the first State witness and G concluded:]

The court being alive to the dangers of conviction on the basis of a single witness's testimony and having sufficiently warned itself, we then proceed to find that the first witness's testimony is credible and competent and it is therefore safe to convict on it. H

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Moyo J

The verdict A

What are the accused persons guilty of? The accused persons cannot be said to have harboured an intention to kill the deceased, both actual or legal. But what is clearly from the facts is that the accused persons were incensed by the theft, and later the failed recovery attempt and assaulted deceased in a bid initially to force a confession from him so that they could recover the B property and later when deceased had mislead them. The accused persons were negligent in the manner that they conducted themselves in assaulting deceased and causing him the injuries that subsequently led to his death. We accordingly find the three accused persons not guilty of murder but proceed to convict them on the charge of culpable homicide.

National Prosecuting Authority, applicant's legal practitioners C

R Ndlovu and Co, accused persons' legal practitioners

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[zRPz]S v MUKANDI & ORS 2014 (2) ZLR 422 (CC)

2014 (2) ZLR p422

Citation	2014 (2) ZLR 422 (CC)
Case No	Judgment No. CC-9-14
Court	Constitutional Court, Harare
Judge	Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA, Guvava JA & Chiweshe AJA
Heard	18 September 2013; CAV
Judgment	25 September 2014
Counsel	Mrs *J B Wood,* for the first, second and third applicants *T R Nyanyiwa*, for the fourth applicant Mrs *S Fero*, for the respondent

Case Type Constitutional reference

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – right to fair trial within a reasonable period of time (s 18(2)) – long delay before person brought to trial – onus on person to show delay unreasonable – court must also have regard to society's interest in seeing* D *trial brought to a conclusion*

Headnote

The applicants sought a permanent stay of their prosecution on charges of fraud, alternatively contravening the Prevention of Corruption Act [*Chapter 9:16*]. The first three applicants were members of the E Central Intelligence Organisation and the fourth was a businessman. The first applicant was a law graduate and qualified to practise in Zimbabwe. They were first arraigned in March 1999, granted bail and then remanded at intervals until January 2000, when the State announced it needed more time to prepare its case. The applicants were removed from remand and the State advised to proceed by way of summons. The prosecution was F not ready to proceed until December 2002.

In July 2001, no further action having by then been taken by the State, the first applicant left the country and went to Canada for ten years, until he was deported back to Zimbabwe for reasons unrelated to the present case. The other applicants remained within Zimbabwe for most of that time. When the first applicant returned in September 2011, summons G was served on him, and subsequently on the other applicants, for trial to start in December 2011. The matter did not start then, and was remanded until mid-January 2012, when the matter was, at the request of the applicants, referred by the presiding magistrate to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe 1980. The issue H

was whether the applicants' right under s 18(2) to a fair trial within a A reasonable period had been infringed.

The State averred that it would have been imprudent to have tried the other three applicants in the absence of the first applicant, and until he was sent back to Zimbabwe the prosecution was unable to proceed.

Held, that in determining such an application the following factors are to be B taken into account: (a) the length of the delay; (b) the reasons for the delay; (c) the assertion by the accused of his or her right to a speedy trial; and (d) the prejudice to the accused caused by the delay. Here, the length of the delay was presumptively prejudicial. The onus was on the applicant to establish that the delay was unreasonable. Lesser delays C than that *in casu* had been held to be unreasonable. The applicants had not suggested that the delay up to December 2002 was unreasonable.

Held, further, that the events that intervened between the time when the applicants were first charged and the eventual setting down of the matter for trial would serve to afford an acceptable explanation for the inordinate delay. The test for determining whether there has been an D unreasonable delay or not requires an objective analysis of all the factors surrounding the entire process, including any challenges and problems that the prosecuting authority might have been faced with during the relevant period. The attitude and actions of the accused persons are also a consideration in the assessment.

Held, further, that, there was no basis for holding that, because the immigration E authorities and a department within the police force were aware of the first applicant's departure from Zimbabwe, the prosecuting authorities must also have been aware. He would have been aware that, unless charges had been withdrawn after a plea was tendered in court, those charges remained pending.

Held, further, that the court had to strike a balance between the interests of the F accused person and those of society. As much as an accused person has the right to assert that his constitutional

rights should be given effect to, it is in the interest of a functioning society that suspected perpetrators of a crime be brought to trial.

Held, further, that although the first applicant made allegations about the G prejudice that he had suffered, the others did not make any specific averments. The yardstick for ordering a permanent stay of prosecution is not simply a question or issue of fairness to the particular accused, although it is an important consideration. The court also has to consider whether there is an abuse of the court processes by the prosecuting H authority for some ulterior motive. It is also of importance to consider

whether the continuation of the prosecution is inconsistent with the A recognized processes of the administration of criminal justice and so constitutes an abuse of court process. Finally, the court, when considering whether a delay is alleged to have prejudiced an accused's right to a fair trial, must have regard to the interest that society has in the resolution of the culpability of an accused person, especially when a permanent stay of prosecution is sought. B

Held, further, that the applicants had the onus of showing that a trial after such a lengthy period would prejudice them in their defence. They had not done so. The charges they faced were very serious and the amount involved was considerable. The allegations related to fraud involving government funds and taxpayers would have an interest in the outcome C of criminal charges concerning fraud allegedly committed in respect of state funds. When weighed against the prejudice that the applicants alleged they would suffer from a delayed prosecution, society would be justified in expecting that the criminal trial be brought to its logical conclusion. D

Cases referred to

In re *Mlambo* 1991 (2) ZLR 339 (S)

S v *Musvitisi & Anor* S-229-93

S v *Nemutenzi* 1992 (2) ZLR 233 (H)

S v *Nhando & Others* 2001 (2) ZLR 84 (S) E

S v *Watson* 2006 (1) ZLR 394 (S)

Sanderson v *A-G, Eastern Cape* 1998 (1) SACR 227 (CC)

Legislation considered

Constitution of Zimbabwe 1980, ss 18(2) & 24(2) F

Case information

Mrs *J B Wood,* for the first, second and third applicants

T R Nyanyiwa, for the fourth applicant

Mrs *S Fero*, for the respondent

Judgment

Gowora JA: The applicants in this matter are seeking an order for the G permanent stay of their prosecution on charges of fraud. They allege their constitutional right to a fair trial within a reasonable period, guaranteed under s 18(2) of the former Constitution, has been violated by reason of the inordinate delay by the State to bring them to trial. H

The background A

The first applicant, Lovemore Itai Mukandi, ("Mukandi"), the second applicant, Nelson Silvern Yeukai Mawere-Mubvumbi ("Mubvumbi") and the applicant David Nyabondo ("Nyabondo") were formerly

employed by the Central Intelligence Organisation. Mukandi was the Deputy Director of B Administration, Mubvumbi was the Chief Transport Officer and Nyabando the Chief Administration Officer. The fourth applicant Mohamed Ahmed Meman ("Meman") was a director and shareholder in African Timber and Builder Suppliers (Pvt) Ltd.

The applicants were arraigned before the magistrates court sitting at Harare on 15 March 1999 for allegedly contravening s 136 of the Criminal C Law (Codification and Reform) Act [*Chapter 9:23*], fraud, alternatively, contravening s 3(1)(f) of the Prevention of Corruption Act [*Chapter 9:16*]. The allegations against the applicants were the following. Mukandi was tasked with the responsibility to arrange for the construction of houses for the organisation. He co-opted Mubvumbi and Nyabando to assist him with D the project. Meman was requested to submit a quotation for the construction of the houses without submitting to government tender procedures. African Timber and Builder Suppliers submitted a quotation for the sum of Z$16 106 559. Meman subcontracted the project to Direct Line Electrical Services and Sale (Pvt) Ltd, a company in which Mubvumbi was the beneficial shareholder. It was alleged that the four applicants misrepresented to the organisation E that the costs of construction had escalated by the sum of Z$16 773 784.32 which the applicants are alleged to have shared.

At their initial appearance in court, the applicants were granted bail and remanded to June 1999. Thereafter they were remanded to September 1999 and 31 January 2000 at the request of the State. On 31 January 2000 the F applicants were removed from remand after the State indicated that it required more time to prepare its case. The State was advised if need be to proceed by way of summons against the applicants.

No further action was taken by the State to bring the applicants to court and on 31 July 2001 the first applicant left the country for Canada. The other three remained in the country. On 21 September 2011 the Canadian G authorities deported the first applicant to Zimbabwe. Following his arrival, the State proceeded to serve summons on all the applicants, starting with the first applicant on 28 September 2011. The second and third applicants were served on 29 November 2011 with the fourth applicant being served last on 2 December 2011. In terms of the summons, the applicants were to H be tried on 15 December 2011.

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On the scheduled date the trial failed to take off yet again. The reason given A by the State was that the docket and the record could not be located. The matter was further remanded to 9 January 2012. Again, for reasons not specified by any of the parties, the trial failed to start and the matter was remanded to 17 January 2012, on which occasion the applicants applied for referral of the matter to this court.

Whether the application is properly before the court B

It is conceded by the State that the application is properly before the court. The matter was referred to this court by the regional magistrate following an application by the applicants in terms of s 24(2) of the former Constitution of Zimbabwe, which provides as follows:

> **"24 Enforcement of Protective Provisions**C
>
> (1) … [not relevant]
>
> (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 D opinion, the raising of the question is merely frivolous or vexatious."

In their application for referral before the magistrates court, the applicants alleged that their rights to a fair trial within a reasonable period as guaranteed under s 18(2) of the former Constitution had been infringed. After a consideration of the authorities and mindful of the delay of 13 years that E had elapsed from the time that the applicants were charged to the date of trial, the magistrate formed the view that the application was not frivolous or vexatious. He concluded that it was a proper case for consideration by the Supreme Court as to whether or not the right of the applicants to a fair trial within a reasonable period had been infringed. He then referred the matter to this court. He was correct. F

The applicants did not file a draft order but all prayed for a permanent stay of the prosecution of charges that had been preferred against them.

Various decisions emanating from this court have set out the factors to be taken into account in determining an application of this nature. In *S* v *Nhando & Others* 2001 (2) ZLR 84 (S), Chidyausiku ACJ (as he then was) set out G the relevant authorities wherein the factors were considered by this court in determining an alleged violation under s 18(2) of the Constitution. This is what he stated at 84G-85B:

> "This court has had occasion to deal with similar applications on a number of occasions. The following are some of the cases: In re *Mlambo* 1991 (2) ZLR 339 (S); *Hungwe & Ors* v *Attorney-General* S-50-94; *S* v *Mataruse* S-101-94; H

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> *S* v *Marisa* S-126-95; *S* v *Musvitisi & Anor* S-229-93; In re *Masendeke* 1992 (2) ZLR 5 (S); A*Martin* v *Attorney-General & Anor* S-53-93. The above line of cases establishes that in determining such an application as this one the following factors are to be taken into account:
>
> (a) the length of the delay;
>
> (b) the reasons for the delay;
>
> (c) the assertion by the accused of his or her right to a speedy trial; B
>
> (d) the prejudice to the accused caused by the delay."

I proceed to consider each of these factors in turn.

The delay

Mukandi told the magistrate that following upon his arrest he got dismissed C from employment in 1998 and at the time he was Deputy Director General. In 2000 he was advised that he had been pensioned off.

Regarding the criminal charges, his evidence was that he had been arrested on 15 March 1999 together with the other three applicants on allegations of fraud, or, in the alternative, contravening a section of the Prevention of D Corruption Act. They were detained for three days and, when taken to court for initial remand, were allowed bail. Thereafter they were remanded to court on a number of occasions up until 31 January 2000 when further remand was refused and the state was advised to proceed by way of summons.

Mukandi was in Zimbabwe for the rest of 2000 and in 2001 he decided to seek greener pastures as he was aware that his chances of obtaining employment E within the country were slim. He then applied for and obtained a visa to study in Canada and on 31 July 2001 left the country for Canada. He told the court that since his last court appearance on 31 January 2000, there had been no contact from the police or the State in connection with the criminal charges.

After his studies he obtained employment from 2009 to September 2011 when he was deported to this country. He had not been made aware in any F manner that the authorities wanted him back to face criminal charges. When he arrived at the Harare International Airport on 22 September 2011 he was placed under arrest and detained. He was taken to court on the 27 September 2011 and was set free as there was no warrant for his arrest.

Thereafter he was served with summons for a court appearance on G 15 December 2011. His co-accused were with him. The trial could not proceed because the police docket and the court record were missing. The matter was then postponed to 9 January 2012 but again for one reason or another it failed to take off. It was then postponed to 17 January 2012 when all the applicants applied for the matter to be referred to the Supreme Court.

The other three applicants gave a similar version in respect of their arrest, H detention and numerous remands at the behest of the State culminating in the

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magistrate refusing to further remand all the applicants. They also confirmed A that from January 2000 to September 2011 there was no effort on the part of the State to bring them to trial. They

were all summonsed to court for the 15 December 2011 subsequent to the return of Mukandi to Zimbabwe.

Mawere-Mubvumbi said that he had remained in the country for the whole period except for a short sojourn to South Africa to buy groceries. He had B been dismissed from employment but had been reinstated through an order of court. He had been served with summons about seven days before the trial. He had learnt of the arrest of Mukandi in the newspapers.

Nyabondo had an almost identical story to tell. He confirmed that he remained within the country the entire period that the charges were pending. He had also been advised that the trial could not proceed in the absence of Mukandi, C although the reason for that decision had not been explained. He confirmed that when the magistrate removed him and his colleagues from remand, they were advised that if anything happened they would be called to court for trial.

In turn, Meman confirmed the several remands at the instance of the State and the fact that further remand was refused by the magistrate in D January 2000. He confirmed that he had been made aware of summons in December 2011. He went to the police station and collected the summons but again the State was not ready for trial resulting in the applicants applying for the matter to be referred to the Supreme Court on the alleged violation of their constitutional right to a fair trial. E

The application is opposed by the State. However, the State did not adduce evidence before the court *a quo* or before this court. Mrs *Fero*, who appeared for the State, placed reliance on heads of argument filed in answer to those filed by the applicants. There was no contest by the State on the facts placed before the court *a quo* by the applicants.

The State accepts that the overall delay in having the applicants brought to F trial was 13 years, and that the delay is presumptively prejudicial so as to trigger an enquiry by this court into a possible contravention of s 18(2) of the former Constitution of Zimbabwe.

Reasons for the delay

Section 18 (2) of the Constitution reads: G

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Under the section any person facing criminal charges is afforded the following:

(a) the right to a fair trial. H

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(b) the right to be tried within a reasonable time. A

(c) the right to be tried by an independent and impartial court.

The applicants contend that the first two of these fundamental rights have been violated. The law is now settled that it is the applicants that bear the *onus* to establish that the delay was unreasonable. In In re *Mlambo (supra)*B at 353A-C it was held:

> "It is for the person charged to persuade the court that the delay complained of exceeds what is reasonable. See *Fikilini* v *Attorney-General (supra*) at 117D-E. The degree of persuasion required of him is to show that the delay is prima facie unreasonable, or in the words of Powell J in *Barker* v *Wingo (supra)* at 530, 'presumptively prejudicial'. It is that which triggers the enquiry into the C other factors that go into the balance. It is the threshold at which the court may look to the State for an explanation.
>
> It is, of course, neither possible nor desirable to identify precisely the length of delay which will trigger an enquiry. Each case is to be viewed in the light of its own particular circumstances in order to determine whether the delay is *prima facie* unreasonable."

It is contended by the applicants that the length of the delay in this case is more D than sufficient for this court to find that the delay is *prima facie* unreasonable. The State is in agreement that the period is lengthy. It is, however, contended by the State that in the circumstances of the case the delay is not at all unreasonable.

Within this jurisdiction, lesser periods of delay have been held to be unreasonable. E In *S* v *Nemutenzi* 1992 (2) ZLR 233 (H), it was held that a delay of four years eleven months was inordinate, resulting in the court granting a permanent stay. In In re *Mlambo (supra)*, a delay of

four years seven months wholly attributable to the State was held to have constituted a grievous infringement of the applicant's right to a fair trial justifying a F permanent stay of prosecution. In *S* v *Musvitisi & Another* S-229-93, the court considered that a delay of two years and five months might be presumptively prejudicial and an enquiry into other factors was conducted to determine whether or not the applicants' rights to a fair trial within a reasonable period had been infringed. Similarly, in *S* v *Watson* 2006 (1) ZLR 394 (S), a delay of ten years in between the arrest of the applicant and bringing the applicant G to trial was held to be inordinate and a violation of his fundamental right to a fair trial within a reasonable period. The prosecution was accordingly stayed.

The applicants contend that the State has not adduced any evidence to explain the initial delay as a result the magistrate refused to keep the applicants on remand. I agree. The State has the *onus* to give an explanation for the delay H for which it has accepted responsibility.

2014 (2) ZLR p430

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Mrs *Fero,* on behalf of the State, accepted that prejudice can be presumed A*in casu*. It is a real possibility that in a period of 13 years the memories of witnesses and those of the applicants would have faded. Further, the witnesses and those sought to be tried will recall certain aspects of the case and forget others.

From the submissions filed by Mrs *Fero* it seems that the applicants were arrested before investigations had been completed and that further B investigations continued subsequent to their arrest. Judging from the remands of the applicants, the State was not ready for trial from March 1999 until December 2002. It is safe to assume that the period in question relates to what is generally termed systemic delays. In In re *Mlambo (supra)* at 345H-346B Gubbay CJ commented as follows: C

> "It is apparent that a reasonable time is necessary for the State to be in a position to get the case to trial. A varying extent of time will be needed to prepare the docket depending on the complexity or otherwise of the proposed charge or charges; to record the statements of witnesses; to arrange for their attendance. In addition, there are the usual systematic delays, such as a congested court calendar, the availability of court facilities, judicial officers and prosecutors D and the considerate accommodation of witnesses. The system is not perfect and resources are limited, and one has to accept as normal and inevitable a period of delay in respect of these matters. But this is not to accept that the State can justify abnormal periods of systematic delays on such grounds."

Mrs *Fero* conceded that the delay to bring the applicants to trial between 15 March 1999 and 6 December 2002 can be visited on the State, as the E record shows that it was not ready for trial during this period.

In my view, the period from March 1999 to December 2002 can by no means be described as abnormal, as it is common cause that none of the applicants within that period sought to have their prosecution stayed. What they did was to request that the magistrate remove them from further remand. However, F the charges against them had not been withdrawn. They did not, at that stage of the proceedings, consider the failure by the State to bring them to trial within that period to constitute a violation of their constitutional right to a fair trial within a reasonable period.

However, the State contends that it was not wholly to blame for the delay that occurred from December 2002 as the State was in a position to proceed but G was unable to do so primarily because Mukandi could not be located. The reason proffered by the State is that it was not prudent to try the other three applicants in the absence of Mukandi due to the nature of the evidence that it had to adduce. As a result, even though they were available for trial, the other three applicants were not summoned for trial until September 2011. H

2014 (2) ZLR p431

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Further, in view of the relationship between the government of Canada and the A government of Zimbabwe efforts to have him repatriated to this country were largely unsuccessful, leaving the trial in limbo.

There is no dispute Mukandi was at liberty to relocate following the court's refusal to keep the applicants on remand and that no restrictive conditions B were placed either on him or the other applicants. Indeed, he was then resident in Canada and the e-mails submitted by the applicants show that there was communication between the State and the Canadian authorities from December

2002 up until 2007, in which requests were made by the State for Mukandi to be extradited, but this was futile as there was little or no co-operation from the latter. Consequently, the decision was made not to C proceed even against those applicants who were in the country. It is common cause that Mukandi was not extradited but was deported to this country in 2011 for reasons not related to the allegations that were pending against him and his co-accused.

Once the State was ready to proceed with the trial, attempts were made to D have Mukandi extradited from Canada as is evident from the communication between Interpol Canada and Harare Interpol. Whilst the communication appears not to have had a sense of urgency, it can be accepted that the State exhibited the desire to have Mukandi brought to this jurisdiction for trial.

In my view, the events that intervened between the period when the applicants E were first charged and the eventual setting down of the matter for trial would serve to afford an acceptable explanation for the inordinate delay. The question that is before this court is whether the explanation can lead to the conclusion that such delay in the circumstances of the case cannot be regarded as unreasonable.

The test for determining whether there has been an unreasonable delay or not F requires an objective analysis of all the factors surrounding the entire process, including any challenges and problems that the prosecuting authority might have been faced with during the relevant period. The attitude and actions of the accused persons are also a consideration in the assessment. In *Mlambo's* case *(supra)* Gubbay CJ stated:

> "The distinction between what is a reasonable period and what is not cannot be drawn G too sharply. Undoubtedly it will be difficult in some cases to decide whether the lapse of time in affording an accused a fair hearing of his case has passed the reasonable mark or not. It is a question of degree. All the circumstances have to be considered in making what is essentially a value judgment. However, I believe that the experience of judicial officers enables them to determine on H which side of the line the position of a particular accused falls."

2014 (2) ZLR p432

Gowora J

Remarks to the same effect were made by Kriegler J in *Sanderson* v *Attorney-General,* A *Eastern Cape* 1998 (1) SACR 227 (CC) at 242a-c wherein he stated:

> "The test for reasonableness whether the time allowed to lapse was reasonable should not be unduly stratified or pre-ordained. In some jurisdictions, prejudice is presumed – sometimes irrebuttably – after the lapse of loosely specified time periods. I do not believe it would be helpful for our courts to impose semi-formal time constraints on the prosecuting authority. That would be a law B making function which it would be inappropriate for the court to exercise. The courts will apply their experience of how the lapse of time generally affects the liberty, security and pre-trial interests that concern us. Of the three forms of prejudice, the pre-trial related variety is possibly the hardest to establish, here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence. By and large, it seems a fair although tentative generalisation that the lapse of time heightens the various kinds of prejudice C that s 25(3)(a) seeks to diminish."

Mukandi holds a Bachelor of Law (BL) degree as well as a Bachelor of Laws (LL B) degree. He was fully aware that he faced serious criminal charges. He stated that, even though he had been retired by his former employer, he could have practised law within the country. He however decided that he D could further his studies elsewhere and by so doing he removed himself from the jurisdiction of the courts in this country. He obtained a police clearance for his visa application to Canada. Much was made of this process. He might have obtained police clearance for processing his visa application, but what he did not state was whether or not he advised the office of the Attorney-General of his intention to leave the country. This court cannot reach the E conclusion, which the applicants urge it to, that because the immigration authorities and a department within the police force were aware of Mukandi's departure from the country, then the prosecuting authority was aware of his departure and allowed him to leave. The suggestion that is implied is that the charges against him had been dropped. Clearly the charges had not been F dropped and the particular authorities that had an interest in him would not have been happy at his departure from the jurisdiction before the conclusion of the criminal trial.

It is a moot issue whether or not the decision by the State not to proceed against the other three applicants in the absence of Mukandi was reasonable G in the circumstances of this case. However, sight cannot be lost of the fact that by leaving as he did, Mukandi placed the ability of the State to prosecute its case in jeopardy. He did not clear himself with those particular officers who had arrested him and placed him on remand. As a trained legal mind, he would have been aware that

unless charges had been withdrawn after a plea was tendered in court those charges remained pending. It cannot have H

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escaped his mind that at some future time the police would conclude their A investigations and he would be required to attend court. He does not suggest anywhere in his evidence that he had left a forwarding address with the prosecution authorities.

In making its value judgment, the court must strike a balance between B the interests of the accused person and those of society. In as much as an accused person has the right to assert that his constitutional rights should be given effect to, it is in the interest of a functioning society that suspected perpetrators of a crime be brought to trial.

Whether the applicants asserted their right to a fair trial

Both parties are agreed that the applicants asserted their right to be tried within C a reasonable time, which resulted in their removal from remand on 31 January 2000. When arraigned for trial after the deportation of Mukandi to this country, they all took the first opportunity they could to assert their right to a fair trial by applying to the magistrate for the referral of the matter to this court.

Whether the applicants have suffered prejudice as a result of the delay D

All the applicants have said that it would be difficult to recall events that took place more than 13 years ago, a position that seems to find resonance E with the State. The delay in this case is considerable and in the history of this jurisdiction would seem to be the longest period on record before a person charged with an offence has been brought to trial. The applicants contend that they will be prejudiced in their defence because of the lengthy time the State has taken to eventually try them.

Whilst accepting that the applicants have spent a long period awaiting trial, F the State contends that its witnesses are available and that it is ready for trial. It is further submitted that it was ready for trial on 17 January 2012 when the application was made referring this matter to this court.

As regards the alleged violation of his constitutional right to a fair trial within a reasonable period, Mukandi said that since his deportation he and G his wife had separated. The family remained in Canada and they were finding it difficult to cope alone. He had not been given notice of his deportation and had to send his boss a letter of resignation via e-mail. He said that since his arrest he had developed health problems and mentioned diabetes, high blood pressure and cholesterol, which ailments he said he did not suffer H from prior to the arrest.

Gowora J

He was concerned that his trial would not be fair due to the delays and conduct A by the State in the whole matter. He said that the offence was alleged to have occurred between 1996 and 1998 and that, due to the passage of time, he could not recall the events surrounding the alleged offence and he was afraid that he would not get a fair trial. He also could not recall whether or not he had any documents which could assist in the conduct of his defence at his trial. B

Mukandi stated that he would have wanted to call a Dr Mashingaidze, who was his immediate boss during the period when the offence with which he is charged is alleged to have occurred. He stated that Mashingaidze is now blind. He did not place evidence before the magistrate to show that Mashingaidze was unable to testify as a result of the alleged blindness. The court is invited to infer that by virtue of the alleged blindness the witness C cannot give evidence.

This is an assumption that the court cannot make. In my view, there is nothing that militates against a blind person being a credible witness and it has not been established that the State cannot be asked to afford facilities to assist the witness in giving evidence. D

Apart from the long delay, Mawere-Mubvumbi did not state how his defence would be compromised if he went to trial now. He had since developed illnesses and was on treatment for stress, diabetes,

hypertension and arthritis. Although Mukandi had received some payment the employer had received no such payments. E

He also stated that he did not believe that he would receive a fair trial. He said he had learnt that the State did not want him and the other two tried in the absence of Mukandi. He was asked if he had any witnesses to call if the matter went to trial and his response was "I do not want to think of any, we would go down to a book of Guinness". He should have shown exactly how being tried now would prejudice him in his defence. This was not an answer F to the question. In my view, he has not shown any prejudice to his defence.

These remarks apply with equal force to Nyabondo. It appears to have escaped the legal practitioner who was representing the applicants when the application for referral was made that each of the applicants individually had to show prejudice. G

When Meman was asked if he had any witnesses who could testify on his behalf, he stated that he could not recall any. He told the magistrate that he had since developed health problems related to trauma, stress and all the things that go with it. His evidence was to the effect that the stress extended to his family members as people would phone asking what was going on. H

2014 (2) ZLR p435

Gowora J

There exists in society, between the State administration and the general A populace, a collective interest that those who commit crimes be tried quickly, fairly and justly. Trials that are held quickly and expeditiously achieve these noble principles. A lengthy period whilst awaiting trial has an effect of eroding an accused person's integrity. Socially, an unresolved criminal charge against an accused would cause him embarrassment and B might result in ostracism from friends and relatives. It is only fair therefore that an accused person be tried provided such trial does not undermine the rights that such accused has to be tried fairly and within a reasonable period of charges being preferred against him.

The yardstick for ordering a permanent stay of prosecution is not simply C a question or issue of fairness to the particular accused, although it is an important consideration in the factors to be weighed. The court has to consider whether there is an abuse of the court processes by the prosecuting authority for some ulterior motive. It is also of importance to consider whether the continuation of the prosecution is inconsistent with the recognized processes of the administration of criminal justice and so constitutes an abuse of court D process.

Thus, it is incumbent upon the court, when considering whether a delay is alleged to have prejudiced an accused's right to a fair trial, to have regard to the interest that society has in the resolution of the culpability of an accused person, especially when a permanent stay of prosecution is sought. I would E respectfully associate myself with the views of Kriegler J in *Sanderson* v *Attorney-General (supra*) at 244g to the following effect:

> "Although this case is concerned with the rights of the accused under s 25(3)(a) of the interim Constitution, the point should not be overlooked that it is by no means only the accused person who has a legitimate interest in a criminal trial starting expeditiously. Since time immemorial it has been an established F principle that the public interest is served by bringing litigation to finality. And, of course, quite apart from the general public there are individuals with a very special interest in seeing the end of a criminal case. Conscientious judicial officers, prosecutors and investigating officers are therefore always mindful of the interests of witnesses, especially complainants, in bringing a case to finality. Ordinarily the interests of all concerned are best served by getting on and getting done with the case as quickly as reasonably possible, but it may happen that G the interests of the accused conflict with those of others. Though the interests of others should not be ignored in deciding what is reasonable, the demands of s 25(3)(a) require the accused's right to a fair trial to be given precedence."

The applicants had the onus of placing before the court factors that would show that a trial after such a lengthy period would prejudice them in their H defence. They have not done so. The charges they face are very serious.

2014 (2) ZLR p436

Gowora J

The amount involved is considerable, notwithstanding that the offences are A alleged to have been committed during the era of the Zimbabwe dollar. The allegations relate to fraud involving government funds and taxpayers would have an interest in the outcome of criminal charges

concerning fraud allegedly committed in respect of state funds. When weighed against the prejudice that the applicants allege they will suffer from a delayed prosecution, it my considered view that society would be justified in expecting that the criminal B trial be brought to its logical conclusion.

It is in the interests of justice that they be put on trial for the allegations they face. In the circumstances of this case none of them has been able to point to any prejudice that would ensue, with the exception of the delay which has been accepted to be presumptively prejudicial. C

In concluding, it is my view that the applicants have failed to make out a case for a permanent stay of prosecution. The application is accordingly dismissed.

MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, HLATSHWAYO JA, PATEL JA, GUVAVA JA and CHIWESHE AJA concurred. D

Mrs *J B Wood,* first – third applicant's legal practitioners.

Manase & Manase, fourth applicant's legal practitioners.

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

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[zRPz]MUSIYIWA v SHOMET INDUSTRY DEVELOPMENT (PVT) LTD 2014 (2) ZLR 437 (H)

Citation	2014 (2) ZLR 437 (H)
Case No	Judgment No. HH-527-14
Court	High Court, Harare
Judge	Mtshiya J
Heard	8 July 2014; *CAV*
Judgment	1 October 2014
Counsel	*S Mushonga,* for the plaintiff *S Hashiti,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Employment – *employee – injuries sustained during the course of employment – action to recover damages – claim may only be brought in terms of the National Social Security Authority (Accident Prevention and Workers* D *Compensation) Scheme – no claim may be brought against employer unless employer is "individually liable" – meaning of – exemption from participation in the scheme – employer having established his own approved scheme – where employer is exempted, employee has a common law right to sue employer for damages*

Headnote

The plaintiff had been injured during the course of his employment. He brought a E claim against the defendant, his employer, for damages, although he had already received compensation in terms of the National Social Security Authority (Accident Prevention and Workers Compensation Scheme) Notice (SI 68 of 1990). The defendant filed a special plea in F bar, to the effect that, as a result of the introduction of the Scheme, no damages could be awarded against the employer.

Held, that the Scheme, which was established in terms of s 2 of the National Social Security Authority Act [*Chapter 17:04*], provides that no action at common law shall lie by a worker or any dependent of a worker against such worker's employer to recover any damages in respect of an injury G resulting in the disablement or death of such worker arising out of and in the course of his employment. The only liability for compensation arises under the Scheme. However, in respect of acts of negligence by the employer himself or by other specified employees, the worker may recover from the employer, if the employer is one who is individually H liable. Such an employer is one to whom exemption has been granted

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Mtshiya J

in terms of s 76 of the Scheme because he has established his own A compensation fund to insure against liability in respect of his employees. In this situation, the employee may proceed against his employer. The defendant had not been granted exemption and thus could not be sued for additional compensation.

Case cited B

Sibanda v *Independence Gold Mining (Zimbabwe) (Pvt) Ltd* 2003 (2) ZLR 155 (H)

Legislation considered

National Social Security Authority Act [*Chapter 17:04*], s 3(2a) C

National Social Security Authority (Accident Prevention and Workers Compensation Scheme) Notice (SI 68 of 1990), ss 8, 9 & 76

Case information

S Mushonga, for the plaintiff

S Hashiti, for the defendant D

Judgment

Mtshiya J: On 18 September 2007 the plaintiff issued summons against the defendant for:

"(a) Payment of the sum of $1 500 000 000 being damages in respect of injuries arising out of and in course of employment.

(b) Interest for the prescribed rate of interest from the 29th of April 2005 to the date of full and trial payment E

(c) Costs of suit"

On 11 March 2011, the above claim was amended through a consent order which reads as follows:

"1. Leave be and is hereby granted to the applicant to amend his summons and declaration as follows: F

2. Wherever the amount of $1 500 000 000 appears in the summons and declaration it be deleted and substituted with US$75 000

3. The interest claim be amended to "interest at the rate of 5% (five percent) per annum calculated form date of judgment to date of full payment."

On 15 March 2011 the defendant, in addition to filing a plea to the merits, G filed the following special plea in bar:

"1. The claim by plaintiff is for damages as a result of injury at the workplace during Plaintiff's employment with the defendant

2. The plaintiff received compensation in terms of statutory instrument 68/1990

3. In terms of Section 8 and 9 of Statutory Instrument 68/1990, no damages maybe awarded by a court of law against Defendant who is the employer. H

Mtshiya J

4. Further, any damages if recoverable can only be sought from the general manager of A the scheme. The said general manager has not been cited in the proceedings."

The background to the plaintiff's claim is that on 29 April 2005, the plaintiff, who was employed by the defendant as an assistant builder, was injured B after being hit by falling bricks at work. The medical report revealed that the plaintiff:

(a) lost four upper incisors;

(b) had a distortion in the right hip joint;

(c) had pelvic fractures; and C

(d) started having bladder problems.

At the time of the accident, the plaintiff was covered under the National Social Security (Accident Prevention and Workers Compensation Scheme) Notice (the Notice) which is created under SI 68 of 1990. The plaintiff was paid a sum of $5 090 500 under the scheme for his injuries. He, however, D believes that he is still entitled to additional compensation in the sum of US$75 000, which sum is indicated in the amended relief. To that end, the plaintiff has instituted these proceedings.

As already indicated, the defendant has excepted to the claim on the ground that the plaintiff has already been fully compensated under the scheme. It E is further averred that in terms of s(s) 8 and 9 of the Notice, the defendant cannot be sued for the additional damages/compensation. Unfortunately and notwithstanding the plight of the plaintiff, that position of the law is painfully correct. It is not a purely administrative issue, as was submitted by Mr *Mushonga* on behalf of the plaintiff.

I also note that one of the issues for determination is: F

"whether or not compensatory damages can only be sought from the general manager of the scheme".

The above issue only comes into play if the employer (defendant) is capable of being sued for the additional damages/compensation. As already stated, G*in casu* the defendant is not capable of being sued.

Section 3(2a) of the National Social Security Act [*Chapter 17:04*] (the Act), which gives birth to ss 8 and 9 in the scheme provides as follows:

"(2a) A notice in terms of subsection (1) which establishes a scheme to compensate employees for injury, disablement or death connected with or arising out of their H employment may provide for –

Mtshiya J

(a) the abrogation of any remedy at common law whereby damages may be A claimed for such injury, disablement or death; and

(b) the payment of additional compensation where such injury, disablement or death is due to negligence on the part of the employer concerned or an agent of the employer or to any defect in –

(i) the premises in which the employee concerned is or was employed; or B

(ii) any plant or machinery used by the employee concerned in the course of his employment."

Indeed on 20 April 1990 a scheme was established i.e. the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice SI 68 of 1990 (the Notice).

Sections 8 and 9 of the Notice, as amended by S.I. 287 of 1991, provide C as follows:

"8. From and after the 1st January, 1960 –

(a) no action at common law shall lie by a worker or any dependent of a worker against such worker's employer to recover any damages in respect of an injury resulting in the disablement or death of such worker arising out of D and in the course of his employment; and

(b) no liability for compensation shall arise save under and in accordance with this Scheme in respect of such disablement or death; and

(c) any worker who is entitled to periodical payments under this scheme shall not be entitled to receive wages in terms of section 14 of the Labour Act [*Chapter 28:01*]." E

"9. (1) Notwithstanding anything to the contrary contained in this Scheme, if a worker meets with an accident which is due **–**

(a) to the negligence –

(i) of his employer; or

(ii) of a person entrusted by his employer with the management or in charge F of such employer's trade or business or any branch or department thereof; or

(iii) of a person having the right to engage or discharge workers on behalf of his employer;

or

(b) to a patent defect in the condition of the premises, works, plant or machinery G used in such trade or business, which defect his employer or any person referred to in paragraph (a) has knowingly or negligently failed to remedy or caused;

the worker or, in the case of his death as a result of such accident, his representative, may, within 3 years of such accident, proceed by action in a court of law against his employer, *where the employer concerned is an employer individually liable*, H

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or otherwise against his employer and the general manager, jointly, for further A compensation in addition to the compensation ordinarily payable under this Scheme" (my own emphasis).

Section 9(1)(b) above refers to " an employer individually liable." Section 3 of the Notice defines that phrase in the following manner:

"'employer individually liable' means an employer to whom exemption has been B granted in terms of section *seventy six*."

The said s 76 of the Notice provides as follows:

"76. (1) The Board may, by writing under its hand, exempt from the payment of assessments for such period and subject to such conditions as it may specify, any employer who proves to be Board's satisfaction that he has established and C made provision of the maintenance of a fund for insurance against any liability which may arise under this Scheme in respect of all workers employed by him, and who has deposited with the general manager sufficient security to meet all claims for compensation which may be due or become due under this Scheme:

Provided that the Board may, after consultation with the Minister responsible for finance, dispense with the obligation of depositing such securities in the case of any local authority or anybody incorporated directly by any law" (my D own emphasis).

I believe that the determination of the exception herein lies in finding out whether or not the employer (the excipient), was exempted in terms of s 76 of the Notice.

Both parties agree that there was no exemption granted to the excipient in E terms of s 76. However, the plaintiff seeks to separate ss 8 and 9 from s 76 on the ground that existing legislation does not directly say so. I disagree.

The definition of "employer individually liable" is directly linked to s 76 of the Notice. There is no ambiguity in the interpretation of the linked provisions of the law. The legislator has, in the case of an employer who chooses to F remain outside the scheme through the exemption, retained an employee's common law right to sue such an employer for damages referred to *in casu.* In order for an employer to remain outside the scheme, the Board must be satisfied that the employer "has established and made provision for the maintenance of a fund for insurance against any liability which may arise under the scheme in respect of all his workers." Such an employer shall G deposit with "the general manager sufficient security to meet all claims for compensation which may be due or become due under the scheme."

With respect to an exempted employer, an employee is therefore entitled to exercise his or her common law right in sueing the employer for damages. This is what is meant by the phrase "where the employer concerned is H individually liable" in s 9 of the Notice. That section, as already indicated,

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should be read together with s 76 of the Notice. It is therefore incorrect to A submit that the exemption under s 76 of the Notice only relates to subscriptions to the National Social Security Authority. The exemption is in respect of participation in the scheme. Participation in the scheme means that the employer is protected from being sued, as would happen under common law, for

negligence. Where the exemption does not apply, the scheme is B meant to fully compensate any concerned employee. The employee cannot therefore proceed to claim additional compensation from an employer who is not exempted from the scheme. *In casu* the respondent was not exempted from the scheme and so cannot be sued for additional compensation.

Sibanda v *Independence Gold Mining (Zimbabwe) (Pvt) Ltd* 2003 (2) ZLR 155 (H), relied upon by the applicant, did not directly deal with the C issue of whether or not the employer was individually liable. The issue was only raised at the end and the court commented as follows:

> "The issue of non-liability in terms of the scheme was raised only after Sibanda had closed his case. It seems to me that there is merit in that submission. If the defendant had pleaded that the scheme precluded Sibanda from claiming against his employer, it is probable that the action would have been aborted." D

In casu, Musiyiwa is precluded from claiming against his employer. Indeed, were it not for legislation, he would have, under the common law, been permitted to sue his employer for negligence. He was and is still being paid under the scheme. The compensation payable to him, under the scheme, removes his right to sue the employer. That, however, would not have been E the case if the defendant was individually liable i.e. exempted in terms of s76 of the Notice. It was not exempted.

In view of the foregoing, there is merit in the exception raised.

It is therefore ordered as follows:

1. The exception be and is hereby upheld, and
2. Each party shall bear its own costs. F

Mushonga Mutsvairo & Associates, plaintiff's legal practitioners.

Hussein Ranchhod & Co, defendant's legal practitioners.

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[zRPz]MUTSINZE v ATTORNEY-GENERAL 2014 (2) ZLR 443 (CC)

Citation	2014 (2) ZLR 443 (CC)
Case No	Judgment No. CC-13-15
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JCC, Gwaunza JCC, Garwe JCC, Gowora JCC, Hlatshwayo JCC, Patel JCC & Guvava JCC
Heard	22 January, 14 March & 24 September 2014; *CAV*
Judgment	1 October 2014
Counsel	*T T G Musarurwa*, with him *A Mambosasa,* for the applicant *E Nyazamba,* for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – right to trial within a reasonable time (s 69) – permanent stay of proceedings – limited circumstances in which may be granted – trial* D *mostly completed except for passing of sentence – lengthy delay caused by disappearance of record and other documents – reconstruction of record possible – stay refused*

Headnote

The applicant sought a permanent stay of the criminal proceedings against E him and an order for his release from custody. He alleged that the failure by the State to complete the proceedings constituted a breach of his rights under ss 50 and 69 of the 2013 Constitution.

He had originally been arrested in August 1998 on allegations of murder and armed robbery. The trial had commenced in the High Court in September 2001 and the defence case was closed in 2003 or 3004. The record of the F proceedings had thereafter disappeared in unclear circumstances. When the matter came before the Constitutional Court, the court ordered that Registrar of the High Court to file an affidavit, within 30 days, to clarify the status of the record and, if lost, the efforts made to reconstruct the record. The court also ordered the trial judge to furnish, through affidavit, the reasons for the delay in the finalisation of the matter.

The Acting Registrar of the High Court advised that the record as transcribed and G the judge's note books had gone missing. The cassette tapes used to record the proceedings had been erased after the transcription and re-used in other cases. Whilst a number of documents had been availed to assist in the reconstruction, the record on the evidence led was not H available. The trial judge stated that after the closure of the defence case

and the hearing of closing arguments, he convicted the applicant on two A counts of murder and one of robbery. One of the three accused persons had passed on before judgment. He acquitted the remaining accused. After hearing submissions on the question of extenuation, he made a finding that were no such circumstances as both counts of murder had been committed in cold blood and in the course of a planned robbery. B The applicant denied that he had been convicted; he said that nothing further had happened since the close of the defence case. However, the trial judge, the trial prosecutor, assessor and transcriber all deposed to the fact that a verdict of guilty had been returned.

The only documents eventually available were the prosecutor's notebooks, one of which also disappeared after she made them available to be C transcribed. Based on the available documents and the affidavits, the Constitutional Court concluded that the trial had indeed proceeded to the stage where the trial court made a finding that there were no extenuating circumstances. For some reason, which remained unclear, the actual sentence of death (which requires certain formalities) had not been passed. The court also concluded that notwithstanding the various D difficulties that had been encountered in trying to reconstruct the record, reconstruction was possible. Moreover, the circumstances surrounding the commission of the offences were not seriously in dispute.

The applicant complained to at least three High Court judges about the delay after the year 2008. The first complaint was made to a judge during a E prison visit. The other two were made during bail applications in the High Court. All were of the opinion that the issue of the delay was better dealt with by the trial judge. The referral of the complaint by these judges to the trial judge did not produce any results. Thereafter it was discovered that the transcript of the record of the proceedings as well as the judge's notes had both mysteriously gone missing. F

The State urged that the interests of justice would be seriously prejudiced were the applicant to be set free, particularly in light of the fact that the trial judge had indicated that he was in a position to reconstruct the remaining portion of the proceedings. The State further submitted that the totality of the facts suggested that someone had gone to great lengths to ensure that the record was destroyed and that the only person G who stood to benefit from the disappearance of the record was the applicant. To release him in these circumstances would set a dangerous precedent

as it would encourage persons undergoing trial to arrange for the disappearance of the record of proceedings in the belief that they would ultimately get a permanent stay of the proceedings. H

2014 (2) ZLR p445

Held, that the factors to be considered in an application of this nature are A settled. These are (a) the length of the delay (b) the reasons given by the State for such delay (c) whether the applicant asserted his rights to a speedy trial and (d) the prejudice to the accused caused by the delay. In order to determine whether the delay is reasonable or not, a court must endeavour to strike a balance between these factors. In general, no one B factor can on its own justify an inference that the delay is unreasonable. The test involves balancing the conduct of both the State and the accused on a scale.

Held, further, that here the delay was certainly inordinate and both parties to this application agreed that the delay was unprecedented and certainly C presumptively prejudicial. While some of the circumstances were not clear, the disappearance of the record largely contributed to the delay.

Held, further, that whilst, as a general proposition, a person who seeks a permanent stay of the criminal proceedings in which he is an accused, must assert his rights and that failure to do so will make it difficult for him to prove that he was denied a speedy trial, in this case that the D applicant was not in a position to do more than complain to the High Court judges. His lawyer, representing him *pro Deo*, never demanded that this matter be determined. After the legal practitioner left the country, no other legal practitioner from the firm pursued the matter. The failure by the applicant to assert his rights in these circumstances was not one E that should weigh heavily against him.

Held, further, that the question of prejudice is to be assessed in the light of the interests of the applicant which the speedy trial right was designed to protect. Three such interests have been identified: (a) to prevent oppressive pre-trial incarceration; (b) to minimise anxiety and concern on the part of the accused; and (c) to limit the possibility that the defence F will be impaired. Only (b) applied here. It could not be doubted that the applicant must have suffered considerable anxiety for the duration of his incarceration. A court may quite properly infer or presume prejudice, where such is not proven.

Held, further, that whilst each case must be decided on its merits, the grant of a permanent stay is an exceptional remedy. The test is whether, in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness, or whether the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to constitute an abuse of process. The power to stay proceedings permanently may be exercised where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross

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2014 (2) ZLR p446

violation of the rights of the individual, making it unacceptable for A justice to embark on its course. There must be prejudice caused to a defendant which interferes with his right to a fair trial in a way which cannot otherwise be remedied; but in the absence of prejudice of that sort, there is normally no justification for granting a stay. The yardstick is not simply fairness to the particular accused or whether the initiation B and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. The focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the court. C

Held, further, that there will also always be the interests of society to be taken into account in any "balancing" of the factors to be considered. All crime disturbs the community and serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, effectively and with reasonable dispatch. The very D reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law. E

Held, further, that in considering whether or not a permanent stay is warranted, the court had to take note that the applicant was convicted of murder committed with actual intent in the course

of an armed robbery and that no extenuating circumstances were found to exist; that all that remained was the pronouncement of sentence; that the record of the proceedings F up to the close of the defence case had, fortuitously, been reconstructed using note books provided by the trial prosecutor; that the disappearance of the record largely contributed to the delay; that the circumstances surrounding the commission of the offence were largely admitted by the applicant during the trial; and finally that the trial judge was in a G position to reconstruct the missing part of the record.

Held, further, that the lengthy delay experienced in the completion of this case could not in these circumstances justify the grant of a permanent stay of the proceedings, particularly in light of the fact that such record of proceedings could be reconstructed. This was a proper case for the H

matter to be referred back to the trial court for the reconstruction of the A missing part of the record and thereafter for sentence to be passed.

Cases referred to

Attorney General's Reference (No.2 of 2001) [2003] UKHL 68; [2004] 2 AC 72; [2004] 1 All ER 1049

Barker v *Wingo* 407 US 514 (1972) B

Clipsal Australia (Pty) Ltd v *Gap Distributors (Pty) Ltd* [2009] 3 All SA 491 (SCA); 2010 (2) SA 289 (SCA)

Fikilini v *Attorney-General* 1990 (1) ZLR 105 (S)

Hodder v *Public Transport Authority* [2009] WASC 293

ICC 01/04-01/06-772, (Appeals Decision) para 30-31, *The Prosecutor* v *Thomas*C*Lubanga Dyilo* (International Criminal Court), 14 December 2006

Jago v *District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23

Mills v *The Queen* [1986] 1 SCR 863

In re *Mlambo* 1991 (2) ZLR 399 (S) D

Police v *Sherlock* [2009] SASC 64

Sanderson v *A-G, Eastern Cape* 1998 (2) SA 38 (CC)

R v *Askov* [1990] 2 SCR 1199

R v *Aydin* [2010] VSCA 190

S v *Banga* 1995 (2) ZLR 297 (S)

R v *Edwards* (2009) 83 ALJR 717 E

S v *Sibanda* HH-80-91

R v *Wells* [2010] VSCA 100

R v *Wells (No 2)* [2010] VSCA 294

Legislation considered F

Constitution of Zimbabwe 2013, s 69(1)

Case information

T T G Musarurwa, with him *A Mambosasa,* for the applicant

E Nyazamba, for the respondent

Judgment

Garwe JCC:

[1] After considering the papers filed of record and hearing counsel, G this court issued the following order:

"It is ordered that:

1. The application for the trial of the applicant in case number H CRB 8/2000 to be permanently stayed be and is hereby dismissed.

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2. The matter is remitted to the trial judge at the High Court, Harare, for A the reconstruction of the missing record, to include the reasons for conviction, proceedings and findings on the question of extenuation and thereafter for him to pass sentence.
3. The reasons for this order will follow in due course.
4. There be no order as to costs." B

[2] What follows are the reasons for the above order.

[3] Owing to the long and tortuous journey that this matter has trudged, it is necessary to set out the background in some detail, as such background explains, to a large extent, why this court issued the above order.

Factual background C

[4] In August 1998, the applicant and two other co-accused were arrested on allegations of murder and armed robbery committed at Chiwaridzo Bottle Store located at Chipadze Township, Bindura. They were placed on remand. Their application for bail was dismissed. The applicant has been in custody since then.

[5] The criminal trial commenced sometime in September 2001 before D Hungwe J and two assessors. The applicant, who was legally represented by *pro deo* counsel, initially Mr *Julian Colegrave* and thereafter Mr *Makuyana*, pleaded not guilty to two counts of murder. He however admitted taking part in the robbery in the company of two others, one of whom was armed. Evidence was led by both the State and defence. E The defence case was closed on a date not known but either in 2003 or 2004.

[6] In July 2013, the applicant filed the present application seeking a permanent stay of the criminal proceedings instituted against him and, as a corollary, an order releasing him forthwith from custody. He alleged F that the failure by the State to complete his trial, ten years after the closure of the State case and 15 years after his arrest, constituted a violation of his rights enshrined in s 50 and s 69 of the current Constitution.

Proceedings before this court

[7] In his founding affidavit, the applicant averred that the record of the G proceedings had gone missing together with the transcript of the proceedings. Attempts to reconstruct the record by the Registrar were unsuccessful.

[8] Owing to the lengthy delay in the finalisation of his trial, the fact that the record of the proceedings had gone missing and the prejudice that H

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he stands to suffer were a trial *de novo* to take place, he prayed for an order A permanently staying the criminal proceedings against him.

[9] On 22 January 2014, this court sat to hear submissions on the application. The State advised the court that it had not been possible to obtain an affidavit from the Registrar of the High Court explaining the status of B the record of proceedings. By consent of both parties, the matter was postponed *sine die* and an order made for the Registrar of the High Court to file an affidavit, within 30 days, to clarify the status of the record and, if lost, the effort made to reconstruct the record. The court also ordered the trial judge to furnish, through affidavit, the reasons for the delay in the finalisation of the matter.

[10] In response thereto, the Acting Registrar of the High Court of Zimbabwe C advised, by affidavit, that the record as transcribed and the judge's note books had gone missing. The cassette tapes used to record the proceedings had been erased after the transcription and re-

used in other cases. Whilst a number of documents had been availed to assist in the reconstruction, the record on the evidence led was not available.

[11] In his response, the trial judge, also by affidavit, stated that after the D closure of the defence case and the hearing of closing arguments, he convicted the applicant on two counts of murder and one of robbery. One of the three accused persons had passed on before judgment. He acquitted the remaining accused. After hearing submissions on the question of E extenuation, he made a finding that were no such circumstances as both counts of murder had been committed in cold blood and in the course of a planned robbery. On the record of the proceedings which has gone missing, he expressed the view, without substantiation, that the circumstances suggested collusion between the applicant and officers F at the High Court to ensure that the matter was not concluded.

[12] The applicant, exasperated by what he considered were unfounded allegations made by the trial judge against him, in a supplementary affidavit, denied that he had ever been convicted and that the proceedings had been postponed so that sentence could be pronounced. He stated that nothing further had happened after the closure of the defence case. G He denied the suggestion that he may have had anything to do with the disappearance of the record of the proceedings, citing lack of capacity on his part, owing to the fact that he has always been in custody.

[13] The matter was again set down before this court on 12 March 2014. It became clear from the submissions made during that hearing that there H was a dispute as to how far the matter had gone and whether it was

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still possible for the record of the proceedings to be reconstructed. The A State, however, advised the court that, at a meeting attended by both sides in the trial judge's chambers, the latter had indicated that he was able to reconstruct the record of proceedings using notes provided by the prosecution. Following this revelation, this court again postponed the matter and issued another order directing the Registrar of the High B Court to attend to the reconstruction of the record, within 30 days, with the assistance of both the State and defence counsel, the assessors and other officials who had a role to play in the criminal proceedings.

[14] Following upon the above order of this court, a number of affidavits were filed:

14.1 *Faith Rutendo Matuku*, a legal process transcriber who transcribed C tape numbers 11 to 22 (tape numbers 1-10 having been transcribed by Miss Mufakose – now deceased) stated in her affidavit that, as far as she recalls, the proceedings went as far as judgment and extenuating circumstances.

14.2 *Florence Ziyambi*, the trial prosecutor, stated that in 2003 the D applicant and another accused were convicted of murder with actual intent, after which submissions were made on the question of extenuation. The matter was then postponed for a ruling on the question of extenuation and passing of sentence. During the proceedings she took notes of all the proceedings. The notes were contained in three note books, which she marked I, II and III. E Following the disappearance of the record, and, in order to assist with the reconstruction of the record, she availed the note books to the Acting Registrar of the High Court, a Mr Makomo. When she later requested the notebooks, she received only the first two. The third, which contained notes on the judgment and submissions on F extenuation, could not be located. She arranged for a transcription of the first two notebooks. A copy of that transcript has been filed with this court.

14.3 *Tatenda Mawere*, who was a partner in the law firm representing the applicant, stated that, at the close of the state case, the applicant's G counsel, Mr *Makuyana,* handed over the file to him as he was leaving the country to work at their Botswana office. He too had to shuffle between Zimbabwe and Botswana as he, like Mr *Makuyana,* was trying to make ends meet during the economic meltdown that gripped the country before dollarization. He handed all the files, including the applicant's, to a professional assistant H

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working in the office. He stated that, so far as he can recollect, he was A never advised to come to court for the verdict. Following the filing of this application and after diligent search,

the file could not be located in their office. He was unable to state categorically whether there had been a conviction.

14.4 *Munyaka Wadaira Makuyana,* who was the applicant's legal B practitioner during the trial, confirmed that the file opened by the law firm in respect of the applicant had disappeared. He also confirmed that he had gone through the transcript prepared using the notes taken by Mrs Florence Ziyambi and that the transcript is a fair representation of what took place during the State case.

14.5 *Felix Makudza*, the investigating officer, confirmed that the C transcript prepared using the notes made by Mrs Ziyambi correctly reflects the evidence he gave in court.

14.6 *Zuze Zuze*, a State witness who gave evidence during the trial and was present at the time of the commission of the offences, also D confirmed that the transcript correctly reflects the evidence he gave during the proceedings.

14.7 *Tatenda Mawere*, in a supplementary affidavit, confirms that the transcript prepared using the notes taken by Mrs Ziyambi is a correct reflection of what happened during the accused's person's evidence in chief.

[15] The application was then set down for hearing on 14 September 2014. At E the hearing, both parties were agreed that the record of the proceedings transcribed with the assistance of the notes made by Mrs Ziyambi was accurate. However, the parties were not agreed on whether or not the applicant had indeed been found guilty of murder and robbery and what remedy should follow.

[16] At the hearing, the applicant submitted that no guilty verdict had been F returned. In the alternative, that even if there was such a verdict, a permanent stay would still be warranted as the record of the proceedings remains incomplete and no-one can say with any degree of certainty what transpired after the closure of the defence case.

[17] The State opposed the grant of a permanent stay, pointing out that the G trial judge, the trial prosecutor, assessor and transcriber had all deposed to the fact that a verdict of guilty had been returned. Whilst accepting that there had been some prejudice owing to the delay in the finalisation of the matter, the State submitted that the interests of justice would be H seriously prejudiced were the applicant to be set free, particularly in light

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of the fact that the trial judge had indicated that he was in a position to A reconstruct the remaining portion of the proceedings. The State further submitted that the totality of the facts suggested that someone had gone to great lengths to ensure that the record was destroyed and that the only person who stood to benefit from the disappearance of the record is the applicant. To release him in these circumstances would set a dangerous precedent as it would encourage persons undergoing trial to B arrange for the disappearance of the record of proceedings in the belief that they would ultimately get a permanent stay of the proceedings. In the circumstances, the State submitted that the court should order the trial judge to reconstruct the missing part of the record and thereafter proceed to pass sentence. This court then reserved judgment. C

Whether the applicant was found guilty

[18] Having considered all the circumstances of this case, the court was satisfied that the appellant had, indeed, been convicted and that submissions on the issue of extenuation were made. Under oath, the trial judge stated that he convicted the applicant of murder with actual D intent and that, following submissions by both parties, he found no extenuating circumstances. In affidavits filed pursuant to an order of this court, the legal process transcriber confirmed that the matter proceeded to the extenuation stage and that no extenuating circumstances were found. The trial prosecutor, Mrs Ziyambi, also by affidavit, confirmed that there was a conviction for murder although it appears she could not E recall whether the issue of extenuation was determined. Moreover, one of the assessors, Mrs Shava, also confirmed that indeed the applicant was found guilty of murder.

[19] Having taken into account all these documents, we were satisfied that the trial had indeed proceeded to the stage where the trial court made a finding that there were no extenuating circumstances. For some reason, F which remains unclear, the actual sentence of death (which requires certain formalities) had not been passed.

Whether the remaining portion of the record can be reconstructed

[20] All the parties were agreed that the transcript of the proceedings that G was prepared using Mrs Ziyambi's trial notes is correct. The transcript captures what happened during the trial proceedings up until the close of the defence case.

[21] In submissions before this court, the State indicated that, at a conference held in the presence of both parties, the trial judge had indicated that H

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he was in a position to reconstruct the remaining portion of the record of the A proceedings.

[22] This court therefore accepted, as a fact, that notwithstanding the various difficulties that had been encountered in trying to reconstruct the record, such reconstruction was possible. Moreover, the circumstances B surrounding the commission of the offences were not seriously in dispute. In the trial before the High Court, the applicant had admitted undertaking a journey from Marondera, in the company of five others, to Bindura, with the sole purpose of committing acts of robbery and theft. He admitted going to Chiwaridzo Bottle Store in the company of one Evans and one Bonga and that he was aware that Evans was armed C with a pistol. He admitted that, whilst in the company of Evans, he had participated in the robbery and had told the patrons to lie down on the floor. He accepted that when the deceased, Konje, confronted him saying the weapon they had was a toy and following an assault on him by Konje with a beer bottle, Evans had then fired the shot which killed the deceased. The applicant admitted that after this shot, he jumped D over the counter and seized a cash box containing the day's takings.

A re-construction of the remaining portion of the record is therefore possible.

Whether the application for permanent stay is warranted

[23] The factors to be considered in an application of this nature are settled. E These are (a) the length of the delay (b) the reasons given by the State for such delay (c) whether the applicant asserted his rights to a speedy trial and (d) the prejudice to the accused caused by the delay.

[24] In order to determine whether the delay is reasonable or not, a court must endeavour to strike a balance between these factors. In general, no one F factor can on its own justify an inference that the delay is unreasonable. The balancing test involves balancing the conduct of both the State and the accused on a scale: *S* v *Banga* 1995 (2) ZLR 297 (S); In re *Mlambo* 1991 (2) ZLR 399 (S) at 352F-H.

I proceed to consider each of the factors in turn.

The length of the delay G

[25] At the time of the hearing of this application, the applicant had been in custody for approximately fifteen and a half years. He had been a convicted prisoner for about ten years. The delay was certainly inordinate and both parties to this application are agreed that the delay was, as far H as we are aware, unprecedented and certainly presumptively prejudicial.

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The explanation for the delay A

[26] The reason for the delay has already been touched upon. The original transcript of the proceedings went missing in mysterious circumstances and the tapes used in the transcription were erased – also in unclear circumstances. The trial judge's own handwritten record suffered a similar fate. The applicant's legal practitioner's file containing the notes B made during the proceedings also disappeared without trace. When the Attorney-General's Office availed three notebooks to the Acting Registrar in 2013, to assist in the reconstruction of the record, the third notebook – containing the notes on the judgment and submissions and findings on extenuation – also went missing. It was only after three orders of this court that a transcript of the proceedings up to the stage C of the close of the defence case was made available by the Registrar of the High Court and confirmed as correct by both the witnesses who gave evidence during the trial and the applicant's erstwhile legal practitioners. Whilst it is by no means clear

on the record before us as to when the transcript of the proceedings and the trial judge's notes went missing, it is however apparent that the disappearance of the record D largely contributed to the delay.

Whether the applicant asserted his rights

[27] There is evidence that the applicant complained to at least three High Court judges about the delay after the year 2008. The first complaint was made to a judge during a prison visit. The other two were E made during bail applications in the High Court. All were of the opinion that, since this was a matter where all the evidence had been heard by Hungwe J, the issue of the delay was better dealt with by the trial judge. The referral of the complaint by these judges to Hungwe J did not produce any results. Thereafter it was discovered that the transcript F of the record of the proceedings as well as the judge's notes had both mysteriously gone missing.

[28] The applicant had been represented by *pro Deo* counsel during the trial proceedings. It is common cause that his counsel thereafter left the country to work in Botswana but left the file at the offices of the law firm. The file was then re-allocated to a legal assistant in the law firm. G What happened to it thereafter is unknown.

[29] Whilst I accept, as a general proposition, that a person who seeks a permanent stay of the criminal proceedings in which he is an accused, must assert his rights and that failure to do so will make it difficult for him to prove that he was denied a speedy trial, I am not convinced in H

this case that the applicant was in a position to do more than complain to the A High Court judges. His lawyer, representing him *pro Deo*, never demanded that this matter be determined. After the legal practitioner left the country, no other legal practitioner from the firm pursued the matter. It is moot whether the applicant received the best representation possible in the circumstances from his erstwhile legal practitioners.

[30] I think this court can take judicial notice of the fact that the *pro Deo*B system in this country is not without difficulty. Usually it is the most inexperienced and junior lawyers who are allocated these cases. It is only the few accused persons who are able to raise money to enlist the services of senior legal practitioners who are able to get appropriate C legal representation required at this level. Therefore the fact that the applicant did not go further to assert his rights, though not irrelevant, should not be taken as sufficient justification for this court to take too serious a view of such failure.

[31] In the above regard, it is important to bear in mind the remarks of Kriegler J in *Sanderson* v *A-G, Eastern Cape* 1998 (2) SA 38 (CC) at D 53 E-G that:

> "… one should not resort to the *Barker* test without recognising that our society and our criminal justice system differ from those in North America. Nor should one for instance adopt the 'assertion of right' requirement of *Barker* without making due allowance for the fact that the vast majority E of South Africans accused are unrepresented and have no conception of a right to a speedy trial. To deny them relief under s 25(3)(a) because they did not assert their right would be to strike a pen through the right as far as the most vulnerable members of our society are concerned. It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment."

[32] I am therefore of the view that although the applicant did not assert his F rights in the sense in which the term is used, one must remain alive to the fact that he was represented by *pro Deo* counsel, who eventually left the country for Botswana and no legal practitioner in the law firm considered it his responsibility to ensure that the matter was concluded. G The failure by the applicant to assert his rights in these circumstances is not one that should weigh heavily against him.

Whether the applicant has been prejudiced by the delay

[33] The question of prejudice is to be assessed in the light of the interests of the applicant which the speedy trial right was designed to protect. H Three such interests have been identified by this court: (a) to prevent

oppressive pre-trial incarceration (b) to minimise anxiety and concern A on the part of the accused, and (c) to limit the possibility that the defence will be impaired: *Barker* v *Wingo* 407 US 514 (1972) at 530-532, cited with approval in *Fikilini* v *Attorney General* 1990 (1) ZLR 105 (S) at 112 and in In re *Mlambo (supra)* at 350G-351B.

[34] The two questions of oppressive pre-trial incarceration and the possibility B of impairment of the applicant in conducting his defence do not arise in the present matter. This is for obvious reasons. Once the applicant was found guilty and no extenuating circumstances found in 2003 or 2004, the question of oppressive pre-trial incarceration cannot therefore arise. So too is the consideration that the applicant would be impaired in conducting his defence, for there was no further evidence to be led C or witnesses to be called.

[35] That the applicant must have suffered considerable anxiety for the duration of his incarceration cannot be doubted.

[36] In his affidavit, the applicant says the church that he had founded has collapsed, whilst two of his four wives have died of AIDS-related illnesses D as they had to engage in sexual immorality to fend for themselves in his absence. His eldest son also committed suicide.

[37] As Gubbay JA stated in In re *Mlambo (supra),* at 344 B-C:

> "The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health E of the individual."

[38] A court may quite properly infer or presume prejudice, where such is not proven: In re *Mlambo (supra)* at p 352F-G. In the Canadian case of *R* v *Askov* [1990] 2 SCR 1199 at 1232, Cory J remarked that there is a – F

> "… general, and in the case of very long delays an often virtually irrefutable presumption of prejudice to the accused resulting from the passage of time."

[39] In *Mills* v *The Queen* [1986] 1 SCR 863 at 919, para [145], another Canadian case, the concept of security of the person was said to encompass protection against:

> "overlong subjection to the vexations and vicissitudes of a pending criminal G accusation, which include:
>
> 'stigmatisation of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction. These forms of prejudice cannot be disregarded nor minimised when assessing the reasonableness of delay.'" H

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There must be good reason for a stay to be granted A

[40] A further general principle that must be borne in mind in a case of this nature is that, whilst each case must be decided on its merits, the grant of a permanent stay is an exceptional remedy: *Clipsal Australia (Pty) Ltd* v *Gap Distributors (Pty) Ltd* [2009] 3 All SA 491 (SCA); 2010 (2) SA 289 (SCA). B

[41] In *Wells* v *Queen* [2010] VSCA 100, the Supreme Court of Victoria (Australia) accepted that it is only in an exceptional or extreme case that a court would grant a permanent stay on the basis that such proceedings constituted an abuse of process and that the test to be applied is:

> "'whether, in all the circumstances, the continuation of the proceedings *would*C involve unacceptable injustice or unfairness', or whether the continuation of the proceedings *would* be 'so unfairly and unjustifiably oppressive' as to constitute an abuse of process".

[42] The power to stay proceedings permanently may be exercised:

> "where either the foundation of the prosecution or the bringing of the accused to justice is tainted with illegal action or gross violation of the rights of D the individual making it unacceptable for justice to embark on its course":

ICC 01/04-01/06-772, (Appeals Decision) para 30-31, *The Prosecutor* v *Thomas Lubanga Dyilo* (International Criminal Court), 14 December 2006.

[43] In *Attorney General's Reference (No.2 of 2001)* [2003] UKHL 68, Lord Woolf E stated:

> "... if there has been prejudice caused to a defendant which interferes with his right to a fair trial in a way which cannot otherwise be remedied, then of course a stay is an appropriate remedy. But in the absence of prejudice of that sort, there is normally no justification for granting a stay."

[44] In *Police* v *Sherlock* [2009] SASC 64, a decision of the Supreme Court of South Australia, the court cited with approval remarks that:

> "The justification for staying a prosecution is that the court is obliged to take that F extreme step in order to protect its own processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor … that the court processes are being employed for ulterior purposes or in such a way … as to cause improper vexation and oppression. The yardstick is G not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so H constitutes an abuse of the process of the court."

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The court further added that: A

> "the power will be used only in most exceptional circumstances to order that a criminal prosecution be stayed".

Societal interest

[45] There will also always be the interests of society to be taken into account in any "balancing" of the factors that have been cited with approval by this court since *Fikilini* v *Attorney-General (supra).* B

[46] In In re Mlambo (supra) Gubbay CJ cited with approval the remarks of Cory J in R v Askov (supra), at p 1220 that:

> "... It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to C say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, effectively and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a D reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law."

[47] In the *Askov* case (*supra*) (at pp 1219-20) Cory J discussed the "community or societal interest" in the following terms:

> "Community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial E and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest."

Disposition

[48] Whilst accepting, as one must, that the applicant has been in custody for an unconscionably lengthy period of time, it is clear, from what has F been said before, that this was due mainly to the fact that the record of the proceedings mysteriously went missing and subsequent attempts to reconstruct the record were further frustrated after the documents that were to be used in such reconstruction also went missing. The record was only reconstructed using two of three note books supplied by the trial prosecutor. G

[49] The delay is clearly not the fault of the State. It is apparent that some unknown person, possibly with the assistance of persons working in the system, went to great lengths to ensure that the record of the proceedings was irretrievably lost. Whilst it will be unfair to suggest, as did the trial judge, that the applicant had anything to do with such disappearance H

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it is, however, clear that the only person who stands to benefit from a situation A where the record is irretrievably lost is the applicant.

[50] The facts of this case illustrate, as observed by Gubbay CJ in In re *Mlambo (supra),* that the system has shortcomings (at p 346B). The disappearance of the record could not have been avoided and, though B occasioned by the activities of some unknown persons but who were obviously intent on making sure the record was permanently lost and that it could not be reconstructed, constituted a systemic delay. Indeed in In re *Mlambo (supra*) at 350D-E Gubbay CJ cited with approval the remarks by Powell J in *Barker* v *Wingo (supra)* that:

> "… Finally, a valid reason, such as a missing witness should serve to justify C appropriate delay."

[51] In *Police* v *Sherlock (supra*), the Supreme Court of South Australia accepted that obstacles to a fair trial may be encountered and that it is not always possible to achieve a perfect trial. The court cited with approval remarks by Mason CJ in *Jago* v *District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23 that:

> "Obstacles in the way of a fair trial are often encountered in administering criminal D justice. Adverse publicity in the reporting of notorious crimes … revelations in a public inquiry … absence of competent representation …, or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed. Unfairness occasioned by circumstances outside the court's control does E not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. …"

[52] In considering whether or not a permanent stay is warranted, this court F takes note of the following: that the applicant was convicted of murder committed with actual intent in the course of an armed robbery and that no extenuating circumstances were found to exist; that all that remained was the pronouncement of sentence; that the record of the proceedings up to the close of the defence case has, fortuitously, been reconstructed using note books provided by the trial prosecutor; that G the disappearance of the record largely contributed to the delay; that the circumstances surrounding the commission of the offence were largely admitted by the applicant during the trial and finally that the trial judge is in a position to reconstruct the missing part of the record.

[53] Case law authority is agreed that it will be in rare cases where the H destruction or disappearance of evidence will justify a permanent stay.

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The court must endeavour to reconstruct the record on the evidence A available, despite any loss of documents or death of witnesses: *R* v *Edwards* (2009) 83 ALJR 717; *Hodder* v *Public Transport Authority* [2009] WASC 293; *Police* v *Sherlock (supra)*; *Wells* v *R* [2010] VSCA 100; *Wells* v *R (No 2)* [2010] VSCA 294; *Aydin* v *R* [2010] VSCA 190; *S* v *Sibanda* HH-80-91.

[54] The lengthy delay experienced in the completion of this case, B occasioned almost entirely by the suspicious disappearance of the record of the proceedings, cannot justify the grant of a permanent stay of the proceedings, particularly in light of the fact that such record of proceedings can be reconstructed.

[55] In light of the above, this court was of the view that this was a proper case C for the matter to be referred back to the trial court for the reconstruction of the missing part of the record and thereafter for sentence to be passed.

[56] Consequently, the court issued the order reflected in paragraph 1 of this judgment.

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, D GOWORA JCC, PATEL JCC, HLATSHWAYO JCC and GUVAVA JCC concurred.

Mambosasa & Associates, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners E

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[zRPz]ZIMBEVA v KINGDOM BANK LTD 2014 (2) ZLR 461 (H)

Citation	2014 (2) ZLR 461 (H)
Case No	Judgment No. HH-531-14
Court	High Court, Harare
Judge	Tsanga J & Chitakunye J
Heard	10 September 2014; *CAV*
Judgment	1 October 2014
Counsel	*R Zimudzi,* for the appellant *M Chitewe,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Bank – *duty to customer – unauthorised transactions using customer's ATM card – when bank liable – customer not reporting loss promptly – customer liable for any transactions up to time report made – report to security guard at ATM – unless guard a bank employee, does not* D *constitute report to bank*

Headnote

The appellant lost her bank card in circumstances that were not made entirely clear by the evidence, but she delayed reporting the card and having been lost, and subsequently discovered that it had been used E for a series of unauthorised transactions totalling some thousands of dollars. She claimed the missing sum from the bank, arguing that the bank was liable for her losses. She admitted disclosing her PIN code to her sister, although the latter had never had occasion to use it. A card she used was retained at an ATM as "stolen", but the likelihood was that this card was not hers but another person's and that the cards had F been exchanged previously when she tried to withdraw money from a different ATM. When her card was retained, she reported the matter to the security guard on duty though not to the bank itself until she tried to withdraw cash at her bank.

Held, that there is no specific legislation in Zimbabwe at present that addresses liability of banks for unauthorised ATM and EFTPOS withdrawals G without a customer's consent. Any liability for refunding unauthorised withdrawals stems from the contractual relationship between a bank and its customer to protect the customer's funds. To protect customers from would-be abusers banks generally place reliance on risk minimisation, key measures including requiring customers to have a secret PIN to H their card. The contractual duty on the part of the customer is to guard

the PIN and card separately for the most part, save when transacting. A The assumption by the bank is that only the customer has control of both these items. The duty to report is also on the customer, particularly since unauthorised withdrawals only come to the attention of the bank via the customer.

While the exact nature of the security guard's duties were not fully canvassed, B the guard was not a bank employee. Reporting to the security guard would not absolve a customer from taking any other action on their card, as the contractual relationship between a customer and a bank is a completely different one. The contract between the bank and a security firm remains at all times

separate from the contract that the bank has with its client. The presence of a security guard at the premises should C not be taken to establish a new type of contract between the customer and the bank, whereby the security guard is seen as acting as an agent of the bank. The appellant could have called the bank on its 24-hour Card Centre service, but did not do so. Only if a report had been made to the Card Centre could it be said that the bank would indeed have been negligent, if, after receiving a direct notification, it had not stopped D transactions on her account.

If an unauthorised person gains access to a customer's ATM card and PIN, the possibility of an unauthorised withdrawal arises. The machine cannot determine whether the person who inserts the card and keys in the correct number is in fact an authorised person. The question is whether E the customer may be debited with the amount of such an unauthorised withdrawal. A customer who obtains an ATM card realises that the whole system functions by means of a card coupled with a secret PIN number. The person also realises that the identity of the person who inserts and keys the number cannot be checked. It is thus reasonable to assume that the customer consents to accept a debit for any withdrawal made by F means of a card and number. The customer will run the risk only until he informs the bank of the loss and possible unauthorised use of the card. With regard to EFTPOS transactions, they are irreversible unless there is evidence that they were wrongly carried out.

Cases referred to G

Barclays Bank Ltd v *Quistclose Invstms Ltd* [1970] AC 567

Lipkin Gorman v *Karpnale Ltd* [1989] 1 WLR 1340

Sino Zimbabwe Cement Co (Pvt) Ltd v *Zimbank Ltd* 2006 (2) ZLR 320 (H)

West Westminster Bank Ltd v *Hilton* (1926) 43 TLR 124 H

2014 (2) ZLR p463

Tsanga J

Case information

R Zimudzi, for the appellant A

M Chitewe, for the respondent

Judgment

Tsanga J: This was an appeal against the decision of the magistrates court in which the appellant Sibongile Zimbeva sought to recover an amount of $7 548.91 from the respondent, Kingdom Bank Ltd, emanating from B unauthorised withdrawals from her account by someone using her automated teller machine (ATM) card and PIN without her authority. In addition, the appellant also sought interest at the rate of 18 percent per annum, being the lending rate of the respondent. She also claimed costs of suit on an attorney-client scale.

The magistrates court having dismissed her claim, she hereby appeals against the C conclusion that the bank was not negligent in any way and that it bore no responsibility for her loss.

The facts

The undisputed facts are these. The appellant maintained an account with D the respondent, Kingdom Bank Ltd, hereinafter called the Bank. She had been a customer for over eight years. She also had an ATM card as part of that account and could obtain cash from the respondent's various machines including those from related banks that were on the ZIMSWITCH system. On the afternoon of Sunday 20 January 2013 she attempted without success to withdraw some money from one of the Bank's ATMs at Karigamombe Building E in Harare's city centre. Having failed to find cash thereat, she proceeded to yet another of the Bank's ATMs located in First Street. There again she did not find any cash. Still resolute in getting some cash, she proceeded to Ecobank, a different bank altogether, to use her card on the ZIMSWITCH system which allows customers from participating banks to draw cash from F related ATMs. However, as emerged in evidence, Ecobank was not on the ZIMSWITCH system and therefore her assumption was erroneous in this regard. What is of significance with regards to her attempt at getting cash from Ecobank's ATM is that while in the process of trying her card for the second time in their machine, she was disrupted by a man who

was behind her who urged her to hurry. She stepped aside and allowed him to proceed, G all the while with her card in her hands, according to her testimony. She said neither of them got any cash and each proceeded to their respective cars.

In a fourth bid to get the much needed cash, she headed to yet another of the respondent Bank's ATMs, this time at Fife Avenue shopping centre. There her efforts came to a halt when her card was captured by the ATM with H the message that the card was "stolen". She reported immediately to the

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guard who was policing the ATM who noted the card's capture in his daily A occurrence book, together with her identity number, her cell phone number, and the time the report was made.

The following day, after putting in some work at her place of employment, the appellant utilised her lunch hour to retrieve her card from the Bank and to get the much needed cash. After being told that her card would be B back at her branch within three or four days, she sought to make a personal withdrawal. It was in attempting to process this transaction in person that she was told that she had insufficient funds in her account. Her testimony was that her account balance on 20 January 2013 stood at $9 863.28. When she attempted to transact on 21 January 2013 at lunch time the balance now stood at $2 314. Since she had tried to withdraw $2 500 it was in light of this that C she was told her funds were insufficient. She immediately highlighted that any transactions on her account were unauthorised and the Bank instantly blocked her card against further transactions. She had however, already been prejudiced of an amount of $7 548.91. Notably, the transactions totalling this amount were carried out in different stores and supermarkets using the appellant's card on 21 January 2013 which was after her report of the card's D capture on 20 January 2013to the security guard.

As the plaintiff in court below, the appellant approached the magistrates court claiming the sum of $ 7548.91 with interest after the respondent (as defendant) refused to assume responsibility. Materially in evidence in the court below, the card which the Bank said it retrieved at its Fife Avenue ATM on E 21 January 2013 did not belong to the appellant, but to one Mr G Zimanga. The Bank averred that the appellant's card was not in their custody on 20and 21 January 2013 as her card was eventually retrieved from High Glen on 22 January 2013 following the report of unauthorised transactions and its disablement made on 21January 2013. However, the appellant disputed that it was not her card that was captured, insisting that her card could have F been removed from the machine by the Bank's employee. In her view this was likely so given the fact that the unauthorised transactions took place from the morning of 21 January 2013which was when the Bank itself would have retrieved captured cards from the previous day, which was a Sunday.

In the court below, the appellant admitted to disclosing her PIN to her sister G in trust as a backup measure for periods when she had travelled out of the country leaving her two children in her custody. Her sister's evidence was that, although she knew the PIN, there was no occasion that had ever arisen requiring its use. In refusing the claim, the court noted the disclosure of the PIN as a material breach of the contract between the bank and its customer. It also placed emphasis on evidence provided by the Bank's witness, its H

Loss Control and Investigations Manager, that from the facts, the reasonable A inference was that the appellant was a victim of a scam and that her card had been most likely exchanged at the Ecobank ATM. This was in the Bank's view more likely so, since the card captured at the Fife Avenue ATM gave her the message that she was in possession of a stolen card, followed by the fact that the card retrieved as having been captured at the time recorded, did B not belong to her but to a Mr G Zimanga.

Her claim having been dismissed the appeal is to this court on the following grounds.

1. That the appellant suffered loss in the sum of $7?548.91 from the unauthorised withdrawals made between 20 and 21 January 2013 due to C the respondent's negligence and or breach of duty of care in protecting a depositor's funds.

2. The court *a quo* erred at law by failing to consider that the respondent was not entitled to debit the appellant's account without her specific mandate.
3. The court *a quo* erred by failing to consider the fact that the appellant D carried out her responsibility and obligation to protect her own interest against fraud and exploitation by third parties.
4. That the court erred by failing to consider that the loss suffered by the appellant was a result of negligence by the respondent after the respondent had been duly notified by the appellant that her card was E captured by the respondent's automated teller machine.

There is no specific legislation in Zimbabwe at present that addresses liability of banks for unauthorised ATM and POS withdrawals without a customer's consent. Any liability for refunding unauthorised withdrawals stems from the contractual relationship between a bank and its customer to protect the customer's funds. To protect customers from would-be abusers, F banks generally place reliance on risk minimisation. Key measures include requiring customers to have a secret PIN to their card. Where a customer discloses such PIN to a third party, then from the bank's point of view, a breach of secrecy will have occurred with the result that it cannot be held responsible for the consequences stemming therefrom. Besides ensuring that withdrawals are effected through secret pins to the card, safety measures G by some banks also include security measures at the ATMs, for example through camera surveillance, and in some cases through the provision of security guards who play some monitoring role. In addition, 24 hour reporting measures which permit a customer to contact the bank in the event that a card is lost or stolen are another protective measure. *In casu*, the first two of H the Bank's ATMs where the appellant tried to withdraw did not have CCTV

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surveillance although the third did have, in addition to having a security A guard. The PIN was also a security measure of its card issuance as was the 24 hour reporting service.

The contractual duty on the part of the customer is to guard the PIN and card "with their life" separately for the most part, save when transacting. The assumption by the bank is that only the customer has control of both these items. The duty to report is also on the customer, particularly since B unauthorised withdrawals come to the attention of the bank via the customer.

In arguing the Bank's duty of care the appellant places reliance on the following cases: *West Westminster Bank Ltd* v *Hilton* (1926) 43 TLR 124 at 126; *Lipkin Gorman* v *Karpnale Ltd* [1989] 1 WLR 1340; *Barclays Bank Ltd* v *Quistclose Investments Ltd* [1970] AC 567. That as a general principle C the Bank owes a duty of care to its customers is itself not in dispute. What is disputed is whether these withdrawals were indeed unauthorised so as to fall into the realm of negligence on the part of the bank which authorised them. The gist of the appellant's argument is that processing withdrawals amounting to $7 548.91 *after* the capture of the card had been reported a D day earlier, was negligence in the extreme on the part of the Bank. The appellant's argument is that all transactions on this card should have been halted from the time that the Bank was notified through the security guard, that the card was no longer in the customer's possession. According to her, it was the Bank's duty thereafter to ensure that no transactions were conducted against her account at least other than by herself in person, until such time E as the card had been safely returned into her hands.

Adequacy of measures taken to protect the account

The appellant's argument that her report to the security guard at the Bank was a full line of defence in protecting her card calls for analysis of the contractual relationship between the parties involved. The record from the F court below suggests that the exact parameters of the role of the security guard in relation to the bank were not fully canvassed. However, from the record, the reason given by the Bank's Loss Control Investigations Manager for having a security guard at the ATM is so that they can ensure no one interferes with clients when they do their transactions. The purpose of the entry by the guard was according to this witness a confirmation that a client G made a report to the security guard of an anomaly.

Of significance is that generally, security firms work to fulfil the objectives given to them by their client. In other words, their contractual relationship is with their hirer. The reasons for which they are sought differ according to context. With respect to those hired to police specific locales, these generally H

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include watch duties, in particular surveillance, as well as protection of life and A property. In our context, at ATMs they are often observed to manage people by requiring that they maintain a distance from a transacting party as also emerged from parts of the record.

In essence, their services are generally aimed at risk management as opposed to acting as a direct interface between a bank and its client. As evidenced B by what is in the record, in carrying out a surveillance role, they record any reported anomalies and complaints that may have taken place on the given day, including staff who may have come to the bank and their stated purpose. As such, theirs appears to be a routinized collection of information which is availed to the bank so that it at least has a starting point should this information C be required. It cannot be said that reporting to the security guard absolves a customer from taking any other action on their card as the contractual relationship between a customer and a bank is a completely different one. The contract between the bank and a security firm remains at all times separate from the contract that the bank has with its client. The presence of a security guard at the premises should not be mistaken to establish a new D type of contract between the customer and the bank, whereby the security guard is seen as acting as an agent of the bank. That is not the case.

In assessing whether a report was fully made to protect her account, this was a bank with a 24 hour reporting service where customers can reach the Bank regarding their account in the case of complaints or anomalies. There E were essentially two abnormal though interlinked events which needed to be brought to the immediate attention of the appellant's Bank once her card had been captured. The first was its attempted use at a bank which was not at that time on the ZIMSWITCH system. The second was the clearly out of place message that her card which she transacted with, had given the message that it was "stolen". The record shows that the appellant herself, in F her subsequent letter of complaint to the Bank, conceded that this message induced a sense of "shock" yet she still did not contact the bank on the given day nor did she attempt to go there first thing in the morning as a matter of urgency as would have been expected under the circumstances.

The Bank's argument that additional measures are to be followed by way of G telephoning the Bank directly on its 24 hour service seems to be the crucial protective measure that ought to have been taken. The evidence of the Bank's witness was that it has messages at all of its ATMs advising clients to contact the call centre which is open 24 hours whenever a client's card is captured. He explained that a stolen card is then disabled in the system. *In casu,* the appellant did not report her card as stolen. She went to collect H her card on 21 January 2013 and it was only in attempting to withdraw cash

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following disclosure to her that her card would take a few days to return to A her branch, that anomalies emerged with her account balance. It was then that it was immediately disabled.

The appellant did not challenge the Bank's witness in the court below on the adequacy of visibility of this message which the Bank said is there at all of its ATMs. It is therefore assumed that the signage is satisfactorily visible. B Given the appellant's own concession in the court below that the message that had come on screen that the card had been stolen, it would reasonably have been expected under such circumstances that any person acting sensibly and protectively, would have taken additional steps to appraise the bank more fully of the abnormal message that came with the card's capture.

Without providing particulars to the Bank, it seems there was no reason for C the Bank to suspect that the appellant's card was at risk. Only if a report had been made to the Card Centre can it be said that the bank would indeed have been negligent if after receiving a direct notification it had not stopped transactions on her account. Merely reporting to the guard was not enough as the correlation between a report to a security guard and an automatic freezing of the card's transactions on the bank's system is simply not there. D*In casu*, the guard merely recorded daily occurrences. If the appellant had indeed called the 24 hour service and spoken to an employee with detailed explanation of what had occurred, the Bank would most certainly have been negligent if it had gone ahead to authorise withdrawals against the customer's account. The Bank cannot be held responsible for unauthorised withdrawals E when the appellant took no action on 20 January 2013 to appraise them more fully of her card's capture.

Breach of care in protecting depositors' funds

The appellant's argument that the Bank was negligent in that it had stopped sending message alerts to its customers notifying them of any withdrawals F also calls for analysis. The issue here is whether it can be said that failure to do so is sufficient to apportion the entire blame for the unauthorised transactions at the Bank's door. The Bank's explanation for not sending transaction alerts was that the system was being revamped and that the appellant was told she would have to register. If the customer was told that G she needed to re-register then she should have done so. Clearly, if she had done so she would have been alerted to the first withdrawal, and the amount taken from her account would have been minimised. But what would have stopped these transactions altogether from taking place would have been a detailed report of the anomalies of the day that may have indicated that the card was at risk. As analysed above, any reports involving a customer's H

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card are dealt with through a 24 hour service. It is the report received from the c A ustomer that alerts the bank if a customer's card is at risk. A card that is reported as showing a message that it is "stolen" would needless to say put any bank on the highest alert. It was the appellant's duty to appraise the bank in some detail of the events that had transpired.

The appellant also argued lack of authorisation on the basis that the withdrawals B were not made by herself and whoever was making the withdrawals did not have her permission. She challenged the Bank's version that she was likely dispossessed of her card at the Ecobank ATM as she had her card with her at all times. The appellant relies on authorities involving cheque fraud to illustrate that banks have been found liable where such cheques have been C processed without the customer's authority. *Sino Zimbabwe Cement Co (Pvt) Ltd* v *Zimbank Ltd* 2006 (2) ZLR 320 (H) was cited in support of this contention. The appellant argued that the same reasoning must apply with equal force to ATM instructions. It can however be argued that forging a cheque is comparatively easier to do without authority since what one is essentially working with is a forged signature which many are able to do. D The Bank's unwavering standpoint through their witnesses and counsel, was that to effect a transaction, the PIN and the card are needed for both ATM and POS withdrawals. It remains their argument that the Bank cannot be held liable where a customer has, through her own acts, compromised both the card and its PIN. In support of this argument the Bank cites the views of Havenga *et al General Principles of Commercial Law*Juta 7 ed (2013) at E p 416 where they state as follows regarding the use of ATM cards and their PIN numbers:

> "If an unauthorised person gains access to a customer's ATM card and PIN, the possibility of an unauthorised withdrawal arises. The machine cannot determine whether the person who inserts the card and keys in the correct number is in fact an authorised person. The question is whether the customer may be debited F with the amount of such an unauthorised withdrawal".

In answering this all important question the authors go on to state as follows:

> "The issue will usually not arise because most financial institutions offering ATM facilities conclude an express contract with their customers in this regard. The agreement provides that the customer's account may be debited with all withdrawals made by means of the particular card and accompanying secret G number. Only if the bank is notified of a possible unauthorised withdrawal before it takes place will the customer not have to accept the debit."

They then state as follows with reference to situations where there may not be an express term:

> "There seems little doubt that the correct PIN entered by the customer is the H customer's mandate for these purposes. However, it seems that in the absence of

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> an express term there might quite possibly be a tacit term in the banker-customer A contract that the customer would carry the risk of an unauthorised withdrawal. Surrounding circumstances which exist on conclusion of the contract play an important role when the court has to determine the intention of the parties. A customer who obtains an ATM card realises that the whole system functions by means of a card coupled with a secret PIN number. The person also realises that the identity of the person who inserts and keys the number cannot be checked. Against this background it seems reasonable to assume that the customer consents B to accept a debit for any withdrawal made by means of a card and number. It stands to reason that the customer will run the risk only until he or she informs the bank of the loss and possible unauthorised use of the card."

Applying these principles to the facts of the present case, there was in essence no effective reporting that would have stopped the transaction on the card. Indeed, once the bank was advised by the appellant on 21 January 2013 that C there were unauthorised transactions, it immediately blocked the card and there were none thereafter.

Significantly, given that any withdrawals are both card and PIN based, the appellant's concession in the court below that she had disclosed her PIN to a third party further weakens her case in terms of the contractual requirements D with the bank that the PIN remains secret. From the evidence in the court record, the bulk of the unauthorised payments from the appellant's account were done using the "electronic fund transfer at point of sale. (EFTPOS). As Havenga *et al* explain *op cit* at p 418, a PIN is also used for these transactions. However, they do highlight that there are EFTPOS systems which use hand written signatures where after the customer's card is swiped, duplicate E transaction slips are issued which must be signed by the customer. In such cases it is the signature of the customer that identifies the user and gives authorisation to the bank to pay. A copy of the transaction slip is kept by the merchant and handed to the bank should a dispute arise. The bank will generally not pay if the merchant has not complied with verification of the customer's signature. The other copy remains with the client. F

In casu, the Bank in its evidence insisted that the PIN and card was the method used to access the account. In other words they disputed that a card alone would have sufficed to use the card without a PIN. But clearly much depends on the type of machine used at the transaction. Nonetheless Havenga *et al* explain at 419 as follows with regard to EFTPOS transactions: G

> "The most important standard term as far as the customer is concerned is that defining the circumstances under which the bank is entitled to debit its customer's account. The general rule is that the customer is (at least initially) liable for all uses made of the card or PIN whether authorised by him or her or not. In some cases liability for unauthorised transactions is limited in terms of the contract, for example on informing the bank of the loss of card or PIN. A second term that is H

> standard to all card conditions is the obligation of the customer to keep the PIN secret. A A third important term is that an EFTPOS transaction is irrevocable …"

In casu, the appellant's card and PIN were utilised, thereby meeting the first standard condition regarding honouring payments using the card and PIN. The second condition that the PIN be kept secret was, as stated, violated by the appellant's disclosure to her sister. The third requirement that once made B the payments could not be revoked explain why the Bank cannot reverse such payments if there is no evidence of being incorrectly carried out.

It also clearly does not help the appellant that she tried to use her ATM card at an ATM which was not supported by her Bank's system. Her narration of events of what took place in the form of her encounter with the man who C disrupted her transaction lends credence to the Bank's assertion that it was possibly at Ecobank that her card was swopped. Whilst indeed the evidence on record was not conclusive that the card disappeared at Ecobank since the Bank's efforts to obtain CCTV footage from Ecobank had been unsuccessful, however, on a balance of probabilities, the events of the day lend support to the claim that the card and the PIN could have been tampered with at D the Ecobank ATM. The fact that the card found in the respondent's ATM machine was not hers further lends credence to this theory of dispossession at the said bank's ATM. The appellant challenged the fact that the card was said to belong to Mr G Zimanga because it was retrieved out of the machine on 21 January 2013 and not 20 January 2013 and therefore could not have been the same card. The explanation by the bank that the card having been E captured on a Sunday when banks were closed, it was only removed on the morning of the following day, appears to have been a credible explanation. Even if the appellant's argument is taken of the possibility that the card was taken by a bank employee, then the issue still arises of how they obtained the PIN. Granted the PIN could have been guessed but there is no evidence that suggests that this is what happened. Also it does not explain why as the F appellant conceded, her card gave the message that it was "stolen". The failure to identify the fraudster captured on CCTV footage at two supermarkets using the card is of course lamentable as it would have gone a long way in clarifying the circumstances of the fraud.

In essence, looking at the various arguments put forward by the appellant G regarding the Bank's negligence and her own efforts to protect her account, as against the Bank's arguments as to why it should not be held liable, the conclusion is that the appellant failed to take active steps to prevent the unauthorised use of her account.

In the circumstances the appeal lacks merit and is accordingly dismissed H with costs.

Tsanga J

CHITAKUNYE J concurred. A

Hove & Associates, appellant's legal practitioners

Chitewe Law Practice, respondent's legal practitioners B

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[zRPz]DZOMONDA & ORS v CHIPANDA & ORS 2014 (2) ZLR 473 (H)

Citation	2014 (2) ZLR 473 (H)
Case No	Judgment No. HH-535-14
Court	High Court, Harare
Judge	Tsanga J
Heard	25 July 2014; *CAV*
Judgment	2 October 2014
Counsel	*M Hungwe*, for the applicants *A Muchandiona*, for the first and second respondents No appearance for the third and fourth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administration of estates – *intestate succession – spouse – entitlement to matrimonial* C *home – descendants of deceased – only entitled to specified portion of remainder of estate – agreement between heirs on alternative distribution – only applicable to remainder of estate*

Succession – *intestate – spouse – entitlement to matrimonial home – descendants of* D *deceased – only entitled to specified portion of remainder of estate – agreement between heirs on alternative distribution – only applicable to remainder of estate*

Headnote

The applicants were the children of N, who died intestate in 2011. She had E divorced the applicants' father. In 1995 she was granted a stand in Harare. In the same year she married the first respondent under customary law and solemnised a civil marriage in 1997. A house was built on the stand as a joint endeavour by both spouses. The applicants stated that they and the first respondent concluded an agreement after N's death, in terms F of which the property was to be

sold, with 30 per cent of the proceeds going to the first respondent and the balance to the applicants. The first defendant averred that he was coerced into signing this agreement. In any event, the executrix distributed the property in accordance with the Deceased Estates Succession Act [*Chapter 6:02*], the result being that the first respondent got the house.

The applicants sought to enforce the agreement with the first defendant, arguing G that the house could not be considered as "free residue" for inheritance by the first respondent only.

Held, that where a party dies intestate and had a civil marriage, the Deceased Estates Succession Act recognises the rights of the surviving spouse to H inherit, as well as those of the children, if any. In the absence of children,

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the blood relatives who are entitled to inherit are also spelled out. The A first enquiry is whether or not there is a surviving spouse. If there is, the spouse's share is prioritised in inheriting from the free residue of the estate. Where the estate has excess assets after the surviving spouse has received what is mandated by the law, then the spouse, together with the children, are accorded certain stipulated legacies. These depend on whether the marriage was in or out of community of property. If, as B here, the marriage was out of community of property, and the deceased spouse leaves any descendants entitled to inherit *ab intestato*, the surviving spouse is entitled, in terms of s 3A, to receive the house or other domestic premises, as well as the household goods and effects.

Held, further, that the primary thrust of the Act is spouse-centred. A spouse C inherits the household goods and effects as well as the domestic premises. If the estate still has residue after this has been done, then the spouse and the children inherit specified statutory legacies. Inheritance by the children, therefore, clearly depends on the size of the estate. Where the marital home is the only asset, as here, then the law is clear: it should go to the surviving spouse. D

Held, further, that the context in which these provisions of the Act were introduced is important in deciding the effect of the legislation. The intention was clearly that the spouse should inherit the matrimonial home to allow for a continuation of the life the spouse was accustomed to living. The benevolence of the family could no longer be assumed, as evidenced by reports of property grabbing. The heir under customary E law, in particular, who was supposed to act as a father figure and protect the widow, had increasingly, in modern society with its money based economy, become a dying breed. More often than not, his own interests became paramount. In any event, women had by then made significant strides in society in terms of pressing for the recognition of both their F economic and non-economic contributions in the marital union and in present day society. They rightly expected to benefit from the sweat of their brows instead of being cast aside as insignificant "others" upon the death of a spouse.

Held, further, that the applicants' argument that s 3A should be read as G inferring that, where the house is the only asset it must be sold and the spouse together with the children must inherit a share, is not supported by a reading of the section, nor by the history and context that led to its adoption. It must also be borne in mind that this was not a divorce, where the courts are enjoined to evaluate the extent of each spouse's contribution. H

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A*Held*, further, that even if the Act only applies to assets acquired during the subsistence of the marriage, the property in this matter was so acquired.

Held, further, that the "agreement" purportedly drawn up between the applicants and the first respondent was invalid. In terms of s 5 of the Act, there must be property devolved on the heirs in undivided shares. If there is, they can enter into an alternative distribution arrangement. B Here, the only asset was the house and that had to be inherited by the surviving spouse. Nothing remained to be distributed to the heirs.

Cases referred to

Chimhowa & Ors v *Chimhowa & Ors* 2011 (2) ZLR 471 (H)

Magaya v *Magaya* 1999 (1) ZLR 100 (S) C

Mashakada v *Master of the High Court & Anor* 2001 (2) ZLR 311 (H)

Murisa v *Murisa* 1992 (1) ZLR 167 (S)

Mwazozo v *Mwazozo* S-121-94

Ponter v *Ponter* 2000 (1) ZLR 336 (H)

Legislation considered D

Constitution of Zimbabwe 2013, ss 25, 56

Deceased Estates Succession Act [Chapter 6:02], s 3, 3A, 5

International instruments

Convention on the Elimination of All Forms of Discrimination Against Women, art 2

Protocol to the African Charter on Human and People's Rights on the Rights of E Women in Africa, art 21(1)

Case information

M Hungwe, for the applicants

A Muchandiona, for the first and second respondents

No appearance for the third and fourth respondents F

Judgment

Tsanga J: Sometimes even the most noble of objectives in legislative reform can result in unforeseen and unintended consequences for certain groups of people. The key question, of course, is what is a court to do when faced with G such a reality? In this matter, which perfectly exemplifies such a scenario, this court is asked to adjudicate the competing claims of a surviving spouse to the matrimonial home against those of his step children who assert that the house was largely their mother's and therefore they have a greater claim to it than her husband. It is brought as an opposed application in which the applicants, being the children of the late Nester Chipanda, seek to set aside H the First and Final Distribution Account in her estate which was confirmed

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by the Master of the High Court, the third respondent, on 13 March 2012. A Furthermore, they want the estate to be reopened. In addition, they seek the removal of Noreen Chikaka, the second respondent and executor in that estate, and her substitution with a neutral executor. They also request that the deed of transfer that placed the immovable property in the name of the first respondent, the deceased's husband, under deed of transfer No. 1320/2012, be set aside by the Registrar of Deeds, who is the fourth respondent. B

In an alternative prayer, they seek that the estate of the late Nester Chipanda be distributed in accordance with a distribution agreement that the applicants say they entered into with the first respondent, Kirison Chipanda on 27 October 2011. The application is made against the backdrop of legislation which for all intents and purposes, at least on the face of it, appears well C settled on this point of who is entitled to the matrimonial home upon death of either spouse.

The facts

The facts that shape the applicants' grievances and resultant quests are these. In 1994 the applicants' mother, then known Nester Mariko, applied for a stand D from the City of Harare. She was granted stand No. 8122 in Budiriro 5, in her own name as a divorcee in June 1995. Her four children, born between 1972 and 1983, were listed as her dependants. It is the applicants' averment that two years after acquiring the stand and constructing a house, their mother married the first respondent, also a divorcee with his own four children. He too had his own property, with his children listed as his dependants. Their E mother did not have any children with the first respondent. The parties initially married under customary law in 1995 before solemnising a civil marriage in 1997. The applicants' mother died intestate on 15 January 2011.

In winding up her estate, it is the applicants' contention that they discussed extensively in the Master's office that, given the circumstances under which F the property was acquired, it was impracticable for the first respondent to inherit the matrimonial home, moreover given that the house was the only asset of value. Their reasoning was that doing so would effectively exclude them, deceased's own children from inheriting from her estate. They contend that they entered into a Beneficiaries Distribution Agreement (hereinafter called the "Agreement") on 27 October 2011 with the first respondent. In G terms of the Agreement, the property was to be sold and he would be accorded 30 per cent of the value of the property while applicants would share the remaining 70 per cent among the four of them, each receiving a 17.5 per cent share. Following this Agreement, they say the second respondent, the executrix, refused to give effect to it and influenced the first respondent to H

Tsanga J

renege on the basis that he was entitled to the whole property. They applied for A the removal of the executrix on 23 November 2011.

They state that soon thereafter the court record could not be found and that they were told that the Judicial Service Commission was carrying out a "record indexing and restructuring exercise". They allege that it was in May 2012 B that their legal practitioners managed to access the record only to discover that the estate had been wound without reference to the Agreement. They also discovered that there was by then a response in the record to their quest to remove the executrix, advising them to go by way of court application. The gist of their claim is that the Agreement that they entered into is a C binding one. There being only one asset in the estate, the matrimonial home, they argue that from their reading of the Deceased Estates Succession Act [*Chapter 6:02*], the home cannot be considered as constituting free residue for inheritance by the surviving spouse only. They say they, too, as children are entitled to inherit if there is only one asset.

Regarding the marriage, the first respondent on the other hand says that he D started living with the late Nester in 1993 when they were lodging together elsewhere. He says he customarily married her in 1995 before solemnising a civil marriage on 17 February 1997. Regarding the property in dispute, his testimony is that they built the house in question together between 1996 and 2001. As for the Agreement that he is said to have entered into and E which the applicants seek to declare as effectively cast in stone, his version of events is that following his wife's death he received threats of violence and eviction from the first applicant and his uncle. He says he was force marched to the applicants' lawyer's office where he was made to sign the document in question or face the risk of losing the property altogether. He F says that, as a "weak unsophisticated and defenceless old man", he had no choice but to comply. When the family met with the second respondent, the executrix, he says he made it clear it was not his intention to sell the house or donate his interest to third parties. He says he also undertook to pay the estate's expenses to avoid the sale of the house. It is his standpoint G that the Agreement sought to circumvent the provisions of the Deceased Estates Succession Act. He says that it was following his protestations that the executrix distributed the estate according to the law, whereby he received a priority right to the matrimonial property. His argument is also that the applicants have misunderstood the meaning of "free residue" and H are misinterpreting the provisions of the applicable Act.

Tsanga J

The applicable law on intestacy A

Where a party dies intestate and had a civil marriage, the Deceased Estates Succession Act [*Chapter 6:02*] basically kicks in to act as the deceased's substitute will, as it were. It recognises the rights of the surviving spouse to inherit, as well as those of the children, if any. In the absence of children, the blood relatives who are entitled to inherit are also spelt out. B

Noteworthy is that its central point of departure in distribution of the intestate estate is whether or not there is a surviving spouse. If so, their share is prioritised in inheriting from the free residue of the estate. Where the estate has excess assets after the surviving spouse has received what is mandated by the law, then the spouse, together with the children, are accorded certain C stipulated legacies. The stipulated legacies are dependent on whether a party is married in or out of

community of property. In the present case the parties were married out of community of property. The Act provides as follows in relation to parties married out of community of property:

> **"3 Entitlement of spouse who dies intestate**
>
> Subject to section *four*, the surviving spouse of every person who, on or after 1st April 1977, dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased according to the following rules –
>
> (a) …
>
> (b) if the spouses were married out of community of property and the deceased spouse leaves any descendant who is entitled to inherit *ab intestato,* the surviving spouse of such person shall –
>
> (i) be entitled to receive from the free residue of the joint estate as his or her sole property the household goods and effects in such estate
>
> (ii) succeed in respect of the remaining free residue of the deceased spouse's estate to the extent of a child's share or to so much as does not exceed the specified amount, whichever is greater.
>
> (c) …"

In terms of additional mandatory entitlements due to the surviving spouse apart from the above, s 3A deals squarely with the inheritance of the matrimonial home and household effects. It is couched as follows:

> "The surviving spouse of every person who, on or after the 1st November, 1997, dies wholly or partly intestate shall be entitled to receive from the free reside of the estate –
>
> (a) the house or other domestic premises in which the spouses or the surviving spouse, as the case may be, lived immediately before the person's death; and

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> (b) the household goods and effects which, immediately before the person's death, were used in relation to the house or domestic premises referred to in paragraph (a);
>
> where such house, premises, goods and effects form part of the deceased person's estate."

The estate is distributed unencumbered by debts, hence the reference to "free residue", which refers to that which is paid once all debts owed by the estate have been settled. That the primary thrust of the Act is to start off by being spouse centred is clear from the above provisions. A spouse inherits household goods and effects. He or she also inherits the domestic premises. If the estate still has residue after this has been done, then the spouse together with the children inherit specified statutory legacies. Inheritance by the children therefore clearly depends on the size of the estate. Where the marital home is the only asset as in the present case then the law is clear that it should go to the surviving spouse.

The context within which a particular piece of legislation is passed is useful in giving guidance to the import of that legislation. The inclusion of s 3A to the Deceased Estates Succession Act under general law came in 1997 at the same time that a swathe of changes were effected to the Administration of Estates Act [*Chapter 6:01*] to make inheritance under customary law more spouse and child centred in the case of disputes. This followed extensive research by the Women and Law in Southern Africa (WLSA) in Zimbabwe as well as lobbying by activists in light of experiences with the then applicable law under customary law in particular. The law governing customary estates focused then on the single male heir and also excluded widows from inheriting under customary law. See *Murisa* v *Murisa* 1992 (1) ZLR 167 (S). Moreover, property grabbing, especially of the marital home by relatives, was prevalent. Female children were also not on an even keel with their male siblings. See *Mwazozo* v *Mwazozo* S-121-94; *Magaya* v *Magaya* 1999 (1) ZLR 100 (S).

Although under general law widows were clearly better off, in the sense that following amendments to the common law position in 1977 that excluded wives from inheriting, they were at least entitled to household goods as well as a stipulated legacy from a deceased spouse's estate. In effecting s 3A, the aim was to ensure that the surviving spouse, whether male or female, and whether married under general law or customary law, received the matrimonial home. The WLSA research, Dengu-Zvogbo et al *Inheritance in Zimbabwe : Law, Customs and Practices* (Harare, Sapes Trust, 1996) p 295, recommended as follows with regard to the matrimonial home in monogamous marriages:

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> "We recommend that the surviving spouse be designated the sole heir/ess to A the deceased's rights in the matrimonial home, in the same way that he/she is the sole heir/ess to the household goods and effects. This should be the case regardless of whether the parties were married under general law o customary law. In either type of marriage, the surviving spouse should be the sole and exclusive heir to the matrimonial home".

In seeking the amendment of existing laws, the intention was clearly that B the spouse should inherit the matrimonial home – understandably, to allow for a continuation of the life the spouse was accustomed to living. This was more so in light of the fact that the benevolence of the family could no longer be assumed, as evidenced by reports of property grabbing. The heir under customary law, in particular, who was supposed to act as a father figure and protect the widow had increasingly, in modern society with its C money based economy, become a dying breed. More often than not, his own interests became paramount. In any event, women had by then made significant strides in society in terms of pressing for the recognition of both their economic and non-economic contributions in the marital union and in present day society. They rightly expected to benefit from the sweat of their D brows instead of being cast aside as insignificant "others" upon the death of a spouse. This, then, is the underlying context within which s 3A came to be effected in 1997 since many people at risk of being rendered homeless were also now contracting their marriages according to general law, given its popularity with those of the Christian faith in terms of its monogamous thrust.

Essentially, then, the law is clear. Where the house is the only asset it goes E to the surviving spouse, together with the household goods and effects. The exclusion of the applicants from inheritance does not arise from a misapplication of the law by the executrix but from the reality of what the present law provides. Furthermore, the exclusion arises from what is in essence available for distribution within the prevailing economic context where more often than not, the matrimonial home is the only meaningful F asset of the estate.

The applicants' purported reading of s 3A, in particular to infer that where the house is the only asset it must be sold and that the spouse together with the children must inherit a share, is not supported by a reading of the applicable provision nor by the history and context that led to its adoption. It must G also be borne in mind that this is not a divorce where courts are enjoined to evaluate the extent of each spouse's contribution. It is an inheritance matter, where the law is undoubtedly more definitive in mandating how the family home is to be dealt with as compared to the provisions under the Matrimonial Causes Act [*Chapter 5:13*] which deal with divorce. H

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Furthermore, this present position in our domestic laws on rights of the surviving A spouse accords with the requirements of our Constitution as well as the spirit of those regional and international instruments to which we are a party. See, for example, s 56 of the new Constitution regarding equality and non-discrimination between the sexes and s 25 on protection of the family. Among regional instruments, also of relevance is art 21(1) of the Protocol to B the African Charter on Human and People's Rights on the Rights of Women in Africa, which zeroes in on the right to remain in the matrimonial home by the widow in particular. Article 2 of Convention on the Elimination of All Forms of Discrimination Against Women is also relevant in terms of the State taking measures to pass laws that advance equality between men and women.

Analysis of the beneficiaries' distribution agreement C

The applicants also place heavy reliance on the Agreement entered into with the first respondent, which they say he cannot resile from. In support of their contention, they cite s 5 of the Deceased Estates Succession Act which deals with agreements on alternative division or direction to sell property devolving in undivided shares. The relevant part of this provision is couched as follows:

> "(1) Where as a result of a distribution in intestacy any property devolves upon any heirs D in undivided shares –
>
> (a) the heirs may agree upon an alternative division of property, and such agreement shall be binding on the executor;
>
> (b) any one or more or all of them may direct in writing that he wishes or they E wish, as the case may be, the property be sold and the proceeds divided amongst the heirs, and such direction shall

be binding on the executor and all the heirs.

(2) …" (my emphasis).

The issue, in my view, is whether any property devolved on the heirs in undivided shares upon which they could then enter into an alternative F distribution arrangement among themselves. In the present case, there was no excess residue to talk of from which the children could inherit anything on intestacy. As stated, what determines whether the children inherit anything is the net size of the estate. With the house being the only asset, and with the law clearly stating that the matrimonial home is to be inherited by the G surviving spouse, I do not think that there was a valid basis upon which the disputed Agreement as understood by the applicants was entered into. Granted, there are many cases in intestacy which do not require the court's intervention, where families enter into their own arrangements and a spouse agrees to forgo a legitimate entitlement despite what the law may provide. Where there are no disputes and the agreements are freely and voluntarily H entered into, then no problems arise. There are also those cases where the

parties with something to inherit genuinely enter into an agreement but later A change their minds regarding sticking to that agreement. Such cases then often involve the court's intervention where a dispute arises to determine whether the agreement can be set aside for valid reasons. But in the present case the first respondent challenged whether there was ever genuine consent from the onset, on the basis that he was ambushed into signing the supposed Agreement. What further complicates the picture in the face of the challenge B is that applicants had no property due to them as the net estate did not generate sufficient residue.

Clearly, the applicants are understandably aggrieved that the property has gone to the surviving spouse, who is their step-father. This is so, given that chances of inheriting from him as they are not his children are unlikely in C the absence of a will. The issue of a step parent inheriting the matrimonial home to the exclusion of the deceased's children has indeed begun to generate disputes following the amendment of the law under both general and customary law. This is particularly so, for instance, in situations where a parent remarries following the death of a former spouse with whom he had acquired the property. In *Chimhowa & Ors* v *Chimhowa & Ors*D 2011 (2) ZLR 471 (H) at 476C-G Chiweshe JP stated as follows in deciding to award the home to the deceased's children and to grant the subsequent spouse a usufruct over the property:

> "In my view the legislature intended to protect in the case of widows that property acquired during the subsistence of their marriage to the deceased persons. This E protection benefitted not just the widows but their minor children as well. I do not perceive the legislature's intent to be to extend this protection and privilege to persons outside the marriage within which such property might have been acquired. To impute that kind of interpretation would lead to serious absurdities in the application of the law. For example A marries B. They acquire jointly what may be termed matrimonial property. They have children. A, the husband, dies and in terms of the law B, the wife and surviving spouse, is awarded the F matrimonial property. Thereafter B contracts another marriage with X, the second husband. She dies and X the second husband and surviving spouse, inherits the matrimonial property that B inherited from A, at the expense of A and B's children in that marriage. Clearly the children will have been disinherited of their parents' property. They may as a result end up in the street particularly if X sells the property and converts the proceeds to his own selfish ends. In the G result the noble intention of Parliament to keep the property within the family for the benefit of the surviving spouse and the children will have been subverted".

He concluded as follows at 477B-D:

> "For these reasons I would conclude that the protection afforded surviving spouses is, in terms of inheritance, limited to those assets that were acquired during the course and subsistence of that spouse's marriage to the deceased person whose H

> estate is under distribution. In particular, surviving spouses cannot by right claim any A right to matrimonial property acquired outside their own marriage. To allow them to do so would lead to the absurdities alluded to above. It would be against public policy and conscience to deprive the children of deceased persons the common law right to inherit from their parents merely because at some stage the surviving parent had remarried. If that had been what Parliament intended to do it would have expressly so provided. I am satisfied that Parliament intended B only the consequences I referred to earlier.

> In my view, it is of paramount importance that the legislature revisits the relevant legislation in order that its intention be expressed in clearer terms than is presently the case."

The *Chimhowa* case, however, is distinguishable from the facts in the present C case in a material respect. The first respondent averred that, although his deceased wife was indeed granted the stand before they married, they built the house together. Although the applicants state that their mother completed the house before the marriage, the first respondent attached evidence confirming that that the stand was allocated to his deceased spouse in June 1995. He also attached evidence in the form of the written record of what he paid as D*lobola* in December 1995 as signed by those who attended. The proximity in time between the acquisition of the stand and the marriage between the parties leads to the reasonable inference that indeed the first respondent's averment that the house was built as a joint endeavour by both of them as their matrimonial home is true.

Moreover, the applicants lay specific emphasis on the Agreement entered into by E the parties regarding the distribution of the estate. The applicants draw support for their standpoint from *Mashakada* v *Master of the High Court & Anor* 2001 (2) ZLR 311 (H), where the court held that an agreement between beneficiaries which they had adopted, following their father's will having been declared invalid, stood to be honoured. Again, this case F is distinguishable from the case before me, in the sense that the reason the court gave for declaring the agreement binding was the absence of a valid reason why the agreement should be cancelled. Another point of difference with the presence case is that the children in the *Mashakada* case did stand to inherit something in terms of the will that they sought to simulate in their agreement. In other words, there was property to be inherited by them G whereas in the case before me this is not the case due to the size of the estate.

The decision in the *Mashakada* case suggests that if the reason for resiling is a legitimate one, then the court will take this into account. The court held in that case that there was no good reason why the applicants sought to resile from an agreement that they had freely entered into. In the case before me, H the first respondent withdrew because he says he was pressured into signing

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the document, so technically speaking there was no agreement in the legal A sense of the word.

The applicants also cite *Ponter* v *Ponter* 2000 (1) ZLR 336 (H), where a spouse's right to remain in the matrimonial home was successfully challenged by the stepchildren. However, that case is distinguishable from the present case in that the death leading to the distribution of the estate in that case, occurred in 1991 when s 3A was not yet in place. B

In advancing their case, the applicants also seek to rely on the report written by the Master in terms of r 248 where such report is deemed necessary or is required by the court in cases involving deceased estates or persons under some legal disability. The report done is dated 31 May 2011. The grievance is that, in later confirming the estate in 2012, he failed to adhere to what he C had recommended in this report. He had concluded and recommended as follows in that report:

> "The first respondent is the surviving spouse in terms of the general law hence entitled to inherit the matrimonial home. I however share the same view with the applicants that where parties entered into a family agreement, it becomes binding at law and one cannot seek to retract it without the court's consent and or D the other part (*sic*). The aforesaid settlement until annulled by the court remains valid and the estate should be distributed in terms thereof. As the estate was complete with all formalities done it is my recommendation that the executrix draws an equitable distribution account and relodge for authorisation. Removal of the executrix will not assist either part (*sic)* as the estate will be burned (*sic)* with double taxation in respect of executor's fees." E

The Master later reneged on this by confirming the executrix's account in terms of the Deceased Estates Succession Act.

But perhaps more significantly, the agreement that s 5 of the Deceased Estates Succession Act has in mind relates to reshuffling assets the beneficiaries would have been entitled to. As already stated there were none in this case. F The situation regarding redistribution agreements among heirs is one that is captured succinctly by N J Wiechers and I Vorster *Administration of Estates* (LexisNexis Butterworths, Durban, 1996 Issue 1) at 5-16, albeit with reference to the South African position. As they explain:

> "Where the beneficiaries are all majors and it is clear that the purpose of the G agreement is merely to *shuffle assets which would in any case have fallen to them,* no problems would normally be experience in obtaining the necessary permission from the Master. Even when the persons concerned do not receive an

equal share, the Master accepts that they have legal capacity and are therefore capable of protecting their own interests. The Master is not concerned with the issue of whether a redistribution agreement is lawful. His duty is to examine the agreement as part of the executor's account …" (my emphasis). H

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There was evidently a contradiction in the Master's actions in conceding in one A breath that the matrimonial property belongs to the surviving spouse and in the same breath ordering a distribution of that very asset against protest by the party legally entitled to it. It is therefore understandable faced with the reality that no assets fell to the beneficiaries due to the size of the estate, the appropriate course of action on the part of the Master was to prioritise B the rights of the surviving spouse to the matrimonial home as required by the Deceased Estates Succession Act. This is what the Master ultimately did.

Conclusion

In the final analysis, if the Deceased Estates Succession Act as amended in 1997 to effectively prioritise the rights of the surviving spouse to the matrimonial C home is working to the disadvantage of children, in particular stepchildren, it is for our legislature to effect the necessary balance. However, ideally this would have to be against the backdrop of detailed research in the same vein that the amendment itself was introduced – in light of extensive research and lobbying by academics and activists alike of lived realities and what people wanted in this area of the law. Whilst a robust interpretation of the D law as occurred in the *Chimohwa* case, such as granting the surviving spouse a life usufruct for example, can clearly bring justice to some cases, it is not in all cases where the facts will fit the glove. Different circumstances will present different challenges. It is for this reason that striking the necessary balance between the rights of the surviving spouse and those of the children is something that should be effected by the legislature for long term equity E and stability in this area of the law. Such action was also aptly recommended in the *Chimhowa* case.

The respondents sought a dismissal of this application on a higher scale on the basis that it is plainly an abuse of court process given that the law is clear on the inheritance of the matrimonial home by the surviving spouse. F However, I am of the view that though it is the case, this matter has provided an opportunity for further engagement with the existing law in situations involving a spouse and step children thereby adding to a growing chorus on possible legislative reform. Also, given the recognition of beneficiary agreements in some circumstances, the quest for the court's intervention on whether this case fell within the same ambit as those where such agreements G have been embraced was not as entirely frivolous as it appeared at first glance.

In the circumstances, the application is dismissed with costs on the ordinary scale.

Hungwe & Partners, applicants' legal practitioners

Danziger & Partners, first and second respondents' legal practitioners H

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[zRPz]NANHANGA v CHALMERS & ORS 2014 (2) ZLR 486 (H)

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Citation	2014 (2) ZLR 486 (H)
Case No	Judgment No. HH-545-14
Court	High Court, Harare
Judge	Dube J

Heard 29 July and 4 September 2014; *CAV*

Judgment 8 October 2014

Counsel *T Mpofu*, for the applicant
L Uriri, for the first respondent

Case Type Court application

Annotations No case annotations to date

Flynote

Practice and procedure – *execution – sale – sale by private treaty – price* C *reasonable and sale confirmed by Sheriff – judgment debtor subsequently paying off debt – sale not thereby cancelled*

Headnote

The first respondent was the registered owner of a property which was sold D at a public auction in execution of a judgment granted against the first respondent. The applicant was the highest bidder. The first respondent objected to the sale on various grounds, including the price obtained. The Sheriff did not determine the objections, but put the property up for sale by private treaty. The applicant once more was the highest bidder and his bid was accepted. The Sheriff confirmed the sale and the transfer E of the property into the applicant's name was ordered. About a month after the Sheriff had confirmed the sale, the first respondent's legal practitioners wrote to the applicant advising that the first respondent had managed to satisfy the judgment debt and notifying him that the transfer of the property had been reversed. The Sheriff then wrote to the F first respondent and indicated that the confirmation of the sale was done in error. The applicant sought an order setting aside the cancellation of the sale and for the transfer of the property to him.

Held, that sales in execution by private treaty are governed by r 358 of the High Court Rules 1971. Under r 358(1) the Sheriff may, at the outset, sell a property by private treaty if he is satisfied that the price offered G is fair and reasonable. He requires the consent of all interested parties, including the judgment debtor. The court may also sanction the sale. The provision was inserted with the judgment debtor in mind. The debtor has an interest in ensuring that the sale has maximum benefit and fetches the highest possible price as the residue will be paid to him. He is required to H

be consulted so that his interests are secured. He may bring a buyer with a A better offer if he is in a position to do so. His consent must be express.

Held, further, that the second situation is where a sale by public auction has taken place and the Sheriff is not satisfied that the price offered is fair and reasonable. The Sheriff has an option to sell the property by private treaty so that he ensures that the sale realizes the best price possible. B The Sheriff may opt for a private sale at any stage. He does not have to be requested by anyone to resort to a private treaty sale, nor does he need the consent of the judgment debtor or any other interested person. Where the Sheriff is not satisfied with the price offered at the private treaty sale, he may put the property up for sale by public auction again.

Held, further, that where a sale by public auction is held and is subsequently C aborted and a sale by private treaty takes place and is confirmed, the objections to the public sale fall away and cannot stand in the way of confirmation of the sale by private treaty simply because the earlier objections were not determined at the time the public sale was in existence. The Sheriff had no grounds for cancelling his confirmation D of the private sale. In any case, once the sale was confirmed, the Sheriff was *functus officio*.

Held, further, that where a debtor manages to settle the debt after the sale but before confirmation of the sale by the Sheriff, he may apply to court to have the debt cancelled. The odds are in his favour at that stage and this is a good ground for having the sale set aside. Where the sale has been E confirmed by the Sheriff, the sale is no longer conditional. The transaction becomes *perfecta* and the sale is sealed. The purchaser acquires rights which can only be upset by a court of law. The approach of the courts is that judicial sales are not to be readily interfered with after they have been confirmed. The fact that the judgment debtor has subsequently satisfied the judgment debt does not automatically invalidate the sale. F Here, the price was reasonable in the circumstances and there was no basis for cancelling the sale.

Cases referred to

Barclays Bank of Zimbabwe Ltd v Sheriff of Zimbabwe & Anor G 2000 (2) ZLR 143 (S)

Lalla v *Bhura* 1973 (2) ZLR 280 (G)

Mapedzamombe v *CBZ* 1996 (1) ZLR 257 (S)

Munyoro v *Founders Bldg Soc & Ors* 1999 (1) ZLR 344 (H)

Zvirawa v *Makoni & Anor* 1988 (2) ZLR 15 (S) H

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Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), rr 258, 358 & 359

Case information

T Mpofu, for the applicant

L Uriri, for the first respondent

Judgment

Dube J: This application was brought in terms of r 359 of the High Court B Rules, 1971 ("the Rules"). The applicant seeks an order for the setting aside of the second respondent's cancellation of the sale of stand No. 5 Angela Close, Chisipite, Harare, ("the property"), and transfer of the property into his name.

The background facts to this dispute are is as follows. The first respondent C is the registered owner of the property in issue. On 3 May 2013 the property was sold by public auction by the fourth respondent on the instructions of the Sheriff of the High Court in execution of a judgment in case no. HC12160/11 granted in favour of the third respondent. The applicant attended the auction and made a bid for the property for $275 000. The bid was accepted as the highest bid. On 14 May 2013, the first respondent lodged objections to the D public sale on the basis of the following grounds:

(a) that the parties had agreed to sell the property by private treaty;

(b) that the property was sold for an unreasonably low price;

(c) that the sale was not adequately advertised;

(d) that the property was sold despite that the movable property had not E been exhausted.

The objections were filed within the prescribed time. The Sheriff put the property up for sale by private treaty. The applicant once more expressed interest in the property and offered to pay $320 000. No higher offer was received and the applicant's bid was accepted around 13 June 2013. The F Sheriff confirmed that the applicant was the highest bidder in the sum of $320 000. The second respondent, the third respondent's legal practitioners, were instructed by the Sheriff to transfer the property into the applicant's name. On 11 July 2013 the second respondent wrote to the applicant advising that the first respondent had managed to satisfy the judgment debt and notifying him that the transfer of the property had been reversed. On 17 July 2013 G the Sheriff wrote to the first respondent and indicated that the confirmation of the sale was done in error and set down the matter for hearing before the Sheriff for 7 August 2013.

The applicant raised four points in argument. Mr *Mpofu* argued that, once the Sheriff confirms a sale, he loses the jurisdiction to set it aside and hence H

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the setting aside of the sale after confirmation of the sale was a nullity. The A second point relates to the acceptance of payment of the debt by the second respondent after the confirmation of the sale. He submitted that it was improper for the second respondent to accept payment of the debt from the judgment debtor after confirmation of the sale by the Sheriff, as the Sheriff cannot reverse his decision once he has confirmed a sale. Mr *Mpofu*B also submitted that once the sale is confirmed, a judgment debt ceases to exist and is extinguished, hence the judgment debtor could not purport to settle the debt after the sale had been confirmed, and that the only time that a judgment debtor is able to settle the debt is between the incurring of the liability and the time of the sale. The applicant further submitted that the second respondent had no legal authority to cancel the sale. He contended C that a judgment creditor or debtor does not have the authority to cancel a sale. He insisted that the reversal of the sale by the second respondent is invalid.

Mr *Mpofu's* last point relates to the objections filed with respect to the public sale. He submitted that the sale challenged through the objections by the respondents is the first public sale of 3 May 2013 and that the respondent D failed to lodge any objections with respect to the second private sale. The applicant contended that once the private sale took place, the objections to the first sale fell through and there was no need to resolve the objections. That there being no dispute in relation to the sale by private treaty, the Sheriff could go ahead and confirm it. The applicant contends that the sale by private treaty remains valid and binding and the property ought to be E transferred to him.

The first respondent is defending the application. He asserts that the sale was conducted in an irregular manner. Mr *Uriri,* who represented the respondents, conceded that a judgment creditor or debtor does not have the power to cancel a sale. He contended, however, that the sale in issue was not F cancelled by the judgment creditor or debtor but by the Sheriff and that this was after the judgment debtor had written to the Sheriff requesting him to do so. He contended that there was not two sales in terms of which two sets of objectives were required. He submitted that for as long as the objections filed with respect to the public sale had not been determined by the Sheriff, the objections remain alive and there could be no further proceedings until G the objections are determined. He argued that there was never a sale in terms of r 358, thus a sale by private treaty, in that r 358 (1) was not complied with as the judgment debtor did not consent to the holding of the private sale. He contended further that, in the absence of nothing to indicate that the Sheriff gave the direction that a private treaty sale be held, the subsequent sale H becomes unsanctioned. He refuted that a judgment debt ceases to exist once

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a sale was confirmed. He submitted that a judgment debt is satisfied when A the judgment creditor has the money in his hands and that the confirmation of a sale does not discharge the debt and that the judgment debtor is at large to make payment before confirmation and that there was no confirmed sale in this case as the confirmation was set aside.

The conduct of judicial sales is governed by Order 40 of the Rules. The B mandate of the Sheriff in terms of this Order is to conduct a sale by public auction. The Sheriff also has an option to conduct sales by private treaty in terms of either r 258(1) or (2). Two sales were conducted with respect to this property. The first sale was a sale by public auction. After the acceptance of the applicant's bid at $275 000 the judgment debtor filed objections to the sale. These were not determined. The filing and determination of objections C is governed by r 359. A judicial sale may be set aside on the grounds that the sale was improperly conducted, the property was sold for an unreasonably low price or any other good ground. Rule 359(1) reads as follows:

> "**359. Confirmation or setting aside of sale**
>
> (1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that – D
>
> (a) the sale was improperly conducted; or
>
> (b) the property was sold for an unreasonably low price;
>
> or on any other good ground."

This rule applies to both private and public judicial sales. The rule allows for objections and these are required to be lodged within 15 days from the date E on which the highest bidder was declared to be the purchaser or the date of the sale in terms of r 359(2). The Sheriff is then expected, in terms of r 359 (7), to hear the objections and either confirm or cancel the sale or make such order as he deems fit. A party aggrieved by the decision of the Sheriff may make an application to court for the setting aside of the decision in terms of r 359(8). The court, in dealing with such an application, may set aside a F sale, confirm or vary the Sheriff's decision or make such other order as the court considers appropriate in the circumstances.

After the objections to the public sale had been filed, the Sheriff did not determine the objections but went on to conduct a sale by private treaty. Sales by private treaty are provided for in r 358. Rule 358 reads as follows: G

> "**358. Sale otherwise than by public auction**
>
> (1) Where all persons interested, including the judgment debtor, consent thereto or otherwise with the consent of a judge, the Sheriff may sell immoveable property attached in execution otherwise than by public auction, if he is satisfied that the price offered is fair and reasonable and that the property is unlikely to realize a larger sum by a sale at public auction. H

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> (2) If, after a sale by public auction has taken place, the Sheriff is not satisfied that the A highest price offered is reasonable as provided by rule 356, the Sheriff may sell the property by private treaty subject to the conditions of sale for such price, being greater than the highest offer made at the public auction, as he deems fair and reasonable. If the Sheriff is unable to sell the property by private treaty at such price, it may again be offered for sale by public auction."

The import of this rule is that the Sheriff may, at the outset, sell a property by B private treaty if he is satisfied that the price offered is fair and reasonable. He may do this in terms of r 358(1). He requires the consent of all interested parties, including the judgment debtor. The court may also sanction the sale. The provision was inserted with the judgment debtor in mind. The debtor has an interest in ensuring that the sale has maximum benefit and fetches C the highest possible price as the residue will be paid to him. He is required to be consulted so that his interests are secured. He may bring a buyer with a better offer if he is in a position to do so. His consent must be express.

The second situation covered under r 358(2) occurs where a sale by public auction has taken place and the Sheriff is not satisfied that the price offered is D fair and reasonable. Rule 358(2) does not require the consent of the judgment debtor to hold a private treaty sale. The Sheriff has wide discretionary powers conferred upon him in terms of this rule. He has an option to sell the property by private treaty so that he ensures that the sale realizes the best price possible. The Sheriff may opt for a private sale at any stage. Rule 358(2) gives the Sheriff unfettered powers. He does not have to be requested by anyone to E resort to a private treaty sale. The Sheriff does not require the consent of the judgment debtor or any other interested person to hold a private treaty sale. Where the Sheriff is not satisfied with the price offered at the private treaty sale, he may put the property up for sale by public auction again.

After the public sale, the Sheriff proceeded and put the property up for sale F by private treaty. Rule 358(2) applies to the circumstances of this case. The sale by private treaty was held on the instructions of the Sheriff. He instructed the auctioneers to advertise and carry out the sale. Various correspondences on record reveal that the Sheriff sanctioned the sale. The Sheriff has not disputed that he sanctioned the sale by private treaty. The applicant submitted that the second sale was conducted after the third respondent G had requested the Sheriff to sell the property by private treaty. There is no formal consent on record disclosing that the first respondent consented to the sale. An agreement to hold a sale by private treaty is confirmed in the objections themselves, where the first respondent speaks to an agreement to sell the property by private treaty. The sale by private treaty was resorted H to after a sale by public auction had taken place and after which the Sheriff

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Dube J

was not satisfied that the highest price offered was reasonable. The Sheriff A was at large regarding the way forward. He obviously had regard to the first respondent's objections in coming up with his decision. In fact, this step resultantly worked out to the best advantage of the judgment debtor, as

the Sheriff raised more money than at the public sale. His discretion to go by way of a private treaty cannot be impeached as he did not exercise his discretion capriciously. The consent of the judgment debtor was not a requisite to the B holding of the sale by private treaty.

Each type of sale is distinct and attracts its own objections at the different stages at which each sale is conducted. Once the Sheriff decided to go the route of the sale by C private treaty, the public sale became aborted. The objections to the public sale were superseded by the process of the sale by private treaty. The Rules do not make any provision governing what is to happen to objections filed where the Sheriff decides to resort to a different or alternative type of sale. What the Sheriff does with the objections is entirely in his discretion. The Sheriff seems to have been swayed by the judgment debtor's objection, calling for a sale by private treaty sale to resort to such sale. It appears that in resorting to the sale by private treaty, the Sheriff tried D to cure most of the objections raised by the judgment debtor. There was no useful purpose in the Sheriff determining the objections when the sale was aborted. Once the Sheriff decided, in his discretion, to resort to a sale by private treaty, determining the objections would have amounted to a purely academic exercise. He was only required to determine the objections if the sale by public auction was proceeding. Once a private treaty sale took place, E was not objected to and was confirmed, the first sale by public auction fell through. It was no longer necessary to resolve the objections to the public sale. I do not think that the drafters of the Rules, in coming up with r 358(2), intended it to be that where a Sheriff decided to resort to a sale by private treaty, objections to the public sale would remain alive. It must be accepted F that the basis of the challenge to the subsequent sale may be different. The objections filed with respect to the public sale are not relevant to this sale as they relate to a different sale, are not applicable to the sale by private treaty and cannot be used as a basis for challenging the latter sale. Where a sale by public auction is held and is subsequently aborted and a sale by private treaty precedes it and is confirmed, the objections to the public sale G fall away and cannot stand in the way of confirmation of the sale by private treaty sale simply because the earlier objections were not determined at the time the public sale was in existence.

After conducting the sale by private treaty, the Sheriff confirmed the sale without objection. I do not find fault with the Sheriff's decision to confirm H

Dube J

the sale as at that stage no objections against the private sale had been filed. A That sale remains unchallenged as no objections were filed in opposition to its confirmation. I find that the private sale was conducted in accordance with laid out procedures.

Some discourse followed after the confirmation. The judgment debtor made the criticism that his objections to the public sale had not been determined, B resulting in the Sheriff reversing his decision to confirm the sale by private treaty. The Sheriff's reversal of his decision confirming the sale and subsequent cancellation of his confirmation of the sale resulted from the Sheriff's misconception that he had erred in failing to determine the objections filed. He went into panic mode, lost his nerve and cancelled his confirmation of the C sale by private treaty. He wrote to Mutumbwa and Mugabe legal practitioners on 17 July 2013 pointing out that the confirmation of the sale had been done in error. His reason is that the Sheriff made an error by confirming the sale in the face of objections. The confusion did not end there. In a letter dated 7 July 2013 he advises that the matter has been set down for 7 August 2013 for hearing, presumably for determination of the objections. The Sheriff D completely lost it. The role of the Sheriff concerning determination of objections filed in a sale comes to a close after his decision confirming or cancelling the sale in terms of r 359(7). Where a Sheriff has confirmed the sale, he has no authority to set it aside or cancel it. He becomes *functus officio* and loses the jurisdiction to set the sale aside. The Sheriff acted outside his E powers when he cancelled the sale after he had confirmed it. His actions are a nullity and amount to nothing. The private treaty sale stands confirmed until set aside by a court in terms of r 359(8). The Sheriff's attempt to determine the objections after he had confirmed the sale was ill-advised.

The judgment debtor avers that he has since settled the judgment debt .It is not clear from the papers if he indeed did so. Correspondence available F shows that he did so after confirmation of the sale by the Sheriff. The second respondent advised the applicant of the settlement of the debt by the first respondent on 11 July 2013.The applicant had already paid the bid price and the Sheriff had confirmed the sale on 14 June 2013. The position of a judgment debtor who subsequent to the sale ,

satisfies a judgment debt was G dealt with in *Mapedzamombe* v *Commercial Bank of Zimbabwe* 1996 (1) ZLR 257 (S) where Gubbay CJ remarked as follows,

> "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura* 1973 (2) RLR 280 (G) at 283A-B. H Once confirmed by the Sheriff in compliance with r 360, the sale of the property

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> is no longer conditional. That being so, a court would be even more reluctant to A set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran* v *Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at p 6-7."

See also *Barclays Bank of Zimbabwe Ltd v Sheriff of Zimbabwe & Anor* 2000 (2) ZLR 143 (S).

The same approach was followed in M*unyoro* v *Founders Building Society & Ors*B 1999 (1) ZLR 344 (H). The case involved a debtor who managed to settle the debt after the sale in execution but before confirmation of the sale by the Sheriff. The purchaser had failed to have the property transferred into his name by the time of the challenge. The Sheriff was advised of the fact that the debtor had managed to settle the debt before confirmation of the sale but proceeded with confirmation of the sale. The court cancelled the sale C which had been subsequently confirmed on the basis that the sale was still a conditional sale at the time the debt was satisfied. The fact that the purchaser had failed to transfer the property into his name worked against him.

The position at law is that a judicial sale remains conditional until it is confirmed by the Sheriff. Where a debtor manages to settle the debt after D the sale but before confirmation of the sale by the Sheriff, he may apply to court to have the debt cancelled. The debtor is usually in the property at that stage. The odds are in his favour at that stage and this is a good ground for having the sale set aside. Where the sale has been confirmed by the Sheriff, the sale no longer remains conditional; it becomes more onerous to get the E sale cancelled. After confirmation of a sale by the Sheriff, the transaction becomes *perfecta* and the sale is sealed. The purchaser acquires rights which can only be upset by a court of law. The approach of the courts is that judicial sales are not to be readily interfered with after they have been confirmed. This approach was aptly summarized in the head note of *Lalla* v *Bhura* 1973 (2) ZLR 280 (G) as follows: F

> "Courts should not be over-ready to set aside sales in execution under Order 40, rule 359 of the High Court Rules, 1971, as this might have a profound effect upon the efficacy of this type of sale as would be purchasers might be deterred from attending and bidding if they considered that their efforts might easily be frustrated by an application under r359 and, as a general rule, it should be accepted that a court will not readily interfere in these matters" G

The consideration is that the practice of lightly setting aside judicial sales discourages prospective purchasers from engaging in judicial sales and it reduces public confidence in the system. The fact that the judgment debtor has subsequently satisfied the judgment debt does not automatically invalidate the sale. H

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Dube J

The judgment debtor settled the debt after confirmation of the sale. The sale A was no longer conditional. Once the sale in execution was confirmed, the judgment debtor could not just decide to settle the debt and expect that the sale would be cancelled. The second respondent, the judgment creditor's legal practitioners, also fell into the error that it could cancel the sale after the judgment debtor had settled the debt. Once the applicant had paid the B purchase price and the sale was confirmed, the attempt at cancelling the sale amounted to closing the stables after the horse has bolted. Neither the judgment creditor nor the judgment debtor or their representatives are vested with the power to cancel or reverse a sale. Mr *Uriri*'s concession on this point was properly made. Cancellation or confirmation of a sale is the domain of the Sheriff and the court. The second respondent's purported cancellation C of the sale after the debtor reportedly paid the creditor is therefore outside the law and a nullity. The sale stands.

I have been asked to consider whether the judgment debt ceases to exist after the sale in execution has been confirmed. The role of the Sheriff in judicial sales is representative in nature. In Herbstein

and van Winsen D*The Civil Practice of the High Courts of South Africa* 5 ed at p 1075, the authors remark as follows:

> "In selling the property at a sale in execution, the Sheriff does not act as the agent of the seller or the purchaser. At the sale a contract comes into existence between the Sheriff and the purchaser and the judgment creditor is not a party to that contract".

The Sheriff's mission is to collect the money owed to the judgment creditor. The E contract is between him and the purchaser. Payment of the purchase price concludes the contract and the Sheriff is required to deliver the property to the purchaser. Once the Sheriff is paid, the contract is sealed and the debt is extinguished. The judgment debtor is at that stage released from the debt. F In the absence of any objections, the confirmation is binding until set aside by the court.

The court considers that this sale must stand. The court has, in coming up with that decision, also considered that the bid price has not been shown to be an unreasonable sum. In the *Lalla* case *supra*, the court considered the meaning of an unreasonably low price and found that it is a price that is G substantially less than the market price and not merely a price which is not a reasonable price. In *Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S) the court held that the market price of a property lies between the highest and lowest prices which the property can reasonably be expected to fetch on the open market. Where a property is well advertised and an auction properly H conducted, the price realized becomes a good indicator of the market price

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of the property. The prices suggested in the valuation reports need to be A balanced against the price realized at the sale. The valuation reports submitted by the first respondent suggest the open market value of the property to be between about $420 000 and $550 000. The property was sold for $320 000 after it had been advertised twice. Offers ranging from $250 000 to $320 000 were received. The judgment debtor wanted $350 000. In coming up with the B decision whether or not this price is reasonable, one has to bear in mind that this is a forced sale and it cannot be expected to raise the same amount as in the case of a willing buyer willing seller. The court has also considered that the debtor was not able to bring in a buyer with a higher offer. The price was offered in "open competition at an auction sale, properly advertised and properly conducted". See the *Lalla* case *supra,* at p 385 for that remark. C There was no opposition to this bid. No good basis exists for challenging the bid price. The court is unable to find that the price is unreasonable and finds no basis for interfering with the Sheriff's decision.

The first respondent has not advanced sufficient reasons why this sale should not stand. The applicant is entitled to the order sought. The application is granted. D

In the result it is ordered as follows:

1. The second respondent's purported cancellation of the sale to the applicant of Stand 167A Chisipite Township measuring 4051 square meters in extent situate in the district of Salisbury and held by the first E respondent under Deed of Transfer No. 9180/01, is unlawful and is hereby set aside.
2. The second respondent shall, within five days from the date of service of this order, do the following:
   (a) deliver the original of Deed of Transfer No. 9180/01 and all other F documents in its possession necessary for the registration of transfer of the aforesaid immovable property to Sibanda & Partners to enable them to register into the name of the applicant; and
   (b) pay to Sibanda & Partners the sum of US$21 370 which was paid by the applicant in respect of transfer fees and stamp duty. G
3. The fourth respondent shall sign all the papers and take all steps necessary to pass transfer of the aforesaid immovable property into the applicant's name.
4. The fifth respondent shall register transfer of the aforesaid immovable property into the applicant's name pursuant to this order. H

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5. The costs of this application shall be borne by the second respondent on the A scale of attorney and client.

Sibanda and Partners, applicant's legal practitioners

Zinyengere Rupapa, firstrespondent's legal practitioners B

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[zRPz]TAYLOR-FREEME v SENIOR MAGISTRATE, CHINHOYI & ANOR 2014 (2) ZLR 498 (CC)

Citation	2014 (2) ZLR 498 (CC)
Case No	Judgment No. CC-10-14
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA & Cheda AJA
Heard	7 July 2011; *CAV*
Judgment	8 October 2014
Counsel	*A P de Bourbon SC*, for the applicant No appearance for the first respondent *T R Zvekare*, for the second respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 18(1) – right to protection of the law – failure by lower court to refer to Supreme Court matter which was neither frivolous nor vexatious – breach of applicant's rights – placing of accused person on remand,* D *trial or on his defence when the allegations and/or the evidence led do not constitute an offence – also a breach of s 18(1)*

Land – *gazetted land – occupation of – lawful authority to occupy – what constitutes – need for occupier to hold offer letter, permit or land settlement lease issued by acquiring authority* E

Headnote

The applicant had been charged in the magistrates court with contravening s 3(2)(a), as read with ss 3(3) and 3(5), of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], it being alleged that he, without lawful authority to occupy, hold or use E gazetted land (the farm he formerly owned), did not cease to occupy, hold or use that land after the expiry of the forty-five day period stipulated in s 3(2)(a) of the Act and had not ceased to occupy, hold or use F that land to date. He raised various defences, among which was the averment that he had authority to occupy, hold or use the gazetted land from the late Vice-President Msika and officials from the Ministry of Lands, Land Reform and Resettlement. A letter from the Vice-President stated G that the Vice-President had granted the applicant permission to continue farming the farm.

At the conclusion of the State case, the applicant applied for discharge on the grounds that none of the six essential elements of the offence charged had been proved or alleged to justify his being put on his defence. H

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The magistrate dismissed the application, and the applicant sought a referral of A the matter to the Supreme Court under s 24(2) of the 1980 Constitution, which was then in force. He contended that his rights under s 18 of the Constitution to the protection of the law and to a fair trial had been infringed. It was also argued that the definition of "lawful authority" in s 2 of the Act was *ultra vires* B s 16B(6) of the Constitution insofar as it sought to limit the meaning of "lawful authority" to an offer letter, a permit or a land settlement lease. The magistrate rejected the application as being frivolous and vexatious.

The applicant then approached the Supreme Court in terms of s 24(1) of the Constitution, contending that the dismissal of his application for referral violated his right to protection of the law guaranteed by s 18(1) C of the Constitution, and his right to a fair trial guaranteed by s 18(2) of the Constitution. He argued that his application was neither frivolous nor vexatious.

Held, that the contention that the definition of "lawful authority" D was *ultra vires* s 16B was neither frivolous nor vexatious and the magistrate's failure to refer the constitutional issue raised to the Supreme Court constituted a violation of the applicant's constitutional right to protection of the law guaranteed in terms of s 18(1) of the Constitution.

Held, further, that placing an accused person on remand, trial or on his defence at the close of the State case, when the allegations and/or the E evidence led by the State do not constitute an offence, was a violation of an accused person's right to the protection of the law, guaranteed by s 18(1) of the Constitution.

Held, further, that the essential elements of the offence the applicant was charged with were that

(a) the accused must be a former owner or occupier; F

(b) of gazetted land;

(c) who had not ceased to occupy, hold or use that land;

(d) after the expiry of the appropriate period referred to, which in the present case was 45 days after the fixed date, being 4 February 2007; and

(e) had no lawful authority to occupy or use that land. G

Held, further, that the elements were established sufficiently to put the applicant on his defence.

Held, further, that the clear and unambiguous meaning of s 2(1) of the Act was that "lawful authority" meant an offer letter, a permit and a land H settlement lease. The documents produced by the applicant were not

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Chidyausiku CJ

offer letters, permits or land settlement leases issued by the acquiring A authority. A letter from the late Vice President, the Presidium or any other member of the Executive did not constitute "lawful authority" in terms of the Act.

Held, further, that s 16B of the Constitution, which allowed an Act of Parliament to make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in the section or other B State land, did not define the concept of "lawful authority", nor did it confer on the courts the power to determine what constitutes "lawful authority". That was left to Parliament to define.

Editor's note: This matter was a "pending constitutional case" as defined in para 18(1)(a) of the Sixth Schedule to the Constitution of Zimbabwe 2013. It had been referred C to the Supreme Court in terms of the former Constitution.

Cases referred to

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

Martin v *A-G & Anor* 1993 (1) ZLR 153 (S) D

S C Shaw (Pvt) Ltd v *Min of Lands* 2005 (2) ZLR 153 (S)

Williams & Anor v *Msipha NO & Ors* 2010 (1) ZLR 552 (S)

Legislation considered

Constitution of Zimbabwe 1980, ss 16B & 18

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

Case information

A P de Bourbon SC, for the applicant

No appearance for the first respondent

T R Zvekare, for the second respondent F

Judgment

Chidyausiku CJ: This application is made in terms of s 24(1) of the former Constitution of Zimbabwe (hereinafter referred to as "the Constitution"), which provided:

> **"24 Enforcement of protective provisions** G
>
> (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." H

Chidyausiku CJ

The applicant alleges that his rights to protection of the law and a fair trial A guaranteed under ss 18(1) and (2) of the Constitution were violated by the court *a quo*.

The facts of this case are that the applicant was charged with contravening s 3(2)(a), as read with ss 3(3) and 3(5), of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] (hereinafter referred to as "the Act"), "using, B or occupying gazetted land without lawful authority", in that on 4 February 2007 and at Romsey Farm (hereinafter referred to as "the farm") Chinhoyi, he, without lawful authority to occupy, hold or use gazetted land, did not cease to occupy, hold or use that land after the expiry of the forty-five day period stipulated in s 3(2)(a) of the Act and has not ceased to occupy, hold C or use that land to date.

The applicant pleaded not guilty to the charge. The applicant's defence is set out in the defence outline, in particular paras 4-6, which read as follows:

> "4. The accused does not own the farm and was not the former owner. The farm is occupied by an operating farming company.
>
> 5. The farm is not gazetted land. The listing of the farm for acquisition purposes D has been declared to be unlawful by the Southern African Development Community Tribunal sitting at Windhoek, Namibia, and that ruling is binding on the Government of Zimbabwe and throughout Zimbabwe.
>
> 6. Since the accused does not occupy the land, there is no issue that he is under any legal obligation to cease occupation of the land."

It was also the applicant's defence that he had authority to occupy, hold or use E the gazetted land from the late Vice-President Msika and officials from the Ministry of Lands, Land Reform and Resettlement. As this is in contradiction to the stance that the applicant is not a former owner or occupier of the farm or gazetted land, I can only assume that this defence is in the alternative. In support of the alternative defence that the applicant has lawful authority F to use the gazetted land, he attached to the defence outline the following letters from the Office of the late Vice-President Msika concerning the farm:

> "4 July 2002
>
> Mr D Tailor-Freeme (*sic*)
>
> P O Box 7516
>
> Chinhoyi
>
> G**MESSRS TAILOR-FREEME (*sic*): REMAINDER OF ROMSEY AND ATHENS A FARM**

Following your various consultations with the Vice President of Zimbabwe, the Honourable J W Msika, and mindful of the fact that you offered Slaughter Farm (1400 ha) to Government for resettlement purposes under the Zimbabwe Joint Resettlement Initiative (ZCRI), the Vice President grants you permission H to continue farming the above farm.

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Chidyausiku CJ

O.E.M. Hove A

Director (Policy and Planning)

Office of the Vice President and Cabinet

Cc Hon P T Chanetsa

Governor/Resident Minister

Mashonaland West Province"; B

And:

"11 December 2007

Hon. D.N.E. Mutasa (MP)

Minister of State for National Security,

Lands, Land Reform and Resettlement

ANOMALIES IN THE IMPLEMENTATION OF THE LAND REFORMCAND RESETTLEMENT PROGRAMME: MASHONALAND WEST PROVINCE

I understand that you convened a meeting with the political leadership of Mashonaland West Province to discuss their representations contained in Cde Shamuyarira's letter dated 19 October 2007.

I wish to remind you that these issues had already been discussed by the Presidium D and a decision had been taken to implement them without any variation. I also wish to remind you that you cannot alter or supersede any decision taken by the Presidium.

DR J.W. MSIKA (MP)

VICE PRESIDENT"

And: E

"26 January 2009

The Provincial Governor and Resident Minister

Mashonaland West

Chinhoyi

Attention: The Hon. F. Chidarikire (MP)

Dear Sir F

FARMING OPERATIONS AT ROMSEY FARM, MAKONDE DISTRICT, MASHONALAND WEST

This letter serves to confirm that Mr D. S. Taylor-Freeme was granted *lawful authority* by the Hon. Vice President Dr J.W. Msika to continue with his farming operations on the above-mentioned farm.

You are therefore requested to hold any action to the contrary in abeyance until G consultations can be held with the Hon. Vice President who comes back from his vacation leave on 19 February 2009. Your co-operation in the above regard will be greatly appreciated.

Yours faithfully

R T Madamombe

Permanent Secretary to the VP Dr J.W. Msika" (the emphasis is mine). H

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Chidyausiku CJ

Given the contents of the above letters, which were in part addressed to the A applicant personally, the applicant's contention that he is not in occupation of or using the farm is untenable. The two contentions that the applicant is not in occupation of the farm and that he has authority to occupy the farm are mutually exclusive.

The matter proceeded to trial and the State led evidence from two State B witnesses, namely Mr Gavanga and Mr Chikomba. These witnesses are officials in the Ministry of Lands and Rural Resettlement. They are responsible for the administration and allocation of land in terms of the Act. Their evidence may briefly be summarised as follows:

1. That they knew the applicant as a farmer on the farm, the gazetted land, C which was acquired in terms of s 16B of the Constitution.
2. That the applicant was running farming operations on the farm before and after the acquisition of the farm.
3. That at the expiry of the 45 day period when the applicant was required, in terms of s 3 of the Act, to vacate the farm he had crops on the farm D that had yet to be harvested. They gave him time within which to complete the harvesting and vacate the farm.
4. That at the end of the harvest the applicant did not vacate the farm and is continuing farming operations on the farm to date.
5. That the farm has since been allocated to another person in terms of E an offer letter but because the applicant is refusing to vacate the farm the new owner in terms of the offer letter has not been able to take occupation of the farm.
6. That although the registered owner of the farm is one Merle Taylor-Freeme, the mother of the applicant, they have always dealt with the applicant in connection with the farm and that it is the applicant who F is carrying out farming operations on the farm.

The evidence of these witnesses is to a large extent corroborated by the correspondence attached to the defence outline, referred to above. It is significant to note that the correspondence is between the applicant in his personal capacity and Government officials. There is nothing in the G correspondence that suggests that the applicant was acting on behalf of a company or some third party.

At the close of the State case, the applicant applied for a discharge. In his application for a discharge, the applicant submitted that none of the six essential elements of the offence charged had been proved or alleged to H justify his being put on his defence. He submitted that for the applicant to be

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put on his defence the State had to lead evidence that *prima facie* establishes A the following as the essential elements of the charge, that –

(a) the accused was a former owner or occupier;

(b) of gazetted or acquired land;

(c) he has not ceased to occupy, hold or use that gazetted land;

(d) after the expiry of the appropriate period referred to, which in the present B case is 45 days after the fixed date;

(e) the accused as the former owner or occupier has no lawful authority to occupy, hold or use that land.

The applicant also pleaded invalidity of s 2 of the Act and mistake of law.

The application for a discharge was dismissed. In dismissing the application C for a discharge, the magistrate concluded that the applicant had a case to answer and should be put on his defence.

Dissatisfied with that ruling, the applicant applied for a referral of the matter to the Constitutional Court in terms of s 24(2) of the Constitution, which provides as follows: D

> **"24 Enforcement of protective provisions**
>
> (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." E

In the application for referral, the applicant contended that the trial court had violated his fundamental right to the protection of the law guaranteed by s 18(1) of the Constitution by putting him on his defence when the evidence for the State failed to establish the essential elements of the offence. The applicant also advanced the following two further grounds in support of the application for referral – F

(1) first, that the trial magistrate had violated the applicant's right to a fair trial by failing to give detailed reasons for dismissing the applicant's application for discharge. In particular, it was contended that the learned trial magistrate should have dealt with each of the six grounds that

were advanced in support of the application for discharge, and that his failure G to do so was a violation of the applicant's right or entitlement to a fair trial in terms of s 18(2) of the Constitution.

(2) second, that the definition of "lawful authority" in s 2 of the Act is *ultra vires* s 16B(6) of the Constitution insofar as it seeks to limit the meaning of "lawful authority" to an offer letter, a permit or a land H

Chidyausiku CJ

settlement lease. The contention is that Parliament has no authority to A truncate the definition of "lawful authority" referred to in the Act without first amending s 16B(6) of the Constitution.

The court *a quo* dismissed the application for referral to the Constitutional Court as frivolous and vexatious.

The applicant now approaches this court in terms of s 24(1) of the Constitution, B on the basis that the court *a quo* violated his fundamental right by refusing to refer his case to this court.

The applicant contends that the dismissal of his application for referral violated his right to protection of the law guaranteed by s 18(1) of the Constitution, and his right to a fair trial guaranteed by s 18(2) of the Constitution. He further C argued that his application for referral was neither vexatious nor frivolous.

In essence the applicant's case in this application is that –

(a) the dismissal of the application for discharge constitutes a violation of his constitutional right to the protection of the law, in that the State had not established any one of the essential elements of the offence that he D was being charged with;

(b) the trial magistrate, by reason of his failure to give detailed reasons in his judgment for dismissing both applications, had violated the applicant's right to a fair trial, the contention being that he should have addressed each of the six grounds that were advanced in support of the application E for discharge before dismissing the application; and

(c) the definition of "lawful authority" in s 2 of the Act was *ultra vires* s 16B(6) of the Constitution and was therefore unconstitutional.

The first issue that falls for determination by this court is whether the court *a quo* was correct in dismissing the application for referral as frivolous and F vexatious. If the court *a quo* was correct in dismissing the application for referral that is the end of the matter. If the court *a quo* erred in dismissing the application for referral, then this court is at large to consider the issue of whether the applicant's rights were violated.

The applicant's contention that the definition of "lawful authority" in the Act is G*ultra vires* the Constitution raises a constitutional issue. Once a constitutional issue arises in any proceedings in an inferior court, it should be referred to the Constitutional Court unless such an application is frivolous or vexatious. The contention that s 2 of the Act is *ultra vires* s 16B(6) of the Constitution is a constitutional issue that arose during the proceedings in the court *a quo.* This constitutional issue is neither frivolous nor vexatious. The court *a quo*H was therefore required in terms of s 24(2) of the Constitution to refer this

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Chidyausiku CJ

matter to the Constitutional Court. The court *a quo's* failure to refer the A constitutional issue raised to the Constitutional Court constitutes a violation of the applicant's constitutional right to protection of the law guaranteed in terms of s 18(1) of the Constitution. Such violation entitles the applicant to approach the Constitutional Court in terms of s 24(1) of the Constitution.

I am therefore satisfied that this application is properly before this court B and this court is at large to consider the constitutional issues raised in the application to this court as if it were the court of first instance.

In this regard see *Martin* v *Attorney-General and Anor* 1993 (1) ZLR 153 (S) at 158H-159A, wherein the court had this to say:

> "For these reasons I am satisfied that the present application was correctly brought under s 24(1) of the Constitution. The order made by the magistrate was, in the C particular circumstances, beyond his jurisdiction. This court must now place itself in the position it would have been in had the magistrate, as he ought to have done, referred to it the question raised before him."

I now turn to deal with the applicant's contention that his constitutional rights have been violated as if this was the court of first instance.

The applicant's main contention is that the State, at the close of its case, had D not established any one of the essential elements of the offence of contravening s 3(2)(a), as read with ss 3(3) and 3(5), of the Act.

Placing an accused person on remand, trial or on his defence at the close of the State case, when the allegations and/or the evidence led by the State do not constitute an offence, is a violation of an accused person's right to the protection of the law, guaranteed by s 18(1) of the Constitution. See E*Martin* v *Attorney-General supra* and *Williams and Anor* v *Msipha NO and Ors* 2010 (1) ZLR 552 (S) at 572G-575G. Thus, *in casu* if the evidence led by the State does not establish *prima facie* any one of the six essential elements of the offence the applicant is F entitled to the relief he seeks, the stay of prosecution.

The following are the essential elements of the offence the applicant is charged with –

(a) the accused must be a former owner or occupier;

(b) of gazetted land;

(c) who has not ceased to occupy, hold or use that land;

(d) after the expiry of the appropriate period referred to, which in the present G case is 45 days after the fixed date, being 4 February 2007; and

(e) has no lawful authority to occupy or use that land.

The applicant also submitted that the State had to disprove the applicant's defence of a mistake of law.

I will deal with each essential element in turn. H

2014 (2) ZLR p507

Chidyausiku CJ

Is the applicant a former owner or occupier? A

The evidence or facts placed before the trial court clearly establish that the applicant carried out farming operations on the farm in question before and after the farm was acquired in terms of s 16B of the Constitution. That evidence is clearly credible and is corroborated by the annexures attached to the applicant's defence outline. The evidence before the court *a quo* clearly B establishes *prima facie*, at the very least, that the applicant is a former occupier of the farm.

Is the farm gazetted land?

The evidence that the farm was acquired in terms of s 16B of the Constitution admits of no debate. The G*overnment Gazette Extraordinary*C dated 22 February 2002, attached to the applicant's defence outline, clearly shows that the farm is one of those farms acquired by the State in terms of Constitution of Zimbabwe Amendment (No. 17) Act, 2005, which came into effect on 28 December 2006. Accordingly, the farm is indeed gazetted land and the evidence to that effect is beyond dispute. The submission that D the acquisition is unlawful because it was declared unlawful by the SADC Tribunal flies in the face of this court's decision in *CFU and Ors* v *Minister of Lands and Ors* 2010 (2) ZLR 576 (S). It is a mischievous submission not worthy of any further comment.

The applicant's failure to cease to occupy, hold or use the land

Again, the evidence of the two State witnesses is that the applicant used the land E before its acquisition in terms of s 16B of the Constitution and is occupying and running farming operations on the farm to date. It is quite clear from this evidence that the applicant has not ceased to occupy, hold or use the farm. Again, the evidence that the applicant is still in occupation of the farm is overwhelming.

F **Is the applicant in occupation after the expiry of the appropriate period referred to, which in the present case is forty-five days after the fixed date, being 4 February 2007?**

As I have stated, the applicant, according to the evidence of the two State witnesses, is still occupying and running farming operations on the farm to G date. Forty-five days have since expired. The applicant should have vacated the farm forty-five days after the date of the acquisition of the farm.

It was submitted that the applicant was permitted to complete his harvest and thus authorised to occupy the farm beyond the prescribed 45 days, and thereafter the law does not prescribe the period to cease occupation beyond H the extended period.

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Chidyausiku CJ

The submission that a former occupier, who is permitted to stay on gazetted A land for a period beyond the 45 days prescribed by the Act to enable such occupier to complete harvesting, who overstays that permitted period does not contravene s 3 of the Act is puerile. It does not merit serious consideration. I shall revert to this submission when I deal with the issue of the definition of "lawful authority" later in this judgment.

Did the applicant as former occupier have lawful authority to B occupy, hold or use that land?

The applicant contends that the letters from the late Vice President Msika and from the Ministry of Lands, Land Reform and Resettlement are "lawful authority" entitling him to remain on the gazetted land. I am not persuaded by this argument. The letters from the late Vice President do not constitute C "lawful authority" in terms of the Act. I shall deal with this submission in some detail when I deal with the issue of what constitutes "lawful authority" later in this judgment.

The applicant's defence of mistake of law D

The applicant's defence of a mistake of law is frivolous and vexatious. If the applicant was serious about this defence, he would have left the farm when he was charged. The fact that the applicant is still occupying the farm makes nonsense of this defence.

Is the definition of "lawful authority" contained in the Act *ultra vires* E **the Constitution?**

In my view, the definition of "lawful authority" in s 2 of the Act is *intra vires* s 16B(6) of the Constitution. Again I propose to deal with this issue when I deal with the issue of the meaning to be ascribed to s 2 of the Act, which defines what constitutes "lawful authority".

I am satisfied that at the close of the State case there was before the court F enough evidence to put the applicant on his defence.

It was also the applicant's contention that the learned trial magistrate, in his reasons for judgment, did not deal with all the grounds that the applicant had raised in his application for discharge and that that constituted a violation of his right to a fair trial. G

It is common cause that the magistrate did give reasons for the dismissal of the application for discharge. The reasons for discharge regrettably did not deal with the grounds of the application in any detail. However, the magistrate's conclusion that the applicant had a case to answer and should be put on his defence cannot be faulted. Although his failure to give detailed H

2014 (2) ZLR p509

Chidyausiku CJ

reasons for judgment amounts to a misdirection, the misdirection did not result in A a substantial miscarriage of justice.

The court *a quo's* misdirection in failing to take into account all the factors it was required by law to take into account constitutes an irregularity. The remedy provided by the law for rectifying such an irregularity is by way of review, in this case to the High Court. The irregularity *in casu* cannot B found an application to the Constitutional Court in terms of s 24(1) of the Constitution.

When an irregularity has been committed by an inferior court, a superior court has to decide whether the irregularity resulted in a substantial miscarriage of justice justifying the setting aside of proceedings on review or appeal. C If the irregularity does not result in a substantial miscarriage of justice the proceedings stand.

However, the procedure to be followed when an application for discharge at the close of the State case is dismissed was set out by the Supreme Court in *S* v *Hunzvi* 2000 (1) ZLR 540 (S), in which the court held:

> "… that the accused has no right of appeal against the refusal of a trial judge to discharge D at the end of the prosecution case because at that stage the final determination of the trial has not been reached and the proceedings are still on-going. After conviction, however, the accused has the absolute right, under s 44(2)(a) of the High Court Act [*Chapter 7:06*], to appeal to the Supreme Court on any ground involving a question of law. A refusal to discharge is a question of law and so may be relied upon as a ground of appeal. The ground of refusal E to discharge would only succeed if on appeal it were found that at the close of the prosecution case there was no evidence justifying a conviction and that the defence case furnished no proof of guilt."

Thus, the remedy available to the applicant was one of appeal to the High Court at the conclusion of the trial.

I find no merit in the contention that the failure to give detailed reasons for F judgment violated the applicant's right to a fair trial and that the case should have been referred to the Constitutional Court on that basis.

I finally turn to deal with the issue of what constitutes "lawful authority" and whether the applicant had "lawful authority" to occupy the farm.

Section 2(1) of the Act provides as follows:

> **"2 Interpretation**G
>
> (1) In this Act –
>
> 'acquiring authority' means the Minister responsible for land or any other Minister to whom the President may, from time to time, assign the administration of this Act;
>
> 'fixed date' means the date fixed in terms of section 1(2) as the date of H commencement of this Act; …

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> 'lawful authority' means – A
>
> (a) an offer letter; or
>
> (b) a permit; or
>
> (c) a land settlement lease;
>
> and 'lawfully authorised' shall be construed accordingly;
>
> 'offer letter' means a letter issued by the acquiring authority to any person that B offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;
>
> 'permit', when used as a noun, means a permit issued by the State which entitles any person to occupy and use resettlement land;
>
> 'resettlement land' means land identified as resettlement land under the Rural District Councils Act [*Chapter 29:13*]."

The clear and unambiguous meaning of s 2(1) of the Act is that "lawful C authority" means an offer letter, a permit and a land settlement lease. Nothing more, nothing less. A letter from the late Vice President, the Presidium or any other member of the Executive does not constitute "lawful authority" in terms of the Act.

In *CFU and Ors* v *Minister of Lands and Ors supra* this court had this to D say at 591:

> "The Legislature in enacting the above provision clearly intended to confer on the acquiring authority the power to issue to individuals offer letters which would entitle the individuals to occupy and use the land described in those offer letters. The draftsman could have used better language to convey the legislative intent, but there can be no doubt that s 2 of the Act confers on the E acquiring authority the power to allocate land using the medium of an offer letter. This provision is not in any way inconsistent with ss 16A and 16B of the Constitution. If anything, it fits in well with the overall scheme envisaged in ss 16A and 16B of the Constitution, which is that the acquiring authority acquires land and reallocates the land so acquired. The acquisition of land and its redistribution lies at the heart of the land reform programme. I have no doubt F that the Minister as the acquiring authority can redistribute land he has acquired in

terms of s 16B of the Constitution by means of the following documents -(a) an offer letter; (b) a permit; and (c) a land settlement lease. The Minister is entitled to issue a land settlement lease in terms of s 8 of the Land Settlement Act [*Chapter 20:01*]. However, if the Minister allocates land by way of a land settlement lease in terms of s 8 of the Land Settlement Act he is enjoined to comply with the other provisions of that Act, such as s 9 which requires him to G consult the Land Settlement Board which obviously has to be in existence. I do not accept the contention by the applicants that the Minister can only allocate acquired land by way of a land settlement lease which he presently cannot do because there is no Land Settlement Board in existence.

The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by H

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way of a permit or by way of a land settlement lease. It is entirely up to the Minister to A choose which method to use. I am not persuaded by the argument that because the offer letter is not specifically provided for in the Constitution it cannot be used as a means of allocating land to individuals.

I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual.

Having concluded that the Minister has the legal power or authority to issue an offer B letter, a permit or a land settlement lease, it follows that the holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease."

"Lawful authority" means an offer letter, a permit and a land settlement lease. The documents attached to the defence outline are not offer letters, C permits or land settlement leases issued by the acquiring authority. They do not constitute "lawful authority" providing a defence to the charge the applicant is facing.

The applicant did not have an offer letter, a permit or a land settlement lease. Accordingly, he had no lawful authority to occupy or continue to D occupy the farm. The letters from the late Vice President Msika and those of the Ministry of Lands, Land Reform and Resettlement do not constitute "lawful authority". "Lawful authority" in terms of the Act begins and ends with an offer letter, a permit and a land settlement lease. A telephone call or a letter, even from the Minister of Lands, Land Reform and Resettlement is not "lawful authority".

It was also submitted that the concept of "lawful authority", as defined in s 2(1) E of the Act is inconsistent with s 16B(6) of the Constitution and therefore *ultra vires*. I have already cited s 2(1) of the Act in the relevant part that defines "lawful authority".

Section 16B(6) of the Constitution provides as follows:

"An Act of Parliament may make it a criminal offence for any person, without lawful F authority, to possess or occupy land referred to in this section or other State land."

The issue here is whether or not the concept of "lawful authority" in the Constitution is fettered by the definition of "lawful authority" in the Act.

The applicant, in his submission that s 2 of the Act is *ultra vires* s 16B(6) G of the Constitution, relied heavily on the decision of this court in *S C Shaw (Pvt) Ltd* v *Minister of Lands and Agricultural Resettlement* 2005 (2) ZLR 153 (S), where it was held that the discretion of the Administrative Court to determine what was reasonably necessary could not be fettered or restricted by an Act of Parliament without first amending the Constitution.

I am not persuaded by this submission for a number of reasons. H

2014 (2) ZLR p512

Chidyausiku CJ

It is common cause that s 16B(6) of the Constitution does not define the concept A of "lawful authority". As a result of this, the applicant's contention that the Act violates a concept which the Constitution does not define is untenable. The Constitution does not confer on the courts the power to determine what constitutes "lawful authority". The Act therefore cannot take away from the courts that which the Constitution has not conferred on the courts.

A careful reading of s 16B(6) of the Constitution shows that it specifically B allows Parliament to create a criminal offence for any person, without lawful authority, to possess or occupy gazetted

land or other State land. For Parliament to successfully create such an offence it has to define the concept of "lawful authority" first. The framers of the Constitution, by expressly conferring on Parliament the power to enact a law that criminalises the possession or C occupation of gazetted land by any person "without lawful authority", must have intended to confer on the Legislature the power to define the concept of "lawful authority". Parliament could not have properly enacted a valid law that criminalises the occupation or use of land without defining what constitutes "lawful authority". A criminal enactment that does not define what constitutes "lawful authority" would be too vague. An enactment D that creates a criminal offence has to be sufficiently clear and precise to be constitutional. A citizen is constitutionally entitled to know exactly when he/she contravenes the law. The definition of "lawful authority" enables the citizen to know exactly when it is that he can occupy gazetted land lawfully without committing a criminal offence. E

The facts and circumstances of this case are distinguishable from those in *S C Shaw (Pvt) Ltd supra*. In *S C Shaw (Pvt) Ltd supra* Parliament had enacted laws, which in effect limited the Administrative Court's discretion that it previously enjoyed in determining whether reasonably necessary grounds for the acquisition of the land existed. In this case, there was no form of "lawful authority" enjoyed by the former owners or occupiers of gazetted F land that has been negated by s 2 of the Act. The allegation that the definition of "lawful authority" provided for in s 2 of the Act impinges upon s 16B(6) of the Constitution is far-fetched and premised on an incorrect interpretation of that provision.

Consequently, this submission also fails. G

In the result, I am satisfied that this application has no merit and must be dismissed with no order as to costs.

MALABA DCJ, ZIYAMBI JA, GARWE JA and CHEDA AJA (retired) concurred. H

Chidyausiku CJ

Coghlan, Welsh & Guest, applicant's legal practitioners A

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

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[zRPz]AFRICAN BANKING CORPORATION OF ZIMBABWE LTD v PFUMOJENA 2014 (2) ZLR 514 (H)

Citation	2014 (2) ZLR 514 (H)
Case No	Judgment No. HH-546-14
Court	High Court, Harare
Judge	Mafusire J
Heard	21 July 2014; *CAV*
Judgment	8 October 2014
Counsel	*N Munetsi,* for the plaintiff *L Uriri,* for the defendant
Case Type	Civil application

Annotations No case annotations to date

Flynote

Contract – *compromise – meaning of – what amounts to – effect thereof upon the original agreement – compromise must be certain – offer not substantially varying conditions of original contract – no compromise formed* D

Contract – *performance – mora in persona – meaning of performance of contract not agreed upon – when necessary to place a defendant in mora*

Contract – *suretyship – grant by creditor to debtor of extension of time within which to pay – effect thereof upon obligations of surety – no automatic discharge of surety's obligations unless surety suffers prejudice arising* E *from such extension of time*

Contract – *suretyship – renunciation of benefit of excussion by a surety – effect thereof upon right of surety against creditor*

Suretyship – *surety – discharge of – extension of time granted to principal debtor after due date – surety not thereby released unless he can* F *demonstrate prejudice*

Words and phrases – *mora in persona – meaning of – date for the performance of the contract not agreed upon by the parties – circumstances where necessary to place a party to the contract in mora* G

Headnote

Along with two other persons, the defendant had bound himself as a surety and co-principal debtor in respect of a loan granted by the plaintiff bank to a company. The company had defaulted and the bank obtained summary judgment against the company and the other sureties. The bank had not proceeded against the defendant at that stage. H

2014 (2) ZLR p515

On the same day as it obtained the summary judgment, the bank, in a letter A to the company, extended the loan repayment period, allowing for repayment in specified instalments. The letter stated that litigation against the company and the guarantors would be held in abeyance, but in the event of default on the repayment plan, litigation against the company and the guarantor would resume without any further notice.

The company defaulted again and the bank then proceeded against the B defendant. His defence was that he had been absolved from liability by operation of law, the surety agreement allegedly having fallen away by reason of two compromise agreements: one where the bank had granted an extension of time to the company, and the other allegedly between the bank and himself personally: when the bank had originally started C proceedings, the defendant had been excluded and had been granted the benefit of excussion.

Held, that *mora in persona* arises where the time for performance of a contract has not been agreed upon. In such cases to place a defendant *in mora*, it is necessary for demand, or cases to place a defendant *in mora*, it is D necessary for demand, or *interpellatio,* to be made.

Held, further, that compromise is an agreement between the parties to an obligation, the terms of which are in dispute, or between parties to a lawsuit, each party receding from his previous position and conceding something, either diminishing its claim or increasing its liability. An E agreement of compromise is a contract like any other. There must be an offer and acceptance. The terms must be certain. If the contract is formed, it extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless there was reserved the right to go back thereto. The conduct from which the defendant tried to infer compromise did not at all fit in with the definition of that term. What F he sought to achieve was not to extinguish *ipso jure* the previous cause of action, but a mere softening up of the terms of one or other of the conditions of the suretyship, particularly the restoration to him of the benefit of the legal exception of excussion. But even in its extension letter, the plaintiff reserved its right to revert to the original cause of action.

Held, further, that renunciation of the benefit of excussion by a surety means G he has waived his right against the creditor to insist on the creditor proceeding first against the principal debtor with

a view to obtaining payment from him, including, if necessary, executing against the assets of the principal debtor before turning to him.

Held, further, that a person who becomes a surety and co-principal debtor H promises the creditor to assume the responsibility for the debt obligation

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Mafusire J

of the borrower if he defaults. It is the surety's business to see that the A borrower pays. Suretyships are the lifeblood of the world of finance. Their value lies in granting additional security to the lender. Even though a suretyship is an agreement ancillary to the principal creditor–debtor relationship and cannot exist alone, it is so important to the principal relationship that it cannot be set aside without upsetting the equilibrium under the principal relationship. In the world of commerce, it is probably B largely on account of the availability and willingness of the surety and also his creditworthiness that the creditor will part with his money in the first place. Therefore, a surety should be bound to the letter and spirit of his undertaking. There can be no question of an automatic discharge of a surety every time a creditor has granted a debtor an extension of time C within which to pay. This is so particularly where such an extension is granted after the whole debt has become due and payable. What a surety has to demonstrate, in order to be discharged from his obligation, is that he has suffered prejudice arising out of the extension of time granted by the creditor to the debtor. D

Cases cited

Asharia v *Patel & Ors* 1991 (2) ZLR 276 (S)

Century Insurance Co Ltd & Anor v *GMB* 1961 R & N 803 (FS)

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

GMB v *Century Insurance Co Ltd & Anor* 1961 R & N 205 (NR)

Midland Motor Showrooms v *Newman* [1929] 2 KB 256

Miller v *Muller* 1965 (4) SA 458 (C)

Tauber v *von Abo* 1984 (4) SA 482 (E)

Wright v *Simpson* (1802) 31 ER 1272

Zimbabwe Football Assn v *Mafurusa* 1985 (1) ZLR 244 (H) F

Case information

N Munetsi, for the plaintiff

L Uriri, for the defendant

Judgment

Mafusire J: This matter started off as an action. It was subsequently G referred to motion court as a special case. The defendant, a practising medical practitioner, had stood co-surety and co-principal debtor in respect of a loan amount advanced by the plaintiff to the principal debtor, Kenrose Filters (Pvt) Ltd ("Kenrose"). The plaintiff had sued and obtained summary judgment against Kenrose and the two other sureties. It was said that the plaintiff had issued a writ but it seems execution was still to happen. The defendant had H

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not been made part of that original action. The plaintiff proceeded against him A separately only much later.

Initially the defendant pleaded a number of defences. He eventually abandoned virtually all but one of them. In my view, he had been well advised to do so. Some of those "defences" were remarkably absurd. For example, it had been B pleaded that because this court had since granted judgment against Kenrose and the two other sureties it had become *functus officio*! It had also been pleaded

that the defendant had not read the surety document when he had signed it and that the principal debtor had misrepresented to him the actual size of the debt (to something less than 18 percent of what it actually was).

The defendant had further pleaded that he had no interest in Kenrose and C that by standing surety he had only meant to help; that the surety agreement had fallen away when the plaintiff had excluded him from the original claim against Kenrose and the other co-sureties and that, in any event, the guarantee that he had signed had not been unlimited but would only be additional security in the event that recovery against Kenrose failed. There D were several other kindred defences.

The defendant's one defence that remained and formed the subject of the special case was that he had been absolved from liability by operation of law, the surety agreement allegedly having fallen away by reason of two compromise agreements: the one, allegedly reached between the plaintiff and E Kenrose without his consent or knowledge, and the other allegedly between the plaintiff and himself personally.

The facts giving rise to the claim for compromise were all common cause, the parties, in fact, having signed a statement of agreed facts. They were these. After obtaining summary judgment against Kenrose and the other two sureties on 22 August 2012, the plaintiff, by letter to Kenrose written F on the same day, had gone on to extend the loan repayment period. The judgment debt was in the sum of US$222 932.02, with accrued interest at US$36 154.93, plus further interest at 48 percent per annum, and costs of suit at the higher scale. In addition, the immovable property owned by Kenrose was declared executable.

The extension on repayment granted by the plaintiff to Kenrose was that G Kenrose would liquidate the debt in instalments of $15 000 per month, beginning in August 2012, and thereafter the same amount on the last day of each succeeding month. Clauses 3 and 4 of the extension letter read as follows:

> "3. Litigation against the principal debtor and guarantors will be held in H abeyance to allow fulfilment of the agreed plan. However, in the event of

> default on the repayment plan, litigation against the principal debtors and A the guarantors will resume without any further notice.
>
> 4. The acceptance of this plan is on a 'no prejudice' basis and in the event of default, litigation will resume using the initial agreement as per facility letter number A10632 dated 29 March 2011."

The defendant argued that the above constituted the one compromise. It was not necessarily the first in time. It was argued that the moment the plaintiff B had agreed to a settlement plan with Kenrose without involving the defendant, it had compromised its claim because the extension of the repayment period was prejudicial to the defendant and that the extension had been granted when the defendant was not *in mora*. Therefore, the argument continued, the defendant had been absolved from liability altogether.

The second compromise was alleged to have occurred the moment the plaintiff C had proceeded against Kenrose and the other sureties in the original claim to the exclusion of the defendant. It was pointed out that the exclusion of the defendant form that action was against a background of several written communication between the parties. Attention was drawn especially to the letter by the defendant's legal practitioners to the plaintiff's former legal practitioners on 18 May 2012 as the embodiment of the second compromise. D The material portion of that letter read as follows:

> "Our client is also surprised by the conduct of the principal debtor who has given several versions regarding how he is to service the debt. Our client has instructed us to advise you and kindly request that you are to do the following:
>
> 1. You do not issue summons in the mean time against our client as that will E create a bad image of our client.
> 2. You first proceed against the other parties.
> 3. In the event that the debt is not fully serviced out of the litigation against the other parties our client is willing to assist by servicing the shortfall.
> 4. In the meantime our client will cede a certain property which your office F is processing title deeds over (which title deeds are pending from City of Mutare) as security so that if there is a shortfall,

that property may be disposed (*sic*) to pay the shortfall. The property is Stand 7546 Mutare Township of Umtali which is currently under the name of Sungai Andrew Pfumojena.

Thank you for your understanding. We wait to hear from you." G

The defendant argued that one looks at the substance and not the form. It was argued that the plaintiff may not have responded directly to the above proposals, but nonetheless that it had acted on them. In particular, it had sued Kenrose and excluded the defendant from the action. Furthermore, despite the fact that, at the inception of the loan facility, the plaintiff had received a written guarantee from the defendant as a condition of the lending, following H

Mafusire J

the defendant's proposals above, the plaintiff had gone on to receive yet another A written guarantee from the defendant, suggesting that, it was argued, a new relationship altogether had intended to be created. The fact that the new guarantee had been largely along the same terms and conditions as the first did not, so the argument proceeded, detract from the fact that the obligations under the old guarantee had been replaced by new ones.

So, in a nutshell, the defendant's defences were that he was released from B liability by virtue of the extension of time to pay granted by the plaintiff to Kenrose, a move that was said to be prejudicial to him in that *inter alia* his own right of recourse against Kenrose had been compromised. In the alternative, the defendant's position was that there was a second compromise agreement C between the plaintiff and himself which was denoted by the conduct of the plaintiff in excluding him from its original action against Kenrose and the other sureties and, further, in getting him to sign another guarantee following his proposal, the effect of which had been to restore to him the benefit of the legal exception *beneficium ordinis seu excussionis*, or excussion. As such, the defendant's alternative argument concluded, the plaintiff was not D entitled to sue him until it had exhausted recovery efforts against Kenrose.

The one question before me therefore was whether or not the extension of the loan repayment period that was granted by the plaintiff to Kenrose in August 2012 released the defendant from liability altogether as surety or guarantor.

The other question before me was whether or not the conduct of the plaintiff, E in excluding the defendant from its first action against Kenrose and the other sureties, following his suggestions to that effect as contained in his lawyers' letter of 18 May 2012, and also coupled with his signing of yet another guarantee contract in favour of the plaintiff for the same debt, albeit with similar terms and conditions as the first one, constituted a compromise agreement, the effect of which was to restore to him the benefit of excussion, F obliging the plaintiff to exhaust all its remedies against Kenrose first before turning on him.

The answer to these questions lies in the detail of the law and the facts.

(a) Effect on surety of extension of repayment period granted to the principal debtor by the creditor

Mr *Uriri*, for the defendant, argued that an extension of time to pay granted by G the creditor to the principal debtor releases the surety whether or not there has been proven prejudice. For this proposition he cited *Grain Marketing Board* v *Century Insurance Company Ltd & Anor* 1961 R&N 205 (NR), a decision of the then Northern Rhodesia High Court; and the appeal of that H case in *Century Insurance Company Ltd & Anor* v *Grain Marketing Board*

Mafusire J

1961 R & N 803 (FS), a decision of the Federal Supreme Court. Both courts A considered *inter alia* the effect on the guarantor of the creditor extending the debtor's time to pay.

Even though on the facts both courts held that the guarantor had not been released by the extension in relation to the obligations arising after the grant of that extension because the guarantee had been given as continuing security, B it is apparent from those cases and the several authorities cited therein that the general rule is that a surety may be released from his obligations where the creditor grants time to the principal debtor. The rationale seems to be as stated by Lord

Thurlow in *Wright* v *Simpson* (1802) 31 ER 1272 at 1282 and quoted by Paterson CJ in the Northern Rhodesian *GMB* case, *supra*, at 208:

> "If the obligee begins to sue the principal, and afterwards gives time, there the C surety has the benefit of it."

The rationale was also stated as follows by Lord Hanworth MR in *Midland Motor Showrooms* v *Newman* [1929] 2 KB 256, also quoted in the *GMB* case at 208:

> "What is the effect of the creditor giving the debtor time? The surety is thereby deprived of his right to have the securities of the creditor and enforce them D in his name … The surety in other words has the right to say, I can come in if default is made in payments by the debtor, and I am interested in the due payment of the debt."

However, I do not believe it is a correct proposition that the grant of time by the creditor to the principal debtor always releases the surety whether or not E there has been proven prejudice. Lord Hanworth MR, in the quote above, referred to the surety being deprived of his right to have the securities of the creditor for enforcement. That is prejudice. There ought to be proven prejudice before a surety can claim release. The position seems to have been settled by this court in *Zimbabwe Football Association* v *Mafurusa* 1985 (1) ZLR 244 (H). In that case, Mfalila J referred to those case in which it had F been held that an extension of time granted to the debtor after the debt had become payable could not be held as a novation and that therefore the surety would not be discharged. He then held as follows at 249G-H:

> "However, this narrow rule has been widened over the years, particularly by the judgment of van Winsen AJ in *Beer* v *Roach* 1950 (4) SA 370 (C). In this case, G while the learned judge expressed the view that the *dictum* of Wessels JA in the *Liebenberg* case was authority for the proposition that an extension of time given after due date does not *per se* release the endorser or surety, the learned judge went on to state that it [the *dictum*] should not be read as intending to lay down that an extension of time so granted can never release the endorser or surety. After considering this and other authorities, the learned judge held that, apart from cases of novation, a surety would be released by reason of an extension of H

Mafusire J

> time granted after due date *if in addition he can show that he himself had been*A*prejudiced thereby*" (my emphasis).

The learned judge went on to consider *Miller* v *Muller* 1965 (4) SA 458 (C). In that case, a surety claimed release on the ground of an extension granted to the principal debtor. The plaintiff excepted to such a defence as being bad in law, arguing that the extension had been granted after the full B debt had become payable owing to the non-payment of the first instalment and the resultant operation of the acceleration clause. The exception failed. It was held that such a plea did disclose a defence if the defendant could show that the extension was made without his knowledge or consent *and that it prejudiced him*.

In the *ZIFA* case, the defendant stood surety for the repayment of a sum of C money advanced to the principal debtor. The principal debtor had repaid only a portion of the debt by due date when it was granted the liberty to pay by instalments. The creditor sued the surety who resisted payment on the ground that the extension granted to the debtor constituted a compromise that discharged the surety agreement. Mfalila J held that, among other D things, the extension was granted after the whole debt had become due and payable and that therefore this *per se* could not discharge the defendant as surety *unless he could show that he was prejudiced thereby. It was held that the defendant had failed to show the prejudice.* The onus had been on him to particularise how that extension of time had prejudiced him (my emphasis).

(b) Defendant's case for discharge E

In the present case I adopt the same approach as in the *ZIFA* case. There can be no question of an automatic discharge of a surety every time the creditor has granted the debtor an extension of time within which to pay, particularly where such an extension is granted after the whole debt has become due and payable. The surety has to demonstrate what prejudice has befallen him F arising out of that extension. When you are a surety and co-principal debtor, you promise the creditor to assume the responsibility for the debt obligation of the borrower if he defaults. It is your business to see that the borrower pays [1] . It is your right to say I can come in if default is made by the debtor, and I am interested in the due payments by the debtor [2] .

In my view, suretyships are the lifeblood of the world of finance. Their value lies G in granting additional security to the lender. Even though a suretyship is

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2014 (2) ZLR p522

Mafusire J

an agreement that is ancillary to the principal creditor–debtor relationship and A cannot exist alone, it is, in my view, so important to the principal relationship that it cannot be set aside without upsetting the equilibrium under the principal relationship. In the world of commerce, it is probably largely on account of the availability and willingness of the surety and also his creditworthiness that the creditor will part with his money in the first place. Therefore, a surety should be bound to the letter and spirit of his undertaking. B

In the present case, the surety document signed by the defendant at the inception of the loan facility was pretty standard and fairly comprehensive. I pick on some of its terms and highlight them in my own words as follows:

(i) In consideration of the plaintiff allowing Kenrose certain credit C facilities, the defendant guaranteed and bound himself to the plaintiff as surety and co-principal debtor with Kenrose for the due and punctual payment, on demand, of all sums of money then, and from time to time thereafter due by Kenrose to the plaintiff, however such indebtedness would arise.

(ii) The guarantee was given as continuing security for all sums of money D which would remain unpaid by Kenrose.

(iii) Among other things, the extent, nature and duration of the facilities to be allowed Kenrose would be in the discretion of the plaintiff.

(iv) All admissions or acknowledgements of indebtedness by Kenrose would be binding on the defendant. E

(v) The guarantee would remain in force notwithstanding the full discharge of the sums secured by it or the release of any security held in terms of it.

(vi) *The defendant's liability under the guarantee, or the plaintiff's rights thereunder, would not be prejudiced if the plaintiff, without consulting*F*the defendant,* inter alia, *varied in any way whatsoever, or determined or novated any contract or relationship with Kenrose,* or granted Kenrose an extension of time for payment, whether before or after due date, or delayed enforcement or granted any other indulgence to Kenrose or any other person. (my emphasis) G

(vii) The defendant renounced the benefits of *inter alia* excussion.

(viii) The guarantee would not be withdrawn, and the defendant would not be released from his obligations verbally, and any release or discharge could only be given by the plaintiff in writing, otherwise anything verbal would be of no force or effect. H

2014 (2) ZLR p523

Mafusire J

It was common cause Kenrose had defaulted the first time. The full amount had A become due. The plaintiff had sued it and its directors who were the co-sureties. It had obtained summary judgment. As already mentioned, an extension on the repayment period had been granted on the same day that the judgment had been obtained. It was common cause Kenrose had defaulted again the second time. The defendant has demonstrated no prejudice suffered B by him on account of the extension granted by the plaintiff to Kenrose.

That the extension was granted when the defendant had not been placed *in mora* is not correct. It would seem the type of *mora* the defendant was referring to was *mora ex persona*. This arises where the time for performance of the contract has not been agreed to. In such situations, to place the defendant in C*mora* it is necessary for demand, or *interpellatio*, to be made. In *Asharia* v *Patel & Ors* 1991 (2) ZLR 276 (S), the Supreme Court held that where the performance of a contract has not been agreed upon between the parties, performance is due on conclusion or so soon thereafter as is reasonably possible. But in that situation the debtor does not fall into *mora ipso facto*. He must know he has to perform. This is known as *mora ex persona*. It only D arises after *interpellatio* or demand.

In the present case the defendant was placed in *mora.* On 13 March 2012 the plaintiff's lawyers wrote to him on the basis of the guarantee and demanding payment of the sums then due by

Kenrose. That triggered the series of letters between the parties' legal practitioners, including the one from the defendant's E legal practitioners on 18 May 2012 aforesaid.

In the circumstances, the defendant's defence based on the extension of time to pay granted by the plaintiff to Kenrose fails.

(c) Whether by its conduct the plaintiff compromised its claim against the defendant and restored to him the benefit of excussion

Compromise is an agreement between the parties to an obligation, the terms of F which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either diminishing its claim or increasing its liability: *Tauber* v *von Abo* 1984 (4) SA 482 (E) at 484. In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) G at 496E-G, Gubbay CJ said:

> "The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. See *Nagar* v *Nagar* 1982 (2) SA 263 (ZH)H at 268E-H."

Mafusire J

Plainly there was no compromise in this matter. What did happen was no A agreement. Yet a compromise is an agreement. The letter from the defendant's legal practitioners on 18 May 2012 made a suggestion. The plaintiff did not respond to it. Mr *Uriri* argued that it did by conduct. That is, by excluding the defendant from its first action and by getting the defendant to sign yet another surety. But that is too sweeping. As I have said, the answer is in the detail. B

A compromise is not only an offer and an acceptance, as in any contract. It is an offer and an acceptance as in any contract, but also in respect of, *inter alia*, terms in dispute, or issues uncertain. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless there was reserved the right to go back thereto. Mr *Munetsi*, for the plaintiff, highlighted that there was nothing in dispute as between the plaintiff and the C defendant. Nothing was in doubt. Among other things, Kenrose's debt was acknowledged. The quantum was not in dispute. The defendant's liability under the surety was not in issue. I agree.

The conduct from which the defendant tried to infer compromise did not at all fit in with the definition of that term. What the defendant sought to D achieve was not to extinguish *ipso jure* the previous cause of action. He sought, in my view, a mere softening up of the terms of one or other of the conditions of the surety, particularly the restoration to him of the benefit of the legal exception of excussion. But even in its extension letter to Kenrose, the plaintiff had reserved its right to revert to the original cause of action. Clauses 3 and 4 highlighted above unequivocally said that in the event that E Kenrose breached the new payment arrangements, litigation against it and the guarantors – thus the defendant included – which had been suspended, would resume using the initial agreements. One of those was the defendant's guarantee. And there is more.

The acceptance by the plaintiff of the second guarantee by the defendant, F which is part of the conduct relied upon to found the defence of compromise, was, in reality a non-event. Firstly, the plaintiff had reserved its rights to resort to the original documents or cause of action. Secondly, the second guarantee changed nothing of significance, except, perhaps the date. Among other things, it simply restated, albeit differently, all the material terms of G the original surety, including the renunciation of the benefit of excussion. Renunciation of the benefit of excussion by a surety means he has waived his right against the creditor to insist on the creditor proceeding first against the principal debtor with a view of obtaining payment from him, including, if necessary, executing against the assets of the principal debtor, before turning to him. H

Mafusire J

In the present case, with the new guarantee, the issue of the plaintiff being A entitled to revert to the old documents or old cause of action was completely put beyond issue by the following:

> "4. Authority to BancABC

I also grant rights in terms of the acknowledgment (*sic) and without prejudice to its rights in terms of the original Individual Unlimited Guarantee of 29th March 2011*B to BancABC to take any legal action they may wish should recovery from Kenrose Filters be delayed or frustrated by any legal process, including but not limited to liquidation or placement under judicial management. BancABC may also resume legal action if my title is deemed defective in any way" (my emphasis).

Incidentally, the "title" referred to in the clause above was in relation to the alleged ownership by the defendant, of a certain immovable property that the C defendant had tendered as collateral security, not only in the letter from his attorneys aforesaid, but also in clause 3 of the new guarantee. As it turned out later, the defendant's title was indeed defective.

In all the circumstances therefore, the defendant had no defence to the plaintiff's claim. The plaintiff's claim is allowed with costs. The following D order is hereby issued:

1 The defendant shall pay the plaintiff the sums of US$222 932.02 and US$36 154.93.

2 The defendant shall pay the plaintiff interest on the sum of US$222 932.02 aforesaid at the rate of 48 percent from the date of this judgment to the E date of payment.

3 The costs of this action shall be borne by the defendant on a legal practitioner and client scale.

4 The liability of the defendant in terms hereof shall be joint and several with that of the respondents under HC7877/12 which is in terms of an F order of this court dated 22 August 2012.

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

Chibaya & Partners, defendant's legal practitioners G

1*Per* lord Thurlow in *Wright v Simpson supra* at 1282, quoted with approval in *Grain Marketing Board v Century Insurance Company & Anor supra* at 208

2*Per* Lord Hanworth MR in *Midland Motor Showrooms v Newman supra* at 262-263, quoted with approval in the *GMB* case, *supra*, at 208.

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[zRPz]S v MEIKLE 2014 (2) ZLR 526 (H)

Citation	2014 (2) ZLR 526 (H)
Case No	Judgment No. HH-565-14
Court	High Court, Harare
Judge	Hungwe J & Mangota J
Heard	8 July 2014; *CAV*
Judgment	15 October 2014
Counsel	*T Magwaliba,* for the appellant *I Muchini,* for the respondent
Case Type	Criminal appeal

Annotations No case annotations to date

Flynote

Company – *criminal offence – liability – shareholders – not liable for criminal acts of company*

Criminal law – *general principles – mens rea – offences of strict liability – when strict liability may be imposed – even where such liability is imposed, actus reus of the offence must be proved* D

Land – *occupation of – meaning – occupation of gazetted land by former owner – not an offence of strict liability*

Headnote

The appellant had been convicted by a magistrate of contravening s 3(2)(a) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], E which makes it a criminal offence for a former owner of land which has been gazetted to continue in occupation of such land 45 days after the fixed date without lawful authority. He did not live on the farm in question, nor did he exercise control over it. A company in which he was a minority shareholder enjoyed control of the farm. That company had acquired a controlling interest in the company which owned the farm before the F farm was gazetted. The latter company had ceased to exist. The grounds on which the magistrate convicted the appellant were that (1) offences under the Act were strict liability offences; (2) the appellant occupied the farm; (3) criminal liability should be imputed to the appellant, rather than the company; and (4) the acquisition of the controlling interest in G the company which owned the farm was tantamount to a sale of the land.

Held, that in construing prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. Whether or not an offence is one of strict liability depends on the express or implied intention of the legislature. In the majority of statutory offences, H

no express indication is given, one way or the other, regarding *mens rea*. A The statute merely provides that any person who does a particular act is guilty of an offence. In this country, all of the cases where the courts have decided that strict liability was impliedly imposed relate to public welfare offences that involve prohibitions or duties designed to prevent grave potential danger to the welfare of the State generally B or to public amenities. These offences include such things as public health legislation, safety regulations, legislation aimed at preventing contamination of drugs and foodstuffs which are being processed and manufactured, motor carriage and transportation regulations, and so on. Strict liability is imposed where the maintenance of these standards C would seriously be impaired if the defence of mistake or blamelessness were to be generally admitted. Even where a case relates to the public welfare offence, though, the courts are generally reluctant to imply that the legislature intended strict liability, because strict liability is directly contrary to the basic principle that there should be no liability without fault. The offences under the Act did not fall into the category of public D welfare offences and there was no justification for departing from the general rule that *mens rea* was required.

Held, further, that, even if the offence were one of strict liability, the *actus reus* also had to be proved, that is, occupation. "Occupation" has been defined as "possession; control; tenure; use. The act or process by which E real property is possessed and enjoyed. Where a person exercises physical control over land." The appellant did not possess or enjoy the farm, nor did he exercise control over it. Control was exercised by a company in which he was a minority shareholder.

Held, further, that shareholders of a company are not owners of the company's property, so the appellant could not be said to occupy the farm through F his shareholding in the company.

Held, further, that criminal liability can be attributed to a company in respect of the acts of persons who control the company. When a company is prosecuted, a director or servant of the corporate body is cited as a representative of the company, not its shareholders. The company should have been prosecuted, if any criminal liability arose under the Act.

Held, further, that the sale of the shares in the company which first owned the G farm was not tantamount to a sale of shares in the farm. The compulsory acquisition was of the farm, not of

the company.

Cases referred to

DPP v *Kent and Sussex Contractors Ltd* [1944] 1 All ER 119 (KB) H

Hungwe J

Lennard's Carrying Co Ltd v *Asiatic Petroleum Co Ltd* [1915] AC 705 A

R v *GD Haulage (Pvt) Ltd* 1977 (1) RLR 24 (A).

R v *ICR Haulage Ltd* [1944] 1 All ER 691 CCA

S v *Arenstein* 1964 (1) SA 361 (A)

S v *Zemura* 1973 (2) RLR 357 (A)

Legislation considered B

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3(2)(a), (3) & (5)

Case information

T Magwaliba, for the appellant

I Muchini, for the respondent C

Judgment

Hungwe J: The appellant was convicted of contravening s 3(2)(a) as read with subss (3) and (5) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] ("the Act"). He was sentenced to US$250 or 25 days' imprisonment as well as a wholly suspended term of imprisonment. He appeals against both conviction and sentence. D

Five grounds of appeal are advanced on behalf of the appellant. The first ground is that the court *a quo* erred in holding that the offences under the Gazetted Land Act are strict liability offences.

The second ground advanced was that the court *a quo* erred in holding that the appellant is in occupation of Coldstream Estate. The third ground advanced E was that the court *a quo* erred in imputing criminal liability to the appellant for conduct which ought to have been imputed to Allied Timbers (Pvt) Ltd. The fourth ground of appeal was that the court *a quo* erred in holding that the acquisition of 51 percent of the shares in E C Meikle (Pvt) Ltd by the then Forestry Company of Zimbabwe (Pvt) Ltd was tantamount to a sale of land. The final ground of appeal was that the court *a quo* erred in ordering F the eviction of the appellant in circumstances where the appellant was not in occupation of Coldstream Estate.

The Act makes it a criminal offence for a former owner of land which has been gazetted to continue in occupation of such land 45 days after the fixed date without lawful authority. The appellant denied that he was in occupation G of gazetted land without lawful authority.

Is the offence charged a strict liability offence?

The general rule is that *actus non facit reum nisi mens sit rea* or *nulla poena sine culpa* (there can be no criminal liability without fault) and that in construing prohibitions or injunctions, the legislature is presumed, in H

Hungwe J

the absence of clear and convincing indications to the contrary, not to have A intended innocent violations thereof to be punishable: *S* v *Arenstein* 1964 (1) SA 361 (A) at p 365. See also *S* v *Zemura* 1973 (2) RLR 357 (A).

In the case of statutory crimes not prescribed in the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] the question whether or not an offence is one B of strict liability depends on the express or implied intention of the legislature. In the majority of statutory offences, no express

indication is given, one way or the other, regarding *mens rea*. The statute merely provides, as in the case of the Gazetted Lands Act, that any person who does a particular act is guilty of an offence. See Burchell and Hunt *Principles of Criminal Law* 2 ed (Juta & Co, 1983) at pp 219-220.

In Zimbabwe, all of the cases where the courts have decided that strict liability C was impliedly imposed relate to public welfare offences that involve prohibitions or duties designed to prevent grave potential danger to the welfare of the State generally or to public amenities. Public welfare offences include such things as public health legislation, safety regulations, D legislation aimed at preventing contamination of drugs and foodstuffs which are being processed and manufactured, motor carriage and transportation regulations, etc**.** See *R* v *G D Haulage (Pvt) Ltd* 1977 (1) RLR 24 (A). See also G Feltoe *A Guide to the Criminal Law of Zimbabwe* 3 ed (Legal Resources Foundation 2004) p 128.

The rationale underlying the imposition of strict liability for the prosecution of E public welfare offences will be immediately clear from the genus of crime at which such liability is aimed: it is necessary in a modern urbanised and industrial society to impose certain standards of conduct in the interest of the community at large. A strict liability is imposed where the maintenance of these standards would seriously be impaired if the defence of mistake F or blamelessness were to be generally admitted. Even where a case relates to the public welfare offence, the courts are generally reluctant to imply that the legislature intended strict liability. The reason for this is that strict liability is directly contrary to the basic principle that there should be no liability without fault. Academic writers, such as Burchell and Hunt, among others, have expressed a doubt whether it can be justified in terms of social G and legal policy.

The magistrate's approach appears to have been that the offence charged fell under the rubric of the "strict/absolute" liability offences where, according to him, all the State needed to do was to prove that the accused committed the act constituting the offence in order to secure a conviction. This would be H so notwithstanding the fact that the accused lacked *mens rea* for the offence.

Hungwe J

In this respect, the magistrate fell into error, as the authority he relied upon A does not state what he states. Professor Feltoe dwells on and discusses the strict liability category of offences rather than absolute liability offences. In any event, the offences created under the Gazetted Land Act do not fall within the unique category of public welfare offences. Accordingly, there is no justification for the departure from the presumption that there can be no criminal liability without fault in the prosecution of offences under this B statute. The court therefore was obliged to inquire into the question whether there was an unlawful mental element on the part of the appellant in relation to the crime charged.

Did the appellant occupy gazetted land?

Even if it were assumed in favour of the State, that the requirement for C*mens rea* was expressly or impliedly excluded by the legislature, it is trite that liability in strict liability offences is dependent on proof of the *actus reus* constituting the offence, in this case, occupation of the land. Burchell and Hunt put the matter thus:

> "It must be stressed that even where the requirement of *mens rea* is expressly or D impliedly excluded by the legislature, liability is dependent upon proof by the prosecution of the *actus reus*. It would have to be proved that the accused's act was both a voluntary one and that it was unlawful. It follows that although a defence which excludes *mens rea* would be irrelevant, a defence which excludes the unlawfulness of the *actus* (e.g. necessity, impossibility, authority) would remain open to the accused. Liability is therefore 'strict' rather than 'absolute'."

The undisputed evidence by the appellant was that the appellant was not E in occupation of Coldstream Estate as alleged in the State outline but that he resides at "Mountain Home, Penhalonga". The Gazetted Land Act does not define "occupation". *Black's Law Dictionary* 5 ed (West Publishing Co) defines occupation as:

> "Possession; control; tenure; use. The act or process by which real property is F possessed and enjoyed. Where a person exercises physical control over land."

The appellant does not possess or enjoy Coldstream Estate, nor does he exercise physical control over it. A company, Allied Timbers (Saligna) (Pvt) Ltd, in which he is a minority shareholder, enjoys control of the same. Clearly, the magistrate fell into error when he held that because the appellant G

is a minority shareholder of this company, he therefore was in occupation of the land in question. As noted by Cilliers and Benade *Company Law* 4 ed (Butterworths, 1982) at p11, an important consequence of the separateness of a company from its shareholders is that

> "[t]he assets of the company are its exclusive property and the members have no proportionate proprietary rights therein. Only on liquidation of the company H

Hungwe J

> are the members entitled to share in a division of the assets of the company. A Consequently, it is not necessary to transfer a company's assets when there is a change of membership…."

As such, the magistrate erred in holding as he did that the appellant was in illegal occupation of the land through his minority shareholding. A company holds its property as its exclusive property not on behalf of its shareholders. B In any event since the land in issue vests in the State by virtue of s16B of the old Constitution, the appellant cannot hold some proportionate right to land that is owned by the State simply because he is a 12.5 percent shareholder in Allied Timbers (Saligna) (Pvt) Ltd.

Is the appellant criminally liable for acts of a company?

Coldstream Estate was formerly held by E C Meikle (Pvt) Ltd. This company, C from the evidence on record, ceased to exist on 23 August 2006 when the Forestry Company of Zimbabwe (Pvt) Ltd bought 51 percent of the shareholding in that company. The new company assumed the name Allied Timbers (Saligna) (Pvt) Ltd. It assumed the operations at Coldstream Estate. The law recognises that where a particular state of mind was an essential D ingredient of an offence, that state of mind can be attributed to a company: *Director of Public Prosecutions* v *Kent and Sussex Contractors Ltd* [1944] 1 All ER 119 (KB)**.** However, such liability can only be attributed to a company in respect of the conduct and mental state of certain persons who control and direct its activities: *R* v *ICR Haulage Ltd* [1944] 1 All ER 691 (CCA)**.** The persons so acting must be considered the company itself; the E mind of a company has been described as that of

> "somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation…somebody for whom the company is liable because his action is the very action of the company itself": *Lennard's Carrying Co Ltd*F v *Asiatic Petroleum Co. Ltd* [1915] AC 705.

It follows that the procedure of prosecuting a company is that a director or servant of the corporate body is cited as a representative of the company, not its shareholders, as the offender. In the present case, Joseph Kanyekanye, the Group Chief Executive Officer for Allied Timbers Holdings under G which Allied Timbers (Saligna) (Pvt) Ltd fell, according to the evidence on record, is the person who directed and controlled the affairs of the company carrying on business at Coldstream Estate. That company, as represented by Kanyekanye, ought to have been cited for the offence of occupying the land, if any criminal liability arose under the Gazetted Lands Act. In my view, the magistrate failed to appreciate the fact that Allied Timbers (Saligna) (Pvt) Ltd H was different and separate from the appellant. The appellant in the

Hungwe J

circumstances, could not be held criminally liable for the acts committed A by the company.

Finally, it follows from the above analysis that upon the compulsory acquisition of land, the company lost its rights in the land. But the company continued to exist. What was compulsorily acquired, through gazetting by the State, was the land, not the company. What was sold were shares in the company E C Meikle (Pvt) Ltd. No shares in the land acquired were sold, as held B by the court *a quo*. The agreement on the sale of shares was a stand-alone transaction as the general rule is that shares are freely transferable in the manner provided for by the Companies Act [*Chapter 24:03*] and articles of association. The sale of shares agreement expressly state that the land was formerly owned by EC Meikle (Pvt) Ltd. The court *a quo* therefore erred in equating the sale of shares to the sale of land. C

In the result therefore we are satisfied that the conviction of the appellant in the court *a quo* was bad in law. The appeal succeeds. The conviction is quashed and the sentence is set aside.

MANGOTA J concurred. D

Bere Brothers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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[zRPz]S v MTETWA 2014 (2) ZLR 533 (H)

Citation	2014 (2) ZLR 533 (H)
Case No	Judgment No. HH-63-15
Court	High Court, Harare
Judge	Hungwe J & Bere J
Heard	29 May 2014;
Judgment	15 October 2014
Counsel	*T Magwaliba*, for the appellant *J Uladi*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *inferences – evaluation of – circumstantial evidence – when inferences of* C *guilt may be drawn therefrom – need to exclude any reasonable hypothesis of innocence*

Headnote

Even in the most straightforward of cases, a court must ultimately draw D inferences. Some evidence requires fewer inferences – direct evidence – whereas other evidence – circumstantial evidence – will require more inferences. The court is never free of drawing inferences and therefore the rules that govern the drawing of inferences govern the court in its ultimate evaluation of all evidence. The question ultimately becomes: E how is a court to evaluate the evidence? The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case. Because circumstantial evidence requires the drawing of inferences, it is incumbent for the court to restate the process involved in analysing that evidence and what a court must do before returning a verdict of guilty based solely on circumstantial evidence. Initially, the court must decide, on the basis of all of the evidence, what G facts, if any, have been proved. Any facts upon which an inference of guilt can be drawn must be proved beyond a reasonable doubt. After the court has determined what facts, if any, have been proved beyond a reasonable doubt, then it 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 the only one

that can fairly and reasonably be drawn from the facts; it must be consistent with the proven facts; and it must flow naturally, H reasonably and logically from them. The evidence must also exclude,

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Hungwe J

beyond a reasonable doubt, every reasonable hypothesis of innocence. If A there is a reasonable hypothesis from the proven facts consistent with the accused's innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of the crime charged, and that inference is established beyond reasonable doubt, then the court must find the accused guilty of that crime. In the drawing of inferences the court must take into account of the totality of B the evidence, and must not consider the evidence on a piecemeal basis.

Cases referred to

McGreevy v *DPP* [1973] 1 All ER 503 (HL)

S v *Blom* 1939 AD 188C

S v *de Villiers* 1944 AD 493

R v *Harry* [1952] NZLR 111

S v *Marange & Others* 1991 (2) ZLR 244 (S)

R v *Mtembu* 1950 SA 670 (A)

S v *Muyanga* HH-79-13

S v *Reddy* 1996 (2) SACR 1 (A)D

S v *Shonhiwa* 1987 (1) ZLR 215 (S)

Shepherd v *The Queen* (1990) 170 CLR 573

Teper v *R* [1952] AC 480 (PC)

Case information

T Magwaliba, for the appellant E

J Uladi, for the respondent

Judgment

Hungwe J: The appellant was convicted of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] involving US$30 178. He was sentenced to five years' imprisonment of which three years were suspended on condition he made restitution in that sum before F 30 December 2013. He appealed to this court against both conviction and sentence.

After hearing counsel we allowed the appeal and indicated that our reasons for that decision will follow. These are they.

The brief facts upon which the magistrate found the appellant guilty of theft G of cash may be stated as follows. The appellant was the local co-ordinator of Cordaid, a non-governmental organisation with provincial offices in Mutare for its Manicaland operations. On 8 November 2012 one Ian Nyamande and the appellant carried out a cash count. There was US$ 30 178 on hand. That sum was left in appellant's custody as his co-administrator, Nyamande, was proceeding on time off that weekend. The safe inside which the money H

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was placed has a double lock system which would require that they both operated A it to lock or unlock. Ian Nyamande did not lock it since he was proceeding on time off, leaving the task to the appellant. On 11 November 2012, the appellant unlocked the safe using his key and stole cash in the sum stated above.

In his grounds of appeal, the appellant states that the magistrate erred in B convicting him on the basis of circumstantial evidence when more than one reasonable inference could be drawn from the proven facts. He also states that the magistrate erred in rely wholly on the evidence of Ian Nyamande without treating it with caution, as he is a possible accomplice to the commission of the crime. These two grounds of appeal, in our view, sufficiently cast doubt C on the soundness of the conviction by the court *a quo*. I will demonstrate.

The appellant in his defence pointed out that Ian Nyamande had the keys to the safe and had locked the safe prior to him proceeding on his days off. He had discovered the theft on the following Monday and reported it to police. He also pointed out that the office inside which the safe was located could be accessed by several other people besides himself and Nyamande. Insiders D as well as outsiders could have perpetrated this offence.

The magistrate in his reasons for judgment emphasised the apparent contradictions in the appellant's testimony regarding whether the appellant had his key to the safe at the relevant time. He noted that the appellant had suggested that he had lost his key after 8 November 2012. The magistrate E also relied on the evidence of Phyllis Mandizvidza that upon entering the office on Monday 12 November 2012, she noticed that the safe door was open. In her words, "it was the most visible thing." Therefore, the magistrate reasoned, the appellant delayed reporting the theft because he had stolen the money. Yet Addlight Mukubvu says she did not notice anything unusual upon her entry into the office on Monday morning. There was no attempt to F reconcile these two ladies' evidence on this point, yet the magistrate used it to make an adverse finding of credibility against the appellant. If Addlight did not notice anything unusual on Monday morning, no inference ought to have been made against the appellant on his failure to notice the break in timeously, as the magistrate did. He also placed reliance on the supposed G malfunction of the door to the office which was not closing properly as noticed by the witnesses on the day prior to Monday 12 November. There was no evidence as to the general security of this particular office so as to exclude the possibility of an outsider having broken into the office then into the safe. That the appellant had the key to the safe and therefore custody of the money is not the only reasonable inference which could be made on H the facts before the court. It appears that the magistrate placed emphasis

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on the fact that Nyamande made a call from South Africa regarding his A absence at work on Monday therefore he was in South Africa at the time the theft occurred. I note that there was no acceptable evidence that indeed Nyamande was in South Africa when he made that call. The magistrate erred in concluding that Nyamande was not in Mutare when the theft occurred. He relied on Nyamande's say so to arrive at the conclusion. He therefore concluded that it was the appellant who had stolen the money as he was the B custodian of this money.

The record demonstrates beyond doubt that there are several possible inferences as to when the money could have been stolen. It is recorded that after counting the money Ian Nyamande placed it back into the safe and locked it. Nyamande says he had not locked it because the appellant needed C to access the safe during his absence. So he left it up to the appellant to lock using his key only. But could it not be possible that Nyamande did not lock it for another reason? The record shows that he had reason to visit the office alone in order to place some US$900 inside appellant's drawer for appellant's use. What this shows is that he also had access to the safe before 12 November 2012 when he was supposedly off-duty. The other ladies came D to the office between Saturday and Sunday for different reasons. Nyamande was required to lock the safe in terms of the established procedure. He did not do so. Nyamande's leave forms permitted his absence from duty only on Friday; so, on Monday he was expected to be in the office. That being so, there is no reason why he had to make the US$900 accessible by the appellant by visiting the office alone on Friday after work. E

I wish to point out that the appellant correctly states that the State case against him rested on circumstantial evidence. I would however wish to point out that even in the most straightforward of cases, one must ultimately nevertheless draw inferences. As an example, where X fired his gun which hits and kills D, it is the only fair and reasonable inference to conclude that F the bullet fired by X hit and killed D since it is not possible to see it travel its line of trajectory and hit D with fatal consequences. Zeffertt and Paizes *South African Law of Evidence* p 99 explain that:

> "All evidence requires the trier of fact to engage in inferential reasoning."

Some evidence requires fewer inferences – this would be traditionally G so-called direct evidence; whereas other evidence, traditionally circumstantial evidence, will require more inferences. The point must be observed that the court is never free of drawing inferences and therefore the rules that govern the drawing of inferences govern the court in its ultimate evaluation of all evidence. The question ultimately becomes: how is a court to evaluate the evidence? H

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Hungwe J

The law draws no distinction between circumstantial evidence and direct evidence A in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case. Because circumstantial evidence requires the drawing of inferences, it is incumbent for this court to restate the process involved in analysing that evidence and what a court must do before returning a verdict of guilty B based solely on circumstantial evidence. 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 the court has determined what facts, if any, have been proven beyond a reasonable doubt, then it must decide what inferences, C if any, can be drawn from those facts. Before they may draw an inference of guilt, however, that inference must be the only one that can fairly and reasonably be drawn from the facts, it must be consistent with the proven facts, and it must flow naturally, reasonably, and logically from them.

Again, it must appear that the inference of guilt of the accused is the only one D 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 accused's innocence, then the court must find the accused not guilty. If the only reasonable inference the court finds is that the accused is guilty of a charged crime, and that inference is established beyond reasonable doubt, E then the court must find the accused guilty of that crime: *S* v *Marange & Others* 1991 (2) ZLR 244 (S) at 249: *Teper* v *R* [1952] AC 480 (PC) at 489; *S* v *Shonhiwa* 1987 (1) ZLR 215 (S) at 218F; *R* v *Harry* [1952] NZLR 111; *McGreevy* v *Director of Public Prosecutions* [1973] 1 All ER 503 (HL); *Shepherd* v *The Queen* (1990) 170 CLR 573 at 579.

The court must always bear in mind that the standard of proof in a criminal case F is "beyond a reasonable doubt." If a piece of evidence cannot measure up to this standard, then the court will discard it; if it does the court will rely upon it. Thus the so-called "cardinal rules of logic" are an exhortation to always bear in mind the rationale behind evidence. The "cardinal rules of G logic" in *S* v *Blom* 1939 AD 188 at 202-203 represent the law on the drawing of inferences in criminal trials. They state that (to paraphrase):

1. The inference sought to be drawn must be consistent with the proved facts.
2. The proved facts must exclude all other inferences except the one sought H to be drawn.

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In attempting to refine this "cardinal rule of logic" I suggested as follows in A*S* v *Muyanga* HH-79-13 (unreported):

> "The law regarding circumstantial evidence is well-settled. When a case rests upon circumstantial evidence, such evidence must satisfy the following tests:
>
> (1) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
>
> (2) Those circumstances should be of a definite tendency unerringly pointing B towards guilt of the accused;
>
> (3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no-one else; and
>
> (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the C accused and such evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence. See *S* v *Shoniwa* 1987 (1) 215 (S) and the cases therein cited."

The courts are clear that in the drawing inferences they must take into account of the totality of the evidence, and must not consider evidence on a piecemeal basis: *S* v *de Villiers* 1944 AD 493; *S* v

Reddy 1996 (2) SACR 1 (A); D*R* v *Mtembu* 1950 SA 670 (A))

It seems to me that the possibility that someone else besides the appellant stole the cash from the safe was not reasonably and fairly excluded by the evidence placed on record. Besides the appellant, the main State witness, had the opportunity to steal the money just as the appellant had. The possibility E of an intruder was similarly not excluded by the evidence. A more thorough and exhaustive investigation might have excluded both the appellant as well as Ian Nyamande and the ladies. It did not. In other words, the evidence does not unerringly point exclusively to the appellant as the culprit in the theft of the money subject of the charge. As such, the conviction cannot be said to be safe as the evidence has not gone past the accepted threshold of proof F beyond a reasonable doubt.

It was for these reasons that we allowed the appeal and quashed the conviction and set aside the sentence imposed by the court *a quo*.

BERE J concurred. G

Bere Brothers, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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[zRPz]S v GUMBURA 2014 (2) ZLR 539 (S)

Citation	2014 (2) ZLR 539 (S)
Case No	Judgment No. S-78-14
Court	Supreme Court, Harare
Judge	Patel JA (in chambers)
Heard	30 July, 1 & 18 August 2014; *CAV*
Judgment	16 October 2014
Counsel	*T Magwaliba*, for the appellant *E Mavuto*, for the respondent
Case Type	Bail appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – rape – consent* C *– what constitutes real consent – devotees of religious sect having sexual relations with pastor – meaningful consent vitiated by religious beliefs and acceptance of authority of pastor*

Headnote

The applicant, who was seeking bail pending appeal, had been convicted of four counts of rape. The victims had been members of the church in which he was a pastor. The complainants had been subjected to frequent indoctrination in the notions of total separation and submission to authority. They were not allowed to fraternise with their relatives and were conditioned to believe that matters of church should not be discussed with outsiders. The applicant displayed a pattern of predatory behaviour, characterised by rampant sexual perversion, manipulating and luring the complainants to accept and endure his deceptively benign patriarchal authority. The applicant argued that the complainants had consented to intercourse with him. The complainants had not reported the rapes until a considerable time afterwards.

Held, that religious doctrines and beliefs cannot be subjected to the rigours of legal proof. In the circumstances presented by this case, the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to the point where it operated to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters. The complainants, having been enmeshed within the overpowering cocoon woven by the appellant, unwittingly succumbed to his sexual advances and predations. Thereafter, constrained by fear and misconception, they remained taciturn for several years and only reported their respective ordeals after appreciating the full nature of their sexual bondage.

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Cases referred to

S v *Gardner* HH-60-08

S v *Hudson* 1996 (1) SACR 431 (W)

S v *Manyange* HH-1-03

Santam Bpk v *Biddulph* [2004] 2 All SA 23 (SCA)

US v *Ballard* 322 US 78 (1944)

Case information

T Magwaliba, for the appellant

E Mavuto, for the respondent

Judgment

Patel JA: The appellant is the pastor of his own church based in Marlborough, Harare. He was convicted by the Harare magistrates court on 3 February 2014 of four counts of rape and one count of contravening s 26 of the Censorship and Entertainment Control Act [*Chapter 10:04*] *i.e.* possession of pornographic material. He was sentenced to a term of 50 years' imprisonment with 10 years suspended on condition of good behaviour. He has since appealed to the High Court against his conviction and sentence. That appeal is pending.

The appellant also applied to the High Court as a court of first instance for bail pending appeal. His application was dismissed. He now appeals against that decision in terms of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The court *a quo* found that the evidence of the complainants in relation to three of the four counts of rape was credible in material respects. The court also found that the complainants' reports of the alleged rapes were voluntarily made and that, although the delays in making those reports were lengthy, the reasons given for those delays were plausible. Moreover, the sentences imposed by the magistrate in respect of the rape counts were appropriate.

As regards the censorship offence, the court *a quo* found that the evidence adduced as to the possession of obscene material was sound and that the appellant had no lawful excuse for his possession of that material. However, the sentence imposed for that offence was probably defective as the magistrate had advanced no reasons for sentence on that count.

In the event, the court *a quo* held that the appellant generally had no prospects of success on appeal and dismissed his application for bail. The court also held that there had been no violation of his constitutional rights to liberty and a fair trial.

The principal ground of appeal herein is that the magistrates court did not properly analyse the evidence before it and that, therefore, the case on appeal was arguable. Moreover, this cursory analysis of the evidence violated H

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the appellant's constitutional rights. Additionally, the High Court erred in A disregarding the effect of the magistrate's mistaken references to cases dealing with mentally defective victims of rape. The High Court also erred in finding plausible explanations for the inordinate delays in reporting the alleged offences. Again, the reports were made in circumstances showing a likelihood of their having been made in response to leading, inducing or B intimidating questions.

Having regard to all of the foregoing, the central issue for determination in this matter is whether the court *a quo* erred or misdirected itself in finding that there were no prospects of success on appeal from the decision of the magistrates court. The test to be applied in this regard is relatively uncomplicated: is the C appeal "reasonably arguable and not manifestly doomed to failure"? See *S* v *Hudson* 1996 (1) SACR 431 (W).

The main point taken by Mr *Magwaliba* for the appellant is that the magistrate did not evaluate the evidence and assess the credibility of witnesses on the rape charges (counts 3, 7, 8 and 9). He thereby erred in accepting the evidence D of a single witness without adequate analysis in respect of each count.

Count 3 relates to PK. Her evidence was that she was raped on several occasions during the period stretching from 2007 to 2013, having succumbed to the appellant's exercise of authority rather than physical force. It is submitted for the appellant that her assertion of having been subjected to indoctrination cannot be sustained. She understood the nature of the sexual acts that she E engaged in and the appellant's influence could not have deprived her of the capacity to give her informed consent. Moreover, her explanation for having reported the alleged rapes at a late stage is totally unreasonable. She could have reported the matter to various people over the years and after she left the appellant's premises in 2013. It is further submitted that her misrepresentation F of certain biblical passages that she relied upon while giving evidence in court rendered her veracity questionable. In short, she willingly subjected herself sexually to the appellant as an integral part of worshipping him and then later changed her position after talking to others.

Mr *Mavuto* for the respondent submits that the appellant stood in the position of being a guardian over PK. She received counselling and religious teachings G from him, including the notion that a master could do as he willed with his servant. The subjective effect was that she believed what she was told by the appellant about his authority and that differences between them should not be taken to court for fear of her being placed in the hands of Satan. It is further pointed out that she did report her first rape to a fellow congregant H but no assistance was forthcoming. Thereafter, she was always accompanied

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or guarded either by the appellant's principal wife or by his brothers. She A therefore remained silent out of fear and eventually escaped after realising that what the appellant was doing to her was wrong.

Count 7 pertains to WS. Mr *Magwaliba* submits that she was aware of the appellant's reputation before she went to stay with him in December 2011. Nevertheless, she allowed herself to be sexually intimate with him. In effect, B she consented to sexual intercourse because of his authority and understood sex with him as being necessary to create a bond between them. Moreover, her account of one of their sexual encounters is physically improbable in terms of their respective bodily positions. She admits to having denied any sexual assault when queried by at least three other people and did not even confide in her mother after police investigations had commenced. C Additionally, her mother's evidence does not corroborate that of WS and the former could not explain why the latter did not confide in her. Again, WS did not make any report to the representatives of Child Line who attended her school for counselling.

For the State, it is submitted that WS was warned by the appellant not to D make any report because she would then be placed in the hands of Satan. She genuinely believed his teachings. She

did not tell her mother anything about her sexual assaults because her mother suffered from hypertension and she did not want her to be overstressed. Furthermore, she did not report her predicament to anyone else because the appellant claimed that the police belonged to him. She only reported the matter to the police after learning of E his arrest and realising that he was not invincible.

Counts 8 and 9 relate to HS. As is correctly pointed out by Mr *Magwaliba*, the court *a quo* entertained considerable doubt as to the propriety of the appellant's conviction on count 9. The learned judge found that it was possible that she may have been raped on the first occasion (count 8) as her evidence F was credible on that score. However, she appears to have acquiesced to sexual intercourse on the subsequent occasions (count 9), having voluntarily returned to the appellant's residence during weekends. Moreover, she spent several months in South Africa before reporting the matter to the police when they contacted her in connection with PK. These are matters that were not adequately interrogated by the magistrates court. G

Mr *Mavuto* submits that HS's evidence on count 9 shows that she was forcibly raped on the first occasion and that the appellant was correctly convicted on that count. He concedes, however, that her conduct in respect of count 9 was inconsistent with the absence of consent, particularly as she continually returned to the appellant's residence of her own accord. H

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Count 10 pertains to the appellant's unlawful possession of two obscene DVDs. There A is no doubt that the appellant was properly convicted on this count. At the hearing of this appeal, Mr *Magwaliba* quite correctly abandoned the technical point raised in his heads of argument as to the propriety of inspecting the material in question after the appellant was arrested. As regards the concurrent sentence of four months' imprisonment imposed by B the magistrate, the court *a quo* highlighted the obvious misdirection of the magistrate in failing to provide any reasons for sentence. In any event, as was accepted by Mr *Magwaliba*, this misdirection has been rendered academic and irrelevant by the fact that the appellant has already served four months in prison following his conviction on 31 January 2014.

As regards the credibility of witnesses, the general rule is that an appellate court C should ordinarily be loth to disturb findings which depend on credibility. However, as was observed in *Santam BPK* v *Biddulph* [2004] 2 All SA 23 (SCA), a court of appeal will interfere where such findings are plainly wrong. Thus, the advantages which a trial court enjoys should not be overemphasised. Moreover, findings of credibility must be considered in the light of proven D facts and probabilities.

In the instant case, the magistrate convicted the appellant on four out of the total nine counts of rape. He rejected the testimony of three complainants and acquitted the appellant in respect of the five counts pertaining to them. With respect to the three complainants presently under consideration, E his assessment of their credibility is not as detailed as might have been expected. Nevertheless, I am not persuaded that any of his critical findings of credibility can be said to be manifestly wrong in light of the proven facts and probabilities of this case. I am inclined to agree with the State that he correctly analysed the subjective effect of the appellant's behaviour and teachings on the complainants. Admittedly, in so doing, he erroneously F cited case authorities revolving around victims of rape who are mentally disordered or incapacitated and their capacity to consent to overtures and acts of sexual intercourse. However, as was correctly noted by the court *a quo*, the magistrate's reference to these cases was designed to show that the complainants were not freely consenting individuals. His misquotation did not go to the root of the convictions and does not, in my view, constitute a G fatal misdirection.

In the court *a quo*, the learned judge elaborated "the subjective nature of religious dogma" in more cogent terms. To paraphrase and summarise his findings, the complainants were subjected to frequent indoctrination in the notions of total separation and submission to authority. They were not H allowed to fraternise with their relatives and were conditioned to believe

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Patel JA

that matters of church should not be discussed with outsiders. The appellant A displayed a pattern of predatory behaviour, characterised by rampant sexual perversion, manipulating and luring the complainants to accept and endure his deceptively benign patriarchal authority.

As was eloquently observed by Justice Douglas in *United States* v *Ballard* 322 US 78 (1944) – quoted by both of the courts below – religious doctrines B and beliefs cannot be subjected to the rigours of legal proof. I would take this sentiment further to opine, in the circumstances presented by this case, that the quasi-mystical force of religious dogma might overwhelm its conscripts and devotees to the point where it operates to vitiate and negate any meaningful consent to sexual abuse and exploitation by their spiritual masters.

Taking a broad conspectus of the facts and probabilities *in casu*, it appears C to me that the complainants, having been enmeshed within the overpowering cocoon woven by the appellant, unwittingly succumbed to his sexual advances and predations. Thereafter, constrained by fear and misconception, they remained taciturn for several years and only reported their respective ordeals after appreciating the full nature of their sexual bondage. D

To sum up, it must be accepted that there are certain deficiencies in the State case. Nevertheless, I take the view that none of the grounds of appeal raised in this case is entirely sustainable. Apart from the conviction on the second charge pertaining to HS (count 9) and the sentence imposed in respect of the possession of obscene materials (count 10), I am satisfied that the appellant has no prospects of success on appeal and that his appeal is doomed to failure. E In that event, he will remain subject to a prison term totalling 40 years, with a period to be determined suspended on condition of good behaviour.

The above conclusion does not necessarily end the matter. An issue that was raised in the court *a quo* but not addressed in its judgment is the possibility of the appellant absconding in the event of being granted bail. I think it F appropriate to deal with this aspect for the sake of completeness.

Mr *Magwaliba* submits that the appellant is unlikely to abscond because he has huge family responsibilities. Moreover, he is prepared to offer his main residence as security for bail. Mr *Mavuto* counters that the appellant will be induced to abscond by the presence of another charge of rape that is pending against him and because of the 40 year sentence imposed in respect G of counts 3, 7, 8 and 10. I note that the pending charge arises from the same period but was deferred because the complainant in that matter had fallen pregnant. In any event, the appellant has denied that charge.

As was highlighted in *S* v *Manyange* HH-1-03, there is a clear distinction between the principles governing the grant of bail pending trial and those H

Patel JA

relating to bail pending appeal. In the former situation, the presumption of A innocence, which resides within the constitutionally guaranteed right to liberty, operates in favour of granting bail unless there are positive reasons for refusal. In the latter situation, on the other hand, the presumption of innocence is inoperative because the accused is a convicted and sentenced offender. The accused must go further than showing that he has prospects B of success on appeal. He must establish that there are positive grounds for granting bail and that the grant will not endanger the interests of justice. In this regard, the public perception is an integral factor to be taken into account. Where the grant of bail would result in a public outcry, the courts should be slow to grant bail in order to safeguard the integrity of the justice C delivery system. See *S* v *Gardner* HH-60-08.

The possibility of public outrage is something that I am not in a position to assess without any compelling evidence in that regard. What is more significant *in casu* is that the appellant has not proffered any positive grounds for allowing him to proceed on bail. The existence of a huge familial entourage, comprising 11 wives and 32 children, is a condition of his own D making and does not really advance his claim to bail. Moreover, he has failed to satisfactorily demonstrate his prospects of success on appeal. Apart from this, there is nothing else to commend his right to liberty. In my view, the prospect of a protracted prison term, coupled with his fresh experience of post-trial incarceration, affords abundant incentive for him to abscond. In all the circumstances, I am amply satisfied that the appellant is not a good E candidate for bail.

For all of the foregoing reasons, the appeal must fail and it is accordingly dismissed.

Nyikadzino, Simango & Associates, appellant's legal practitioners

Prosecutor-General's Office, respondent's legal practitioners F

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[zRPz]DHL INTERNATIONAL (PVT) LTD v TINOFIREYI 2014 (2) ZLR 546 (S)

Citation	2014 (2) ZLR 546 (S)
Case No	Judgment No. S-80-14
Court	Supreme Court, Harare
Judge	Gwaunza JA, Gowora JA & Patel JA
Heard	14 November 2013; *CAV*
Judgment	17 October 2014
Counsel	*H Mutasa*, for the appellant *R Matsikidze*, for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment – *dismissal – grounds – conduct inconsistent with express or implied terms of contract of employment – common law right of employer to dismiss employee for such conduct – employer's right to dismiss on such grounds not altered by Labour Act – code of conduct – cannot override common law* D

Headnote

The respondent was employed by the appellant company. He was convicted of two offences under the company's code of conduct. In respect of one (an act of disobedience), he was issued with a final written warning. In respect of the second (an act of indiscipline), he was dismissed. The code E of conduct did not provide for dismissal in respect of acts of indiscipline. After unsuccessful domestic appeals, he appealed to the Labour Court. There, the company argued that the respondent's indiscipline amounted to conduct that was incompatible with the fulfilment of the express terms and conditions of his employment, and that accordingly it was entitled to dismiss him. The Labour Court ordered his reinstatement. Its grounds for F doing so were that any unwarranted departures from a code of conduct only served to undermine the labour standards agreed by employers and employees, and risked reviving the old master and servant laws of the common law, which were tilted in favour of the employer. On appeal to the Supreme Court, the issue was whether the provisions of a code G of conduct can override, and therefore alter, the common law principles governing an employer's right to dismiss an employee for misconduct that goes to the root of the employment contract.

Held, that the common law position is that the commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him H

if the circumstances of the commission of the offence show that the A continuance of a normal employer and employee relationship has in effect been terminated. There is a presumption that the legislature did not intend to alter the common law. The Labour Act [*Chapter 28:*01] contains no provision which either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss B an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. Section 2A of the Act sets out the objectives of the Act and specifically provides that in the event of a conflict between the Act and any other enactment the Act shall prevail. "Enactment" does not include the common law. The section is thus not a wholesale amendment of the common law. The C common law can only be altered by an explicit provision of the Act. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct is a product of an agreement.

Held, further, that a situation where an employee absents himself from work in defiance of an order to the contrary is untenable in any work D situation. This is particularly so where the employer is in business and its success and viability hinge on, among other factors, the discipline of its workforce. The respondent deliberately defied an order from his superiors not to leave work. His defiance had the effect of disrupting the appellant's operations and causing inconvenience to its customers. Such conduct was clearly inconsistent with the fulfilment of the express or E implied conditions of his employment. On the basis of common law and numerous authorities in this jurisdiction and beyond, such misconduct justified dismissal.

Held, further, that not all acts of misconduct that are inconsistent with the express or implied conditions of one's employment warrant the penalty F of dismissal. If it is shown that he is guilty of such misconduct, it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.

Cases referred to G

Clouston & Co Ltd v *Corry* [1906] AC 122

Standard Chartered Bank Zimbabwe Ltd v *Chapuka* 2005 (1) ZLR 52 (S)

Tobacco Sales Floor Ltd v *Chimwala* 1987 (2) ZLR 201 (S)

Toyota Zimbabwe v *Posi* 2008 (1) ZLR 173 (S)

United Bottlers v *Kaduya* 2006 (2) ZLR 150 (S) H

2014 (2) ZLR p548

Gwaunza JA

Legislation considered A

Labour Act [*Chapter 28:01*], ss 2 & 2A

Case information

H Mutasa, for the appellant

R Matsikidze, for the respondent

Judgment

Gwaunza JA: This is an appeal against the judgment of the Labour Court, B Harare, handed down on 28 January 2011. The brief facts of the matter are as follows. The respondent was employed by the appellant in the capacity of data co-ordinator. On 7 May 2007 the respondent was served by the appellant with two separate charges of misconduct. The two charges were disobedience, provided for C under s 19.3.5, and indiscipline, provided for under s 19.2.10, of the appellant's code of conduct. The first hearing was held on 10 May 2007. The respondent was found guilty of disobedience on the first charge and issued with a final written warning valid for 12 months. The second hearing was held on 22 May 2007 in respect of the second charge. The respondent was found guilty of indiscipline and punished with dismissal. He unsuccessfully appealed to the general manager of the appellant. D His next appeal to the managing director met the same fate. The

respondent was, however, successful in his appeal to the Labour Court, which ordered that he be reinstated to his former employment, or be paid damages *in lieu* of re-instatement.

The appellant was disgruntled by this order, and filed the appeal now before E the court. The appellant's grounds of appeal are as follows:

1. The court *a quo* erred in law in finding that the provisions of the applicable code of conduct precluded the imposition of the penalty of dismissal for the commission of the disciplinary offence of which the respondent had been found guilty; F
2. The court *a quo*, having found that the respondent had committed a disciplinary offence striking to the root of the relationship between employer and employee, erred in law in nevertheless allowing the appeal;
3. Alternatively, the court *a quo* erred in law in upholding the appeal in its totality, without the imposition of any disciplinary penalty on the respondent. G

The appellant prays that the appeal be allowed and that an order upholding the original determination of the hearing officer, to the effect that the respondent be dismissed from employment, be granted. The conduct with which the respondent was charged, and for which the penalty of dismissal was imposed, is not in dispute. Nor is it disputed that for the conduct in question, i.e. H

Gwaunza JA

indiscipline categorised as very serious misconduct, the appellant's code of A conduct provides the penalty of a severe written warning. It does not impose the penalty of dismissal.

The appellant argued *a quo* that the respondent's refusal to report for duty on 27 May 2007, after being asked to do so by the appellant, amounted to B conduct that was incompatible with the fulfilment of the express terms and conditions of his employment. Such terms and conditions, it is further argued, required that he accepts changes in his hours or pattern of work, and upon request, that he works overtime. For these arguments, the appellant relied on, among other authorities, *Standard Chartered Bank Zimbabwe Ltd* v *Chapuka* 2005 (1) ZLR 52 (S), where the court stated as follows:

> "conduct which is found to be inconsistent or incompatible with the fulfilment of the C express or implied conditions of a contract of employment goes to the root of the relationship between an employer and an employee, giving the former a *prima facie* right to dismiss the latter."

See also *Clouston & Co Limited* v *Corry* [1906] AC 122 at p 129, and D*Tobacco Sales Floor Limited* v *Chimwala* 1987 (2) ZLR 210 (S).

The court *a quo* was not persuaded by the appellant's submissions and stated as follows at p 16 of its judgment:

> "Respondent's reasoning is consistent with the common law position on the master and servant relationship. However, our labour laws have evolved beyond that E position. Our law has incorporated international labour standards including the concepts of social justice and democracy. Part and parcel of these concepts is collective bargaining involving employer and employee representatives in the setting of terms of employment. This has led to the introduction of employment codes. (See s 101 of the Labour Act [*Chapter 29:01*]. On such codes, Gubbay CJ had this to say,
>
> > 'The purpose of a code of conduct is to create certainty by spelling out what constitutes F an offence in a given work place and, the penalty to be imposed for the commission of such offences.' *Delta Corp* v *Gwashu* S-96-00 (at p 3).
>
> It follows, in my view, that any unwarranted departures from these codes only serves to undermine the labour standards agreed by employers and employees and risks reviving the old master and servant laws of the G common law. As the common law was tilted in favour of the employer, continued reliance thereon in labour matters is, in my view, retrogressive."

The crisp issue for determination is therefore whether the provisions of a code of conduct can override, and therefore alter, the common law principles governing an employer's right to dismiss an employee for misconduct that H goes to the root of the employment contract.

Gwaunza JA

This court, in *Toyota Zimbabwe* v *Posi* 2008 (1) ZLR 173 (S), had occasion A to consider and determine the exact same issue. In that case Malaba JA, as he then was, stated as follows at 179D-G:

> "The view of s 2 of the Code adopted by the learned President would drastically alter the common law. The position at common law is that a high degree of negligence, such as gross negligence in the performance of work, justifies an employer dismissing the employee: *Wallace* v *Rand Daily Mail Co* 1917 AD 479B at 482. It is a common law position that commission by an employee of conduct inconsistent with the fulfilment of express or implied conditions of the contract of employment entitles the employer to dismiss him if the circumstances of the commission of the offence show that the continuance of a normal employer and employee relationship has in effect been terminated. Standard Chartered Bank *Zimbabwe* v *Chapfuka* S-125-04. C
>
> We are bound by the rule of construction to the effect that we must presume that there is no intention to alter the common law. As Mr *Zhou* put it, *the Labour Act contains no provision which either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss an employee following conviction for a misconduct of a material nature going to the root of the employer and employee relationship. A code of conduct cannot alter or abrogate a principle of the common law. It does not matter that the code of conduct*D*is a product of an agreement"* (my own emphasis).

In the earlier case of *United Bottlers* v *Kaduya* 2006 (2) ZLR 150 (S) *,* a similar view was adopted by the Labour Court, albeit in relation to s 2 of the Labour Act ('the Act'). In that case, Chidyausiku CJ considered the meaning and import of s 2A of the Act and stated as follows at p 155 B-C; E

> "Section 2A essentially sets out the objectives of the act and specifically provides that in the event of a conflict between the Labour Relations Act and any other enactment the Labour relations Act shall prevail. *The section is not a wholesale amendment of the common law. The common law can only be altered by an explicit provision of the Labour Relations Act"* (my emphasis).

It is pertinent to add that s 2A of the Act refers to conflict between the F Labour Act and any enactment. "Enactment" does not include the common law. In any case, a proper reading of the authorities cited on this point clearly suggest that codes of conduct must be formulated in such a way that their provisions are not in conflict with the common law, unless such a course is explicitly sanctioned by the enabling statute, that is the Labour Act. The respondent G did not point the court to any legal provision that either expressly or by implication purports to alter the common law principle that an employer has a right to dismiss an employee for misconduct that goes to the root of the employer and employee relationship. The view taken by the court *a quo* that a code of conduct overrides the common law is, in the light of this, clearly erroneous. The court *a quo* therefore seriously misdirected itself in stating: H

Gwaunza JA

(i) that the dismissal of the respondent *in casu* was an "unwarranted'" A departure from the appellant's code of conduct;

(ii) that our labour laws have "evolved" from the position where employers can dismiss an employee for conduct found to be inconsistent with the fulfilment of the conditions of his service; and

(iii) that it and any other court could not "re-write" a company's Code of B conduct in the absence of any ambiguity therein.

The fact hardly needs emphasising that a situation where an employee absents himself from work in defiance of an order to the contrary is untenable in any work situation. This is particularly so where the employer is in business and its success and viability hinge on, among other factors, the discipline of its C workforce. Discipline in the work place fundamentally entails obedience to orders and respect for authority. It is therefore in the employer's interest to do all in its power to nip in the bud any conduct that may lead to anarchy in the workplace. The respondent deliberately defied an order from his superiors not to leave work. His defiance had the effect of disrupting the appellant's D operations and causing inconvenience to its customers. Such conduct was clearly inconsistent with the fulfilment of the express or implied conditions of his employment. On the basis of the common law and numerous authorities in this jurisdiction and beyond, such misconduct justified dismissal. See also *Clouston & Co Ltd* v *Corry* [1906] AC 122 at 129.

The point must, however, be made that not all acts of misconduct that are E inconsistent with the express or implied conditions of one's employment warrant the penalty of dismissal. In this respect, McNally JA, in the *Tobacco Sales Floors* case *supra*, cited with approval the following *dictum:*

> "I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied conditions of his contract'. If it is, then it is serious enough *prima facie* to warrant summary F dismissal. *Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted*" (my emphasis).

The respondent *in casu* has not denied the seriousness of the misconduct for which he was dismissed. He did not, and indeed could not, show that G the offence was "so trivial, so inadvertent or otherwise so excusable" as not to warrant the remedy of summary dismissal. I find, in the result, that the appellant properly and in its discretion imposed the penalty of dismissal on the respondent, even though the conduct in question was not dismissible in terms of its code of conduct.

In all respects, therefore, the appeal has merit and must, accordingly, succeed. H

Gwaunza JA

In light of this finding, it is the view of this court that it is not necessary to A consider the appellant's other grounds of appeal.

It is accordingly ordered as follows:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and is substituted with the following: B

   "The appeal be and is hereby dismissed with costs".

GOWORA JA and PATEL JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners C

Matsikidze & Mucheche, respondent's legal practitioners

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[zRPz]S v JOCHOMA 2014 (2) ZLR 553 (H)

Citation	2014 (2) ZLR 553 (H)
Case No	Judgment No. HH-606-14
Court	High Court, Harare
Judge	Bhunu J
Heard	21 October 2014
Judgment	21 October 2014
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – engaging in practices commonly associated* C *with witchcraft (s 98) – need for expert evidence to determine whether practice is one commonly associated with witchcraft – plea of guilty to such charge – may be accepted by court – no need for expert evidence in event of unequivocal plea*

Evidence – *judicial notice – meaning – facts of which court may take judicial notice* D

Headnote

The accused pleaded guilty to and was convicted of engaging in an act commonly associated with witchcraft with intention thereby to cause E harm to any person, in contravention of s 98(1) of the Criminal Law Code [*Chapter 9:23*]. He was seen early one morning at the Chitungwiza magistrates court breaking an egg at the court gate. When confronted he ran away. The following morning at around the same time he was again observed attempting to break another egg at the same gate. When F confronted, he again fled, but was pursued and apprehended. Upon being searched he was found in possession of some red and white cloths. When questioned by the trial magistrate after pleading guilty, he admitted that he engaged in a practice commonly associated with witchcraft and that he intended to cause harm to persons at those premises.

The matter was referred for review by the Chief Magistrate, who took the G view that because s 98(4) of the Code precludes a court from taking judicial notice of any practice commonly associated with witchcraft, a court cannot simply convict an accused of this offence without calling expert evidence to determine whether indeed the practice which forms the subject of the charge is a practice commonly associated with witchcraft, H even if the accused pleads guilty.

2014 (2) ZLR p554

Bhunu J

Held, that under both common law and s 31 of the Criminal Procedure and A Evidence Act [*Chapter 9:07*], what is admitted need not be proved because the admission constitutes evidence of the admitted fact. Section 98(4) of the Code did not preclude an accused person from admitting that a particular conduct he engaged in amounted to "any practice commonly associated with witchcraft."

Held, further, that under s 271 of the Criminal Procedure and Evidence Act, B where an accused person pleads guilty and the plea is accepted by the State (as happened in this case), the court is authorised to convict the accused without hearing any further evidence.

Held, further, that the concept of judicial notice is a rule of evidence that allows a fact to be introduced into evidence where the truth or veracity C of that fact is so notorious or well-known such that it needs no proof. A court may also invoke the rule where facts are known either from the judicial officer's general knowledge of them, or from inquiries made by himself for his own information from sources to which it is proper for him to refer. Here, the magistrate did not take judicial notice of the fact that breaking an egg at the gate with the intention of causing harm D to the occupants of the premises is a practice commonly associated with witchcraft. He convicted the accused on the basis of proven facts placed before him by virtue of the accused's admission. That being the case, the question of taking judicial notice of any facts in convicting the accused did not arise E

Cases referred to

S v *de Jager* 1965 (2) SA 612 (A)

S v Nhumwa S-40-88

Legislation considered F

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 98(1) & (4)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 271(1) and 314

Judgment

Bhunu J: This matter was referred for review by the Chief Magistrate in terms of s 29 (4) of the High Court Act [*Chapter 7:06*]. That section empowers G the High Court or a judge of the High Court to

review any proceedings of an inferior court or tribunal whenever it comes to his notice that the proceedings may not have been conducted in accordance with real and substantial justice.

A perusal of the record shows that the accused was convicted on his own plea of guilty to the charge of engaging in a practice commonly associated H

2014 (2) ZLR p555

Bhunu J

with witchcraft in contravention of s 98(1) of the Criminal Law (Codification and A Reform) Act [*Chapter 9:23*]. The section reads:

> **"98 Engaging in practices commonly associated with witchcraft**
>
> (1) Any person who engages in any practice knowing that it is commonly associated with witchcraft shall be guilty of engaging in a practice commonly B associated with witchcraft if, having intended thereby to cause harm to any person, such practice inspires in the person against whom it was directed a real fear or belief that harm will occur to that person or any member of his or her family, and be liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.
>
> (2) Spoken or written words shall not in themselves constitute a practice commonly associated with witchcraft for the purpose of this section, unless C accompanied by or used in connection with other conduct commonly associated with witchcraft.
>
> (3) For the avoidance of doubt it is declared that any person who assists another person to commit the crime of engaging in a practice commonly associated with witchcraft by giving advice or providing any substance or article to enable that person to commit the crime shall be liable to be charged as an accomplice to D the crime.
>
> (4) A court shall not take judicial notice of any practice that is said to be commonly associated with witchcraft, but any person who, in the opinion of the court, is suitably qualified to do so on account of his or her knowledge, shall be competent to give expert evidence as to whether the practice that forms the subject of charge under this section is a practice that is commonly associated E with witchcraft, whether generally or in the particular area where the practice is alleged to have taken place".

The facts admitted by the accused were that on 25 March 2014 at around 6 am he was observed by a security guard at Chitungwiza magistrates court breaking an egg at the court gate. When confronted he ran away. The following F morning at around the same time, he was again observed attempting to break another egg at the same gate. When confronted he again fled but was pursued and apprehended, upon being searched, he was found in possession of some red and white cloths.

When he appeared before the trial magistrate he pleaded guilty to the charge and unequivocally admitted all the facts and essential elements of the offence. G The trial magistrate properly canvassed the essential elements of the offence with the accused as follows:

> "Q. Have you understood facts read?
>
> A. Yes.
>
> Q. Anything to add or subtract?
>
> A. Nothing. H

2014 (2) ZLR p556

Bhunu J

> Q. You admit that on 26/8/14 you unlawfully and intentionally engaged in a A practice that is commonly associated with witchcraft?
>
> A. Yes.
>
> Q. You admit that you intended to cause harm to persons at the said premise?
>
> A. Yes.
>
> Q. Any right or excuse?
>
> A. None. B
>
> Q. Any excuse to offer?
>
> A. None.
>
> J. ... Guilty as charged."

Despite the fact that it is clear that the accused admitted all the facts and essential elements constituting the offence, the Chief Magistrate was of the view that the accused was not properly convicted. He took the view that C having regard to the wording of the section it was not competent

for the magistrate to convict without expert evidence. In his written submission the Chief Magistrate had this to say:

> "1. Much as the accused purportedly pleaded guilty to the charge it would appear that s 98(4) precludes a court from taking judicial notice of any practice commonly associated with witchcraft. It provides that: D
>
> 'A court shall not take judicial notice of any practice that is said to be commonly associated with witchcraft but any person who, in the opinion of the court, is qualified to do so on account of his or her knowledge of, shall be competent to give expert evidence as to whether the practice that forms the subject of a charge under this section is a practice commonly associated with witchcraft, whether generally or in the particular area where E the practice is alleged to have taken place.'
>
> The above provision clearly shows that a court cannot simply convict an accused of this offence without calling expert evidence to determine whether indeed the practice which forms the subject of the charge is a practice commonly associated with witchcraft. It follows therefore that it may not be possible for an accused to be convicted on his/her own plea of guilty on this charge. Some form of expert evidence is required. Unfortunately no such evidence was called in this case. F Further the essential elements of the offence were canvassed in one swooping question which read:
>
> 'You admit that on 26 March 2014, you unlawfully and intentionally engaged in a practice that is commonly associated with witchcraft?'
>
> It is doubtful that the accused ever understood what that meant. It is our considered view that the conviction may be untenable on this basis." G

With respect, I am unable to agree with the Chief Magistrate's opinion. It is trite and a matter of elementary law both at common law and statute that what is admitted need not be proved because the admission constitutes evidence of the admitted fact. The adage *volenti non fit injuria,* that is to say no harm is done where one has consented to it is apt. This is a logical common sense H

Bhunu J

approach consistent with the provisions of s 314 of the Criminal Procedure and A Evidence Act [*Chapter 9:07*] which provides that:

> "**314 Admissions of fact**
>
> (1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and *any such admission*B*shall be sufficient evidence of that fact.*"

Where an accused person pleads guilty and the plea is accepted by the State, as happened in this case, the court is authorised to convict the accused without hearing any further evidence. Section 271(1) of the Criminal Procedure and Evidence Act provides for the procedure to be followed on a plea of guilty. It reads:

> "**271 Procedure on plea of guilty**C
>
> (1) Where a person arraigned before the High Court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any *offence other than murder*, convict and sentence him for that offence without hearing any evidence."

Thus following his unequivocal plea of guilty to the charge, admission of the facts D and all the essential elements of the offence the accused was convicted on the basis of proven facts in terms of s 314 of the Act.

Judicial notice is a rule of evidence that allows a fact to be introduced into evidence where the truth or veracity of that fact is so notorious or well-known such that it needs no proof. For instance, if a certain event occurred E on Christmas Day, the court needs no evidence to establish that the event took place on 25 December. This is because everyone knows that Christmas invariably comes once in a year, on 25 December.

Cross on Evidence 6 ed at p 63 gives two scenarios where the court or judicial officer will take judicial notice when he says that:

> "There are two classes of case in which the court will act in this way, for, to quote Lord F Sumner:
>
> 'Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.'"

The rationale for taking judicial notice is that the fact in question is too notorious G to be the subject of any serious dispute or doubt in the mind of any reasonable person.

In this case the trial magistrate did not take judicial notice of the fact that breaking an egg at the gate with the intention of causing harm to the occupants H of the premises is a practice commonly associated with witchcraft. He correctly

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Bhunu J

convicted the accused person on the basis of proven facts placed before him A by virtue of the accused's admission. That being the case, the question of taking judicial notice of any facts in convicting the accused does not arise.

With respect, it appears that the Chief Magistrate misconstrued the relevant section. The section merely provides for the mode of proving disputed facts that are in issue. It certainly does not require that undisputed facts that are not in issue be proven through expert evidence as suggested by the B Chief Magistrate.

While s 98(4) of the Criminal Law (Codification and Reform) Act precludes the court from taking judicial notice of, "any practice commonly associated with witchcraft" without expert evidence, nowhere does it preclude an accused person from admitting that a particular conduct he engaged in amounts to C "any practice commonly associated with witchcraft." Had the law maker intended that no conviction should be made without expert evidence, it would certainly have said so. Section 271(1) of the Criminal Procedure and Evidence Act makes it clear that it is only in the case of murder that the law expressly prohibits the conviction of an accused person on a plea of guilty without hearing evidence. D

The nature of the offence has to do with the accused's mental state at the time he engaged in the proscribed conduct. The accused admitted that his conduct in breaking an egg at the courthouse gate with the intention of causing harm to the occupants is conduct commonly associated with witchcraft. He further admitted that his motive was to defeat the course of justice. Undoubtedly his E admission constitutes the best evidence of his state of mind and commission of the prohibited conduct. It would then be preposterous to speculate and suggest that the accused might not have understood the nature of the proscribed conduct when his own mouth militates against him.

The trial magistrate therefore cannot be faulted for convicting the accused on his own plea of guilty. F

Turning to the question of sentence, the accused was sentenced to 12 months' imprisonment, of which three months' imprisonment was suspended for a period of five years on appropriate conditions of good behaviour. The offence is punishable by a fine not exceeding level ten or five years' imprisonment, depending on the accused's moral blameworthiness, mitigating and G aggravating circumstances.

In assessing sentence, the trial magistrate took into account that the accused is a first offender who pleaded guilty and was contrite. He also took into account the accused's personal circumstances. He is a responsible married man with three children. He was gainfully employed earning $20 per day. H

Bhunu J

In aggravation, he found that the offence was serious calling for a deterrent A sentence. He then weighed the mitigating features against the aggravating features and found that the aggravating circumstances outweighed the mitigating circumstances. He then decided to impose an effective period of imprisonment of nine months.

I cannot agree more with the trial magistrate that the accused's moral B blameworthiness was of a very high degree indeed. The offence was committed in a brazen manner and with determination, driven by an evil and wicked frame of mind, not once but twice. His conduct was akin to a person who sets a time bomb or booby trap in a crowded public place with the wicked intention of defeating the course of justice. In that case it does C not matter whether or not the bomb explodes with fatal consequences, the accused's moral blameworthiness remains high. Against that background, the trial magistrate took into account that the accused's immoral criminal conduct had induced real fear in court officials, thereby undermining the due administration of justice.

At this juncture it is appropriate to restate that assessment of sentence is to D a large extent governed by a wide judicial discretion. Unless that discretion is vitiated by irregularity, incompetence, misdirection or where the sentence imposed by the trial court is so severe as to induce a sense of shock, the reviewing or appeal court will not interfere. See *S* v *Nhumwa* S-40-88 and *S* v *de Jager* 1965 (2) SA 612 (A).

In this case I am unable to find any irregularity or misdirection on the party of the E trial magistrate warranting interference by this court on review. The conviction is proper and the sentence eminently appropriate. It suits both the crime and the offender.

The proceedings are accordingly confirmed as being in accordance with real and substantial justice.

Uchena J concurs. F

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[zRPz]S v MUPFUMBURI 2014 (2) ZLR 560 (H)

Citation	2014 (2) ZLR 560 (H)
Case No	Judgment No. HH-64-15
Court	High Court, Harare
Judge	Hungwe J & Bere J
Heard	21 October 2014
Judgment	21 October 2014
Counsel	*S Gahadzikwa,* for the appellant Ms *F Kachidza,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *single witness – approach to – precautions to be taken – desirability* C *of corroborating evidence – what corroborating evidence may consist of*

Headnote

With crimes other than perjury and treason, the court is entitled to convict an accused on the basis of the uncorroborated evidence of a single competent and credible witness. There is obviously a risk which attaches D to convicting the accused on the basis of the uncorroborated testimony of a single witness. There is a paucity of evidence in the case and the testimony of the witness is the sole proof of the accused's guilt. In this situation the danger arises of poor observation, faulty recollection, and reconstruction of evidence after the event, bias and any other risk that E the circumstances of the case suggest. Before the court relies on such evidence it must be satisfied

that the quality of evidence must make up for the lack of quantity. The uncorroborated evidence of a single witness should only be relied upon if the witness's evidence is clear and satisfactory in every material respect. Slight imperfections would not rule out reliance on that evidence, but material imperfections would. F Single witness evidence should not be relied upon where, for example, the witness has an interest adverse to the accused, has made a previous inconsistent statement, has given contradictory evidence or had no proper opportunity for observation. There is no rule of thumb to be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and G demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting the accused. H

Corroboration is regarded by many as a cornerstone of the criminal justice A system. It is perceived to be an important check which helps to ensure, so far as practicable, that miscarriages of justice are kept to a minimum. Corroboration is biblical in origin, its roots being found in references in both Old and New Testaments to a fact needing to be established by two or more witnesses. The purpose of the requirement is to protect an B accused from being convicted on the basis of a single witness, who may be either fallible or dishonest. Where there is a single witness to the crime itself, corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved C are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied.

Proper investigation of criminal cases will usually uncover corroborating D evidence and it is seldom necessary to rest the entire State case upon the uncorroborated testimony of a single witness. Police officers and prosecutors should not be content with the production of evidence from a single witness. However, where it appears to a court that there are other witnesses who may be called, it has the power to call these witnesses E itself in appropriate cases.

Cases referred to

Fox v *HM Advocate* [1998] JC 94 LJG

O'Hara v *Central SMT Co* [1941] SC 363 LP

S v *Corbett* 1990 (1) ZLR 205 (S)

R v *Mokoena* 1956 (3) SA 81 (A)F

S v *Mukondo* HH-15-87

S v *Musonza & Ors* S-217-88

S v *Nduna & Anor* 2003 (1) ZLR 440 (H)

S v *Nemachena* S-89-86

S v *Nyabvure* S-23-88

S v *Sauls & Ors* 1981 (3) SA 172 (A)G

S v *Tamba* S-81-91

S v *Worswick* S-27-88

S v *Zimbowora* 1992 (1) ZLR 41 (S)

Hungwe J

Legislation considered A

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 269

Case information

S Gahadzikwa, for the appellant

Ms *F Kachidza,* for the respondent

Judgment

Hungwe J: The appellant was convicted on one count of theft as defined in B s 113(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 30 months' imprisonment of which 12 months were suspended for five years on the usual conditions and a further six months were suspended on condition that the appellant makes restitution in favour of the complainant in the sum of US$130 within a given period. C

This matter raises the single issue of the sufficiency of evidence by a single witness in a criminal trial. What is the probative value attached to such a witness when he testifies in a case in which his interest looms large? Pointedly, that is also the only ground of appeal succinctly raised by the appellant. The facts upon which the conviction was based were as follows. D

The complainant boarded a Dzivaresekwa-bound commuter omnibus. He sat in the front passenger seat. Between him and the driver was a conductor. He was asked to close the door as the bus took off at high speed. There were other passengers inside the bus. After a short distance, which the complainant gave as 200 m, he was told to disembark as the bus was no longer going to E Dzivaresekwa. He did as ordered. Upon disembarking he realised that he had been relieved of his wallet. Immediately, he got onto the next commuter omnibus and a car chase involving the two omnibuses followed. The former commuter omnibus evaded the latter. The complainant gave up the chase and went to make a police report at Dzivaresekwa police station near his home. Police there advised him to lodge his report with Kuwadzana police F station. He went home and changed his clothes. Later, he was recalled to his place of employment. He decided to make a police report at Kuwadzana police station, on his way back to work. As he walked along the road, he then saw an omnibus which he flagged down. The appellant was the conductor occupying the same seat as did his alleged assailant a few hours previously. G He announced that the appellant had stolen from him and effected a citizen's arrest. Police on patrol nearby came and arrested the appellant on these charges. He repeated this evidence during trial. No other witness was called by the state. The trial magistrate found that there were inconsistencies in his testimony but went on to convict on the evidence of a single witness. H

2014 (2) ZLR p563

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The law regarding single witness evidence A

The entire State case against the accused may rest upon the evidence given by a single State witness. This may be because the State has been able to produce only one witness against the accused. Alternatively, the State may have called more than one witness but the only evidence on which the guilt B of the accused is going to depend is that of one witness alone. This situation has been referred to as a "boxing ring" situation because the outcome of the "contest" hinges on which of the two contestants is believed, namely the State witness or the accused.

According to s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], with crimes other than perjury and treason, the court may be entitled C to convict an accused on the basis of the uncorroborated evidence of a single competent and credible State witness. There is obviously a risk which attaches to convicting the accused on the basis of the uncorroborated testimony of a single witness. There is a scarcity of evidence in the case and the testimony of the witness is the sole proof of the accused's guilt. In this situation the D danger arises of poor observation, faulty recollection, and reconstruction of evidence after the event, bias and any other risk that the circumstances of the case suggest. Before the court relies on such evidence it must be satisfied that the quality of evidence must make up for the lack of quantity.

It is recognised that corroboration is regarded by many as a cornerstone of the criminal justice system. It is perceived to be an important check which E helps to ensure, so far as practicable, that miscarriages of justice are kept to a minimum. Sufficiency of evidence is the amount of evidence required for a conviction. This is a matter of law. It is not concerned with whether the evidence is

truthful or reliable. There may be sufficient evidence for a conviction, yet the judge or jury may choose to acquit an accused because F of the quality of that evidence.

For a person to be convicted of a crime there must be:

(a) at least one source of evidence, e.g. the testimony of a witness, that describes the commission of the crime and points to the accused as the perpetrator; and

(b) an additional source of evidence, e.g. the testimony of at least one G other witness, which confirms or supports the first source in respect of each of these two essential or crucial facts, i.e. that the crime was committed and that the accused was the perpetrator.

The sources may consist of direct (eye witness) evidence or indirect H (circumstantial) evidence.

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The requirement for corroboration A

Corroboration is biblical in origin, its roots being found in references in both Old and New Testaments to a fact needing to be established by two or more witnesses. The purpose of the requirement is to protect an accused from being convicted on the basis of a single witness, who may be either fallible or dishonest. Hume states:

> "no matter how trivial the offence and how high so ever the credit and character B of the witness, since the law is averse to rely on his single word in an inquiry which may affect the person, liberty or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is concurrence of testimonies, it is willing that the guilty should escape."

The classic statement on the principle of corroboration comes from a civil case of *O'Hara* v *Central SMT Co* [1941] SC 363 LP (Normand) at 379: C

> "Corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the D facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied".

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

> "Corroborative evidence is … evidence which supports or confirms the direct evidence of a witness … the starting-point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, even when they have reached that stage, they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence … the evidence is properly described as being corroborative because of its relation to the direct evidence : it is corroborative because it confirms or supports the direct F evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met."

In *R* v *Mokoena* 1956 (3) SA 81 (A) at 85-86 it was laid down that the uncorroborated evidence of a single witness should only be relied upon if the evidence was clear and satisfactory in every material respect. Slight G imperfections would not rule out reliance on that evidence but material imperfections would. The court stated that single witness evidence should not be relied upon where, for example, the witness had an interest adverse to the accused, has made a previous inconsistent statement, has given contradictory evidence or had no proper opportunity for observation. However, in the later H

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case of *S* v *Sauls & Ors* 1981 (3) SA 172 (A) the Appellate Division stated that A there was no rule of thumb to be applied when deciding upon the credibility of single witness testimony. The court must simply weigh his evidence and consider its merits and demerits. It must then decide whether it is satisfied that it is truthful, despite any shortcomings, defects or contradictions in that testimony. The approach adopted in the *Sauls* case was followed in B*S* v *Nyabvure* S-23-88. See also *S* v *Worswick* S-27-88, *S* v *Mukondo* HH-15-87, *S* v *Nemachena* S-89-86 and *S* v *Corbett* 1990 (1) ZLR 205 (S).

Beck JA in his article in 1986 Vol 1 No 1 *Prosecutors Bulletin* at p 18 says that in assessing the quality of the single witness's evidence, to decide whether the accused should be convicted on the basis of this evidence, the C court should be most attentive to the nature of the witness, looking at his apparent character, his intelligence, his capacity for observation, his powers of recall, his objectivity and things like that. The evidence should be carefully weighed against the objective probabilities of the case, and against all the other evidence which is at variance with it. The court must have rational grounds to conclude that the evidence of the single witness is reliable and D trustworthy and is a safe basis for convicting the accused. Thus, although an accused can be convicted on the basis of the uncorroborated testimony of a single competent and credible State witness, the court must assess very carefully the credibility and reliability of such a witness to see whether it is safe to convict on the basis of his testimony alone.

The courts have pointed out that proper investigation of criminal cases will usually E uncover corroborating evidence and that it is seldom necessary to rest the entire State case upon single uncorroborated testimony. The courts have exhorted police officers and prosecutors not to be content with the production of evidence from a single witness. However, where it appears to a court that there are other witnesses who may be called, it has the power F to call these witnesses itself in appropriate cases.

In *S* v *Musonza & Ors* S-217-88 the Supreme Court stated that as a general rule it is undesirable to rely solely and entirely on the evidence of the complainant, particularly in assault cases and more particularly where there are counter allegations of provocation, self-defence or justification in one G form or another. The complainant in such cases has a clear bias and a reason to place himself in a favourable light and the accused in an unfavourable light.

In *S* v *Tamba* S-81-91 the court stated that in assault cases, where there are other witnesses to the incident in addition to the complainant, these witnesses should be called and the case against the accused should not be left to rest upon H the testimony of the complainant alone. It is wrong to deal with such cases

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as if they were a "boxing match" between the complainant and the accused. A These two protagonists should not, as it were, be thrown into the ring with the magistrate as referee who, at the end of the bout, having awarded points for demeanour and probability, would name the winner (who would usually be the complainant). It was even worse if the magistrate is, as often seemed to be the case, a biased referee who worked on the unspoken assumption that the police would not have charged the accused if he was not the guilty B one. This approach, said the Supreme Court, was dangerous, especially in assault cases where almost invariably the parties give conflicting versions of what was the cause of the fight and often both versions are partially untrue or exaggerated. Without evidence from bystanders, it was almost impossible to determine which version of the facts was the true one. C

In *S* v *Zimbowora* 1992 (1) ZLR 41 (S) the appellant had been convicted of three counts of contravening the Labour Relations Act. The State case had rested entirely on the evidence of the complainant. On appeal, the Supreme Court said that although the trial court was entitled to convict the appellant on the single evidence of the complainant, it was necessary for such evidence to be clear and satisfactory in every material respect. As the complainant was D a witness with an interest to serve, the trial court was not only required to approach her evidence with caution but should also have sought corroboration of her evidence. The conviction was set aside by the Supreme Court as the complainant's evidence was not satisfactory in all material respects and no evidence was led to corroborate her assertions. E

In *S* v *Nduna & Anor* 2003 (1) ZLR 440 (H) it was held that where a conviction relies on the evidence of a single witness, discrepancies in the witness's evidence are not necessarily fatal. The discrepancies must be of such magnitude and value that it goes to the root of the matter to such an extent that their presence would no doubt give a different complexion of the matter altogether. The fact that the single witness is himself guilty of some F unlawful conduct does not make him an accomplice in the crime which is charged. Where the accused, who were policemen, arrested and robbed a person who was crossing the border illegally, that person was not an accomplice.

The present case demonstrates all the reasons why corroboration is required in criminal trials more acutely than the above cases. The following features G stick out like a sore thumb:

(i) the complainant only had a fleeting encounter with his assailants;
(ii) there was virtually no opportunity for observation of any features of the "thief";
(iii) no particulars of the commuter omnibus was recorded during the chase; H

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(iv) no reason was given for the failure to call the driver of the pursuing A omnibus;
(v) no description is given by the complainant to the police of his assailant upon making his initial report at Dzivaresekwa police station;
(vi) the possibility of an honest but mistaken identification of both the B appellant and his omnibus was not eliminated.

The complainant clearly believed that the approaching omnibus was the same omnibus which the crew which robbed him were using. The court *a quo* did not demonstrate how it had applied the cautionary rule so as to render the conviction safe and reliable as required by s 269 of the Criminal Procedure and Evidence Act.

In the result the conviction remained unsafe. It is therefore set aside and the C sentence imposed consequent to the conviction is hereby quashed.

BERE J concurred

Gahadzikwa & Mupunga, appellant's legal practitioners D

National Prosecuting Authority, respondent's legal practitioners

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[zRPz]Z (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2014 (2) ZLR 568 (H)

Citation	2014 (2) ZLR 568 (H)
Case No	Judgment No. HH-575-14
Court	High Court, Harare
Judge	Kudya J
Heard	21 July 2014; *CAV*
Judgment	22 October 2014
Counsel	*A P de Bourbon SC*, for the appellant *T Magwaliba*, for the respondent
Case Type	Income tax appeal
Annotations	No case annotations to date

Flynote

Revenue and public finance – *income tax – income – deductions allowable – loss incurred for the purposes of trade or in the production of income – money paid to the Reserve Bank as part of normal method of carrying on trade – money not returned by Reserve Bank – such money should be regarded as a loss and deducted from taxable income* D

Headnote

The appellant company was a tobacco merchant. During the years before the introduction of the multi-currency system, growers of tobacco would be paid in local currency but the purchasers had to pay in foreign currency. Merchants like the appellant had to deposit foreign currency with the E Reserve Bank. The tobacco merchant purchased the tobacco in foreign currency but paid for it in local currency. The foreign currency was sold to the Reserve Bank which converted the amount into local currency for transmission to the tobacco grower by the appellant through the on-shore bank.

The currency of account for all purchases of local tobacco, whether from F contract growers or auction floors, was denominated in United States dollars. These had to be sourced off-shore and transmitted through the on-shore bank to the Special Tobacco Foreign Currency Account for the appellant in the Reserve Bank. The account in the Reserve Bank represented a pre-payment of the anticipated tobacco purchases during each calendar year trading season. The on-shore bank kept a mirror G account of the funds. The appellant would participate on the auction floor only after confirmation by the Reserve Bank of the deposit of off-shore funds into the Special Tobacco Foreign Currency Account.

On purchasing the tobacco, the appellant would be invoiced in the currency of account. It would transmit the invoice to the on-shore bank which H

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would in turn dispatch it to the Reserve Bank, which would transfer the local A currency equivalent of the invoiced amount to the on-shore bank. The amount would be deposited in the appellant's Zimbabwe dollar tobacco special account of the appellant held in the on-shore bank. The local currency would be paid over to the tobacco grower at the auction floor or to the contract farmer. The on-shore bank would make B a corresponding debit in the mirror United States dollar special tobacco account it held for the appellant.

During the tax year in question, some US$5 million, on instruction of the appellant, was remitted to the on-shore bank and deposited with the Reserve Bank for the purchase of tobacco by the appellant in August 2008 C for that year's tobacco purchases. There were inadequate supplies of tobacco on the market to exhaust the amount and a balance of about US$2.3 million remained outstanding. The Reserve Bank and the appellant agreed to roll over the amount to the 2009 tobacco season. Of that, just over US$1 million was not converted by the Reserve Bank into local currency in the 2009 tobacco trading season. The Reserve Bank failed D to avail these funds to the on-shore bank for payment of the appellant's obligations to the tobacco sellers.

The missing money did not constitute planned voluntary expenditure. The appellant did not spend the money before it was lost. The funds were sitting in readiness to purchase tobacco and awaiting draw down. The amount remained outstanding. Liability had been acknowledged, but E the Reserve Bank was unable to pay.

The appellant sought to have the missing money classed as a deduction in terms of s 15(2)(a) of the Income Tax Act [*Chapter 23:06*], as being an expenditure or loss incurred for the purposes of trade or in the production of the income.

Held, that the general principle is to allow as deductions all expenses attached to F the performance of a business operation *bona fide* performed for the purpose of earning income, whether such expenses are necessary for its performance or attached to it by chance or are *bona fide* incurred for the more efficient performance of such operation, provided they are so closely connected with it that it would be proper, natural or reasonable to regard G the expenses as part of the cost of performing the operation. In this case, the issue was whether the expense was one attached to the performance of the business operation by chance. The loss was integrated in and an adjunct of the ordinary trading of the appellant. The system followed was the way the appellant had to carry on business. The payment was H not one of a capital nature. The effect of the failure to avail the amount

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in question was that other funds were used to pay for tobacco purchases A and pay the off-shore financier. The loss of the money thus constituted fortuitous expenditure that was closely linked to the appellant's business operations and should have been allowed as a deduction.

Cases referred to

CoT v *A Company* 1979 RLR 29 (A); 1979 (2) SA 409 (RA)B

CoT v *Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A)

CoT v *Rendle* 1964 RLR 463 (A)

ITC 807 (1955) 20 SATC 338 (T)

ITC 1485 (1990) 52 SATC 337 (T)

ITC 1587 (1994) 57 SATC 97 (T) C

ITC 1588 (1994) 57 SATC 148 (C)

S (Pvt) Ltd v *CoT* 1985 (4) SA 34 (ZH)

Legislation considered

Income Tax Act [*Chapter 23:06*], s 15(2)(a)

Case information

A P de Bourbon SC, for the appellant D

T Magwaliba, for the respondent

Judgment

Kudya J: The question for determination in this appeal is whether the misappropriation of the US$1 004 833 of the appellant's money by a E third party is deductible as an expense or loss suffered in the course of trade or business or in the production of income under s 15(2)(a) the Income Tax Act [*Chapter 23:06*]. The pith of the appellant's evidence and submissions was that it was, while that of the respondent was that it was not.

The only evidence adduced at the appeal hearing came from a chartered accountant employed by the appellant as an accounts director. In addition, F the appellant produced a 112 page bundle of documents. The respondent did not call any evidence.

The appellant company is duly registered with the Tobacco Industry and Marketing Board (TIMB) as a tobacco merchant and purchases both auction and contract tobacco, processes, packages, markets it for manufacturers and then exports it. It operates in conformity with the financial architecture G designed in the Exchange Control (Tobacco) Finance Order SI 61 of 2004 and the Reserve Bank of Zimbabwe directive dated 2 May 2008 issued in terms of s 35 (1) of the Exchange Control Regulations SI 109 of 1996. These legal instruments directed that funds for the purchase of local tobacco and for financing contract tobacco growers should be sourced off-shore. H

Kudya J

It was common cause that on 30 June 2010 the appellant through its designated A public officer filed the tax return ITF 12C for the year ended 31 December 2009 on 30 June 2010. It disclosed in the return that the cost of sales included the amount of US$1 004 833 that was liquidated to the Reserve Bank of Zimbabwe for the purpose of purchasing tobacco in terms of exchange control regulations but which was not subsequently availed.

On 26 July 2012, the respondent issued an amended assessment in respect B of the tax year in question. He added back into taxable income of the appellant for that year of assessment the amount in dispute that resulted in a tax liability of US$453 575.22. The figure was made up of the principal amount of US$200 966.20 interest of US$51 642.82 and penalty of C US$200 966.20. The appellant objected to the amended assessment on 13 September 2012. By letter of 18 March 2013, the commissioner allowed the objection of waiver of penalty in full but disallowed the objections on

the principal amount and interest. The appellant was obligated to and did pay the principal of US$ 200 966.20 and the interest thereon that had increased to US$ 58 690.40 by 12 April 2013.

On 27 March the appellant gave notice of appeal. The appellant's case was filed D on 11 May 2013. By consent of the parties, the commissioner's case was filed on 19 August 2013.

The chartered accountant outlined the business operations of the appellant. It was common cause that the tobacco season in Zimbabwe runs from April E to October of each calendar year. The tobacco trade is strictly governed by certain legal instruments (SI 61 of 2004) and the Reserve Bank of Zimbabwe directive of 2 May 2008, and the loan agreement from an off-shore financier and TIMB rules. The TIMB issues a yearly trading licence to tobacco merchants such as the appellant on production of the approval of the loan F facilities by the External Loan Coordinating Committee of the Reserve Bank of Zimbabwe covering the full season. The appellant often received its licence by February or March in any given year.

It was common cause that there were five players that interacted with the appellant in the tobacco merchant operations. These were firstly the growers of the tobacco who interfaced with the appellant either as contract growers G or auction floor vendors. The second was the TIMB, which registered the appellant each year as a tobacco merchant and issued it with a trading licence. The remaining players were financial institutions. These were the Reserve Bank of Zimbabwe, the off-shore bank that availed the foreign currency required by the appellant to purchase tobacco on the local market and the H on-shore bank that acted as a conduit pipe for the channelling of the foreign

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currency requirements of the appellant and as the authorised dealer and A interloper between the Reserve Bank of Zimbabwe and the appellant. All interactions with the Reserve Bank of Zimbabwe during the negotiation of the loan facility, draft agreement, receipt of a return sheet and summary of terms and External Loans Coordinating Committee approvals were carried out through the authorised dealer. There was no direct communication between the appellant and the Reserve Bank of Zimbabwe. B

The purchase of tobacco was regulated in part by SI 64 of 2004 and the directive from the Reserve Bank of Zimbabwe. In a nutshell, the currency of account for all purchases of local tobacco, whether from contract growers or auction floors, was denominated in United States Dollars. These had to be sourced off-shore and transmitted through the on-shore bank to the Special C Tobacco Foreign Currency Account for the appellant in the Reserve Bank of Zimbabwe. The account in the Reserve Bank of Zimbabwe represented a pre-payment of the anticipated tobacco purchases during each calendar year trading season. The on-shore bank kept a mirror account of the funds. The appellant would participate on the auction floor only after confirmation by the Reserve Bank of Zimbabwe of the deposit of off-shore funds into the D Special Tobacco Foreign Currency Account.

On purchasing the tobacco, the appellant would be invoiced in the currency of account. It would transmit the invoice to the on-shore bank which would in turn dispatch it to the Reserve Bank of Zimbabwe. The Reserve Bank of Zimbabwe would transfer the local currency equivalent of the invoiced E amount to the on-shore bank. The amount would be deposited in the Zimbabwe Dollar Tobacco Special Account of the appellant held in the on-shore bank. The local currency would be paid over to the tobacco grower at the auction floor or to the contract farmer. The on-shore bank would make a corresponding debit in the mirror United States Dollar Special Tobacco Account it held for the appellant. F

In a nutshell, the process was such that the tobacco merchant purchased the tobacco in foreign currency but paid for it in local currency. The foreign currency was sold to the central bank which converted the amount into local currency for transmission to the tobacco grower by the appellant through the on-shore bank. G

In his evidence the chartered accountant basically confirmed the movement of funds between the off-shore bank and the Reserve Bank through the on-shore bank. He set out how the balance of US$1 004 833 that remained outstanding in the Special Tobacco Foreign Currency Account was calculated. The amount in question was part of the US$5 million that on instruction H

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of the appellant was remitted to the on shore bank and deposited with the RBZ A for the purchase of tobacco by the appellant in August 2008 for that year's tobacco purchases.

There were inadequate supplies of tobacco on the market to exhaust the amount. A balance of US$2 299 070.04 remained outstanding. The Reserve B Bank of Zimbabwe and the appellant agreed to roll over the amount to the 2009 tobacco season. The appellant was issued with a trading licence for 2009 in February 2009 by TIMB after it was satisfied that it had the required offshore funds to purchase tobacco for the full season. The difference between the balances outstanding after the 2008 tobacco season and the amount in issue was set off against third parties in mutually agreed transactions amongst C all the involved parties.

It was common cause that the remaining US$1 004 833 was not converted by the Reserve Bank into local currency in the 2009 tobacco trading season. At that time, the local currency had been demonetised and the currency of account due to contract growers and on the auction floor was in United States D dollars and not local currency.

The Reserve Bank failed to avail these funds to the on-shore bank for payment of the appellant's obligations to the tobacco sellers. The chartered accountant stated that the appellant was entitled to buy tobacco to the value of the United States dollars held by the Reserve Bank of Zimbabwe and not E to receive Zimbabwe dollars. In addition, the appellant remained indebted to the off-shore supplier of funds and repaid the funds and interest in terms of the loan agreement between the parties. The loan was settled in four instalments of US$1 606 503.36 on 12 December 2008, US$632 175.88 on 31 December 2008, US$1 789 815.54 on 26 January 2009 and US$1 086 408.22 on 25 February 2009. A total of US$5 114 903 inclusive of interest F was repaid to the offshore bank by 3 March 2009. The money was paid from the proceeds derived from the sale of tobacco as demonstrated by the figures in the appellant's bundle of documents.

He stated that the missing money did not constitute planned voluntary expenditure. The appellant did not spend the money before it was lost. The G funds were sitting in readiness to purchase tobacco and awaiting draw down. It was lost in the hands of the exchange control authority, a body mandated by law to be part of the core business cycle of the appellant's tobacco trading operations. The appellant would require use of the money after a sale at the stage it sought conversion into local currency to pay the farmer. The amount H remains outstanding. Liability has been acknowledged. The Reserve Bank is

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willing but unable to pay (p 47 to 70 and especially p. 68 of the appellant's A bundle of documents covering the period 15 April 2009 and 7 January 2013).

He conceded under cross examination that the loss was not a cost of sales in the ordinary sense. He, however, stated that it was money lost in the tobacco chain that constitutes the core business of the appellant. The appellant was required by law to avail the United States dollars upfront to the B Reserve Bank before it could purchase tobacco. It was lost in the appellant's revenue or trading account where it was reflected as a cost of sales. He was adamant that the missing amount fell into the category of working capital before sales for which the appellant did not receive value. It constituted a normal loss in trade. It was lost in pursuit of trade. The process of the purchase of tobacco started with accessing the off-shore funds without which the appellant's C trade would be stillborn. He revealed that the appellant would only access the money when it wanted it liquidated to pay the farmer.

He conceded that although the appellant had described the debt as bad in meetings and correspondence with the respondent (13 September 2012 objection in which six points justifying the bad debt status of the balance), D it was not a bad debt as contemplated by s 15(2)(g) of the Income Tax Act, for the reason that it did not arise from a sale. He was adamant that the loss fell into the provisions of s 15(2)(a) of the Act.

The chartered accountant gave his evidence well. He was not shaken in cross examination. His evidence was credible, relevant and material to E the business operations of the appellant. The respondent did not lead any contrary evidence. His evidence stood uncontroverted. It was confirmed by the documents filed in the appellant's bundle of documents. I believed his version on how the US$5 million was sourced and drawn down. I accepted his testimony on how the sum was reduced to the sum of US$1 004 833 that was rolled over to the 2009 trading season. I accepted his version

under cross F examination that the funds were not availed in 2009 after the appellant had purchased tobacco and sought to draw down the lost funds.

The issue for determination is whether the appellant is entitled to rely on the provisions of s 15(2)(a) of the Income Tax Act for the deduction of US$1 004 833 in the 2009 tax year. G

The section reads:

"(2) The deductions allowed shall be –

(a) expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except to the extent to which they are expenditure or losses of a capital nature." H

Kudya J

In *Commissioner of Taxes* v *Rendle* 1964 RLR 463 (A) at 465 *in fine*-466C; A1965 (1) SA 59 (SRA) at 62H-63D (which was followed by Smith J in *S (Pvt) Ltd* v *Commissioner of Taxes* 1985 (4) SA 34 (ZH) at 38I-39D), Beadle CJ stated that:
"The broad test which is now universally applied there was laid down by Watermeyer AJP in *Port Elizabeth Electric Tramway Co* v *Commissioner for Inland Revenue*B 1936 CPD 241 at 246. This test, with slight alteration in the wording, was approved by the Appellate Division in *Commissioner for Inland Revenue* v *Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 299, and the test as modified by the Appellate Division has**6**
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subsequently been approved by that Division in the *Commissioner for Inland Revenue* v *African Oxygen Ltd* 1963 (1) SA 681 (A) at 688, and in *Commissioner for Inland Revenue* v *Allied Building Society,* 1963 (4) SA 1 (A) at 13.

This broad test, which may now be regarded as the accepted standard test, is as follows: C

'All expenses attached to the performance of a business operation *bona fide* performed for the purpose of earning income are deductible whether such expenses are necessary for its performance or attached to it by chance D or are *bona fide* incurred for the more efficient performance of such operation provided they are so closely connected with it that it would be proper, natural or reasonable to regard the expenses as part of the cost of performing the operation.'

(Note: This is Watermeyer AJP's test as modified by the Appellate Division).

It will be seen that this passage deals with three types of expenditure:

(1) expenses which are necessary for the performance of the business operation; E

(2) expenses which are attached to the performance of the business operation by chance, or

(3) expenses which are *bona fide* incurred for the more efficient performance of such business operations.

All these types of expenditure are deductible provided that they are so closely F connected with the performance of the business operation that it would be proper, natural or reasonable to regard them as part of the cost of performing the operation."

Mr *de Bourbon,* for the appellant, and Mr *Magwaliba,* for the respondent, were in agreement that the determination of this matter turns on the second rung of the formulation by Beadle CJ , that is, whether the US$1 004 833 G falls into the category of "expenses which are attached to the performance of the business operation by chance."

Mr *Magwaliba* correctly submitted that the loss was not planned expenditure; the kind Beadle CJ at 61A termed "money voluntarily and designedly spent-designed expenditure" by the taxpayer for the purpose of his trade. H Put in another way, he correctly submitted that the loss was not an actual

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Kudya J

cost arising from a sale. He further submitted that the money did not fit into A the category of expenditure "involuntarily spent because of some mischance or misfortune which has overtaken the taxpayer-fortuitous expenditure". He argued that the taxpayer had failed to show that the risk or mishap giving rise to the involuntary expenditure was an inseparable or a necessary incident or inherent risk of the carrying on of its business operations.

He argued that the appellant did not suffer any loss as the Reserve Bank of B Zimbabwe acknowledged liability and is willing to repay the money. It seems to me the acknowledgement of a debt does not change the character of the loss to the appellant. The uncontroverted testimony of the chartered accountant was that the prepayment to Reserve Bank of Zimbabwe constituted working capital. It was designed to produce income once the Reserve Bank of Zimbabwe was C advised to make good the funds to the seller of tobacco.

According to Lewis JP in *Commissioner of Taxes* v *A Company* 1979 RLR 29 (A); 1979 (2) SA 409 (RA) at 410 as read with 412H-413A and 420A, working or floating capital is deductible under s 15(2)(a).

Mr *Magwaliba* further argued that when the money was deposited into the D Reserve Bank of Zimbabwe account, it became the Reserve Bank money for which the Reserve Bank was entitled to defray as it pleased. He argued that the appellant was only entitled to payment of an equivalent amount in local currency. The money was rolled over to 2009.

In my view, when payment to farmers became due in 2009, the entitlement E of the appellant was not receipt of local currency but transmission of the payment in the currency of account to the authorised dealer for payment.

In fact, it was not correct that the money once deposited into Reserve Bank was for the Reserve Bank to utilize it as it pleased. The chartered accountant stated that the Reserve Bank was entitled to convert the currency on presentation of the invoice by the authorised dealer for payment to the farmer. F

Mr *Magwaliba* further submitted that the loss was not a cost to any sale. He was correct. He was merely underscoring that it was not designed expenditure. It was common cause that the loss was for intended cost of sales. Such loss, in my view, falls into the category of expenses attached to the performance of business by chance. G

In *Commissioner of Taxes* v *Genn & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 299G Schreiner JA stated:

> "In deciding how the expenditure should properly be regarded the court clearly has to assess the closeness of the connection between the expenditure and income-earning operations, having regard both to the purpose of the expenditure and to what it actually effects." H

Kudya J

To the same effect was Melamet J in *ITC 1485* (1990) 52 SATC 337 (T) at 341-2 A and van Dijkhorst J in *ITC 1587* (1994) 57 SATC 97 (T) at 103 and van Zyl J in *ITC 1588* (1994) 57 SATC 148 (C) at 151-152. Melamet J held that "an absolute and unconditional legal obligation must be incurred" to qualify for deduction.

Van Dijkhorst J held that expenditure actually incurred did not mean B expenditure actually paid in the year of assessment but meant "all expenditure in respect of which the taxpayer incurred an unconditional legal obligation" in the year of assessment and not in the year of actual payment if the two are different. He did not limit incurred to defrayed, discharged or borne but he excluded impending, threatened or expected C expenditure.

In *ITC 1588* (1994) 57 SATC 148 (C) at 151 van Zyl J stated:

> "The words 'expenditure actually incurred' have been authoritatively interpreted as meaning expenditure in respect of which there is an unconditional legal liability to make payment, regardless of when the liability as such is discharged. There is hence no prerequisite that payment must be effected during the year D of assessment, provided the said liability has been incurred in that year. *Caltex Oil SA Ltd* v *SIR* 1975 (1) SA 665 (A) at 674D-E; *Nasionale Pers Bpk* v *Kommissaris van Binnelands Inkommste* 1986 (3) SA 549 (A) at 564A-B; *Edgars Stores Ltd* v *CIR* 1988 (3) SA 876 (A) at 888G-889C; *CIR* v *Felix Schuh (SA) (Pty) Ltd* 1994 (2) SA 801 (A) at 8071-808A."

The unconditional liability to repay the money, the borrowed working capital, E was to the off-shore lender. It was an unconditional liability incurred in the previous year of assessment that was also carried forward into the 2009 year of assessment. The initial loan amount of US$5 million inclusive of the US$1 004 833 in issue had been repaid to the offshore financier by 3 March 2009. In fact two repayments of US$1 789 815.54 and US$1 086 408.22 were made to the off-shore financier on 26 January and F 25 February 2009, respectively.

Mr *de Bourbon* disagreed with the submission made by Mr *Magwaliba* that the loss was not closely connected to the appellant's business operations. He forcibly submitted that the loss of the money was an incidental risk inherent in the business of the appellant. The money was borrowed for the G purpose of purchasing tobacco. It was deposited with the Reserve Bank by operation of law for payment after the purchase. It was a legal requirement for the money to be deposited with the Reserve Bank in advance of the purchase otherwise the appellant would be disallowed from buying tobacco.

It is clear to me that Mr *de Bourbon* was correct. *ITC 807* (1955) 20 SATC 338 (T) H is in point. In that case the taxpayer owned half the shares in a

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manufacturing concern that supplied it with some of its stock-in-trade. It was A the taxpayer's custom to make cash advances against future purchases to its suppliers. It also made such cash advances to the manufacturing subsidiary. In the relevant year of assessment the subsidiary failed to supply stock valued at £4 807. It was held that the outstanding balance was not a prepayment for specific goods but was a prepayment against business and was therefore deductible as a cost of doing business in terms of the South African section B equivalent to our s 15(2)(a). At 342-3 Price J stated:

> "We are of the opinion that the loss incurred in the present case is deductible against the income of the appellant for the purposes of assessment for tax because it was integrated in and an adjunct of the ordinary trading of the appellant. It was the way in which it carried on its business. The amount, in our opinion, C was correctly brought up in the trading account and is expenditure incurred in the production of the appellant's income and is not an outlay of a capital nature. In our opinion the loans were made wholly and exclusively for the purposes of trade, in the ordinary course of the appellant's business operations."

In the present matter, the appellant made advance payment to the Reserve Bank of Zimbabwe for the purpose of paying for tobacco purchases. It was the normal, customary and legal practice for the appellant to conduct its D business operations. The payment was therefore integrated in and an adjunct of the ordinary trading of the appellant. The chartered accountant, in his uncontroverted testimony, stated that the money was reflected as a cost of goods in the trading accounts of the appellant and was never held as an investment. It was not revenue but working capital. E

The effect of the failure to avail the amount in question was that other funds were used to pay for tobacco purchases and pay off the off-shore financier. It is clear to me that the loss of the money constitutes fortuitous expenditure that is closely linked to the business operations of the appellant.

I am satisfied that the appellant has established on a balance of probability F that the loss of US$1 004 833 was fortuitous expenditure, and not an outlay of a capital nature, incurred in the ordinary course of business. The Commissioner should have allowed the deduction. The appeal succeeds.

Mr *de Bourbon* sought, in the event of success, the deduction of the costs incurred by the appellant in respect of this appeal against its taxable income in the year it is incurred. G

The prayer was not opposed. I will therefore grant the prayer.

Accordingly, it is ordered that:

The appeal be and is hereby allowed. The amended assessment of 26 July 2012 disallowing the sum of US$1 004 833 is set aside. H

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Kudya J

1. The respondent shall forthwith reimburse to the appellant the tax paid in A the sum of US$200 966.20 together with interest paid in the sum of US$58 690.40.
2. The respondent is directed to issue a further amended assessment allowing the deduction of the sum of US$1 004 833 in terms of s 15(2) (a) of the Income Tax Act [*Chapter 23:06*] as a deduction against the gross B income of the appellant for the year ending 31 December 2009.
3. The costs incurred by the appellant in respect of the objection and this appeal, as taxed by the Registrar, shall be allowed as a deduction in terms of s 15(2)(aa) of the Income Tax Act [*Chapter 23:06*].

Gill, Godlonton & Gerrans, appellant's legal practitioners C

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[zRPz]S (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2014 (2) ZLR 580 (H)

Citation	2014 (2) ZLR 580 (H)
Case No	Judgment No. FA-05-13
Court	Fiscal Appeal Court
Judge	Kudya J
Heard	23 July 2014; *CAV*
Judgment	22 October 2014
Counsel	*A P de Bourbon SC*, for the appellant *R Magwaliba,* for the respondent
Case Type	Fiscal appeal
Annotations	No case annotations to date

Flynote

Revenue and public finance – *value added tax – deductions allowed – input tax – when may be claimed – need for operator to submit claim timeously*

Revenue and public finance – *value added tax – tax on goods or services supplied – meaning of "supply" – wide meaning to be given to – supply of goods by operator in lieu of payment of cash for goods supplied to* D *operator – supply treated as sale in operator's books of account – not a settlement in kind*

Headnote

The appellant company in these two appeals was a manufacturer of steel and steel products. E

In the first appeal, the facts were that in 2008 another company in the business of making steel products supplied, at the request of the appellant, fuel and groceries imported from South Africa. The appellant did not settle the debt on delivery of the goods. At the commencement of the multicurrency regime in February 2009, the appellant created a liability in its books F of account in favour of the other company for the indebtedness. In due course it settled the debt by providing steel of equivalent value to the debt. It issued invoices and delivery notes for the transaction. The appellant's tax agents, a firm of chartered accountants, in a letter to the respondent, described the transaction as barter trade and further treated it as a sale in a subsequent letter. The appellant initially treated the transaction as G a sale, but later altered it to "cost of sales". It did not collect or remit VAT on the transaction. The respondent treated it as a barter trade and assessed the appellant for VAT. The issue on appeal was whether the provision of the steel constituted a "supply" of the steel or a payment by means of steel. H

In the second appeal, the appellant and a third company concluded an agreement A in terms of which that company, a scrap metal supplier, supplied scrap metal which the appellant converted into finished products for the scrap metal supplier's use. In return for the processing, the appellant would receive one tonne of finished steel products for every five tonnes of scrap processed. Both companies raised debit notes showing the value B of the metal supplied and the VAT owing. The amount in each debit note were identical. The appellant submitted a VAT return for other transactions but did not declare the supplies of finished steel products supplied. It also failed to claim for input tax for the scrap it received. When the respondent audited the appellant's tax returns it directed the C appellant to submit amended VAT returns. The appellant did so, and claimed input tax for the scrap it received. The claim for input tax was disallowed. The issue was whether the claim was validly made in terms of s 15(2)(a) of the Value Added Tax Act [*Chapter 23:12*].

Held, that, under s 6(1)(a) of the Act, VAT is charged on the supply, on or after 1 January 2004, by any registered operator of goods and services D in the course or furtherance of any trade carried on by him. All these elements were present, the only issue being the nature of the transaction. The word "supply" was not defined in the Act, other than as including "all forms of supply". It thus had a wider connotation than its usual and ordinary meaning. The appellant received goods from the other company E and set off the debt through the supply of steel of equivalent value. The contention that the appellant treated the set off as a payment was not borne out by the facts. Before VAT was assessed, the appellant treated the transaction as a sale of steel in its books of accounts. It issued invoices to the other company, as well as delivery notes. The transaction was a sale. It was a sale for which the appellant did not receive cash but offset F the cash due against the debt owing. It was not a settlement in kind.

Held, further, that the *contra fiscum* rule of construction of tax laws entails interpreting the law so as to impose the smaller burden on the taxpayer. However, there is little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation. Ultimately, the true intention of the G legislature is of paramount importance, indeed decisive. If the language of an enactment is unambiguous, that is the end of the matter. Where the meaning is unequivocally expressed, there is neither need nor room for ancillary aids to interpretation.

Held, further, that the essential factors on which a deduction of input tax H is based are (a) a tax invoice, debit note or credit note must have been

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provided in accordance with s 20 or 21; (b) the tax invoice, debit note A or credit note must be provided within the period in which the registered operator is required to furnish a return in terms of s 27 or s 28, or 12 months, whichever is the longer; (c) the tax invoice, debit note or credit note must be held by the operator; and (d) the tax invoice, debit note or credit note must be held at the time any return in respect of that supply was furnished. Items (a), (c) and (d) applied to the appellant. The appellant B fell into category C as a registered operator, which meant that it had to furnish its return within 10 days of the end of its taxable period. Like every other registered operator, it had a grace period to do so of 12 months from the last day of the month from which it was supposed to furnish the return. It did not do so, either during the ordinary period or during the grace period. It only did so two years later, after receiving a directive C in terms of s 30 from the respondent. Accordingly, the respondent was correct in disallowing the claim for input tax.

Editor's note: The judgment number is given as FA-5-13 (fiscal appeal judgment 5 of 2013). At the time of preparing this volume of the Reports, the HH (High Court, Harare) number for the judgment was not available. D

Cases referred to

CIR v *Insolvent Est Botha* 1990 (2) SA 548 (A)

Endeavour Foundation & Anor v *CoT* 1995 (1) ZLR 339 (S)

Glen Anil Development Corp Ltd v *Sec for Inland Revenue* 1975 (4) SA 715 (A)E

Meman & Anor v *Controller of Customs & Excise* 1987 (1) ZLR 170 (S)

R v *Beechmore* 1903 TS 348

R v *Ndamelda* 1927 TPD 242

S v *Mngadi* 1965 (1) SA 129 (N)

S v *Wolters & Anor* 1963 (4) SA 135 (N)F

Shell's Annandale Farm v *Commissioner SA Revenue Service* 2000 (3) SA 564 (C)

XYZ CC v *CSARS* (2007) SATC 7

Legislation considered

Fiscal Appeal Court Act [*Chapter 23:05*], s 10 G

Value Added Tax Act [*Chapter 23:12*], ss 3, 7, 9, 10, 11, 15, 20, 26, 27, 28 & 30

Case information

A P de Bourbon SC, for the appellant

R Magwaliba, for the respondent H

Kudya J

Judgment

Kudya J: This appeal, filed under cover of one notice of appeal, covers two A separate and distinct issues between the appellant company on the one hand and the Zimbabwe Revenue Authority on the other. The court agreed with the parties that it was just and expedient for the matters to be dealt with in one appeal. The issues will, however be resolved *seriatim.*

The ZW (Pvt) Ltd transaction B

The facts are common cause. The appellant is a manufacturer of steel and steel products. In 2008 ZW (Pvt) Ltd ("ZW"), a company in the business of making steel products, supplied, at the request of the appellant, fuel and groceries imported from South Africa. The appellant did not settle the debt on delivery of the goods. At the commencement of the multicurrency C regime in February 2009, the appellant created a liability in its books of accounts in favour of ZW in the sum of US$392 326.64 for the indebtedness.

In due course it settled the debt by providing 337.8 tonnes of steel of equivalent value to the debt. It issued invoices and delivery notes to ZW for the transaction. The appellant's tax agents, a firm of chartered accountants, in a letter to the respondent dated 24 May 2012, described the transaction as D barter trade and further treated it as a sale in the letter dated 23 October 2012.

The appellant initially treated the transaction in its books of account as a sale, but later altered it to cost of sales. It disputed supplying goods to ZW. It did not collect or remit value added tax on the transaction. The respondent treated the transaction as barter trade and assessed the appellant for value added E tax. The appellant objected to the assessment. The respondent disallowed the objection, hence the present appeal.

The issue for determination is whether the 337.8 tonnes of steel constituted a supply of steel or a payment by steel. The appellant contended that it merely paid consideration in kind in place of cash. The respondent argued F to the contrary and submitted that the act of the appellant fell squarely into the provisions of s 6(1)(a) of the Value Added Tax Act [*Chapter 23: 12*] (hereinafter referred to as "the Act"). The section reads:

> **"6 Value added tax**
>
> (1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund, a tax at such rate as may be fixed G by the Charging Act on the value of –
>
> (a) the supply by any registered operator of goods or services supplied by him on or after the 1st January, 2004, in the course or furtherance of any trade carried on by him:"

The constituent elements for value added tax contemplated by s 6 are therefore:

1. the supply by any registered operator; H

Kudya J

2. of goods or services; A

3. supplied by him on or after 1 January 2004;

4. in the course or furtherance of any trade carried on by him.

In my view, these elements are conjunctive rather than disjunctive. In other words, all the elements must apply to the conduct of the taxpayer. If any one element is missing, then the taxpayer will be exempted from paying value B added tax. It was common cause that the appellant is a registered operator. It was also common cause that the transaction took place after 1 January 2004 and that it was undertaken by the appellant in the course or furtherance of its trade. Lastly, it was common cause that the transaction involved goods. The only dispute between the parties revolves around the nature of the transaction. The respondent described it as a supply while the C appellant referred to it as a consideration of payment for goods supplied by ZW in 2008. The appellant thus disputed the respondent's finding that the settlement of the debt by steel of equivalent value constituted a supply as contemplated by s 6(1)(a) of the Act.

Section 2 of the Act defines supply and supplier in these terms: D

> "'Supply' includes all forms of supply, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly;
>
> 'Supplier', in relation to any supply of goods or services, means the person supplying the goods or services".

The legislative definition subsumes foreknowledge of the meaning of E the word "supply". We must investigate the ordinary meaning of the word. The *Shorter Oxford English Dictionary* defines the word *inter alia* as "the action of supplying or condition of being supplied; the act of making up a deficiency, or of fulfilling a want or demand; to furnish with and to provide". The word clearly carries a variety of meanings.

Mr *de Bourbon* referred to various non-comparative law-based cases that F attempted to define the word. In criminal cases involving liquor, dagga and firearms, the word was defined to exclude delivery and handing over. In the comparative law case of *Shell's Annandale Farm* v *Commissioner SA Revenue Service* 2000 (3) SA 564 (C), the word supply in the South African VAT Act, was defined in exact terms as in our own. The case involved involuntary G expropriation of the property of a taxpayer who carried on the business of leasing agricultural land. The Commissioner for SA Revenue Services assessed VAT on the compensation received on the ground that the taxpayer had supplied the property to government. In the context of the Act, supply was construed to connote an active, as opposed to a passive, meaning. The taxpayer was exempted from VAT on the ground that he was H

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a passive A supplier. The state of mind of the taxpayer in the transaction was of paramount importance in that decision.

The steps walked by the court in arriving at its decision are instructive. The first was to consider the ordinary definition in the *Oxford English Dictionary* of the word "supply". It zeroed in on "the action of supplying or condition of being supplied", which it held connoted both passive and active condition. B In that dictionary, "supply" also connoted "making up a deficiency, fulfilling a want or demand, supplying something needed ... provision or furnishing necessaries". The second step was to consider the provisions of the Act. The learned judge concluded that the context in the Act favoured an active, as opposed to a passive, connotation. At 573A-H he stated:

> "In short, whilst it is possible to construe 'supply' to include a passive connotation, the C Act needs to be read as a whole in order to extract the meaning from the text and its purpose. Thus the word 'services' as employed in s 7(1) of the Act is defined to include anything done or to be done including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage.
>
> There are indications in the Act which would appear to employ the active as opposed to D the passive meaning of the word 'supply' as set out in the dictionary.
>
> The emphasis on the active finds support in the definition of enterprise. As s 7(1) (a) of the Act makes clear there are two requirements before VAT can be levied, namely there must be a supply and such supply must be in the course of furtherance of any enterprise carried on by a vendor.
>
> But for this reason the definition of enterprise represents a key definition in E the Act.

"'Enterprise' means (a) in the case of any vendor other than a local authority, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic, and in the course or furtherance of which goods or services are *supplied* to any other person for a consideration, whether or not for profit, including any trade or activity F carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club:

Provided that –

(i) *anything done* in connection with the commencement or termination of any such enterprise or activity shall be deemed to be done in the G course or furtherance of that trade, enterprise or activity;

The words emphasised [*supplied* in the main definition and *anything done* in the proviso] in the definition highlight the importance of some act on the part of the vendor prior to VAT being charged. While our law recognises forms of delivery such as *traditio brevi manu* Mr *Seligson* argued that prior to such forms of delivery being effected there must be a form of agreement between H the parties, that is a preceding positive act [for passing ownership by delivery

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Kudya J

the transferor must have the intention of passing the ownership of the thing and A not merely some right in it less than ownership] "

The third stage was to compare the contextual application to other foreign jurisdictions with similarly worded statutes. At 574D-E he stated:

"There is some indication from comparative law that supply is used in the active sense. In *Customs and Excise Commissioners* v *Oliver* [1980] STC 73 (QB) the court interpreted a similar definition of supply in the Finance Act 1972 B (the UK VAT legislation) to mean "furnishing or serving goods or services .supply is the passing of possession in goods pursuant to an agreement where under the supplier agrees to part and the recipient to take possession' (at 75).

In *Databank Systems Ltd* v *Commissioner for Inland Revenue* [1987] NZLR 312 (HC) the court analysed the word supply within the context upon which our Act is based, Goods and Services Act 1985. It examined the dictionary C definition of supply and concluded that supply `simply means to furnish with or to provide.'(at 323). Some form of act is required to be a supply for the purposes of VAT legislation."

The Zimbabwean Act is drafted in the same terms as was the South African Act at the time the *Annandale Farm* case *supra* was decided. I, however, find myself in disagreement with the conclusion in the *Annandale Farm* case. D That the decision was wrong was confirmed in hindsight by the amendment of the South African Act to capture passive supplies. In my view, a passive supply is as much a supply as an active one. The ground for distinction eludes me. The word supply bears both the passive and active meaning. It seems to me that all forms of supply are contemplated by the Act, including derivatives of supply. E

Mr *de Bourbon* submitted that the word "supply" was ambiguous and should be interpreted by the court in favour of the taxpayer so as to exclude payment in kind. He based his submission on the definitions of "supply" in the criminal cases of *R* v *Beechmore* 1903 TS 348 at 349 where supply could not be equated with "deliver"; *R* v *Ndamelda* 1927 TPD 242 (a liquor F case) and *S* v *Mngadi* 1965 (1) SA 129 (N) (a dagga case) with "handing over" and *S* v *Wolters & Another* 1963 (4) SA 135 (N) where it was held the word excluded "deliver" and "handover" both meant to provide or to furnish.

He also relied on the *Annandale Farm* case *(supra)* that excluded transfer of expropriated immovable property to the Government from being a supply G of that property. In S v *Wolters and Another (supra)* at 138H Miller J, as he then was, observed that:

"The word *supply is not defined* in the Act. It is a word which has a large variety of meanings, *depending upon the context in which it is used*" (emphasis mine).

Again at 140A: H

Kudya J

"it seems to me, therefore, that unless there are reasonably clear indications in A Act 23 of 1937 that supply as used in sec 23 has a wider connotation than its ordinary and usual one, there is no justification for assigning such wider meaning to the word, particularly when we are dealing with a provision the breach of which entails serious criminal consequences" (emphasis added).

The principle, *contra fiscum,* of favouring the subject in a case of ambiguity B is part of our law. It entails interpreting the law so as to impose the smaller burden on the taxpayer. See *Endeavour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at 362D and *Meman & Anor* v *Controller of Customs & Excise* 1987 (1) ZLR 170 (S) at 175 F.

In my view, all the cases referred to by Mr *de Bourbon* that curtailed the C meaning of "supply" confirmed that the word has a large variety of meanings. In the present case, unlike in *Wolters'* case, "supply" is defined in s 2 of the Act. The context in which it is used indicates reasonably clearly that a wider connotation than its usual and ordinary one should be assigned to the meaning of the word. The remarks of Botha JA in *Glen Anil Development Corporation Ltd* v *Secretary for Inland Revenue* 1975 (4) SA 715 (A) at D 727E-G are instructive.

He states:

> " Apart from the rule that in the case of an ambiguity a fiscal provision should be construed *contra fiscum (Estate Reynolds and Others* v *Commissioner for Inland Revenue* 1937 AD 57 at 70) which is but a specific of the general rule that all legislation imposing a burden upon the subject should, in the case of E ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation. Indeed, I do not think that the rule as stated in the *Cape Brandy Syndicate* case, *supra,* is any different from that applicable in the interpretation of all legislation. However that may be, it is clear from the remarks of Wessels CJ in the *Delfos* case, *supra*, that even in the interpretation of fiscal legislation the true intention of the legislature F is of paramount importance and I should say decisive."

Again, in *Commissioner for Inland Revenue* v *Insolvent Estate Botha* 1990 (2) SA 548 (A) at 559H-560C Hoexter JA stated:

> "In the process of interpretation it is the function of the court to determine what the legislature means from the words it has used. If the language of an enactment is G unambiguous that is the end of the matter. Where the meaning is unequivocally expressed there is neither need nor room for ancillary aids to interpretation. Had it been Parliament's intention to ordain that illegal agreements of sale should not attract sales tax, nothing would have been simpler than to have said so. Here it omitted to do so. In defining a 'sale' s 2 of the Act uses words of general and very broad signification. Unless there is to be noticed in the Act H itself some sound reason for a restrictive interpretation, the general words of

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Kudya J

> the definition must receive a general meaning; and full and fair effect must be A given to the language used.
>
> In its ordinary meaning the word agreement signifies an accord or concurrence of minds. On the face of it, so it seems to me, the *kweekkontrak* comes squarely within letter of the definition of sale in s 2 of the Act. In the *kweekkontrak* Trio Kulture agreed to sell goods to others. To read 'an agreement whereby a party agrees to sell' in the statutory definition as signifying 'an agreement enforceable B at law whereby a party agrees to sell' involves, so I consider, an arbitrary retrenchment of the ordinary and natural meaning of the word. Is there then to be found elsewhere in the Act an indication that the ordinary and natural meaning must be curtailed or cut down? I do not think that there is."

The legislature was aware of the large variety of meanings of the word "supply". It seems to me that the intention of the legislature was to catch all C the shades of meaning of the word supply hence the use of the wide, broad, deep, extensive and all-embracing phrase "all forms of" prefacing it. The purpose of the Act as set out in the preamble is "*to provide for taxation in respect of the supply of goods and services and the importation and exportation of goods; to provide for the repeal of the Sales Tax Act* [Chapter 23:08]*; and to provide for matters connected therewith*". It is in this architectural design D that the context of the Act resides. VAT is levied in respect of the supply of goods and services. That is the context in which the controlling words in s 6 (1)(a) operate. Both "goods" and "services" are defined in the Act.

Those definitions remove all forms of ambiguity suggested by Mr *de Bourbon* in his submissions. The first purported ambiguity was that E payment by money falls into the definition of supply. He contended that levying VAT on money would be absurd. I agree it would be absurd to levy VAT on payment of cash. He however overlooked that the payment of money is excluded from VAT in the definition of goods and services in the Act. Goods and services are, respectively, defined thus:

> "'goods' means corporeal movable things, fixed property and any real right in F any such thing or fixed property, but excluding –
>
> (a) money;

(b) any right under a mortgage bond or pledge of any such thing or fixed property; and

(c) any stamp, form or card which has a money value and has been sold or G issued by the State for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collector's piece or investment article;

'services' means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excludes the supply of goods, money or any stamp, as contemplated in paragraph (c) of the definition of 'goods'". H

2014 (2) ZLR p589

Kudya J

Mr *Magwaliba* contended in para 7 of his heads that: A

> "The essence of a VAT system is that *all transactions* entered into by an organisation are subject to tax. If the organisation is the supplier in the transaction, it must charge output tax and collect it. If the organisation is the receiver in the transaction, it must be charged input tax and it must pay it. In this case, the appellant was the supplier. It ought to have charged and collected VAT in its supply of its steel B products to ZW."

Mr *de Bourbon* correctly took issue with the first sentence. It is incorrect and is too widely and liberally stated. Not all transactions entered into by an organisation are subject to VAT. Mr *Magwaliba* clearly overlooked the exemptions set out in s 11 of the Act. In addition, the goods and services that C are liable for value added tax are circumscribed by the fourth constituent element, *viz,* the supply must be in the course or furtherance of any trade carried out by the taxpayer. However, I agree with him that the words "all forms" are clear and unambiguous. They cover everything that connotes a supply.

Mr *de Bourbon* further submitted that levying VAT on what was a settlement D in kind of a debt owed violated the definition of consideration set out is s 2 of the Act. Consideration is defined as follows:

> "'consideration', in relation to the supply of goods or services to any person, includes any payment made or to be made, including any deposit on any returnable container and tax, whether in money or otherwise, or any act or E forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as an unconditional gift to any association not for gain:
>
> Provided that a deposit, other than a deposit on a returnable container, whether refundable or not, given in respect of a supply of goods or services shall not be F considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited;
>
> 'consideration in money' includes consideration expressed as an amount of money;".

It is correct that the appellant received goods from ZW and set off the debt through the supply of steel of equivalent value. The contention that the G appellant treated the set off as a payment is not borne out by the facts. Before VAT was assessed by the respondent, the appellant treated the transaction as a sale of steel in its books of accounts. It issued invoices to the supplier and delivery notes. The invoice numbers are quoted in the delivery notes. The tax agent of the appellant, in correspondence to the respondent dated H 24 May 2012 described the transactions as "barter trade deals". The same

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agent, in a letter dated 23 October 2012, indicated that the transaction was recorded as a "sale" in the appellant's ledger.

I am satisfied from these records that the transaction was A a sale. It was a sale for which the appellant did not receive cash but offset the cash due against the debt owing.

In South Africa, in *XYZ CC* v *CSARS* (2007) SATC 7, barter transactions B were treated as supplies liable to VAT. The facts in the former case were that the appellant provided services to certain sponsors who in turn paid him cash and in kind for the services. The sponsors did not submit any VAT returns nor charge VAT on the appellant. The appellant did not pay VAT on the sponsorships or charge output VAT on the services it provided, but submitted a return in which it claimed deduction of input VAT that was never C charged by the sponsors. The issue is whether the appellant was

entitled to deduct input tax for supplies made to it by the sponsors in the absence of tax invoices issued by the sponsors. The sponsors declined to issue the invoices in question. In para 30 passing reference is made to the contentious mix of supplies of which the transactions that were assessed were barter transactions. The assessments raised by the Commissioner were confirmed. D It is not apparent in the judgment what the rationale of the treatment of barter transactions as supplies was.

That consideration by way of goods and services constitutes supply is clearly recognised in the Act. I need only refer to the provisions of s7(1)(a) and (b) that deem payment of debt through the disposal of goods of the debtor E by the creditor in certain circumstances constitutes supply in the course of trade. There is therefore no contradiction between the wide definition of "supply" and that of "consideration", and the various mechanisms found in ss 3(2) and (3), and 9(2) for determining the open market value of that consideration in the Act. It seems to me, therefore, that the appellant first supplied the goods and then, instead of being paid cash and handing it back F to its creditor, forewent that cash in settlement of the debt. In my view, the appellant utilized a mechanism not disparate from the open market value of the goods to calculate the value of the steel before setting off the debt owing.

It was agreed by the parties, in line with s 10 of the Fiscal Appeal Court Act [*Chapter 23:05*], that in the event that the appellant lost, I should not G make any order as to costs. Accordingly the appeal is dismissed with no order as to costs.

The ZOS Company Ltd Transaction

In this appeal, the parties did not lead any oral evidence. Counsel were agreed on the facts in this matter. They are as follows. The appellant and H

Kudya J

ZOS Company Limited ("ZOS") A concluded a "conversion agreement", annexure G to the respondent's case, which came into effect on 19 January 2009. It was for an initial period of six months and subject to renewal. In terms of the agreement ZOS, the scrap supplier, supplied scrap steel to the appellant, the converter, for conversion into finished products for ZOS's use. ZOS delivered 4 768.44 tonnes of scrap metal to the appellant between B February and December 2009 for processing into finished steel products. In return for the processing the appellant, in terms of clause 2.1.1 of the agreement, received 1 tonne of finished steel products for every 5 tonnes of scrap processed.

The appellant, in return, delivered 1 135.73 tonnes of finished products to the C scrap supplier. The parties exchanged debit notes indicating their respective VAT liability. The debit note from ZOS to the appellant indicates a taxable value of the supply of US$851 796 and VAT of US$127 796.40 giving an aggregate value of US$979 565.40. The debit note from the appellant to ZOS shows that the appellant delivered 1 135.728 tonnes of steel valued at US$851 796. VAT was charged at 15% in the sum of US$127 769.40.

The appellant submitted timeous VAT returns during the period February to D December 2009 for other transactions. It, however, never declared the supplies of finished steel products it made to ZOS in its returns for the months in question. It also failed to claim for input tax for the scrap it received during these months. In 2012 the respondent conducted an audit of the tax E returns of the appellant. It discovered that the sales figures in the income tax return of the appellant were much higher than the total sales figure in its VAT returns. One of the causes was the failure to declare the supplies of the finished products it made to ZOS. Acting in terms of s 30 of the Act, the respondent directed the appellant to submit amended VAT returns for the months in question in order to ascertain the correct tax payable. The F appellant submitted the amended returns for the period on 22 June 2012. The appellant claimed the input tax for the scrap iron supplied by ZOS during the period in question. The claims were disallowed and the appellant was reassessed for VAT. The respondent added back the input tax claimed in the amended returns. The appellant filed the present appeal contesting the G respondent's decision.

The issue for determination is whether the claim for input VAT was validly made in terms of s 15(2)(a) of the Act.

Section 15(2)(a) deals with the right to claim input tax. It reads:

"(2) No deduction of input tax shall be made in terms of this Act in respect of a H supply or the importation of any goods into Zimbabwe, unless –

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(a) a tax invoice or debit note or credit note in relation to that supply has A been provided in accordance with section *twenty* or *twenty-one* within the period the registered operator is required to furnish a return in terms of sections *twenty-seven* and *twenty-eight* or twelve months, whichever is the longer period and is held by the registered operator making that deduction at the time that any return in respect of that supply is furnished; or ..."

The essential factors on which a deduction of input tax is based are: B

(a) a tax invoice, debit note or credit note in relation to the supply must have been provided in accordance with s 20 or s 21;

(b) that tax invoice, debit note or credit note must have been provided within the period the registered operator is required to furnish a return in terms of s 27 or s 28 or twelve months, whichever is the longer period; C

(c) the tax invoice, debit note or credit note must be held by the registered operator making the deduction; and

(d) that holding must be at the time that any return in respect of that supply was furnished.

It was common cause that the debit note in relation to the supply was provided D in accordance with ss 20 and 21. It was also common cause that the debit note was held by the appellant, a registered operator, seeking the deduction. It was further common cause that the appellant held the debit note when it furnished the return in respect of the supplier. The dispute centres on the second essential factor.

Section 27 sets out the four categories (A, B, C and D) that any registered E operator may fall in. A registered operator in the tax period of the two months ending on the last day of the month of January, March, May, July, September or November falls into category A; and one in the tax period for the months ending on the last day of the remaining calendar months falls into category B. Category C caters for tax periods of one month ending on F the last day of each of the 12 months in the calendar year while category D covers those made on written application by the registered operator to the Commissioner for a tax period other than A, B or C ending on the last day of such other period as the Commissioner may approve.

The criteria for categorising a registered operator are set out in subss (2) G to (6) of s 27. The classifications are based on the total values of the taxable supplies of a registered operator within a period of 12 months and on the nature of operations which, for category C and D are agricultural, pastoral and other farming activities. Subsection (7) makes the tax periods applicable to a registered operator coincide with the tax periods of the category to which the registered operator falls into, commencing from H

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1 January 2004. The tax period ending on the last day of a month may be A extended to within ten days after such last day. Subsection (7) reads:

"(7) The tax periods applicable under this Act to any registered operator shall be the tax periods applicable to the category within which the registered operator falls as contemplated in this section:

Provided that – B

(a) the first such period shall commence on the 1st January, 2004 or, where any person becomes a registered operator on a later date, such later date;

(b) any tax period ending on the last day of a month, as applicable in respect of the relevant Category, may, instead of ending on such last day, end within ten days before or after such last day;

(c) the first day of any tax period of the registered operator subsequent to the C registered operator's first tax period shall be the first day following the last day of the registered operator's preceding tax period."

It was the undisputed averment of the respondent, that the appellant fell into category C.

Section 28 outlines the period for submitting the returns and payment of tax D to the Commissioner. These are on the 25th day after the first month, or on the last day for a tax period that ends between the first day and last day. The registered operator is required to furnish the Commissioner with a return in the prescribed form containing relevant information on the calculation and payment of the tax due to the Commissioner or a refund due to the registered operator. A Part IV registered operator shall within that E period furnish the return for each tax period that covers it, whether or not tax is payable, or a refund is due for such period. Subsection (3) of s 28 allows the Commissioner to extend the period for furnishing the return and paying the tax, after considering the circumstances of the case and subject to s 38 (requires full payment and permits provisional payments while awaiting full F information from the registered operator for accurate calculation of tax due).

It was common cause that the appellant fell into category C. It is clear to me that the ordinary time within which the appellant was expected to furnish returns to the Commissioner was within 10 days of the end of its taxable period.

It was common cause that it did not do so. Like every other registered G operator, it had a grace period to do so of 12 months from the last day of the month from which it was supposed to furnish the return. Again, it was common cause that it did not do so. In fact, it did not submit any such returns voluntarily during the ordinary period in 2009 or the grace period ending in 2010. It only did after receiving a directive, made in terms of s 30, from H the respondent in 2012.

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Mr de Bourbon submitted that the 12 months do not govern the period of A furnishing the return to the Commissioner but the period within which the supplier receives the debit note. In short, the submission was that the 12 months governs the supply of the debit note and not the timing of the return. Mr Magwaliba submitted to the contrary that the grace period of 12 months governed the maximum period within which a taxpayer was obliged to furnish his return if he wished to access the input tax claim benefit. My understanding B of s 15(2)(a) coincides with the submission made by Mr Magwaliba. The main subject-matter we are concerned with in s 15(2)(a) is the submission of the return for the deduction of input tax. The debit note is not the main subject-matter. It is one of the requisites for a registered operator to succeed in the claim. The registered operator must, at the time of submitting the C return, hold, in this case, the debit note. The debit note must conform to the requirements of s 20 or 21. The return, which is the main subject-matter, must be submitted by the 10th of each month or within 12 months from the last day of the month when it was due.

The time frame has nothing to do with the possession of the debit note by the taxpayer. The words "s 27 and 28 or 12 months" relate to the furnishing D of the return and not the possession of the debit note. In any event, the submission that the tax invoice, debit note or credit note can be obtained within 12 months of the supply of the goods or services runs contrary to s 20(1) of the Act, which mandates that a tax invoice for a taxable supply shall be issued within 30 days from the delivery of the goods or services. It reads:

> "20 Tax invoices E
>
> (1) Except as otherwise provided in this section, a supplier, being a registered operator, making a taxable supply, other than a supply contemplated in subsection (9) of section seven, to a recipient shall provide that recipient within thirty days from the date of supply with a tax invoice containing such particulars as are specified in this section."

The appellant failed to meet the requirements of s 15(2)(a) in full. It did not F provide the debit note within the prescribed period. The belated submission of the debit note outside the prescribed time was neither saved nor revived by the invocation of s 30 of the Act by the respondent. The Commissioner was correct in disallowing the claim for input tax and in reassessing the appellant for value added tax for the period February to December 2009. G

The appeal must fail. It is dismissed. There will be no order as to costs. For the avoidance of doubt, the two appeals launched by the appellant cannot succeed and are accordingly dismissed with no order as to costs.

Gill, Godlonton and Gerrans, appellant's legal practitioners H

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[zRPz]FBC BANK LTD v DUNLETH ENTERPRISES (PVT) LTD & ORS 2014 (2) ZLR 595 (H)

Citation	2014 (2) ZLR 595 (H)
Case No	Judgment No. HH-568-14
Court	High Court, Harare
Judge	Zhou J
Heard	9 & 30 September, 3 October 2013; *CAV*
Judgment	22 October 2014
Counsel	*P Nyeperayi*, for the plaintiff Mrs *B Mtetwa* for the fifth defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *mistake – party signing contract in blank and leaving it to other party to complete – when first party may escape liability*

Contract – *written agreements – written agreement signed in blank – blank* D *spaces completed by the other party thereto – effect thereof – application of the caveat subscriptor principle – written suretyship agreements – possible defences open to the party who has signed the agreement in blank.*

Costs – *award of costs on the scale of attorney and client – no justification for claiming collection commission in addition thereto*

Headnote

Where a party to an agreement signs it in blank and leaves it to the other party to E complete the rest of the document, the former cannot claim that he is not bound by the terms of the agreement. Applying the *caveat subscriptor* principle, he could escape liability only by raising one of the defences that would have availed him if the blank spaces had been filled in prior F to his signature. These are the normal defences which would have been available to any signatory, such as misrepresentation, fraud, illegality, undue influence and mistake. In relation to suretyship agreements, blanks in written contracts can sometimes be dealt with on the basis that they could be filled in from another document, where there is such a document which is incorporated by reference, or a clause containing G the blank space which was designed solely for the benefit of one party, who, by leaving the blank, has elected not to take the proffered benefit.

Where payment is recovered in terms of a judgment and in terms of which the judgment creditor has been awarded costs on an attorney and client scale, there can be no legal justification for claiming collection commission in H addition to such costs. Collection commission is a charge that is levied by

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an attorney or agent when payment of a debt has been recovered through A his services prior to judgment. In other words, the commission is for collecting the payment other than through a judgment. The rationale is that attorney-client costs compensate the judgment creditor in full for the costs paid to the legal practitioner representing him.

Editor's note: this decision was upheld on appeal. See *Muzuva* v *FBC Bank Ltd*B S-67-15 (Ziyambi JA, Gowora & Mavangira JJA concurring) (judgment delivered 16 November 2015).

Cases referred to

First Consolidated Holdings (Pty) Ltd v *Bissett* 1978 (4) SA 491 (W)

National and Grindlays Bank Ltd v *Yelverton* 1972 (1) RLR 364 (G); C1972 (4) SA 114 (R)

Scotfin Ltd v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H)

UDC Rhodesia Ltd v *Ushewokunze* 1972 (2) RLR 97 (G)

Case information

P Nyeperayi, for the plaintiff

Mrs *B Mtetwa* for the fifth defendant D

Judgment

Zhou J: The plaintiff, a commercial bank, instituted an action against the five defendants jointly and severally the one paying the others to be absolved, for payment of a sum of US685 442.42 together with interest thereon, costs of suit and collection commission. The claim arose from certain banking E facilities extended to the first defendant by the plaintiff. The second to fifth defendants were cited on the basis that they executed guarantees in favour of the plaintiff for the performance by the first defendant of its obligations to the plaintiff arising from the facilities. The first, second, third and fourth defendants did not oppose the claim. Judgment was accordingly given against them on 28 February 2012. Only the fifth defendant entered appearance to F defend and filed a plea, in which she denied that her liability in terms of the guarantee, which she executed, was unlimited. Her contention was that her liability was limited to a maximum amount of US$150 000 which amount, according to her, has already been paid by the principal debtor.

In support of its claim the plaintiff called Bernard Mutambara, its Credit G Services Manager. His evidence was that the first defendant was given a facility by the plaintiff in March 2011. The terms of the facility were reduced to writing. It was a composite facility in terms of which a limit of US$500 000 applied in relation to revolving acceptance credits while US$100 000 was in respect of the cash advance facility. The facility offer letter details the figures applicable under the composite facility. He testified that the fifth H

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defendant signed an unlimited guarantee and tendered her immovable property A as security for the debt. The mortgaged property is a certain piece of land situate in the District of Salisbury called Stand 156 Groombridge Township 2 of Lot 39A Mount Pleasant measuring 4062 square metres. Copies of the deed of hypothecation and guarantee form signed by the fifth defendant B were produced in evidence. The witness stated that the amount secured by the deed of hypothecation was up to a maximum of US$150 000. He stated, however, that that amount did not reflect the total debt guaranteed by the fifth defendant which, according to him, was unlimited.

The fifth defendant gave evidence and also called the second defendant, Duncan Mukondiwa, to testify on her behalf. The two of them are related. C The fifth defendant testified that she was approached by the second defendant who asked to use her property as security for a loan which he intended to obtain from the plaintiff. He advised her that the loan amount was US$150 000.00. She agreed and surrendered the title deed of her immovable property to the second defendant. She did not personally meet the bank officials. The guarantee form was brought to her by one Fainah Mangwende, who was D the first defendant's accountant. The form had blank spaces when she signed it. In other words, according to her, the handwritten portions were completed after she had signed the form. She filled in her name and address and signed the form. She stated that she never became aware of the further borrowings made by the first defendant after she had signed the

guarantee form. Her evidence was that her understanding of the deed of hypothecation was that E the hypothecation of her property related to a maximum of US$150 000. She understood that to be the full extent of her liability as well. The fifth defendant stated that she was assured by the second defendant that he would repay the loan to the plaintiff within three months and that her security was required just for that period. F

Duncan Mukondiwa's evidence was that, as far as he understood, the fifth defendant's immovable property was to secure the first defendant's debt up to a maximum of US$150 000. He confirmed that he is the one who approached the fifth defendant as a relative in order for him to use her property as security for the first defendant's debt. He denied that he assured the fifth defendant that the security she had given would lapse after three months. His evidence G was that even in 2011, when he made further borrowings, the security given by the fifth defendant was still valid.

I need to consider whether the fifth defendant's liability was limited to a sum of US$150 000, which is stated in the deed of hypothecation, as well as whether the principal debtor has discharged its obligations to the plaintiff H in a manner that discharges the fifth defendant from liability.

Zhou J

The fifth defendant's case is that she believed that her liability was limited A to a sum of US$150 000 because of the assurances given to her by the second defendant. But the security was given in favour of the plaintiff, not the second defendant. In other words, the agreement was between the fifth defendant and the plaintiff. She does not allege that the plaintiff or its employees ever assured her that her guarantee applied only to a maximum sum of US$150 000. If any person misled her as to her maximum liability B then that person was the second defendant. The fifth defendant's contention is that because the word "unlimited" had not been inserted at the time that she signed the guarantee form, she is not bound by its contents insofar as they relate to the extent of her liability.

When a party to an agreement signs it in blank and leaves it to the other C party to complete the rest then they cannot turn around and claim that they are not bound by the terms of the agreement. In *National and Grindlays Bank Ltd* v *Yelverton* 1972 (1) RLR 364 (G); 1972 (4) SA 114 (R) the court considered the implications of signing a contract in blank, where a printed form containing blank spaces was allegedly filled in after signature. Applying the *caveat subscriptor* principle, the court held that the signatory D could escape liability only by raising one of the defences that would have availed if the blank spaces had been filled in prior to the signature, that is, the normal defences which would be available to any signatory. Those defences are misrepresentation, fraud, illegality, duress, undue influence and mistake. See R H Christie *The Law of Contract in South Africa* 3 ed p 197; A J Kerr *The Principles of the Law of Contract* 4 ed p 90. E

In relation to suretyship agreements, blanks in written contracts can sometimes be dealt with either on the basis that they could be filled in from another document where there is such a document which is incorporated by reference, or that the clause containing the blank was designed solely for the benefit of one party who, by leaving the blank, has elected not to take the proffered F benefit. See *First Consolidated Holdings (Pty) Ltd* v *Bissett* 1978 (4) SA 491 (W) at 495-6; Christie *op cit* p 139. *In casu* the terms of the deed of hypothecation were not incorporated into the terms of the guarantee. The fifth defendant does not explain why she did not fill in the sum of US$150 000 if she genuinely believed that figure to represent the full extent of her liability in terms of the deed of suretyship. She should therefore be taken to be bound G by the terms of the guarantee form which she signed. That, in my view, is the approach which is consistent with the dictates of modern commercial convenience.

Further, I do not believe that the addition of the word "unlimited" altered the extent of the fifth defendant's liability from what it would be if that word H

Zhou J

was to be excluded. A The document is worded in sufficiently clear terms to mean that in the absence of a figure being mentioned then the liability is unlimited. Clause 1 of the guarantee form signed by the fifth defendant provides, inter alia, that the fifth defendant guarantees and binds herself as surety "for the repayment on demand of *all sum or sums of money which the Debtor may now or from time to time hereafter owe or be indebted in to the* B *said Bank*…" (my emphasis). The

unlimited guarantee could only have been limited if a specific amount had been stated in the blank space in which the word "unlimited" is inserted. Indeed, it is clear that the word "unlimited" does not even grammatically accord with the sentence in which it is inserted, as that space would be relevant where there is a specific figure to be filled in. The words preceding the blank space illustrate that that space is meant for a C specific sum of money to be inserted, if there is one agreed upon.

The deed of hypothecation specifically provided that the liability of the fifth defendant in respect of that security was not to exceed a sum of US$150 000. But that limit applied only to the security constituted over the fifth defendant's immovable property, Stand 156 Groombridge Township 2 of Lot 39A Mount Pleasant. D It does not in any way limit the liability constituted through the guarantee form to a sum of US$150 000. That conclusion does not at all depend on what the second defendant represented to the fifth defendant. The two, that is, the deed of security and the deed of hypothecation, are separate and distinct forms of security; one has a maximum limit of liability while E the other one does not limit the liability to a specific amount.

The fifth defendant does not contest the total amount which is owed to the plaintiff by the principal debtor. After all, judgment has already been given against the principal debtor and the other three defendants. That judgment was granted on 28 February 2012. Her contention that the total of the payments made by the first defendant to the plaintiff exceed a sum of US$150 000 does F not present a sound defence, as those payments have not cleared the debt.

The plaintiff claims both attorney-client costs and collection commission. It is important for the principle to be reiterated, that collection commission is a charge that is levied by an attorney or agent when payment of a debt has been recovered through his services prior to judgment. See *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd*G 1997 (2) ZLR 567 (H) at 569B-570B; *UDC Rhodesia Ltd* v *Ushewokunze* 1972 (2) RLR 97 (G) at 100F. In other words, the commission is for collecting the payment other than through a judgment. Where the payment is recovered in terms of a judgment in terms of which the judgment creditor has been awarded costs on an attorney-client scale, there can be no legal justification for claiming collection commission in addition to H such costs. The rationale is that attorney-client costs compensate the judgment

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creditor in full for the costs paid to the legal practitioner representing him. A Accordingly, it seems to me that there is no justification *in casu* for the plaintiff to recover both attorney-client costs and collection commission.

In the result, it is ordered that judgment be and is hereby given in favour of the plaintiff against the fifth defendant for payment of a sum of US$685 442.46 together with interest thereon at the rate of 6.5% per month plus a penalty B rate of 5% per month with effect from 1st June 2011 to the date of payment in full, and costs of suit on an attorney-client scale. The fifth defendant's liability is joint and several with that of the first, second, third and fourth defendants, the one paying the others to be absolved.

Costa & Madzonga, plaintiff's legal practitioners C

Mtetwa & Nyambirai, fifth defendant's legal practitioners

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[zRPz]MHLANGA v MHLANGA 2014 (2) ZLR 601 (H)

Citation 2014 (2) ZLR 601 (H)

Case No Judgment No. HH-574-14

Court	High Court, Harare
Judge	Chitakunye J & Tsanga J
Heard	18 September 2014; *CAV*
Judgment	22 October 2014
Counsel	*S Machingauta,* for appellant *T Nyahuma,* for respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Family law – C *husband and wife – divorce – maintenance – approach to – treating parties on equal basis – need to achieve substantive equality – unequal power dynamics that may apply – one party may be at a disadvantage compared to other*

Headnote

The D appellant appealed against the grant of maintenance to his wife and child. The parties were in the process of divorce. The appellant had been employed at an embassy abroad and for a time his wife, the respondent, and their child stayed with him. They returned to Zimbabwe on holiday and when he went back to his foreign posting he told his wife that she E would be staying in Zimbabwe. At the time this happened, the respondent was pregnant with another child.

The appellant, apart from disputing his financial status, argued that, with the emergence of equality, young women can no longer expect maintenance for life as a result of their marriage, more so where a woman has worked F before and is young enough to obtain employment. The appellant argued that the respondent fell squarely into this envisaged bracket where maintenance for herself was not called for and to grant it infringed the concept of equality.

Held, that while self-reliance is to be applauded and accords with the principle of equality between men and women as a core constitutional value, the G approach to equality must always aim at achieving substantive, rather than merely formal, equality in light of the circumstances of each case. Interpreting equality to always entail a gender neutrality approach that emphasises sameness between men and women can lead to the very inequality which the Constitution enjoins the courts and society to guard H against. Such an approach does not distinguish between men and women

Tsanga J

in any way, neither does it recognise the unequal power dynamics that A may be inherent between the parties that may, to a large measure, be largely contributory to the dispute in question.

Whilst an approach to equality founded on women's sameness with men clearly has its uses depending on the circumstances to be addressed, it is, however, not the only approach to achieving equality between the sexes, nor is it always appropriate for all issues. Equality is a fundamental B constitutional principle, but the methodological approach to its actual achievement is by no means through a singular constant such as sameness, and the courts should not treat it as if it were. There are other pertinent approaches that the court can embrace in giving effect to equality, such as the "difference approach". There is also the "disadvantage approach". C These two approaches were equally manifest in the matter in the court below. Equality may be achieved by recognising the differential effects of power between men and women that arise within a

particular context and that may place a woman at a disadvantage compared to a man. In this case, the respondent was at a relative disadvantage at having joined him abroad as a spouse, temporarily forgoing the opportunity to advance D her own career. When she returned, she was unemployed and pregnant and without an income. To seek to deny her even bridging support on the pretext that she could work would be to miss the point that is manifested by real life situations that can lead to inequality. In the face of lack of meaningful gains for women as a marginalised group, using sameness as E the standard of equality (*de jure* equality), the reality is that increasing emphasis is being placed on the role of power play and power dynamics between the sexes in understanding the failure to achieve equality in real life settings (*de facto* equality). The respondent presently had no earning capacity and therefore was in a considerably weaker and disadvantaged economic position compared to the appellant. F

Cases referred to

Lindsay v *Lindsay* 1993 (1) ZLR 195 (S)

Koumides v Koumides HH-35-12

Nyaude v Nyaude HH-197-14 G

Rabvukwa v Rabvukwa 2004 (1) ZLR 530 (H)

Case information

S Machingauta, for appellant

T Nyahuma, for respondent H

Tsanga J

Judgment

Tsanga J: This is A an appeal against a magistrates court decision awarding the respondent the sum of $2 000 as maintenance. Of this sum $1 500 is for the respondent and $500 for the minor child.

The facts that were placed before the magistrate in the application for maintenance were these. The parties, who are currently now pursuing a B divorce, were married on 2 March 2012. At the time of marriage here in Zimbabwe, the husband was working for the Zimbabwe Embassy in Iran. The plaintiff thus joined him in December of that year, together with their minor child, who was born in July of that year. Sometime in September 2013 the parties came to Zimbabwe, ostensibly for a funeral. However, it was the respondent's contention that the appellant then deserted her and the minor C child here in Zimbabwe and informed her that she would not be going back to Iran with him. It was within this context that she found herself back in Zimbabwe with insufficient means to support herself and the minor child. At the time that the application was made she was also five months pregnant.

In her application for maintenance she sought a lump sum of $10 591 to D purchase new household property since she said she had sold everything when she went to join him in Iran. She also sought to cover maternity costs. In addition, she sought $2 675 as monthly maintenance to cover groceries, accommodation, clothing, medical expenses and other day- to-day expenses. The court *a quo* upon hearing the evidence in the application dismissed the E lump sum claim for a number of reasons. Her quest for money to buy furniture was dismissed on the basis that she had been offered furniture which she had declined as being substandard. Furthermore, as the parties were in the process of divorcing, the court did not think it appropriate for them to be buying new property. Regarding the claim for lying-in expenses, the court noted that the Maintenance Act [*Chapter 5:09*] does not make any provision F for these. However, regarding the claim for monthly support, after reducing what it considered to be exorbitant claims, the court awarded her US$2 000 for herself and the minor child. This was on the strength of the appellant's earnings, which the court found to be US$5 056 per month based on the salary slip provided by the appellant's employers, the Ministry of Foreign Affairs. G

The grounds of appeal are that the magistrate erred by (1) holding that there was a pay slip from the Ministry of Foreign Affairs, (2) holding that the appellant earns $5 056 and (3) failing to take into account that the appellant is a civil servant and earns US$460 per month. It is said that what

the court relied on are allowances which are meant to take care of the appellant whilst H in Iran and not in Zimbabwe.

2014 (2) ZLR p604

Tsanga J

The appellant asserts that he earns $460 and not $5056, yet there is nothing A in the record to confirm that he earns $460. Our courts have in various cases emphasised the need for litigants in maintenance cases to place their financial position fully before the courts to enable the court to make an informed decision regarding the appropriate level of maintenance to be paid. Indeed the following cases were cited by the respondent in support of this contention: *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S) at 197, *Koumides* v *Koumides*B HH-35-12; *Nyaude* v *Nyaude* HH-197-14.

The appellant placed before the court as his proof of earnings payment vouchers which showed his earnings varying from month to month from as low as $900 to as high as $5056. The magistrate made a concerted effort to clarify the real figure by asking for a salary slip from the appellant's employer. C It is from this that the magistrate made the determination whether or not what the respondent had applied for in the court below was reasonable and whether the appellant would realistically be able to pay.

In maintenance claims, the court's role is to ensure that those who need maintenance get it if the evidence produced supports the claim. Financial needs and resources, as well as the standard of living that the parties are D accustomed to, are all factors that are taken into account in determining an appropriate order of maintenance. As such, an award for maintenance which has been heard fully on the facts by a trial magistrate will not be lightly reversed in the absence of compelling reasons to do so which are also supported by evidence that was placed before the magistrate in the court below. E

There is nothing from the evidence placed before the court and from the court record itself that supports the claim that the magistrate erred in holding that there was a payslip from the Ministry of Foreign Affairs. The pay slip was requested by the court. It was duly stamped as authentication by the Ministry. It shows that the appellant was earning a salary of $3 745 per month; a food and clothing allowance of $749 per month and a transport allowance of $562 F giving the total of $5 056 per month. The magistrate therefore did not err in finding that the appellant earns this amount. The appellant failed to produce a single shred of evidence in support of his claim that he only earns $460 per month as a civil servant. The magistrate therefore cannot be faulted for dismissing his claim that these are his earnings. The vouchers that he G produced as exemplifying his earnings were not his salary. The respondent's explanation that these denote amounts paid to him in Iran from the $5 056 would seem to explain why the amounts vary as they are determined by his requests. They could also be basically travel and subsistence claims as the vouchers also seem to suggest but whatever they are, these vouchers are certainly not his confirmed monthly salary slip. H

2014 (2) ZLR p605

Tsanga J

In this A appeal, the appellant also places emphasis on *Rabvukwa* v *Rabvukwa* 2004 (1) ZLR 530 (H) at 535 for the argument therein that with the emergence of equality, young women can no longer expect maintenance for life as a result of their marriage. It is emphasised that this is more so where a woman has worked before and is young enough to obtain employment. The appellant's argument is that the respondent falls squarely into this envisaged bracket B where maintenance for herself is not called for and infringes the concept of equality.

While self-reliance is to be applauded and accords with the principle of equality between men and women as a core constitutional value, the approach to equality must always be one which aims at achieving substantive rather than C mere formal equality in light of the circumstances of each case. Interpreting equality to always entail a gender neutrality approach that emphasises sameness between men and women as counsel for the appellant advocates in this case, can lead to the very inequality which the constitution enjoins the courts and society to guard against. Such an approach does not distinguish between men and women in any way and neither does it recognise the unequal D power dynamics that may be inherent between the parties that may to a large measure, be contributory to the dispute in question.

Whilst an approach to equality founded on women's sameness with men clearly has its uses depending on the circumstances to be addressed, it is however not the only approach to achieving equality between the sexes. It is E not always appropriate for all issues. Equality is a fundamental constitutional principle but the methodological approach to its actual achievement is by no means through a singular constant such as sameness and the courts should not treat it as if it were. There are other pertinent approaches that the court can embrace in giving effect to equality such as the "difference approach". There is also the "disadvantage approach". These two approaches were F equally manifest in the matter in the court below.

For example, the respondent framed her quest for a lump sum payment for pregnancy related expenses using an alternative approach to equality which emphasises difference between the sexes as evidenced by women's child-bearing role. Although her claim may have been dismissed on the basis of not G being covered by the Maintenance Act, it is undisputable that "difference" as an approach to equality finds expression in other areas of our law such as in the recognition of maternity rights as contained in the Labour Act

The third approach which appears to have been the one that permeated the magistrate's judgment in the court below, albeit unwittingly rather than as H expressly stated, lays emphasis on achieving equality by recognising the

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Tsanga J

differential effects of power between men and women that arise within a A particular context and that may place a woman at a disadvantage compared to a man. In awarding the respondent $1 500 as maintenance for herself, the lower court appears to have been guided by her relative "disadvantage" at having joined him in Iran as a spouse, temporarily forgoing the opportunity to advance her own career. She had to put this on hold when she joined him. Moreover, in a display of power by the appellant over the respondent, he had B simply told her that she would not be going back with him to Iran after a funeral in Zimbabwe. She was pregnant. In addition, she had a young child. She had no job. She had no income. He withheld adequate support, having to be dragged to court to be compelled to support her. To suggest that equality between the two means treating the same under the circumstances that were placed before the court, and to seek to deny her even bridging support on C the pretext that she can work, is to miss the point that is manifested by real life situations that can lead to inequality. In the face of lack of meaningful gains for women as a marginalised group using sameness as the standard of equality (*de jure* equality) is unacceptable. The reality is that increasing emphasis is being placed on the role of power play and power dynamics between the sexes in understanding the failure to achieve equality in real D life settings (*de facto* equality).

The reality therefore is that the order was made in the context of the respondent presently having no earning capacity and therefore being in a considerably weaker and disadvantaged economic position compared to the appellant. Currently without means to support herself, the respondent is not E in a position to lead a life commensurate with the standard she was leading when the parties were in Iran. Moreover the amount ordered was arrived at on the basis of a legitimate pay slip.

The magistrate's order is also not an order for life. Maintenance orders can be varied when circumstances change.

In sum, the appeal lacks merit and is hereby dismissed with costs. F

CHITAKUNYE J concurred

Tavenhave & Machingauta, appellant's legal practitioners G

Takawadiyi & Associates, respondent's legal practitioners H

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[zRPz]NYAHORA v CFI HOLDINGS (PVT) LTD 2014 (2) ZLR 607 (S)

Citation	2014 (2) ZLR 607 (S)
Case No	Judgment No. S-81-14
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA & Patel JA
Heard	28 January 2014; *CAV*
Judgment	23 October 2014
Counsel	*C Venturas*, for the appellant *L Uriri*, for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Court – *Labour Court – jurisdiction – limits to jurisdiction – relief sought not specifically set out in Labour Act – right of party to seek relief from High Court*

Employment – *contract – termination – rights of employee after termination of contract – right to retain or buy company car – unless contract specifically gives right to employee, car remains property of employer*

Headnote

The High Court is a superior court with inherent jurisdiction. There is a presumption against the ouster of the jurisdiction of a court unless this is clearly the intention of the legislature. The exclusive jurisdiction conferred on the Labour Court by s 89(6) of the Labour Act [*Chapter 28:01*] relates only to the hearing and determination, in the first instance, of any application, appeal or matter referred to in subsection (1). Subsection (1)(a) in turn clearly limits that jurisdiction to applications and appeals in terms of the Act or any other enactment. Instances in which applications and appeals may be made in terms of the Act are clearly set out in the Act. These include the applications referred to in ss 92C and 93(7). These being applications in terms of the Act, no other court has jurisdiction to hear or determine such applications at first instance.

Applications or appeals in terms of "any other enactment" would be limited to those pieces of legislation that specifically provide for an application or an appeal to be made to the Labour Court. An example would be the Public Service (General Conditions of Service) Regulations SI 1 of 2000, which makes reference to an appeal to the Labour Court against a decision of the Public Service Commission.

The right of an individual to approach the High Court seeking relief, other than that specifically set out in s 89(1)(a) of the Act, has not been

abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour Act. Nor is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application for the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court.

The *actio rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner C of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property. D

In most cases where an employee has the use of a company car, the option granted by the employer to purchase the car after a given time is a privilege accorded to its employees, perhaps in the hope that this will induce loyal service, as well as a culture of caring for the company property or some other reason beneficial to the employer/company. Therefore, unless the E contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of the employer. The question of a right to purchase could only arise after an offer had been made to, and accepted by, the employee to purchase the vehicle and not before. Unless such a contract is formed, the employee has no F right to retain the vehicle if his employment with the company ceases.

Cases referred to

de Wet v *Deetlefs* 1928 AD 286

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

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

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

NRZ v *Zimbabwe Railways Artisans Union & Others* 2005 (1) ZLR 341 (S)

R v *Padsha* 1923 AD 281

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

2014 (2) ZLR p609

Ziyambi JA

Legislation considered A

Labour Act [*Chapter 28:01*], s 89(1) & (6), 92C, 92E(2) & 93(7)

Public Service (General Conditions of Service) Regulations 2000 (SI 1 of 2000)

Case information

C Venturas, for the appellant

L Uriri, for the respondent B

Judgment

Ziyambi JA: This appeal deals with the oft-recurring question whether an employee whose contract of employment has been terminated, and who has appealed to the Labour Court against that termination, is entitled, pending C resolution of the appeal, to retain a motor vehicle allocated to him for the performance of his duties during the course of his employment. It also addresses the question of the jurisdiction of the High Court in these circumstances to grant relief to the employer under the *rei vindicatio.*

The appellant, who was employed by the respondent as the chief executive D officer of its subsidiary Victoria Foods (Pvt) Ltd, was, on 3 August 2012, suspended without pay and benefits pending disciplinary proceedings to be brought against him. He was ordered to return to the respondent a certain motor vehicle, a BMW X5, allocated to him for use in the performance of his duties as respondent's employee. He refused to do so and an additional charge of wilful disobedience to a lawful order was preferred against him. E

On 3 October 2012, the determination of the disciplinary authority finding him guilty of misconduct and dismissing him from employment with the respondent was communicated to the appellant by a

letter to his legal practitioners. In the same letter, the appellant was directed to surrender the vehicle to the respondent by 5 October 2012, failing which it was intended to F hand the matter over to legal practitioners to obtain recovery thereof. When no positive response to the letter was received, the respondent successfully filed an urgent application in the High Court for a provisional order. The order, dated 16 October 2012, and granted by consent of the parties, read as follows: G

"TERMS OF FINAL ORDER

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the respondent be and is hereby ordered to surrender possession of and to return to applicant the motor vehicle namely a BMW X5registration number AAX 8022 upon service of this order failing which the Deputy Sheriff be and is hereby authorised to take all and any such steps as may H be necessary to recover the said motor vehicle from the respondent or

Ziyambi JA

any person whomsoever is in possession thereof on the authority of the A respondent and return it to the applicant.

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

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of this Provisional Order Applicant is granted the following relief: B

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

On the same day, the appellant appealed to the Labour Court against his dismissal by the disciplinary authority of the respondent.

The provisional order was confirmed by the High Court on 24 July 2013 * . E The appellant now appeals against the whole judgment of the High Court on grounds, firstly, that the High Court had no jurisdiction to entertain the matter; and, secondly, that in terms of the contract of employment, the appellant had a right to purchase the vehicle which right constituted a defence to the vindicatory action brought by the respondent. F

The jurisdiction of the High Court

It was submitted by Mr *Venturas* that judicial authority in this jurisdiction has established the principle that the jurisdiction of the High Court is specifically ousted in cases such as the present. Reference was made to s 89(6) of the Labour Act [*Chapter 28:01*] ("the Act") which, it was submitted, (as I understand the submission) conferred exclusive jurisdiction on the G Labour Court in all matters concerning or linked to employment issues. It was submitted that the possession of the motor vehicle was so interdependently linked to the contract of employment of the appellant that one cannot decide

Ziyambi JA

one A without deciding the other. Therefore, so the submission went, because the Labour Court has exclusive jurisdiction over one, it also has exclusive jurisdiction over the other 1 .

It was further submitted that the noting of the appeal to the Labour Court had suspended the decision of the disciplinary authority dismissing the B appellant, and (presumably as an employee) he was therefore entitled to retain possession of the motor vehicle until his appeal was finally resolved by the Labour Court.

Mr *Uriri* contended, however, that this was not one of the matters over which the Labour Court could exercise jurisdiction in terms of s 89 of the Act which circumscribes the limits of its jurisdiction; that the High Court is a superior C court with inherent jurisdiction; and that there is a presumption against the ouster of the jurisdiction of a court unless this is clearly the intention of the legislature. He referred the court to *de Wet* v *Deetlefs* 1928 AD 286 at 290 where the principle was stated by Solomon CJ as follows:

> "It is a well-recognized rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention D of the legislature."

And also to the following remarks by Innes CJ in *R* v *Padsha* 1923 AD281 at 304:

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

In line with the above, he submitted, any provision in any statute or contract F that purports to oust the jurisdiction of the courts is restrictively interpreted.

It was submitted further that an examination of the provisions of s 89(6) of the Act, which must be read with s 89(1), clearly shows that s 89(1)(a) grants power to the Labour Court to hear applications and appeals already defined in the Labour Act or any other enactment that makes reference to the Labour Act. G

Determination

The Labour Court is a creature of statute. Its jurisdiction is set out in s 89 of the Act. Sections 89(1) & (6) are set out hereunder:

Ziyambi JA

> **"89 Functions, powers and jurisdiction of the Labour Court** A
>
> (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
>
> (b) hearing and determining matters referred to it by the Minister in terms of this Act; and B
>
> (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;
>
> (d1) exercise the same powers of review as would be C exercisable by the High Court in respect of labour matters;
>
> (e) doing such other things as may be assigned to it in terms of this Act or any other enactment …
>
> (6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)." D

The exclusive jurisdiction conferred by s 89(6) relates only to the hearing and determination, in the first instance, of any application, appeal or *matter referred to in subsection (1).* Subsection (1)(a) in turn clearly limits that jurisdiction to applications and appeals in terms of this Act or any other enactment. E

Instances in which applications and appeals may be made in terms of the Act are clearly set out in the Act and need no further elaboration. Reference was made, among others, to the applications referred to in ss 92C and 93(7) of the Act[2]. These are applications in terms of the Act and no other court has jurisdiction to hear or determine such applications at first instance. F

Applications or appeals in terms of any other enactment would be those where that enactment specifically provides for an application or an appeal to be made to the Labour Court. We were

referred, by way of example, to the Public Service (General Conditions of Service) Regulations SI 1 of 2000, which makes reference to an appeal to the Labour Court against a decision G of the Public Service Commission. As it was put, the words "any other enactment" is limited to those pieces of legislation that specifically make provision for an application or an appeal to the Labour Court.

Ziyambi JA

As A submitted on behalf of the respondent, the right of an individual to approach the High Court seeking relief, other than that specifically set out in s 89 1 (a) of the Act, has not been abrogated. Nothing in s 89(6) takes away the right of an employer or employee to seek civil relief based on the application of pure principles of civil law, except in respect of those applications and appeals that are specifically provided for in the Labour B Act. Nor is there contained in s 89 any provision expressly authorizing the Labour Court to deal with an application, such as in the instant case, for the common law remedy of *rei vindicatio*. Such applications fall squarely within the jurisdiction of the High Court.

In any event, as the court *a quo* found, by consenting to the provisional C order, the appellant had acquiesced in the jurisdiction of the High Court to grant it. The appeal on this ground therefore fails.

The claim of right

The *actio rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based D on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract E has come to an end. The claim can be defeated by a defendant who pleads a right of retention or some contractual right to retain the property.

In the present case, the respondent raised a claim of right. It was based on the company's motor vehicle policy scheme for its employees clause 5.2 of which provides: F

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

And clause 6:1

> "Disposal
>
> 6.1. All matters of vehicle disposal shall be administered by the group Human Resources. G
>
> 6.2. The vehicle user will be given the first option to purchase the vehicle on disposal time. Purchase price will be set by the Executive committee reviewed as necessary …"

It is common cause that, in 2011, the vehicle had reached "completion of four years of purchase" and that the appellant was dismissed in 2012. However, by the time of his dismissal, the respondent had neither made a decision to H dispose of the vehicle nor offered the vehicle for sale to the appellant. The

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Ziyambi JA

ownership of the vehicle, therefore, remained vested in the respondent. Upon A his dismissal, which was not suspended by the appeal noted against it [3] , the appellant ceased to be an employee of the respondent and any former right acquired, by virtue of his employment, to possession of the vehicle for his use, also ceased.

It may be mentioned here that in most cases the option granted by an employer B to purchase a used company car is a privilege accorded to its employees, perhaps in the hope that this will induce loyal service as well as a culture of caring for the company property or some other reason beneficial to the employer/company. Therefore, unless the contract specifically states so, a court ought to be careful not to read a legal right into a policy matter which is for the discretion of the employer. In my judgment, the question of a right C to purchase could only arise after an offer had been made to, and accepted by, the employee to purchase the vehicle and not before.

As matters now stand, no offer has been made to the appellant by the respondent employer. The terms of the purchase have not been set. The appellant has no sale agreement on which to found his alleged right to purchase. He is not entitled to hold onto the vehicle pending agreement. As it

was put by D Makarau JP (as she then was) in *Medical Investments Limited* v *Pedzisayi* 2010 (1) ZLR 111 (H) at 116A-B:

> "I am unaware of any law that entitles a prospective purchaser to have possession of the *merx* against the wishes of the seller, prior to delivery of the *merx* in terms of the sale agreement". E

The appellant's further claim that he had a legitimate expectation to purchase the vehicle is, in my view, also without merit. It seems to me that whatever expectation he had to purchase the vehicle is merely that: an expectation. It has no legal basis. It is not justiciable. It cannot be converted into a claim of right.

In conclusion, I would respectfully adopt the remarks by Mtshiya J in F*FBC Bank Ltd* v *Deshe*HH-285-11 that:

> "… employers deserve the protection of the law from employees who … take the law into their own hands as demonstrated by the respondent *in casu*."

In the result, no claim of right having been established, the court *a quo* was correct in dismissing the application. G

The appeal is therefore dismissed with costs.

GWAUNZA JA and PATEL JA concurred. H

2014 (2) ZLR p615

Ziyambi JA

Kantor & Immerman, applicant's legal practitioners A

Venturas & Samukange, respondent's legal practitioners

* See *CFI holdings v Nyahora* 2013 (2) ZLR 97 (H), a judgment of CHIGUMBA J. — *Editor*

1 Counsel relied on *DHL International (Pvt) Ltd* v *Madzikanda* 2010 (1) ZLR 201 (H). See also *Zimtrade* v *Makaya* 2005 (1) ZLR 427 (H).

2 See also *NRZ v Zimbabwe Railways Artisans Union & Others* 2005 (1) ZLR 341 (S).

3 Labour Act [*Chapter 28:01*], s 92E(2)

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[zRPz]DELTA BEVERAGES (PVT) LTD v CHIMURIWO & ORS 2014 (2) ZLR 616 (H)

2014 (2) ZLR p616

Citation	2014 (2) ZLR 616 (H)
Case No	Judgment No. HH-600-14
Court	High Court, Harare
Judge	Chigumba J
Heard	29 September 2014; *CAV*
Judgment	29 October 2014
Counsel	*G Chingoma*, for the applicant

L Chimuriwo, for the first respondent
No appearance for the second and third respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Court – *High Court – jurisdiction – review – decision of magistrates court to order execution on basis of arbitral award without such award being registered – such order incompetent – applicant should approach magistrates court for stay of execution – High Court not having jurisdiction* D

Headnote

The first respondent, a former employee of the applicant, had an arbitral award in his favour. The applicant paid the amount awarded, having deducted income tax. The amount of the award being within the monetary jurisdiction of the magistrates court, the first respondent instructed the E messenger of clerk to execute against the applicant's property for the balance. The applicant brought review proceedings in the High Court, the grounds of review being that the first respondent had instructed the messenger to attach, remove and sell the applicant's movable property acting under an irregularly issued warrant of execution, the warrant having been issued without registration of the arbitral award; and that F the judgment debt had been paid in full and that there was no need to proceed with execution.

Held, that what the applicant sought to have reviewed was the procedure adopted by the magistrates court, a court whose procedures are governed by the Magistrates Court Act [*Chapter 7:10*] and rules. The registration of arbitral awards is provided for by s 98(14) and (15) of the G Labour Act [*Chapter 28:01*]. The effect of registration of an arbitral award is to turn the award into a civil judgment of the appropriate court. Without being registered, an arbitral award is not a court order for purposes of enforcement. Under s 20 of the Magistrates Court Act, in order for a writ of execution to be issued, there must be a judgment of the magistrates H

court, A which is founded in money, on which execution will be based. The procedure adopted by the magistrates court in this case, of merely issuing a writ of execution on the basis of an arbitral award, was akin to putting the cart before the horse. The applicant's first port of call in these circumstances should have been the magistrates court itself, as B the issue of a warrant of execution was not based on its own judgment as provided by its governing Act or its rules. The applicant ought to have applied to the magistrates court for stay of execution, simply because that court had issued the warrant of execution. Any review of the arbitral award should have been brought before the Labour Court. The matter should not have been brought before the High Court, which C did not have jurisdiction.

Editor's note: this judgment should be read in conjunction with that in *Nyahora* v *CFI Hldgs (Pvt) Ltd* S-81-14 (see *ante* at p 607 of this volume). While any review of the arbitral award itself would certainly be within the exclusive jurisdiction of the Labour Court, a review brought because the wrong procedure was adopted in an inferior court – albeit that the original case was a labour matter – may not itself be D a "labour matter".

Cases referred to

Djordjevic v *Chrmn, Practice Control Cttee, Medical & Dental Practitioners Council of Zim & Anor* 2009 (2) ZLR 221 (H) E

Girjac Svcs (Pvt) Ltd v *Mudzingwa* 1999 (1) ZLR 243 (S)

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

Moyo v *Forestry Commission* 1996 (1) ZLR 173 (H)

Olivine Industries (Pvt) Ltd v *Gwekwerere* 2005 (2) ZLR 421 (S) F

Legislation considered

Administrative Justice Act [*Chapter 10:28*], Preamble & s 7

High Court Act [*Chapter 7:06*], ss 26, 27 & 28

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

Labour Act [*Chapter 28:01*], ss 89, 92, 92E & 98

Magistrates Court Act [*Chapter 7:10*], ss 20 & 89 G

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 26

Case information

G Chingoma, for the applicant

L Chimuriwo, for the first respondent

No appearance for the second and third respondents H

Chigumba J

Judgment

Chigumba J: This is a matter in which I was called upon to decide whether A s 89(6), as read with s 89(1)(d1), of the Labour Act [*Chapter 28: 01*], ousts the review jurisdiction of the High Court over matters that the Labour Court has exclusive jurisdiction over. The question for determination is whether the High Court has jurisdiction to entertain an application for review of a labour matter, at first instance. It appears to me that, by its very nature, the Labour B Court is frequently seized with matters whose conduct evokes the biblical David and Goliath pathos – David being the employee litigants that appear before it and Goliath being the more powerful employer. It is important that labour practitioners pay heed to the need to protect and promote the powers and remedies provided by the Labour Act. This involves becoming intimately acquainted with these provisions, and utilizing them as frequently as possible, C in order to streamline them, and to provide room for their improvement.

Labour practitioners should not lose sight of the fact that the cost of litigation is cheaper in the Labour Court. Surely this assists our biblical David in his puny attempts to make Goliath pay what is due and owing to him, on termination of employment. This court should be loath to collude with, and to assist, D Goliath to bully David into submission, into giving up the enforcement of his rights, simply because Goliath has the financial wherewithal, a bottomless pit, that enables him to go forum shopping, to hop from one court to the next, looking for a suitable remedy with which to hit David on the head, knock him out and delay or avoid paying what is due at any cost. Time has come E for labour practitioners to recognize that, as officers of the court, they must show respect to the Labour Court and not run to the High Court at the drop of a hat because it is perceived as being more expeditious in disposing of these matters, or because they are more familiar with its rules and procedures.

This matter came to me via the urgent chamber book. After perusing the F application and the opposing papers filed of record, I formed the preliminary view that the applicant had not exhausted domestic remedies, and that the High Court should decline jurisdiction. I invited the parties to attend on me in chambers, and to address me solely on that point. I was not persuaded to change my preliminary view. I dismissed the application with costs for lack of jurisdiction. The applicants have now written to me and asked me to G provide my reasons for holding such a view. These are the reasons.

In this urgent chamber application for stay of execution, the applicant sought the following relief:

Interim Relief Granted

Pending the return date it is ordered that – H

Chigumba J

1. execution A of the warrant of execution issued under MC16865/14 be and is hereby suspended pending the return date;
2. the third respondent or any of his officers shall not attach and remove from the applicant's premises any of the applicant's movable or other property; and B
3. costs shall be determined on the return date.

The terms of the final order sought were:

That on the return date the respondent show cause why a final order should not be made on the following terms:

(a) the application for review is hereby granted; C

(b) the warrant of execution issued on 31 July 2014 be and is hereby set aside;

(c) the applicant shall be entitled to deduct income tax per the Income Tax Act [*Chapter 28:06*] on the amounts due to the first respondent in terms of the Arbitral Award of 18 July 2014; D

(d) the first respondent's legal practitioner, Mr. Chimuriwo, shall bear the costs of these proceedings *de boniis propis.*

The grounds supporting this application were that the first respondent had instructed the third respondent to attach, remove and sell the applicant's movable property acting under an "irregularly" issued warrant of execution, E and that the judgment debt had been paid in full and that there was no need to proceed with execution. The certificate of urgency was authored by Johhannes Muchada, a legal practitioner with Dube, Manikai & Hwacha, the applicant's legal practitioners of record. Mr *Muchada* certified that the application was urgent because the first respondent had acted improperly in instructing the third respondent to attach and remove the applicant's property F on the basis of an irregular warrant of execution, the charge being that the warrant of execution was issued without registration of the arbitral award.

Mr *Muchada* also certified that the matter was urgent because property had been attached on 17 September and removal was due on 18 September 2014. It was also averred that if the application was not heard quickly, it would suffer irreparable harm as the attached property would be sold in satisfaction G of an irregular warrant. Attached to the papers filed of record was a court application for review made in terms of r 256 of the High Court Rules, 1971. That application was premised on the averment that, a warrant of execution had been issued on 31 July 2014, which the applicant became aware of on 22 August 2014. It was alleged that when the warrant of execution against H the property was issued, there was no judgment which had been obtained

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against the applicant by the first respondent, in that court, and that the A arbitral award had not been registered as an order of the magistrates court. It was contended that the warrant of execution had no legal basis and was null and void, more so since the applicant alleged that it had discharged its indebtedness to the first respondent in full.

Mr *Mashava*, in his founding affidavit in the application for review, stated B that the applicant was seeking an order to set aside the warrant of execution granted by the second respondent despite the fact that the applicant had discharged the judgment debt in full, and without registration of the arbitral award as an order of that court. The applicant also seeks a declaration that it is entitled to withhold income tax from the first respondent's remuneration. The first respondent was charged with acting *mala fide,* and with intending to C cause irreparable financial prejudice to the applicant whose property would be sold for a paltry sum at auction.

The first respondent filed his opposing papers to this application on 29 September 2014. In his opposing affidavit, he raised three points *in limine,* jurisdiction, the question of who could competently prepare a certificate of D urgency and whether or not this matter was indeed urgent. Before setting out the first respondent's contentions which he raised in these three preliminary points, I will set out the first respondent's submissions regarding the merits of the application. It was contended that the proper appropriate court before which the applicant should seek relief was the Labour Court. It was contended, further, that the applicant is not entitled to withhold income tax from an award E that does not take income tax into account. The first respondent averred that the question of income tax was not raised at the quantification proceedings before the arbitrator, and

that, in the face of such an omission, the applicant ought to have appealed against the arbitral award on the basis that it was incompetent in that it failed to make provision for income tax.

The first respondent submitted that the procedure adopted when the warrant of execution had been issued by the clerk of court was recommended to him by the resident magistrate at Harare civil magistrates court when he sought his advice. He said that he was advised that the procedure for registration of an arbitral award was different in the magistrates court, where it was not necessary that a formal written application for registration be filed, unlike in the High Court. The respondent denied that the judgment debt had been discharged in full, as alleged by the applicant. He denied that his actions were motivated by malice. The first respondent maintained that the procedure he adopted is the one provided for in by s 98(14) of the Labour Act [*Chapter 28:01*].

Chigumba J

The first preliminary point raised by the first respondent is that the High Court has no review jurisdiction over matters covered by the Labour Act that can competently be dealt with by the Labour Court. He submitted that s 89(6), as read with s 89(1)(d1), of the Labour Act clearly ousts the High Court's review jurisdiction over matters that the Labour Court has jurisdiction. Let us examine this curious submission made by the first respondent. This court's own review jurisdiction is found in s 26 of the High Court Act [*Chapter 7:06*] which provides that:

> "**26 Power to review proceedings and decisions**
>
> *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" (my emphasis).

It is trite that both the Labour Court and the magistrates court are inferior courts of justice. The word "inferior" is not an indictment of the quality of justice that is dispensed by these courts. It is an acknowledgment of the fact that these courts have no inherent jurisdiction, that they are confined to the four corners of the Acts of Parliament which founded them, in so far as their jurisdiction and in determining what they may or may not do. My reading of s 26 of the High Court Act is that the High Court does have review jurisdiction over all inferior courts, but that jurisdiction is subject to what is provided in the High Court Act, and by any other other law. In other words, the High Court's power to review decisions of the Labour Court and the magistrates court is subject to the provisions of the Labour Act [*Chapter 28:01*] and of the Magistrates Court Act [*Chapter 7:10*]

Section 89(1)(d1) and s 89(6) of the Labour Act provide as follows:

> **"89 Functions, powers and jurisdiction of Labour Court**
>
> (1) The Labour Court shall exercise the following functions –
>
> (a) to (d) [not relevant]
>
> (d1) exercise the same powers of review as would be exercisable by the High Court in respect of labour matters;
>
> (6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."

Clearly, if the High Court's powers of review are similar to those of the Labour Court, but the review powers of the Labour Court are confined to labour matters only, and s 89(6) confers exclusive powers to review labour matters at first instance on the Labour Court, then it is correct to state that the High Court has no jurisdiction to entertain an application for review of a labour matter at first instance. In my view, any application for review of a labour matter, which is an application of first instance, must be directed

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Chigumba J

to, and dealt with by, the Labour Court. Section 89(1)(d1) spells out clearly that the powers of review of the Labour Court are the same as those of the High Court. In my view, when considering what those powers are, regard should be had to section 27 of the High Court Act, which provides the grounds for review.

> "**27 Grounds for review**
>
> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision 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;

(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

(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."

It is interesting to note that s 27 makes it clear that the High Court's powers of review are subject to any other law, and that these powers shall not affect D any other law relating to the review of proceedings or decisions of inferior courts. It is my respectful view that this is a clear ouster of the High Court's inherent jurisdiction, and of its powers of review conferred on it by s 27, where other laws are expressly cloaked with similar jurisdiction but in a specialized area, such as labour matters. The Labour Court has the same powers to set aside or correct the proceedings or decision, as provided in E s 28 of the High Court Act.

Having settled the question of the Labour Court's review jurisdiction, it was apparent to me that the court application for review purportedly filed in terms of r 256 of the High Court Rules, was incompetent, being an application for review at first instance, and consequently not properly before the High F Court. It ought to have been filed in the Labour Court, which has similar powers of review and provides similar remedies. It then occurred to me that what the applicant sought to have reviewed was the procedure adopted by the magistrates court, another inferior court whose procedures are governed by the Magistrates Court Act and rules. The registration of arbitral awards is G provided for by ss 98(14) and 98(15) of the Labour Act which stipulates that:

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

2014 (2) ZLR p623

Chigumba J

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

Section 98(14) allows registration of an arbitral award for purposes of enforcement with any court of competent jurisdiction. In this case, the arbitral award fell within the monetary jurisdiction of the magistrates court, which B is currently pegged at USD$10 000. Section 98(15) provides that the effect of the registration of an arbitral award in terms of s 98(14) is to turn the arbitral award into a civil judgment of the appropriate court. My reading of s 98 is that it accepts that an arbitral award is not a court order for purposes of enforcement. By rights, arbitral awards should be registered as orders C of the Labour Court, because they emanate from labour related processes. Unfortunately, the Labour Court, which was initially constituted as a tribunal, was not cloaked with enforcement procedures of its own by its parent Act.

In my view, this anomaly is continuing to cause great hardship to litigants, especially petitioners in labour matters, who I have expressed great sympathy with at the outset. It has resulted in a situation where they are forced to move D from pillar to post, in search of justice, and the procedures in place are not user friendly, but cumbersome and protracted, and ultimately expensive, placing justice beyond the reach of many. It is my humble view that the time is long past for the legislature to address this anomaly, especially in light of our current economic environment where many people find themselves E out of employment and require a streamlined, speedy, inexpensive one stop shop where their labour grievances may be addressed.

I also hold the view that the applicant ought to have exhausted the domestic remedies provided in terms of the Labour Act. Section 92E (3) provides that:

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

See *Greenland* v *Zimbabwe Community Health Research Project* HH-93-13. It was held in that case that an arbitral award can be stayed or suspended by the Labour Court pending the determination of an appeal in terms of s 92E(3). We have established that the Labour Court's powers of review are similar to those of the High Court. In my view, since the High Court has G power to stay or suspend judgments pending review, we can safely infer that the Labour Court has similar powers on review.

It was held in *Djordjevic* v *Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe & Anor* 2009 (2) ZLR 221 (H) that:

> "… it has been laid down in a number of cases that where domestic remedies H are capable of providing effective redress in respect of the complaint, the litigant

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Chigumba J

> should exhaust the domestic remedies themselves unless there are good reasons A for not doing so".

Those domestic remedies ought to be exhausted unless there are good reasons for not doing so. Similar sentiments were expressed in *Girjac Services (Pvt)Ltd* v *Mudzingwa* 1980 (1) ZLR 243 (S) at 249E-F. In another related matter, *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H), it was held that: B

> "…this court should not be prepared to review the decision of a domestic tribunal merely because the aggrieved person has decided to apply to this court rather than proceed by way of domestic remedies."

The Supreme Court expressed similar sentiments in a matter where the respondent had been employed by the appellant as a manager. He was suspended from duty following an investigation into alleged acts of C misconduct. He was invited to a disciplinary hearing which he failed to attend on 3 July 2002. The respondent was found guilty as charged on 10 July 2002. He applied to the High Court for a review of the proceedings leading to his dismissal. He did not appeal against the decision in terms of the Code of Conduct.

The appellant appealed against the review proceedings on the basis of failure D to exhaust domestic remedies, among other grounds of appeal. It was held that domestic remedies should not be abandoned without valid reasons. See *Olivine Industries (Pvt) Ltd* v *Gwekwerere* 2005 (2) ZLR 421 (S). In that case, the applicant did not provide any reasons why it sought to have the procedure adopted by the magistrate court reviewed by this court, in a E labour matter. It did not provide any reasons why the domestic remedies provided by the Labour Act were not fully utilized by it. The applicant did not give any reasons why it did not apply for stay of execution before the magistrates Court, whose parent Act and rules clearly provide for such a remedy. In the absence of any good reasons why the applicant did not utilize the domestic remedies available to it, it is my view that the applicant ought F not to be heard by this court. The applicant must go back and utilize the available domestic remedies or provide this court with a good reason why that is impossible or distasteful to it.

I then turn to consider whether the applicant could have obtained the relief that it sought from any of the inferior courts. It is common cause that the G arbitral award was "registered" for purposes of execution by the magistrates court. Section 20 of the Magistrates Court Act provides that:

> **"20 Writs of execution**
>
> *When a court gives judgment* for the payment of money the amount shall be recoverable, in case of failure to pay the same forthwith or at the time or times and in the manner ordered by the court, by execution against the movable property H

Chigumba J

> and, A if there is not found sufficient movable property to satisfy the judgment, then against the immovable property of the party against whom such judgment has been given." (my emphasis)

It is my considered view that s 98 of the Labour Act is based on the premise that an arbitral award is not an order of court and that it requires registration in a court B of competent jurisdiction for purposes of execution. The purpose of registration is to turn the arbitral award into an order of that court. Section 20 of the Magistrates Court Act provides that in order for a writ of execution to be issued, there must be a judgment of the magistrates court, which is founded in money, on which execution will be based. The procedure adopted by the magistrates court, of merely issuing a writ of execution on the basis C of an arbitral award is akin to putting the cart before the horse.

In my view, the issuing of a writ of execution must be preceded by the filing and determination of an application for registration of the arbitral award as an order of the magistrates court. Only then may the arbitral award, now a competent order of the magistrate's court, be competently enforced via the auspices of a writ of execution emanated from the magistrates court. My D view is supported by the provisions of the Magistrates Court (Civil) Rules, 1980 (Order 26) wherein it is stated that:

"(1) The process for the execution of any judgment for –

(a) the payment of money;

(b) …

(c) … E

shall be by warrant issued and signed by the clerk of the court and addressed to the messenger.

(2) *Such process may be sued out by any person in whose favour any such judgment* has been given if such judgment is not then satisfied, stayed or suspended" (my emphasis).

My reading of r(1)(a), as read with r (2), is that before execution of a judgment F which sounds in money, and before a warrant of execution is issued by the clerk of court, there must be proof that there is a judgment which has not been satisfied, stayed or suspended. In this case, there was no registration of the arbitral award into a judgment of the magistrates court (in terms of s 98 of the Labour Act, and so there was no basis on which a warrant of execution could have been issued. G

What then should have been the applicant's first port of call in these circumstances? Clearly, the magistrates court itself, the purveyor of a warrant of execution which was not based on its own judgment as provided by its governing Act, or its rules. The magistrates court purported to issue a warrant of execution. It is my view that the applicant could only have approached H the Labour Court for review of the procedure for registration of its arbitral

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award. Pending that review, on the basis of procedural irregularity, the A applicant ought to have applied for stay of execution out of the magistrates court, simply because it had issued the warrant of execution. There was no legal basis on which the applicant could approach the High Court. The matter was within the monetary jurisdiction of the magistrates court. The matter concerned an arbitral award which was not properly registered by the magistrates court. The Labour Court ousts the jurisdiction of the High B Court to review labour matters at first instance. The relief sought by the applicant in the main matter (review of a labour matter) was consequently incompetent at law.

The Administrative Justice Act [*Chapter 10: 28*] provides:

"… for the right to administrative action and decisions that are lawful, reasonable C and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions …"

In my view, the High Court, without limitation to its discretion as provided in terms of ss 26, 27 and 28 of the High Court Act, should decline to entertain applications if the applicant is entitled to seek relief under any other law and D the High Court considers that any such remedy should be first exhausted. This is what s 7 of the Administrative Justice Act provides, and the provisions of that Act are merely cited here as an illustration of the point that I wish to emphasise. The discretion to entertain applications should extend to, and be exercised to decline to hear applications that pertain to labour matters, especially those applications which the Labour Act itself has reserved E exclusively for the Labour Court. As long as the High Court continues to entertain any applications that legal practitioners in their wisdom continue to file in this court, there will always be a siege mentality caused by multiplicity of actions, increasing litigiousness and the desire to shop for different fora in a bid to secure a certain desired result. The High Court, in my humble view, ought to be careful not to unnecessarily usurp the jurisdiction of the F Labour Court.

The court did not consider any of the other preliminary points raised by the first respondent in reaching its conclusion to dismiss the application before it with costs. The application was incurably and fatally defective, being within the four corners of the exclusive jurisdiction of the Labour Court. Even the G question of urgency was not considered, my view being that urgency ought to be considered only after jurisdiction has been founded.

Dube, Manikai & Hwacha, applicant's legal practitioners

Lawman Chimuriwo, Attorney At Law, first respondent's legal practitioners H

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[zRPz]SMETHWICK TRADING (PVT) LTD & ANOR v ROME FURNITURE (PVT) LTD 2014 (2) ZLR 627 (H)

Citation	2014 (2) ZLR 627 (H)
Case No	Judgment No. HH-603-14
Court	High Court, Harare
Judge	Mwayera J
Heard	16 September 2014; *CAV*
Judgment	5 November 2014
Counsel	*K Chivizhe*, for the applicant *T Mpofu*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *process – service of – on body corporate – delivery to a "responsible person" – who such person may be – delivery to security guard at business premises sufficient*

Headnote

Under D r 39(2)(d) of the High Court Rules 1971, process on a body corporate may be served, among other ways, by delivery to a responsible person at the body corporate place of business or registered office. A "responsible person" is one who is able to act without guidance and this description E would not exclude a security guard who served at the company's business premises. It would not only be unreasonable but illogical to hold that a man charged with responsibility of security of premises should be viewed as not fit or responsible enough to be served with process, given that under r 40 affixing process at place of residence, business or employment or placing in a letter box is deemed sufficient service may F be regarded as sufficient service.

Cases referred to

Arab v *Arab* 1976 (2) ZLR 166 (A)

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

Ndokwani v *Shoniwa* 1992 (1) ZLR 269 (S) G

Stewart Scott Kennedy v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 655 (S)

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

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 39(2)(d) H

Mwayera J

Case information

K Chivizhe, for the applicant A

T Mpofu, for the respondent

Judgement

Mwayera J: This is an opposed application for rescission of a judgment given in default of the applicant. The application is in terms of r 63 of the High Court Rules 1971.

The factors for consideration in applications of this nature are fairly settled. B The court has to consider whether or not there is "good and sufficient cause" warranting the rescission of the default judgment. In deciding on whether there is good and sufficient cause the court ought to take into account the following factors:

(a) the reasonableness of the applicant's explanation for default. C

(b) the *bona fides* of the application to rescind the judgment and

(c) the *bona fides* of the defence on merits of the case and the applicant's prospects of success.

It is an established position that the above factors ought not be considered singly or individually, but must be cumulatively considered in conjunction with D the application as a whole. The court at the end of the day has to judiciously exercise its discretion. The cases of *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S) at 173E-F, *Ndokwani* v *Shoniwa* 1992 (1) ZLR 269 (S) at 270C-D and *Dewera Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998 (1) ZLR 368 (S) at 369E–F are instructive.

The background to the present application can be briefly outlined as follows. E The applicants and the respondent entered into a contractual agreement whereby the first applicant bought and took occupation and control of the respondent's business on 1 June 2013. The premises on which the business operated was owned by the respondent hence the applicant was to pay rent for occupation and then vacate premises by 31 January 2014. Following an F alleged breach the respondent instituted legal proceedings under HC 1317/14 wherein they sought eviction of applicants and an order for payment of $75 000 being arrear rentals. The applicant (respondent then) did not file opposing papers within the *dies induciae*, culminating in a default judgment which the applicant seeks to have rescinded.

The applicant presented twofold arguments: firstly, that it was not in wilful G default; and secondly that it has a genuine defence to the claim in HC 1317/14. The applicant argued that its failure to oppose the application was because of misinformation by a security guard, one Enias Madumira, who upon handing over the application to the applicant's Finance Manager, Linda Gomba on 21 February 2014 notified that was the day he received process. It was on H

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that A premise that opposition was filed out of time on 7 March 2014. Further, the applicant pointed out that service on the security guard was improper as that was not the place where the applicant was carrying out business and also the security guard was not a responsible person as envisaged by r 39(2)(d).

Further, on the *bona fides* of the defence, the applicant argued that the sale B agreement entered into was not yet operational because of non-fulfilment of suspensive conditions. The applicant contended that the agreement signed by the parties is not the sole memorial of the agreement between the parties as the terms of the signed agreement differed from the draft negotiations agreement. The applicant argued that the parties' intention was to suspend the operation of the agreement pending the fulfilment of the suspensive C condition. The applicant did not sign the resolution because the terms of contract which they signed to were different from their negotiations a fact which the applicant only realised after signing. Further, the applicant was to deliver to the respondent a duly signed copy of the lease agreement, signed by the first applicant and the landlord and valid for six months.

In short, D the applicant's argument was that the signed contract or sale agreement was not operating since the suspensive conditions had not yet been met and argued that the signed agreement did not reflect the wishes of the parties. The applicant also raised that the proceedings under case HC 1317/14 referred to the respondent then the applicant as "Rome Furniture (Pvt) Ltd"

and not Rome Furniture Manufacturers (Pvt) Ltd, meaning the E proceedings referred to a totally none existent person thus rendering the proceedings a nullity.

Stewart Scott Kennedy v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 655 (S), which the applicant sought to rely on in so far as citing a non-existent party rendering proceedings void *ab initio*, is not applicable in the circumstances of this case, given that the name is properly cited on the founding affidavit. F

The other argument pertained to the terms of contract wherein the parties made a choice that in the event of breach or disagreement the matter was to be referred to arbitration unless dispute required an urgent relief.

The applicant urged the court to grant rescission of judgment on the basis that they were not in wilful default and that the applicant has a *bona fide*G meritorious defence as outlined.

The respondent opposed the application, citing wilful default on the part of the applicant and also that the applicant had no genuine defence to the matter wherein they entered into a sale agreement which was reduced to writing and they breached the terms of the agreement. A close look at the H applicant's explanation for not filing opposition raises an interesting point

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of whether or not a security guard in a corporate setting would be deemed A a responsible person. Rule 39(2)(d) reads:

> "Subject to this order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways –
>
> (d) in the case of process served on a body corporate –
>
> (i) by *delivery to a responsible person at the body corporate's place of*B*business or registered office*; or
>
> (ii) if it is not possible to serve process in terms of sub paragraph (i) by delivery to a director or to the secretary or public officer of the body corporate" (my emphasis).

A responsible person, in my view, is one who is able to act without guidance and this would not exclude a security guard, given he was served at the company C business premises. He passed on the documents to the finance manager, a fact which is common cause. His version is on the day he was served he was showing a sense of responsibility. It would not only be unreasonable, but illogical, to hold that a man charged with responsibility of security of premises be viewed as not fit or responsible enough to be served with process. If affixing process at place of residence, business or employment or placing D in a letter box is deemed sufficient service (as per Order 5 of the High Court Rules 1971), then to class a security guard as not being a responsible person to receive process is not only discriminatory but undermines the person of a security guard. This defies logic. To this end, therefore, my view is that service was properly and satisfactorily effected. Given the circumstances of E this case and the common knowledge aspect that the applicants had taken over the business operation, the explanation of not filing opposition papers is unreasonable. The applicant, with full knowledge of the action and full appreciation of the consequences, deliberately adopted a carefree and dilatory attitude. It refrained from opposing the matter, only to spring into action after the *dies induciae*, when they were barred. Put differently, no opposition was F filed hence the default judgment. The applicant's defence on the grounds that they realised, after signing, that the terms of agreement were materially different from the parties' intention is viewed with suspicion. This is more so when one considers what transpired after the signing of the agreement. The applicant took over the business and commenced running it. The applicant G appreciated the premises were owned by the respondent and took control and ran the business but did not pay rentals. The conduct of the applicant of seeking to accept the written contract piecemeal for its benefit – for example, taking over the business and operating from the date of signing and when it came to non-payment of rentals, seeking to hid behind suspensive conditions – is viewed with suspicion. It only shows lack of genuineness on the part of H

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the A applicant. The first applicant had authority to transact on behalf of the second applicant and thus when he entered into agreement he must have been aware of the *caveat subscriptor* rule. The

agreement was clear and it spelled out the need to give notice in event of breach. The applicant was issued with a letter of demand from the respondent's legal practitioners but did nothing to rectify the situation. The agreement which the applicant B entered into spells out that, in the event that disputes arose, they would be referred to arbitration and that in the event of a material breach going to the root the matter would be resolved in terms of the law.

The agreement was couched in such a manner that it did not exclude litigation, as was opted for by the respondent in HC 1317/14. Clause 8.1 of C the agreement is relevant:

> "In the event that the seller or purchaser breaches any of the provisions of this agreement and breach is material including non-payment of any amount due and the defaulting party fails to remedy the breach within 10 business days after receipt of a written notice … requiring it to remedy that breach, the non-defaulting party will be entitled without prejudice to any rights it may otherwise D have in terms of this agreement or at law, to terminate this agreement on the occurrence of such material breach or upon expiry of the 10 day period and to claim payment of any outstanding amount or the full balance which shall immediately become due and payable notwithstanding anything contrary in this agreement contained ..."

The argument that the respondent opted for legal proceedings and not E arbitration therefore does not bolster the defence which the applicant claims to have.

The applicant's argument that the citation in the High Court case reflected a non-existent *persona*, when viewed with the totality of the papers and documents filed herein, clearly has no leg to stand on. The founding affidavit, F which is the basis of the application and the court order, is clearly spelled out. This point appears to have been raised solely to try and bolster possible non-existent defences to the claim by the respondent in HC 1317/14 to which default judgment was granted.

Having considered all the circumstances of this case, it is apparent that G the applicant wilfully defaulted. With full knowledge of the service and appreciation of risks attendant upon default, it took a decision not to file opposition timeously. The suggestion by the applicant that the agreement had not been consummated, given that the applicant had taken over business and was operating, is inconsistent with that proposition. The takeover of business operations was after signing the agreement. If there was no meeting of minds, H then the applicant ought to have refrained from operations. The superficial

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Mwayera J

defence by the applicant is contrary to the public policy of bringing litigation A to finality. See *Arab* v *Arab* 1976 (2) ZLR 166 (A).

There is certainly no *bona fide* defence warranting this court to accede to the applicant's request.

Having said that the applicant was in wilful default and that there is no *bona fide* defence, it follows in the circumstances that the applicant has not B established good and sufficient cause for this court to rescind the default judgment given in case HC 1317/14.

Accordingly, it is ordered that the application for rescission of judgment be and is hereby dismissed with costs.

Wintertons, applicants' legal practitioners C

Ushewokunze Law Chambers, respondent's legal practitioners

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[zRPz]S v SENGEREDO 2014 (2) ZLR 633 (CC)

Citation 2014 (2) ZLR 633 (CC)

Case No	Judgment No. CC-11-14
Court	High Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Patel JA, Hlatshwayo JA & Guvava JA
Heard	26 February 2014; *CAV*
Judgment	10 November 2014
Counsel	*T Mugabe*, for the applicant *I Muchini*, for the respondent
Case Type	Constitutional reference
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 18 – right to trial within a reasonable time – allegation of inordinate delay – what must be shown – need for applicant to place evidence* D *before lower court so that Constitutional Court may properly determine whether applicant's rights have been infringed – right to protection of the law – complainant in criminal matter making representations to Attorney-General – not constituting interference with Attorney-General's independence*

Headnote

The E applicant was charged in the magistrates court with two counts of fraud, both relating to the purported sale of the same house to two different people. He war arrested and made a statement to the police on 15 February 2009, after which he was placed on remand. On 5 November 2009, after attending court ten times, further remand was refused. F

Some time in November 2010, a law officer in the then Attorney-General's Office declined to prosecute, on the erroneous ground that the applicant's conduct did not constitute a criminal offence. In May 2011, after representations from one of the complainants, the Attorney-General rescinded the decision not to prosecute and directed that the appellant be summoned to attend court. On 10 August 2011 the applicant was placed G on remand and thereafter remanded a number of times until February 2012, when, following an application by the applicant, the magistrate referred the matter to the Supreme Court in terms of s 24(1) of the 1980 Constitution. The issues for determination were (a) whether the applicant's right under s 18 of the Constitution to a fair hearing within H a reasonable time was violated; and (b) whether his right under that

section to protection of the law was violated by the State, in that the A Attorney-General rescinded his decision not to prosecute the applicant after receiving representations from one of the complainants.

In respect of the second issue, it was argued that a complainant's representation to the Attorney-General to reconsider his decision in a criminal matter was unconstitutional and violated the accused's right to protection of the law, as it undermined the independence of the Attorney-General. B

Held, that the law with regard to stays of prosecution on the grounds of inordinate delay was now well settled. The court must consider (a) the explanation and responsibility for the delay; (b) the assertion of his right by the accused person; (c) the prejudice arising from the delay; and (d) the conduct of the prosecution and of the accused person in regard to C the trial. To enable the court

to properly determine these factors, certain peremptory requirements have to be met by the applicant making such an application. Evidence must be placed before the lower court as to the extent to which, if at all, the cause of the delay was the applicant's responsibility; to whether at any time he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether D any actual prejudice had been suffered as a result of the delay. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Constitutional Court hears argument and then decides whether a fundamental right had been infringed. Only in exceptional circumstances E will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits. Cogent reasons will have to be provided as to why the further evidence was not presented to the lower court. No such evidence was placed before the lower court. This failure was fatal.

Held, further, that a complainant in a criminal matter has a substantial F interest in the prosecution of an accused and is perfectly entitled to make representations to the Attorney-General regarding such prosecution. The Attorney-General is not bound to accept such representations. He can either accept or reject them, depending on whether or not he finds merit in the representations. Where he does not accept the representations the complainant is entitled to a certificate of *nolle prosequi*. The mere G fact that representations had been made did not in any way interfere with the independence of the Attorney-General. This submission was as absurd as submitting that the court's independence is compromised by submissions by counsel. H

Chidyausiku CJ

Cases referred to A

In re *Mlambo* 1991 (2) ZLR 339 (S)

S v *Banga* 1995 (2) ZLR 297 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 18

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 13 & 16 B

Case information

T Mugabe, for the applicant

I Muchini, for the respondent

Judgment

Chidyausiku CJ: C This application was referred to this court by the court *a quo* in terms of s 24(2) of the old Constitution of Zimbabwe (hereinafter referred to as "the Constitution"). The facts forming the background to this application are the following.

The applicant was charged in the magistrates court with two counts of fraud as defined in s 136(b) of the Criminal Law (Codification and Reform) Act D [*Chapter 9:23*]. In count one it is alleged that on 19 February 2008 and at no. 30 East Road, Avondale, Harare, the applicant unlawfully, and with intent to defraud, misrepresented to the complainant in count one that he was selling a property, stand number 521 St Patrick's Close, Helensvale Township, Harare ("the stand"), when he well knew that he was not selling the said property but only intended to induce the complainant in count one E to act upon the misrepresentation and pay him some money. As a result of this misrepresentation the complainant in count one paid the applicant the sum of US$62 000, thereby causing the complainant in count one to suffer prejudice in the amount of US$62 000.

In count two it is alleged that on 11 October 2008 and at no. 30 East Road, Avondale, F Harare, the applicant unlawfully, and with intent to defraud, misrepresented to the complainant in count two that he was selling a property, stand number 521 St Patrick's Close, Helensvale Township, Harare, yet in truth and in fact he was not selling the said property. The applicant made the misrepresentation when he well knew that he was not selling the said property but only intended to induce the complainant in count two to act upon G the misrepresentation. The complainant in count two paid the applicant the sum of US$48 500, thereby causing the complainant in count two to

suffer prejudice in the amount of US$48 500. In short, the applicant sold the same stand to two different people from whom he received the above amounts.

The applicant was arrested by the police in connection with the above H allegations. He was made to sign a warned and cautioned statement on

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Chidyausiku CJ

15 February 2009 after being formally advised that criminal proceedings A were being preferred against him. On 17 February 2009 he was placed on remand on these allegations. On 05 November 2009, after attending court on no less than ten occasions, further remand was refused.

It would appear from the record that some time in November 2010 a decision was arrived at by a law officer in the then Attorney-General's Office to B decline prosecution, on the ground that the allegations against the applicant did not constitute a criminal offence. He opined that the allegations against the applicant constituted a civil wrong, for which the complainant could sue the applicant. Quite clearly, this conclusion by the law officer was erroneous. The alleged conduct of the applicant, if proved, constitutes both a criminal offence and a civil wrong. C

In May 2011 the Attorney-General rescinded his earlier decision to decline prosecution and directed that the applicant be re-summoned to attend court. It would appear that the Attorney-General rescinded the earlier erroneous decision after representations from the complainant in count one.

On 10 August 2011 the applicant was placed on remand and thereafter D remanded on a number of occasions.

On 20 February 2012 the applicant made an application for referral of this matter to this court for in terms of s 24(2) of the Constitution. The trial magistrate granted the application and the matter was referred to this court.

Two issues fall for determination in this application: E

1. whether the applicant's right to a fair hearing within a reasonable time, as enshrined in s 18 of the Constitution, was violated; and
2. whether the applicant's right to protection of the law, as enshrined in s 18 of the Constitution was violated by the State, in that the Attorney-General rescinded his decision not to prosecute the applicant after F receiving representations from the complainant in count one.

Counsel for the applicant made detailed submissions in support of these two grounds.

I will deal with the second ground first. The submission that a complainant's representation to the Attorney-General to reconsider his decision in a criminal G matter is unconstitutional and violates the accused's right to protection of the law as it undermines the independence of the Attorney-General is misconceived. A complainant in a criminal matter has a substantial interest in the prosecution of an accused. In my view, a complainant is perfectly entitled to make representations to the Attorney-General regarding such prosecution. The Attorney-General is not bound to accept such representations. He can H

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either A accept or reject such representations depending on whether or not he finds merit in the representations. In terms of the law, where the Attorney-General does not accept the representations the complainant is entitled to a certificate of *nolle prosequi* – see s 13, as read with s 16, of the Criminal Procedure and Evidence Act [*Chapter 9:02*]. The mere fact that representations have been made does not in any way interfere with the independence of the B Attorney-General, who is free to accept or dismiss such representations. In fact this submission is as absurd as submitting that the court's independence is compromised by submissions by counsel.

This ground of challenge therefore fails.

I now turn to the first ground of challenge, namely the alleged inordinate C delay in bringing this matter to trial. This court has dealt with applications for stay of prosecution on the grounds of inordinate delay in trying the accused on numerous occasions and the law is now well settled. In the leading case of In re *Mlambo* 1991 (2) ZLR 339 (S), this court set out the procedure to be followed and the factors that a court takes into account in deciding whether D the applicant's right to a fair

trial within a reasonable time has been violated or not. The following are the factors to be taken into account in making a determination:

1. the explanation and responsibility for the delay;
2. the assertion of his right by the accused person;
3. the prejudice arising from the delay; and
4. the conduct of the prosecution and of the accused person in regard to the trial.

In re *Mlambo supra* has been followed in numerous cases. In *S* v *Banga* 1995 (2) ZLR 297 (S) at 300F-G the court had this to say:

> "The principles which govern applications of this nature are now well settled. They were set out in In re *Mlambo (supra)* and have since been applied on many occasions; more recently in *Hungwe & Ors* v *A-G* S-50-94; *S* v *Matarutse* S-101-94 and *S* v *Marisa* S-126-95.
>
> In this application, the period of slightly over four years was presumptively long enough to trigger an enquiry into the factors that go into the balance in the determination of whether the delay in bringing the applicant to trial was reasonable in the pertaining circumstances. These factors are –
>
> (i) the explanation and responsibility for the delay;
>
> (ii) the assertion by the applicant of his fundamental right to a hearing of the case within a reasonable time;
>
> (iii) the existence of any prejudice suffered by the applicant resulting from the delay."

To enable this court to properly determine the factors set out in In re *Mlambo* *supra*, certain peremptory requirements have to be met by the applicant making such an application. In *Banga's* case *supra* at 300G-301B the court pronounced itself as follows:

> "Regrettably, the manner in which the legal practitioner requested the referral was totally misconceived. It was wholly insufficient to make a statement from the bar, and then to point solely to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether at any time before 16 August 1994, he had asserted his right to be tried within a reasonable time; and, even more importantly, to whether any actual prejudice had been suffered as a result of the delay.
>
> Such a fundamental omission on the part of the defence is fatal to the success of the application.
>
> This court has stressed frequently that if an accused is of the view that the State is dragging its feet in bringing him to trial, he must assert his constitutional right to be tried within a reasonable time and in default of compliance with such protest seek a stay of proceedings. See *S* v *Ruzario* 1990 (1) ZLR 359 at 367F-G; In re *Mlambo supra* at 354B-C; *S* v *Musivitisi & Anor* S-229-93 at p 6; *S* v *Matarutse supra* at p 3."

The court went further to state the following at pp 301F-302A:

> "I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on that record that the Supreme Court hears argument and then decides if a fundamental right had been infringed. Only in exceptional circumstances will an applicant be permitted to supplement the record of the proceedings before the lower court by the production of affidavits. Cogent reasons will have to be provided as to why the further evidence was not presented to the lower court. The well known requirements laid down in *Farmers' Co-op Ltd* v *Borden Synd (Pvt) Ltd* 1961 R & N 28 (FS), 1961 (1) SA 441 (FS) and as discussed latterly in *Leopard Rock Hotel Co (Pvt) Ltd* v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) and *Bevan Trading (Pvt) Ltd* v *Voest-Alpine Intertrading GbmH* S-149-94, will have to be met."

In casu, the legal practitioner for the applicant did not fully appreciate what was required of him. He only made submissions from the Bar and simply pointed to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility or that of the prosecutor. He was required to place before the magistrate's court evidence as to whether at any time before 28 February 2012 the applicant had asserted his right to a fair trial within a reasonable time and, even more importantly, whether or not actual prejudice had been suffered as a result of the delay. See *S* v *Nkomo and Anor* S-89-03.

The failure by the applicant's legal practitioner to place evidence before the magistrate's court, which evidence would have assisted this court in assessing the relevant facts in this case, was fatal.

Accordingly, the application is dismissed. There will be no order as to costs. B

MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, PATEL JA, HLATSHWAYO JA and GUVAVA JA concurred.

Nyakutombwa Mugabe Legal Counsel, applicant's legal practitioners C

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[zRPz]BT (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2014 (2) ZLR 640 (H)

Citation	2014 (2) ZLR 640 (H)
Case No	Judgment No. HH-617-14
Court	High Court, Harare
Judge	Kudya J
Heard	22 July 2014; *CAV*
Judgment	12 November 2014
Counsel	*A P de Bourbon SC*, for the appellant *T Magwaliba,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – *income tax – appeal against decision of Commissioner of Revenue* C *Authority – nature of appeal – appeal a broad appeal, with rehearing of evidence – court not restricted to evidence provided to Commissioner – court entitled to exercise its own discretion*

Revenue and public finance – *income tax – appeal – against decision of* D *Commissioner of Revenue Authority – nature of appeal – appeal a broad appeal, with rehearing of evidence – court not restricted to evidence provided to Commissioner – court entitled to exercise its own discretion*

Revenue and public finance – *income tax – deductions allowable – doubtful and bad debts – what constitute such debts – debtor issuing acknowledgment of debt – debtor's inability to pay established – deductions allowed* E

Revenue and public finance – *Reserve Bank – powers of – issue of bonds in lieu of repayment of debt – no lawful authority for Bank to issue such bonds – bonds merely having effect of acknowledgment of debt*

Headnote

The ZRA had disallowed deductions claimed by the appellant in respect of F doubtful debts (for the year 2009) and bad debts (for the year 2010). The appellant was a gold mining company. The production of and trading in gold in Zimbabwe is strictly controlled by and regulated under the Gold Trade Act [*Chapter 21:03*]. The appellant came into the local mining scene in 2006 and became one of the three largest producers of gold in the country. At various dates during the 2008 calendar year, the appellant sold G the gold bullion it produced to a company wholly owned

by the Reserve Bank (RBZ). The law, contract and practice obliged the RBZ to pay the appellant for all the gold bullion delivered to the company.

Before the onset of the multi-currency monetary regime in the country, one component of the payment was in local currency, while the other was H

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in A United States dollars. Payment in local currency was on delivery and through bank transfer based on an implied exchange rate set unilaterally by the RBZ. Payment in foreign currency was slow and lethargic and was done through transfer into foreign currency denominated bank accounts of the appellant, usually after a monetary policy statement. The foreign currency component was set against the price of gold on the London B afternoon fix. The RBZ always unilaterally fixed the gold support price from time to time in local currency. The appellant was not paid the foreign currency component for any of the deliveries it made in 2008. In January 2009 the Governor of the RBZ unilaterally converted all outstanding amounts to the gold sector into tradable "Special Gold-backed Foreign C Exchange Bonds" with a tenor of 12 months. The bank undertook to honour the full principal plus interest on maturity to the holders of the bonds. The appellant found that if it wanted to trade the bonds on the market, there would be a discount of 40-50 percent on the face value. It decided to wait until the maturity date. When that date arrived, the bonds were not redeemed. The RBZ unilaterally rolled over the bonds D for a further six months. After that, it issued replacement bonds, but up to the date of the appeal, the bonds had not been redeemable, further roll overs being unilaterally declared by the RBZ.

There being no prospect of payment by the RBZ, the appellant wrote off approximately half of the value of the bonds for the year 2009 as E doubtful debts and the balance, for the following year, as a bad debt. The respondent treated the bonds in the hands of the appellant as investment and not debt. It took the view, firstly, that the debt was converted into an investment by the issue of the bonds and, secondly, that the acceptance of the conversion constituted a full repayment of the debt.

Held, that all appeals in tax matters brought in the High Court or Special F Court against the decisions of the Commissioner of the ZRA, whether on substantive issues or against penalties, are appeals in the broad rather than in the narrow sense. This principle is unaffected by the choice of forum exercised in terms of s 65(1) of the Income Tax Act [*Chapter 23:06*]. After all, these two courts hold concurrent jurisdiction in income tax appeal cases. In an appeal against a decision where the Commissioner exercised a G discretion, the Special Court is called upon to exercise its own original discretion. It is not restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can involve the leading of evidence and the submission of facts and arguments of which the Commissioner was unaware. The appeal was not H a mere review of the correctness of the Commissioner's determination.

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The court was required to exercise its own independent and unfettered A discretion unaffected by imputed wrong motives or errors of fact and law of the Commissioner.

Held, further, that the bonds issued by the RBZ had no legal standing. Under s 4(2)(a) of the State Loans and Guarantees Act [*Chapter 22:13*], the power to issue bonds was vested in the Minister of Finance. When the Act was B repealed by the Public Finance Management Act [*Chapter 22:19*], that power remained with the Minister. No Act gave the RBZ the power to issue bonds in order to meet its financial obligations. While s 13(1)(b) of the Reserve Bank Act [*Chapter 22:15*] allows the bank to discount bills, notes and other debt securities issued by it, these must be in respect of a banking institution that holds an account with it. The bonds issued C by the RBZ were little different from a bill of exchange or a promissory note or even a post-dated cheque to pay an outstanding debt, but the RBZ would be precluded from issuing such instruments as the appellant was not a banking institution. The RBZ was not empowered to issue bills, notes or other debt securities to the appellant. In the absence of statutory authority to issue bonds, the bonds were not lawful tender and could D not discharge a debt. They remained at best acknowledgments of debt.

Held, further, that for the year 2009, it was permissible, under s 15(2)(g)(ii) of the Income Tax Act, to deduct "doubtful" debts. The section was amended, and from the following year onwards, only "bad" debts could be deducted. The essential factors for a claim for both doubtful debts E and bad debts that the appellant must prove on a balance of probability are that (a) the amount claimed

must be due and payable; (b) the ZRA considers (is satisfied that) the amount is unlikely to have been recovered at the end of the financial year; (c) the amount must have been included in the taxable income of the taxpayer in the current or any previous year F of assessment; and (d) once the claim was allowed it would have to be added back to income in the following year of assessment. The debt here was "due and payable", in the sense of "accrual" or "entitled to". Payment was due immediately on delivery of the gold. The creation of the bonds merely constituted a unilateral rescheduling of the debt. The purported gold bonds were null and void. They were of no force G or effect and, in law, did not exist. They could not therefore constitute a payment for the debt. Even if they were valid, they would be akin to mere rescheduled acknowledgments of debt. An acknowledgement of debt is a document which confirms the existence of a debt, but does not constitute payment of the debt. H

Held, A further, that a "doubtful" debt can be equated with uncertainty of the likelihood by a creditor of receiving the amount owed. This uncertainty was borne out by events. The RBZ had demonstrated inability to pay and was in poor standing in the local market. It was also failing to settle recurring obligations to its workers. Any reasonable person submitting the return to the respondent would doubt the likelihood of the debt being B paid, even though he might recognise an outside and remote possibility that such payment might take place. There was no reasonable probability of payment occurring, but this did not completely exclude that payment might happen. A likelihood of lack of collectability existed. It was a doubt, as opposed to a certainty.

Held, further, that the Act does not define a "bad" debt. It is, however, C defined in ordinary commercial and accounting practice as an amount that is unlikely to be paid. The appellant had established that, by the end of 2010, the claimed amount had been outstanding for more than 26 months. The accounts for that year end were compiled on 31 March 2011. The purported gold bonds had been issued and rolled over time D without number. It was clear that the RBZ was unable to pay. It had no funds to pay. Suing the RBZ would be fruitless, as its assets could not be attached to satisfy the debt. The respondent should have allowed the deductions.

Cases referred to

Bailey v CIR 1933 AD 204E

Barros & Anor v Chimpondah 1999 (1) ZLR 59 (H)

Bubye Minerals (Pvt) Ltd v Min of Mines & Ors 2011 (2) ZLR 384 (S)

CIR v Delfos 1933 AD 242

Commissioner, SA Revenue Svcs v Pretoria East Motors (Pty) Ltd 2014 (5) SA 231 (SCA)F

CoT v 'A' Co (1979) SATC 59 (RA); 1979 (2) SA 409 (RA)

Dube v Maphepha Synd & Ors 2009 (1) ZLR 29 (H)

G v CoT 1972 (3) SA 121 (R); (1972) 34 SATC 62 (R)

Hicklin v Sec for Inland Revenue 1980 (1) SA 481 (A)

ITC 93 (1927) 3 SATC 239 G

ITC 1601 (1995) 58 SATC 172

Lategan v CIR 1926 CPD 202

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

MEC for Health, Province of the Eastern Cape NO & Anor v Kirland Invstms (Pty) Ltd 2014 (3) SA 219 (SCA)

Mudzumwe & Ors v MDC & Anor 2012 (1) ZLR 490 (H) H

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

Kudya J

Nicolle v Min of Lands & Anor 2003 (1) ZLR 280 (H) A

Oudekraal Ests (Pty) Ltd v City of Cape Town & Ors 2004 (6) SA 222 (SCA)

Queenstown Girls High School v MEC, Dept of Education, Eastern Cape & Ors 2009 (5) SA 183 (Ck)

Norgold Invstms (Pty) Ltd v Min of Minerals & Energy, RSA & Ors [2011] 3 All SA 610 (SCA) B

Rand Ropes (Pty) Ltd v CIR 1944 AD 142

Sommer Ranching (Pvt) Ltd v CoT 1999 (1) ZLR 438 (S)

Legislation considered

Bills of Exchange Act [*Chapter 14:02*], ss 3(1), 72 and 89(1) C

Income Tax Act [*Chapter 23:06*], s 15(2)(g)(ii)

Public Finance Management Act [*Chapter 22:19*], s 54(3)

Reserve Bank of Zimbabwe Act [*Chapter 22:15*], ss 4, 6, 7(1)(d)(iii) & 13(1)(b)

State Loans and Guarantees Act [*Chapter 22:13*], s 4(2)(a)

Case information

A P de Bourbon SC, for the appellant D

T Magwaliba, for the respondent

Judgment

Kudya J: This is an appeal brought in the High Court in terms of s 65(1) of the Income Tax Act [*Chapter 23:06*] against the decision of the Commissioner-General disallowing claims by the appellant for the deduction of doubtful E debts for the tax year ending 31 December 2009, and bad debts for the year ending 31 December 2010.

The appellant company is a producer of gold bullion from its underground mining operations in Zimbabwe. The respondent is the Zimbabwe Revenue Authority, a corporate body created in terms of s 3 of the Revenue Authority F Act [*Chapter 23:11*] charged with the responsibility of collecting revenue for the general good and well-being of the Republic of Zimbabwe.

It is important at the outset to emphasize that all appeals in tax matters brought in the High Court or Special Court against the decisions of the Commissioner, whether on substantive issues or against penalties, are in G the broad rather than in the narrow sense. This principle is unaffected by the choice of forum exercised in terms of s 65 (1) of the Income Tax Act. After all, these two courts hold concurrent jurisdiction in income tax appeal cases. The nature of appeals to these courts was restated in a judgment delivered in the Supreme Court of Appeal of South Africa on 12 June 2014 by Ponnan JA in *Commissioner for the South African Revenue Services* v H

Kudya J

*Pretoria*A*East Motors (Pty) Ltd* [2014] ZASCA 91; 2014 (5) SA 231 (SCA) at para [2]. He said:

> "It is important at the outset to emphasise, as Curlewis JA did in *Bailey* v *Commissioner for Inland Revenue* 1933 AD 204 at 220, that the Tax Court is not a court of appeal in the ordinary sense: it is a court of revision. That means, as Centlivres JA observed in *Rand Ropes (Pty) Ltd* v *Commissioner for Inland Revenue*B1944 AD 142 at 150:
>
> > 'That the Legislature intended that there should be a rehearing of the whole matter by the Special Court and that that Court could substitute its own decision for that of the Commissioner'."

These sentiments apply with equal force and are part of our law in Zimbabwe. In *Sommer Ranching (Pvt) Ltd* v *Commissioner of Taxes* 1999 (1) ZLR 438 (S) C at 443A-B Gubbay CJ emphasised that:

> "Presently, it is well settled that in an appeal against a decision where the Commissioner exercised a discretion, the Special Court is called upon to exercise its own original discretion. Nor is it restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can involve the leading of evidence and the submission of facts D and arguments of which the Commissioner was unaware. See *Commissioner for Inland Revenue* v *da Costa* 47 SATC 87 (A) at 95; 1985 (3) SA 768 (A) at 775B-G; *K* v *CoT* 1993 (1) ZLR 142 (S) at 147B-F; 55 SATC 276 (ZS) at 281."

The appeal before me therefore constitutes a rehearing of the matter and not a mere review of the correctness of the Commissioner's determination. I am required to exercise my own independent and unfettered discretion unaffected E by imputed wrong motives or errors of fact and law of the Commissioner.

The appellant called the evidence of one of its directors, a chartered accountant based in South Africa, who is the chairman of its audit committee and a vice-president finance and administration and chief financial officer of its international holding company that is registered in Canada and listed on F the Toronto Stock Exchange. In addition it produced a 109 page bundle of documents, exh 1. The respondent did not call any evidence. It relied on the documents produced by the parties during their interactions.

I must at the outset state that the chartered accountant gave his evidence very well. His testimony was not seriously challenged in cross-examination. It G dovetailed with the contents of the correspondence and documents exchanged between the parties that were filed of record. I found him a credible and truthful witness in all material respects.

The facts are basically common cause. What is in dispute is the import of those facts. The production of and trading in gold in Zimbabwe is strictly controlled by and regulated under the Gold Trade Act [*Chapter 21:03*]. The H appellant burst onto the local mining scene in 2006 through an offshore

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transaction involving two Toronto listed companies. It became one of the A largest three producers of gold in the country and had invested between 12 and 15 million US dollars by 31 December 2008. In 2008 the appellant produced between 1 000 and 15 000 ounces of gold monthly. At various dates during the 2008 calendar year, the appellant sold gold bullion to Fidelity Printers and Refiners (Pvt) Ltd, a subsidiary wholly owned by the Reserve Bank of Zimbabwe (the central bank). The law, contract and practice obliged the B central bank to pay the appellant for all the gold bullion delivered to Fidelity.

The chartered accountant detailed the two tier system for payment of gold deliveries in existence before the onset of the multi-currency monetary regime in the country. One component of the payment was in local currency while the other was in United States dollars. Payment in local currency was on C delivery and through bank transfer based on an implied exchange rate set unilaterally by the central bank.

Payment in foreign currency was slow and lethargic and was done through transfer into foreign currency denominated bank accounts of the appellant, usually after a monetary policy statement. The foreign currency component D was set against the price of gold on the London afternoon fix. The central bank always unilaterally fixed the gold support price from time to time in local currency. The appellant was not paid the foreign currency component for all the deliveries it made in 2008. It closed the mining operations in October 2008 and resumed in April 2009 after it was issued with a gold licence that allowed it to control the sale of bullion and collection of the proceeds. E

The central bank would without fail always analyse the gold sector in its bi-annual monetary policy statements. In one such statement in January 2009 (pp 1-2 of the appellant's bundle of documents) the governor of the central bank unilaterally converted all outstanding amounts to the gold sector into "Special Goldbacked Foreign Exchange Bonds" with a tenor of 12 months. F The other terms attaching to the bonds were interest of 8 per cent per annum on maturity applied in retrospect from the date each amount fell due, tradable to any interested counterparty locally, regionally and internationally at the agreed time-to-maturity discounts. The central bank unequivocally undertook to honour the full principal plus interest on maturity to the holders of the bonds. G

The appellant saw the conversion for the first time in the monetary policy statement. As at 31 January 2009 the central bank owed the appellant US$2 794 318.18 for bullion deliveries. In a letter, annexure C 1 to the respondent's case, dated 23 February 2009, the central bank sought written confirmation of the total debt, inclusive of interest, owing to the appellant in the sum of US$ 2 945 388.32, "before the Reserve Bank issues you with one- H

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year A bonds for the amount due" and indication of the preferred denomination of the gold bonds. The appellant responded to the letter on 24 June 2009, annexure C2. It confirmed the amount inclusive of interest owed and indicated its preferred denominations for the gold bonds being twenty-five US$100 000, twenty-one US$ 20 000 and one US$ 25 388.32 bonds.

The gold bonds were duly issued in the preferred denominations (p 48 of the B appellant's bundle). Each was depicted as a Reserve Bank of Zimbabwe Gold Backed Tradable Bond. On the face of it was an issue and redemption date, the denomination, the tenor, annual interest, the promise to honour on presentation and the signatures of the governor and deputy governor. Each stated that "the Reserve Bank of Zimbabwe promises to pay bearer of this bond the sum of C (amount in United States dollars) plus interest at the Reserve Bank of Zimbabwe Harare on the (date) against presentation of this Bond." Each bond bore the date of issue of 1 February 2009 and due date of 1 February 2010.

The appellant investigated the marketability of the bonds on the local market. It discovered that one member of the gold sector that attempted to trade the D gold bonds did so at a whopping discount of between 40% and 50% of their face value. The gold bonds were received with scepticism and perceived to be high-risk paper susceptible to non-payment. The local market was highly illiquid and inactive.

The appellant took the conscious decision that it was not in the best interests of the company to trade the gold bonds at such huge discounts based on its E status and responsibilities as a foreign listed company. There was no appetite for the gold bonds in the local, regional and international markets. There were no liquid and serious buyers. Under cross-examination, he clarified that the appellant was not prepared to sell good gold for a song and was happy to wait for the payment of the face value. F

The central bank did not redeem the gold bonds on the due date. In yet another monetary policy statement dated 29 January 2010 (p.3 to 4 of the appellant's bundle), made without consultation with or agreement of the appellant, the central bank unilaterally rolled over the bonds ostensibly for six months but did not issue out replacement bonds. The sole witness who testified signed the financial statement ending 31 December 2009 on p 81 of the appellant's G bundle. Note 22 in that financial statement recorded the source and purpose of the six-month rollover.

The monetary policy statement revealed that the debt owed to gold producers was actually a central government debt and that the rollover was necessitated by the need for the central bank and central government to agree on best initiatives H to redeem the outstanding debts. The central bank only issued out replacement

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bonds on 1 August 2010 due on 1 August 2011 (p 49 of appellant's bundle and A C3 of the respondent's case). The gold bonds have never been redeemed and as at the date of appeal were still outstanding.

The chartered accountant testified that these rollovers were replaced without any further announcements as each period of bonds passed without payment. Pages 50 to 52 of the appellant's bundle highlights a sample of further unilateral B roll overs from 1 August 2011 to 1 August 2012, and then 1 August 2012 to 2 August 2013 and the last roll over before the commencement of the appeal hearing from 2 August 2013 to 4 August 2014.

The appellant averred and the respondent sought to dispute that the capital debt denominated in United States dollars was brought to account as income in local currency in the financial statement ending 31 December 2008. The C 2008 financial statements were not produced. The sole witness for the appellant testified that the gold sales were reflected as income even though payment had not yet been received.

At the time, the appellant's accounts were required by law to be reflected in Zimbabwe dollars and not in United States dollars. Local currency was the D transactional currency of account. In his case the respondent at first challenged the inclusion of the income into the 2008 accounts and then conceded that it was included. I accepted the chartered accountant's testimony in that respect.

In the financial statement for the year ended 31 December 2009, approved by its directors on 17 May 2010, the appellant made a provision for a trade E receivable of part of the outstanding money from the central bank in the sum of US$2 391 147 (note 7 of the appellant's financial statement of

31 December 2009 on p 76 of the appellant's bundle of documents and annexure 4 of the respondent's case). The decision was predicated upon the failure by the central bank to redeem the debt over a period of up to two years for the amount and the likelihood of payment ever eventuating. F

Again, the appellant was obliged to comply with International Financial Reporting Standards that governed the operations of its parent company to report on whether the debt was likely to be paid in that financial year. Failure to provide for the doubtful debt was certain to result in the independent auditors declining to certify the accounts as fair and true. G

Again in its financial statements for the year ending 31 December 2010 (p 82-109 of the appellant's bundle), signed by the sole witness and another director on 31 March 2011 (p 90 of the appellant's bundle) the appellant wrote off the remaining portion in the sum of US$1 032 380 as bad debts. It was written off as a bad debt because the amount was potentially uncollectable. H

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At A p 101, note 3.5 the debt, amounting to US$3 419 22 (2009 US$3 162 693) converted to gold bonds was written off.

Three reasons were advanced. These were the financial dire straits the central bank was enmeshed in resulting in staff retrenchments; the gloomy outcome of discussions with Treasury (central government) to assist the central bank B with sufficient financial support, and failure by the central bank to honour the gold bonds to other gold miners despite lobbying through the Zimbabwe Chamber of Mines.

The appellant was impotent to enforce payment. It did not see value in pursuing litigation. The appellant instead always presented the bonds for redemption on the due dates. The witness was not aware of any creditor who had sued C the central bank and satisfied the judgment. The governor acknowledged the debt and hoped central government would assume the debt. While the appellant could sue for recovery, it took the practical view that any judgment obtained would be a *brutum fulmen* in the face of s 63B of the Reserve Bank Act [*Chapter 22:15*], which precluded the attachment and execution of the central bank's assets to satisfy such judgment. It adopted a purely accounting D solution to the debt by making provision for the doubtful debt in terms of s 15(2)(g)(ii) of the Income Tax Act, before it was repealed, for the year ending 31 December 2009 and writing off the balance as a bad debt in terms of s 15 (2) (g) of the same Act for the year ending 31 December 2010.

The chartered accountant stated that the bonds were considered security for E payment and not an investment. The interest that accrued to 31 December 2010 was written off. The appellant still holds the bonds and once honoured they will be added back to income and the necessary tax paid.

In the income tax return for year ending 31 December 2009 the appellant claimed an allowance for doubtful debt in terms of s 15(2)(g)(ii) of the F Income Tax Act in the sum of US$2 391 147 due but not paid by the Reserve Bank of Zimbabwe and in the return for the period to 31 December 2010 it claimed under 15(2)(g) a deduction for bad debt in the sum of US$3 423 527.

The respondent audited the appellant and noted it made a provision for doubtful debts for US$2 391 147 in 2009 that were subsequently written G off as bad debts in 2010 (annexure 4 and 5 of the Commissioner's case). In its 2010 financial statements under note 14 the appellant did not add back to income the doubtful debts for 2009. The respondent disallowed the claim for doubtful debt for 2009 of US$2 391 147 and bad debts for 2010 of US$1 032 380. Additional tax in terms of s 46(1)(c) of the Act of 100% was initially charged on both claims on 16 November 2011 (p 7 of appellant's H bundle), which was first reduced on 2 April 2012 to 40 per cent (p 27-28,

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and 34-35 of appellant's bundle) and finally reduced to 10 per cent on A 25 October 2012 (p 42-46 of the bundle).

The appellant noted its objection in full against the assessments on 20 July 2012. The objections were disallowed but the additional tax was reduced from 40 per cent to 10 per cent on 25 October

2012. The amended assessments for both years were issued on 5 November 2012 (p 44-46 of the bundle).

The appellant appealed to this court against the respondent's decision on 21 December 2012. It was common cause that pending the determination of the appeal the appellant paid to the respondent in four equal instalments (on 27 December 2012, 31 January, 28 February and 28 March 2013) the additional principal amount of the amended assessments of income tax together with interest thereon in the sum of US$687 106.

The respondent, however, suspended the payment of penalties pending the determination of this appeal.

The respondent treated the bonds in the hands of the appellant as investment and not debt. It took the view, firstly, that the debt was converted into an investment by the Special Tradable Gold-backed Foreign Exchange Bonds and secondly that the acceptance of the conversion constituted a full repayment of the debt. It determined that such payment precluded the appellant from invoking the provisions of s 15(2)(g) of the Act.

The issue for determination is whether or not the debt due to the appellant by the central bank was correctly claimed as a doubtful debt in the 2009 year of assessment and the balance as a bad debt in the 2010 year of assessment in terms of s 15(2)(g)(ii) and 15(2)(g), respectively.

Mr *de Bourbon* prefaced his submissions by contending that the central bank lacked the legal authority to issue bonds. He submitted that in the absence of such power, the bonds issued by the central bank had no legal standing and were unlawful and void. He forcefully argued that such invalid bonds could not and did not preclude the appellant from claiming the debt as a doubtful debt in one year and the balance as a bad debt, in the subsequent year. It is correct that when the monetary policy statement was announced in January 2009, s 4(2)(a) of the State Loans and Guarantees Act [*Chapter 22:13*] reposed the power to issue bonds in the State acting through the Minister of Finance.

That Act was repealed on 2 April 2010 by s 93 of the Public Finance Management Act [*Chapter 22:19*]. In terms of s 54(3) of the new Act, the power to issue bonds remained with the Minister of Finance. The two Acts did not clothe the central bank with power to issue bonds.

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The central bank is a creature of statute. It is trite that it can only exercise such power and authority as is conferred by statute. The powers and functions of the central bank are set out in s 6 and 7 of the Reserve Bank Act [*Chapter 22:15*]. That Act came into force on 13 August 1999. Mr *de Bourbon* contended, without any opposition from Mr *Magwaliba*, that it was impossible to find any provision in the Act which would entitle the central bank to meet its financial obligations by issuing bonds.

I have scoured through the Reserve Bank Act, the Bills of Exchange Act [*Chapter 14:02*] and the Banking Act [*Chapter 24:20*] in search of the powers of the central bank. The corporate status of the central bank is set out in s 4 of the Reserve Bank Act [*Chapter 22:15*] which reads:

> **"4 Continuation of former Reserve Bank**
>
> The Reserve Bank of Zimbabwe established by the repealed Act shall continue in existence as a body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform."

The section preserves the continuity of the central bank established under the repealed Reserve Bank Act [*Chapter 22:10*]. The wide common law powers the central bank possessed as a corporate body were curtailed and made subject to the provisions of the Act. Indeed, s 7 which together with s 6 sets out the powers and functions of the central bank makes the exercise of its powers subject to the Act. The only reference to "bills and notes and other obligations issued" by the central bank is made in s 7(1)(d)(iii) of the Act. It reads:

> "7 Powers of Bank
>
> (1) Subject to this Act, in the exercise of its functions the Bank may do all or any of the following –
>
> (a) – (c) …
>
> (d) subject to section *thirteen*, buy, sell, discount or re-discount –
>
> (i) – (ii)…

(iii) bills, notes and other obligations issued by itself."

The issuance of bills, notes and other obligations by the central bank are subordinated to the provisions of s 13 of the Act and limited to the discounting G of bills of exchange and promissory notes for banking institutions that hold an account with the central bank. While s 13(1)(b) of the Reserve Bank Act allows the central bank to discount bills, notes and other debt securities issued by it, these must again be in respect of a banking institution that holds an account with it. The Bills of Exchange Act deals with the law relating to bills of exchange, cheques and promissory notes. These are defined in H s 3(1), 72 and 89(1) of that Act.

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In his submissions, Mr *de Bourbon* correctly submitted that that the bonds A issued in this matter by the central bank were little different from a bill of exchange or a promissory note or even a post-dated cheque to pay an outstanding debt. I would hold that they fit the mould of these financial instruments. While it appears from the architectural design of the Act that any person is qualified to issue them, it seems to me that the central bank is precluded from doing so by its own constitutive Act. It was common cause B that the appellant was not a banking institution. The central bank was not empowered to issue bills, notes or other debt securities to the appellant.

What, then, is the effect of want of authority in these circumstances? Mr *de Bourbon* submitted that lack of authority invalidated the bonds *ab initio* and every transaction founded on them was incurably bad. He relied on a C long line of pedigree precedent based on *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172, such *as Nicolle* v *Minister of Lands & Anor* 2003 (1) ZLR 280 (H) at 285; *Bubye Minerals (Pvt) Ltd* v *Minister of Mines & Ors* 2011 (2) ZLR 384 (S) at 393, *Mudzumwe & Ors* v *MDC & Anor* 2012 (1) ZLR 490 (H) at 493 and *Dube* v *Maphepha Syndicate & Ors*D 2009 (1) ZLR 29 (H) at 31E.

Mr *Magwaliba* submitted that such an unlawful act had valid legal consequences until set aside by a court of competent jurisdiction. He relied on the Supreme Court of Appeal of South Africa case of *MEC for Health, Province of the Eastern Cape NO & Anor* v *Kirland Investments (Pty) Ltd*E2014 (3) SA 219 (SCA) delivered on 16 May 2013. The reasoning of the Supreme Court of Appeal of South Africa is found in paras 19 to 22 of the judgment of Plaskett AJA, who wrote the unanimous decision for the court.

The facts were that the respondent applied to the Superintendent-General to set up two private hospitals in the Eastern Cape. The Superintendent-General set F up a committee of experts to make a recommendation to him. The committee recommended that the applications be declined. The Superintendent-General wrote a letter to the respondent refusing the application. He was involved in a road traffic accident before he had signed and dispatched the letter. He was hospitalised for six weeks. The letter was never dispatched to the respondent. An acting incumbent who took over office had access to all the G contents of the respondent's file. He was prevailed upon by the Provincial Minister to whom he reported to consent to the applications in the face of the refusal. He accordingly granted the application. When the substantive incumbent resumed duty, he withdrew the approval. An internal appeal to a new Provincial Minister by the respondent against the withdrawal failed. H

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On A appeal, the Provincial Minister and Superintendent-General contended that because the decisions of the acting holder of office were an invalid and unlawful administrative action, they could simply be ignored by the administrative authority that took them.

It was held in para 20 that the argument ran contrary to authority of the court B found in such cases as *Oudekraal Estates (Pty) Ltd* v *City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26, *Queenstown Girls High School* v *MEC Department of Education, Eastern Cape & Ors* 2009 (5) SA 183 (Ck) para 20, *Norgold Investments (Pty) Ltd* v *Minister of Minerals and Energy, RSA & Ors* [2011] 3 All SA 610 (SCA) paras 46-47. In the *Oudekraal* case, *supra* at para 26 Howie P and Nugent JA stated that: C

> "Until the Administrator's approval (and thus all the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the

validity of the act in question. No doubt it is for that reason that our law has always recognised that even an unlawful administrative act is capable of producing legally D valid consequences for so long as the unlawful act is not set aside."

In para 21 Plaskett AJA confirmed these views thus:

"[21] There is no suggestion in the above passage that the obviousness of the unlawfulness is a factor of any relevance. Indeed Hoexter *Administrative Law in South Africa* at 277 note 6 understands Oudekraal to mean – and she is in my E view correct – that 'even an obvious illegality cannot simply be ignored'. One can easily understand why this is so. It would be intolerable and lead to great uncertainty if an administrator could simply ignore a decision he or she had taken because he or she took the subsequent view that the decision was invalid whether rightly or wrongly, whether for noble or ignoble reasons. The detriment that would be caused to the person in whose favour the initial decision had been F granted is obvious. Baxter says the following [*Administrative Law* (1984) at 372]:

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could G be reversed at any moment. Thus when an administrative official has made a decision which bears upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio*.'"

He held in para 22 that the decisions could not be treated as nullities without formal revocation by a court of law on review. He said:

"I therefore conclude that B could not validly take the view that because the H decisions taken by Diliza were invalid, he could treat them as nullities and

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formally revoke them. For as long as the decisions taken by Diliza had not been A set aside on review they existed in fact and had legal consequences."

The ratio of the decisions appears to be that public authorities cannot invoke the doctrine of invalidity of their own actions for their own benefit, to the detriment of private citizens, and are deemed to have discharged their duty once the decision made is communicated to the private citizen. B

I find the reasoning of the Supreme Court of South Africa highly persuasive. I, however, find myself bound by the decision of the Zimbabwe Supreme Court in *Mugwebie* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) at 96G-97C where Sandura JA stated:

"In my view, these comments apply to the facts of the present case with equal force. The suspension of the appellant was a nullity and all the subsequent C proceeding" The question which now arises is whether the appellant's suspension was valid. There is no doubt in my mind whatsoever that it was null and void. It was a complete nullity. In this respect, I can do no better than quote what Lord Denning said in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I:

'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. D There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there as if it were of no force or effect. It will collapse' (emphasis is mine).

It is, therefore, unnecessary to consider the effect of the failure to give a decision E within fourteen days.

As the appellant's suspension was a nullity, there was really no need for a court order to set it aside, though it was convenient to have the court declare it null and void so that the parties knew their respective positions."

Accordingly, I hold that in the absence of statutory authority to issue F bonds, the bonds were not lawful tender and cannot discharge a debt. They remain at best acknowledgments of debt. I am satisfied that the appellant has demonstrated on a balance of probabilities that the bonds issued by the Reserve Bank of Zimbabwe were invalid for want of statutory authority and have no legal effect. G

It was further contended for the appellant that the claims for the deductions for both doubtful and bad debts in the two respective years were correctly made. The issue for determination is whether the claims conformed to the requirements set out in s 15(2)(g)(ii) for doubtful debts and s 15(2)(g) for bad debts. It must be borne in mind that the provision for doubtful debts is no longer part of our law. It was repealed by s 14 (a) of the Finance Act (No H

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3) A (Act 10 of 2009) with effect from 1 January 2010. It was, however, still operational in 2009 and therefore falls for consideration.

Section 15(2)(g)(ii) for that period reads:

> "(2) The deductions allowed shall be –
>
> (ii) such an allowance as may be made each year by the Commissioner in B respect of such debts due to the taxpayer as he considers to be doubtful if such debts are included in the current year of assessment or were included in any previous year of assessment in the taxpayer's income, either in terms of this Act or a previous law. Such allowance shall be included in the income of the tax payer in the following year of assessment."

Section 14(a) of the Finance Act (No 3) (Act 10 of 2009) repealed the whole C of s 15(2)(g) as it existed and replaced it with a new s 15(2)(g) which reads as follows:

> "The deductions allowed shall be –
>
> (g) The amount of any debts due to the taxpayer to the extent to which they are proved to the satisfaction of the Commissioner to be bad, if such amount is included in the current year of assessment or was included in any previous D year of assessment in the taxpayer's income either in terms of this Act or a previous law".

The essential factors for a claim for both doubtful debts and bad debts that the appellant must prove on a balance of probability are that:

1. the amount claimed must be due and payable; E
2. the commissioner considers (is satisfied that) the amount is unlikely to have been recovered at the end of the financial year;
3. the amount must have been included in the taxable income of the taxpayer in the current or any previous year of assessment;
4. once the claim is allowed it will have to be added back to income in the F following year of assessment.

Mr *de Bourbon* contended that the debt was due and payable. The phrase "due and payable" carries the same import as accrual. It also means "entitled to". See *Lategan* v *CIR* 1926 CPD 202 at 209 and *Commissioner for Inland Revenue* v *Delfos* 1933 AD 242 at 260 and 262. It was the uncontroverted G version of the chartered accountant that the law, contract and practice concerning the delivery of gold was that payment was due immediately on delivery. This certainly was what was happening from 2006 to the dawn of the multicurrency regime in respect of payments in local currency. He testified that during the same period and especially in 2006 and parts of H 2007, payment in respect of the foreign currency component was immediate.

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However, as shortages of foreign currency began to bite, payment was A slow and lethargic and normally followed upon the delivery of a monetary policy statement. In 2008, the payments completely dried up. The January 2009 monetary policy statement in prescribing that "outstanding amounts to the gold sector have been converted into special Gold-backed Foreign Exchange Bonds," did not seek the active consent of the appellant. It decreed an accomplished deed of dealing with the debt. B

Mr *Magwaliba* contended that the monetary policy statement was a statement of intent and not a decree of an accomplished deed. He based his contention on the letter of 23 February 2009 written for the central bank, the appellant's response of 24 June 2009 and the gold bonds issued soon thereafter with a tenor of 12 months from 1 February 2009 to 1 February 2010. C

I agree with the chartered accountant that the issuance of the gold bonds was an accomplished fact that did not depend on any contrary views of the appellant. The phrase "before the Reserve Bank issues you with one year bonds for the due amount" in the letter of 23 February were in my view prescriptive and commanding rather than persuasive and compromising. The D appellant was expected to cooperate much like it did in its response of 24 June 2009. It confirmed the amount owed and indicated the denominations for the bonds. Its attempt in that letter to turn the gold bonds into prescribed assets was clearly rebuffed and not dignified with a response. When the bonds

were eventually issued, they contained issue and due dates unilaterally set by the central bank. In my view, stripped of all technicalities, the creation of E the bonds merely constituted a unilateral rescheduling of the debt.

I am satisfied that the appellant established that the debt was due for payment on the delivery of the gold bullion to which it related in 2008. The appellant further established that it was coerced by the monetary policy statement of January 2009 to consent to the rescheduling of the debt at the end of December 2009. F

The further contention by Mr *Magwaliba* that the appellant did not expect and was therefore not entitled to payment until 1 February 2010 falls away. It cannot stand in the face of my finding that the bonds were invalid. It would also fail on the ground that the permissible final date for inclusion of the doubtful debt G into the financial statement of the appellant was the date the accounts were prepared: post the financial year end. The contention for the respondent that the debt was not due and payable in 2009 falls away. I hold that it was due and payable during the course of the 2009 tax year.

The next factor for determination is whether the Commissioner ought to have been satisfied that the central bank was in all probability unlikely to make H

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payment of the amount claimed as a doubtful debt in the course of the 2009 tax A year. Mr *Magwaliba* submitted that the present appeal was in the narrow sense. He relied on the South African tax cases of *ITC 1601* 58 SATC 172 at 180-181*, ITC 93* (1927) 3 SATC 239 and the Zimbabwean case of *Barrows & Anor* v *Chimpondah* 1999 (1) ZLR 58 (S) at 62F-63A for this proposition.

The *Barrows* case is distinguishable from the present case on two grounds. B It was not a tax matter. It also concerned an appeal from the High Court to the Supreme Court. The South African cases are not binding on me. They also run contrary to various decisions of the South African Appellate Division. Those cases are conveniently set out in the *da Costa* case, *supra,* where at 774 G-775A van Heerden JA disapproved of the penchant for Frieden J to defy C those decisions and confirmed that in an appeal before the Special Court, the appeal was a rehearing in which the Special Court exercised its own discretion for the Commissioner's. See *Bailey* v *CIR* 1933 AD 204, *Rand Ropes (Pty) Ltd* v *CIR* 1944 AD 142 at 150 and *Hicklin* v *Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 485. The Supreme Court of Appeal of South Africa recently confirmed the correctness of these decisions in the *Pretoria East Motors* case, D cited at the beginning of this judgment.

In our law, on appeal, the Commissioner's discretion is supplanted by that of the Special Court. I agree with Mr *de Bourbon* that I may substitute my discretion for that of the Commissioner. See *Sommer Ranching (Pvt) Ltd* v *Commissioner of Taxes*, *supra*. E

A doubtful debt was obliquely equated in *G* v *Commissioner of Taxes* 1972 (3) SA 121 (R) at 122F; (1972) 34 SATC 62 (R) at 64 by Goldin J with uncertainty of the likelihood by a creditor of receiving the amount owed. In *Commissioner of Taxes* v *'A' Company* (1979) SATC 59 (RA) at 65; 1979 (2) SA 409 (RA) the taxpayer prepared its financial statement for the year ending 31 March 1976, F in accord with ordinary commercial and accounting practice, after the year end. It did not make entries in its books of account writing off the debt owed before the end of that tax year and the decision to write off was not taken during that year. The decision to write off the debt was made by the managing director during the preparation of the financial statement for that year end. In its tax return for that financial year it claimed for a deduction of the bad debt G that was written off in its financial statements.

At 412A-413A Lewis JP held that a bad debt could be written off during the preparation of the financial statements for the year end to which it related and claimed as an allowable deduction for that tax year as it was not a necessary prerequisite that it be formally written off in that tax year. See also H*Commissioner for Inland Revenue* v *Delfos* 1933 AD 242 at 257 which is to the same effect.

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Provision for the doubtful debt was only made on 17 May 2010, the date on which A the financial statement for the year ending 31 December 2009 was finalised. Mr *de Bourbon* relied on these cases for the submission that the appellant was not precluded from claiming the provision for a doubtful debt in the sum of US$2 391 147 as an allowable deduction for the 31 December 2009 tax year merely because it was brought to account after the close of that tax year. B

In any event, the ordinary commercial and accounting practice is that financial statements are prepared after the close of the financial year. I agree that that the principle enunciated in these cases is correct. In fact, *Commissioner of Taxes* v *A Company*, *supra*, is binding on me. The underlying assumption in those cases was that the bad debts remained due and payable. Likewise, in the present case, the uncertainty that existed in 2009 that the debt was unlikely to C be paid was confirmed on 17 May 2010 to have been prescient. That uncertainty was predicated on the issuance of the invalid bonds with a maturity date of 1 February 2010, contrary to the 31 December 2009 date promised in the January monetary policy statement. The amount claimed had been outstanding for up to two years. The central bank had demonstrated inability to pay and was in poor standing in the local market. It was also failing to settle re-occurring D obligations to its workers.

I am satisfied that the appellant established on a balance of probabilities that there was a likelihood that the debt would not be paid by the central bank in the course of 2009. In my view, any reasonable person submitting the return to the respondent would doubt the likelihood of the debt being paid even though E he might recognise an outside and remote possibility that such payment might take place. There was no reasonable probability of payment occurring but this did not completely exclude that payment might happen. A likelihood of lack of collectability existed. It was a doubt as opposed to a certainty.

The last essential element for determination is whether the amount provided F for was included in the gross income of the appellant for that tax year or any of the previous tax years. The sole witness for the appellant stated that the amount was included in the 2008 tax return. It was, however, in Zimbabwe dollars. It was common cause that at the time the Zimbabwe dollar was the transactional currency and all sales in foreign currency at the time were converted into local currency at the exchange rate ruling on the date of the sale. G

The respondent first raised the issue in its correspondence of 1 December 2011. It simply took the view that the amount claimed for deduction was not included in 2008 because the tax return for that year was in local currency. On 16 December 2011 the appellant clarified that this was so because the local currency was the transactional currency. It relied on the Commissioner's H

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Provisional A General Ruling Conversion of Closing Balances for Tax Purposes in Government Notice 274 of 2010 published in the Government *Gazette* of 1 October 2010 that set out the way in which tax returns were to be compiled in the post dollarization era.

It decreed that sums previously expressed in local currency were to be B converted into United States dollars for tax reporting in 2009 onwards in a prescribed manner acceptable to the Commissioner. The Revenue Authority Act was amended. It provided that all reporting in terms of the Income Tax Act was to be in United States dollars. In subsequent correspondence the respondent appeared to have dispensed with the purported non-inclusion of the debt in the gross income of 2008 contention, preferring to concentrate on C whether the bonds constituted an investment rather than a bad debt (letter of 6 January 2012 on p 16, I February 2012 p 19, 15 February 2012 on p 23, 2 April 2012 on p 27, and 13 July 2012).

Indeed, in the determination of 25 October 2012 to which this appeal relates the respondent disallowed the provision on two grounds. The first was that the outstanding amount was settled by conversion of the debt into gold backed tradable bonds and the second was that the D outstanding amount in each of the years thereafter changed its character by conversion from being a debt to an investment. The contention that the debt was not included in the 2008 tax return was abandoned.

The evidence of the sole witness in this matter was not controverted by any E witness called by the respondent or by any of the documentary trail exchanged between the parties and filed of record. I am satisfied from the oral evidence of the chartered accountant and the documents filed of record that the amount owed was included in the 2008 tax return as taxable income. Accordingly, I hold that the appellant established on a balance of probabilities all the three F elements necessary to qualify the claim for deduction as a provisional bad debt.

The next issue to decide is whether the claim for the bad debt for 2010 should have been allowed. For the reasons stated above under the provision for the 2009 bad debt, I am satisfied that the amount claimed as a bad debt in 2010 was rendered in the 2008 tax return. G

The next essential element to determine is whether the amount was due and payable during that year. I hold that it was. The purported gold bonds were null and void. They were of no force or effect. They, in law, did not exist. They could not therefore constitute a payment for the debt. But even if they were valid, I would have found them, as already stated, akin to mere rescheduled acknowledgments of debt. An acknowledgement of debt is a document which H confirms the existence of a debt. In my view, it does not constitute payment

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of the debt. In its monetary policy statement of December 2009 delivered on A 29 January 2010 the central bank treated the debt as outstanding. It did not consider it paid. In my view, a debt does not become an investment merely because it also records terms of payment. The debt remained and still remains due and payable. Writing it off as a bad debt does not extinguish it.

The last element for consideration is whether the Commissioner ought to B have been satisfied that the claimed amount was bad. The Act does not define a bad debt. It is, however, defined in ordinary commercial and accounting practice as an amount that is unlikely to be paid. The appellant established on a balance of probabilities that by 31 December 2010, the claimed amount had been outstanding for more than 26 months. The accounts for that year end were compiled on 31 March 2011. The purported gold bonds had been C issued and rolled over time without number. The swan song from the debtor was now familiar. It was clear that it was unable to pay. It had no funds to pay. The December 2009 monetary policy statement delivered on 29 January 2010 on p 4 of the appellant's bundle dealt with gold bonds in paras 4.70 to 4.72.

The import of the message was that the debtor was engaged in discussion D with central government over the government's Reserve Bank of Zimbabwe held debt. The purported bonds were rolled over for another six months and other undisclosed initiatives were under consideration to meet all outstanding obligations. The central bank did not have the means to settle the debt. The legal route to sue while available had been substantially restricted by E legislation. First the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank of Zimbabwe Act) Regulations 2010 were promulgated on 18 June 2010 to protect the assets of the central bank from the reach of its creditors.

It was confirmed by s 14 of the General Laws Amendment Act No 5 of F 2011 and given retrospective effect to 18 June 2010. The assets could not be attached in execution to satisfy a court judgment. The appellant correctly recognised that suing a man of straw was an unproductive exercise. The measures taken by central government to place the assets of the central bank on the same footing as State assets satisfies me that the debt was unlikely to be paid during the tax year ending 31 December 2010. In hindsight, the G gazetting of the Reserve Bank of Zimbabwe (Debt Assumption) Bill on 13 June 2014 in which central government will take over gold bond debt of US$43 706 489.09 even if Reserve Bank of Zimbabwe had no power or capacity to incur the debt justified writing off the amount in the year ending 31 December 2010 (s 3(b)(i) of the Bill). H

2014 (2) ZLR p661

Kudya J

The A requisite elements for a bad debt found in s 15(2)(g) were in my view satisfied by the appellant. The respondent should have allowed them. The appeal succeeds in respect of both claims.

In consequence, the interest and penalties imposed by the Commissioner cannot stand. They are set aside. The appellant has won the appeal on all aspects and is entitled to the order of costs as contemplated by s 15 (2) (aa) B of the Income Tax Act.

Accordingly, it is ordered that:

1. The amended assessment No 00186334 for year ending 31 December 2009 issued on 29 October 2012 is set aside and respondent is directed to issue to the appellant an Amended Assessment for year ending C 31 December 2009 allowing the claim for an allowance in respect of the doubtful debt due to appellant by the Reserve Bank of Zimbabwe in the sum of US$2

391 147 resulting in the taxable income of the appellant being US$2 303 262 and discharging the penalty imposed on the appellant;

2. The amended assessment No 00186333 for year ending 31 December 2010 D issued on 29 October 2012 is set aside and the respondent is directed to issue to the appellant an amended assessment for year ending 31 December 2010 allowing the claim for a deduction in respect of the bad debt due to the appellant by the Reserve Bank of Zimbabwe in the sum of US$1 032 382 and discharging the penalty imposed on the appellant.
3. The respondent shall forthwith reimburse the appellant the additional E principal amount and interest of the amended assessments of income tax in the sum of US$687 106.
4. The costs incurred by the appellant in respect of the objection and this appeal, as taxed by the Registrar, shall be allowed as a deduction in terms of s 15(2)(aa) of the Income Tax Act [*Chapter 23:06*]. F

Gill, Godlonton and Gerrans, appellant's legal practitioners

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[zRPz]DERDALE INVESTMENTS (PVT) LTD v ECONET WIRELESS (PVT) LTD & ORS 2014 (2) ZLR 662 (H)

Citation	2014 (2) ZLR 662 (H)
Case No	Judgment No. HH-656-14
Court	High Court, Harare
Judge	Dube J
Heard	2 October 2014; *CAV*
Judgment	12 November 2014
Counsel	*P C Paul*, for the applicant *T W Nyamakura*, for the respondents
Case Type	Application for review
Annotations	No case annotations to date

Flynote

Court – *Administrative Court – status of – not a superior court – decisions subject to review by High Court – application to Administrative Court – application for rescission of judgment granted in error – no provision for such application in rules of Administrative Court – High Court Rules* D *to be followed*

Court – *High Court – jurisdiction – court of "inherent jurisdiction" – meaning and effect – review jurisdiction – review powers over inferior or subordinate courts – High Court's powers to review decisions of Administrative Court* E

Headnote

The Administrative Court granted leave to the applicant to file an appeal out of time against the second respondent's (the city council) decision granting a permit to the first respondent to establish a cellular base at a place in a suburb in Harare. Twelve days later, the first respondent made F a chamber application to the Administrative Court for leave to appeal to the Supreme Court against the interlocutory order. The application was served on the applicant the next day, but the court dealt with and granted the application in chambers before the 10 day period within which the applicant was required to file a response had elapsed. The next day, the applicant filed its notice of opposition. The court, on being advised that G it had granted the order in error, accepted its error and requested the parties to appear before it in chambers. The first respondent refused to abandon the order granted in its favour, resulting in the court ruling that it was *functus officio*. On the basis of the ruling in its favour, the first respondent had lodged an appeal with the Supreme Court. H

The A applicant sought a review of the decision of the Administrative Court granting leave to appeal to the respondent. It argued that the High Court, being a court of original and inherent jurisdiction, had the power to review proceedings of all inferior courts. The Administrative Court was a court inferior to the High Court and thus the High Court had jurisdiction in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*] to review B proceedings of that court. On the merits of the application for review, the applicant contended that the Administrative Court erred when it failed to afford the applicant an opportunity to oppose the application before it, thereby committing a gross irregularity which was subject to review by the High Court. C

Opposing the application for review, the first respondent argued that the High Court had no review jurisdiction over the Administrative Court, which was a court of record whose proceedings were subordinate only to the Supreme Court. The question of whether the appeal was properly before the Supreme Court was an issue that should be taken in the Supreme Court. D

Held, that the applicant could have applied to the Administrative Court for rescission of judgment in terms of r 449 of the High Court Rules 1971. Although the Administrative Court (Miscellaneous Appeals) Rules 1980 do not make provision for rescission of a judgment or order, particularly where there is an allegation that the order or judgment was erroneously made or granted, in any case where the conduct of proceedings is not E covered by those rules, the practice in that court is to apply the High Court Rules: see s 13(3)(a) of the Administrative Court Act [*Chapter 7:01*].

Held, further, that the Supreme Court and the High Court were specifically and directly provided for in the old Constitution. Other courts subordinate to the High Court and Supreme Court could be established under Acts of F Parliament. The Administrative Court was so established. Under s 177 of the 2013 Constitution, the High Court is a superior court of record and has original jurisdiction in all civil and criminal matters. It has unlimited original jurisdiction which it exercises unless its jurisdiction is specifically ousted. It has concurrent jurisdiction and may exercise its jurisdiction over matters which other courts have jurisdiction. It is given the power G to supervise the magistrate's court and other subordinate courts and to review their decisions. It also has inherent power conferred upon it by s 176 of the Constitution to protect and regulate its own process and to develop the common law or the customary law.

Held, further, that the "inherent jurisdiction" of the High Court means the H unwritten power without which the court is unable to function with

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justice and good reason. Such powers are enjoyed by the court by A virtue of its very nature as a superior court. The concept of inherent jurisdiction has its foundation in common and law is reserved for the highest courts in the land. In this country only the superior courts – the Constitutional Court, the Supreme Court and the High Court – are courts of superior jurisdiction. The power of the High Court to review and supervise the decisions of subordinate and inferior courts enshrined in B the Constitution and codified in the enabling act derives from its inherent jurisdiction or power. Inherent power is unwritten power which superior courts are endowed with. Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default C powers which it can exercise in the absence of express power and can deal with all areas of the law and all procedural matters involving the administration of justice. The mischief behind the concept is to ensure that justice is done between the parties by ensuring that due process of law

is observed, proceedings are fair and are conducted in accordance with real and substantial justice. It is an issue of the interests of justice D and access to justice rather that some perceived wrestling match for power and supremacy. Such jurisdiction extends to all matters including those over which other courts have jurisdiction. If a litigant chooses to go to the High Court, the court can assume jurisdiction over that person. It can hear any matter that comes before it. It can also review all proceedings of all inferior courts. The High Court will refrain from exercising its E inherent jurisdiction only where its jurisdiction is specifically excluded or ousted by a statute or other law. Because the High Court has inherent jurisdiction, its jurisdiction cannot be excluded by implication.

Held, further, that under s 26 of the High Court Act, decisions of "inferior courts" are reviewable by the High Court except where the law provides F otherwise. "Subordinate court" and "inferior court" mean the same thing. An "inferior court" is a court of limited and specified jurisdiction, one whose jurisdiction is specified and does not apply the common law. It is not a superior court. What governs what an inferior court is the nature of the jurisdiction that it exercises and nothing more. All courts G that do not apply the common law, do not have original and inherent jurisdiction, and exercise limited and specified jurisdiction are inferior courts. All courts which are not superior courts are inferior courts. The High Court, being a superior court of original and inherent jurisdiction, is empowered, in the absence of any law that ousts its jurisdiction, to review decisions of inferior courts. H

Held, A further, that under the 1980 Constitution, the Administrative Court was a specialist court dealing with review of decisions of administrative and statutory bodies and dealt only with matters of an administrative nature. The court was placed in the category of subordinate courts and was subordinate to the High Court and Supreme Court and was therefore an inferior court. Its decisions and proceedings were in terms B reviewable by the High Court. Although the court was now provided for in the 2013 Constitution and was made a court of record, it was not defined as a superior court. It remained a specialist court with limited and specified jurisdiction, dealing with administrative matters only. It does not have original and inherent jurisdiction and does not apply the C common law. There was no provision in the Administrative Court Act or its rules that ouster the review jurisdiction of this the High Court in administrative matters. The fact that the Administrative Court was described as a court of record did not mean that the status of the court was raised to that of a superior court.

Held, further, that although the High Court had the jurisdiction to entertain D the review in question it is undesirable for it to usurp the functions of the Supreme Court, with which the appeal had been lodged. The matter should have been dealt with by the Administrative Court but would now have to be dealt with by the Supreme Court.

Cases referred to E

Chawora v *RBZ* 2006 (1) 525 (H)

Ex p *Kearny* 55 Cal 212 (1880)

Kwaramba v *Bhunu NO* 2012 (2) ZLR 358 (S)

Mushaishi v *Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H)

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

Smith v *Andrews* 6 Cal 652 F

Legislation considered

Administrative Court Act [*Chapter 7:01*], s 13(3)(a)

Constitution of Zimbabwe 1980, s 79

Constitution of Zimbabwe 2013, ss 170, 171, 173, 174(c), 176 G

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

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

Supreme Court Act [*Chapter 7:13*], ss 17(h) & 25

Case information

P C Paul, for the applicant H

T W Nyamakura, for the respondents

Dube J

Judgment

Dube J: This is an application for review brought in terms of s 27 of the A High Court Act [*Chapter 7:06*].

The brief facts surrounding this application are as follows.

On 22 November 2013 the Administrative Court granted leave to the applicant to file an appeal out of time against the second respondent's decision granting a permit to the first respondent to establish a cellular base at a place in B Mt Pleasant, Harare. On 4 December 2013, the first respondent made a chamber application to the Administrative Court for leave to appeal to the Supreme Court against the interlocutory order. The chamber application was served on applicant on 5 December 2013. The court dealt with and granted the application in chambers on 18 December 2013 before the 10 day period within which the applicant was required to file a response had elapsed. C A default order was in effect granted. The next day, the applicant filed its notice of opposition. The court, on being advised that it had granted the order in error, accepted its error and requested the parties to appear before it in chambers to map the way forward. The meeting did not produce any fruitful results. The first respondent refused to abandon the order granted in its favour resulting in the court ruling that it was *functus officio*. The first D respondent (hereinafter referred to as the respondent) has proceeded to erect the base station which is the subject of litigation between the parties. An appeal premised on the leave to appeal granted to the respondent in default by the Administrative Court on 18 December 2013 has already been filed in the Supreme Court under SC 535/13and is pending. The applicant seeks a E review of the proceedings of the Administrative Court under T16/13 granting leave to appeal to the respondent.

The parties are at variance concerning this court's jurisdiction to review proceedings of the Administrative Court. The applicant maintained that the High Court, being a court of original and inherent jurisdiction, has the power to review proceedings of all inferior courts. The applicant further submitted F that the Administrative Court is a court inferior to the High Court and that this fact clothes the High Court with jurisdiction in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*] (hereinafter referred to as "the High Court Act"), to review proceedings of that court. On the merits of the application for review, the applicant contended that the Administrative Court erred when it failed to afford the applicant an opportunity to oppose the application before G it. The applicant maintained that the Administrative Court, in determining and granting the application without affording the applicant an opportunity to oppose the application, committed a gross irregularity which is subject to review by this court.

The first respondent defends the application. It contends that the High Court H does not have the power to exercise review jurisdiction over proceedings and

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Dube J

decisions A of the Administrative Court, let alone set aside a decision of the court. The first respondent submitted that the Administrative Court is a court of record whose proceedings are subordinate only to the Supreme Court. The respondent did not suggest that the High Court and the Administrative Court are at par. The first respondent urged this court not to grant the order sought as such order will render nugatory proceedings pending in the Supreme Court B and have the effect of expunging leave granted by the Administrative Court, thereby rendering the appeal already filed to have been filed without leave of court. Mr *Nyamakura* who represented the respondent submitted that the question of whether the appeal is properly before the court is an issue that the Supreme Court may be ceased with if brought up by the parties and if C it is their position that the appeal is premature. The respondent insisted that this point should be taken in the Supreme Court and argued that the applicant has failed to lay a basis for the court to depart from the norm and intervene in proceedings held before a higher court.

At the hearing of this matter, I queried the wisdom of bringing the dispute D over the propriety of the order granted in default to this court as a review. An alternative procedure was available to resolve the dispute between the parties. Both parties agreed that the applicant had the simpler option of placing before the Administrative Court an application for rescission of judgment in terms of Order 49 r 449 of the High Court Rules 1971 .The rule provides for correction, variation, and rescission of judgements or orders erroneously E granted in the absence of any party affected thereby. The Administrative Court (Miscellaneous Appeals) Rules 1980 do not make provision for rescission of a judgment or order, particularly where there is an allegation that the order or judgment was erroneously made or granted. In any case where the conduct of proceedings is not covered by the Administrative Court rules, the practice embraced in that court is to resort to application of the High Court Rules. F This course of action is made possible by the provisions of s 13(3)(a) of the Administrative Court Act [*Chapter 7:01*]. The section reads as follows:

> "13(3) In any proceedings not covered by rules in terms of subsection (1) or any other enactment –
>
> (a) the rules relating to practice and procedure in the High Court shall, where G appropriate, apply;"

Invoking r 449 could have saved the day here.

Being seized with the application, I decided in my discretion, to investigate the contentious issue regarding the jurisdiction of the High Court to review proceedings of the Administrative Court and further determine the arguments H advanced for and against review of the proceedings by this court in the face

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Dube J

of the appeal subsequently filed in the Supreme Court and premised on the A order challenged. The parties requested me to resolve the following issues:

1. whether this court has the competency to review and set aside proceedings of the Administrative Court
2. whether the pendency of the appeal in SC 535/13 is fatal to the present application.

The High Court B

Both the High Court and the Administrative Court are provided for in the Constitution of the country. The Lancaster House Constitution of 1979, which came into effect in 1980, made provision for the courts in s 79. It read as follows:

> **"79.Judicial authority**C
>
> (1) The judicial authority of Zimbabwe shall vest in –
>
> (a) the Supreme Court; and
>
> (b) the High Court; and
>
> (c) such other courts subordinate to the Supreme Court and the High Court as may be established by or under an Act of Parliament." D

The High Court and Supreme Courts were specifically and directly provided for in the old Constitution. Other subordinate courts could be established under Acts of Parliament and were not named. Such other courts would be subordinate to the High Court and Supreme Court. The effect of this provision was to render all other courts established by Acts of Parliament E courts subordinate to the Supreme Court and High Court. Subsequent to the coming into effect of the constitution, the Administrative Court was established through an enabling statute.

The current Constitution makes provision for the High Court in s 170. The section reads as follows:

> "**170 High Court**F
>
> The High Court is a superior court of record and consists of –
>
> (a) the Chief Justice, the deputy Chief Justice and the judge President of the High Court; and
>
> (b) such other judges of the High Court as may be appointed from time to time."

The jurisdiction of the court is outlined in s 171 of the Constitution. The G section reads as follows:

> **"171 Jurisdiction of High Court**
>
> (1) The High Court –
>
> (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe; H

Dube J

(b) has A jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions;

(c) may decide constitutional matters except those that only the Constitutional Court may decide; and …"

The High Court has original jurisdiction over all people in Zimbabwe. B

Original and inherent jurisdiction of the High Court

The High Court is a superior court of record and has original jurisdiction in all civil and criminal matters. It has unlimited original jurisdiction which it exercises unless its jurisdiction is specifically ousted. It has concurrent jurisdiction and may exercise its jurisdiction over matters which other courts have jurisdiction. It is given the power to supervise the magistrate's C court and other subordinate courts and to review their decisions. It may also decide constitutional matters except those that only the Constitutional Court may decide.

The High Court also has inherent power conferred upon it by s 176 of the Constitution to protect and regulate its own process and to develop the D common law or the customary law. Section 176 provides as follows:

> "The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this constitution."

The concept of inherent jurisdiction has its roots in the English common E law that a superior court has the inherent jurisdiction to hear any matter that comes before it unless that authority is expressly excluded or limited by some statute or rule of law. The concept of inherent jurisdiction is described by Jerold Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta, Cape Town, 1985) as follows: F

> "The inherent jurisdiction of the supreme court may be described as the unwritten power without which the court is unable to function with justice and good reason. As will be observed below, such powers are enjoyed by the court by virtue of its very nature as a superior court modelled on the lines of an English superior court …"

In *Halsbury's Laws of England* 4 ed (Butterworth's, London), inherent power G is defined as follows:

> "In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between H the parties and to secure a fair trial between them."

Dube J

In *Sibanda and Anor* v *Chinemhute NO and Anor* HH-131-04 Makarau J A (as she then was) gives a graphic distinction between a court of inherent jurisdiction and one without and remarks thus:

> "I have always visualised the difference between a court of inherent jurisdiction and one without as two buildings open to the citizenry. One has all its doors and windows open to all and for all reasons (and in all seasons), apart from those expressly and clearly forbidden entry by statute. Where a point of entry B is hitherto non-existent for a member of the public in the form of procedure, one is inherently created in the interests of justice. This is the court of inherent jurisdiction. The sentry manning the building is less stern and less demanding than his counterpart at the gates of the other building. This other building representing the court without inherent powers is generally closed up apart from a few windows to allow access to those expressly defined in the statute creating the court, on certain terms and for certain specified purposes. Where the statute C does not create a point of entry, the court cannot open one for anyone. In this country that distinction boils down to classification of courts on the basis of superior courts and inferior courts."

These sentiments succinctly summarise the concept of inherent jurisdiction.

The concept of inherent jurisdiction has its foundation in common and law is D reserved for the highest courts in the land. In this country, only the superior courts, thus the Constitutional Court, the Supreme Court and the High Court, are courts of superior jurisdiction. The power of the High

Court to review and supervise the decisions of subordinate and inferior courts enshrined in the Constitution and codified in the enabling act derives from its inherent jurisdiction or power. Inherent power is unwritten power which superior E courts are endowed with. Inherent power gives the court wide ranging and all-embracing powers to deal with any matter that may be placed before them. This means that a court of inherent jurisdiction has default powers which it can exercise in the absence of express power and can deal with all areas of the law and all procedural matters involving the administration of justice. The mischief behind the concept is to ensure that justice is done between F the parties by ensuring that due process of law is observed, proceedings are fair and are conducted in accordance with real and substantial justice. It is an issue of the interests of justice and access to justice rather that some perceived wrestling match for power and supremacy. Such jurisdiction extends to all matters including those over which other courts have jurisdiction. If a litigant G chooses to go to the High Court, the court can assume jurisdiction over that person. It can hear any matter that comes before it. It can also review all proceedings of all inferior courts. The High Court will refrain from exercising its inherent jurisdiction only where its jurisdiction is specifically excluded or ousted by a statute or other law. Because the High Court has inherent jurisdiction, its jurisdiction cannot be excluded by implication. An example H

of A express exclusion of the jurisdiction of the High Court is found in s 89 (6) of the Labour Court Act [*Chapter 28:01*], which expressly excludes the jurisdiction of any other court in labour matters in the first instance.

High Court's power of review

The High Court is given power to review proceedings and decisions of B inferior courts by ss 26 and 27 of the High Court Act. Section 26 of the High Court Act reads as follows:

> **"26 Power to review proceedings and decisions**
>
> 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 C justice, tribunals and administrative authorities within Zimbabwe."

This section empowers the High Court to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. There is no ambiguity in this section. The intention of the legislature in giving the court powers to review proceedings and decisions of all inferior courts of justice is clear from the language of the statute .That D power, as previously stated, derives from the court's inherent jurisdiction. In any case where it has been shown that a court is an inferior court, the jurisdiction of the High Court over it is not limited. It must follow that the High Court has review jurisdiction over it. Decisions of inferior courts are reviewable by the High Court except where the law provides otherwise E thereby ousting its jurisdiction. Grounds upon which the court may review decisions and proceedings of inferior courts are laid down in s 27 and these will be dealt with at a later stage.

Inferior and subordinate courts

The Constitution, in s 171, gives the High Court the jurisdiction to supervise F and review decisions of the magistrates courts and other subordinate courts. Section 26 and 27 of the High Court Act gives the court power to review decisions of inferior courts of justice, tribunals and administrative authorities. The ordinary meaning of the word "subordinate" denotes something that is secondary, lesser, lower, minor or inferior. It appears to me that reference G to a subordinate court refers to an inferior court and that the two references refer to a court of a similar status. Reference to one includes the other. The two descriptions of the courts mean the same; it is a distinction without a difference. When the Constitution makes reference to a subordinate court it includes all inferior courts, tribunals and administrative authorities. The purpose of the legislature in making proceedings of subordinate courts H reviewable by the High Court was purposeful and was to have all proceedings

of subordinate courts subject to supervision of the High Court in the interest A of the due administration of justice.

It is not necessary to split hairs over a non-existent distinction between an inferior court and subordinate court. I will proceed and determine what an inferior court is as requested and resolve whether or not the Administrative Court is a court inferior to the High Court. The High Court and Supreme B Court Acts do not define what an inferior court is. *A Legal Dictionary* by John Bouvier (1856) defines an "inferior court" as a court of limited jurisdiction. In Ex p *Kearny* 55 Cal 212 (1880) the court remarked that:

> "Inferior courts are those whose jurisdiction is limited and special and whose proceedings are not according to the course of the common law."

See also *Smith* v *Andrews* 6 Cal 652 for the same proposition. C

Herbstein and van Winsen *The Civil Practice of the South African High Courts* 5 ed on p 49 says of inferior courts:

> "… whereas inferior courts may do nothing that the law does not permit, superior courts may do anything the law does not forbid."

An inferior court is a court of limited and specified jurisdiction. It is a special D court whose jurisdiction is specified and does not apply the common law. It is not a superior court. What governs what an inferior court is the nature of the jurisdiction that it exercises and nothing more. All courts that do not apply the common law do not have original and inherent jurisdiction, exercise limited and specified jurisdiction and are inferior courts.

The superior courts of this country are the Constitutional Court, the High E Court and the Supreme Court. All other courts are inferior and/or subordinate to these courts. All courts which are not superior courts are inferior courts. The High Court, being a superior court of original and inherent jurisdiction, is empowered to review decisions of inferior courts. In the absence of any law that ousts its jurisdiction, the High Court is entitled to exercise its supervisory and review power over an inferior court. F

The Administrative Court

It has already been highlighted that the Administrative Court was created by an Act of Parliament. This was in compliance with the provisions of s 79 of the old Constitution. The court was created by Act No 39 of 1979. G The old Constitution did not mention this court by name. The position with the court was that it was a specialist court dealing with review of decisions of administrative and statutory bodies and dealt only with matters of an administrative nature. The Administrative Court Act, as created under the old Constitution, was placed in the category of subordinate courts and was subordinate to the High Court and Supreme Court and was therefore an H

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inferior A court. Its decisions and proceedings were in terms of ss 26 and 27 of the High Court Act reviewable by the High Court.

The Administrative Court is now specifically provided for in the new Constitution. Section 173 of the Constitution reads as follows: B

> **"173 Administrative Court**
>
> (1) The Administrative Court is a court of record and consists of –
>
> (a) a judge president; and
>
> (b) such other judges of the Administrative Court as may be appointed from time to time.
>
> (2) The Administrative Court has such jurisdiction over administrative matters as may be conferred upon it by an Act of Parliament. C
>
> (3) An Act of Parliament may provide for the exercise of jurisdiction by the Administrative Court and for that purpose may confer the power to make rules."

The Administrative Court has jurisdiction over administrative matters only. Its jurisdiction remains the same as that under the old Constitution and may be provided for by an act of Parliament. The Administrative Court is now D a court of record. The Constitution does not specifically list it as one of the courts that are subordinate to the High Court. A notable achievement is that the court is now

specifically provided for in the new Constitution by special reference to it. Its jurisdiction as well as its composition is specified. However, nothing has been gained with regards the jurisdiction of the court. E

Faced with this information, the court will now resolve whether the Administrative Court is an inferior court whose proceedings are reviewable by the High Court. The Constitution does not define what an inferior court is, nor does it describe the Administrative Court as an inferior court. A breakdown of the provisions that establish the courts and govern the powers and jurisdiction conferred upon each court reveals the status of each court. In F order to discern whether this court is an inferior court one has to scrutinise its jurisdiction. The Administrative Court is a specialist court with limited and specified jurisdiction. It deals with administrative matters only. Specifics of its jurisdiction are outlined by the Administrative Court Act and enabling statutes that confer jurisdiction on the court. It is generally a statutory court G and its jurisdiction is limited to the four corners of enabling statutes. It mainly deals with applications, appeals and reviews emanating from decisions of administrative and statutory bodies. The Administrative Court does not have original and inherent jurisdiction and does not apply the common law. The Constitution does not define it as a superior court. There is no provision in the Administrative Court Act or its rules that ouster there view jurisdiction of H this court in administrative matters. A presumption exists when interpreting

statutes against the ouster of this court's jurisdiction unless it is specifically A ousted by statute. See the S*ibanda* case (*supra*) where the court held that this court guards jealously its inherent jurisdiction and that the rational is to ensure access to justice. Similar sentiments were expressed in *Chawora* v *RBZ* 2006 (1) 525 (H).

The High Court can do anything that it is not prohibited by law to do, whilst B the Administrative Court can only do that which it is empowered by the law to do. Where the jurisdiction of the High Court is not specifically ousted, the court may in terms of its inherent jurisdiction found jurisdiction in order to ensure access to justice to litigants. This narrative leaves no doubt in my mind that the Administrative Court falls squarely within the four corners of an inferior court and consequently its decisions and proceedings are subject to review by the High Court in terms of s 26 of the High Court Act. C

Court of record

The respondent submitted that the Administrative Court is a court of record whose proceedings are subordinate only to the Supreme Court. No authorities were cited in support of that proposal. The word "record" connotes a permanent D inscription of the proceedings. That is the ordinary grammatical meaning. Only the High Court and Supreme Court were described as superior courts of record in the old constitution. The current Constitution now describes the Administrative and Labour Courts as courts of record. This, in my view, does not reveal that the legislature intended that the status of the court be uplifted E to that of a superior court. The Constitutional Court, Supreme Court and High Court remain the only superior courts of record and superior courts. There is nothing magical about a court being a court of record. The fact that it is a court of record does not make it a superior court. Moreover the Administrative Court is not described as a superior court of record. What is clear is that the Administrative Court is not at the same level as the High F Court which is a superior court of record. It remains an inferior court to the High Court, placing its proceedings within the ambit of s 26 of the High Court Act.

Section 174(c) makes provision for the establishment of other courts and tribunals subordinate to the High Court. The Administrative Court is not a G superior court, but an inferior court subordinate to the High Court. It is not at the same level as the High Court. The use of the word "other" in the provision seems to me to imply that the legislature intended to leave room for the creation of other subordinate courts to be established by acts of parliament. They were not closing the door to the creation of other subordinate courts. The provision does not exclude the Administrative Court from the category H

of A inferior courts. The Administrative Court remains an inferior court on the basis of its limited jurisdiction. The reference to it being a court of record does not make it a superior court. In the ordinary run of things this would be an appropriate case for this court's exercise of its review powers.

Pendency in the Supreme Court B

After the respondent obtained an order from the Administrative Court granting it leave to appeal, it proceeded to lodge an appeal in the Supreme Court, premised on that order. There is no pending appeal by the applicant in the Supreme Court with respect to the order of 18 December 2013.This court is being urged to decline to set aside the order granted by the Administrative Court purely on the basis that there is an appeal pending in the Supreme C Court. It was contended that this court cannot determine whether the appeal pending before the Supreme Court is properly before it. I agree entirely.

The High Court's power of review over inferior courts is similar to that exercisable by the Supreme Court. See *Kwaramba* v *Bhunu NO* 2012 (2) ZLR 358 (S). This power derives from ss 17(h) and 25 of the Supreme D Court Act [*Chapter 7:13*], which give the Supreme Court similar powers of review as those conferred upon the High Court by s 29 of the High Court Act. Section 25 of the Supreme Court Act provides for the court's review powers and reads as follows:

> "**25 Review powers**E
>
> (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings 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 F the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court."

This matter is *sub judice* the Supreme Court and it is not desirable that this court intervenes in this matter. In *Mushaishi* v *Lifeline Syndicate &Anor* 1990 (1) ZLR 284 (H), Greenland J considered the propriety of exercising jurisdiction over a matter that is *sub judice* the Supreme Court and remarked G as follows:

> "This prayer must fail for the simple reason but good reason that this court will not exercise jurisdiction over a matter which is *sub judice* the Supreme Court. As said it is the applicant's stance that the injunction is now the subject matter of an appeal to the Supreme Court. It is simply not possible for this court to, H in effect intervene. That prayer fails."

Dube J

Although strictly speaking the High Court has the jurisdiction to entertain the A review in question, I am hesitant to interfere with a matter which is pending in the Supreme Court, a superior court. The court has considered that this court has similar review jurisdiction with the Supreme Court, and takes the view it is undesirable that this court usurp the functions of a higher court.

It is neater and convenient to have the matter determined by one court. I would rather both the review and the appeal be determined by the B Supreme Court in the exercise of powers conferred by it by s 25 (2) of the Supreme Court Act. I do not see the need to fragment the proceedings. The Supreme Court is already seized with the matter. It is therefore not desirable for the two courts to find themselves in an invidious position where they come up with two different viewpoints on the merits of the review itself. This court will defer jurisdiction to the Superior Court. C

This matter ought not to have come here. The Administrative Court was amenable to resolving this dispute and could have done so had the parties cooperated. I do not consider that the applicant was unreasonable in its stand.

In the result it is ordered as follows:

The application is dismissed. D

Each party shall bear its own costs.

Wintertons, applicant's legal practitioners

Mtetwa & Nyambirai, first respondent's legal practitioners E

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[zRPz]KAMURUKO v MAPIMBIRO & ANOR 2014 (2) ZLR 677 (H)

Citation	2014 (2) ZLR 677 (H)
Case No	Judgment No. HB-174-14
Court	High Court, Bulawayo
Judge	Makonese J
Heard	13 November 2014
Judgment	13 November 2014
Counsel	No details supplied
Case Type	Review of maintenance application
Annotations	No case annotations to date

Flynote

Family lawC – *child – maintenance of – person responsible for maintaining child – ability to contribute – duty of court to make full enquiry – fact that such person in a particular job not per se absolving him of duty to pay maintenance*

Headnote

The D respondent, who was an apprentice, had fathered a child. An application by the mother of the child for maintenance was dismissed by a magistrate on the grounds that the respondent was an apprentice.

Held, that a party who is legally liable to maintain a minor child is expected to contribute whatever maintenance he can, according to his means. The fact that a party's disposable income is low does not at law excuse him E from contributing towards maintenance. A person who earns income as an apprentice is not absolved from his duty to maintain a minor child merely on the basis that he is an apprentice. A proper inquiry should have been carried out regarding the respondent's income and expenditure.

Cases referred to F

S v *Mpofu* HB-73-03

S v *Ndlovu* HH-87-07

Legislation considered

Maintenance Act [*Chapter 5:09*], ss 2 & 6 G

Judgment

Makonese J: This matter has been placed before me by way of a review in terms of s 26 of the High Court Act [*Chapter 7:06*]. On 4 August 2014, the second respondent dismissed an application for maintenance in respect of one minor child, J, aged 3 years 6 months. The application was dismissed H on the grounds that the first respondent was an apprenticeship student at

---

Makonese J

Zimplow Ltd. The magistrate, the second respondent, who did not give full A reasons for his ruling, threw out the application in one sentence as follows:

> "Maintenance request dismissed as respondent is currently on apprenticeship at Zimplow Ltd."

Facts that are common cause

It is common cause that the first respondent fathered a child with the applicant. B It is not disputed that in terms of s 6 of the Maintenance Act [*Chapter 5:09*], the first respondent is legally liable to maintain the said minor child. It seems logical that the reason the applicant brought this application to court is the failure by the first respondent to provide reasonable maintenance for the child. It also seems obvious from a perusal of the papers that the first respondent is either unwilling or unable to provide adequate maintenance for C the minor child. The magistrate concluded, without providing any reasons, that because the first respondent was employed as an apprentice, earning the sum of $284.60 before deductions, he had no capacity to contribute towards the maintenance of the minor child.

The law D

The law governing maintenance is provided in s 6 of the Maintenance Act, as follows:

> "(2) A maintenance court shall not make an order in favour of a dependant unless it is satisfied that –
>
> (a) the person against whom the order is sought is legally liable to maintain E the dependant; and
>
> (b) the person against whom the order is sought is able to contribute to the maintenance of the dependant; and
>
> (c) the person against whom the order is sought fails or neglects to provide reasonable maintenance for the dependant." F

The following issues become apparent in this matter:

(i) the first respondent is legally liable to maintain the minor child; and

(ii) first respondent is able to contribute towards the maintenance of the minor child (regardless of the *quantum* of the contribution). G

As I have pointed out, the magistrate failed to give any reasons for his decision. That on its own is a misdirection which is fatal to the proceedings. See *S* v *Ndlovu* HB-87-07, and *S* v *Mpofu* HB-73-03. In a bid to remedy the apparent defect in the proceedings, the magistrate filed an opposing affidavit to this review application wherein he sought to explain the reasons for his decision. In the second paragraph, he states as follows: H

Makonese J

> "It is A not in dispute that first respondent is currently an apprenticeship student at Zimplow.
>
> Proof of employment and of earning were tendered. From the tendered proof of earnings a payslip which bore proof that first respondent was indeed an Apprenticeship student at Zimplow however with earnings of basic pay of $275.00, with a net of $126.98. B
>
> The first respondent submitted that such earnings were to enable him to purchase tools of trade and for his own rentals.
>
> Maintenance obligation can be set aside or discharged upon satisfying the court as in the first respondent's case that he is currently undergoing studies, is not in employment and though he is earning it is evident that the earnings are just sufficient and meant for his studies, i.e to purchase the tools for his trade and C it is in the best interests of the minor child that he so completes the studies and gets a formal employment."

It is clear from the above that the magistrate's approach to a maintenance enquiry is flawed. Firstly, because someone is undergoing an apprenticeship does not absolve him from his obligation to look after his minor child. D Secondly, though the income is on the low side, that does not mean that the first respondent should be discharged from his duty to contribute towards the upkeep of the child, whatever that contribution may be. Thirdly, and most importantly, is not clear why the first respondent has to purchase his tools of trade each and every month. It seems to be common cause that an apprentice will purchase tools of trade at least once or twice during the tenure of the E apprenticeship. I have examined the first respondent's payslip and observed that there is a deduction of $130 for what is termed "advance". This implies to me that this deduction may not be permanent. A proper inquiry needs to be carried out regarding the income and expenditure of the first respondent. It is my considered view that a party who is legally liable to maintain a minor child is expected to contribute whatever maintenance he can, according to F his means. The fact that a party's disposable income is low does not, at law, excuse him from contributing towards maintenance and, in the same breath, a person who earns income as an apprentice, is not absolved from his duty of maintain a minor child merely on the basis that he is an apprentice.

It is instructive to note that in terms of s 6 of the Maintenance Act, "earnings" G are defined as follows:

> "earnings, in relation to a responsible person, means any money payable to that person –
>
> (a) by way of salary, wages, remuneration or allowances and includes any fees, bonus, commission, overtime pay or other emoluments payable in addition H thereto …"

Makonese J

In the result, I am inclined to agree with the applicant's contention that the A second respondent failed to conduct a proper and judicious inquiry into all the material aspects and circumstances of the parties, as well as the interests of the minor child. The proceedings, regrettably are not in conformity with real and substantial justice. The proceedings are therefore grossly irregular and the failure by the magistrate to give reasons for his decision militates against all notions of justice and fairness. It is my view therefore that the B applicant is entitled to the relief she is seeking and order as follows:

1. The second respondent's ruling of 4 August 2014 dismissing the application for maintenance against the first respondent filed under case number M1600/14, be and is hereby set aside.
2. The matter between the applicant and the first respondent under C case number M1600/14 be and is hereby remitted to a different magistrate for a trial *de novo*.

Mutema J agrees. D

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[zRPz]NEC, CONSTRUCTION INDUSTRY v ZIMBABWE NANTONG INTERNATIONAL (PVT) LTD 2014 (2) ZLR 681 (H)

Citation	2014 (2) ZLR 681 (H)
Case No	Judgment No. HH-626-14
Court	High Court, Harare
Judge	Chigumba J
Heard	3 November 2014; *CAV*

Judgment 14 November 2014

Counsel *R Nyapadi*, for the excipient
R Dembure, for the plaintiff

Case Type Civil application

Annotations No case annotations to date

Flynote

Employment – *collective bargaining agreement – breach of – procedure to be followed – breach an unfair labour practice – Labour Court having* D *exclusive jurisdiction*

Headnote

Section 79 of the Labour Act [*Chapter 28:01*] provides that, after negotiation, a collective bargaining agreement (CBA) shall be submitted to the Registrar of Labour for registration. The effect of such registration is that the Minister must then publish it as a statutory instrument and thereafter E the terms and conditions of the CBA become effective and binding from the date of publication of the SI. Failure to comply with a CBA is an unfair labour practice in terms of s 83(3)(a) of the Act and, as such, it must be resolved in terms thereof by going through a conciliation process before a labour officer or possibly arbitration. Such matters are labour matters which must be dealt with by the Labour Court at first instance, F as the High Court's jurisdiction is expressly ousted. It is an abuse of the High Court's jurisdiction to entertain a purely labour matter which has not been heard by the Labour Court at first instance, simply because an applicant found it expedient to approach the High Court and to shun the Labour Court. Any attempt by a legal practitioner to undermine the powers and jurisdiction of the Labour Court in this way would amount G to unethical conduct.

Cases cited

Barnsley v *Harambe Hldgs (Pvt) Ltd & Anor* 2012 (1) ZLR 265 (H)

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

NRZ v *Zimbabwe Railway Artisans Union & Ors* 2005 (1) ZLR 341 (S)

Chigumba J

Telecel Zimbabwe (Pvt) Ltd v *Omar* HH-116-11 A

Legislation considered

Labour Act [*Chapter 28:01*], ss 8(e), 79, 82(3), 89(1), 89(6) & 93

Case information

R Nyapadi, for the excipient B

R Dembure, for the plaintiff

Judgment

Chigumba J: It is trite that only the Labour Court may deal with labour matters, at first instance. In my view, it is now settled that there is no concurrent jurisdiction between the Labour Court and this court in a dispute which involves a purely labour matter, at first instance. The Labour Court C has exclusive and unique jurisdiction to deal with labour matters, at first instance. The problem that is bedeviling this court is that legal practitioners, who practice labour law, see fit to bring all manner of labour matters disguised or masquerading as matters which this court has jurisdiction over. It is

time that legal practitioners stopped this unethical practice of "enticing", for want of a better word, or coaxing the High Court to exercise its inherent D jurisdiction, and inducing it to dispose of purely labour matters which ought to be dealt with by the Labour Court at first instance. With all due respect, I urge this court, to resist these insidious attempts to undermine the powers and jurisdiction of the Labour Court.

Failure to comply with a collective bargaining agreement is an unfair labour E practice, which must be dealt with in accordance with strictly laid down procedures when it is resolved. A litigant, who wishes to have an unfair labour practice of this nature resolved, ought to approach the Labour Court for relief. This is because collective bargaining agreements are registered as statutory instruments in order to make them enforceable by either the employer or an employee who may be aggrieved by an act or omission of F the other. Do collective bargaining agreements regulate employer-employee relationships, and set out their rights and obligations? Do collective bargaining agreements seek to regulate employer- employee dynamics? If so, which court should properly be seized with the resolution of a dispute, at first instance, between an employer, which collects monthly pension contributions from its employees, for onward transmission to a National Employment Council G for a certain industry: the High Court and the Labour Court?

The defendant has raised an exception to the plaintiff's claim on the basis that this court has no jurisdiction to entertain it, because of the ouster provisions of s 89(1)(i), as read with s 89(6) of the Labour Act [*Chapter 28:01*] (the Act). The defendant raised two other grounds for excepting to the plaintiff's claim: H

Chigumba J

(a) that A the claim has prescribed, and (b) in relation to the rate of interest claimed, which exceeds the prescribed rate. I will not consider the merits of these grounds of exception, it being my considered view that jurisdiction must be founded first, before this court may give its views on the propriety of any matters brought before it by a litigant. Once jurisdiction is founded, the merits or otherwise of other issues which will then be properly before B the court can be ventilated. The question for determination in regards to the issue of jurisdiction, is whether the plaintiff's claim against the defendant, being a claim for pension contributions payable by defendant (an employer) for and on behalf of its employees, in terms of SI 45 of 2013 (Collective Bargaining Agreement Construction Industry Regulations), provided for C in terms of s 79 of the Act, is such a claim that only the Labour Court may determine at first instance. Put differently, the court must determine whether it has jurisdiction to entertain the plaintiff's claim, or whether its jurisdiction is ousted in terms of s 89 of the Act.

The plaintiff issued summons against the defendant on 2 October 2013, claiming payment of the sum of US$165 755.06 being general fund and D pensions contributions due from the defendant, to the plaintiff, calculated from 16 February 2009 to 31 March 2013, interest thereon at 7.5 percent per annum calculated from the date of issue of the summons to the date of payment, and costs of suit. In the declaration to the summons, the plaintiff identifies itself as an employment council as defined by the Act. It avers that the defendant, by virtue of being an employer engaged in the construction E industry as defined by the Act, and in the Collective Bargaining Agreement (CBA) for the Construction Industry SI 244 of 1999 as read with SI 45 of 2013, is obliged to deduct certain dues and pensions contributions from its employees and forward these to the plaintiff.

The plaintiff averred that the defendant is obliged to match each employee's F contribution, and itself remit similar sums to the plaintiff. It was averred further, that, the defendant is obliged to file returns in which it sets out each employee's identity, grade, pension, and contribution towards the general funds and sets out the defendant's own contributions towards those funds. The plaintiff averred further that, during the period February 2008 to March 2013, the defendant's obligation towards the general and pension funds G amounted to US$165 755.06 inclusive of compound interest calculated from 31 August 2013. This figure covers all of the defendant's employees at all its worksites at Borrowdale Brooke, Bindura, Borrowdale racecourse and CBZ Borrowdale. The plaintiff charged the defendant with misrepresenting its employees' contributions by omitting some employees and understating H the number of weeks worked, on its returns. The plaintiff averred that it

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Chigumba J

uncovered evidence of the defendant's alleged misrepresentations following A impromptu visits to the sites, and from the correct returns which were given to the plaintiff by some of the defendant's employees.

On 1 November 2013, the defendant filed a notice of appearance to defend, and subsequently requested for further particulars, on 5 November 2013. On 6 December 2013, the plaintiff furnished further and better particulars as requested, and filed a notice to plead and intention to bar on B 12 December 2013. On 9 December 2013, the defendant's legal practitioners addressed a letter to the plaintiff's legal practitioners, in which letter the plaintiff's legal practitioner is advised that s 82(3)(a) as read with s 8(e) of the Labour Act provides that failure to comply with a CBA shall be regarded as an unfair labour practice, and that any aggrieved party must place the matter before C a labour officer for arbitration in terms of Part XII. It was pointed out that, in the result, the plaintiff had not exhausted domestic remedies, and that the plaintiff had approached the wrong court, this matter being in the sole purview of the Labour Court.

The plaintiff did not afford the defendant the courtesy of a reply. Accordingly, on 18 December 2013, the defendant filed the present exception which D has now come before me for consideration. The defendant averred that this court has no jurisdiction to entertain the plaintiff's claim, because the plaintiff's cause of action arises from the Collective Bargaining Agreement: Construction Industry Regulations which are registered in terms of s 79 of the Act. Section 79 of the Act provides that, after negotiation, a CBA shall E be submitted to the Registrar of the Labour Court for registration, and/or approval. The effect of such registration is that the Minister must then publish it as a statutory instrument (in this case SI 45 of 2013), and thereafter, the terms and conditions of a registered CBA become effective and binding from the date of publication of the SI (see s 80 of the Act).

Statutory Instrument 45 of 2013 is the Collective Bargaining Agreement for F the Construction industry, which replaced SI 244 of 1999, and was registered in terms of the Labour Act. Part VIII of the CBA which, provides penalties in s 44, expressly stipulates that:

> "(1) Attention is drawn to s 82(3) of the Labour Act… which reads –
>
> (3) Any person who fails to comply with the provisions of a collective bargaining G agreement which is binding on him/her shall, without derogating from any other remedies that may be available against him/her for its enforcement –
>
> (a) commit an unfair labour practice for which redress may be sought in terms of part XII."

My reading of s 44 of the CBA is that it entrenches s 82(3) of the Labour Act as the section that parties to the CBA should look to, when looking for H

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resolution A of any disputes that may arise from the CBA. The phrase "…without derogating from any other remedies that may be available against him/her for its enforcement" clearly refers to the remedies for enforcement which are provided for in terms of other penalty provisions of the Labour Act such as reporting the violation of the CBA as a criminal offence, which if proved, will result in the levying of a fine or other sanctions provided by B the Labour Act. This phrase cannot in any way be interpreted as authority for a violation of the CBA to be dealt with or enforced in terms of other enactments, if the Labour Act does not expressly say so. The phrase cannot in my view be interpreted as an invitation to litigants to choose a different forum to resolve a dispute emanating from an alleged violation of a CBA. C The CBA, in s 44, expressly draws attention to s 82(3) of the Labour Act as the recommended section to rely on when seeking penalties for violation of the CBA.

Section 8 of the Act identifies what constitutes an unfair labour practice. The category which is relevant to the matter at hand is identified in terms of s 8(e)(i) as follows:

> **"Unfair labour practices by employer**D
>
> An employer or, for the purpose of paragraphs (*g*) and (*h*), an employer or any other person, commits an unfair labour practice if, by act or omission, he –
>
> (a) to (d) [not relevant]
>
> (e) fails to comply with or to implement – E
>
> (i) a collective bargaining agreement".

Section 82 of the Act provides for Collective Bargaining Agreements (CBA). In s 82(3)(a) the Act provides:

"82 Binding nature of registered collective bargaining agreements

(1) … F

(2) This section shall apply, *mutatis mutandis*, in respect of any part of a collective bargaining agreement.

(3) Any person who fails to comply with a collective bargaining agreement which is binding upon him shall, without derogation from any other remedies that may be available against him for its enforcement – G

(a) commit an unfair labour practice for which redress may be sought in terms of Part XII; and

(b) …

(4) If a registered collective bargaining agreement provides a procedure for the conciliation and arbitration of any category of dispute, that procedure is the *exclusive procedure* for the determination of disputes within that category" H (my emphasis).

2014 (2) ZLR p686

Chigumba J

Part XII provides for the resolution of disputes and unfair labour practices A and, in s 93 of the Act, provides the powers of labour officers to whom labour disputes or unfair labour practices are referred for resolution. Section 82(3)(a) provides that failure to comply with the provisions of a CBA is an unfair labour practice. See *Barnsley* v *Harambe Holdings* 2012 (1) ZLR 265 (H) and *DHL* v *Madzikanda* 2010 (1) ZLR 201 (H) at 204. My reading of s 82(4) of the Act is that the procedure set out in a CBA for resolution of disputes B is the only procedure that ought to be used to resolve any disputes which may arise in terms of the CBA.

Section 93(1) of the Act stipulates that a labour officer to whom a dispute or unfair labour practice has been referred shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration. If the C labour officer fails to resolve the dispute by conciliation within 30 days, a certificate of no settlement shall be issued to the parties to the unfair labour practice. The period for conciliation may be extended by consent. Section 93(5) goes further to provide the circumstances in which the unfair labour practice may be referred to arbitration, and whether such referral ought to be compulsory or voluntary. The interpretation which is the most reasonable D and probable is that an unfair labour practice is subject to the conciliation procedure, and possibly, by consent of the parties or operation of law, may be referred to arbitration.

The defendant's exception to the plaintiff's claim is premised on the averment that only the Labour Court may hear labour matters at first instance as provided in s 89 of the Act as follows: E

"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 any other enactment; and

(2) to (5) [not relevant] F

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

Section 89(1)(a), as read with s 89(6), clearly ousts the jurisdiction of any other court, except the Labour Court, to hear and determine applications and appeals in terms of the Labour Act, or any other enactment. See G*Telecel Zimbabwe (Pvt) Ltd* v *Omar*HH-116-11 where it was held that s 89 ousts the jurisdiction of this court to hear labour matters at first instance, and that this court does not have inherent or concurrent jurisdiction with the Labour Court. Such jurisdiction has clearly been ousted by s 89 of the Act. I associate myself fully with the sentiments expressed in that judgment. I am fortified H

2014 (2) ZLR p687

Chigumba J

in A my view by a plethora of other decided cases which support this view. See *NRZ* v *Railways Artisans Union & Ors* 2005 (1) ZLR 341 (S); and *DHL International (Pvt) Ltd* v *Madzikanda supra* at 204 where Makarau JP (as she then was) cleared up the apparent confusion as follows:

"As a general statement, it is correct that the Labour Court has no jurisdiction to entertain claims that are brought at common law. It can only determine B applications and appeals among others that are brought in terms of the Act. Where, however a dispute can either found a cause of action at common law, or in terms of the Act, a case of *apparent concurrent jurisdiction between this court and the Labour Court*

appears to arise (my emphasis). I say appears to arise because the apparent conflict can easily be resolved by paying regard to the overall intention of the legislature in creating the Labour Court. In my view, C in such a case, the Labour Court's jurisdiction being special must prevail. It would make a mockery of the clear intention of the Legislature to create a special court if the jurisdiction of such a court could be defeated by the mere framing of disputes into common law cause of action where the act has made specific provisions for the same. *In my view, if the dispute is provided for in the Act, the Labour Court has exclusive jurisdiction even if the dispute is also resolvable*D*at common law*" (my emphasis).

A collective bargaining agreement is negotiated for and registered in terms of s 79 of the Labour Act. Failure to comply with a CBA is an unfair labour practice, in terms of s 83(3)(a) of the Act. An unfair labour practice must be resolved in terms of s 93 of the Act, by going through a conciliation process before a Labour Officer, and possibly arbitration. *Ergo*, failure to comply E with a CBA is a labour matter, which must be dealt with by the Labour Court, at first instance. The High Court's jurisdiction is expressly ousted in this matter. It would be an abuse of the High Court's inherent jurisdiction to entertain a purely labour matter, which matter has not been heard by the Labour Court at first instance, simply because the applicant found it more expedient to approach this court, and to shun the Labour Court. F

The plaintiff wrote a letter to the defendant in which it pointed out the issue of jurisdiction. The defendant ignored the letter. The law is now settled. It is clear. There is no *lacuna*, or grey area. As a mark of its disapproval of the defendant's conduct of bringing a purely labour matter to this court to be heard at first instance, the court will exercise its discretion and make a punitive order as to costs. In the result, the matter is dismissed with costs G on a higher scale of legal practitioner and client.

Muza & Nyapadi, (excipient's) defendant's legal practitioners

Mabulala & Dembure, (respondent's) plaintiff's legal practitioners H

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[zRPz]SHERIFF & ORS v DUBE & ORS 2014 (2) ZLR 688 (H)

Citation	2014 (2) ZLR 688 (H)
Case No	Judgment No. HH-628-14
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	4 November 2014; *CAV*
Judgment	14 November 2014
Counsel	*T Tande,* for the applicant *F F Nyamayaro*, for the claimant *B Chipadza*, for the judgement creditor
Case Type	Interpleader proceedings
Annotations	No case annotations to date

Flynote

Company – *corporate veil – lifting of – when permissible – directors constituting alter ego of company – judgment against company – no need for separate court order to lift corporate veil before attachment of directors' property in satisfaction of judgment debt* D

Headnote

In these interpleader proceedings, the claimants were resisting the attachment of property said to belong to themselves in satisfaction of a judgment debt against a company of which they were the sole directors. After going from one premises to another, the sheriff had found that the company was operated from the claimants' home, where the property in question E was attached. The claimants argued that the company was is a separate legal person from themselves claimants and as such its obligations could not be visited upon them. The attachment of their property was not done in terms of any order of court. The judgment creditors argued that the company did not have a registered office from where it operates. An attempt to execute at the given registered address of the company was F no avail. That resulted in the judgement creditor directing the sheriff to attach property at the directors' residence, they being the persons who solely ran the company and were the *alter ego* of the company. It was not necessary to approach the court for the piercing of the corporate veil before attaching the property. G

Held, that directors of a company may be held personally liable for their actions when they have acted fraudulently or unjustly and when for the court to refuse to do so would deprive an innocent victim of redress for an injury caused by them. Where the directors have failed to observe separateness of themselves and the company, then that remedy should not be refused at interpleader stage. Where the directors are the *alter*H

2014 (2) ZLR p689

Matanda-Moyo J

*ego*A of the company, the courts can confirm attachment of their property without them having been cited in the proceedings, because the *alter ego* of a company is always aware of the happenings of the company at any time and the issue of non-observance of the principle *audi alteram partem* rule does not apply. There is no reason to require the judgement creditor to institute fresh proceedings to pierce the corporate veil in B circumstances where those proceedings would entail the same conclusion.

Cases referred to

Cape Pacific Ltd v *Lubner Controlling Invstms (Pty) Ltd* 1995 (4) SA 790 (A)

Deputy Sheriff v *Trinpac Invstms (Pvt) Ltd & Anor* 2011(1) ZLR 548 (H) C

Die Dros (Pty) Ltd & Anor v *Telefon Beverages CC & Ors* 2003 (4) SA 207 (C)

Hulse-Reutter and Others v *Godde* 2001 (4) SA 1336 (SCA)

Case information

T Tande, for the applicant D

F F Nyamayaro, for the claimant

B Chipadza, for the judgement creditor

Judgment

Matanda-Moyo J: The judgment creditor obtained judgment against Wepbury Investment (Pvt) Ltd in case No. HC 5050/12. This court registered an arbitral award against Wepbury Investments in the sum of $21 105 together E with interest at the rate of 5 per cent plus costs of registration. Consequent to such order the applicant was instructed to attach certain property listed in Annexure A2 to this application. Subsequent to such attachment the claimants have laid a claim to the attached property. The applicant approached this court by this court by way of interpleader summons. F

The claimants submitted that they are directors of Wepbury Investments (Pvt) Ltd. Wepbury is a separate legal person from the claimants and as such its obligations could not be visited upon them. The applicant has attached the property to satisfy a judgment against Wepbury Investments. Such attachment of the claimants' property was not done in terms of any order of court and the claimants caused the applicant to bring interpleader process G to determine the issue.

The judgment creditor on the other hand argued that Wepbury Investments does not have a registered office from where it operates in violation of the Companies Act. The Sheriff attempted to execute at the given registered address of the company to no avail. That resulted in the judgment creditor H directing the sheriff to attach property at the directors' residence. The two

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claimants are the directors of Wepbury Investments. The two solely ran A Wepbury Investments. The two are therefore the *alter ego* of that company.

It is not in dispute that the Sheriff firstly tried to execute at the registered office of Wepbury Investments in Belvedere. The judgment creditors submitted that Wepbury Investments no longer operated therefrom. They were directed to number 42 McChlery Avenue, Eastlea. The Deputy Sheriff attempted B execution but found the address occupied by another company. Wepbury Investments was said to have moved to 10 Stirling Road, Workington at National Foods Complex. The Deputy Sheriff proceeded to 10 Stirling Road but was told Wepbury Investment did not have any property at those premises. Wepbury was said to be not operating from those premises. The judgment creditors learnt that Wepbury Investments operated from its directors' house C number 4366 Matidoda Tynwald North, Harare. They then directed the Deputy Sheriff to the directors' house where property was attached.

The judgment creditors argued that it was not necessary to approach the court for the piercing of the corporate veil before attaching the property. They referred me to *Deputy Sheriff* v *Trinpac Investments (Pvt) Ltd & Anor* 2011(1) ZLR 548 (H). D

Alter ego is a doctrine used by the courts to ignore the corporate status of a group of directors of a corporation in reference to their limited liability, so that they may be held personally liable for their actions when they have acted fraudulently or unjustly and when to refuse to do so would deprive an innocent victim of redress for an injury caused by them. E

Whilst the doctrine of piercing of the corporate veil is a common law remedy which should ordinarily be applied for and granted by court, I am of the view that where the directors of a company have failed to observe separateness of themselves and the company, then that remedy should not be refused at interpleader stage. Where the directors are the *alter ego* of F the company the courts can confirm attachment of their property without them having been cited in the proceedings. This is because the *alter ego* of a company is always aware of the happenings of the company anytime and the issue of non-observance of the *audi alteram partem* rule does not apply. In *Hulse-Reutter and Others* v *Godde* 2001 (4) SA 1336 (SCA) it was held that generally a court has no general discretion to disregard a company's G separate legal personality but only in the most unusual circumstances. For a court to do so would depend on a close analysis of the facts of each case. There must be some abuse of the distinction between the corporate entity and those who control it, which would entail unfair advantage being afforded to the latter. This principle was also enunciated in *Cape Pacific Ltd* v *Lubner*H

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Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A) at 803A-804D A and *Die Dros (Pty) Ltd & Another* v *Telefon Beverages CC & Ors* 2003 (4) SA 207 (C). I am of the view that once it has been established that the separate personality of a company had not been maintained then the corporate veil should be pierced.

In casu the claimants are the two directors of the company. They are in control B of the company. That company is no longer operating from its registered office and no changes of address have been filed with the Companies Registry. The first claimant is aware of the obligation to the judgment creditors. She explained in her affidavit that National Foods (Pvt) Ltd was going to settle the bill. Therefore her subsequent claim that she is not involved in the C running of Wepbury Investments

(Pvt) Ltd can only be far from the truth. The second claimant has been running the company: that is admitted. The two are the sole owners of such company.

I agree fully with the sentiments of the court in *Cape Pacific supra* at 816-818 (which was quoted with approval by Patel J (as he then was) in *Deputy Sheriff Harare* v *Trinpac Investments (Pvt) Ltd and Anor supra)* where the D court said:

> "… when the corporation is the mere *alter ego* or business conduit of a person, it may be disregarded. This rule has been adopted by the courts in those cases where the idea of the corporate entity had been used as a subterfuge and to observe it would work an injustice …
>
> In cases of fraud, whether actual or constructive, the courts regard the real parties E responsible and grant relief against them or deny their claims and defence based on the principle of equity … So, when a corporation is organized or maintained as a device in order to evade an outstanding legal or equitable obligation … the courts, even without reference to actual fraud, refuse to regard it as a corporate entity."

In *Trinpac supra* at 553 Patel J observed that: F

> "… mere procedural technicalities should not be allowed to frustrate or impede the effective satisfaction of a just claim. In any event I see no logic or practical reason in requiring the judgment creditor to institute fresh proceedings in this court to pierce the corporate veil in circumstances where those proceedings would entail the same conclusion that I have reached earlier."

I am of the view that the judgment creditor has managed to demonstrate G that the company is just a sham. The separateness between the directors and the company has not been maintained in operating the business. The claimants have not even told this court where the company operates from nor point to any assets of the company. I find no basis for observing the principle of limited liability. The directors who are owners of the company will have H personal liability for the business debts.

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In the result I order as follows: A

1. The claimants' claim to the property placed under attachment in execution of judgment, HC 5050/12 is hereby dismissed.
2. The property as set out in the notice of seizure and attachment dated 26 November 2013 issued by the applicant is declared executable and
3. The claimants pay costs of the judgment creditors and the applicant. B

Nyamayaro Makanza & Bakasa, claimant's legal practitioners

Kantor & Immerman, applicant's legal practitioners

Lawman Chimuriwo Attorneys at Law, judgment creditors' legal practitioners C

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[zRPz]ECONET WIRELESS (PVT) LTD v POSTAL & TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE 2014 (2) ZLR 693 (H)

Citation	2014 (2) ZLR 693 (H)
Case No	Judgment No. HH-635-14
Court	High Court, Harare
Judge	Dube J

Heard 28 October & 3 November 2014; *CAV*

Judgment 17 November 2014

Counsel *T Nyambirai,* for the applicant
J Muzangaza, for the respondent

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Practice and procedure – *application – urgent – certificate of urgency – validity of – fact of urgency must appear from founding affidavit – affidavit* D *making no such averment – no basis for issue of certificate – issue of certificate without seeing founding affidavit – certifying practitioner seeing only a draft of such affidavit – issue of certificate not competent – certificate not valid*

Headnote

It E is not competent for a legal practitioner who is requested to certify a matter as urgent to see the founding affidavit in draft form, before it is signed, in order to ensure that the affidavit discloses urgency before he agrees to certify the matter. It is not his duty to ensure that the affidavit discloses urgency. He is required to see a signed and commissioned affidavit and either agree or disagree on the urgency of the matter. It F is not his function to amend or suggest amendments to the affidavit so that it complies with the requirements of urgency. The practice of legal practitioners who insist on seeing founding affidavits in draft form is undoubtedly wrong. This sort of conduct is most inappropriate and ought to be discouraged.

A certificate of urgency is required to be premised on a founding affidavit. G A statement only becomes an affidavit when it is signed by the maker and sworn to and signed before a commissioner of oaths. Where there is no founding affidavit when the matter is certified urgent (because the affidavit was in draft form), there can be no valid certificate of urgency.

A legal practitioner cannot certify a matter as being urgent where the applicant H itself does not hold the view that the matter is urgent. The founding

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affidavit must disclose urgency. The deponent to the founding affidavit A should therefore be alive to the fact that he is bringing a matter to court on an urgent basis. It is incumbent upon him to articulate fully, in his affidavit, why he is bringing the matter on an urgent basis and why he cannot wait and enrol the matter on the ordinary roll. He cannot simply regurgitate the history of the matter and expect that he may persuade the court to find the matter urgent by merely outlining the irreparable harm B likely to ensue. He must make specific averments on the allegation that the matter is urgent and cannot wait. Where there has been a delay in bringing the application, such delay should be explained in the founding affidavit. This role should not be left entirely to the person who certifies the founding affidavit as urgent. Nor can the deponent to the founding C affidavit leave it to his counsel to address the issue of urgency of the matter at the hearing either, because that opportunity might never arise. A court dealing with an urgent matter is required to consider the urgency of the matter when the matter is placed before it and on the basis of papers placed before it. Before a court sets down an urgent application for hearing, it must be of the preliminary view that the matter is urgent. D The court has not had the benefit at this stage of hearing the applicant's counsel; hence the need for the certificate of urgency and founding affidavit themselves to adequately address the issue of urgency.

Cases referred to E

Graspeak Invstms (Pvt) Ltd v *Delta Corp (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H)

Gwarada v *Johnson* 2009 (2) ZLR 159 (H)

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 188 (H)

Madzivanzira v *Dextprint Invstms (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H) F

Case information

T Nyambirai, for the applicant

J Muzangaza, for the respondent

Judgment

Dube J: This is an application for an interdict. The applicant is a telecommunications services provider. The respondent is the Regulatory Authority established in terms of s 3 of the Postal and Telecommunications Act G [*Chapter 12:05*] (the Act).

The salient facts of this court application may be summarised as follows. On 16 October 2014, the respondent issued Regulatory Determination No. 1 of 2014, a circular on Implementation of Excise Duty on airtime or network usage for voice, internet and data services provided by public H

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telecommunication A service providers. The determination fixes new national interconnection tariffs and mobile voice tariffs for telecommunications operators for the period December 2014 to December 2016. Aggrieved by this decision, the applicant has launched this application. The applicant claims that the respondent varied or amended the existing tariffs without affording the applicant a right to be heard on whether or not the existing approved B tariffs should be amended and, if so, to what levels and when this should be done; and that the respondent proposed to amend the existing tariffs by reducing them significantly. The applicant contended that the respondent's direction that the applicant propose tariffs which the respondent has itself set by 14 November 2014 is an effort to purge the illegality it committed by fixing tariffs for the applicant without having first received a tariff proposal C from the applicant. The applicant maintains that the respondent's failure to afford the applicant an opportunity to be heard violates principles of natural justice as well as provisions of the Constitution. The applicant contends that the determination is biased against the applicant in that the tariff reduction will weigh more heavily on the applicant than on the other operators who D have not bothered to pay the $137.5 million licence fees. The applicant avers that there is no level playing field. In addition, the applicant challenges the authority of the respondent to act in the manner it did. The applicant argues that s 4(g) and (i) as read with s 100 of the Act, under which the respondent purported to act, does not empower it to vary existing approved tariffs *mero motu*, without an application or proposal for the variation of the tariffs by E a licensee. The applicant further submitted that the respondent violated the *audi altram partem* rule by imposing tariffs without first affording the applicant an opportunity to be heard on the proposed tariffs and the effective date of the tariffs. The applicant's position is that the respondent exceeded the powers conferred upon it and acted *ultra vires* the Act. Mr *Nyambirai*, F who represented the applicant, contended that the applicant cannot purport to act in terms of s 42, as a tariff is not part of a licence and powers conferred upon the authority by s 42(1) do not include the power to amend a tariff.

The applicant canvassed the requirements of a temporary interdict and urged the court to find in its favour. I will not, for the purposes of this judgment, summarise arguments advanced by both parties with respect to the merits G of the interdict.

The application is premised upon the trepidation that, if the respondent is allowed to impose illegal tariffs before the applicant's rights are finally decided by the court, it will suffer irreparable harm if it subsequently succeeds in this dispute, in that it will not be able to recover the loss suffered as a result of H the unlawful reduction in tariffs. The applicant reasons that the reduction in

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its tariffs will force the applicant to retrench some of its employees and to A down scale its distribution network that has created 20 000 jobs. Further, the applicant will be forced to

discontinue some of its scholarship programs in which it pays fees for more than 40 000 less privileged members of the society.

The terms of the interim order sought are as follows:

> "INTERIM RELIEF GRANTED B
>
> Pending the determination of this matter, the applicant is granted the following relief:
>
> 1. That the implementation of the Postal and Telecommunication Regulatory Authority of Zimbabwe (Determination on Voice, Data and Internet Charges for Regulated Telecommunication Services in Zimbabwe) (Circular on Implementation of Excise Duty on Airtime or network usage for voice, internet and data services provided by Public Telecommunication Service C Providers) Regulatory Circular Number 1 of 2014 be and is hereby suspended."

The final relief sought is for an order suspending the operation of the determination until the respondent has collected licence fees from other mobile operators. D

The respondent's submissions in response may be summarised as follows. The regulatory determination purports to cite s 100 instead of s 42(1)(d) of the Act. The true intention or purpose of the action can be gleaned from the consequences and not the label placed on the determination. There has not been any unlawful interference by the respondent in the applicant's business. The conduct complained of has a basis in s 42, which gives the respondent E powers to amend licences in specific instances and an amendment can be made in terms of s 42(1)(d) if considered desirable and in the public interest. The regulatory determination does not seek to direct any licensee what to charge, but sets a limit above which no operator shall charge. The same section in subs (2) enjoins the respondent, prior to amending the licence, to F give its reasons for the decision and invite the licensee's input into the matter.

The respondent denied that the determination is discriminatory. Mr *Muzangaza* who appeared for the respondent submitted that there is no discrimination as the licence fees which other operators also pay have not been reduced. The other operators are expected to fork out the same full licence fees. He G contended that the applicant has the advantage that it has been able to recoup part of its outlay on the back of high tariffs. He submitted that the tariffs have been reduced in the public interest.

The respondent took up two preliminary points. The respondent argued that the applicant has adopted a wrong procedure for seeking this relief. The respondent submitted that the remedy of an interdict is resorted to only when H

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other A alternative remedies are not available and when the delays associated with the use of other remedies could cause irreparable harm. The respondent submitted that that the applicant ought to have sought relief in terms of s 96 of the Act, as the effect of the regulatory determination complained about is to amend existing tariffs which are an extricable component of a licence. The applicant ought to have requested for reasons from the Minister and, if B not satisfied with the reasons, appealed to the Administrative Court if need be. The respondent insists that a wrong procedure was adopted for seeking this relief, that the application is improperly before the court and that it ought to be dismissed on that basis alone.

The respondent's second point relates to the urgency of the application. The C respondent submitted that the application is not urgent as the applicant has always been aware of the respondent's intentions. Mr *Muzangaza* submitted that the dispute has been raging on since 2013 when research was conducted by the respondent with the participation of the applicant. This resulted in the applicant penning a letter dated 24 June 2004 wherein the applicant threatened to take the matter to court if the respondent did not withdraw its D intentions. He submitted that this matter became urgent and ripe for taking to court in June 2014 and that the applicant has not explained its failure to take any action from July to 24 October 2014. The respondent asserts that the applicant has not been candid with this court and was selective in the information it presented to the court. If the applicant had disclosed to the court E the existence of the letter dated 24 June 2014, this would have negatively affected any notions of urgency.

The respondent also took issue with the certificate of urgency. It submitted that the certificate of urgency in support of this application is no certificate at all, as it was done before the founding

affidavit had been deposed and attested to. The respondent further averred that the founding affidavit does F not disclose urgency.

The applicant opposed both preliminary points. The applicant insisted that this application is properly before the court. It submitted that this matter is not an appeal but a review against the determination and is properly before the court. G

On the issue of urgency, Mr *Nyambirai* asserted that this application was triggered by the regulatory determination of 16 October 2014. He asserted that the applicant acted in a timely manner and shortly after receiving the determination and, further, that the matter is urgent because the applicant seeks to prevent the implementation on 14 November 2014 of a decision H to reduce its tariffs. He contended that the letter threatening legal action

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was in relation to a different matter concerning the Lyric Model and a tariff A proposal to set up a group 5 tariff which application was declined by the respondent. The applicant is not pursuing that matter. The applicant contends that both the founding affidavit and the certificate of urgency are valid and disclose urgency.

The respondent's opposing affidavit and written submissions raised the issue B of urgency. The matter proceeded to argument on the merits without the respondent formally raising the issue of urgency, only to do so in response to applicant's submissions on the merits. The applicant contends that the respondent let the court hear the matter on the merits having declined an opportunity to raise any preliminary objections. That is not a correct reflection of what transpired. No invitation was extended to the respondent to address C the court on its preliminary issues. The court proceeded on the assumption that the parties had discussed the issue and come to some common ground over the issue of urgency. The applicant submitted that the respondent should have raised the issue of urgency from the outset. It was irregular for the applicant to let the court hear the case on the merits, only to raise the issue of urgency in response to applicant's submissions on the merits. It urged the D court to disregard the issue of urgency. The applicant is clutching at straws. A preliminary point is one that is likely to dispose of the matter without the need to go into the merits of the matter. It is expected to be taken at the outset. If it is upheld at that stage, it obviates the need for the court to hear argument on the merits. It is therefore desirable that it be taken before commencement E of argument on the merits in the spirit of for good order and convenience. Where a preliminary point is raised during the course of argument on the main matter, it becomes a point of contention which still requires resolution. The taking of a preliminary point on urgency albeit belatedly does not render it fatal to the taking of the point. One has to have regard to the fact that in F applications of this nature, the court is required to be satisfied that the matter is urgent irrespective of the position of the opponents. A matter brought on an urgent basis does not assume urgency simply because an adversary failed to raise the issue of urgency timeously. The fact that the point was raised tardily does not defeat the point.

The requirements of urgency have been articulated in numerous decisions G and the law is considered settled. The law is basically that in any matter where an applicant brings an application on an urgent basis, he should show that the matter cannot wait to be determined in the sense that if not dealt with immediately, irreparable harm will result and, secondly, that the applicant himself did treat the matter as urgent. See *Madzivanzira* v *Dextprint*H

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Investment (Pvt) Ltd 2002 (2) ZLR 316 (H). A In *Gwarada* v *Johnson* 2009 (2) ZLR 159 (H) the court added its voice to the debate and remarked thus:

> "Urgency arises when an event occurs which requires contemporaneous resolution the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat." B

Similar sentiments were expressed in *Kuvarega* v *Registrar-General and Anor* 1998 (1) ZLR 188 (H) where the court remarked as follows:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning, a matter is also urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency

contemplated by the rules. If C there has been any delay, the certificate of urgency or supporting affidavit must contain an explanation of the non-timeous action."

The evidence on record reveals that there has been extensive correspondence and consultations with all stakeholders inviting representations regarding the proposed tariff and inviting licensees to submit tariff proposals. The D applicant failed to disclose correspondence that took place between the parties prior to this application. The following letters were not attached to the application and were made available by the respondent. On 20 March 2014, the applicant wrote to the respondent and expressed its views over the subject. The letter reads in part as follows:

"We remain fully committed to the current initiative that will provide the Regulator E with a tool … for use in evaluating tariff proposals that may be submitted by operators for approval by the regulator."

This letter was followed by another dated 12 June 2014 from the respondent to the applicant advising of the results of the survey and its intention to implement same. The applicant was invited to submit its views and comments on the exercise. On 24 June 2014, the applicant wrote to the respondent giving its F views on the results of the survey. Part of the letter reads:

"Our client has briefed us with your letter of 17 June 2014 in terms of which you declined its tariff proposal for the proposed Group 5 (hard to reach).We have also been briefed on your plans to implement a change to the tariff regime using the LCRIC MODEL … It is clear from this section that the authority does G not have power to impose tariffs. Once the authority has approved a tariff, it cannot amend or replace the tariff *mero motu*. The authority's power is restricted to approving or disapproving a tariff proposed by a licensee. The process of changing a tariff has to be initiated by the licensee."

In concluding this letter the applicant writes:

"We hereby notify you that unless you withdraw your request for our client to H submit a plan for the implementation of the results of the LCRIC model within

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the next seven days, we shall apply to court for an order declaring that our client A is entitled to maintain its tariff regime for the entire duration of the licence."

Two issues emerge from the letter of 24 June. The first relates to the refusal by the respondent to approve a tariff proposed by the applicant for the Group 5. The second issue relates to the applicant's plan to implement a change to the tariff regime using the LCIC Model. In that letter the applicant challenges B the respondent's authority to impose, amend or replace a tariff *mero motu* in terms of s 100 of the Act and threatens legal action if the respondent does not withdraw its request for submission of a plan for implementation of the results. The applicant became aware that the respondent intended to introduce the disputed tariff as early as 24 June 2014. By that date, the applicant was noticeably aggrieved and concerned about the respondent's authority or power C to impose and amend the tariffs *mero motu.* Even though the determination had not been issued, the applicant was fully aware of the applicant's plans and undoubtedly disgruntled by the respondent's desired course of action. They saw it coming. The challenge raised in the letter of 24 June relates to the respondent's powers to take the intended measures. The same challenge raised then, is the same pursued in this application. I am satisfied that the D applicant was aware as early as June 2014 that the respondent had plans to implement a change to the tariff regime in issue using the LCRIC model. What the applicant ought to have done then is to stop the respondent in its tracks and thwart its intentions.

The applicant did nothing from June until 24 October 2014 to assert its E rights. The applicant elected instead to threaten legal action, which threats it did not pursue. The need to act arose when the applicant became aware of the respondent's plans to implement the proposed tariffs based on the new model. The determination of 16 October simply put ice on the cake. The applicant chose to act after the determination and only a few days before the determination was to be finalised. What constitutes urgency is not the F imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arises, the matter cannot wait. This approach was well articulated the *Kuvarega* case where the court remarked thus:

"What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until G the dead-line draws near is not the type of urgency contemplated by the rules."

A party who brings a matter on an urgent basis should show that the matter cannot wait in the sense that if it is not immediately dealt with, some irreparable harm will ensue. He must assert himself and take corrective action as soon as he becomes aware of the imminent harm. He must exhibit H

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urgency A in the manner in which he reacts to the event or threat and not wait until the deadline draws near. The applicant failed to take corrective measures when it was expected to take action. The applicant has decided to act now and expects everyone to jump in accordance with its whims. The applicant sat on its hands and did absolutely nothing; it cannot expect any sympathy from the court. The applicant did not treat this matter as urgent. This is not B the sort of urgency envisaged by the rules. The urgency is self-created. I find that there was a deliberate or careless abstention from action until the deadline drew near.

The application was certified urgent by Dominic Musengi, a legal practitioner of this court, on 23 October 2014. The affidavit of Douglas Mboweni dated C 24 October 2014 was used to found the application. The applicant's response to the suggestion that the legal practitioner who certified the matter urgent did so before the affidavit was made went as follows. Mr Musengi, the legal practitioner who certified the matter urgent, always insists that he wants to see the papers in draft form first so that he can make up his mind whether he agrees that the matter is urgent. Mr *Nyambirai* drafted the papers and D gave them to him and Mr Musengi looked at the papers and then asked the deponent to the affidavit to get the affidavit signed and commissioned. The reason why he always requires to see the affidavit in draft form was not given. The idea of seeing the papers in draft form eludes me.

Mr Musengi had no business wanting to see the affidavit in draft form. It is E not competent for a legal practitioner, who is requested to certify a matter as urgent, to see the founding affidavit before it is signed to ensure that the affidavit discloses urgency before he agrees to certify the matter. It is not his duty to ensure that the affidavit discloses urgency. He is required to get a signed and commissioned affidavit and either agree or disagree on the urgency of the matter. There is no room for him to amend or suggest amendments to F it so that it complies with the requirements of urgency. He has no business going out of his way to ensure that the affidavit discloses urgency and hence it was wrong to insist that the affidavit come in draft form. The practice of legal practitioners who are required to certify matters as urgent insisting on seeing founding affidavits in draft form is undoubtedly wrong. This sort of conduct is most inappropriate and ought to be discouraged. G

The suggestion on the papers is that the certificate of urgency was signed before the deponent to the founding affidavit had made and signed his own affidavit. This means that Mr Musengi certified the application as urgent before the founding affidavit was in place. A certificate of urgency is required to be premised on a founding affidavit. A statement only becomes H an affidavit when it is signed by the maker and sworn to and signed before

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a commissioner of oaths. There was no founding affidavit when the matter A was certified urgent and hence there was no certification. For all intents and purposes, there was no valid affidavit before the legal practitioner and ultimately there is no certificate of urgency. This application has no leg to stand on. Even assuming that I am wrong in this view, a look at the certificate reveals that the issue of the urgency of the matter was not well thought and canvassed. As a result the certificate of urgency does not disclose urgency. B

The applicant's founding affidavit is sketchy on the issue of urgency .It does not appear that the applicant had any notion that this matter was being brought on an urgent basis. Nowhere in his affidavit does he make use of the word "urgent". One does not get the impression that this affidavit is one that is meant to be used in support of an urgent application. The affidavit C falls far short of what is required in matters such as this. A deponent to a founding affidavit required to be used in an urgent application should be alive to the fact that he is bringing a matter to court on an urgent basis. It is incumbent upon him to articulate fully in his affidavit, the reasons why he has decided to bring the matter on an urgent basis and not wait and enrol the matter on the ordinary roll. He cannot simply regurgitate the history of D the matter expect that he may persuade the court to find

the matter urgent by merely outlining the irreparable harm likely to ensue. He must allege facts that render the matter urgent and explain why the relief sought cannot wait to be obtained in the ordinary course. He must make specific averments on the allegation that the matter is urgent and cannot wait .Where there has been a delay in bringing the application, such delay should be explained in the E founding affidavit. This role should not be left entirely to the person who certifies the founding affidavit as urgent.

The deponent to the founding affidavit must not leave it to his counsel to address the issue of urgency of the matter at the hearing either, because that opportunity might never arise. A court dealing with an urgent matter F is required to consider the urgency of the matter at the time the matter is placed before it and on the basis of papers placed before it. Before a court sets down an urgent application for hearing, it must be of the preliminary view that the matter is urgent. The court has no benefit at this stage of hearing applicant's counsel and hence the need for the certificate of urgency and founding affidavit to adequately address the issue of urgency. G

The legal practitioner who certifies the matter as urgent should make his decision that the matter is urgent on the basis of information supplied to him in a founding affidavit. He cannot certify the matter urgent where the applicant itself does not hold the view that the matter is urgent. The founding affidavit does not disclose urgency. H

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The A purpose of a certificate of urgency is to certify the matter urgent and highlight reasons why a matter is urgent and explain the justification for preferential treatment. It assists the court in deciding whether the application should be dealt with immediately or wait to join the ordinary queue. The court is required, on the basis of that certificate alone, to make a decision regarding the urgency of the matter. Where the certificate is scanty in detail B and fails to disclose sufficient reasons why the matter should be dealt with immediately, the certificate is rendered useless, warranting dismissal of the application. Legal practitioners are in the habit of certifying matters urgent when they have not applied their minds to the matters to which their certificate of urgency is required. A legal practitioner who certifies a matter as urgent should only do so on the basis of clear and satisfactory averments C of urgency in the founding affidavit. This court is left to speculate regarding the urgency of this matter. The legal practitioner gives a summary of the dispute and in one paragraph says:

> "Applicant has a reasonable apprehension of irreparable harm if respondent is not stopped from implementing its directive. The loss of income that applicant D will suffer will not be recoverable. Applicant will be forced to retrench some of its employees, and to reduce its distribution network that has created more than 20 000 jobs directly and indirectly. Applicant will also be forced to reduce its scholarship programs that pay school fees for more than 40 000 less privileged members of our society and has been doing so for years.
>
> In the circumstances, I urge this honourable court to hear this matter on an E urgent basis."

There is no specific allegation or averment of urgency in the certificate of urgency. Mr Musengi does not use the word "urgent" at all until at the end of the certificate where in conclusion he urges the court to treat the matter as urgent. The certificate does not explain fully why the matter should get preference and why the applicant cannot wait to get substantive relief in the F ordinary course. In *Kuvarega (supra*) the court expressed its displeasure at this sort of conduct. Legal practitioners who offer this service are required to acquaint themselves with the facts of the matter and satisfy themselves that a matter is urgent. They should not certify the matter as urgent when they have not read the founding affidavit of the applicant and are satisfied that the matter is urgent. Their roles are not simply to rubber stamp or endorse G the matter as urgent when the papers do not disclose urgency. It is shocking that the legal practitioner did not pick the anomalies in the founding affidavit. The applicant has not shown good cause for preferential treatment.

The certificate of urgency fails to explain the inordinate delay in bringing this application in its certificate of urgency. In any case where there has been a H delay in bringing a matter on an urgent basis, it is imperative that such delay

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2014 (2) ZLR p704

Dube J

be explained in the certificate of urgency. The certificate fails to address the A reasons for the delay in bringing this application. I am not satisfied that the certificate of urgency discloses urgency.

The conduct of the applicant in this his matter calls for censure. The applicant deliberately omitted to attach letters that have a bearing on the urgency of the matter. In *Graspeak Investments (Pvt) Ltd* v *Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) at 555D Ndou J dealt with material B non-disclosure and dishonesty in urgent applications and held as follows:

> "The courts should, in my view, discourage urgent applications, whether *ex parte* or not, which are characterised by material non disclosures, *mala fides* or dishonesty. Depending on the circumstances of the case, the court may make adverse or punitive orders as a seal of disapproval of *mala fides* or dishonesty on the part of litigants. In this case the applicant attempted to mislead the court C by not only with holding material information but also by making untruthful statements in the founding affidavit. The applicant's non-disclosure relates to the question of urgency. In the circumstances, I find that the application is not urgent and dismiss the application on that basis."

The courts frown at conduct such as exhibited here.

Had the court been aware of these correspondences, it may have held a D different view over the urgency of the matter at the time the application was set down. Mr *Nyambirai* is a senior and well respected member of the profession. We expect better than that from him. Litigants who play hide and seek with the court only have themselves to blame when courts penalise them for their conduct. The court should mark its displeasure at this sort E of conduct. The court does that best with an award of punitive costs. The court will show its disgust by making an award of costs on a higher scale against the applicant.

I am not satisfied that that the certificate of urgency and the founding affidavit disclose urgency. Consequently I decline to deal with this matter on an urgent basis. Having found that the matter is not urgent, the court will F not take the trouble to resolve the remainder of the arguments advanced in favour of this application.

I accordingly make the following order:

1. The application is not urgent.
2. The applicant shall pay costs of this application on a legal practitioner G client scale.

Mtetwa & Nyambirai, applicant's legal practitioners

Muzangaza, Mandaza & Tomana, legal practitioners H

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[zRPz]S v MANHENGA 2014 (2) ZLR 705 (H)

Citation	2014 (2) ZLR 705 (H)
Case No	Judgment No. HH-62-15
Court	High Court, Harare
Judge	Hungwe J & Bere J
Heard	13 November 2014; *CAV*
Judgment	18 November 2014
Counsel	*E T Moyo* and *I Mureriwa*, for the appellant Mrs *S Fero*, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal lawC – *motoring offences – negligent driving – finding on degree of negligence – need to carry out factual enquiry before making such finding*

Headnote

The appellant pleaded guilty to a charge of culpable homicide arising out D of a motoring accident. The particulars of negligence alleged were (a) turning right upon (*sic)* path of oncoming traffic; (b) failing to keep a proper look out of the road ahead; and (c) failing to stop or act reasonably when accident seemed imminent. In the agreed statement of facts it was said that she turned right into a residential stand in a suburb in Harare E and was hit by the deceased, who was riding a motor cycle and coming from the opposite direction. The magistrate concluded, without further enquiry, that the appellant was grossly negligent and imposed an effective prison sentence.

Held, that a finding of gross negligence could not possibly have been made so intuitively on such skeletal allegations. Such a finding has far-reaching F consequences in a culpable homicide case which is linked to negligence on the part of the appellant. Turning right in front of oncoming traffic *per se* could not possibly have led the magistrate to conclude that the appellant's driving conduct amounted to gross negligence, because such conduct can be a particular of ordinary negligence. The inference of gross negligence drawn by the magistrate clearly did not exclude any other G competing inferences. Any such inference was not sustainable. Apart from the excessive delay in finalising what was a simple plea matter, a prison sentence was inappropriate and would be replaced by a fine.

Cases referred to

R v *Blom* 1939 AD 188H

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Bere J

S v *Corbett* 1990 (1) ZLR 205 (S) A

S v *Dzvatu* 1984 (1) ZLR 136 (H)

S v *Lusenge* A-138-81

S v *Mtizwa* 1984 (1) ZLR 230 (H)

Case information

E T Moyo and *I Mureriwa*, for the appellant B

Mrs *S Fero*, for the respondent

Judgment

Bere J: On 15 March 2010 the appellant, who was driving her motor vehicle along Sherwood Drive, was involved in a tragic accident that took the life of a motor cyclist, Graham Millard, who was going in the opposite direction. An attempt to save the deceased was futile as he succumbed to the injuries sustained on admission at West End Hospital in Harare. The appellant, C having offered unequivocal pleas of guilty to the offences of driving without a driver's licence and culpable homicide, was subsequently found guilty as charged on both counts.

In respect of count 1, the appellant was sentenced to pay a fine of US$300 or, in default of payment, to undergo three months' imprisonment. The appellant D holds no qualms against the

sentence imposed. In respect of count 2 of culpable homicide, the appellant was sentenced to 24 months' imprisonment, of which six months' imprisonment were suspended for five years on the usual condition of future good conduct, leaving her to undergo an effective 18 months' imprisonment. It is in respect of this sentence that the appellant felt aggrieved and sought the intervention of this court. E

Although on the face of it the appellant appears to have raised six grounds of appeal, they can in fact be compacted into basically two grounds. The first ground is that the court *a quo* erred in its finding that her driving on the day in question amounted to gross negligence, without carrying out a factual enquiry to establish this particular class of negligence. The second ground is F that the sentence imposed by the court *a quo* was unduly harsh and excessive to the point of inducing a sense of shock, if regard is had to the compelling and weighty mitigatory factors that were presented to the trial court.

In his filed heads of argument the respondent's counsel sought to support the imposed sentence but, as the arguments unfolded here in court, the counsel conceded that the appellant's appeal was well founded, and further G conceded that this court could properly revisit the issue of gross negligence and consequently the sentence which had been based on that finding by the court *a quo*.

There can be no doubt that the position subsequently adopted by the respondent's counsel was well founded. I will, in this judgment, endeavour H

Bere J

to A demonstrate why this court is of the firm view that this appeal ought to succeed.

It is not in dispute that a specific finding on the degree of negligence will inform the sentence to be imposed by the trial court, and that generally speaking a finding of gross negligence or reckless driving calls for a term of B imprisonment unless there are compelling mitigating factors. See *S* v *Mtizwa* 1984 (1) ZLR 230 (H) and *S* v *Dzvatu* 1984 (1) ZLR 136 (H).

The main bone of contention by the appellant in this appeal, as argued by her counsel Mr *Mreriwa,* is that it was not competent for the trial court to make a specific finding that the appellant's driving conduct amounted to gross negligence without having carried out a factual enquiry to determine C such a degree of negligence. I share this view. It is equally true that, despite her initial view to the contrary, the respondent's counsel ultimately conceded this aspect. The record of proceedings show that the only hint to the driving conduct of the appellant was informed by para 4 of the summary of the State case to which the appellant admitted. The paragraph reads as follows: D

> "The accused person then turned right into number 14, a residential stand in Mabelreign, and was hit by the now deceased".

Added to the above were what appears to be standard particulars of the appellant's negligence which were given as follows:

> "Particulars of negligence
>
> Turning right upon path of oncoming traffic. E
>
> Fail to keep a proper look out of the road ahead
>
> Fail to stop or act reasonably when accident seemed imminent".

It does seem to be the position that from these averments in the State Summary the magistrate triumphantly concluded, by inference, that the appellant's conduct amounted to gross negligence. In so concluding he stated as follows: F

> "… Accused stated it was out of necessity but did not furnish the court with proof. Her moral blameworthiness here is very high. What is more aggravating is that she turned in front of oncoming traffic, that is *gross negligence*" (my emphasis).

Therein lies the problem with the magistrate's reasoning and conclusion.

The view that this court takes is that a finding of gross negligence could not G possibly have been made so intuitively on such skeleton allegations as put in the State summary, because such a finding has far-reaching consequences in a culpable homicide case which is linked to negligence on the part of the appellant. That finding as made by the magistrate can only be made by the court after a due factual enquiry has been conducted, as was the case in *Mtizwa supra*. In that case the court accepted as a fact that the driver H had, among other factors, driven on the wrong side of the road on a wide

Bere J

tarred road in the face of oncoming traffic. The accused could not explain A his vehicle being on the incorrect side of the road or why he could not see the deceased's motor cycle for what appeared to be a considerable length of time before the collision occurred. It was only after this factual enquiry that the court was able to draw an adverse inference that the accused's driving conduct must have been grossly negligent. B

Compare the approach in the *Mtizwa* case with the instant case. There is no indication on record that any factual inquiry was conducted by the trial magistrate on the driving conduct of the appellant. Turning right in front of oncoming traffic *per se* could not possibly have led the magistrate to conclude that the appellant's driving conduct amounted to gross negligence, because that can be a particular of ordinary negligence. C

The other challenge one faces in dealing with the approach of the court *a quo* is an attempt by the trial magistrate to draw an inference of gross negligence from limited facts – i.e turning in front of an oncoming motorcyclist. Finding the appellant, or any accused for that matter, guilty on inferences carries with it certain challenges as observed by Watermeyer JA (as he then was) in *R* v *Blom* 1939 AD 188. D

The learned judge of appeal referred to "two cardinal rules of logic which govern the use of circumstantial evidence in a criminal trial" as follows:

> "(i) The inference sought to be drawn must be consistent with all the proved facts. If not, the inference cannot be drawn. E
>
> (ii) The proved facts should be such that they exclude any reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".

It will be noted that the inference of gross negligence drawn by the magistrate in this case clearly does not exclude any other competing inferences and, F above all, such inference were hinged in air and therefore are not sustainable. To this extent, the appellant's conviction on a finding of gross negligence was erroneous and the subsequent sentence based on that finding inappropriate. This court remains at large on the question of sentence.

Mr *Moyo,* who argued for the reduction of the appellant's sentence, submitted G to our satisfaction that the court *a quo* did not take into account the inordinate delay of three years and eight months in the conclusion of this case, despite it having been a plea. See *S* v *Corbett*1990 (1) ZLR 205 (S) referred to by the magistrate but wrongly applied to the appellant's case. It is trite that an inordinate delay in the conclusion of a criminal trial amounts to serious mitigation of sentence. There are other salient mitigatory factors in this case H

Bere J

which A the court *a quo* ought to have seriously considered, as opposed to paying mere lip service. The rigours of imprisonment must not be lightly looked at, particularly in this case where the appellant is a mother of four and a first offender.

Given the fact that the court *a quo* had clouded its mind with an inappropriate B finding on gross negligence, it is understandable that it then sought to settle for a prison term. Though understandable, that approach was clearly wrong in the light of what the court has now accepted on appeal. In arriving at what I think to be an appropriate sentence in this case I am persuaded by the instructive views of Fieldsend CJ in *S* v *Lusenge* A-138-81 when he stated the following: C

> "In my view, unless it can be shown by the evidence that the accused is guilty of this class of negligence it would be improper to send a first offender to prison for a driving offence. Such a person should be spared the hardship and humiliation which of necessity would arise from imposing prison conditions".

Given the very strong mitigating factors, some of which were properly captured by the court *a quo,* I feel a monetary penalty coupled with a D suspended sentence would meet the justice of this case.

Consequently the sentence in respect of count 2 is set aside and substituted by the following one:

> "$1000 or, in default of payment, three months' imprisonment. In addition, the appellant is sentenced to five months' imprisonment suspended for E five years on condition that the accused does not, within that

period commit any offence involving negligent driving and for which upon conviction, is sentenced to a term of imprisonment without the option of a fine".

HUNGWE J concurred. F

Scanlen & Holderness, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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[zRPz]PREMIER TOBACCO AUCTION FLOORS (PVT) LTD v MESOENYAMA & ANOR 2014 (2) ZLR 710 (H)

Citation	2014 (2) ZLR 710 (H)
Case No	Judgment No. HH-632-14
Court	High Court, Harare
Judge	Uchena J and Mwayera J
Heard	4 November 2014; *CAV*
Judgment	19 November 2014
Counsel	*T Mpofu*, for the appellant *K Gama*, for the first respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – *trial court's findings – failure by trial court to give reasons – a fatal irregularity – failure to give full reasons – distinction from failure to give no reasons – appeal court's duty to endeavour to make sense of trial court's judgment* D

Headnote

While a failure to give reasons for judgment is a fatal irregularity which warrants the upholding of an appellant's appeal and the setting aside of the decision of the court *a quo*, a distinction must be drawn between that situation and the failure of a court *a quo* to analyse adequately the E evidence led in the course of its judgment. A poorly written judgment is a judgment and cannot be equated to a situation where there is no judgment. It is dangerous to equate the situation where a large portion of the trial court's considerations remained stored in the judicial officer's mind instead of being committed to paper to poorly written judgments which, to an appreciable extent, spell out the court's findings but merely F omit the details thereof. Judgment writing is a skill which judicial officers acquire and polish as they progress in the profession. In the case of a poorly written judgment, an appellate court should try to make sense out of the reasons of the court *a quo* for its judgment. It is only when no sense can be made out of it, or no reasons for a

particular finding were given, that it can be said the reasons for judgment or a part of the judgment, remained stored in the judicial officer's mind. The distinction must be found in the missing reasons for judgment.

Cases cited

Fletcher v *Three Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S)

Uchena J

S v *Makawa & Anor* 1991 (1) ZLR 142 (S)

Legislation considered

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 19 r 1(11) and Order 30 r 2(1)

Case information

T Mpofu, for the appellant

K Gama, for the first respondent

Judgment

Uchena J: The appellant is a tobacco merchant to which the first respondent a tobacco farmer sold his tobacco. The appellant, for reasons which have not been clarified, paid the proceeds of the first respondent's tobacco sales to the second respondent, another tobacco merchant.

A simple dispute over whether the first respondent authorised a stop order over the proceeds of his tobacco sales has seen this case coming this far over whether or not a default judgment should be rescinded. The appellant, after acknowledging receipt of the notice of set-down of a pre-trial conference, defaulted, leading to default judgment being granted against it. It applied for rescission which was dismissed by the court *a quo*.

The appellant noted this appeal on the following grounds:

1. The magistrate equated negligence to wilful default, on the basis that there was no wilful intention to abstain from the proceedings in view of the staff turn-overs at appellant.
2. The magistrate erred by not addressing her mind to the *bona fides* of the defence of the applicant, as quite clearly the applicant had a defence which, if proved at trial, would entitle it to succeed.
3. The magistrate erred and misdirected herself by failing to pay due regard to the provisions of Order 19 r 1(2) of the Magistrates Court Rules, as the default judgment should not have been entered in the first place.

The application for rescission was strenuously resisted in the court *a quo* and before this court on appeal, on the basis that the appellant's legal practitioner in the court *a quo* had previously threatened his client with withdrawal of service if he did not put him in funds. That type of communication does not usually leak to the adversary, as it did in this case.

The appellant and his legal practitioner did not attend a pre-trial conference that was set down for 1 October 2013. The appellant's legal practitioner had confirmed by his letter dated 28 August 2013 that they had been served with the notice of set-down of the PTC.

Uchena J

The failure to attend is, therefore, either wilful or negligent. It would be wilful if the reason for non-attendance was because the legal practitioner's fees had not been paid. It would be due to negligence if it was due to failure to properly diarise the set-down date. A deliberate abstention by a party's legal practitioner from attending court on the set down date in protest against the client's failure to pay fees is wilful default. If a legal practitioner is not happy with his client's failure to pay he should renounce agency instead of holding the court, his client and the other party to ransom for his fees. A client in those circumstances is expected to come to court on the set-down date, to apply for a postponement so that he can resolve issues with his legal practitioner. Failure to attend

court in those circumstances by both the legal practitioner and his client constitutes wilful default. One cannot be allowed to default in the hope that one will raise money, pay one's legal practitioner C and then apply for rescission. That would be an abuse of court process.

The facts of this case on the diarisation of the PTC are easy to digest. It cannot be said that the appellant's legal practitioner was not aware of the set-down date. He admits receiving the notice and communicated with the first respondent's legal practitioner about it, specifically and accurately mentioning D the date on which the PTC was to be held. Mr Ncube's supporting affidavit, which should have explained how the "matter fell out of diary", did not explain what he meant, or what "falling out of diary" is. He and his client had a duty to candidly tell the court what happened. This is especially so in view of the leaked intention to abandon the client's case due to his failure to E pay the legal practitioner's fees. The first respondent placed that information before the court to prove wilful default. The appellant cursorily glossed over this serious allegation, leaving the appellant's default not satisfactorily explained. In spite of its shortcomings the magistrate's judgment specifically states that rescission will not be granted if a party "freely takes a decision to refrain from appearing." F

Mr *Mpofu* for the appellant submitted that the trial magistrate did not clearly bring out the reasons for his finding that the appellant's default was wilful. He submitted that the alleged "four incoherent reasons" for the appellant's default remained stored in the magistrate's mind. This was in reference to the magistrate's reasons for judgment where she said: G

> "Respondent herein seems to have four incoherent reasons warranting his none appearance on the day in question. Taken in totality the court connects an element to wilfulness and accordingly will not investigate the merits".

It is true that the magistrate did not mention the four incoherent reasons, but clearly stated that the applicant's reasons for default were incoherent and point to his having been in wilful default. H

Uchena J

Mr *Mpofu*A also submitted that the use of the word "respondent" in the magistrate's reasons for judgment, instead of "applicant", means that that judgment could be for the respondent's prior application for rescission. That cannot be correct because the respondent's application for rescission was not opposed. It was granted by consent. If there was any doubt as to which application the magistrate dismissed it is clarified in the magistrate's B comments to the grounds of appeal where she says "The appellant was clearly in wilful default ..."

In respect of the magistrate's reference to "four incoherent reasons warranting his none appearance on the day in question," Mr *Mpofu* submitted that a judgment should bring out the reasons for the decision, and that the reasons C should not remain stored in the judicial officer's mind. I partially agree with that criticism. It is true that the magistrate did not mention in detail the "four incoherent reasons" but clearly stated that they are incoherent. Their description thus remained stored in her mind, but she clearly stated their effect to the application. Mr *Mpofu* relied on *S* v *Makawa* 1991 (1) ZLR 142 (S) at 146A-E where Ebrahim JA said that failure to give reasons for judgment D is a fatal irregularity which warrants the upholding of the appellant's appeal and the setting aside of the court *a quo*'s decision. I agree with the Supreme Court's decision in *Makawa (supra*), but the issue in this case is not failure to give reasons for judgment, but failure to clearly spell them out.

It is true that the magistrate did not write a good judgment which lucidly E explains why she dismissed the appellant's application for rescission. It is, however, clearly stated in the judgment that the default was not satisfactorily explained. An analysis of the judgment leads to the inescapable conclusion that she accepted the first respondent's evidence of the appellant's legal practitioner having deliberately withdrawn his services because he had not been paid. F

A failure to give reasons for judgment, or "a large portion of the trial court's considerations" for judgment, must be distinguished from a failure to adequately analyse the evidence led in a given judgment. A poorly written judgment is a judgment. It cannot be equated to a situation where there is no judgment. It is, in my view, dangerous to extend the rationale in *S* v *Makawa*G (*supra*), where "a large portion of the trial court's considerations remained stored in his mind instead of being committed to paper", to poorly written judgments which to an appreciable extend spell out the court's findings but merely omits the details thereof. Judgment writing is a skill which judicial officers acquire and polish as they progress in the profession. Appellate courts should, in cases of

poorly written judgments, endeavour to make sense out H of the trial court's reasons for judgment. It is only when no sense can be

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2014 (2) ZLR p714

Uchena J

made out of it, or no reasons for a particular finding were given, when it can A be said the reasons for judgment or a part of the judgment, remained stored in the judicial officer's mind. The distinction must be found in the missing reasons for judgment. In my view, the mere failure to spell out the "four incoherent reasons," which the magistrate found to be incoherent, does not justify the result sought by Mr *Mpofu*. B

I must in this case consider the findings of the judicial officer and weigh them against the evidence led, which he may have failed to articulate. The court *a quo* specifically found that the appellant's explanation of his default was incoherent. This, to me, means that the explanations given for the default do not stick together, and were therefore not accepted by the court C*a quo*. The acknowledgment of receipt of the notice of set-down and the subsequent alleged "falling out of the diary" is indeed incoherent. I do not find fault with the conclusion arrived at by the court *a quo*. The resignation of Chironzi and the alleged failure to assign someone else to attend the PTC is also not convincing. The appellant should have gone to court with a coherent explanation as its legal practitioner had previously threatened not D to carry on with the case until his fees had been paid. There is no explanation or proof that the legal practitioner was paid before the set-down date. Such evidence would have taken away the legal practitioner's motive to withdraw services from the client.

Mr *Mpofu*'s submission that the letter of 28 August 2013 is evidence that the E appellant's legal practitioner continued to work for the appellant does not prove that he thereafter did not deliberately default court because his fees had not been paid. The facts which were placed before the court *a quo* by the respondent called for clear proof that the appellant's legal practitioner did not carry out his threat. His incoherent alleged "falling out" of the set-down date from the diary is not satisfactory. I am satisfied that the magistrate's F decision, though not lucidly articulated, is correct.

Mr *Mpofu* further submitted that the default judgment was not competently granted because a magistrate cannot *mero moto* grant a default judgment in chambers if the other party does not attend a pre-trial conference. Mr *Gama* for the first respondent submitted that the court is entitled to do so G if an application for default judgment is made by the party in attendance. I agree. Mr *Gama* further submitted that he applied for default judgment which was granted.

Order 19 r 1(11) of the Magistrates Court (Civil) Rules 1980 provides as follows: H

2014 (2) ZLR p715

Uchena J

> "(11) If A a party fails to comply with directions given by a magistrate in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4), the court may, on court application being made therefor by any other party, dismiss the claim or strike out the defence or make such other order as may be appropriate."

Mr *Mpofu* submitted that default judgment was granted without an application being made for it by the respondent. That is not correct. Mr *Gama*, who B appeared for the respondent, made an application which the court granted. A default judgment can be granted on an oral application being made in chambers once the other party's default is established. Nothing therefore turns on this issue.

The appellant's reliance on the magistrate's failure to determine whether C or not the appellant's case was meritorious is defeated by the provisions of Order 30 r 2(1) which provides as follows;

> "(1) The court may on the hearing of any application in terms of rule 1, *unless it is proved that the applicant was in wilful default* –
>
> (a) rescind or vary the judgment in question; and
>
> (b) give such directions and extensions of time as necessary for the further D conduct of the action or application" (emphasis added).

The use of the words "unless it is proved that the applicant was in wilful default" means that once the applicant for rescission is proved to have been in wilful default, there is no need to consider the merits of his case. Proof of wilful default is a bar to the applicant being granted the orders provided E under Order 30 r 2(a) and (b) of the Magistrates Court (Civil) Rules. This was clearly spelt out in

Fletcher v *Three Edmunds (Pvt) Ltd*; *Vishram* v *Four Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S) at 260B where Gubbay CJ commented on the effect of wilful default as follows:

> "Order 30 r 2(1) of the Magistrates Court (Civil) Rules expressly provides that F a magistrate has no power to rescind where the default was wilful. The enquiry terminates with that finding. Indulgence must be withheld. See *Neuman (Pvt) Ltd* v *Marks* 1960 R&N 166 (SR) at 168B-C; *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S) at 228F; *Karimazando* v *Standard Chartered Bank Zimbabwe* 1995 (2) ZLR 404 (S) at 407E-F."

In the result the appellant's appeal is hereby dismissed with costs.

MWAYERA J concurred. G

Gill Godlonton & Gerrans, appellant's legal practitioners

Gama & Partners, first respondent's legal practitioners

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[zRPz]RESERVE BANK OF ZIMBABWE v ROYAL BANK OF ZIMBABWE LTD & ANOR 2014 (2) ZLR 716 (H)

Citation	2014 (2) ZLR 716 (H)
Case No	Judgment No. HH-639-14
Court	High Court, Harare
Judge	Zhou J
Heard	17 December 2013; *CAV*
Judgment	19 November 2014
Counsel	*S J Chihambakwe,* for the applicant *F Girach*, with him *A Mambosasa,* for the first respondent No appearance for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *winding up – by court – grounds – inability to pay its debts – what must be shown – "just and equitable" – broad nature of such ground – disappearance of substratum of company as ground for winding* D *up – meaning of "substratum" in relation to a company – company established as a bank – banking licence surrendered – substratum thereby disappearing – bank – role in economy of country – effect of failure of bank*

Headnote

The first respondent ("the bank") was a registered commercial bank. In E August 2004 it was placed under curatorship by the applicant owing to problems occasioned by its poor lending practices and corporate governance issues. Its assets were acquired by a new entity known as Zimbabwe Allied Banking Group. The bank was given back its banking licence in September 2010. It was not long afterwards that problems F manifested themselves, which included serious undercapitalisation, persistent liquidity challenges and repeated losses. The bank failed to meet the minimum capital requirements for commercial banks. It continued to suffer losses. It had substantially less than the minimum capital requirement. It imposed a maximum daily withdrawal amount G on its clients. Apart from failing to pay its creditors, it failed to give effect to transfers of funds from its clients' accounts into the accounts of third parties. It owed its creditors a total of US$2.27 million as at 31 May 2012. Statutory obligations were not being paid. It showed a cumulative loss of US$5.98 million as at 30 June 2012. Since its re-licencing the first respondent had been using depositors' funds to cover H

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its A operational expenses, resulting in a non-funded deficit of US$4.1 million as at 14 June 2012.

Shareholders of the bank who opposed the application admitted its problems but alleged that attempts to secure investors were frustrated by the applicant. They contested the value of the assets and liabilities of the bank as stated by the provisional liquidator. The applicant sought the B winding up of the bank on the grounds that it would be just and equitable to do so. The reasons given by the applicant were admitted by the bank.

Held, that a company may be wound up by the court if, among other reasons, the company is unable to pay its debts or if the court is of the opinion that it is just and equitable that the company should be wound up. These C are separate and distinct grounds. A company is deemed to be unable to pay its debts if any of the criteria set out in s 205 of the Companies Act [*Chapter 24:03*] are in existence. Section 205(c) provides that, in determining whether a company is unable to pay its debts, the court is enjoined to take contingent and prospective liabilities into account. Thus the liabilities need not be regarded as if they are immediately due and D payable, but they must be considered for what they are, *viz*. contingent or prospective liabilities, that is to say, as factors having a bearing on the question whether the company is at present unable to pay its debts. Also, in order to determine whether a company is unable to pay its debts it is not necessary to prove that its liabilities exceed its assets; it is E sufficient if it is shown that the company is in a situation of commercial insolvency. A company is considered to be commercially insolvent if it is unable to meet the current demands upon it, that is to say its day to day or current liabilities in the ordinary course of its business.

Held, further, that the "just and equitable" provision is an omnibus provision in terms of which the court does not confine itself to the facts, but also to F considerations of justice and equity. The manner in which the business of a company is being managed can be impugned to the extent of justifying a winding up by the court. Here, the bank was heavily indebted and was unable to meet its day-to-day liabilities. The depositors who held accounts with it had not been refunded their money and the bank did not have the capacity to pay the depositors what was due to them. The G imposition of a maximum daily withdrawal limit and the failure to pay the statutory obligations were sufficient evidence of a failure to meet the everyday liabilities. The report prepared by the provisional liquidator and the undisputed evidence tendered by the applicant illuminated the bank as a failed company with no prospects of ever being able to resume H operations as a normal financial institution. Even if one were to accept

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the unsubstantiated assertion by the shareholders that the bank had A assets which exceeded its liabilities, those assets had not been shown to be liquid assets or readily realisable assets out of which the bank could pay its debts.

Held, further, that the business of banking occupies a central role in any economy. It has a potential to destroy confidence in an economy if B not properly conducted. The business of banking entails, among other undertakings, the undertaking to pay cheques drawn upon the bank by its customers in favour of third parties and the conduct of current accounts in terms of which customers must be able to freely withdraw their money whenever the need arises. The relationship between a bank and its customer is basically a debtor and creditor relationship where an C account is in the credit, and all money that lands into the bank's hands for the credit of a

current account is to be taken as lent to the bank. The bank was unable to allow its customers to withdraw money as and when they needed it and imposed a small maximum daily withdrawal. There was serious abuse of depositors' funds. It was clear, therefore, that the bank was unable to pay its debts. D

Held, further, that the courts have found it just and equitable to wind up companies on the grounds of the disappearance of the substratum. In the context of company law, the substratum would be that business or undertaking which in the contemplation of the company's memorandum the company will carry on. In order to determine what the substratum of E a company is, the court is not necessarily confined to the main object of a company as set out in the memorandum of the company, but is entitled to ascertain the main business which the company actually carries on. *In casu*, the name of the bank and evidence of its previous undertaking ineluctably show that it was established to carry on the business of banking, as a commercial bank. It had surrendered its banking licence. F That meant that it was unable to carry on the business of banking, although it still owed depositors the funds which they deposited with it.

Held, further, that the failure of the substratum of a company is established by proof that it has become objectively impossible for the company to achieve its objects; the intention of the company is irrelevant. The G bank failed to meet the minimum capital requirement for a commercial bank, and owed large sums of money to creditors. It did not have the resources to start any banking business by whatever name. Justice and equity demanded that the bank be wound up in order to salvage what little might be recovered, for the benefit of its creditors. H

Zhou J

Cases referred to A

Barclays Bank (DCO) v *Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C)

Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v *Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H) B

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

Gillis-Mason Construction Co (Pty) Ltd v *Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T)

Hirschorn v *Evans (Barclays Bank Ltd garnishees)* [1938] 3 All ER 491 (CA)

Joachimson v *Swiss Bank Corp* [1921] 3 KB 110 C

Re *Kitson & Co* [1940] 1 All ER 435 (CA)

Moosa NO v *Mavjee Bhawan (Pty) Ltd & Anor* 1967 (3) SA 131 (T)

Pienaar v *Thusano Foundation* 1992 (2) SA 552 (B)

Rosenbach & Co (Pty) Ltd v *Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D)

Shagelok Chemicals (Pvt) Ltd v *Intl Finance Corp & Ors* 2003 (1) ZLR 207 (S) D

Ex p *Strydom NO:* In re *Central Plumbing Works (Natal) (Pty) Ltd* 1988 (1) SA 616 (D)

United Dominions Trust v *Kirkwood* [1965] 2 All ER 992 (QB)

Legislation considered E

Companies Act [*Chapter 24:03*], ss 205(c) & 206(f) & (g)

Case information

S J Chihambakwe, for the applicant

F Girach, with him *A Mambosasa,* for the first respondent

No appearance for the second respondent F

Judgment

Zhou J: This is a matter for the confirmation or discharge of a provisional order granted by this court on 20 February 2013. The order placed the first respondent under provisional liquidation in

terms of the provisions of the Companies Act [*Chapter 24:03*]. The confirmation of the provisional order is opposed by two of the respondent's shareholders, Jeffery Mzwimbi and G Durajadi Simba.

The respondent is a company incorporated in accordance with the laws of Zimbabwe, and is a registered commercial bank in terms of the relevant provisions of the Banking Act [*Chapter 24:20*]. It was incorporated on 6 November 1997 but was only registered as a commercial bank on 8 May 2002. H In August 2004 the first respondent was placed under curatorship by

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the applicant owing to problems occasioned by its poor lending practices A and corporate governance issues. Its assets were acquired by a new entity known as Zimbabwe Allied Banking Group.

The first respondent was given back its banking licence in September 2010. It was not long after that that problems manifested themselves, which included serious undercapitalisation, persistent liquidity challenges and repeated losses. B The first respondent failed to meet the minimum capital requirements for commercial banks which was US$12.5 million then. It continued to suffer loses. The unchallenged evidence of the applicant is that as at 31 May 2012 the first respondent required no less than US$11.4 million in order to comply with the minimum capital requirement of US$12.5 million. It imposed a maximum daily withdrawal amount of US$50 on its clients. Apart C from failing to pay its creditors, the first respondent failed to give effect to transfers of funds from its clients' accounts into the accounts of third parties. It owed its creditors a total of US$2.27 million as at 31 May 2012. Statutory obligations to the National Social Security Authority, Zimbabwe Revenue Authority and Workers' Compensation Insurance Fund were not being paid. Investigations by the applicant revealed that the first respondent recorded D a cumulative loss of US$5.98 million as at 30 June 2012, and that since its re-licencing the first respondent had been using depositors' funds to cover its operational expenses, resulting in a non-funded deficit of US$4.1 million as at 14 June 2012. The applicant also makes allegations of mismanagement by the respondent's senior management, as well as violations of the law, among other allegations. E

On 27 July 2012 the first respondent surrendered its banking licence to the applicant. It is, therefore, without a licence at this juncture despite holding funds belonging to its clients.

The shareholders of the first respondent who oppose the application admit F its problems as set out in the founding affidavit generally. They explain that the first respondent was exempted by the applicant from meeting the statutory capital reserve of US$12 500 000 up to September 2012. The shareholders allege that attempts to secure investors were frustrated by the applicant. In particular, the allegation made is that the applicant refused to G approve an investor who wanted to inject a sum of US$7 million on the ground that the investor was a family trust. They also refer to a failed deal with the Commercial Bank of Africa which, according to them had offered to recapitalise the first respondent. But letters from the Commercial Bank of Africa and the Central Bank of Kenya dated 11 December 2012 show that the Central Bank of Africa took the decision not to proceed with the H

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proposed A investment on the basis that it would not be able to meet the new minimum capital requirement of US$100 million.

The shareholders contest the value of the assets and liabilities of the first respondent as stated by the provisional liquidator. According to them the value of US$6 300 000 ascribed to the fixed assets failed to take into account B the fact that expired money instruments listed in table 11 of the liquidator's report were covered by landed assets and that upon expiry those assets would return to the first respondent's books, thereby raising the value of the fixed assets. They state that the figure of US$5 500 000 recorded in the provisional liquidator's report includes an interbank loan of US$529 194 which was due to Banc ABC which has since been dropped in the maturities of July 2012. C According to the shareholders there are negotiations under way to restructure and recapitalise the first respondent by converting "debts owed to the major creditors in an admitted amount of US$3 700 000 into equity or long term debt" and obtaining a microfinance banking licence in order to ensure that operations resume and that sufficient funds are raised to settle all the debts.

The applicant contends as follows in para 25 of the founding affidavit: D

"I believe that it is just and equitable for the first respondent (to) be wound up because:

25.1 it has no hope of recovery;

25.2 its liabilities exceed its assets – hence it is insolvent;

25.3 it is unable to pay its depositors, creditors and statutory obligations – hence E it is unable to pay its debts;

25.4 it is unable to raise the minimum capital required for commercial banks;

25.5 it has failed to court investors to meet the minimum capital requirements;

25.6 it has voluntarily surrendered its banking licence to the applicant; and

25.7 it has poor corporate governance." F

The above allegations are admitted by the first respondent.

The inability to pay debts and the "just and equitable" grounds are distinct grounds upon which a company may be wound up in terms of the Companies Act [*Chapter 24:03*]. Section 206 of the Act provides as follows:

"A company maybe wound up by the court – G

(a) – (e) …

(f) if the company is unable to pay its debts;

(g) if the court is of opinion that it is just and equitable that the company should be wound up."

In regard to inability of a company to pay its debts, s 205 of the Act provides H as follows:

Zhou J

"A company shall be deemed to be unable to pay its debts – A

(a) …

(b) …

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company." B

In other words, what is required is proof to satisfy the court that the company is unable to pay its debts. See *Cilliers & Benade Corporate Law* 3 ed (edited by H S Cilliers *et al,* 2000) p 504. A company is deemed to be unable to pay its debts if any of the criteria set out in s 205 are in existence. Section 205(c) provides that in determining whether a company is unable to pay its debts the C court is enjoined to take contingent and prospective liabilities into account. Thus the liabilities need not be regarded as if they are immediately due and payable, but they must be considered for what they are, viz. contingent or prospective liabilities, that is to say, as factors having a bearing on the question whether the company is at present unable to pay its debts: *Gillis-Mason Construction Co (Pty) Ltd* v *Overvaal Crushers (Pty) Ltd*D1971 (1) SA 524(T); *Barclays Bank (DC&O)* v *Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C) at 950. Also, in order to determine whether a company is unable to pay its debts it is not necessary to prove that its liabilities exceed its assets; it is sufficient if it is shown that the company is in a situation of commercial insolvency. A company is considered to be commercially E insolvent if it is unable to meet the current demands upon it, that is to say its day to day or current liabilities in the ordinary course of its business. See *Rosenbach & Co (Pty) Ltd* v *Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597; Ex p *Strydom NO:* In re *Central Plumbing Works (Natal) (Pty) Ltd;* Ex p *Spendiff NO:* In re *Candida Footwear Manufacturers (Pty) Ltd;* Ex p *Spendiff NO:* In re *Jerseytex (Pty) Ltd* 1988 (1) SA 616 (D). F

The "just and equitable" section is an omnibus provision in terms of which the court does not confine itself to the facts, but also to considerations of justice and equity. The manner in which the business of a company is being managed can be impugned to the extent of justifying a winding up by the court. See *Ebrahimi* v *Westbourne Gallaries* [1972] 2 All ER 492 (HL); *Moosa NO* v *Mavjee Bhawan (Pty) Ltd & Anor* 1967 (3) SA 131 (T) at 136. G

In the instant case, while there are disputes regarding some figures, it is not in dispute that the first respondent is heavily indebted and that it is unable to meet its day-to-day liabilities. It is not in dispute that the depositors who held accounts with the first respondent have not been refunded their money and that the first respondent does not have the capacity to pay the depositors H

Zhou J

what A is due to them. The imposition of a maximum daily withdrawal limit and the failure to pay the statutory obligations are sufficient evidence of a failure to meet the everyday liabilities. The report prepared by the provisional liquidator and the undisputed evidence tendered by the applicant illuminate the first respondent as a failed company with no prospects of ever being able to resume operations as a normal financial institution. Even if one was B to accept the unsubstantiated assertion by the shareholders that the first respondent has assets which exceed its liabilities, those assets have not been shown to be liquid assets or readily realisable assets out of which the first respondent can pay its debts.

The business of banking occupies a central role in any economy. It has a C potential to destroy confidence in an economy if not properly conducted. The celebrated case of *United Dominions Trust* v *Kirkwood* [1965] 2 All ER 2992 (QB) laid down what constitutes the business of banking. The business entails, among other undertakings, the undertaking to pay cheques drawn upon the banker by his customers in favour of third parties and the conduct of current accounts in terms of which customers must be able to freely withdraw D their money whenever the need arises. See also M Megrah & F R Ryder *Paget's Law of Banking* 9 ed p 5. The relationship between a banker and its customer is basically a debtor and creditor relationship where an account is in the credit, and all money that lands into the banker's hands for the credit of a current account is to be taken as lent to the banker. See *Joachimson* v *Swiss Bank Corporation* [1921] 3 KB 110; *Hirschorn* v *Evans (Barclays Bank Ltd garnishees)*E [1938] 3 All ER 491 (CA). The uncontested evidence of the applicant is that the first respondent was unable to allow its customers to withdraw money as and when they needed it and imposed a maximum daily withdrawal of US$50. The provisional liquidator's report also reveals that there was serious abuse of depositors' funds by the first respondent. It F is clear, therefore, that the first respondent is unable to pay its debts.

Circumstances in which the courts have granted winding up orders on the ground of the just and equitable provision include disappearance of the substratum. According to the *Longman Dictionary of Contemporary English*, "substratum" means "an idea, quality, etc. which forms the hidden base of G something else". In the context of company law, the substratum would be that business or undertaking which in the contemplation of the company's memorandum the company will carry on. The authorities show that in order to determine what the substratum of a company is the court is not necessarily confined to the main object of a company as set out in the memorandum of the company, but is entitled to ascertain the main business which the company H actually carries on. *In casu,* the name of the first respondent and evidence of

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Zhou J

its previous undertaking ineluctably show that it was established to carry on A the business of banking, as a commercial bank. It has surrendered its banking licence. That means it is unable to carry on the business of banking, although it still owes depositors the funds which they deposited with it.

The failure of the substratum of a company is established by proof that it has become objectively impossible for the company to achieve its objects; B the intention of the company is irrelevant: *Pienaar* v *Thusano Foundation* 1992 (2) SA 552 (B); Re *Kitson & Co* [1940] 1 All ER 435 (CA) at 439. The intention to obtain a microfinance banking licence as expressed by the shareholders is therefore irrelevant, as that was not the basis upon which the first respondent received the depositors' money. It failed to meet the minimum capital requirement for a commercial bank, and owes large sums C of money to creditors. It has not shown that it has the resources to start any banking business by whatever name.

This court has a discretion as to whether or not to grant an order for the winding up of a company. See *Shagelok Chemicals (Pvt) Ltd* v *International Finance Corp & Ors* 2003 (1) ZLR 207 (S) at 217E-H; *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd* v *Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H) D at 414G-415A. That discretion must, of course, be exercised judicially upon a consideration of all the relevant facts and circumstances of the case. The first respondent was placed under curatorship in 2004. When it was allowed to resume its banking business its financial situation was still in bad shape. The situation worsened through a combination of factors, which included a E failure to moblise resources as well as bad management. It did not show signs of recovery during the period that it was under provisional liquidation. The real losers are the various creditors, including members of the public who held money in their accounts with the first respondent. Justice and equity demand

that the first respondent be wound up in order to salvage the little that may be recovered for the benefit of its creditors. F

In the result, it is ordered that the provisional order granted by this court on 20 February 2013 be and is hereby confirmed.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners

Mambosasa Legal Practitioners, legal practitioners for the interveners G

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[zRPz]KM INSURANCE v MARUMAHOKO 2014 (2) ZLR 725 (H)

Citation	2014 (2) ZLR 725 (H)
Case No	Judgment No. HH-678-14
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	25 November 2014
Judgment	25 November 2014
Counsel	*N Bvekwa,* for the plaintiff Defendant in person
Case Type	Pre-trial conference
Annotations	No case annotations to date

Flynote

Practice and procedureC – *pre-trial conference – purpose of – no disputed issues remaining after conference – no need for judge to refer matter to trial – may enter judgment immediately*

Headnote

The duties of a judge in a pre-trial conference include: (a) identification of D issues to be resolved at trial; (b) identifying common cause areas; (c) eliminating frivolous claims or defences; (d) identifying witnesses and documents; and (e) discussing possibilities of a settlement. After the conference the judge either issues an order reflecting the results of the conference or refers the matter for trial on identified issues. The judge E cannot simply refer a matter to trial where there are no disputed issues to be resolved at trial. To do so would defeat the real purpose for which a trial court is constituted. When it is clear that a litigant simply refuses to settle but concedes that there are no issues for determination at trial, it is permissible for the pre-trial judge to enter judgment at that stage. F

Case information

N Bvekwa, for the plaintiff

Defendant in person

Judgment

Matanda-Moyo J: On 17 November 2014 this matter came before me for a pre-trial conference. The parties duly attended and the only issue G was whether the loan amount was repaid. The plaintiff submitted that an amount of $18 897 remained outstanding to date. The defendant submitted that such amount was settled. I postponed the matter to 24 November 2014 to enable the defendant to submit proof of payment. On 24 November 2014 I postponed the matter to 25 November 2014 at 1000 hours. At 8:59 am on H 25 November 2014 the defendant's lawyers filed a renunciation of agency.

Matanda-Moyo J

Such conduct by lawyers is intolerable. At worst the lawyer was supposed A to attend and explain to me the reasons for such renunciation. In future, I will not hesitate to order costs *de bonis propriis* against such offending legal practitioners. Such conduct is disrespectful to the very court to which lawyers are officers of.

On the 25 November 2014 the defendant attempted to proffer a different B defence from the one in papers. The defendant admitted to owing the said amount but disputed receiving farming inputs to the value of $20 000. The pleadings in this matter were closed, and the defendant having not sought and obtained leave to reopen proceedings, could not be allowed to proffer a new defence at that stage.

The duties of a judge in a pre-trial conference include: C

(1) identification of issues to be resolved at trial

(2) identifying common cause areas

(3) eliminating frivolous claims or defences

(4) identifying witnesses and documents

(5) discussing possibilities of a settlement. D

After the conference a judge either issues an order reflecting the results of the conference or refers the matter for trial on identified issues.

The question is, can a pre-trial judge simply refer a matter to trial where there are no disputed issues to be resolved at trial? Certainly not. To do so would amount to defeating the real purpose from which a trial court is constituted E to do. When it is clear that a litigant simply refuses to settle but concedes that there are no issues for determination at trial. I am of the view that it is permissible for the pre-trial judge to enter judgment at that stage.

I found that there were no issues to refer to trial as the parties basically agreed that a loan amounting to the tune of $20 000 was advanced to the defendant F for the 2011-2012 agricultural season. A sum of $4 000 was advanced for tobacco insurance and $2 850 was advanced for livestock insurance, making a total of $26 850. Adding interests and other costs, the amount came to $33 355. The defendant has since paid the sum of $14 458 towards extinguishing of the debt, leaving a balance of $18 897 which is the amount claimed in the summons. G

I therefore did not identify any issues for referral to trial. Accordingly judgment is entered in favour of the plaintiff in the following;

1. That defendant pay to plaintiff the sum of $18 896.15 together with interest at the rate of 60 per cent *per annum* from 31 March 2011 to date of full payment. H

Matanda-Moyo J

2. Collection A commission in terms of the loan agreement.

3. Costs on the higher scale.

Musekiwa & Associates, plaintiff's legal practitioners

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[zRPz]ZUVA PETROLEUM (PVT) LTD v MOTSI & ANOR 2014 (2) ZLR 728 (H)

Citation	2014 (2) ZLR 728 (H)
Case No	Judgment No. HH-648-14
Court	High Court, Harare
Judge	Chigumba J
Heard	6 November 2014; *CAV*
Judgment	26 November 2014
Counsel	*E Jera*, for the applicant Mrs *J B Wood*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Costs – *legal practitioner and client scale – unethical conduct on part of* C *legal practitioners – practitioners deliberately failing to advise other party of planned proceeding, result in unnecessary litigation – costs on higher scale awarded*

Legal practitioner – *conduct and ethics – duty to other legal practitioners –* D *duty to advise other party's legal practitioners of planned proceedings – deliberately failing to do so, resulting in unnecessary litigation – costs on higher scale awarded*

Practice and procedure – *judgment – default judgment – rescission – applicant unaware of proceedings – whether in wilful default – legal practitioner* E *failing to advise applicant of proceedings – good prospects of success in main action – rescission granted*

Headnote

The applicant was the plaintiff in an action brought against the respondents. They had sought an order for further particulars within a stated period, failing which the applicant's claim would be deemed to have been F dismissed. The order was granted in default. The applicant sought rescission of the order on the grounds that there was good and sufficient cause for rescission. It was argued that default was not wilful, that it had shown that it had good prospects of success in the main matter and that it has a genuine and unassailable claim against the respondents. G

The order obtained by the respondents had not been served on the applicant, who thus did not know when the period within which to supply further particulars began to run. The applicant admitted that the order did not stipulate that it be served on the applicant. The applicant had not been advised by its legal practitioner that an application had been made to compel the delivery of further particulars. The legal practitioner had H

taken A the view that the particulars requested were matters of evidence which were not required to enable the respondents to plead, so decided not to oppose the application to compel delivery of further particulars. He expected to be served with a copy of the order to compel delivery so that he could comply with it, but this was not done. He admittedly failed to apply his mind to the effect of the draft order sought in the B application to compel delivery of further particulars.

The applicant submitted that it should not be punished for the tardiness of its legal practitioner, because its explanation was sufficient, and its conduct is not blameworthy to the extent that it exceeded the limit beyond which a litigant cannot escape the result of his attorney's lack of diligence. It C should escape the consequences of its legal practitioners conduct because he misled it, gave it wrong advice, and failed to follow up progress in the matter. There was an understandable oversight, because it could have been presumed that the other party would serve the proposed order upon it. A convention has arisen in the practice of law that an order of court which requires a party to perform an act must be served on that party. It D argued that it had good prospects of success in the main matter, and that the respondents should pay costs on the higher scale because they had displayed unethical and deplorable conduct by failing to serve the court order on the applicants, and by tenaciously defending the application for rescission of default judgment when they knew full well that they E had not paid what was due and owing to the applicant.

Held, that the applicant clearly did not have full knowledge of the service or the set down of the matter. It did not possess knowledge of the risks attendant upon default, and did not freely take a decision to refrain from appearing. For the application to be refused, there must be an element of wrongdoing on the part of the applicant and such wrongdoing must F be solely and wholly attributable to the applicant, after being given competent legal advice. There should be *prima facie* evidence of a deliberate failure to act in the manner that the applicant ought to have acted, with full knowledge of the consequences of acting or failing to act in the prescribed manner, for a charge of lack of *bona fides* in bringing an application for rescission to be sustainable. G

Held, further, that the respondents had not shown any defence on the merits.

Held, further, that although the respondents were not obliged at law to serve a copy of the order on the applicant, there is a convention, a rule of practice, ethics and professionalism that binds all officers of the court to be courteous and respectful towards each other. This is a noble and H honourable profession, and the respondent's counsel ought to have

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Chigumba J

done the honourable thing and advised counsel for the applicant of the A existence of the order before the time stipulated had expired. If that courtesy had been extended, the multiplicity of actions that resulted would have been avoided. Costs would be awarded on a punitive scale to discourage such conduct in future.

Cases referred to B

Deweras Farm (Pvt) Ltd & Ors v *Zimbank* 1997 (2) ZLR 47 (H)

Dunmuc (Pvt) Ltd v *Gulliver Consolidated Ltd* HH-29-04

Garret v *Stevens* HB-60-04

Highline Motor Spares & Hardware (1933) (Pvt) Ltd & Ors v *Zimbank* 2002 (1) ZLR 514 (S) C

Khumalo v *Mufarirano* HB-11-04

Mahembe v *Matombo* HB-13-03

Moyo & Ors v *Madondo NO* HB-44-07

Mpofu v *Mpofu & Ors* HB-23-09

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

Rautenbach v *Symington* 1995 (4) SA 583 (O)D

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

Sapirstein & Ors v *Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A)

Shinga Express (Pvt) Ltd v *Hubert Davies (Pvt) Ltd* 1989 (2) ZLR 45 (H)

Songore v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S)

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

Legislation considered

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

Case information

E Jera, for the applicant

Mrs *J B Wood*, for the respondents F

Judgment

Chigumba J: This is an application for rescission of default judgment brought in terms of r 63 of the High Court Rules, 1971. The relief sought is that: judgment in case HC 1805/12 entered against the applicant on 28 March 2012 be rescinded, the applicant be granted leave to supply further particulars requested by the first and second respondents under case G HC 11517/11 within 5 days of the date of the granting of this order, and that the first and second respondents pay costs of suit on a legal practitioner client scale if opposed to the application.

The background to this matter is that under case no. HC1805/12, this court granted an order that: H

Chigumba J

1. The A respondent (applicant in this matter) supplies the further particulars requested by the applicants on 6 February 2012 within 10 days of the date of this order, failing which the respondents claim in case number HC11517/11 shall be deemed to be dismissed.
2. The respondent bears the costs of this application. B

When that order was granted, the applicant was in default. It contends that the order was not served on it, consequently it was unable to supply the further particulars within the 10 day period in terms of the court order. The applicant avers that it became aware of the order on 10 January 2013. The present application was filed on 25 January 2013. It was set down for hearing on 15 July 2013. Although this was not raised by any party at the hearing of C the matter in terms of the law that governs applications of this nature (r 63), the court considered itself bound, by its duty to ensure compliance with its own rules, to consider whether the applicant had complied with the provisions of r 63 (1) in relation to the stipulated time period within which to file an application for rescission of default judgment. The court's findings in that D regard were taken up on appeal. The court had considered the question of what constituted the "making" of an application generally, and specifically, for purposes of compliance with the provisions of r 63. The court considered that one school of thought suggested that when court process is filed with the office of the Registrar and date stamped, that was when an application E was generally, "made". By implication, if that happens within 30 days of the date when an applicant acquired knowledge of the judgment sought to be rescinded, then that applicant is deemed to be properly before the court for purposes of r 63(1).

The court's decision was appealed against on two grounds of appeal, namely, F whether the court erred in finding that the applicant failed to "make a Court Application" for rescission of judgment within one month, when in actual fact the application was made within the period as specified in the rules of the High Court, since making a court application should not include setting it down within a period of one month, and secondly, that the court misdirected itself in dismissing the application without considering the G matter on the merits. It has been brought to my attention that the full bench of the Supreme Court allowed the appeal, and has now remitted the matter back to me for consideration of the merits of the application for rescission of default judgment.

The law that governs applications in terms of r 63 of the High Court Rules, H 1971 is as follows. Rule 63 provides:

Chigumba J

"**63 Court may set aside judgment given in default**A

(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.

(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment B 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".

The meaning of the phrase "good and sufficient cause", which is contained in r 63 (2), has been widely debated and is now fairly settled. In order for good and sufficient cause to set aside a judgment given in default to be found, the party seeking rescission must: C

1. present a reasonable and acceptable explanation for its default.
2. present a *bona fide* explanation.
3. show that it has a *bona fide* defence (claim) which has *prima facie* prospects of success. See *Highline Motor Spares & Hardware (1933) (Pvt) Ltd & Ors* v *Zimbank* 2002 (1) ZLR 514 (S), *Moyo & Ors* v *Madondo NO*D HB-44-07*, Deweras Farm (Pvt) Ltd & Ors* v *Zimbank* 1997 (2) ZLR 47 (H).

It was correctly submitted on behalf of the respondents that the onus is on an applicant for rescission of judgment to show a reasonable and acceptable explanation for his default, and to show a *bona fide* defence on the merits E which carries *prima facie* prospects of success. The respondents relied on *Shinga Express (Pvt) Ltd* v *Hubert Davies (Pvt) Ltd* 1989 (2) ZLR 45 (H) as authority for these propositions. In my view, this re-statement of the principles that should guide a court in consideration of the merits of an application for rescission, made in terms of r 63 of the High Court Rules, accurately captures the issues that fall for determination in this present F case. The applicant contended that it had given a reasonable and acceptable explanation for its default and that this default was not wilful, that it had shown that it had good prospects of success in the main matter and that it has a genuine and unassailable claim against the respondents. In support of these contentions it was submitted on the applicant's behalf that it is common cause that the order obtained by the respondents was not served on it. The G applicant did not know when the 10 day period within which to supply further particulars began to run, because it did not know the date of the order. The applicant admitted that the order did not stipulate that it be served on it but denied being advised by its legal practitioner at the time that an application had been made to compel the delivery of further particulars. The applicant H

Chigumba J

submitted A that the legal practitioner who was seized with the matter at the time has deposed to an affidavit in which he confirms that he did not advise the applicant of the application to compel delivery of further particulars. The legal practitioner confirms in that affidavit that he only advised the applicant of the existence of such an application on 11 April 2012, well after the order to compel delivery had been granted. The applicant submitted that its legal B practitioner would tell him that the matter was waiting for allocation of a hearing date whenever he made inquiries about progress in this matter.

The applicant submitted that the explanation given by the legal practitioner could not be said to be unreasonable because he had formulated the view that the particulars requested were matters of evidence which were not required to C enable the respondents to plead, that he decided not to oppose the application to compel delivery of further particulars in a bid to avoid escalation of costs, that he expected to be served with a copy of the order to compel delivery so that he could comply with it, that he was never served with a copy of the order and that he failed to apply his mind to the effect of the draft order sought in the application to compel delivery of further particulars. The applicant D submitted that the views held by its previous legal practitioner were *bona fide*, even though these views resulted in an undesirable consequence which was exacerbated by the failure to serve the order to compel delivery on him. The applicant submitted that it relied on the advice of its legal practitioner and that, it subsequently withdrew its business from that legal practitioner E because of the prejudice he occasioned to it by his conduct of this matter.

The applicant submitted that this was not such a case where the court ought to find that it deserved to be visited with the conduct of its legal practitioner at the time. It submitted that the legal practitioner misled the applicant by failing to advise it of the existence of the application to compel

delivery of further particulars, despite numerous queries and follow ups, and that, F applicant did not fail to act when the need to act arose, when it became aware of the existence of the order. The applicant submitted that it should not be punished for the tardiness of its legal practitioner, because its explanation is sufficient, and its conduct is not blameworthy to the extent that it has exceeded the limit beyond which a litigant cannot escape the result of his G attorney's lack of diligence. See *S* v *McNab* 1986 (2) ZLR 280 (S) and *Moyo & Ors* v *Madondo NO supra.* The applicant submitted that, in this case, the court should find that it can and should escape the consequences of its legal practitioner's conduct because he misled it, gave it wrong advice, and failed to follow up progress in the matter. The applicant submitted that it cannot be punished in a scenario where its own legal practitioner was misleading it. Its H oversight in the matter is accordingly understandable. The applicant relied

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Chigumba J

on *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) as authority for this proposition. A In that case, it was held that where there is an understandable oversight where one would assume that the other party would serve the order upon it should the order be granted. It is a convention that has arisen in the practice of law that an order of court which requires a party to perform an act must be served on that party.

In *Zimbank* v *Masendeke* 1995 (2) ZLR 400 (S) it was stated that: B

> "Wilful default occurs when a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing…"

The applicant's submission that the circumstances of this case show that its default was not wilful because it was never appraised of the existence of the C application, let alone of the risks attendant upon default, was accepted by the court. The submission made on behalf of the respondent, based on the *dicta* in *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 212B-H, that the explanation tendered on behalf of the applicant was "an insult to the intelligence of the court", did not find favour with me. The applicant clearly D did not have full knowledge of the service or the set down of the matter. It did not possess knowledge of the risks attendant upon default, and did not freely take a decision to refrain from appearing. Mr Harrison Nkomo, counsel of record for the applicant at the time, deposed to an affidavit in which he admitted to misleading his client by failing to advise it of the decision that he took, not to oppose the application to compel delivery of further particulars. E He explained his reasoning for the decisions that he made. I imagine the affidavit was not easy for him to depose to. But it was honourable of him to place the truth before the court. His decision costs him his client, which may or may not be viewed as sufficient punishment. How can this court find that it is not an acceptable explanation, or a reasonable one, when an F officer of this court has sworn, on oath, that he misled his client, albeit with no *mala fides,* but in a bid to save escalating legal fees? In my view, for an explanation given by an applicant for rescission of judgment in terms of r 63 to be found to be unacceptable or unreasonable, there must be some conduct on the part of that applicant, some deliberate and express action or omission, taken with full knowledge of the set down of the application, of G the dates of hearing, of the risks involved in not appearing or defending the matter, accompanied by a recklessness or a sense of a rolling of the dice in regards to the outcome of the application. The circumstances of this case, and the evidence placed before me, do not support the contention that the explanation given by the application is neither acceptable nor unreasonable. H

Chigumba J

It A was submitted by the applicant that has always had a desire to collect the sums due and owing to it from the respondents. The amount alleged to be owing, US$66 836, is significant; it is not small change. The applicant submitted that instead, it is respondents' conduct that clearly shows *mala fides,* they did not disclose the existence of the order; the order entitled them to recover costs as against the applicant which they were content to forgo B because they intended to snatch judgment and hide the order until it was too late. The applicant submitted that it is *bona fide* in bringing this application and that; all it is seeking is an opportunity to recover what is owed to it by the respondents.

It was submitted on behalf of the respondents that the applicant is acting C in bad faith because, to date, the further particulars requested have still not been supplied, and the omission on the part of

its legal practitioner should be visited on it. The respondents relied on the following cases as authority for this proposition: *Khumalo* v *Mufurirano* HB-11-04 and *Garret* v *Stevens*HB-60-04. D

In my view, there must be an element of wrongdoing on the part of an applicant for rescission of default judgment made in terms of r 63, such wrongdoing as is solely and wholly attributable to the applicant, after being given competent legal advice. There should be *prima facie* evidence of a deliberate failure to act in the manner that such an applicant ought to have acted, with full knowledge of the consequences of acting or failing to act E in the prescribed manner, for a charge of lack of *bona fides* in bringing an application for rescission, to be sustainable.

The applicant contended that it has a genuine and unassailable claim as against the respondents. The claim is based on a lease agreement which was entered into between the applicant and the second respondent, in terms F of which the applicant would supply fuel on credit, and in regard to which the first respondent bound himself as surety and co-principal debtor to the second respondent for the due performance by the second respondent of all the obligations in terms of the lease. The applicant averred that the invoices which it raised after supplying fuel to the second respondent have remained unpaid to date, and that the second respondent has not shown that it paid G the amount in question, to the applicant, by producing receipts in proof of payment. The applicant submitted that its case was not hopeless, and relied on *Mpofu* v *Mpofu & Ors* HB-23-09 as authority for the proposition that:

> "Looking at the facts that are common cause, I do not consider the applicant's case as being hopeless. It is trite that the court would not consider that the H application should be refused unless it is thought that the applicant's case is

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Chigumba J

> hopeless. *Stevenson* v *Broadly NO* 1972 (2) RLR 467 (A). In this regard, that A is what McNally said in the *Songore* case, *supra*, at 213A:
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> > 'One is naturally reluctant to reach a decision which would result in the giving of judgment against a person without his being heard, when he protests that he has a valid defence. If I were convinced that the defendant in this case was *bona fide* and had a *prima facie* defence, then I might be unjustified in condemning him for a short delay despite the inadequacy of B his explanation.'"

The applicant contended that it has a good *prima facie* case against the respondents and that it has produced sufficient evidence to show that the probabilities are in its favour. The applicant submitted that the respondents have not disputed that the parties entered into a lease agreement, or disputed that the first respondent bound himself as surety and co-principal debtor C with the second respondent, or disputed that the second respondent occupied the applicant's premises pursuant to a lease agreement, or disputed that the applicant supplied fuel and raised invoices to the second respondent for payment for the fuel. The applicant submitted that all these admissions show that it has good prospects of succeeding in its claim against the respondents, especially when the respondents have not submitted any evidence to prove D that they paid their rentals, and paid in full for the fuel supplied by the applicant. On good prospects of success, see *Dunmuc (Pvt) Ltd* v *Gulliver Consolidated Ltd* HH-29-04.

The applicant submitted that this is a case where the court ought to exercise its discretion and award costs on a higher scale because the respondents E deserve to be punished for their conduct. It relied on Rautenbach v Symington 1995 (4) SA 583 (O), where it was stated that a court's discretion to award costs on a legal practitioner-client scale is not limited to cases of dishonest, improper or fraudulent conduct, but also includes all cases where the circumstances warrant such an order. See also *Mahembe v Matambo* HB-13-03, and *Sapirstein & Ors v Anglo African Shipping Co (SA) Ltd*F1978 (4) SA 1 (A). It was suggested that the respondents displayed unethical and deplorable conduct for failing to serve the court order on the applicant, resulting in the applicant failing to supply further particulars within the stipulated period. It was further submitted that the respondents should be censured for tenaciously defending the application for rescission of default G judgment when they knew full well that they had not paid what is due and owing to the applicant. In *Zimbank v Masendeke supra*, after rescinding a judgment entered in default on the part of the appellant on the basis that there was a mistake, the court stated that:

> "… a lawyer in Mr Moyo's position must have at least suspected, when no appearance was entered by Zimbank, that something had gone wrong. A telephone H

Chigumba J

call A to Zimbank's legal department would, as we can now see with hindsight, have saved a lot of trouble and expense.

He did not do that. He obtained default judgment. But he must have at least half-expected that what did in fact happen would happen. In future cases, we may have to consider awarding costs personally against legal practitioners who not only 'snatch at their judgment', but then stubbornly and unreasonably B cling to them".

The applicant's contention that it had given a reasonable and acceptable explanation for its default and that this default was not wilful, that it had shown that it had good prospects of success in the main matter and that it has a genuine claim against the respondents, was supported by the C evidence which it placed before the court. It is my considered view that the applicant successfully discharged the onus that was incumbent upon it, on a *prima facie* basis, and that it would be in the interests of justice to give the applicant an opportunity to prove its case against the respondents, on a balance of probabilities. No useful purpose would be served by non-suiting the applicant, when it has sought to enforce its rights against the respondents D so consistently, and at considerable financial prejudice.

I am inclined to accede to the invitation made to the court to censure the conduct of the respondents. This matter has already been to the Supreme Court, albeit on a technical legal point that involved an interpretation of the case law that governs the time limits set out in terms of r 63(1). I accept E that the respondents were not obliged at law to serve a copy of the order to compel delivery of further particulars to the applicant. The order did not require service on the applicant. Yet surely there is a convention, a rule of practice, ethics and professionalism, that binds all officers of the court, to be courteous and respectful towards each other. This is a noble and honourable profession, and in my view the respondent's counsel ought to have done the F honourable thing and advised counsel for the applicant of the existence of the order before the time stipulated had expired. If that courtesy had been extended, the multiplicity of actions that resulted would have been avoided. For that reason, costs will be awarded on a punitive scale to discourage such conduct in future. G

In the result, it is ordered that:

1. Judgment in case no. HC 1805/12 entered against the applicant on 28 March 2012 be and is hereby rescinded.
2. The applicant is granted leave to supply further particulars requested by first and second respondents under case HC 11517/11 within five days H of the date of the granting of this order.

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3. First and second respondents pay costs of suit on a legal practitioner A client scale if opposed to the application.

Moyo & Partners, applicant's legal practitioners

Dhlakama Attorneys, respondent's legal practitioners B

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[zRPz]MHETE & ORS v CITY OF HARARE & ANOR 2014 (2) ZLR 739 (H)

Citation 2014 (2) ZLR 739 (H)

Case No Judgment No. HH-649-14

Court High Court, Harare

Judge Chigumba J

Heard 10 November 2014; *CAV*

Judgment 26 November 2014

Counsel *K Gama*, for the applicants
B Furidzo, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Administrative law – *administrative authority – who is – local authority – duty to comply with Administrative Justice Act – requirement to give reasons for actions – relief which may be granted*

Headnote

The three elderly applicants were suddenly and unceremoniously evicted by the first respondent from their homes in a high-density suburb in Harare. They had been living there under a rent to buy scheme. All the applicants had held certificates of occupation for their homes and, despite requests, none of them had been allocated alterative accommodation. The first respondent had been requested to give written reasons for its actions in respect of the applicants but had failed to do so. Aggrieved by the treatment they had received and relying on the provisions of ss 3 and 4 of the Administrative Justice Act [*Chapter 10:28*], the applicants sought an order to compel the first respondent to provide written reasons for its conduct and to determine an application to provide them with alternative accommodation.

The issue was whether a local authority could be compelled to give reasons for any administrative action that it takes, by any person who can show that such action has affected them; and if so, in terms of which statutory provisions, and what relief could be granted.

Opposing the application, the council stated that the administrative action complained of, and in respect of which applicants sought reasons, took place more than three years earlier and the applicants' claims against it had prescribed. The council averred that the first applicant's certificate of occupation was cancelled because she had sub-let the house. The first respondent intimated that the first applicant's legitimate expectation of being offered to purchase the property ought to have been tempered by

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the qualification that, although each individual tenant was entitled to be offered to purchase the house that he or she lived in, this was subject to the house being suitable for sale. The houses in that particular area were not offered to the sitting tenants for sale because, at that time, they used septic tanks which the sitting tenants had no financial capacity to maintain, especially in light of the fact that those houses had always been earmarked to cater for the poorer members of society, and it was part of the council's social responsibility to reserve those houses for the poorer members of society.

Held, that the first respondent was an administrative authority in terms of the Administrative Justice Act and the action taken by it in evicting the applicants and failing to provide them with alternative accommodation when asked to do so was an administrative action in terms of the Act, entitling the applicants in terms of s 4 thereof, to apply to the High Court for relief.

Held, further, that the applicants used the correct legal instrument for the kind of relief that they were seeking: the mere giving of reasons where none have been supplied and an explanation

where none had been D forthcoming, despite reasonable efforts to obtain explanations. The Act also requires that reasons be given within a reasonable period after the administrative action is taken, or there is an omission to take appropriate administrative action. The court could use the Act to consider whether the evictions of the applicants by the first respondents, which evictions E fitted within the definition of "administrative action", and the failure to allocate the applicants with alternative housing, were done in a lawful, reasonable and procedurally fair manner. Here, the actions were not lawful, reasonable or fair. The council failed to give reasons for its actions in writing when requested to do so; in regards to the request for alternative accommodation, the council was obliged to give written F reasons within a reasonable period. It also breached s 3(2) by failing to give notice of the proposed eviction or room to make representation.

Held, further, that in deciding on the appropriate remedy, the court must be guided by the provisions of s 5 of the Act, which stipulates that, for the purpose of determining whether or not an administrative authority has G failed to comply with the provisions of s 3, the High Court may have regard to whether or not a breach of the rules of natural justice, where applicable, has occurred. The determining factors are numerous (s 5(a) to (n)). The principles of natural justice imply a duty to give reasons for decisions. Being told why something is done is an important element in the fairness of a decision and it helps to inspire confidence in the decision. H

Chigumba J

Held, A further, that while any claim in respect of the evictions may have prescribed, the present application was not affected.

Cases cited

Buthelezi & Ors v *A-G, Natal* 1986 (4) SA 377 (D)

Carvahlo v *Min of Home Affairs* 1987 (2) ZLR 172 (H) B

Heatherdale Farms (Pty) Ltd & Ors v *Deputy Min of Agriculture & Anor* 1980 (3) SA 476 (T)

Mutambara & Ors v *Min of Home Affairs* 1989 (3) ZLR 96 (H)

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

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 2, 3, 4(1), 4(2) & 5

Constitution of Zimbabwe 2013, s 68

Case information

K Gama, for the applicants

B Furidzo, for the respondent D

Judgment

Chigumba J: It is often argued that the principles of natural justice imply a duty to give reasons for decisions. "Being told why", we know from childhood, is an important element in the fairness of a decision and it helps to inspire confidence in the decision. The Constitution of Zimbabwe protects E the rights of citizens to have access to adequate shelter. Like every other right in a democratic society, this right is subject to certain restrictions, in this case it is provided that whatever measures the state and all institutions and agencies of government at every level must take, in pursuit of the provision of adequate shelter, whether legislative measures or otherwise, must be "reasonable" and must be "…within the limits of the resources available". F See s 28 of the Constitution of Zimbabwe 2013. The Constitution also protects the family (s 25), elderly persons (s 21), youths (s 20), and children (s 19). The Constitution confers rights to administrative justice (s 68) on all. This is a case in which elderly citizens and their families and their children who resided in Mabvuku Township suddenly and unceremoniously found themselves deprived of their homes. A few of them have approached this G court complaining about the conduct of the first respondent in arbitrarily evicting them, from their homes of more than thirty years in some instances.

The bone of contention is that the administrative conduct of causing their eviction was unlawful, inefficient, unreasonable, disproportionate, partial, and both substantively and procedurally unfair. The first respondent did not H give any reasons for its conduct. This is an application to compel the first

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respondent to give reasons for its conduct, and to determine an application for A the allocation of alternative accommodation by the applicants. In considering the merits of this application, the question for determination will include an analysis of whether the first respondent can be compelled to give reasons for any administrative action that it takes, by any person who can show that such action has affected them. In other words, can a local authority be brought to book, and compelled to account for its actions, and if so, in terms of which B statutory provisions, and what is the relief that applicants may be granted?

Three applicants filed a court application on 8 July 2013. Beaulah Mhete, the first applicant, deposed to a founding affidavit in which she avers that she is a female adult aged 82 years, and that she and her co-applicants are applying in terms of s 4(1) of the Administrative Justice Act **[***Chapter 10:28***]** for an C order in terms of s 4(c), (d) or (e) of that Act. The applicants are holders of certificates of occupation of the first respondent's properties which were assigned to them during the period 1972 and 1987, in the Chizhanje area of Mabvuku Township. On 29 January 1979, Certificate of Occupation No. 19493 was issued to Muzuwa Samuel Mhete, (first applicant's husband), in terms of D s 33 of the African (Urban Areas) Accommodation and Registration Act 1951 by the Superintendant. He was allocated house number E8 Muroti Road, in the "married quarters", by first respondent's predecessor. His wife, the first applicant, as well as six children are listed on the certificate of occupation as his beneficiaries. The house has four rooms. The applicant averred that she and her late husband lived in this house together with their family from E 29 January 1979, until sometime in 1999 when he died.

The second applicant's certificate of occupation was issued to him on or about 7 August 1985, by the first respondent's Department of Community Services, in terms of s 9 of the Harare (African Township) By-Laws of 1972. He was allocated house number H29 Hung road. His wife Margaret and two F daughters and three sons are listed as beneficiaries. He is now 88 years old, and a widower. The first applicant avers that she occupied this house together with her late husband and their children from 29 January 1979 to December 2008, and was paying rent to buy subscriptions faithfully every month to the first respondent. She averred further, that, in 1981, the first respondent had announced that the occupiers of these houses, who possessed legitimate G certificates of occupation, could purchase the houses, and attached a letter from the Director of Community Services, to that effect. The first applicant averred that, contrary to the contents of that letter, she was never invited to make an offer to purchase her house by the first respondent from 1981 when the letter was written, to 2008 when she was evicted. She submits that the H

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first A respondent created a legitimate expectation that she would be invited to purchase her house.

The first applicant averred that, in December 2008, she visited Karanda Mission hospital for eye treatments. When she returned, she found her belongings outside and a new tenant in occupation. There was no written B or verbal warning to her by the first respondent on its intention to evict her. She has not received any reasons from the first respondent as to why she was evicted. She was taken in and given shelter by a good Samaritan until in June 2013, she found a firm of legal practitioners who were willing to assist her to right this wrong and injustice perpetrated on her and her family. Letters written to the first respondent by her legal practitioners, dated 3 June 2013 C and 21 June 2013, have gone unanswered to date. A meeting was held in which the first applicant and others in a similar predicament requested that the first respondent supply them with alternative houses. Nothing has materialized, and there has been no communication from the first respondent as to whether applicants' request was acceded to, or turned down. The first respondent has not supplied any reasons for its failure to respond to the D applicants' request for alternative accommodation.

The first respondent filed a notice of opposition on 23 July 2013, in which it stated that the administrative action complained of, and in respect of which applicants seek reasons took place more than three years ago and accordingly, that the applicants' claims against it had prescribed. The first respondent E averred that the order sought by the applicants was incompatible with the averments in their affidavits and that, for that reason, the applicants' claims should be dismissed with costs. The first respondent averred that the first applicant's certificate of occupation was cancelled in 2007 because she had sub-let the house to one Calistas Kahanda, who, on being confronted by the first respondent about her illegal occupation, surrendered the keys to the house F to the first respondent. The first respondent inferred that the first applicant's legitimate expectation of being offered to purchase the property ought to have been tempered by the qualification that although each individual tenant was entitled to be offered to purchase the house that he/she lived in, this was subject to the proviso that "…provided the house is suitable for sale". G

The first respondent averred, further, that the Chizhanje houses were not offered to the sitting tenants for sale because, at that time, they used septic tanks which the sitting tenants had no financial capacity to maintain, especially in light of the fact that those houses had always been earmarked to cater for the poorer members of society, and it was part of the first respondent's social responsibility to reserve those houses for the poorer members of society. H The first respondent denied creating a legitimate expectation that those

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houses would be offered for sale to sitting tenants. It denied, further, the A first applicant's averments that she was evicted from her property in 2008, or at all. In her answering affidavit, filed of record on 28 August 2013, the first applicant denied the submission made on behalf of the first respondent that the applicant's claims had prescribed. She submitted that the request to the first respondent for reasons was only made on 3 June 2013. She denied that her certificate of occupation was cancelled in 2007, and challenged the B first respondent to provide evidence, that if this was what had transpired, on what date was she advised of the cancellation.

In the heads of argument, which were filed of record on 10 October 2013, the applicant submitted that s 4(1), as read with s 4(2)(c), (d), and (e) of the Administrative Justice Act (the Act), ought to guide the court in an C application of this nature. Section 3 of the Act sets out the duties expected of an administrative authority. These include:

> "**3 Duty of administrative authority**
>
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall – D
>
> (a) act lawfully, reasonably and in a fair manner; and
>
> (b) act within the relevant period specified by law or, if there is no specified period, within a reasonable period after being requested to take the action by the person concerned; and
>
> (c) where it has taken the action, supply written reasons therefore within the E relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
>
> (2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) – F
>
> (a) adequate notice of the nature and purpose of the proposed action; and
>
> (b) a reasonable opportunity to make adequate representations; and
>
> (c) adequate notice of any right of review or appeal where applicable.
>
> (3) …."

The purpose of the Act is described as: G

> "AN ACT to provide for the right to administrative action and decisions that are lawful, reasonable and procedurally fair; to provide for the entitlement to written reasons for administrative action or decisions; to provide for relief by a competent court against administrative action or decisions contrary to the provisions of this Act; and to provide for matters connected with or incidental to the foregoing." H

In A the interpretation section, "administrative action" is described as any action that is taken or decision made by an administrative authority. An administrative authority means any person who is:

> "(a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
>
> (b) … B
>
> (c) …
>
> (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned."

I am satisfied that the first respondent is an administrative authority in terms of the Act, and that the action taken by the first respondent of evicting the C applicants, and of failing to allocate them with alternative accommodation when requested to do so, constituted administrative action as contemplated and defined in terms of the Act. I am also satisfied that the applicants have used the correct legal instrument for the kind of relief that they are seeking, the mere giving of reasons where none have been supplied and no explanation D is forthcoming from the administrative body, despite reasonable efforts to obtain explanations. The Act also requires that reasons be given within a reasonable period after the administrative action is taken, or there is an omission to take appropriate administrative action. This court can use the Act to consider whether the evictions of the applicants by the first respondents, which evictions fit the definition of administrative action, and the failure E to allocate the applicants with alternative housing, were done in a lawful, reasonable and procedurally fair manner.

Clearly, the first respondent breached the provisions of s 3(1)(a) to (c). Its actions were not lawful, reasonable or fair. It failed to give reasons for its actions in writing, when requested to do so in regards to the request for F alternative accommodation. The first respondent is obliged to give written reasons within a reasonable period. The first respondent also breached s 3(2) by failing to give notice of the proposed eviction or room to make representation. After considering the propriety of the two sets of administrative action which have been complained of, using the criteria set out in the Act, I will now proceed to consider whether the relief sought is appropriate and G competent, in terms of the Act. Section 4 of the Act provides for relief against administrative bodies, as follows:

> **"4 Relief against administrative authorities**
>
> (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply H to the High Court for relief.

Chigumba J

> (2) Upon an application being made to it in terms of subsection (1), the High A Court may, as may be appropriate –
>
> (a) confirm or set aside the decision concerned;
>
> (b) refer the matter back to the administrative authority concerned for consideration or reconsideration;
>
> (c) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a B period fixed by the High Court;
>
> (d) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
>
> (e) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*." C

In deciding on the appropriate remedy, the court must be guided by the provisions of s 5 of the Act, which stipulates that, for the purpose of determining whether or not an administrative authority has failed to comply with the provisions of s 3, the High Court may have regard to whether or not a breach of the rules of natural justice, where applicable, has occurred: D s 5(n). The determining factors are numerous, s 5(a) to (n). In my view, based on the papers which have been filed of record, the applicants' complaint is that no reasons were given to them by the first respondent when they were evicted, and that they have not been advised of the outcome of their request to be provided with alternative accommodation, a request which was made in the letter to the first respondent, from their legal practitioner, on 3 June 2013, E is such a breach.

What are the rules of natural justice? There is an age old adage that "Justice must not only be done, it must be seen to be done". In my view, this legal maxim means that procedures that have been

put in place are in place for a reason and must be followed, and that, that there be a similar way of dealing F with and disposing of matters which ensures fairness to all. In other words, if the procedures are flouted, it gives an impression that there was malice, or bias, lack of fairness, and that justice was not done. The *audi alterem partem* rule requires that procedures be followed; it is part of the right to be heard principle. See *Mutambara & Ors* v *Minister of Home Affairs* 1989 (3) ZLR 96 (H), *Carvahlo* v *Minister of Home Affairs* 1987 (2) ZLR 172 (H), G*PF-ZAPU* v *Minister of Justice* 1985 (1) ZLR 305 (S) at 326, *Buthelezi & Ors* v *Attorney General, Natal* 1986 (4) SA 377 (D). These cases emphasise the importance of being afforded an opportunity to be heard before a decision is taken that may affect one adversely. In *Carvahlo* v *Minister of Home Affairs (supra*) at 572 Chatikobo J had this to say: H

Chigumba J

"In A Baxter *Administrative Law* p 568, one finds this statement:

'It is often argued that the principles of natural justice imply a duty to give reasons for decisions. "Being told why", we know from childhood, is an important element in the fairness of a decision and it helps to inspire confidence in the decision. The courts have not yet fully accepted this argument.'

In B my view, it is one thing to make a decision without telling the person affected by the decision 'why'. It is another thing to decline to give reasons when an interested party asks for the reasons. If a person asks for the reasons, then in the absence of a statutory prohibition the decision-maker should furnish reasons for the decision. It is often said that reasons which are furnished after the decision has been made may be tainted by an *ex post facto* attempt by the decision-maker C to justify a decision which is indefensible. The answer, I think, lies in the fact that any decision must be consistent with the evidence upon which it is based. If it does not, it is irrational."

In *Heatherdale Farms (Pty) Ltd & Ors* v *Deputy Minister of Agriculture & Anor* 1980 (3) SA 476 (T) at 486 the operability of the *audi alteram partem* maxim was applied to the actions of a statutory body. D

The first respondent not only denied the applicants an opportunity to be heard, it failed to supply the applicants with reasons for its actions, contrary to the requirements of s 3 of the Act. Unfortunately, I did not find the submissions contained in the first respondent's heads of argument instructive. The submissions focus on the issue of prescription. I accept that, the evictions E having taken place in 2008, the cause of action arising therefrom may have prescribed in terms of the Prescription Act [*Chapter 8:11*]. The applicants' request of 3 June 2013, however, is not canvassed. It is a request for reasons why the first respondent has failed to allocate alternative accommodation to the applicants. It is administrative action which is subject to the requirements F set out in s 3 of the Act. This court is satisfied that the first respondent is in breach of s 3 of the Act, and accordingly, in terms of s 4 of the Act, makes the following order:

1. That first respondent be and is hereby directed to:
   (a) give written reasons for its administrative action of failing to supply G the applicants with suitable alternative accommodation.
   (b) clarify and give written reasons for its policies when allocating houses in the Chizhanje Area.
   (c) clarify and give written reasons why the applicants are not eligible to be provided with alternative accommodation elsewhere, other H than in the Chizhanje Area.

Chigumba J

   (d) clarify and give written reasons on its policy where rent has been paid A consistently over a considerable period, in a rent to buy scheme, but the property is subsequently allocated to another tenant, in regards to the rent contributions which will have been paid by the outgoing or deposed tenant.
   (e) deliver the written reasons to the applicants within seven days of the date of this order. B
2. Pay costs of suit on a legal practitioner and client scale.

Gama & Partners, applicant's legal practitioners

Kanokanga & Partners, respondent's legal practitioners C

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[zRPz]GUMBI v MAJONI 2014 (2) ZLR 749 (H)

Citation	2014 (2) ZLR 749 (H)
Case No	Judgment No. HH-654-14
Court	High Court, Harare
Judge	Chigumba J
Heard	12 November 2014; *CAV*
Judgment	26 November 2014
Counsel	*S Hashiti,* for the plaintiff
Case Type	Application for provisional sentence
Annotations	No case annotations to date

Flynote

Practice and procedure – *provisional sentence – defences – allegation of "material disputes of fact" requiring oral evidence – approach court should take in deciding whether material disputes exist*

Headnote

Provisional sentence may be granted to a creditor who is in possession of a duly signed and witnessed liquid document, where, *inter alia*, the defendant has very poor prospects of success in the main matter because the defence proffered is weak and not likely to be accepted by the court. Only a *bona fide* defence can defeat an application for provisional sentence. A *bona fide* defence has been held to be a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defendant must allege facts which if established, would entitle him to succeed. To avoid the grant of provisional sentence, the defendant may show that there are material disputes of fact. In deciding whether there are "material" disputes of fact, the court should follow the following principles:

If it is possible to take a bold and rational approach, which is not overly exacting or picky, and there is no real possibility of being unfair to the other party concerned, the dispute may be resolved on the papers.

If it appears that the submission that there is a material dispute of fact is a deliberate and transparent ploy, calculated to delay the resolution of the matter by making it appear to be difficult to do so on the papers, the court must be careful not to allow such a strategy to hamper its effectiveness, or to defeat or delay the resolution of the matter.

If the dispute of fact appears to be one that can confidently be relied on as being genuine, authentic, true and above board, and it is not merely

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deceptive or false, it is a material dispute of fact which may require A*viva voce* evidence for it to be resolved.

If the dispute of fact is one of substance, and has a bearing on the issue to be determined, it is a material dispute of fact which may require *viva voce* evidence for it to be resolved.

Cases referred to B

Caltex (Africa) Ltd v *Trade Fair Motors & Anor* 1963 (1) SA 36 (SR)

Chikomo v *Yehudah* 2012 (1) ZLR 187 (H).

Chisese v *Alluvial Exploration Svcs (Pvt) Ltd* HH-13-12

Joossab & Ors v *Shah* 1972 RLR 137 (G)

Kingstons Ltd v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) C

Lalla v *Spafford NO & Ors* 1973 (2) RLR 241 (G)

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

Muza v *Agricultural Bank of Zimbabwe Ltd* S-138-04

Nyika v *Moyo & Ors* HB-145-10

Room Hire Company (Pty) Ltd v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 115 (T)D

Sibanda v *Mushapaidze* 2010 (1) ZLR 216 (H)

Soffiantini v *Mould* 1956 (4) SA 150 (E)

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

Zimbank v *Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H)

Zuva Petroleum One (Pvt) Ltd v *Ruzive* HB-32-14 E

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 20 & 28

Case information

S Hashiti, for the plaintiff F

Judgment

Chigumba J: The facts of this matter in my view disclose a tangled web of deceit. The plaintiff is cast in the role of the big hairy spider, and the defendant would have the court believe that she is a harmless fly, caught in the spider's web. There is an underlying element that pervades this case, of an unfortunate malaise that has afflicted business transactions in this country, G in these harsh economic times. People borrow money, then turn around and come up with the flimsiest of excuses to avoid paying back. The court's task is to separate the wheat from the chaff, and to determine who is telling the truth between the borrower and the lender. In order to do this, the court looks at the evidence on the papers which the parties place before it. Sometimes, the court can decide that the whole story is not apparent from the papers H

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before A it, and consequently, refers the matter to trial so that witnesses can testify under oath. Other times, the court can adopt a robust approach when it looks at the papers before it, and decide that the papers contain sufficient evidence for the dispute to be resolved without going to trial.

The plaintiff issued summons (provisional sentence on a liquid document), B in Form number 5, on 29 September 2014, claiming payment of US$60 000, on the basis of an acknowledgment of debt, dated 19 November 2013. The acknowledgment of debt was attached to the summons. It advertised itself as having been prepared by Lawman Chimuriwo Attorney at Law, a firm of legal practitioners. The terms of the agreement between the parties included the following: the defendant borrowed and

the plaintiff lent her the sum of C US$60 000, the borrowed sum was to be repaid on or before the last day of August 2013 (preamble), the principal debt was to be repaid by 5 December 2013 (clause 1); the payments of the capital and interest were to be made at the legal practitioner's office. The defendant agreed to pay collection commission calculated at 10 percent of each and every payment made in reduction of the principal debt, costs and interest including the costs of D preparation of security documents. Curiously, the document is silent when it comes to the rate of interest agreed by the parties. In clause 3, the defendant tells us that she: "Expressly renounces the benefits of no cause for the debt, error in calculating the revision of accounts, no value added, and no value received, and no value recorded the meaning of which I acknowledge is E understood by me". No doubt the legal practitioner responsible for the drafting of this document, mindful of his duties as an officer of the court and of his responsibilities as a member of this noble and honorable profession of the practice of law, explained the exigencies of all those legal benefits that the defendant so expressly and eloquently renounced. The agreement was signed before two witnesses. Summons was served on the defendant on 8 October 2014. F The return date endorsed on the summons was 22 October 2014. The defendant filed a notice of opposition on 27 October 2014.

In her opposing affidavit, the defendant confirmed that the signature on the acknowledgment of debt is hers. She denied owing the $60 000, and averred that she only borrowed a sum of $15 000. The defendant narrated the G background to the debt as follows. Sometime in July/August 2013 she was introduced to the plaintiff by her friend Collin Maworerea. Her friend told her that the plaintiff was in the money lending business. The defendant was in urgent need of US$15 000 with which to fund a business venture. When the parties met, the plaintiff told the defendant that he could loan her that sum, and that he could get the money from his employer, Zimbabwe Rural District H Council Workers' Union (ZRDCWU). In terms of the parties' agreement, an

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acknowledgment of debt was signed by Collin in favor of ZRDCWU, on A 3 August 2013. The defendant signed that document as a witness. A perusal of this agreement will show that it was titled "Loan Agreement", and that it was a seven days' loan of US$15 000 at 100 percent interest per month, whose purpose was to provide working capital and which was to be repaid by 18 August 2013. B

The defendant averred that the plaintiff then gave Collin the US$15 000, and Collin handed the money over to her. The defendant said that she was later shocked when she "discovered" that the rate of interest was 100 percent per month. She was also subsequently "shocked" to discover that the plaintiff is not a registered moneylender. She confirmed that she failed to repay the US$15 000 by 18 August 2013 as stipulated. The parties subsequently C agreed that the defendant would pay 100 percent interest on the capital loan of US$15 000 calculated from August to November 2013, bringing the loan amount to US$60 000. It was agreed that no further interest would accrue. These are the circumstances under which the second acknowledgment of debt was allegedly signed by the defendant. She was again shocked to discover D that the lender was now the plaintiff and not ZRDCWU, that the capital was now $60 000, that interest would commence afresh, again at 100 percent as if $60 000 was the original loan sum.

On objecting "most strongly" to the rate of interest, and after threatening to call her friend Mr Hussein, the defendant avers that the interest element was E dropped. She avers further, that she refused to sign the acknowledgment of debt on the basis that the lender was ZRDCWU, not the plaintiff, but changed her mind when her friend Collin threatened to commit suicide by taking poison if she refused to sign the document. The defendant did not "want blood on her hands", so she signed the agreement. In addition, the plaintiff allegedly threatened to press charges of fraud against her if she did not sign F the acknowledgment of debt. The plaintiff filed his answering affidavit on 17 October 2014. He denied that the defendant borrowed US$15 000 from him, and pointed out that she signed an acknowledgment of debt indicating that she borrowed US$60 000, therefore she had no basis at law for contesting the summons for provisional sentence. The plaintiff denied that usurious G rates of interest were charged to the defendant, and denied compounding such interest.

The first question that falls for determination before me is whether the plaintiff has discharged the onus on him in an application for provisional sentence, such that he should be granted the relief that he is seeking. H

Chigumba J

The A second issue that falls before me for determination is whether the defendant has discharged the onus on her to adduce such evidence that amounts to a viable defence against the granting of provisional sentence. Provisional sentence is a summary remedy which is provided for in Order 4 r 20, of the Rules of the High Court 1971, as follows: B

> **"ORDER 4**
>
> CLAIMS FOR PROVISIONAL SENTENCE
>
> **20 Summons claiming provisional sentence**
>
> Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons C to be issued claiming provisional sentence on the said document".

It was submitted on behalf of the plaintiff, in the plaintiff's heads of argument which were filed of record on 12 November 2014, that the principles which govern the determination of the merits of an application for provisional sentence are settled. I am grateful to counsel for the plaintiff for the exhaustive D heads of argument which he filed for the assistance of the court in determining this matter. The essential elements of the procedure of provisional sentence were captured in *Zimbank* v *Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H) as follows at 114D-E:

> "… the procedure of provisional sentence allows a creditor armed with a liquid document, to obtain payment of the debt without having to wait for the final E determination of the dispute between the parties. Whilst a speedy remedy, provisional sentence is an extraordinary remedy based on the presumption of indebtedness created by the liquid document. It is a brisk and robust remedy granted by the court in appropriate cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case". F

Let us try to summarise and to put these essential elements another way. To succeed in a claim for provisional sentence, a petitioner must allege and show that:

1. The petitioner is a creditor in possession of a duly signed and witnessed G liquid document.
2. There is a *prima facie* presumption of indebtedness in favor of the petitioner.
3. The petitioner is entitled to be summarily paid without having to wait for resolution of the dispute in the main matter. H
4. The petitioner is entitled to a quick and robust remedy.

Chigumba J

5. The defendant has failed to discharge the onus on it, to rebut the A presumption of indebtedness which is raised by the production of a valid liquid document.
6. The defendant has very poor prospects of success in the main matter; the defence proffered is weak, and not likely to be accepted by the court.

For further elucidation of the essential elements of provisional sentence, see B*Sibanda* v *Mushapaidze* 2010 (1) ZLR 216 (H). It was submitted on behalf of the plaintiff that provisional sentence is an efficacious remedy which ought to be granted without ado, especially considering that a defendant always has resort to the protective provisions of the rules, in particular, of r 28, which provides:

> **"28 Rights of defendant when provisional sentence granted**C
>
> A defendant against whom provisional sentence has been granted may –
>
> (a) within one month after the attachment made under a writ of execution issued by virtue of such sentence; or
>
> (b) if he has satisfied the judgment without an attachment, then within one month after having done so; D
>
> cause an appearance to be entered with the registrar to defend the action, and shall notify the plaintiff of such entry. If he fails to do so within the stipulated time, the provisional sentence shall immediately thereafter become a final judgment of the court and the security given by the plaintiff shall *ipso facto* become null and void." E

The plaintiff challenged the averments made on behalf of the defendant that there are material disputes of fact in this matter. The challenge was aimed at the alleged failure to disclose the nature

of the disputes, and at the alleged lack of substantiation of the disputes. The plaintiff submitted that the alleged disputes are "illusory" and "are of imaginative conjury". The plaintiff referred the court to *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) F at 339C-Ewhere the court said:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve disputes 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 G 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".

Other cases which have pronounced on the issue of the cogency of evidence that is necessary to establish a real dispute of fact are: *Room Hire Company (Pyt) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 115 (T) at 1165 H

Chigumba J

and A*Soffiantini* v *Mould* 1956 (4) SA 150 (E) at 154G where the court said the following:

> "It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be B difficult to do so. Justice can be defeated or seriously impeded and delayed by an over- fastidious approach to a dispute raised in affidavits".

See also *Joossab & Ors* v *Shah* 1972 RLR 137 (G) at 138G-H*, Lalla* v *Spafford NO & Ors* 1973 (2) RLR 241 (G) at 243B*, Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H). In *Chisese* v *Alluvial Exploration Services (Pvt) Ltd*C HH-13-12 Mavangira J said:

> "It is not all disputes of fact that matter in the determination of applications. It is the material disputes of fact that matter".

Here is a brave attempt to summarise and restate the principles which ought to guide a court, in motion proceedings, where the oft-heard lament of "there is a dispute of facts which cannot be resolved on the papers" is heard: D

(a) If it is possible to take a bold and rational approach, which is not overly exacting or picky, and there is no real possibility of being unfair to the other party concerned, the dispute may be resolved on the papers.

(b) If it appears that the submission that there is a material dispute of fact is a deliberate and transparent ploy, which is calculated to delay the E resolution of the matter by making it appear to be difficult to do so on the papers, the court must be careful not to allow such a strategy to hamper its effectiveness, or to defeat or delay the resolution of the matter.

(c) If the dispute of fact appears to be one that can confidently be relied on as being genuine, authentic, true and above board, and it is not merely deceptive or false, it is a material dispute of fact which may require F*viva voce* evidence for it to be resolved.

(d) If the dispute of fact is one of substance, and has a bearing on the issue to be determined, it is a material dispute of fact which may require *viva voce* evidence for it to be resolved.

A party against whom provisional sentence is claimed is called upon to satisfy the G plaintiff's claim, or to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the claim. See *Zuva Petroleum One (Pvt) Ltd* v *Ruzive* HB-32-14. In the matter at hand, the defendant has not paid, so she has not satisfied the H plaintiff's claim; she has not denied that she signed the acknowledgment of

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Chigumba J

debt. It was submitted on behalf of the plaintiff that the defendant is bound A by the *caveat subscriptor* rule. Roughly translated this rule stipulates that "... let the signer beware". The celebrated author R H Christie in *Business Law in Zimbabwe* at p 67, has this to say:

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises

> would become hazardous in the extreme. B The general rule, sometimes known as the *caveat subscriptor* rule is therefore that a party to a contract is bound by his signature, whether or not he has read and understood the contract … and this will be so even if he has signed in blank … or it is obvious to the other party that he did not read the document".

See also *Nyika* v *Moyo & Ors* HB-145-10. The defendant has not placed any evidence before the court in support of her allegations of threats of arrest C or duress. She did not report the threats to the police; if she had, and there was evidence of this threat, the offence of extortion could be established. She did not immediately take steps to have the acknowledgment of debt declared a nullity. She waited until the plaintiff sought to recover the debt, then confirmed signing it, but denied doing so voluntarily. It is circumstances such as these that the *caveat subscriptor maxim* rule were designed to regulate, D in my view. In *Muza* v *Agricultural Bank of Zimbabwe Ltd* S-138-04 the Chief Justice said:

> "The evidence in this case simply does not support the allegation that exhibit 2 was void *ab initio* and therefore a nullity by reason of duress. Contracts that are *void ab initio* by reason of duress are very rare as the duress required to render an E agreement void *ab initio* has to be extremely severe. It has to be so severe as to negative any element of voluntariness such as where a stronger person physically overcomes a weaker person and puts a pen in his hand and physically forces his hand to write his signature on a written contract [1] . The evidence adduced by the appellant fell far short of this requirement".

The defendant has not disputed that the acknowledgement of debt is a liquid F document. Of the defences open to a defendant in terms of Order 4, this leaves only one open, that of disputing the validity of the claim. See *Caltex (Africa) Ltd* v *Trade Fair Motors & Anor* 1963 (1) SA 36 (SR) where it was held that, where the acknowledgment of debt is sufficiently clear and certain, and no evidence to the contrary has been given by the defendant, provisional sentence will be granted. The defendant has raised the issue of the rate of interest which she alleges is usurious. It has been held that where parties agree on a rate of G interest, that agreement is a qualification of the provisions

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of A s 4 of the Prescribed Rates of Interest Act [*Chapter 8:10*], and interest may be levied as agreed by the parties, and not at the prescribed rate. See *Chikomo* v *Yehudah* 2012 (1) ZLR 187 (H).

Only a *bona fide* defence can defeat an application for provisional sentence. A *bona fide* defence has been held to be B

> "…a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which if established, would entitle him to succeed".

See *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 451F.

The defendant has failed to present a plausible case in her own defence, to qualify her to defeat the plaintiff's claim for provisional sentence. There is C insufficient clarity, incompleteness in her evidence, on the papers, to support her contention that the plaintiff's claim is not valid. There is insufficient evidence that the defendant was subjected to duress when she signed the acknowledgment of debt. She is bound by her signature and by the contents of the acknowledgment of debt. There is insufficient and incomplete evidence that the principal debt is only US$15 000. Again *caveat subscriptor*. The D defendant signed a contract in which she agreed that the principal debt was US$60 000 and went on to expressly renounce all the legal benefits that she could have subsequently relied on in her defence such as no value received, or error in calculation. The defendant is a respected and sophisticated businesswoman of many years standing. It is highly improbable that she E would sign a document acknowledging indebtedness in a sum that is four times what she actually owes, because she is subjected to duress, then to simply keep quiet and not seek to discredit that document in a court of law, once the alleged duress had passed. In any event, the defendant has other remedies open to her in terms of Order 4 if she is aggrieved by the decision of this court. F

It is my considered view that the plaintiff has discharged the onus on him and shown on a *prima facie* basis that he is entitled to provisional sentence as claimed in the summons. The defendant has no *bona fide* defence to the plaintiff's claim. In the result it is hereby ordered that provisional sentence be and is hereby granted in favor of the plaintiff, as against the defendant, in the sum of

US$60 000, together with interest thereon at the prescribed G rate calculated from 19 November 2013 to the date of payment in full, as well as costs of suit.

Chimuriwo Attorneys, plaintiff's legal practitioners

Jakachira & Co, respondent's legal practitioners H

1 R H Christie *The Law of Contract in South Africa* 3 ed p 337; Grotius 3.48; van Leeuwen *Censura Forensis* 1.4.41; Voet *Commentary on the Pandects* 4.2.2; *Smith* v *Smith* 1948 (4) SA 61 (N) at 67-8

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[zRPz]TANYANYIWA v HUCHU 2014 (2) ZLR 758 (H)

Citation	2014 (2) ZLR 758 (H)
Case No	Judgment No. HH-668-14
Court	High Court, Harare
Judge	Chigumba J
Heard	29 October 2014; *CAV*
Judgment	26 November 2014
Counsel	*T E Mudambanuki*, for the applicant Respondent in default
Case Type	Unopposed application
Annotations	No case annotations to date

Flynote

Delict – *actio inuriarum – adultery – action against third party committing* C *adultery with plaintiff's spouse – delict remains part of law of Zimbabwe – no reason to follow jurisdictions which have abandoned the remedy*

Headnote

Zimbabweans pride themselves on being a conservative nation that upholds the D institution of marriage, and traditional family values. Many Zimbabweans are God-fearing Christians; others are traditionalists who practice polygamy. Most Zimbabweans of black descent believe in paying *lobola*, or bride price, irrespective of their Christian or traditionalist beliefs. The entitlement to damages as compensation for the commission of adultery E in traditional culture in Zimbabwe is recognized in customary law as the right of a man who has paid *lobola* for his wife. The Christian concept of marriage is based on an ideal that both the man and the woman leave their respective parents, appear before God as equals, and "cleave" to each other. They are equals before God. In

this modern society, does the law still have a place in regulating what may appear to be, matters F of morality, and of the heart? Should these matters not be best left to be regulated by religion, and by the custodians of our culture back in the village?

In other jurisdictions, the question of whether adultery should continue to be regulated by the law has spanned widespread debate. There are G proponents for and against the award of damages to the injured spouse. Different countries have adopted different views, based on cultural or religious considerations. The debate appears to be fuelled by the fact that those who are pro-marriage advocate for the compensation of an injured spouse, by an errant spouse, for emotional and mental distress that is accepted to be a by-product of an adulterous relationship. In H

South Africa, A the debate on whether adultery damages should remain an area that is regulated by the law was taken up in *RH* v *DE* 2014 (6) SA 436 (SCA), which was a delictual claim for damages based on adultery between the defendant and the plaintiff's wife on the law as it stands. The court found that the award had been rightly made for *contumelia* but that the award for loss of *consortium* was not justified. The court B considered whether the action should be maintained as part of South African law and concluded that its continued existence was no longer justified. The court acknowledged that the main advantage of the action was that it protects the institution of marriage which our society holds dear as one of the most important bases for family life and which is C recognised and protected as such by the Constitution.

In Zimbabwe, before the courts could take the approach adopted by the South African court, they should consider whether our society's views regarding the institution of marriage have changed. They have not changed. If effect is given to our national objectives, as enshrined in our Constitution, one would find that the institution of marriage and family D values are protected and enshrined in the Constitution. In South Africa, their Constitution protects and enshrines a myriad other institutions which are not necessarily compatible with marriage. The views of our society are that, unless the courts are prepared to take a strong and principled stand in support of the vital institution of marriage, they will E only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and extra-marital sex and which has landed the world in the sexual morass over which the monster of AIDS now presides in all its frightening aspects. Our Constitution, which came about as a result of widespread consultations with grassroots Zimbabweans, declares one F of our national objectives to be that the State must take appropriate measures to ensure that there is equality of rights and obligations of spouses during marriage. There is nothing in our Constitution which may be interpreted as precluding a wife from being entitled to damages from a third party who has destabilized her marriage, knowing full well G that she was married to her husband in terms of the Marriages Act.

Cases referred to

Chinyadza v *Phiri* HH-76-09

Doyle v *Salgo (1)* 1957 R & N 840 (FS)

Forrester v *Forrester* [1963] SC 662 H

Gombakomba v *Bhudhiyo* HH-118-06

Chigumba J

Gwatiringa v *Matake* HB-119-09 A

Katsumbe v *Buyanga* 1991 (2) ZLR 256 (H)

Khumalo v *Mandishona* 1996 (1) ZLR 434 (H)

Muyambo v *Bere* HH-30-07

Nyakudya v *Washaya* 2000 (1) ZLR 653 (H)

Nyandoro v *Tizirai* 2006 (1) ZLR 121 (H)

RH v *DE* 2014 (6) SA 436 (SCA)B

Sapsford v *Sapsford & Furtado* [1954] 2 All ER 373 (P)

Takadini v *Maimba* 1996 (2) ZLR 737 (S)

Walker v *Taylor* HB-35-08

Legislation considered C

Constitution of Zimbabwe 2013, s 26(c)

Case information

T E Mudambanuki, for the applicant

Respondent in default

Judgment

Chigumba J: Adultery is defined as "sexual intercourse between two D persons of whom one or both are married but who are not married to each other". [1] Zimbabweans pride themselves on being a conservative nation that upholds the institution of marriage, and traditional family values. A lot of Zimbabweans are God-fearing Christians. Some of them are traditionalists who practice polygamy. Most Zimbabweans of black descent believe in paying *lobola*, or bride price, irrespective of their Christian or traditionalist beliefs. E The entitlement to damages as compensation for the commission of adultery in traditional black culture in Zimbabwe is recognized in customary law as the right of a man who will have paid *lobola* for his wife. Back in the village, the chief may fine the third party, the adulterous man, to pay a beast or two as compensation to the woman's husband. There is no corresponding right F that accrues to a married woman to sue her husband's consort for damages if they engage in a sexual relationship, in our customary law. The rationale for that appears to be rooted in the fact that the man "marries" the woman when he pays *lobola*, not the other way round. The Christian concept of marriage is based on an ideal that both the man and the woman leave their respective parents, appear before God as equals, and "cleave" to each other. G They are equals before God. In this modern society, does the law still have

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a A place in regulating what may appear to be matters of morality and of the heart? Should these matters not be best left to be regulated by religion, and by the custodians of our culture back in the village?

These questions are causing vexation in most of the world these days, yet it appears to me as if there is still a strong case to be made for remaining B conservative in this area, in this country. This matter came before me on the unopposed roll. Judgment was reserved despite the fact that the respondent has never bothered to defend herself against the applicant's claims. The reason for such a course of action was the desire to do justice to the issue at hand by writing a full judgment. The applicant issued summons against the respondent on 15 September 2010, claiming payment of the sum of C US$10 000, being damages for injured feelings loss of love, affection and support by the applicant's husband, towards her, as a result of adultery committed by the applicant's husband and the respondent, interest on that sum at the prescribed rate, calculated from the date of the summons to the date of payment in full, plus costs of suit.

In the declaration to the summons, the applicant averred that she is married D to Richard Tanyanyiwa in terms of the Marriage Act [*Chapter 5:11*], and has been so married since 14 April 1989. The couple has four children from their marriage and, at the time that summons was issued, two of those children were still minors. The applicant averred, further, that at the time that summons was issued, her husband and the respondent had two minor children E aged nine years and four years, as a result of their adulterous relationship. She averred that the respondent had been provided with accommodation at the applicant's husband's brother's house in Kambuzuma Township, where he frequently visits the respondent at night until the early hours of the morning. The applicant is aggrieved at this blatant deprivation of her husband's company, love and support, and at her husband's increasing failure F to support her and the children of their marriage because of his financial commitment to the respondent and her children. The applicant maintained that her husband now exhibited cold feelings towards her, thereby hurting her and causing her injured feelings as a result of his adulterous relationship with the respondent. G

The respondent has not defended herself against the applicant's claims since summons was served on her daughter Maggie on 20 September 2010. As a result, the applicant applied for default judgment on 17 March 2011, in terms of r 58(2) of the High Court Rules 1971. The chamber application for default judgment was referred to the unopposed roll for consideration of the quantum of damages. The issue that falls for determination before me is therefore this: H in what circumstances is an award of US$10 000 justifiable in a claim for

Chigumba J

damages for injured feelings, loss of love affection and support, resulting A from an adulterous relationship? The applicant filed heads of argument on 5 January 2011 in support of her claim. She submitted that the respondent knew, at the time of the sexual intercourse with the applicant's husband, of his marital status, and cited *Forrester* v *Forrester* [1963] SC 662 in support of her contention that this knowledge justified the quantum of damages that she is seeking. In that matter Lord Alderson stated: B

> "I think it is essential that before a co-defender can be penalized in expenses it must be established that he was aware when he misconducted himself with the woman that she was a married woman. The underlying principle whereby the court penalizes a co-defender is just this – that he knew when he was having … with the woman that he was wronging a husband". C

It was submitted on behalf of the applicant that these *dicta* are equally applicable to the converse circumstance, in this case the respondent knew that she was wronging a wife. In both *Nyandoro* v *Tizirai* 2006 (1) ZLR 121 (H) and *Gombakomba* v *Bhudhiyo* HH-118-06 the court adopted the definition of *contumelia* set out in *Doyle* v *Salgo (1)* 1957 R & N 840 (FS) at 844A, *Katsumbe* v *Buyanga* 1991 (2) ZLR 256 (H) at 258C and D*Takadini* v *Maimba* 1996 (2) ZLR 737 (S) at 738F. *Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by the adultery committed by a defendant with his or her spouse. In *Khumalo* v *Mandishona* 1996 (1) ZLR 434 (H) Malaba J, as he then was, set out the five factors that a court considers in arriving at an estimate of the damages due to a plaintiff for *contumelia*. These are: E

a. the character of the spouse involved;
b. the social and economic status of the plaintiff and the defendant;
c. whether the defendant has shown contrition;
d. the need for deterrent measures against the adulterer to protect the F innocent spouse against contracting HIV from the errant spouse;
e. the level of awards in similar cases.

Equally, in *Nyakudya* v *Washaya* 2000 (1) ZLR 653 (H), Smith J noted the need to also consider the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse. G

In other jurisdictions, the question of whether adultery should continue to be regulated by the law has spanned widespread debate. There are proponents for and against the award of damages to the injured spouse. Different countries have adopted different views, based on cultural or religious considerations. In Nigeria, it has been said that: H

Chigumba J

> "Adultery A is one of the cardinal sins in the Ten Commandments and, despite the modern apparently relaxed attitude towards sexual intercourse; it has remained one of the main reasons for marriage breakdowns. Its seriousness as a matrimonial offence is clearly reflected in the fact that originally it was the only permitted ground for divorce under English Law. Of particular gravity was adultery by a wife which was described as being unforgivable by a husband. For while a B husband could divorce his wife on the sole basis of her adultery, a wife had to prove other material facts in addition to her husband's adultery in order to obtain a similar relief. Even under customary law, adultery, particularly by a wife, was treated as a sin against the ancestral gods and required the performance of certain rituals to appease them and the husband and to cleanse the violated woman." [2]

In the United States, it has been said that: C

> "According to the 'godmother of infidelity research', Shirley Glass, the United States is currently experiencing a 'crisis of unfaithfulness'. The most reputable social science surveys reveal that at least twenty to fifty percent of American adults admit to committing adultery, and some studies estimate the

adultery rate to be as high as seventy percent. Pro-marriage activists and feminists are leading a war against decisions such as *Koestler.* Pro-marriage activists usually attack rejections of adultery claims by emphasizing the importance of marriage and D family. Feminists favoring adultery claims emphasize the negative consequences of adultery on women". [3]

The debate appears to be fuelled by the fact that those who are pro-marriage advocate for the compensation of an injured spouse by an errant spouse, for emotional and mental distress that is accepted to be a by-product of an adulterous relationship. E

"Adultery is almost always debilitating for victimized spouses. They can suffer tremendous emotional damage, loss of trust, troubling mental insecurities, decreased job performance, and financial insecurity (especially when adultery leads to divorces involving children). "What is even more tragic is that currently, most law in the United States does little to remedy the mental damage caused by unfaithful spouses." [4]F

Closer to home in South Africa, the debate on whether adultery damages should remain an area that is regulated by the law was taken up in the recent case of *RH* v *DE* 2014 (6) SA 436 (SCA). It was a delictual claim for damages based on adultery between the defendant and the plaintiff's wife on the law as it stands. The court found that the award had been rightly made for G*contumelia* but that the award for loss of *consortium* was not justified. The

court considered whether the action should be maintained as part of South A African law and concluded that its continued existence no longer justified.

In this case, the plaintiff's cause of action relied on the *actio iniuriarum* in the form of adultery and adultery only, although he claimed damages under the two headings of *contumelia* (i.e. insult or injury to his self-esteem) and loss of *consortium* (i.e. the loss of comfort and society of his wife). The court B considered the question for determination to be: what are the consequences of adultery? It followed that the court considered that it need only consider the question of the quantum of damages. Brand JA said the following:

"The context in which the question arises is the recognition by our courts that, while the major engine for law reform lies with the legislature, the courts are nonetheless obliged on occasion to develop the common law in an incremental C way. These occasions are dictated, firstly, by s 39(2) of the Constitution which imposes the duty on the courts to develop the common law so as to promote the spirit, purport and objectives of the Bill of Rights. Secondly, by the acceptance that the courts can and should adapt the common law to reflect the changing social, moral and economic fabric of society; that we cannot perpetuate legal rules that have lost their social substratum (see for example D*du Plessis* v *De Klerk* 1996 (3) SA 850 (CC) para 61; *Carmichele* v *Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 36).

The *boni mores* of society or the legal convictions of the community, which in effect constitute expressions of considerations of legal and public policy, are of particular significance in determining wrongfulness, which is an essential E element of delictual liability in our law, both under the *lex Aquilia* and the *actio iniuriarum.* In *le Roux* v *Dey (Freedom of Expression Institute and Restorative Justice Centre as* amici curiae*)* 2011 (3) SA 274 (CC) para 122 the principle was formulated thus:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately F depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) *that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.'*

(See also *F* v *Minister of Safety and Security & other*s 2012 (1) SA 536 (CC)G paras 117-124; *Roux* v *Hattingh* 2012 (6) SA 428 (SCA) para 33.)

This means that, especially in determining whether conduct should be regarded as wrongful, i.e. whether delictual liability should follow, courts are more sensitive to have regard to the dynamic and changing nature of the norms of our society" (my emphasis). H

The A South African court acknowledged that the main advantage of the claim was that it protects the institution of marriage which our society holds dear as one of the most important bases for

family life and which is recognised and protected as such by the Constitution. In Zimbabwe, if we are to take the approach adopted by the South African court, we should consider whether our society's views regarding the institution of marriage have changed. B In my view, they have not. If we give effect to our national objectives, as enshrined in our Constitution, we will find that the institution of marriage, and family values, is protected, and enshrined in the Constitution. In South Africa, their Constitution protects and enshrines a myriad of other institutions which are not necessarily compatible with marriage. It is my view that the *dicta* in *Katsumbe* v *Buyanga* 1991(2) ZLR 256 (H) at 258H-259A, which C was decided more than ten years ago, still applies in this country, and that it reflects the views of our society:

> "Accordingly unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the courts will only be party to society's further slide down the slippery slope to the unlicensed promiscuity D which scoffs at the spiritual prohibitions against pre-marital and extra marital sex and which has landed the world in the sexual morass over which the Monster AIDS now presides in all its frightening aspects".

In my view, this country is not ready to follow our South African counterparts down the slippery slope. Our Constitution, which came about as a result of widespread consultations with grassroots Zimbabweans, declares one of E our national objectives to be that the State must take appropriate measures to ensure that there is equality of rights and obligations of spouses during marriage [5] . My interpretation of this clause is that there is nothing in our Constitution which may be interpreted as precluding a wife from being entitled to damages from a third party who will have destabilized her marriage knowing full well that she was married to her husband in terms of F the Marriage Act, as opposed to the African Marriages Act.

Applying the principles that are to be taken into consideration in considering an application for damages for adultery in Zimbabwe will show that there is no evidence in the papers filed of record, of the character of the spouse involved, other than an averment that he spends most of his time with the G respondent, and is "cold', to the applicant, which she finds hurtful. The American study showed that adultery "is almost always debilitating for victimized spouses. They can suffer tremendous emotional damage, loss of trust, troubling mental insecurities, decreased job performance, and financial insecurity". The applicant averred in the summons that the respondent no

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longer takes care of the family the social and economic status of the plaintiff A and the defendant. There is no evidence in the papers, of whether or not the respondent showed contrition, or of the parties' HIV status. The level of awards in similar cases is set out below:

A comparison of past awards for adultery damages

1. *Walker* v *Taylor* HB-35-08: ZW$50 million B
2. *Muyambo* v *Bere* HH-30-07: ZW$1.5 million
3. *Chinyadza* v *Phiri* HH-76-09: US$1 500
4. *Gwatiringa* v *Matake* HB-119-09: US$500

After taking into consideration the circumstances of this case, it is hereby ordered that the respondent pay to the plaintiff, damages in the sum of C USD$1 500, together with interest thereon at the prescribed rate calculated from the date of the summons to the date of payment in full, as well as costs of suit.

P Takawadiyi & Associates, applicant's legal practitioners D

1*Sapsford* v *Sapsford and Furtado* [1954] 2 All ER 373 (P); P M Bromley and N v Lowe, *Family Law* 7 ed (1987) at 176; See also S A Adesanya *Laws of Matrimonial Causes* (Ibadan University Press, 1973) at 49; E I Nwogugu *Family Law in Nigeria* (Ibadan, 1974) at p 135

2 E N U Uzodike *Judicial concepts of adultery ,intolerability and damages in Nigeria*

3 Nehal A Patel "The State's Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin's Faded Adultery Torts" *Wisconsin Law Review* Vol. 2003 Iss. 5 (2003) p 1013

4 Patel *op cit*

5 Constitution of Zimbabwe 2013, s 26(c)

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[zRPz]FINWOOD INVESTMENTS (PVT) LTD & ANOR v TETRAD INVESTMENT BANK LTD & ANOR 2014 (2) ZLR 767 (H)

Citation	2014 (2) ZLR 767 (H)
Case No	Judgment No. HH-669-14
Court	High Court, Harare
Judge	Chigumba J
Heard	18 November 2014; *CAV*
Judgment	26 November 2014
Counsel	*F Girach*, for the applicant Ms *F Mahere*, for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – *appearance to defend – when may be made – summons and declaration served together – defendant has 20 working days within which to enter appearance*

Headnote

In terms of r 17 of the High Court Rules 1971, once summons is served the *dies induciae* for the defendant to enter appearance to defend expire after ten working days, excluding the date of service. The proviso to r 119 makes it clear that, where a summons has been served together with a declaration, a further ten day period is added onto the normal *dies induciae* provided by r 17, within which to enter appearance to defend.

Cases referred to

Church of the Province of Central Africa v *Diocesan Trustees, Diocese of Harare* 2010 ZLR 364 (H)

Denenga & Anor v *Ecobank Zimbabwe (Pvt)Ltd* HH-177-14

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 189 (H)

Madzivanzira & Ors v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H)

Mafu & Ors v *Solusi University* HB-53-07

Williams v *Kroutz Investments (Pvt) Ltd & Ors* HB-25-06 G

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 17, 119 & 449

Case information

F Girach, for the applicant

Ms *F Mahere*, for the first respondent H

2014 (2) ZLR p768

Chigumba J

Judgment

Chigumba J: Is the guillotine of execution of judgment unfairly hovering A above the applicants' proverbial necks when they have in fact correctly and competently entered appearance to defend themselves against the first respondent's claims, in terms of r 17, as read with r 119 and proviso, of the High Court Rules, 1971? That is the question that came before me in this matter, via the urgent chamber book. The relief that is being sought is the stay of execution and attachment of applicant's movable and immovable property, B pending the determination of an application for rescission of judgment filed under case number HC10003/14. The judgment that is sought to be rescinded was granted under case number HC 5895/14.

Marshall Jonga deposed to the founding affidavit on behalf of the applicants. He stated therein that he is the Chief Operating Officer of the first applicant, C a company duly registered in accordance with the laws of this country. The second applicant is also a duly registered company. The first respondent is a registered financial institution. The second respondent, the Sheriff, was cited in his official capacity and has no interest in the matter. The applicants attached a copy of the application for rescission of judgment to their papers. D It was averred on behalf of the applicants that the default judgment that was granted against them in case number HC5895/14 had been granted on the "purported" basis that they had failed to enter appearance to defend within the time limit prescribed by the rules of this court, and were barred, as a result. The order for default judgment, dated 3 September 2014, and granted by Matanda-Moyo J, in chambers, is for payment of the sum of E US$2 078 750.53, plus interest thereon at 23 percent per annum, calculated from 5 March 2014 to date of payment in full, together with costs of suit on a legal-practitioner client scale, as well as collection commission. The property of the first applicant, Stand 65 Colne Valley Township, held under deed of transfer 2688/09, was declared specially executable. F

It was averred, on behalf of the applicants, that their application for rescission of judgment has overwhelming prospects of success as it clearly establishes good and sufficient grounds for the setting aside of the default judgment. In particular, that the application for rescission of the default judgment establishes that the first respondent obtained default judgment in circumstances where the applicants were not under a bar for failure to enter appearance to defend. G The applicants reiterated that they have, in fact, entered appearance to defend and are intent on defending themselves against the first respondent's claim under case number HC5895/14. Finally, the applicants contended that the balance of convenience favours the granting of this application pending the determination of the application for rescission of judgment. H

2014 (2) ZLR p769

Chigumba J

On A the question of urgency, the applicants averred that the matter was urgent because the default judgment obtained by the first respondent is set to be executed any moment from now. A writ of execution has already been issued. A notice of seizure and attachment was served on the applicants by the second respondent, the Sheriff. The 48 hour notice of execution is due to expire soon. Execution of judgment is imminent and the applicants maintain that B the default judgment was erroneously granted against them before the *dies induciae*, had expired, *ergo* judgment was sought prematurely and granted prematurely. The applicants lamented the fact that their financial, proprietary and/or economic interests were under imminent threat of impairment in circumstances where the underlying basis for the granting of default judgment C to the first respondent is not justifiable.

The applicants averred that when first respondent filed its application for default judgment, they still had five days within which to enter appearance to defend the matter. They maintained that this is so because where summons and a declaration are served together, the *dies induciae* is a 20 day period. The applicants maintained that the *dies induciae* had not expired and that D consequently, when judgment was given in default, they were not barred. This is a procedural defect in the granting of the default judgment. The applicants averred that the imminent execution of their property is bound to inflict serious damage to their continued operations and to the multitude of people that are employed by them. E

At the hearing of the matter, counsel for the first respondent, Ms *Mahere,* launched a spirited attack and raised a preliminary point that this matter was not urgent. She referred the court to the plethora of cases in which the question of what constitutes urgency was exhaustively discussed, then settled. It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency F is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules".

See *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 189 (H). G

It has also been held that:

> "For a court to deal with a matter on an urgent basis, it must be satisfied on a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait, in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words, H if the applicant does not act immediately and waits for doomsday to arrive, and

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> does not give a reasonable explanation for that delay in taking action, he cannot A expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…"

See *Church of the Province of Central Africa v Diocesan Trustees, Diocese of Harare* 2010 ZLR 364 (H), *Madzivanzira & Ors v Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H) and *Williams v Kroutz Investments (Pvt) Ltd & Ors* HB-25-06. B

In my view, in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met: A matter will be deemed urgent if:

(a) the matter cannot wait at the time when the need to act arises;

(b) irreparable prejudice will result, if the matter is not dealt with straight C away without delay;

(c) there is *prima facie* evidence that the applicant treated the matter as urgent;

(d) the applicant gives a sensible, rational and realistic explanation for any delay in taking action; and

(e) there is no satisfactory alternative remedy. D

It was submitted on behalf of the first respondent that the facts of this matter are similar to those in *Denenga* v *Ecobank*HH-177-14. A perusal of that judgment will show that indeed there are many similarities, on the face of it, between the facts of that case and this one. For instance, the applicants borrowed money from a financial institution, they admitted to being served E with a summons to recover the borrowed sum, they gave the summons to a judicial manager who "promised to do something about it", they averred that they had a *bona fide* defence and applied for stay of execution pending an application for rescission of judgment. In my view, the similarities between the two matters ends there. No appearance to defend was entered at all in that case, which distinguishes it from this case where appearance to defend F was entered and the question for consideration is whether the appearance to defend was entered within the time limits allowed by the rules of this court. Mawadze J in the *Denenga* case *supra* made an express finding that the applicants, Denenga and his wife, did nothing more in pursuit of this matter after handing over the summons to someone who promised to take care of it. They did not follow up or inquire as to the progress in the matter. G They sat on their rights and waited for doomsday to arrive.

It is my view that such is not the case here. The applicants filed an appearance to defend the matter on 14 August 2014, after being served with the summons and declaration on 21 July 2014. I cannot,

in all good conscience, find that the applicants sat on their rights. They were legally represented. They consulted H

Chigumba J

their A legal representative and were given advice which they relied on. They believed that they had 20 days after summons was served on them, within which to enter appearance to defend. They entered appearance to defend before the expiry of the *dies indiciae,* calculated in accordance with the advice given to them. They filed a request for further particulars on 25 September 2014. These actions, in my view, constitute *prima facie* evidence that the applicants B acted when the need to act arose. The applicant's conduct is the opposite of the conduct of Denenga and his wife, who simply folded their hands and waited for the day of reckoning, and did not follow up or check on progress in their matter. The applicant's contention that they will suffer irreparable financial prejudice was not disputed by the first respondent. Having found C the matter to be urgent, I will now turn to consider the merits of the matter.

The applicants have applied for rescission of judgment in terms of r 449 of the rules of this court, contending that the default judgment obtained against them was erroneously sought and erroneously granted. In order to investigate the correctness of this contention, it is necessary to look at the rules of this court, and determine whether the applicants correctly entered appearance D to defend in terms of these rules. Rule 17 of the High Court Rules, 1971 provides as follows:

> **"17 Time allowed for entering appearance to defend: dies induciae**
>
> The time within which a defendant shall be required to enter appearance to defend shall be ten days, exclusive of the day of service." E

It is common cause that summons was served on the applicants on 21 July 2014. Excluding the date of service, weekends and public holidays, according to my calculation, and applying the provisions of r 17, the *dies induciae* expired on 4 August 2014. At the hearing of the matter, the applicants submitted that r17 should be read in conjunction with r 119 which provides:

> **"119 Time for filing plea, exception or special plea**F
>
> The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:
>
> Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113, *there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of rule 17*" (my emphasis). G

If the court accepts the interpretation contended for by Mr *Girach*, counsel for the applicants, it will find that the *dies indiciae* expired on 20 August 2014. This calculation involves adding a further ten day period to the ten day period allowed for ordinarily entering appearance to defend in terms of r 17. It involves counting ten business days from 4 August 2014, excluding public H holidays and weekends. It would follow, therefore, that when the applicants

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Chigumba J

entered appearance to defend the matter, on 21 August 2014, they were out A of time by one day. The *dies induciae* expired on 20 August 2014. They ought to have entered appearance to defend within that stipulated period.

Counsel for the first respondent, Ms *Mahere*, urged the court to accept her interpretation of the rules that r 17 applies to the circumstances of this case, and that, because it is couched in peremptory terms, there is no room for B incorporating the provisions of r 119 in its application. She submitted that only r 17 governs entry of appearance to defend, because it expressly says so in its title. It was submitted on behalf of the first respondent, that r119, in its title, suggests that it is applicable to the time within which to file a plea. With respect to the spirited argument put forward by Ms *Mahere*, I am unable to agree. The construction of both r 17 and r 119 will not allow such C an interpretation. Rule 17 is clear, once summons is served, the *dies induciae* expire after 10 days, excluding the date of service. The proviso to r 119 is equally clear, where summons has been served together with a declaration, there shall be added to the period of 10 days to the time allowed a defendant to enter appearance as calculated in terms of r 17, a further 10 days. D

My reading of r 17 is that it applies in the normal course of things, where summons is served; appearance to defend may be entered within 10 days. Rule 17 implies that summons may be served with or without a declaration. Rule 119 then expressly stipulates, in its proviso, that where summons is served together with a declaration, a further 10 day period is added onto the normal *dies induciae* provided by r 17, within which to enter appearance to E defend. There is no other construction of these rules which would not lead to an absurdity. It follows that the applicants have shown, on a *prima facie* basis, that they may have good and sufficient cause for the default judgment obtained against them to be rescinded in terms of r 449.

The court is satisfied that this matter is urgent because it could not wait when the need to act arose. The need to act arose on 10 November 2014 F when the applicants were served with a copy of the default judgment dated 3 September 2014, and their property was attached in execution. The applicants did everything required in terms of the Rules to indicate their intention to defend themselves against the first respondent's claim. The court is satisfied, in light of the averments contained in the applicants' founding affidavit, G and out of consideration of the quantum of the first respondent's claim, that the applicants will suffer irreparable financial prejudice if the matter is not dealt with straight away without delay. There is *prima facie* evidence that the applicants treated the matter as urgent, the first applicant approached this court on 12 November 2014, a mere two days after its property was attached. The court considered whether the applicants have a satisfactory alternative H

Chigumba J

remedy. A In my view, both parties stand to suffer financial prejudice. Yet the balance of convenience favours the applicants, because their financial prejudice will be irreparable, whereas the first respondent, a creditor with security in the form of immovable property which is duly hypothecated, will not suffer irreparable financial prejudice if the relief that the applicants are seeking is granted. For these reasons, and in the result, it is ordered that: B

Pending the application for rescission of judgment under case number HC10003/14, the second respondent be and is hereby ordered to stay the execution and attachment of the first applicant's movable and immovable property to satisfy the default judgment in case number HC5895/14. C

Mutamangira & Associates, applicants legal practitioners

Mawere & Sibanda, first respondent's legal practitioners

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[zRPz]CARGO CARRIERS INTERNATIONAL HAULIERS (PVT) LTD v SHERENI & ANOR 2014 (2) ZLR 774 (H)

Citation	2014 (2) ZLR 774 (H)
Case No	Judgment No. HH-679-14
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	22 November 2014; *CAV*
Judgment	1 December 2014

Counsel *I Ahmed*, for the plaintiff
B Hashiti, for the defendants

Case Type Civil trial

Annotations No case annotations to date

Flynote

Insurance – *subrogation – meaning – when plaintiff's right to claim damages may be removed – need for plaintiff to have been compensated by insurer – in absence of such compensation, plaintiff has locus standi to pursue claim against defendant* D

Headnote

The plaintiff sued the defendants for the costs of repairs to one its vehicles which had been damaged in a motoring accident, which it said was caused by the negligence of the defendants. Apart from disputing the allegation of negligence, the defendants argued that the plaintiff had no E*locus standi* as its vehicle was insured and that because by the plaintiff failed to produce evidence that its vehicle was insured, and because it failed to produce the insurance policy and a letter from the insurance company that they would not compensate the plaintiff for such damages, the plaintiff had no authority to bring such a claim. F

Held, that the law of subrogation enables an insurer to pursue a third party which caused an insurance loss to an insured as a means of recovering the amount of the claim paid to the insured. Subrogation only arises, therefore when an insurer has paid monies to the insured. Once it has done so, the insurer is entitled to all the rights and remedies belonging to the insured against the third party with respect to any loss covered G by the insurance policy. The law of subrogation is mean to protect the public from being vexed more than once by what is in reality a single claim. For the principle of subrogation to take away the plaintiff's *locus standi*, there must be proof that the insured received money from the insurers. Here, the plaintiff did not receive any payment from the H

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insurance A company. No basis had been laid for subrogation, which only arises when the insurer has paid monies to the insured.

Cases cited

Dube v *Dube* 2008 (1) ZLR 326 (H)

First National Bank of South Africa v *Duvenhage* 2006 (5) SA 319 (SCA)B

Nissan Zimbabwe (Pvt) Ltd v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S)

Supreme Service Station (1969) (Pvt) Ltd v *Fox and Goodridge (Pvt)* Ltd 1971 (1) RLR 1 (A)

Tsozvai v *Mageza and Anor* 2011 (2) ZLR 160 (H)

Case information

I Ahmed, for the plaintiff C

B Hashiti, for the defendants

Judgment

Matanda-Moyo J: The plaintiff instituted summons against the defendants jointly and severally, the one paying the other to be absolved, for the sum of $8 751.50 representing costs of repairs to the plaintiff's vehicle damaged as D a result of an accident negligently caused by the first defendant in

the scope and course of his employment with the second defendant. The defendants denied liability and denied that the accident was caused by the negligence of the first defendant. The defendants alleged that it was the plaintiff's driver's negligence that caused the accident. Alternatively, the defendants pleaded contributory negligence on the part of the plaintiff's driver. The E issues referred to trial in terms of a joint pre-trial conference minute filed of record are as follows:

(1) whether the defendants are liable for the plaintiff's claim; and

(2) if so, the quantum of damages.

The plaintiff called one witness to testify, Mr da Silva Muneira. His F testimony was simple and straight forward. On 2 May 2013 this witness was travelling along Kenneth Kaunda road due west. At the intersection of Kenneth Kaunda and Orr Street a combi vehicle which was driven by the second defendant suddenly made a U-turn from the extreme left and collided with his vehicle. This witness testified that it was solely the negligence of G the second defendant which caused the accident. The second defendant fled the scene of the accident and the police later advised that the second defendant had paid an admission of guilty fine. As a result of the accident the plaintiff's vehicle sustained frontal damages as exhibited by photographs produced during the trial. The defendant's vehicle suffered damages on the right side and front. The plaintiff testified that its vehicle was repaired for H $8 751.50. Three quotations were produced from M P Panel Beaters, P and

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P Panel Beaters and Swiss Motors. The plaintiff's vehicle was at the time A insured by Eagle Insurance.

Under cross-examination the witness maintained his version that it was only the second defendant's negligence that caused the accident. On being questioned on the quantum this witness insisted that the figure was agreed upon and assessed by an independent assessor. The defendants also B cross-examined this witness on salvaged parts, as to which he had no idea. It was his testimony that the plaintiff has since settled the repair bills. The plaintiff closed its case after the testimony of this witness.

At the close of the plaintiff's case the defendants applied for absolution from the instance on the following: C

1. *Locus standi*

The defendants submitted that from the evidence led from the plaintiff, it became apparent that the plaintiff's vehicle was insured by Eagle Insurance Company Ltd. The plaintiffs in their pleadings had omitted to mention that point. It is upon that basis that the defendants objected to the plaintiff's *locus standi* on the basis of the law of subrogation. The defendants submitted that D it is not clear whether the plaintiff would in future also make a claim as against the insurance company. The law of subrogation is meant to avoid being doubly compensated for the same act. The defendants submitted that by failing to place before the court evidence that the plaintiff's vehicle was insured, and by failing to place before the court the insurance policy and E a letter from the insurance company that they would not compensate the plaintiff for such damages, the plaintiff had no authority to bring such a claim.

I understand the law of subrogation to mean, in relationship to this matter, the right of an insurer to pursue a third party that caused an insurance loss to the insured. This is done as a means of recovering the amount of the claim paid to the insured for the loss. Lee R Russ *Couch on Insurance* (3 ed 2000) F s 222 .2 at 222-14 defines subrogation as:

> "… the principle under which an *insurer that has paid a loss under an insurance policy* is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy" (my own underlining). G

For the principle of subrogation to succeed, there must be proof that the insured received money from the insurers. In the present case, the plaintiff only accepted that its vehicle was insured but did not receive any payment from the insurance company. Without any evidence of the plaintiff having received any compensation from the insurers no basis has been laid for subrogation. It only arises when the insurer has paid monies to the insured. H

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It A is my finding therefore that the plaintiff has *locus standi* to bring the action. *Tsozai* v *Mageza and Anor* 2011 (2) 160 (H), relied upon by the defendants for this proposition, is distinguishable from the present case. In that case, the plaintiff had been adequately compensated by his insurers and had no right to make another claim against the defendants without proof that he was going to surrender the amount claimed to the insurance company. In B that matter Bere J said at 166A:

> "… all this was calculated to endure that the plaintiff would quietly enjoy a double benefit over a single loss, knowing fully well that his insurer, Altfin Insurance, had adequately indemnified him. There is nothing on paper or in his evidence that his actions were meant to benefit the insurer". C

The law of subrogation is meant to protect the public from being vexed more than once by what is in reality a single claim. There is no reasonable apprehension established that Eagle Insurance may sue the defendants for the same claim. I know of no law which prohibits the persons of the plaintiff from pursuing wrongdoers to recover their loss simply because they are holders of insurance policies. That preliminary point is without merit and is dismissed. D

2. *Lack of evidence to substantiate negligence*

The defendants argued that the plaintiff had failed to establish the particulars of negligence. Counsel for the defendant argued that, from the evidence adduced by the plaintiff, the only reasonable conclusion that could be drawn was that the plaintiff was trying to overtake and in the process rammed into E the second defendant's vehicle.

The defendants also submitted that failure to call witnesses from the garages which repaired the plaintiff's vehicle was fatal to the plaintiff's case. The quantum of damages has not been proved.

It is settled that the counts should strive as much as possible to determine F matters on the merits. The courts should not be abused by the defendants who are afraid to stand trial to cause an injustice. See *Dube* v *Dube* 2008 (1) ZLR 326 (H). *In casu* it is common cause that the second defendant deposited an admission of guilt fine with the police immediately after the accident. This in itself should seal the issue of liability at this stage. The second defendant has G not explained why he would want to revoke his admission of guilt presently. The defendants opted to abuse the application for absolution from the instance procedure. At this stage the plaintiff should not have proven its case on a balance of probability, but the plaintiff, should only have proffered a *prima facie* case. As said by Beadle CJ in *Supreme Service Station (1969) (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd*H 1971 (1) RLR 1 (A) at 5D:

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> "The test, therefore, boils down to this: is there sufficient evidence on which a A court might make a reasonable mistake and give judgment for the plaintiff?"

The plaintiff explained that the second defendant suddenly made a U-turn from the extreme left of Kenneth Kaunda into Orr Street. I am of the view that the raising of the application was a waste of the court's time as it lacked any merits. Accordingly I dismissed the application and put the defendants on their defence. B

The defendants first called the second defendant to the witness stand. He was driving the combi which collided with the plaintiff's car at the corner of Kenneth Kaunda Avenue and Orr Street. He testified that he was driving the combi vehicle due west along Kenneth Kaunda Avenue. His vehicle was in the inner lane. On approaching Orr Street he indicated to turn right into Orr Street. In front of him was no oncoming traffic. He then started his C turn into Orr Street. Suddenly he was hit by the plaintiff's vehicle which was trying to overtake him. Because the plaintiff's vehicle was travelling at an excessive speed, the impact caused this witness's vehicle to travel a few metres, hitting into a construction site and finally hitting into the wall of Mohammed Mussa Building. He explained the damages sustained by the D combi vehicle. Its headlamp was damaged when the combi hit a plank. And so did the indicator light. The damages in the middle of the car were caused by the plaintiff's vehicle hitting into the combi. This witness admitted to paying a deposit of guilt fine to the police. He explained he did so on the advice of the police. He admitted to driving without due care and attention.

This witness explained that he ran away from the scene for fear of being E attacked by the mob.

Under cross-examination this witness accepted that his version of events differed with the version in the summary of evidence. He was evasive and argumentative under cross-examination. He initially said he left the scene and went to the police, but later changed his story and said he did not immediately proceed to the police. F

Under cross-examination this witness revealed that he had dropped off passengers at the corner of Kenneth Kaunda Avenue and Second Street. He pulled to the extreme left. He failed to explain how he ended up travelling in the inner lane after driving off from the drop off point. He also confirmed G that the vehicle which he said was behind him noticed he intended to turn into Orr Street. This version corroborates the plaintiff's version that the second defendant came from the extreme left and suddenly made a U-turn in front of him. The second defendant failed to give a coherent version of how the accident occurred. He testified that he never saw the plaintiff's vehicle until he was hit. H

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The A first defendant also testified. He was not present when the accident occurred. He arrived at the scene of the accident. He confirmed the plaintiff's vehicle was still stationary along Kenneth Kaunda Avenue, blocking a section of oncoming lane. The defendant's vehicle had stopped by the Mohammed Mussa Building. He explained the damages to the vehicles. The combi's middle right side was smashed. It had left frontal damage. B

He testified that he got quotations from the plaintiff and based on those quotations he sought another quotation from Toyota. Such quotation was for $3 703. Under cross-examination he admitted Toyota does not provide panel beating services. I am satisfied that the plaintiff managed to prove the defendant's liability on a balance of probabilities. The mere fact that the C second defendant paid a fine with the police is testimony that he was negligent. The second defendant admitted to driving without due care and attention.

Let me come to the issue of contributory negligence. The defendants averred that the plaintiff's driver contributed to the accident in that he was travelling at an excessive speed in the circumstances, failed to keep a proper look out D and overtook a vehicle turning right. The plaintiff's driver denied that he was traveling at an excessive speed in the circumstances. He testified that he was travelling in the inner lane proceeding west along Kenneth Kaunda road. When the combi driven by the second defendant suddenly made a U-turn from the extreme left, he tried to apply brakes, to no avail. The accident was E sudden. The plaintiff's vehicle stopped immediately after the impact but the second defendant's vehicle travelled some 10-15 metres from the point of impact. From the vehicles' positions after the accident it is most probable that the second defendant's vehicle was travelling fast in the circumstances. The second defendant was trying to move fast from the extreme left into Orr Street. The combi which was traveling in the outer lane had slowed F down to give way to the second defendant's vehicle, and, unfortunately the plaintiff's driver who was travelling in the inner lane did not notice the second defendant's vehicle before it appeared in front of him. I do not believe there was any contributory negligence on the part of the plaintiff's driver.

That brings me to the issue of quantification. G

In the present case it is not in dispute the plaintiff's vehicle was damaged as a result of the accident. The plaintiff effected repairs to the damaged vehicle. The plaintiff produced three quotations and showed that it accepted the lowest of the three quotations for the purpose of the repairs. The figure of US$8 751.50 claimed by the plaintiff is correspondent to the quotation of H the lowest value. Further the plaintiff produced the receipt to prove that it

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had paid the amount via an internet bank transfer to M P Panel Beaters for A the amount of US$8 751.50.

It is trite law that where there has been proof of damages the court must make an assessment of the quantum of damages on the material placed before it, even if on that evidence it is not possible to compute the amount of damages precisely. See *Nissan Zimbabwe (Pvt) Ltd* v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S) at 573E. B

The plaintiff proved on a balance of probabilities that it paid US$8 751.50 for repairs. As such, it will be just and fair for them as the injured party to restore their status *quo ante* before the accident. This is the essence for an award of delictual damages: see *National Bank of South Africa* v *Duvenhage* 2006 (5) SA 319 (SCA) at 324H-1. C

In the circumstances I will order as follows:

1. The first and second defendants jointly and severally pay the plaintiff the sum of USD$8 751.50 with interest thereon at the prescribed rate from the date of service of summons to the date of final payment.
2. The defendants are to pay costs of suit. D

Ahmed & Ziyambi, plaintiff's legal practitioners

Gill Godlonton & Gerrans, first & second defendants' legal practitioners

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[zRPz]TOAKONA TRADING (PVT) LTD v VAN ROOYEN & ANOR 2014 (2) ZLR 781 (H)

Citation	2014 (2) ZLR 781 (H)
Case No	Judgment No. HH-684-14
Court	High Court, Harare
Judge	Mafusire J
Heard	17 December 2013; *CAV*
Judgment	3 December 2014
Counsel	*D Ochieng,* for the plaintiff *R Makamure,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

CompanyC – *director – liability – liability for business of company being carried out recklessly or with gross negligence – meaning – concepts synonymous – both instances of culpa but not equating to dolus*

Headnote

Under D s 318(1) of the Companies Act [*Chapter 24:03*], the court may, if it appears that any business of a company was being carried on (a) recklessly; or (b) with gross negligence; or (c) with intent to defraud any person or for any fraudulent purpose, declare that any of the past or present directors of the company or any other persons who were E knowingly parties to the carrying on of the business in the manner or circumstances mentioned shall be personally

responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

A judicial officer called upon to impeach the conduct of directors of a company for perceived wrongful conduct in the running of the affairs of the company F where harm has ensued must be careful to avoid an armchair approach in judging that conduct. Directors must of necessity be diligent in their conduct of business and devote their skill for the good of the company. In practice, they sometimes have to make important decisions on the spur of the moment and sometimes have to take drastic actions without much time to think through the consequences. Their perceived lack of G foresight cannot readily be assessed on the basis of knowledge gained in hindsight. The courts accordingly are reluctant to interfere with the directors' business judgment.

"Recklessness" and "gross negligence" are practically synonymous in this context. They mean that the person concerned exhibits an "I don't care" H attitude, where the person may not intend the harmful consequences of

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his actions which are reasonably foreseeable, but nonetheless persists A with that conduct in total disregard of the harmful consequences. Despite the separate depiction of "recklessness" and "gross negligence" in s 318 of the Act, both refer to the conduct of business in an extremely bad manner. No matter how bad that conduct may be, the statute did not intend to equate "recklessness" or "gross negligence" with *dolus*. They both remain instances of *culpa*. B

Cases referred to

A-G v *Munganyi* 1986 (2) ZLR 137 (S)

A-G v *Paweni Trading Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S)

Littlewoods Stores v *IRC* [1969] 1 WLR 1241 (CA); [1969] All ER 3 (CA) C

Mayhew v *Alcock NO* 1991 (2) ZLR 203 (S)

Ordeco (Pvt) Ltd v *David & Anor* 2013 (1) ZLR 532 (H)

Ozinsky NO v *Lloyd & Ors* 1995 (2) SA 915 (A)

Chibwe v *Fawcett Security Ops (Pvt) Ltd* HH-79-06

Rosenthal v *Marks* 1944 TPD 172

Salomon v *Salomon & Co* [1897] AC 22 (HL) D

Stanbic Bank Zimbabwe Ltd v *Durand* 2007 (1) ZLR 398 (H)

Legislation considered

Companies Act [*Chapter 24:03*], s 318(1) E

Case information

D Ochieng, for the plaintiff

R Makamure, for the defendants

Judgment

Mafusire J: The first and second defendants were wife and husband. From now on I shall refer to them as "Corinne" and "Cornelius". They F were the sole shareholders and sole directors in a company called Corvan Enterprises (Pvt) Ltd (hereafter referred to as "Corvan" or "the company"). The name "Corvan" was word play on their names: "Cor" from Corinne and/or Cornelius, and "van" being the "van" before Rooyen.

The plaintiff and Corvan were fish mongers. The plaintiff sold and supplied kapenta at wholesale. Corvan sold it at retail. At the relevant time Corvan G owed the plaintiff US$53 690. The plaintiff issued summons. But Corvan went bankrupt before the claim had been determined. It was placed under provisional liquidation at the instance of one of the creditors. In the action before me the

plaintiff sued Corinne and Cornelius in their individual capacities to pay what Corvan owed. In the main, the plaintiff alleged a H

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fraudulent A misrepresentation. In the alternative, it based its claim on s 318 of the Companies Act [*Chapter 24:03*] (hereafter referred to as "the Act").

The details of the plaintiff's claim against Corinne and Cornelius in their individual capacities were these. Between February and October 2012 the plaintiff sold and supplied Corvan with kapenta. By October 2012 Corvan's B debt was US$38 000. Corvan, through Corinne, ordered more fish. The plaintiff's case was that but for Corinne's fraudulent misrepresentation it would not have parted with its fish in the first place, let alone supply more fish later on. Corinne is alleged to have represented to the plaintiff that if it supplied more fish either she or Corvan would pay the whole amount in due course. Payment would be made in November 2012. C

November 2012 came and went by. No payment was made. Corinne's misrepresentation was said to be this: even as she ordered more fish she and Cornelius knew that they had misappropriated Corvan's assets. As a result, Corvan did not have the capacity to, or any reasonable prospect of paying. The plaintiff also said that Corinne had never sincerely intended to pay. D

The claim against Corinne and Cornelius was for US$63 345, allegedly being the value of the fish at the time of the summons.

To prove its case the plaintiff called two witnesses. One was Lizette Nortier ("Lizette"). The other was Neville George Mountford ("Neville"). From her evidence Lizette was the plaintiff's bookkeeper-cum-credit controller-cum-accountant-cum-manager-cum-marketing E manager. Lizette confirmed the supply of fish to Corvan at Corinne's instance. She said Corinne had arranged some form of credit facility with the plaintiff through one of its directors. She confirmed Corinne had ordered more fish in the face of an existing debt, promising full payment for both the old and the new debt. On F the strength of that promise the plaintiff had parted with 100 bags of fish in the first instance. Corinne had wanted 300 bags. She had come back for the outstanding 200. To convince the plaintiff to part with the outstanding 200 bags in the face of mounting indebtedness Corinne had explained that she had courted an offshore investor. The investor would deposit US$75 000. It G was then arranged between Corinne and the plaintiff that she would ensure that the deposit would be made directly into the account of the plaintiff's holding company in Mauritius. Later Corinne said this had been done. She brandished a SWIFT bank transfer showing a deposit of US$75 000 into the account of the plaintiff's holding company sometime in November 2012. On that basis the outstanding 200 bags of kapenta had been released. Strangely, H the funds were never received into the account of the plaintiff's holding

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company. The debt remained unpaid. Then in December 2012 Corinne A announced the provisional liquidation of Corvan.

As to the defendants frittering away company funds and stripping off company assets, Lizette said Corinne had bought Cornelius an expensive motor cycle, a Harley Davidson, using Corvan's funds. Furthermore, she and Cornelius had paid for a house for their daughter using Corvan's funds. As to the details of such misuse of Corvan's funds Lizette left it all to the B plaintiff's next witness, Neville.

The plaintiff's next witness, Neville, had been employed by Corvan as the sales manager between 2010 and 2012. He had quit in frustration and without giving notice. He was not being paid. He was having to rely on his family to keep going. Neville said part of his duties involved collecting cash from C Corvan's customers. Corinne used to send him with large sums of money to certain people. Frequent payments were made to one Mr Yaya ("Yaya"), a friend of the defendants. Neville said on one occasion he delivered as much as US$39 000.

Neville further explained that other huge payments were being made to a D company called Expeller Investments (Pvt) Ltd ("Expeller"). He said there was a debt factoring arrangement between Corvan and Expeller. In terms of it Expeller would buy Corvan's invoices to its customers. To recover its money Expeller would collect from those customers. Collections made by Corvan had to be remitted

to Expeller. But frequently they were not. Instead, they would be paid to third parties or spent by Corvan. E

Neville further testified that at times he was instructed to transfer large sums of Corvan's money into Corinne's offshore accounts. On one occasion Corinne was in the United Kingdom. She needed money deposited into an HSBC Bank account domiciled in the Isle of Man. It was a personal account. Corvan's banks were Stanbic and Barclays. Corinne told him she required the money F to purchase stock for Ella's Décor. Ella's Décor was a little shop operated by the defendants' daughter, but from Corvan's premises. It sold items for home décor. In cross-examination Neville said when Corvan experienced financial difficulties Ella's Décor would loan it some money. When asked about a house in Greendale, Harare, Neville said the previous owner used to come to collect money from Corvan. G

After Neville the plaintiff closed its case.

In their plea the defendants strenuously denied any personal liability towards the plaintiff. They averred that in the course of their dealings, they acted as no more than directors and agents for the company. Corvan was not their *alter ego*. They never gave out any personal guarantees for the payment of H

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Corvan's A debts or held themselves out as co-principal debtors. They denied any form of misrepresentation whatsoever, let alone one that was fraudulent. They also denied conducting Corvan's affairs recklessly or negligently and averred that at all times they had acted in good faith and for the good of the company. They denied having derived any personal benefit from Corvan's funds beyond what was permitted by law. B

The defendants further pleaded that Corvan's liquidation was neither reasonably foreseeable nor intended. It was caused by economic factors beyond their control, such as the financial distress of Corvan's own customers. They claimed that Corvan had enough assets to cover its liabilities and that the plaintiff had to wait for the liquidation process to conclude in order C for them to get paid. They stressed that the plaintiff had already submitted proof of its claim to the provisional liquidator and that in its papers it had acknowledged that Corvan was solely responsible for its debt.

The defendants called two witnesses. The first was Corinne herself. In summary, her evidence was that she did all she could to make Corvan meet its obligations to its creditors, including the plaintiff. She had made efforts D to recapitalise it. However, despite all her best intentions everything had flopped. The biggest single let-down had been by a potential investor. It had appeared on the scene at the critical moment. Hopes had been raised. Corvan seemed on the road to recovery. Unfortunately, it subsequently turned out that the investor was no more than a mirage. It had just fizzled out.

The chronology of Corinne's evidence was this. Corvan had been a family E business. It had been established in 1992. The company had been dear to her and her husband. They had grown it from a small concern to what it had become. Corvan's business relationship with the plaintiff spanned over fifteen years. Their trading terms had been cash on delivery. However, when Corvan started experiencing financial difficulties, Chris Hoggart ("Chris"), F one of the plaintiff's directors, had agreed to offer some credit terms.

When the situation deteriorated significantly, it was decided to look for an investor to inject fresh capital into the business. It was also decided to sell Corvan on a "walk-in walk-out" basis. She gave the agency to some estate agents, among them Robert Root and Fox & Carney. Robert Root became the lead agent. The point person was one Suzanne Maureen Beresford-Miller G ("Suzanne"). Corvan was put on the market. Apart from the business it also had its own factory. In October 2012 a non-governmental organisation ("NGO") fronted by someone called Tara Wilkins ("Tara") who was based in, or whose source of funds was Italy, and another lady called Mercy Masvikepi ("Mercy") who was locally based, made an offer to buy. The offer H was more than the asking price. The asking price had been US$2.5 million.

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The NGO offered US$2.7 million. That included the cost of goodwill and A the cost of keeping Corinne and any support staff during the "walk-in" and "walk-out" period. The deal seemed genuine. The NGO seemed serious. It said it was looking to invest in Zimbabwe. Among other things, Corinne met with Mercy and their lawyer. Corrine had also done a background check on it through her bankers.

However, the deal soon collapsed. For some reason the NGO would not B submit proof of funds as required by the estate agents. Corinne explained to it the desperate financial situation Corvan was facing and the inevitable collapse if funds were not released immediately. As a stop gap measure, the NGO offered to pay Corvan's kapenta suppliers directly. Armed with that promise Corinne approached Chris and negotiated the supply of more fish. The plaintiff's bank details were transmitted to the NGO. At some stage in C November 2012 the amount of US$75 000 actually reflected in the plaintiff's offshore bank account. Documentary evidence to that effect was produced. But the funds were never transferred. By that time the plaintiff had already released the 300 bags of kapenta.

There was also documentary evidence of further cheque deposits into Corinne's D off-shore account allegedly by the same NGO. The amounts were US$55 000 and US$47 310.33 on 6 and 12 December 2012 respectively. However, the deposits would inexplicably be reversed immediately after being made.

There was further documentary evidence in the form of print-outs of a series of e-mail and telephone messages at the relevant time. They showed that Corinne actively engaged both the NGO and the plaintiff. She was appealing E to the plaintiff for understanding and patience as she pressed the NGO to expedite the release of the money.

On the Harley Davidson, a prominent feature of the plaintiff's case, Corinne said the motorbike had been meant to be a surprise fiftieth birthday present for Cornelius in 2010, but that due to lack of funds she had failed to buy it for him then. Cornelius had eventually bought it himself out of his own savings. F

On the payments to Yaya, Corinne admitted that he was not one of Corvan's creditors. However, Corvan had used the money that he had loaned Ella's Décor for the purchase of a house. The house had eventually been purchased in Greendale, Harare. Therefore, Corvan was paying back that loan. Yaya's G money had also been utilised to procure goods for Ella's Décor. Ella's Décor had no bank account of its own.

On the documentary evidence was an interim report by the provisional liquidator. Among the list of creditors was Expeller. The debt due to it was standing in excess of US$1.3 million. Yet the estimate of the recoverable debtors on that report was no more than US$20 000. Asked to explain how H

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there A could be such a huge discrepancy given that in terms of the debt factoring agreement uncollected invoices would have been sold off to Expeller, Corrine said she could not properly account for the difference except to attribute a significant portion of that debt to interest. She also conceded that the money collected on some invoices had not been remitted to Expeller but had been ploughed back into the company to keep the operations going. On stripping B of company assets, Corinne denied the allegations and said they had been selling their own personal property, including vehicles, to keep Corvan afloat.

A great deal of the documentary evidence by the defendants, particularly print-outs of the e-mail and telephone messages that reflected Corinne's active engagement with the plaintiff was only discovered on the day of the C trial. Questioned on why it had been left so late to discover such important documents, Corrine explained that when she had filed her discovery affidavit, the issue of such documentation had never been brought to her attention by the legal practitioner who had prepared the first discovery affidavit. It was only towards the trial that her new legal practitioner, albeit from the same firm, had highlighted the importance of those documents. As a result, a D supplementary discovery affidavit had had to be filed.

The second and last witness for the defendants was Suzanne. She had vast experience in the property world spanning over twenty-two years. At the time she was a property consultant with Robert Root. Corinne was her close friend for close to twenty years. Suzanne confirmed Corinne's instructions to sell Corvan. She corroborated Corinne's evidence on dealings with, and E eventual disappointment by, the NGO.

One highlight of Suzanne's testimony about which the plaintiff grilled her was the absence of any documentary evidence of any sort of the alleged agreement with the NGO. The plaintiff queried how any normal investor would be prepared to part with as much as US$75 000 or the subsequent deposits of F US$55 000 and US$47 310.33 without any agreement of sale. The plaintiff also questioned why, if an agreement had indeed been concluded with the NGO as Suzanne alleged, Corvan had remained on the market. She replied that it was the practice or the custom in the property world, particularly in situations when money is tight, that not until acceptable evidence of proof G of funds had been remitted, would a property be removed from the market. Offers are never taken at face value. She maintained that the NGO's offer had indeed been drafted on the basis of which an agreement of sale at US$2.7 million had been concluded. However, Suzanne said, her computer had crashed soon afterwards. She had no other evidence of the agreement apart from the numerous e-mail exchanges the print-outs of which had already H been produced.

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Suzanne also corroborated Corinne's evidence on the character of the NGO's A representatives that they had dealt with. They were well presented. They spoke well. They were discrete and calculative. There was no reason to doubt their capacity to pull through the deal. Finally, Suzanne insisted that Corinne had acted reasonably and diligently in believing that the money had been available.

After Suzanne, the defendants closed their case. B

That was the totality of the evidence before me. Going by their closing submissions both parties also seemed to agree. Their differences were only in respect of their analyses of that evidence and their conclusions from it.

The joint pre-trial conference minute listed the issues for trial as follows: C

- Did the first defendant make fraudulent misrepresentations to the plaintiff as regards the capacity of Corvan Enterprises (Pvt) Ltd to pay its actual or future debts to the plaintiff?
- Whether or not the plaintiff suffered damages due to the alleged fraudulent misrepresentations made by the first defendant, and if so, the quantum thereof; D
- Whether or not the defendants carried on the business of Corvan Enterprises (Pvt) Ltd fraudulently, negligently and/or recklessly and should therefore be [held] personally liable in terms of s 318 of the Companies Act [*Chapter 24:03*].

The onus of proof was on the plaintiff on all the issues. E

In my view, a claim such as the plaintiff's herein, where the shareholders or directors of a company face personal liability for the company's debts, is classically an application to pierce the corporate veil of the company. It is basically an application to ignore the fiction that a company is a legal or juristic person, which is clothed with, as s 9 of the Act provides, the F capacity and powers of a natural person with full legal capacity in so far as a body corporate can exercise such capacity. Section 22 of the Act limits the liability of the members of the company to contribute to the assets of the company in the event of winding up. It also says that from the date of its incorporation a company becomes a body corporate by its registered name. It attains perpetual succession which remains unaffected by the death of its G members. In the celebrated nineteenth century English case of *Salomon* v *Salomon & Co* [1897] AC 22 (HL) at 51Lord MacNaghten put it as follows:

> "The company is at law a different person altogether from the subscribers …. [T]he company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act." H

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A A claim to pierce the corporate veil essentially runs counter to certain fundamental principles of company law as provided for by statute or established by the common law. In terms of s 8 of the Act, every company limited by shares, as Corvan was, is required to include and display in its name the word "limited". That is a warning, especially to potential creditors of the company. Among other things, in the event of the company going B insolvent, the liability of the members on winding-up becomes limited to no more than the amount still owing on their shares if they were not fully paid up. If they were fully paid up, the shareholders only lose their capital. Tett and Chadwick *Rhodesian Company Law* p 61 point out that in giving credit to a company a creditor knows that his remedy will

be confined to the C assets of the company. This will be the capital if all the shares are fully paid up. If not, it will be the capital and such amounts as are still owing on those shares. The creditor will not look to the personal assets of the shareholder even if the capital be insufficient to pay off his debt.

Therefore, to present a claim such as the one *in casu*, the plaintiff must bring D himself within one or other of the exceptions to the rule, either as prescribed by statute, such as s 318 of the Act, or by the common law. From time to time the courts will rend the company's corporate veil to get to the members hidden behind it. This happens where, for example, the company is a sham or where it has been used as a tool to cause harm to others, or where it would be flagrantly unjust to leave the veil intact. Lord Denning put it this way in E*Littlewoods Mail Order Stores Ltd* v *IRC* [1969] 1 WLR 1241 (CA) at 1254; [1969] 3 All ER 855 (CA) at 860F:

> "The doctrine laid down in *Salomon's* case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and F often do, pull off the mask. They look to see what really lies behind."

Mr *Ochieng*, for the plaintiff, urged me to find that the defendants had the requisite fraudulent intent to prejudice creditors, including the plaintiff, in the manner that they conducted Corvan's business. His argument implied or insinuated that the defendants were complicit in the debacle pertaining to the fake deposit of US$75 000 which was what induced the plaintiff to G part with more fish in the face of an outstanding debt.

In a contractual context, fraud consists of an intentional misrepresentation of material facts that induces a party to enter into an agreement he or she would otherwise not have entered into but for the misrepresentation, causing him or her actual or potential prejudice. In *Stanbic Bank Zimbabwe Ltd* v *Durand*H 2007 (1) ZLR 398 (H) Gowora J, as she then was, said at 401B-C:

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> "A party seeking to rely on such representation must allege *an intention* on the A part of the maker of the representation that such representation was made [to] induce the party to whom it was made to enter into a contract. The plaintiff must further allege that the maker of the representation *intended or may be presumed to have intended* that the representation be acted upon" (my emphasis).

In *Attorney-General* v *Paweni Trading Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S) at 27F Korsah JA said: B

> "Generally speaking, fraud consists in *knowingly* making a false representation of fact *with the intention to defraud* the party to whom it is made, and such false representation actually causes prejudice or is potentially prejudicial to another" (my emphasis).

Thus fraud is not mere *culpa*. There has to be *dolus*. In the case before C me, I have found nothing in Corinne's conduct from which to infer fraud. The e-mail exchanges and "SMS" telephone messages in November 2012 between herself and the plaintiff on the one hand, and between herself and the potential investor on the other, depicted a distressed director genuinely trying to secure a life line for the company, and at every stage keeping the plaintiff, the creditor, abreast of developments. A sample of such exchanges D will illustrate the point.

- 9 November 2012; Corinne to Chris: "Hi Chris. Please see the attached transfer that I have been sent for your payment. Please go through and check everything."
- 12 November 2012; Lizette to Corinne: "Hi Corinne. Thanks for your E e-mail. I have just checked our account and your payment is still not reflecting. Please check and get back to me as soon as possible. I also checked the details and they are correct."
- 26 November 2012; Corinne to Lizette: "Hi Lizette. I have got a message through to person who did transfer. They are aware your payment not come through and said they will organise cash this week. I am not able F to phone them at the moment only send messages. Sorry there is nothing more I can do but keep pressure on them."
- 27 November 2012; Corinne to Lizette: "Hi Lizette, we are hoping to receive cash from these people that did the transfer tomorrow." G
- 27 November 2012; Lizette to Corinne: "Dear Corinne. Thank you for your sms yesterday. I find it difficult to believe that the transfer was done more than a month ago and is still not reflecting in our account. Yet, in your sms you imply that the person who did the transfer is aware that it has not been done. Your account with us is $53 690. Most of the fish bought by you was at a price of $150 per 30 kg. $53 690 divided by $150 H

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= 358 A bags outstanding, which in todays value = 358 bags kapenta @ $200 per 30kg = $71 600. This is what I tried to explain to you. Please ensure that every effort will be made to settle this outstanding bill."

- 28 November 2012; Corinne to Lizette: "Hi Lizette. I don't know what to say other than I was promised that it had been debited off the account B and would be in your account. The person that did it is here but very bad network where they currently are. They are aware as I said that you obviously have not had your funds and that i[t] has put me in a very difficult position with you, hence they are trying to sort the cash. I am desperately trying everything I can to sort this and as I said I will keep you informed." C
- 29 November 2102: Corinne to Lizette: "Nothing yet. / I am waiting for anytime. Checking account every hour. Unfortunately I have no coms with them. Sorry but I cannot do more am really desperately trying."
- 30 November 2012; Corinne to Chris and Lizette: "Dear Chris/ Lizette. My apologies this person still has not paid us the cash promised yet. D We are owed over a hundred thousand by them and I do not know what has happened as we have been promised that cash will be paid in once it became evident that the transfer had not come through. As I have explained I am unable to reach them by phone and have to wait for them to phone me. Chris I did explain to you the reason why. This E has put us in a very difficult position now as we have no other way of paying you. We are desperately trying to secure a loan to trade our way out of our financial mess that we are in. If this fails we have no choice but to go into liquidation. We are hoping to have an answer on the loan by middle of next week. Obviously I am hoping that this cash will be deposited and am checking our account all the time. Whilst I realise this F is putting a huge strain on your finances, please rest assured that firstly this was never intentional and I do apologise sincerely for this and that I am trying everything I can to avoid the liquidation and to get you paid. Chris you know that I do not play games of ducking and diving but did feel that it is prudent to put you into the picture of exactly where we are at. Again my sincere apologies. I will keep you updated the minute G I have anything."
- 14 December 2012; Corinne to Lizette: "Hi I have received some funds into my overseas account but they are yet to clear. A payment from an investor is also being made from UK to my Harare account today. I do not expect to receive this till late next week wherein I can settle. Our H company in liquidation but we do have investor."

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In court, as in her e-mail and SMS messages, Corinne displayed sincerity. A I find that she or Corvan was a victim of chancers. The potential investor turned out to be counterfeit. There was another one, a Zimbabwean based in Namibia. He appeared on the scene also in November 2012. He kept changing the goal posts. In the end he simply fizzled out as well.

I am satisfied that there was no fraudulent conduct or intent on Corinne's part. B Her business relationship with the plaintiff spanned over fifteen years. First it was with Chris's brother, then with Chris himself, and later on with Lizette. Corvan's fortunes started to deteriorate in 2011. There was no suggestion that Corinne kept anything away from the plaintiff. On the contrary, as the exchanges showed, during the worst and defining period she actively communicated every material development to the plaintiff. That Corvan C eventually went under leaving the plaintiff's debt unpaid cannot, and was not, the evidence of a fraudulent conduct or intent on her part.

Mr *Ochieng* questioned the authenticity of the e-mail and SMS messages. His strong argument was that the print-outs were only discovered on the day of the trial, i.e. more than two years later. However, I found them quite genuine. Among other things, Lizette, the plaintiff's own witness, confirmed D the exchanges. The SMS transcriptions were downloaded from her own mobile phone.

Furthermore, the messages in those texts were contemporaneous to the events as they unfolded. For example, the deposit of US$75 000 at one time did indeed reflect in the plaintiff's Mauritian bank account or that of its holding E company as had been arranged. That the actual funds were never credited was not Corinne's fault, let alone her intentional design.

Still further, the deposits of US$55 000 and US$47 310.33 in December 2012 about which she had immediately communicated to the plaintiff, were indeed reflecting in her account. That they were subsequently reversed was again not F her fault. Mr *Ochieng* charged that Corinne should have produced the actual dishonoured cheques for her to be believed. However, she explained that all the relevant documents had been handed over to the provisional liquidator. Incidentally, the provisional liquidator, a practising legal practitioner, who *inter alia* would, on appointment, have investigated Corvan's affairs in accordance with the powers vested in him, and whose interim report both G parties appeared to accept without question, noted Corinne's efforts to woo potential investors, their lack of seriousness and their counterfeit deposits.

It seems Corinne was the driving force behind Corvan. Cornelius seems not to have played any active role. He did not even testify. However, no issue was taken at that. At any rate, that Cornelius may have been a passive H

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director A would be immaterial. As a co-director and co-shareholder in Corvan, his fate would be the same as that of Corinne. Such a situation obtained in *Ozinsky NO* v *Lloyd & Ors* 1995 (2) SA 915 (A). In that case, the driving force behind the business was the wife, the first defendant, and her brother, the second defendant. The husband, the third defendant, was no longer actively involved when the company went into liquidation. In an action to B find the directors personally liable for the company's debts, the South African Appellate Division said of the third defendant at 919:

> "The third defendant, so the court *a quo* found on the probabilities, likewise had faith in the first defendant's resources. His view of the future of the company would not have differed materially from that of the second defendant ... At 407B-C the court said: C
>
> 'The third defendant did not testify, but no issue was made of this and it was accepted by *Mr Nelson* (for the plaintiff) that third defendant had played no active role whatsoever in the management of the company and had concurred in all the decisions made by the first defendant, who remained the driving force behind the venture and was solely in control of the company's financial requirements.'" D

In the circumstances, I exonerate both Corinne and Cornelius from the allegations of fraud.

In the alternative, the plaintiff submitted that if I did not find evidence of fraud then I must find that the defendants carried on Corvan's business recklessly, or with gross negligence or with intent to defraud any person or for a fraudulent purpose, within the meaning of s 318 of the Act. That E section reads:

> **"318 Responsibility of directors and other persons for fraudulent conduct of business**
>
> (1) If at any time it appears that any business of a company was being carried on – F
>
> (a) recklessly; or
>
> (b) with gross negligence; or
>
> (c) with intent to defraud any person or for any fraudulent purpose;
>
> the court may, on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, G declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

To start with, in view of my findings on fraudulent misrepresentation above, H it follows that para (c) of that section automatically falls away. The plaintiff's

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argument was hinged on the fact that in the face of a rapidly deteriorating A financial situation, the defendants would see it wise to spend money on such items as the Harley Davidson motorbike which was for personal use. It was also argued that the defendants siphoned money from Corvan for personal use or for the benefit of their daughter. The Expeller debt was one huge hole that remained unexplained.

In my view, a judicial officer called upon to impeach the conduct of directors B of a company for perceived wrongful conduct in the running of the affairs of the company where harm has ensued must be too careful to avoid an armchair approach in judging that conduct. Directors must of necessity be diligent in their conduct of business and devote their skill for the good of the company. In practice they sometimes have to make important decisions on C the spur of the moment and sometimes have to take drastic action without much time to think through the consequences. Their perceived lack of foresight cannot readily be assessed on the basis of knowledge gained in hindsight. Gower *Principles of Modern Company Law* 4 ed summed it up as follows at pp 603-604:

> "Full-time employees are obviously bound to devote their whole time and D attention (during usual office hours) to the business of the company, and solicitors, accountants, and secretaries are expected to display the normal skill of members of their professions. Full-time managing directors are also expected to display similar *diligence* but it is not yet clear whether there is, so far as they are concerned, any objective standard of *skill* to which they must measure up … E
>
> The judges have faced one further difficulty. Whereas their training and experience make them well equipped to adjudicate on questions of loyalty and good faith, they move with less assurance among complicated problems of economics and business administration. Hence, they display an understandable reluctance to interfere with the directors' business judgment – a reluctance of which many examples will be found throughout the whole area of company law. Perhaps, too, they are conscious of the possible unfairness of attempting to substitute their F hindsight for the directors' foresight, and are therefore unwilling to condemn directors even though events have proved them wrong."

The cost of the Harley Davidson motorbike was not disclosed. Nor was the cost of the Greendale house. Understandably, it was not, and could not have been, the plaintiff's case that but for the purchase of those items Corvan would not have sunk. I believe that all that the plaintiff had to demonstrate G was recklessness or gross negligence in the use of Corvan's funds, of which the purchase of those specific assets would have been part.

In *Mayhew* v *Alcock NO* 1991 (2) ZLR 203 (S), a case Mr *Ochieng* said was on all fours with the present one, the directors were found personally liable for the company's debts. Among other things, they had fiddled with H

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the A value, and therefore the price, of an immovable property of the insolvent company that they sold to a third party. They did this by deflating the agreed price of that immovable property, and inflating by the same amount, the price of the movable assets of a sister company whose assets were being sold at the same time and to the same third party buyer. To that buyer the fiddling was of no consequence. It would end up paying the same amount. B The directors also sponsored from company funds their own air fares as well as those for their daughter who had no connection with the company, for holidays overseas. The court held that to render a director personally liable in such circumstances there must be at least an element of dishonesty in the manner he carried on the business of the company. The director was held liable. The court said that it had been shown that certain transactions C had been undertaken for a fraudulent purpose.

I disagree that *Mayhew* is on all fours with the current case. The decision in that case was predicated on a finding of dishonesty and fraud, elements that I have found to be absent in this case. *In casu*, for the defendants to be held personally liable, there must be a finding of recklessness or gross D negligence. Section 318 of the Act lists recklessness, gross negligence and fraud separately. It may be a suggestion that the Legislature saw different or distinct elements in each of them. In my view, fraud is certainly a distinct and stand-alone element. But with "recklessness" and "gross negligence" I find it difficult to read different meanings in a practical context. To me they are synonymous. In *Rosenthal* v *Marks* 1944 TPD 172 "gross negligence" E was described at p 180 as connoting recklessness for an entire failure to give consideration to the consequences of one's action, or a total disregard to duty. In *Chibwe* v *Fawcett Security Operations (Pvt) Ltd* HH-79-06 Bhunu J, citing *Rosenthal*, said gross negligence was tantamount to wilful non-performance of one's contractual duties and obligations. F

In my view, "recklessness" or "gross negligence" means someone exhibiting an "I don't care" attitude. One may not intend the harmful consequences of one's actions which are reasonably foreseeable, but nonetheless one persists with that conduct in total disregard of the harmful consequences. Despite the separate depiction of "recklessness" and "gross negligence" in s 318 of the Act, in my view, both refer to the conduct of business in an extremely G very bad manner. But

no matter how extremely bad that conduct may be, the statute did not, in my view, intend to equate "recklessness" or "gross negligence" with *dolus*, or, with all due respect to Bhunu J in *Chibwe's* case above, to make it tantamount to *dolus*. They both remain a question of *culpa*. In *Attorney-General* v *Munganyi* 1986 (2) ZLR 137 (S) *,* in the context of H reckless driving within the meaning of the Road Traffic Act, then No 48 of

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1976 (now *Chapter 13:11*), where driving "recklessly" and "negligently" are A now listed separately and seemingly disjunctively following an amendment to that Act, a pitched argument was presented that because of that amendment, the legislature intended to create two separate offences. The court rejected that argument. It held that, in the context of reckless driving, "recklessness" had a well-settled meaning. It is one of the categories of negligent driving B*which involves a gross and aggravated degree of negligence. It does not require any element of dolus*(my emphasis).

In my view, despite the noted reluctance of judicial officers to wade into problems of economics and business administration, and despite the caution to avoid judging the foresight of company directors with the knowledge gained in hindsight, I find that Corinne's management of Corvan's financial affairs C in the last days was extremely imprudent. It involved a gross and aggravated degree of negligence. It was reckless. My reasons are these. She ought to have scrupulously maintained their own personal accounts separately from those of Corvan and Ella's Décor. I find that, as its name portrayed, Corvan was merely the defendants' *alter ego*. Ella's Décor's parasitic existence prejudiced Corvan's creditors. Among other things, it operated from Corvan's D premises. It was not paying rent. It was fed from Corvan's bank account. Huge sums of money remained unaccounted for, for example the payments to Yaya, allegedly for a house for Ella's Decor.

The biggest dent in the defendant's conduct of Corvan's affairs, was, in my view, the disparity between the enormous debt still owing to Expeller at the E time of provisional liquidation, and the miniscule amount of invoices still to be collected. If Expeller's debt was US$1 360 000, it meant that, as Mr *Ochieng* argued, Corvan's debtors were once as high as that amount, or, at the very least, US$750 000 as admitted by Corinne herself. The defendants must have collected the money and spent it elsewhere because only US$20 000 F remained to be collected. Corinne had no plausible explanation. Corinne's explanation that Corvan went under because of its own debtors' failure to pay was contradictory. As I have said, on her own version the debtors were once as high as US$750 000. It must mean that all of it except US$20 000 had been collected.

With regard to the purchase of the Harley Davidson motorbike, it was not G shown that Cornelius had any source of funds other than what he would draw from Corvan. That purchase, whatever the price, but at such a critical time when Corvan's finances were in distress was, in my view, insensitive and therefore reckless. Prudence demanded that expensive birthday presents, undoubtedly from company funds, be deferred. H

Corinne A was adamant that the creditors would be paid from the liquidation process. However, from the interim report of the provisional liquidator, it seemed highly unlikely. Among other things, the creditors' claims that had provisionally been accepted stood at above US$1.9 million against assets worth US$445 000. It seems that despite Corvan's parlous situation the defendants continued to run it into more debt, including the order for more B fish from the plaintiff in the last days. On the provisional liquidator's report, apart from the plaintiff, there were two other suppliers of kapenta. One was owed US$46 109, which the liquidator had provisionally accepted. The other was owed US$811 which had not yet been accepted. Other big creditors, apart from Expeller at over US$1.3 million, were debts for plastic packaging C at over US$7 000; security services at over US$7 900; a bank loan at over US$182 000; transportation at over US$10 000; defendants' loan accounts (+US$99 900); employees' terminal benefits (+US$160 000) and statutory creditors such as the National Social Security Authority and dues for an employment council and a trade union. D

Recently, in *Ordeco (Pvt) Ltd* v *Govere & Anor* 2013 (1) ZLR 532 (H), Chigumba J held the director of the debtor company personally liable for the company's debts in terms of s 318 of the Act, plus the plaintiff's costs of suit in the case where the plaintiff had attempted to recover directly from the company. In that case the director had *inter alia* purposefully run the company into debts for *inter*

alia rent and operating costs and had purported E to enter into a consent judgment with the creditor on behalf of the company in circumstances where the company had no capacity to pay. *In casu*, I find the defendants equally responsible.

The plaintiff's main claim was for US$63 345 together with interest thereon at the prescribed rate from the date of judgment, plus costs of suit. The alternative F claim was for US$53 690 together with interest thereon at the prescribed rate from 30 October 2012 to the date of payment, plus the plaintiff's costs of suit in the action in which it had proceeded directly against Corvan but had had to put it on hold on account of the liquidation.

In terms of s 318 of the Act the court has a wide discretion to declare culpable G directors "***...*** personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

At trial none of the parties devoted any attention to quantum. They were wholly focused on the question of liability. Furthermore, very little attention was paid to the liquidation proceedings in which the plaintiff's claim had H been provisionally accepted at US$55 990.

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From the plaintiff's declaration I gathered that its main claim was one for A damages, the quantum being the value of the same quantity of fish as delivered to Corvan but calculated at the time of the summons. The cost of that fish as at October 2012 when they were delivered was US$53 690. The damages claim was predicated on a finding of fraud against the defendants. Having found against the plaintiff on that score, it follows that its main claim falls away. At any rate, the damages were simply not proved as nobody paid any B attention to quantum.

In the final analysis, judgment is hereby granted with costs in favour of the plaintiff and against the defendants jointly and severally, the one paying the other to be absolved, in the sum of US$53 690, together with interest on that amount at the prescribed rate from 30October 2012 to the date of payment. C In addition, the defendants shall jointly and severally pay the plaintiff's costs of suit in the plaintiff's action against Corvan Enterprises (Pvt) Ltd under the case reference number HC54/13. However, it is directed that the liability of the defendants herein shall only be in respect of such amounts as shall remain outstanding after such payments, if any, as may be received by the plaintiff in the liquidation proceedings. D

Kevin J Arnott, plaintiff's legal practitioners

Kantor & Immerman, defendants' legal practitioners

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[zRPz]MATIASHE v MAHWE NO & ANOR 2014 (2) ZLR 799 (S)

Citation	2014 (2) ZLR 799 (S)
Case No	Judgment No. CC-12-14
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA & Patel JA
Heard	16 May 2013; *CAV*
Judgment	4 December 2014

Counsel *T Mpofu*, for the applicant
J Uladi, for the respondents

Case Type Constitutional application

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application for matter to be referred to Supreme Court – allegation that right to trial within reasonable period has been breached – duty of lower court to consider whether a constitutional issue has been raised – not for lower court to decide who is to blame for delay – consideration of issue by Supreme Court – need for applicant to give evidence in support of application*

Headnote

The applicant had been arrested on allegations of fraud and placed on remand in June 2007. In February 2008 the charges were withdrawn. However, in July 2012 she was served with a summons to appear on charges of fraud in August 2012. On 21 August 2012 she filed an application in the magistrates court seeking a declaration that the decision by the Attorney-General to try her after six years violated her right to the protection of the law enshrined in s 18 of the former Constitution and that the matter be referred to the Supreme Court in terms of s 24(2) of that Constitution. She claimed that the delay of six years during which no trial had taken place was wholly attributable to the State and that she had always been available to stand trial. She also claimed that a defence witness had relocated to Europe and was not available. It was not disputed that on 24 July 2009 and 2 November 2010 the applicant had filed a complaint with the police against the complainant and his wife. Evidence was led from the police about the applicant's allegations against the complainant and that it was eventually decided that the complainant would be prosecuted first. If he was acquitted, then the applicant would be tried. In the event, the complainant was acquitted, and the applicant was then summoned. The magistrate took the view that since the applicant had participated

in the agreement which had contributed to the delay she could not now be heard to complain and accordingly found the application to be frivolous and vexatious.

Held, that the delay of over five years in the prosecution of the matter was presumptively prejudicial and the applicant was entitled to challenge the decision of the State to prosecute her on a charge of fraud in respect of which she had been charged more than five years previously. In dismissing the request for referral, the magistrate did not ask himself whether a constitutional issue arose from the proceedings. He considered that the applicant had contributed to the delay and that she was trying to further delay the day of reckoning. He was wrong in determining the application on the basis of who was to blame for the delay. The decision to refuse to refer the application was wrong and it violated the applicant's right to the protection of the law as provided in s 18(1) of the former Constitution.

Held, further, that on the merits, the length of the delay was inordinate and sufficient to trigger an inquiry into the possible breach of the applicant's rights under s 18(2). However, the applicant did not give oral evidence to refute that given by the police, whose evidence remained largely uncontroverted. An applicant must adduce evidence and be cross-examined on it. The absence of *viva voce* evidence can be fatal, because it is on that evidence that the opinion has to be expressed as to whether the question raised is merely frivolous or vexatious. It is on the record from the lower court that the Supreme Court hears argument and then decides if a fundamental right had been infringed.

Held ,further, that in the circumstances, the State had offered a reasonable explanation for the delays.

Held, further, that as to whether the applicant had asserted her rights, she had done so up to the point when further remand was refused. However, she F thereafter laid complaints against the complainant and made allegations against certain police officers. The totality of the circumstances suggested that whilst in 2008 she asserted her rights, from 2009 she did not and was content to go along in the hope that perhaps the criminal allegations would go away.

Held, further, that the issue of prejudice should be assessed in the light of G the interest of the accused which the speedy trial right was designed to protect. Three such interests have been identified: (i) to prevent oppressive pre-trial incarceration (ii) to minimize anxiety and concern of the accused and (iii) to limit the possibility that the accused will be impaired in his defence. Without oral evidence on the points, it was not H

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possible A to say whether the applicant suffered anxiety or was prejudiced in her defence by the unavailability of her witness.

Cases referred to

Fikilini v *A-G* 1990 (1) ZLR 105 (S)

Martin v *A-G & Anor* 1993 (1) ZLR 153 (S) B

In re *Mlambo* 1991 (2) ZLR 339 (S)

Mukoko v *Comr-Genl of Police & Ors* 2009 (1) ZLR 21 (S)

S v *Banga* 1995 (2) ZLR 297 (S)

S v *Matutu* 2013 (1) ZLR 412 (S)

S v *Nhando* 2001 (2) ZLR 84 (S)

Shumba v *A-G* 1997 (1) ZLR 589 (S) C

Legislation considered

Constitution of Zimbabwe 1980, ss 18(1) & (2) & 24

Case information

T Mpofu, for the applicant D

J Uladi, for the respondents

Judgment

Garwe JA: In this application, the applicant seeks the following relief:

1. A declaration that the refusal by the magistrate to refer the issues raised by the applicant to the Supreme Court is wrong at law and consequently a breach of the applicant's right to the protection of the law enshrined E in s 18(1) of the former Constitution of Zimbabwe.
2. A declaration that the decision by the Attorney-General to proceed with the prosecution of the applicant more than five years after the alleged commission of the offence is a violation of the applicant's right to the protection of the law under s 18 of the former Constitution. F
3. A declaration that the present application is properly before the Supreme Court.
4. An order that, the prosecution of the applicant being a violation of her right under s 18, such prosecution be and is hereby permanently stayed.
5. An order that the respondents pay the costs of this application. G

The background

The applicant and one Cecil Rhaniel Chengetai Muderede ("Muderede") were engaged in an intimate relationship until about 2005 when the relationship came to an end. At the centre of the dispute giving rise to the present proceedings are two properties. The first is No. 4 Goodall Avenue, Emerald H Hill, Harare registered in the name of Helce Enterprises (Pvt) Ltd, a company

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incorporated according to the laws of Zimbabwe. It is common cause that, A from the time of its incorporation, the applicant's name appeared on the official records of the company as one of the two directors of the company. The second property is No. 106 Lomagundi Road, Avondale, registered in the name of another company, Drisdane Investments (Pvt) Ltd. It is not in dispute that it was Muderede who purchased this property. B

In May 2004 Muderede was specified under the Prevention of Corruption Act [*Chapter 9:16*]. Following this development, the applicant proceeded to the offices of the Registrar of Companies where, using the specification of Muderede, she was able to remove the name of Muderede as a director of Helce Enterprises and in his place had the names of her brothers, Kumbirai Matiashe and Kudzai Matiashe, substituted as directors. On the strength of C a board resolution passed by the new board, the applicant was able to obtain a duplicate copy of the deed of transfer for No. 4, Goodall Avenue, Emerald Hill. The applicant was able, using the same *modus operandi*, to get another duplicate copy of the title deeds for No. 106 Lomagundi Road, Avondale.

On 7 June 2007 Muderede filed a complaint of fraud against the applicant D with the police. The allegation on both counts was that the applicant had misrepresented that Muderede had resigned as a director of Helce Enterprises (Pvt) Ltd and Drisdane Investments (Pvt) Ltd and in his place had appointed her two brothers, Kundai Matiashe and Kumbirai Matiashe. It was alleged that on the basis of the misrepresentation, the applicant managed to get duplicate title deeds for both properties. E

On 25 June 2007, the applicant made a statement to the police. She was thereafter placed on remand. On 26 February 2008 the charges against the applicant were withdrawn by the State. However on 17 July 2012 the applicant was served with summons to appear in court on 6 August 2012. On 21 August 2012 the applicant then filed an application in the Magistrates F Court seeking a declaration that the decision by the Attorney-General to try her after six years violated her right to the protection of the law enshrined in s 18 of the Constitution and that the matter be referred to the Supreme Court in terms of s 24(2) of the former Constitution.

In papers filed before the magistrates court, the appellant stated that the delay G of six years during which no trial had taken place was wholly attributable to the State. She had always been available to attend court to answer any allegations. Further, she stated that one of her defence witnesses, Doctor Iris Sarupinda, who was present during the time she had a relationship with Muderede, had relocated to Europe and she was not aware of her present H

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whereabouts. A The appellant did not give oral evidence in support of her application.

In the magistrates court, it was not in dispute that on 24 July 2009 and 2 November 2010 the applicant filed a complaint with the police against Muderede and his wife Michelle. In the complaint she alleged that the B two had fraudulently used the title deeds for the two properties to secure mortgage loans in favour of Shankuru Estates. She also complained that a Mr Magwere, from the office of the Registrar of Deeds, a Mr Shadreck Beni from Metropolitan Bank and one Mujokoro, a legal practitioner, had colluded with Muderede and his wife in the fraudulent registration of the mortgage bonds over the two properties. C

The State opposed the application for referral of the matter to this court and led evidence from the investigating officer, Detective Inspector Charles Chirove. The investigating officer told the court that a number of factors had contributed to the delay in the prosecution of the matter. In 2008 and 2009 the country experienced a severe economic meltdown which affected D the ability of the police to carry out its functions. At one stage the police received reports that Muderede was in South Africa. Because Muderede could not be located the charges against the applicant were withdrawn. Thereafter in 2009 and 2010 the applicant filed reports with the police based on the same facts against Muderede, his wife and other persons resulting in the arrest of Muderede on fraud charges. When both cases were sent to E court, Muderede queried why his complaint, which had been filed earlier, was being overtaken by the complaint filed later by the applicant. Muderede even approached the Anti- Corruption Commission alleging that the police were giving the applicant preferential treatment. The applicant also harassed the police and even made complaints to Police

General Headquarters against F the witness and several of his fellow officers. She was saying she wanted to be consulted before the police made any decision on this matter. He told the court he formed the opinion that the applicant was throwing spanners into the works to ensure that the matter went nowhere. In an effort to make some progress, the State then reached an agreement with the applicant and Muderede that the case in which Muderede was an accused was to be tried G first. In the event that Muderede was convicted, then the case in which he was complainant would die a natural death. However in the event that he was acquitted, then the case in which applicant was an accused would then commence. As it so happened, Muderede was acquitted in 2012 as a result of which applicant was then summoned to appear in court. It was his evidence H that it was the applicant who was largely to blame for the delay.

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The magistrates court was of the view that since the applicant had participated A in the agreement which had contributed to the delay she cannot now be heard to complain. On that basis the court found the application to be frivolous and vexatious. The court further found that the application was an attempt to further delay the proceedings. The court therefore dismissed the application. Following that decision the applicant filed the present application in terms of s 24(1) of the former Constitution. B

The issues for determination

it seems to me that the issues that arise for determination are twofold. These are, firstly, whether the matter has been properly brought before this court in terms of s 24(1) of the former Constitution. Secondly, if so, whether the applicant is entitled to a permanent stay of proceedings. C

Whether the matter is properly before this court

In dismissing the application for the referral of the matter to the Supreme Court, the magistrate commented:

> "Accused now wants to renege from her commitment that she would only be D prosecuted if only Cyril Muderede was acquitted because the facts forming the basis of the court charges were similar. Cyril Muderede has now been acquitted so the natural interpretation of their agreement should follow. Accused participated in circumstances which caused the delay so she should not cry foul because if she had no hand in this matter the State could have proceeded to cause the trial of both matters at the same time but in different courts.
>
> Accordingly, I find that the application is just meant to further delay proceedings E and it is frivolous and vexatious. Accordingly the application is dismissed."

It is common cause that, at the time of the making of the application, there had been a delay of over five years in the prosecution of the matter. That this delay was presumptively prejudicial is without doubt. The applicant was entitled to challenge the decision of the State to prosecute her on a charge F of fraud in respect of which she had been charged more than five years previously. The delay was such as to trigger an inquiry into the possible violation of the applicant's rights to the protection of the law.

It is clear from his reasons for dismissing the request for referral that the magistrate did not ask himself whether a constitutional issue did arise from G the proceedings. He considered that the applicant had contributed to the delay and that she was trying to further delay the day of reckoning. On that basis alone he found the application to be frivolous and vexatious.

I am satisfied that the magistrate was wrong in determining the application on the basis of who was to blame for the delay. As Mr *Mpofu* correctly submitted, the magistrate asked himself the wrong question and inevitably came to the H

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wrong A conclusion. Indeed, the State conceded that the decision to refuse to refer the application was wrong and that it violated the applicant's right to the protection of the law as provided in s 18(1) of the former Constitution.

In these circumstances the applicant was entitled to approach this court directly: *Martin* v *Attorney-General & Another* 1993 (1) ZLR 153 (S) at 158H; *Mukoko* v *Commissioner-General of Police & Ors* 2009 (1) ZLR 21 (S) B at 24B. This court must now place itself in the position it would have been in had the magistrate, as he ought to have done, referred to it the question raised before him.

Whether the applicant is entitled to a permanent stay of C proceedings

The factors that this court is enjoined to consider in an application of this nature are now settled. These are (a) the length of the delay, (b) the reason given by the prosecution for the delay, (c) whether the accused person asserted his rights and (d) the prejudice occassioned to the accused by the delay: In re *Mlambo* 1991 (2) ZLR 339 (S) at 350A-G; *Fikilini* v *Attorney-General*D 1990 (1) ZLR 105 (S) at 113A-H. I proceed to consider each of these factors in turn.

(a) The length of the delay

The delay in bringing the applicant to trial is reckoned from 25 June 2007 when she was charged. See *Shumba* v *Attorney-General* 1997 (1) ZLR 589 (S) E at 592G. The fact that charges were withdrawn in 2008 is irrelevant. The clock continued ticking: In re *Mlambo (supra)* at 346E-H. The applicant was summoned to appear in court for trial on 6 August 2012. The delay from the time she was cautioned was therefore just over five years. That delay was inordinate and sufficient to trigger an inquiry into the possible breach of the applicant's rights under s 18(2) of the Constitution. F

(b) The reasons for the delay

In her application before the court *a quo*, the applicant attached an affidavit in which she explained the basis of her request for the matter to be referred to the Supreme Court. She did not give oral evidence. In the affidavit she stated that she had not contributed to the delay in any way and that it was G the State that had employed dilatory tactics in the prosecution of the matter.

The State however led evidence from the investigating officer. His evidence was that the police force, like most other State entities in the country, was affected by the economic difficulties of 2008 – 2009. The result was that the police had no resources to look for Muderede who was in Banket and H at one stage was reportedly in South Africa. Instructions had also been

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issued for further investigations to be carried out after the withdrawal of A the charges in 2008. The main cause of the delay, however, was the fact that the applicant filed two complaints in 2009 and 2010 based on the same facts. The result was that Muderede, who had been complainant earlier, also became an accused. The witness explained that the applicant brought a lot of pressure to bear on the police. She made reports against several police officers including the investigating officer to Police General Headquarters. B She wanted her complaint tried first. Muderede too complained that the police were giving preferential treatment to the applicant. It was because of this situation that an agreement was then reached between the applicant, the State and Muderede that the matter in which the applicant was complainant be tried first. If Muderede was convicted then his complaint would die a natural C death. However if he was acquitted then the case in which the applicant was the accused would be resuscitated. On that basis, Muderede was tried and was acquitted. Consequently, the applicant was then summoned so that she would undergo trial on the allegations levelled by Muderede.

Although the investigating officer was cross-examined at length on this D evidence, he remained unshaken and was adamant that the applicant played a significant role in the delay. The applicant did not give evidence and consequently the evidence given by the investigating officer remained largely uncontroverted.

The position is now settled that an applicant must adduce evidence and be cross-examined on it: *S* v *Banga* 1995 (2) ZLR 297 (S). Indeed this court E has emphasized that the absence of *viva voce* evidence can be fatal: *S* v *Nhando* 2001 (2) ZLR 84 (S); *S* v *Matutu* 2013 (1) ZLR 412 (S). In *S* v *Banga (supra*) Gubbay CJ stressed the need for an applicant to testify on the extent to which, if at all, the cause of the delay was his responsibility, whether he had asserted his rights and whether any actual prejudice had been suffered as a result. At 301D-G, the learned Chief Justice remarked further: F

> "Moreover, the absence of *viva voce* evidence completely disables findings to be made that the long delay has been the cause of mental anguish and disruption to the business and social activities of the accused, particularly where, as here, his liberty was not interfered with; and that it has impaired his ability to exonerate himself from the charge due to the death, disappearance or forgetfulness of G potential witnesses. See In re *Mlambo supra* at 352G and 354D-E; *S* v *Demba* S-194-94; *S* v *Marisa supra* at p 9.
>
> I trust that I have made it clear that it is essential for an accused, who requests a referral to this court of an alleged contravention of the Declaration of Rights, to ensure that evidence is placed before the lower court. It is on that evidence that the opinion has to be expressed as to whether the question raised is merely H

> frivolous A or vexatious. It is on that record that the Supreme Court hears argument and then decides if a fundamental right had been infringed."

On the basis of the evidence adduced before the court *a quo*, the position may be summarized as follows. The delay between June 2007 when the applicant was charged and the year 2009 is attributable to the State. However, that B period was explained by the State. When the charge was withdrawn in 2008, it had not been possible for the police to contact Muderede. There also had been instructions for some aspects of the case to be further investigated. Further, this was the time of hyperinflation and the police had no resources to look for Muderede. This court can take judicial notice of the fact that indeed 2008 and 2009 were very difficult years and even the operations of C this court were affected owing to the economic situation then prevailing. It was a situation that affected government and the citizenry at large. In my view that explanation cannot be said to be unreasonable.

The delay after 2009 is explained by the fact that the applicant filed criminal complaints against Muderede, Muderede's wife and other persons involved D in the registration of the bond on the two properties. The investigating officer explained the difficult situation he and other officers found themselves. They had two dockets on essentially the same facts. The complainant in the one case was the accused in the other. He explained the pressure that was brought to bear on the police officers by the applicant. The applicant made complaints to Police Headquarters and investigations into her complaints were E instituted. The dilemma that faced the prosecuting authorities was which case to prosecute first. The applicant wanted the case in which she was complainant to be tried first whilst Muderede was insisting that his complaint be tried first as it was first in time. It was against that background that an agreement was reached between the State, the applicant and Muderede that the applicant's F complaint be tried first and in the event Muderede was convicted, then his complaint would die a natural death, and, if not, the applicant would then stand trial. Indeed Muderede was tried and acquitted. It was when the State then sought to proceed with the prosecution of the applicant that she then filed the application for stay of criminal proceedings.

In my view, whilst the State, being *dominus litis*, should have been more G assertive, the reality is that the State was faced with a difficult question given the allegations and counter allegations made by both, as to whom to prosecute first between the two. The delay was occasioned by this confusion and the agreement that Muderede be prosecuted first. The explanation in my opinion is acceptable. It is important that one does not take an armchair H view of the situation that arose.

In all the circumstances I am of the view that the State has proffered a A reasonable explanation for the delay.

(c) Whether applicant asserted her rights

It must be accepted that, in March 2008, when a further remand was refused, this was at the instance of the applicant. To that extent therefore she asserted her rights. However in 2009 the applicant also filed a complaint on the same B facts. The police investigated both complaints. Two dockets were opened. Both the applicant and Muderede were alleging that the police were not impartial.

Clearly during this time the applicant was aware, or ought to have been, that the State wanted to prosecute her. She is said to have approached Police Headquarters making a number of allegations against certain police officers. C She did not, during this period, seek to assert her rights. Instead

she went along and only after Muderede's acquittal and the decision by the State to prosecute her did she then file the application to permanently stay the criminal proceedings against her. The totality of the circumstances suggests that whilst in 2008 she asserted her rights, from 2009 she did not and was content to go along in the hope that perhaps the criminal allegations would go away. D

(d) The prejudice occassioned by the delay

The issue of prejudice should be assessed in the light of the interest of the accused which the speedy trial right was designed to protect. Three such interests have been identified. These are (i) to prevent oppressive pre-trial incarceration (ii) to minimize anxiety and concern of the accused and (iii) to E limit the possibility that the accused will be impaired in his defence: *Fikilini* v *Attorney-General (supra)* at 113H-114A.

In her affidavit both in the court *a quo* and before this court the applicant says her friend, Dr Iris Sarupinda, who was present at the time the companies were formed, has relocated to Europe and her present whereabouts are F unknown. This case is a good example why *viva voce* evidence is essential in an application of this nature. The applicant does not say what evidence exactly Dr Sarupinda would give in her defence. She does not say whether she suffered any anxiety during this period. Because the applicant did not give evidence, the State was not given the opportunity to cross-examine her on these issues. She does not say when the doctor left the country and G what efforts she has made to trace her current whereabouts. In any event the formation of a company is never without formality. Various documents have to be filed showing the shareholding, directorship, registered office, etc, of a company. It is not suggested that this documentation is no longer available. The suggestion that the absence of Dr Sarupinda will prejudice her is a bald H

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one A and in my view would not, in the absence of further substantiation, justify a permanent stay of the proceedings against her.

Disposition

In my view no justification for a permanent stay of the criminal proceedings pending against the applicant has been shown. Put another way, the suggestion B that the right to a fair trial within a reasonable time has been contravened is not sustainable on the facts of this case.

In the result therefore the application must fail.

The application is accordingly dismissed with no order as to costs. C

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA & PATEL JA concurred.

Mtetwa & Nyambirai, applicant's legal practitioners

Prosecutor-General, for the first & second respondents

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[zRPz]TICHAVANHU & ORS v OFFICER IN CHARGE, MORRIS DEPOT & ORS 2014 (2) ZLR 810 (H)

Citation 2014 (2) ZLR 810 (H)

Case No Judgment No. HH-690-14

Court High Court, Harare

Judge Bere J

Heard 24 November & 2 December 2014; *CAV*

Judgment 4 December 2014

Counsel *N Mugiya*, for the applicants
T O Dodo, for the respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – duty of State organs to protect freedoms set out in Declaration (s 44) – ill treatment by police of members of the force – breach of constitutional duties and members' constitutional rights* D

Police – *discipline – punishment under Police Act [Chapter11:10] – informal punishment following punishment meted out under Act – ultra vires the Act*

Headnote

The applicants, all junior police officers, had each charged with and convicted of violating sections of the Police Act [*Chapter 11:10*] for E which they were each ordered to undergo different lengths of detention at the police detention barracks. Upon their release from the barracks, they were each handcuffed and deposited at Morris Training Depot for what the respondents alleged was a retraining programme to assist in the "rehabilitation" of the officers. They were effectively detained at the Depot and subjected to harsh treatment, details of which were given F in evidence. This "retraining" was purportedly authorised by a circular issued by a senior police officer, which gave the duration of the retraining as ranging from between six weeks to three months. It also authorised a reduction in salary. The applicants sought an order for their release.

Held, that s 29 of the Police Act deals exhaustively with a list of punishable conduct and what is deemed to be the appropriate penalty is specified in G the same Act. The circular attempted to redefine some of the violations and prescribe further punishment in complete violation of the Act. The circular was clearly *ultra vires* the Act. It could not be justified as being standing orders issued in terms of s 9 of the Act, for which Ministerial approval is required. H

2014 (2) ZLR p811

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Held, A further, that the advent of the new Constitution, with its elaborate provisions on the need to recognise and protect fundamental human rights of the citizenry irrespective of their station in life, makes it mandatory for every citizen of this country to be conscious of such rights. For our police officers, policing must be executed in full compliance with the Constitution. Under s 44 of the Constitution, the State and every B person, including juristic persons, and every institution and agency of the Government at every level must respect, protect, promote and fulfil the rights and freedoms set out in the Declaration of Rights. One such right, under s 86(3)(c), is the right not to be tortured, or subjected to cruel, inhuman or degrading treatment or punishment. The evidence C showed that the respondents were guilty of deliberate violations of not only their own governing Act but of the Constitution as well.

Legislation considered

Constitution of Zimbabwe 2013, ss 44 & 86(3)(c)

Police Act [*Chapter 11:10*] , ss 9, 10 & 72

Case information

N Mugiya, for the applicants D

T O Dodo, for the respondents

Judgment

Bere J: The five applicants are duly attested members of the Zimbabwe Republic Police. All of them are constables. The common thread that runs E through their application is that on separate occasions they were each charged and convicted of violating sections of the Police Act for which they were each ordered to undergo different lengths of detention at Chikurubi Detention Barracks. Upon their release from Chikurubi, they were each handcuffed and deposited at Morris Training Depot for what the respondents allege is a F retraining programme to assist in the rehabilitation of the officers.

There is disagreement between the applicants and the respondents as to what exactly the applicants are being subjected to at Morris Depot. The applicants in both their founding affidavits and their *viva voce* evidence in court gave a graphic explanation of what they have been subjected to ever since completing G their detention at Chikurubi Detention Barracks. Their main contention is that their punishment at Chikurubi is being unlawfully extended under the guise of further training. They allege that this added punishment is being done in complete violation of the Police Act. All the applicants explained in detail how they have been abused, humiliated and often assaulted by their supposed trainers or instructors. They were all categorical that ever H since being transferred from Chikurubi they had not undergone any form of

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retraining, except to be ordered to do things which are calculated to degrade A and humiliate them as members of the police force. They are being labelled as "Bangwellas", a term which they regard as derogatory and which term they understand to mean either bandits or rebels within the force.

I will not attempt to rehash the evidence given by the applicants, but suffice it to say that on the three occasions that the applicants appeared before B me during the course of this enquiry, they were all dressed in trench coats despite the weather being unaccommodative of such attire because of the high temperatures. They all testified that the only time they are ordered to remove the trench coats is when it is cold. This was not challenged.

All the applicants testified that from the time they were transferred from Chikurubi Detention barracks to Morris Depot they have each had to do C with one set of clothes which is a pair of uniform plus the trench coat. Each of them has a single set of underwear which they have to dry wash every night to enable them to wear in on the following day.

They all testified that their liberty has been severely curtailed to the extent that their relatives are not allowed to pay them visits, let alone know where D they are being kept. The applicants are always under guard by fellow police officers. They pointed out to two senior officers who were in court who have had to escort them each time they have been coming for this enquiry. Even more ominous in the applicants' complaints were the allegations of assault which brought the second respondent to the fore.

When I heard this level of senior police brutality against the applicants who E are fairly junior members of the force, I could not believe such was the situation in our beloved Zimbabwe Republic Police. The situation became even more worrisome to me when it was brought to my attention that the plight of the applicants had worsened as a result of their decision to exercise their constitutional rights by mounting this application. This was said to have F been orchestrated by Senior Assistant Commissioner Ndebele (the Officer Commanding Harare Province). My natural and judicious reaction was to instruct that the officer concerned presents herself to court and explain her conduct. This was despite the fact that I could have disposed of this matter on the papers filed of record and submissions made by both counsel. In my view, the allegations raised by the applicants were of a very serious magnitude. I G took this view because anything that speaks to a naked violation of our rights as enshrined in our constitution must be seriously interrogated.

When the second respondent appeared in court, she denied all the allegations levelled against her and gave the impression that she could not have stooped so low to treat the applicants in the manner alleged against her by the H

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applicants. A She indicated that the applicants were certainly exaggerating in their evidence against her.

She drew the court's attention to the circular of 6 October 2014 which she suggested was the bedrock upon which the "retraining" programme is founded. She also drew the court's attention to the Developmental Training B Programme and alleged that as far as she was concerned all the applicants were being subjected to that training programme.

There can be no doubt in my mind that if one were to accept that the circular was done above board, the first challenge it faces is that it on the face of it gives ZRP General Headquarters more power that the power vested in it by the Police Act [*Chapter 11:10*], which is supposed to regulate the conduct C of the Zimbabwe Republic Police.

For example, the circular sets new grounds for dismissal from the police force under its clause 6.0 in direct violation of the Police Act itself which has sufficient provisions to deal with the dismissal of any member from the force.

Secondly, D the applicants in this case were sentenced to periods ranging from 4 days to 14 days at Chikurubi Detention Barracks in terms of the penalty provisions under s 29 of the Police Act. However, clause 5 of the circular gives the duration of the retraining as ranging from between six weeks to three months. This becomes ridiculous if one considers that someone who E has been convicted of a minor omission and sentenced to undergo four days at Chikurubi Detention Barracks must now undergo a further deprivation of liberty at a compulsorily reduced salary in terms of clause 4.5 of the circular.

Section 29 of the Police Act as currently framed deals, in my view exhaustively, with a litany of punishable conduct and what is deemed to be appropriate penalty is specified in the same Act. But alas! Clause 3.0 F of the circular attempts to redefine some of the violations and prescribing further punishment in complete violation of the enabling Act. I could go on and on but the bottom line is that the circular is clearly *ultra vires* the Act. If the Zimbabwe Republic Police feel that the Police Act has any notable inadequacies, the proper thing to do is for it to lobby Parliament to effect G the necessary amendments in the usual way and not to try and amend the Act through an offending circular like it did on 6 October 2014.

More importantly, it is clear to me that the circular in question was clearly not done in accordance with ss 72, 9 or 10 of the Police Act. I say so because the way the circular is formulated does not say what it is ascribed to by the H makers of that circular.

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There is no indication on the preamble to the circular itself that it was A created in consultation with the Minister as per the dictates of the sections referred to above.

Secondly, the power to come up with such circular can only be vested in the Commissioner General himself and the circular in question suggests it was created by Senior Assistant Commissioner J C Chengeta. This officer B does not have the power to do what he did. If the argument is that he was acting in terms of s 9 of the Police Act (which incidentally speaks to standing orders), then the circular should have been properly framed to comply with that section.

Officer Ndebele came short when it came to challenging the averments by the applicants that ever since they were transferred from Chikurubi to C Morris Depot in handcuffs they have not undergone any form of training, except to be humiliated and degraded in direct violation of the Constitution. The officer could not produce documentary confirmation of the alleged training programme. Not even a single instructor was called to confirm the conducting of any retraining exercise. This was important, given the assertive position D taken by the applicants that they had never been trained except to have the misfortune of having senior Zimbabwe Republic Police Officers based at Morris Depot taking turns to derive joy in humiliating and embarrassing them and on occasions assaulting them.

In the light of the clear evidence given by the applicants, it would be foolhardy E for one not to accept their evidence as revealing the truth of what has been happening to them.

What one sees in all these shenanigans by senior members of the ZRP at Morris Depot is a serious conspiracy to terrorise fellow officers who would have served their punishment under the guise of subjecting them for further F training. One may ask, if there is need for rehabilitative training of someone who has been properly convicted and sentenced for violating provisions of the Police Act and served their sentence, for example four days or 14 days, as is the case here, why can a rehabilitative programme not be put in place to fit into the statutorily recognised period of punishment?

This case is particularly frightening in that the conduct complained of by the G applicants does not only undermine the Police Act itself but the Constitution.

The advent of the new Constitution, with its elaborate provisions on the need to recognise and protect fundamental human rights of the citizenry irrespective of their station in life makes it mandatory for every citizen of this country to be conscious of such rights. For our police officers, policing has H

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long A seized to be business as usual. It must be executed in full compliance with the constitution.

In this regard, I am reminded of the remarks made by the Honourable the Chief Justice Godfrey Chidyausiku on 20 November 2014 at a police graduation parade, incidentally at Morris Depot (the scene of these allegations) when B he stated:

> "I would want to believe that in addition to the above subjects, the graduands were also taken through the provisions of our new Constitution, as it is the bedrock upon which policing and the entire justice system is founded …
>
> It is now our duty, Commissioner General, the police and the judiciary to ensure that our Constitution is upheld at all times and by all without fear or favour. C With the adoption of the new Constitution, constitutionalism should be the order of the day for all of us. We in the judiciary are ready to play our part and I am confident that the police are equally ready."

There can be no doubt in my mind that the conduct complained of by the applicants in this case is a clarion call to the police in general to execute their duties in terms of the Constitution. Lest we forget, s 44 of the Constitution D is specific in what is expected of all of us in our quest to guard jealously our fundamental human rights and freedoms. The section is crafted as follows:

> **"44 Duty to respect fundamental human rights and freedoms**
>
> The State and every person including juristic persons, and every institution and agency of the Government at every level must respect, protect, promote and fulfil the rights and freedoms set out in the charter." E

Furthermore, the Constitution is clear under s 86(3)(c) that every citizen must be accorded "the right not to be tortured, or subjected to cruel, inhuman or degrading treatment or punishment."

The numerous violations complained of by the applicants and graphically narrated in this application, like the arbitrary curtailment of their liberty, F deliberate deprivation of decent clothing, denial of food and lying that they have partaken of that food in order to further hurt them by suffering a reduced salary through compulsory salary deductions, their being ordered to wear trench coats even when temperatures are soaring (all these being done outside the provisions of any recognised law) summarise the brazen G determination by their superiors to violate the applicants' rights.

The enquiry in this case has exposed the respondents of their deliberate violations of not only their own Police Act but of the Constitution as well.

It is particularly frightening to note that this well-orchestrated scheme is being instigated by senior members of the police against fellow police officers. It is difficult for me to fathom that all these shenanigans are being done with H the approval of the Commissioner General of Police.

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It is clearly a gross exaggeration by the second respondent to try and argue A that if the order desired by the applicants were to be granted there would be chaos in the Zimbabwe Republic Police. The very strong view that I take is that no one must be allowed to so openly violate a fellow citizen's rights with impunity like what is sadly projected by this case.

What is clear is that the second respondent made a miserable attempt to defend B the indefensible, thereby exposing herself as one of the chief architects of the degrading and inhuman treatment of fellow police officers. It is such officers like the second respondent who require rehabilitative assistance in order to properly manage the affairs of the police force.

It is for these cumulative reasons that I feel inclined to grant the provisional order as amended. C

In granting this provisional order, I am fully conscious that this court has no capacity to prescribe how the Zimbabwe Republic Police must regulate its affairs. That function is best left to be properly handled by the Zimbabwe Republic Police as an institution. Our concern as courts is to ensure that the Zimbabwe Republic Police must never be found in the forefront in trampling D upon the people's rights, more particularly in this case, the constitutionally recognised rights of its own members. Courts are obliged to ensure that the Zimbabwe Republic Police operates within the confines of the law.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners

Prosecutor General's Office, respondents' legal practitioners E

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[zRPz]REMO INVESTMENT BROKERS (PVT) LTD & ORS v SECURITIES COMMISSION OF ZIMBABWE 2014 (2) ZLR 817 (S)

Citation	2014 (2) ZLR 817 (S)
Case No	Judgment No. S-85-14
Court	Supreme Court, Harare
Judge	Garwe JA, Gowora JA & Patel JA
Heard	27 May 2013; *CAV*
Judgment	5 December 2014
Counsel	*F Girach*, with *J Samkange,* for the appellants *T Mpofu*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Stock exchange – *discipline of dealers in securities – powers of Securities Commission to cancel licences of alleged offenders – procedures provided for in ss 48 and 105 of Securities and Exchange Act [Chapter 24:25]*D *– difference between such procedures – requirement under s 105 to investigate offence and to give offender opportunity to make representations – cancellation under s 48 not necessarily requiring that offender be given opportunity to make representations*

Headnote

Following E upon turbulence within the securities sector, the Securities Commission suspended the first appellant (Remo) from trading for a period of six months. This was done in terms of s 49 of the Securities and Exchange Act [*Chapter 24:25*]. This provision allows for the suspension of a licence in order to facilitate investigations. Such F suspension may not be for more than six months. After the suspension, the Commission instituted investigations under s 103 of the Act through an inspector, Proctor and Associates, who compiled a report and in terms of s 104 forwarded it to the Commission. On the basis of that report, the Commission charged Remo and the second appellant with G contravening certain sections of the Act. The appellants were invited in terms of s 104(2) to make representations to the charges. Ultimately, the Commission convicted the appellants and cancelled their licences for a period of five years after which they could re-apply for registration. The appellants appealed to the Administrative Court, which dismissed the appeal and confirmed both the conviction and sanctions imposed H by the Commission.

On appeal to the Supreme Court, it was argued that the Administrative A Court had erred in finding that the cancellation was effected in terms of s 105 of the Act. The suspension having been effected in terms of 49, the cancellation should have been effected in terms of s 48(1), and was premature, in that the Commission was not empowered to cancel a licence under s 48(1) until a period of 30 days allowing for an appeal to the Administrative Court in terms of s 108 had elapsed. The appellants also B contended that the Commission had, contrary to the provisions of s 105(2), not provided them an adequate opportunity to make representations as to why their licences should not be cancelled. They contended that the court *a quo* did not address that issue.

Held, that the powers of the Commission to cancel a licence are contained C in ss 48 and 105 of the Act. Under the latter, the Commission may, after considering an inspector's report and any representations made by the person concerned and if satisfied that the person is guilty of a condition of his licence or of a breach of the Act, cancel the person's licence. The process of cancellation under s 105 is preceded by an investigation of the licence holder. Any report from the investigator is availed to D the licence holder for comment and in addition, the Commission is obliged to call upon the holder to make representations to it before any sanction is imposed. There is no provision for the suspension of a licence under s 48 prior to its cancellation. The provisions of s 48 do not contemplate a situation where the holder has been the subject of an investigation under s 49. Where a licence is cancelled under s 48(1), E such cancellation is made subject to the provisions of subss (2) and (3). Subsection (2) enjoins the Commission to notify the holder in writing that it proposes to cancel the licence and the reasons for proposing to do so. The Commission is also obliged to afford the holder of the licence an adequate opportunity to make representations. In the event that the F Commission believes on reasonable grounds that it is not possible to notify the holder personally, the Commission is permitted to publish a notice in the *Gazette* and a newspaper circulating in the area in which the licence resides or is situate, stating that the licence shall be cancelled unless the holder lodges an appeal with the Administrative Court in terms of s 108 of the Act. G

Held, further, that all the actions by the Commission after receipt of the inspector's report were consistent with the provisions of s 104. All the appellants were availed the opportunities afforded to a registered person or a licence holder to be heard in terms of that section prior to the Commission taking any action subsequent to an investigation. The H

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procedure A adopted by the Commission in its dealings with the applicants was more consistent with the provisions of s 105 as opposed to s 48. The latter section envisages a situation where the licence holder is informed of the sanction that the Commission intends to impose and then is given an opportunity to make representations. Under s 105 the licensee is investigated and a report of the investigation is availed to the licence holder for comment. Over and above this B the licence holder is provided with an opportunity to be heard by the Commission. A cancellation effected under s 48 is summary and the licensee is not assured of an opportunity to make representation before the cancellation. Thus, there is need for the cancellation not to be effected before the appeal process provided for under s 108 has been exhausted. There is no such C requirement under s 105.

Held, further, that an appeal to the Administrative Court is an appeal in the wide sense and the appellants could have, if they had chosen to do so, led evidence before that court in order to

ensure that whatever irregularities the Commission may have been guilty of were corrected. They did D not avail themselves of that opportunity, leaving the appeal court in as good a position as the court *a quo* to determine the issue raised by the appellants. On the evidence, all the appellants were given an adequate opportunity to be heard before the cancellation of the two licences and the Commission complied fully with its obligations under the Act.

Held, further, that on the evidence, the findings of guilt were unassailable E and the penalties, though harsh, were not irrational.

Cases referred to

Barros v *Chimponda* 1999 (1) ZLR 58 (S)

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

Duly Holdings v *Chanaiwa* 2007 (2) ZLR 1 (S) F

IMATU v *MEC, Environmental Affairs etc, Northern Cape* 1999 (4) SA 267 (NC)

Malimanji v *CABS* 2007 (2) ZLR 77 (S)

S v *Fikizolo* 1978 (2) SA 676 (NC)

Watchtower Bible & Tract Society of Pennsylvania & Anor v *Drum Investments (Pvt) Ltd & Anor* 1993 (2) ZLR 67 (S) G

ZB Financial Holdings v *Manyarara* S-3-12

Legislation considered

Securities and Exchange Act [*Chapter 24:25*], ss 48, 49, 65, 103, 104, 105(1) & 108

Case information H

F Girach, with *J Samkange,* for the appellants

2014 (2) ZLR p820

Gowora J

T Mpofu, for the respondent A

Judgment

Gowora JA: This is an appeal against a judgment of the Administrative Court by which the court dismissed the appeal to that court against a decision of the Securities Commission of Zimbabwe ("the Commission") cancelling the licences of the first and second appellants, and imposing sanctions upon the third and fourth appellants. B

The first appellant Remo Investment Brokers (Pvt) Ltd ("Remo") is one of the longest established registered securities exchanges within Zimbabwe. The second appellant Mahomed Iqbal Mahmed ("Mahmed") is a securities dealer and is also the Managing Director of Remo. The third appellant Rezana Ebrahim ("Ebrahim") is married to Mahmed and is a Compliance Officer C for Remo. She and Mahmed are the beneficial owners of Remo. The fourth appellant John Motsi ("Motsi") is a registered securities dealer.

Following upon turbulence within the securities sector, the Commission suspended Remo from trading for a period of six months. After the suspension of Remo, the Commission instituted investigations through Proctor and D Associates who compiled a report. Armed with that report, the Commission charged Remo and Mahmed of contravening certain specified sections of the Securities Exchange Act [*Chapter 24:25*] ("the Act").

The appellants were invited to make representations to the charges. Ultimately, the Commission confirmed the convictions and cancelled the licences of Remo and Mahmed for a period of five years, after which they could E re-apply for registration. Ebrahim was advised by the Commission that she was permanently disapproved as a compliance officer. Motsi was able to retain his dealer's licence but was advised that he had to practise under a supervising senior broker for a period of one year. Aggrieved by the decisions of the Commission, the appellants collectively launched an appeal with the Administrative Court which dismissed the appeal and confirmed both the F conviction and sanctions imposed by the Commission.

The appellants now appeal to this court on several grounds.

Mr *Mpofu* on behalf of the Commission took the point in his heads of argument that the grounds of appeal complain against every finding made G by the court *a quo*. The grounds, which number thirteen, have been framed too widely. They are not clear and concise as required by the rules of this court. Although the manner in which the grounds have been set out is not in itself fatal to the appeal, it would be neater to deal with the appeal on the basis of the substantive issues for resolution rather than the piece meal approach detailed within the grounds. H

2014 (2) ZLR p821

Gowora J

A A preliminary point raised on appellants' behalf was that the court *a quo* had erred in finding that the cancellation of the licences of Remo and Mahmed was effected in terms of s 105 of the Act. In the alternative, it was argued that the court erred in failing to find that the cancellation of the said licences was premature regard being had to the provisions of s 48 as read with s 108 of the Act. It was contended further that the court *a quo* had erred in any event B in failing to find that, contrary to the provisions of s 105(2), the appellants had not been afforded an adequate opportunity to be heard. It was argued that they did not receive a fair hearing. It was therefore contended that on this basis the appeal should succeed.

Before the Administrative Court, the appellants had similarly argued that the C cancellation of the licences had been done in breach of the quoted sections. *Per contra*, the respondent contends that the licences for Remo and Mahmed were cancelled under s 105 of the Act.

The court *a quo* found that, in terms of s 48(3), the Commission was not empowered to cancel a licence under s 48(1) until a period of 30 days D allowing for an appeal to the Administrative Court in terms of s 108 would have elapsed. The court, however, found that contrary to the contention of the appellants, the licences were cancelled in terms of s 105 of the Act as opposed to s 48(1). In the circumstances, the court *a quo* came to the conclusion that there had been no breach of s 48(3) and s 108 on the part of the Commission.

In E my view, the dispute centres on the interpretation of ss 48, 49 and 105 of the Act. The powers of the Commission to cancel a licence are provided for in s 48 and s 105 of the Act. It was s 105 which the court found to be the applicable section.

Section 105(1) reads in relevant part: F

> "If, after considering an inspector's report sent to it in terms of subsection (1) of one hundred and four, together with any representations made by the person, committee or operator concerned in terms of subsection (3) of that section, the Commission is satisfied that the person, committee or operator as the case may be, has contravened any term or condition of his or her licence, registration or approved scheme, as the case may be, or any provision of this Act, or any G direction, requirement or order made under this Act, the Commission may, subject to subsection (2), do any of one or more of the following –
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> …
>
> (f) direct the person, committee or operator to suspend all or any of his or her business; ...
>
> (i) in the case of a licensed or registered person or entity, cancel the licence H or registration or amend any of its terms and conditions."

2014 (2) ZLR p822

Gowora J

It is common cause that, prior to launching an investigation into the activities A of Remo, the Commission advised the former in writing that it intended to investigate the relationship between itself and Interfin Securities (Pvt) Ltd ("Interfin"), and further, that to facilitate such investigation, it was necessary to cause the suspension of Remo.

The appellants have not challenged the propriety of the suspension. The B Commission advised Remo that the suspension was being effected in accordance with the provisions of s 49. The suspension was effected by a letter dated 29 March 2012, addressed to Mahmed in the following terms:

> "An announcement was made at yesterday's trading session that your firm is suspended from trading on the Zimbabwe Stock Exchange with immediate effect.
>
> A complaint was received from Remo Investment Brokers (Pvt) Ltd that C Interfin Securities had misappropriated shares lodged as collateral in a loan transaction. The Zimbabwe Stock Exchange and

Securities Commission of Zimbabwe have since had sight of Interfin Securities (Pvt) Ltd's response to the allegations.

Regrettably, there are serious inconsistences in the submissions made by both parties so that it has been found necessary to suspend you from trading in terms of Section 49 of the Securities Act in order to facilitate a full investigation. D Amongst other issues, the enquiry will seek to establish the exact nature and terms of the transaction between two members of the Zimbabwe Stock Exchange involving such a material sum of money as well as the true beneficial owner of the shares lodged as collateral with yourselves.

The period of suspension is a maximum of 6 months but regular reviews will be carried out and you will be permitted to return to trading as soon as possible after satisfactory conclusion of the matter. E

In the circumstances we look forward to your full co-operation with the matter."

Section 49, under which the licence was suspended, reads in relevant part:

"49 Suspension of a licence

(1) Subject to subsection (6), if the Commission considers it necessary to suspend a licence – F

(a) in order to facilitate an investigation into the holder's conduct; or

(b) pending the determination of an appeal in terms of section *one hundred and eight*; or

(c) …

the Commission may, by notice in writing to the holder, suspend the licence wholly G or partially in relation to all or any of the activities authorised by the licence.

(2) A suspension in terms of subsection (1) shall last for such period as the Commission may specify, but in no case shall it last for longer than six months."

The position of the appellants is that once the Commission suspended the licence in terms of s 49, it was only logical that any cancellation subsequent to such suspension be done in terms of s 48(1) and, that consequently, the H

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provisions A of s 48(3) would apply. The argument advanced on behalf of the appellants is that once a licence is suspended under Part V of the Act, specifically in terms of s 49, then it stands to reason that any cancellation of the licence can only be effected in terms of s 48 as it is also found in Part V of the Act. As I understand the argument, s 49 must be read together with s 48. B

The letter of 29 March 2012 is specific as to the intention behind the suspension, that there was need to investigate the relationship between Remo and Interfin Securities. The Commission did not in the letter specify any alleged violation on the part of Remo and the logical conclusion is that it was intended that the investigation would reveal if there was any wrongdoing on the part of Remo and Interfin in their mutual dealings.

The facts considered by the court *a quo* were the following. After the suspension, C the Commission appointed Proctor and Associates to investigate the conduct of Remo and Interfin. This power is derived from s 103(1) of the Act which empowers the Commission to direct an inspector to conduct an investigation where: D

"(e) the Commission has reasonable grounds for believing that a licensed person or board of a registered securities exchange or operator of a central securities depository, or any person connected with such a person, board or operator, has committed an offence under this Act, other than an offence arising out of conduct referred to in paragraph (a) or (b); or …"

Upon completion of an investigation an inspector is required in terms of E s 104(1) to forward the report to the Commission. On receipt of a report from the inspector, the Commission is required under s 104(2) to forward the report to the licensee and invite the licensee to make representations to it on the conclusions of the inspector and the recommendation.

On 7 May 2012 the Commission sent a copy of the report from Proctor and Associates to Remo and requested a written response within a period of F thirty days. Remo responded by a letter dated 8 May 2012. Section 104(2) provides in relevant part:

"On receipt of a report in terms of subsection (1), the Commission shall –

(a) send a summary of the conclusions reached in the report, and any recommendations made therein, to the licensed person, committee of the G registered securities exchange or operator of the central securities depository, as the case may be, that was the subject of the investigation; and

(b) invite the committee, licensed person or operator concerned to make representations on the conclusions and recommendations set out in the summary.

(3) A licensed person, committee of a registered securities exchange or operator H of a central securities depository that has been sent a summary of conclusions and

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2014 (2) ZLR p824

Gowora J

recommendations in terms of subsection (2) may, within thirty days, submit to A the Commission representations on any of the conclusions or recommendations."

On 23 May 2012 the Commission advised all the appellants in writing that it intended to cancel the licences of the first two and impose sanctions on the last two and, as a consequence, all the appellants were invited to appear before the Commission in person to make representations. Subsequent to the letter of 23 May 2012, all the appellants appeared before the full board of B the Commission and made representations on the proposed action intended by the Commission against each of them. On 7 June 2012 the Commission proceeded to cancel the two licences and imposed the sanctions which are the subject of this appeal.

Having confirmed that the cancellations were effected under s 105 of the C Act, the court *a quo* also found that the cancellations were not done in a summary manner but after due consideration of a report presented to it by Proctor and Associates following upon an investigation into the activities of the appellants and Interfin.

Section 48, on which the appellants hinge their appeal, reads: D

"48 Cancellation of licence

(1) Subject to subsections (2) and (3), the Commission may, by notice in writing to the holder, *cancel a licence if the Commission has reasonable grounds for believing that* –

(a) the holder has ceased to carry on business; or

(b) the licence was issued in error or through fraud or the misrepresentation of E a material fact by the holder; or

(c) *the holder has contravened any provision of this Act or any term of or condition of the licence*; or

(d) the holder misrepresents the facilities he or she offers to the public; or

(e) the holder has become disqualified to hold a licence in terms of section thirty-nine; or F

(f) the holder no longer meets any prescribed financial requirements for carrying on any activity authorised by the licence; or

(g) *the holder, or any employee or agent of the holder, has been guilty of any act or omission in the conduct of the holder's business that has resulted or is likely to result in prejudice to members of the public*; or G

(h) …; or

(i) …

(2) *Before cancelling a licence in terms of subsection (1), the Commission shall notify the holder in writing that it proposes to cancel the licence and of the Commission's reasons for proposing to do so and shall give the holder of the licence an adequate opportunity to make representations in the matter*: H

2014 (2) ZLR p825

Gowora J

Provided A that, if the Commission believes on reasonable grounds that it is not possible to notify the holder personally, the Commission shall publish a notice in the *Gazette* and a newspaper circulating in the area in which the holder carries or carried on business, stating that the licence will be cancelled unless the holder lodges an appeal with the Administrative Court in terms of section *one hundred and eight* within thirty days from the date of publication of the notice in the *Gazette*. B

(3) The Commission shall not cancel a licence in terms of subsection (1) –

(a) until –

(i) the period within which an appeal may belodged in terms of section one hundred and eight has elapsed; or

(ii) the thirty day period referred to in the proviso to subsection (2) has C elapsed, where a notice was published in terms of that proviso;

unless the holder has consented to its cancellation;

(b) if an appeal is lodged in terms of section one hundred and eight, until the appeal has been abandoned or withdrawn or, where it has proceeded to finality, until the Commission is notified that its decision has been upheld.

(4) …" (my emphasis throughout). D

One must look at the purpose and provisions of an Act in order to interpret the different sections forming that Act. In construing the meaning of a section, it is necessary to look at the Act generally to see what the scope of it is and whether the section accords with the scope and intention of the Act. It then becomes possible to draw a conclusion as to its meaning, considering the E terms of the enactment. The piecemeal approach advocated by the appellants does not accord with principles of construction of statutes. In my view, it is impossible to know the intention of the legislature without enquiring further and ascertaining the context in which the legislature intended to regulate. In *S* v *Fikizolo* 1978 (2) SA 676 (NC), van Rhyn J stated: F

"It is a fundamental principle that the intention of the Legislature must be inferred from the words which the legislature used and in *du Plessis* v *Joubert* 1968 (1) SA 585 (A) at 595 Botha JA stated the following in this regard:

'Only a clear and indubitable, particular intention of the legislature, and not merely an assumed intention can justify a departure from the usual meaning of words and then only if the words are amenable to another meaning.'" G

Moreover, the whole piece of legislation must be examined to determine the intention of the legislature. It is equally clear that one section can throw light on the intention of another section:

"The correctness of the statement that the whole act must be taken into account has been adopted so generally in our practice as to be a matter of course, that our courts have seldom found it necessary to stress this" (Steyn *Die Uitleg van*H*Wette* 4 ed p 143).

2014 (2) ZLR p826

Gowora J

Stripped bare of the verbiage, the process of cancellation under s 105 is A preceded by an investigation of the licence holder. Any report from the investigation is availed to the licence holder for comment and in addition, the Commission is obliged to call upon the holder to make representations to it before any sanction is imposed.

There is no provision for the suspension of a licence under s 48 prior to its B cancellation. In fact, the provisions of s 48 do not contemplate a situation where the holder has been the subject of an investigation under s 49. Where a licence is cancelled under s 48(1), such cancellation is made subject to the provisions of subs (2) and (3) of s 48. Subsection (2) enjoins the Commission to notify the holder in writing that it proposes to cancel the licence, the reasons for proposing to do so, and further to this, to afford the holder of the C licence an adequate opportunity to make representations. In the event that the Commission believes on reasonable grounds that it is not possible to notify the holder personally, the Commission is permitted to publish a notice in the *Gazette* and a newspaper circulating in the area in which the licence resides or is situate, stating that the licence shall be cancelled unless the holder lodges an appeal with the Administrative Court in terms of s 108 of the Act. D

It cannot be gainsaid that all the actions by the Commission after receipt of the inspector's report were consistent with the provisions of s 104. All the appellants were availed the opportunities afforded to a registered person or a licence holder to be heard in terms of that section prior to the Commission E taking any action subsequent to an investigation. None of the appellants have denied that the report was sent to them, that they were requested to make representations, or further, that they appeared before the Commission before sanctions were imposed upon them on an individual basis.

The procedure adopted by the Commission in its dealings with the applicants F is more consistent with the provisions of s 105 as opposed to s 48. The latter section envisages a situation where the licence holder is informed of the sanction that the Commission intends to impose and to then avail the licensee an opportunity to make representations. Under s 105 the licensee is investigated and a report of the investigation is availed to the licence holder for comment. Over and above this the licence holder is provided G with an opportunity to be heard by the Commission. As a consequence the requirement in s 48(3) obliging the Commission not to cancel a licence until the opportunity given to appeal to the Administrative Court becomes obvious. Unlike the procedure provided for

under s 105, a cancellation effected under s 48 is summary and the licensee is not assured of an opportunity to make representation before the cancellation. Thus, there is need for the cancellation H

2014 (2) ZLR p827

Gowora J

not A to be effected before the appeal process provided for under s 108 has been exhausted. There is no such requirement under s 105.

It is also pertinent to note that under s 105, the Commission is given the discretion to impose a sanction before affording the holder an opportunity to make representations if it considers that immediate action is necessary to B prevent harm to the licensed person, its employees, agents, other securities or members of the public. In this case, all the appellants were afforded an opportunity to make representations before the cancellations were put into effect and the sanctions on the last two were imposed.

In proceeding under this section, the Commission is not required to have regard to the provisions of s 48(3). The distinction is obvious. However any C powers exercised by the Commission under s 105(1) are made subject to subs (2) of the same section which provides:

> "Before taking any action referred to in subsection (1), the Commission shall –
>
> (a) inform the person, committee or operator concerned, in writing, of the action it proposes to take; and
>
> (b) afford the person, committee or operator concerned an adequate opportunity D to make representations in the matter;
>
> Provided that where, the Commission considers that immediate action is necessary to prevent irreparable harm to the licensed person, registered securities exchange or central depository or its members, creditors or participants, the Commission may take such action before affording the person, committee or operator an E opportunity to make representations in terms of this subsection."

In this court, the appellants submitted that the Commission had, contrary to the provisions of s 105(2), not provided them an adequate opportunity to make representations as to why the licences of Remo and Mahmed should not be cancelled. Their contention that the learned President in the court *a quo* did not address that issue has substance. F

It is trite that an appeal to the Administrative Court is an appeal in the wide sense. The appellants could have, if they had chosen to do so, led evidence before that court in order to ensure that whatever irregularities the Commission may have been guilty of were corrected. They did not avail themselves of that opportunity. In *Watchtower Bible & Tract Society of Pennsylvania & Anor* v *Drum Investments (Pvt) Ltd & Anor* 1993 (2) ZLR 67 (S), Gubbay CJ G remarked as follows at 76A-E:

> "I am satisfied that the appeal from the decision of the Rural Council to the Administrative Court is an appeal in the first sense above, an appeal in the wide sense. I accept the comment of the court in the *Jones* case *supra* that we are dealing with 'not so much a re-hearing as the first full inquiry'. But that H comment does not take the case out of the category; it puts it more firmly in it.

2014 (2) ZLR p828

Gowora J

> The main reasons why the appeal falls into the wide category are that the Act, A in providing for the appeal, authorises the Administrative Court to 'make such order as it deems fit' (s 39(1) of Act 22 of 1976), and that evidence is for the first time led and examined in accordance with the rules of a court of law.
>
> I do not think it is possible to argue that even though this is a category one appeal, an appeal in the wide sense, the onus may nevertheless be on the objector. The whole point of the formulation which I have set out is that the appellate tribunal B (in this case the Administrative Court) is starting again. It is deciding afresh the merits of the application, not the merits of the Rural Council's decision. The formulation makes sense only if one accepts that the onus is where it was in the original application."

A failure to deal with an issue that has been placed before a court constitutes a misdirection. However, this court is in as good a position as the court *a quo* to determine the point raised by the appellants. However, as submitted C by Mr *Mpofu*, notwithstanding the failure by the court *a quo* to address this particular aspect, the record shows that the Commission complied with the requirements of s 104 and 105. The court has already dealt with the instances of the appearances by the appellants before the full board of the Commission in this judgment. D

Over and above those representations, the appellants communicated with the Commission in writing after receipt of a letter dated 17 May to which was attached the report from the inspector and calling upon the appellants to respond to the report in writing within thirty days. On 29 May, 2012 Motsi addressed a letter to the Commission in which he stated the following: E

> "We refer to your letter dated 17 May 2012 to ourselves on the above matter and advise that we have responded as per paragraph 3 of your letter. Please find attached response for your attention."

In casu, in addition to the written responses during the appearance of Mahmed before the full board on 29 May 2012, the record reveals that he was availed an opportunity to produce additional documentary evidence in response to the F report by the inspector. The record reflects that fresh evidence was produced to the Commission on 29 May and 1 June 2012. The proceedings of 7 June, 2012 were at the appellants' request. There never was a complaint during the intervening period before the cancellation of the licences that the appellants had been denied an opportunity to be heard. In this connection attention is G drawn to the remarks of Steenkamp AJA in *IMATU* v *MEC, Environmental Affairs, etc, Northern Cape* 1999 (4) SA 267 (SCA) to the following effect:

> "Mr *van Wyk* also referred to the various meetings and submitted that there was no proper consultation or negotiation with second applicant prior to first respondent's decision not to negotiate a new service framework before or on 8 September 1998. This conclusion is not factually correct, because the second H

> applicant A was invited to put forward an alternative scheme to provide primary health services and did in fact do so but his proposals were referred back to second applicant to put alternative models on the table because there was no duty on the first respondent to come forward with new models. If a process for a fair hearing is set in motion then the person who is prejudiced should come forward and put his case to enable the other parties to consider these alternative B proposals. (See Baxter (op cit at 546))."

I am of the view that all the appellants were given an adequate opportunity to be heard before the cancellation of the two licences and that the Commission complied fully with its obligations under the Act. This view is fortified by the *dicta* in *Duly Holdings* v *Chanaiwa* 2007 (2) ZLR 1 (S). In that matter Gwaunza JA stated at 6A-C: C

> "To the extent the respondent was given an opportunity to answer to the charges and present his side of the story, he should not be heard to say that there was no observance of the *audi alteram partem* rule. The court *a quo* correctly noted in its judgment that the rules of natural justice required no more than that the domestic tribunal acts according to the common sense precepts of fairness procedures followed. Given the circumstances outlined above, I respectfully disagree with the court a quo's conclusion that it could, *in casu,* not be said that the rules of D natural justice were observed. I am satisfied that the respondent was, therefore, not prejudiced in any way by the disciplinary procedures followed.
>
> The appellant argues, correctly, that the adoption of the disciplinary procedures not specifically outlined in the Code finds support in *ZFC* v *Geza* 1998 (1) ZLR 137 (S), where this court emphasized the importance of flexibility in the conduct of disciplinary tribunals, and the principle that they were there to conduct an E enquiry. It cannot in my view, be said in this case that the disciplinary tribunal did not conduct an enquiry."

Those remarks apply with equal force to the circumstances of this appeal and I respectfully associate myself with them. The Commission is a disciplinary and regulatory body set up in terms of the Act. Perforce, its procedures are F less rigid and formal than would be required of a court of law. The flexibility referred to in the case of *Geza (supra*) would be a necessary feature in the conduct of its proceedings. It is not required to abide by a set of formal rules in its proceedings as is required of a court of law. The only rules provided for under the Act relate to the regulation of securities and licensed persons and the conduct of their functions in terms of the Act, which rules however do G not prescribe the manner in which proceedings by the Commission should be conducted.

A reading of the Act however establishes that, irrespective of whether the Commission cancels a licence under s 48 or s 105, the Act has provided that the Commission complies with the *audi alteram partem* principle before H cancellation of a licence or the imposition of any other sanction under the Act.

Notwithstanding the failure by the court *a quo* to address the question as A whether the Commission had given the appellants an opportunity to be heard, the finding that the cancellation of the licences

was effected in terms of s 105 is correct and cannot be faulted. I find no basis for overturning the conclusion by the court in that regard.

On the substantive issues relating to the Commission's decision to cancel B the licences, the court *a quo* concluded that the Commission had arrived at a correct decision. The learned President of the Administrative Court, sitting with two assessors, stated as follows:

> "Part of the appellants' argument is that the cancellation of the First and Second Appellants licences is too harsh. They argue that less drastic penalties provided for in the Act would have sufficed. C
>
> Given the extent of the deviations from the expected standard of operating the registered securities exchange that have been outlined above the court finds that the respondent was justified in opting for cancellation of the first and second appellants' licences with provision for re-application after five years if the two would have been adequately rehabilitated. D
>
> Regarding the third and fourth appellants it is noted that the pronouncements made with regard to them were not sentences but inevitable pronouncements made by an administrator concerned with practical consequences of its decision.
>
> The appeal is accordingly dismissed with costs."

The Commission preferred five charges against Remo and Mahmed. The appellants concede that they accept liability in respect of one of the charges E laid by the Commission. The first charge related to the appellants participating in non-permissible activities in breach of s 42(1) of the Act, in terms of which section a licence holder is authorized to carry out one or more of the activities specified in the definition of licensable activities. The allegation against Remo was that it borrowed money from Interfin Securities which F allegation Remo admitted. It was further alleged that Remo had lent the money it borrowed from Interfin to its own clients. This was denied when the appellants made representations to the Commission. However, in a letter to the Commission dated 12 March 2012, soon after the dispute with Interfin had erupted, it was stated:

> "During the course of the last eighteen months we arranged several loans from G Interfin on behalf of our clients.
>
> As security for these loans, we lodged several share certificates with InterfIn. The share certificates in question are as follows ……
>
> On 23 February 2012, we settled all amounts due to Interfin and asked for the return of the securities that had been lodged with them." H

Gowora J

It A is not disputed by any of the appellants that the lending of money is not a licensable activity as defined in the Act. The Commission found that Remo had lent money to Cold Power after it had borrowed from Interfin Securities. It was never disputed by Remo that it gave money to Cold Power. This non permissible activity is contained in a letter dated 8 May 2012 to the Commission wherein it was stated: B

> "We provided documentary evidence that the funds borrowed were not lent to any of our associated companies. They were used to fund Remo, and to an extent one or two of our other companies."

Remo and its associated companies are distinct and separate entities. The monies were borrowed by it and any sums advanced to the associated C companies could only have been availed as loans. There is no suggestion that Remo was giving grants to the associated companies. Given the admissions of the financial transactions, the conclusion by the Commission that the sums in question were advanced as loans cannot be seriously impugned. In any case, the extending of loans to other persons was not one of the functions that Interfin was permitted under its licence. As a consequence, Remo could D not legally borrow from Interfin and to that extent it participated in a non-permissible activity.

Remo was convicted of contravening s 50(1) of the Act by the Commission. The conviction was upheld by the court *a quo*. Section 50(1) requires that a licensed person shall open and keep a current account at a bank as a separate trust account in which he or she shall deposit any money received for or on E behalf of a client. The Commission found that although Remo advised the Commission of the opening of the account, there was no indication that the account in question was used solely for funds belonging to clients. It was also found by the Commission that the same account was used by Remo to keep its own money, and further, that the same account was used for channelling F loans secured on behalf of Remo's clients.

It was argued on behalf of the appellants that Remo was convicted on an allegation in respect of which it had not been charged. I agree. This particular charge is not reflected amongst the charges laid against Remo in the letter of 7 May 2012. The allegations spelt out in the letter were that the borrowings and on-lending were not in the accounts of the company as required in G terms of Part VI. The conviction of Remo on an alleged contravention of s 50 (1) constitutes an irregularity and the court *a quo* should have set aside the said conviction.

Further to the above, the court *a quo* found that transactions relating to the loans sourced by Remo from Interfin and its own loans to its clients and to H Cold Power were not reflected in the books of account that Remo kept. The

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failure on the part of Remo to keep a record of the transactions relating to A the loans it received and lent to its clients was found by the Commission to constitute a contravention of s 51(1) which requires a licensed person to keep proper books of account containing particulars and information of money the licensee has received, held or paid for on account of any other person and money that the licensee has deposited in his or her trust account. B

The report from the inspector indicated that Remo did not keep a register of all the securities in which the licence holder, or any director, officer, employee, associate, or partner who is directly involved in its business had an interest as required under s 61(1). The provision is couched in mandatory terms.

It is common cause that the shares that had been pledged to secure loans C were not recorded in the nominees register. In answer to queries raised by the inspector, the appellants confirmed that the shares had not been recorded because they had been paid for and delivered to the client and thus could not be part of a scrip ledger. This response would contradict the assertion now being made on behalf of the appellants that the shares pledged as security actually belonged to Mahmed and his wife Rezana Ebrahim. D

In addition, the appellants went on to state that only those shares held by brokers in safe custody were recorded in the scrip ledger. They stated that the nominee shares were not in the scrip ledger because they were not custodial shares. The court *a quo* held that the excuse by the appellants that the shares were only held for a short time did not assist because the strict requirement E for their inclusion in a register is for the benefit of the public. Section 61(3) enjoins a licenced person to record any change in the interest of security to be recorded within a period of 48 hours from the time of acquisition or change as the case may be.

On 20 May 2011 the Commission requested all securities dealing firms to F declare such loans as they might have obtained and a list of any clients' shares that might have been pledged as security for any loan. Remo rendered a nil return, which, as matters turned out, was false. The appellants admitted that the return was false but gave the alleged absence of Mahmed from the country as an excuse. The appellants could not explain why the record was not corrected subsequent to his return. Section 65 reads in relevant part: G

> "(1) The rules of a registered securities exchange shall make adequate provision for such of the following matters as are appropriate to its functions –
>
> (a)…
>
> (b) in regard to membership of the exchange –
>
> (i) …
>
> (ii) ensuring that – H

A. members A are of good character and integrity or, in the case of members that are corporate bodies, that they are managed and controlled by persons who are of good character and integrity."

The court *a quo* concluded that by making a false declaration as aforesaid, the first and second appellants demonstrated the absence of professionalism and integrity in their business dealings. The Commission, as the regulator B under the Act, is obliged to ensure that high standards are

maintained by securities dealers. It did not place either first or second appellants in good stead to claim that the return was done during the absence of Mahmed from the country.

As members of a registered securities exchange are required and meant to C be of good character and integrity, it was the finding by the Commission, which finding the court *a quo* confirmed, that Mahmed was not a fit and proper person to hold a licence as provided for in s 41(1)(c). Mahmed was the principal dealer in Remo. The Act requires that a person in that position should have the attributes of good character, honesty and integrity in order to ensure efficiency, honesty, fair practice and fair competition in relation D to dealings with other exchanges.

It was pointed out by Mr *Mpofu* that the appellants admitted guilt in respect of the failure to disclose the financial transactions as well as the false declaration. Having pleaded guilty to the charges before the Commission, the attempt to run away from those admissions on appeal cannot be regarded in a serious light. In *DD Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 92 (S) at 998, E Gubbay JA (as he then was), when discussing formal admissions, stated:

> "The effect of a formal admission made in pleadings was underscored in *Gordon* v *Tarnow* 1947 (3) SA 525 (A) where Davis AJA at 531-532 said:
>
> 'But this admission in the plea is of the greatest importance, for it is what *Wigmore* (paras 2588-2590) calls a 'judicial admission' (of the *confessio judicialis*F of *Voet* (42.2.6)) which is conclusive, rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it. (See also *Phipson* 7 ed p 18)). *Wigmore loc cit*, speaking of judicial admissions in general, refers to the court's discretion to relieve a party from the consequences of an admission made in error. It does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a G pleading, in any other way than by granting an amendment of that pleading.'
>
> These *dicta* were approved by Macdonald ACJ (as he then was) in *Moresby-White* v *Moresby-White* 1972 (1) RLR 199 (A) at 203E-H; 1972 (3) SA 222 (RA) at 224."

In my view, the court *a quo* was correct in upholding the convictions in respect H of the following charges: s 42(1), s 41(1)(c), s 51(1), 61(1) and s 65(1)(b).

2014 (2) ZLR p834

Gowora J

The decision of the court *a quo* in upholding the conviction of Remo on an A alleged contravention of s 50(1) constitutes a misdirection on the part of the court on the basis that Remo was never charged of contravening that particular offence. The conviction on that charge cannot therefore stand and is accordingly set aside.

It was contended on behalf of Mahmed that he received a harsher sentence than B what was meted to Zengeni of Interfin. The Act empowers the Commission to impose any sanction from issuing a warning to the cancellation of a licence. In imposing such sanctions under s 105 the Commission exercises a discretionary power. Implicit in the exercise of that discretion is the fact that the Act does not impose any limitations on the Commission on the extent of the duration of the period for which a licence may be suspended or cancelled C as the case may be. It is trite that the exercise of such discretion can only be interfered with in limited circumstances. [1]

Mahmed has not argued a legal basis to justify the interference with the cancellation of his licence by this court, and it is not enough to argue that he should have received a similar sentence to that imposed on Zengeni. In any case, it has not been suggested that the Commission exercised its discretion D improperly. Whilst it is accepted that the period of five years for which the licence was cancelled appears a bit harsh, it cannot by any means be said that such penalty is irrational. For that reason, any interference with the period cannot be warranted or justified by an appellate court.

That said, slightly different considerations apply in respect of Remo. This E court has set aside one of the five charges that Remo was found guilty of. The Commission had imposed a globular penalty against Remo on all the five charges in respect of which Remo had been convicted. Considering however, that the conviction on one charge is unsustainable it seems proper in these circumstances that the globular penalty be interfered with to some extent in order to reflect this finding. F

In determining the extent to which this court should interfere with the globular sentence imposed by the Commission, there is need to bear in mind the circumstances that gave rise to the four charges in respect of which Remo was convicted. As security for being availed loans by Interfin, Remo surrendered shares in negotiable form and, as matters turned out, Interfin used the same G shares as security for its own borrowings. In its letter to the Commission of 8 May 2012, Remo provides a

narrative of the manner in which Interfin then dealt with those shares and the efforts Remo took to recover them. In

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Gowora J

cancelling A the licence of Mahmed, the Commission made reference to the market disruptions that occurred when the Deputy Sheriff seized the shares which are the subject of the dispute between Remo and Interfin. It was noted that the market's integrity and investor confidence was compromised

Some of the objectives that the Commission is charged with under s 4 B include, the promotion of high levels of investor confidence, the reduction of systemic risk, the promotion of market integrity and investor confidence. The Commission is also obliged to prevent market manipulation and ensure transparency in the market. As a consequence, in the circumstances of this case, the sanction attaching to the infractions should reflect the gravity of the proved offences and should not appear to be a slap on the wrist as it were. C

The activities of Remo and Interfin sought to, and did undermine the objectives of the Act. The potential prejudice to investors was found by the Commission to be US$5.3 million. The Commission found that the conduct of Remo and Mahmed went against the tenets that the Commission was supposed to uphold and regulate. In my view, bearing in mind the mandate of the Commission to D protect the market and ensure the integrity of the market and regain investor confidence, the Commission was correct in finding that it was necessary that the licence of Remo and Mahmed be cancelled. Given the overall gravity of the transgressions by Remo, and, taking into account the finding above that one of the charges in respect of which Remo was convicted is not sustainable, it seems to me proper that a portion of the period of five years in respect of E which the licence for Remo was cancelled should be reduced by six months, leaving the period of cancellation for Remo at four years and six months.

The position is different when one considers the cases of Ebrahim and Motsi. On 24 May 2012 each of them received a letter from the Commission inviting them to make representations in respect of their conduct in the F affairs of Remo. Ms Ebrahim was not a licensed person under the Act, but she was an approved compliance officer. She was not specifically charged with an offence, but as a compliance officer she confirmed that she was the ears and eyes of the Commission with Remo. The Commission decided to permanently disapprove her as compliance officer. She was further advised that she would not be employed in that capacity in this country. G

Motsi was not charged with a specific offence nor was his licence cancelled. He was, however, sanctioned to work under the supervision of a senior dealer for a period of one year. There is uncontroverted evidence that he is in fact the most senior dealer in this country.

In respect of the two, the principles relating to the *audi alteram partem* rule, H which requires that a party be afforded a fair hearing, were not adhered to.

Gowora J

They were sanctioned in the absence of having specific charges preferred A against them. In relation to Motsi, he was advised that he had not committed any offence and, that merely due to his employment with Remo, it was decided to sanction him. I find no justification for the actions of the Commission against Ebrahim and Motsi. The court *a quo* ought not to have confirmed the sentences against them. B

The appeal succeeds in part to the extent that the sanction imposed on Remo is reduced and, in respect of Ebrahim and Motsi, is set aside in its entirety.

In the result the court makes the following order:

1. The appeal by the first appellant is allowed to the extent that the conviction on a charge of contravening s 50(1) of the Act is set aside and consequent thereto, the period of cancellation is reduced to four C years and six months.
2. The appeal by the second appellant is dismissed.
3. The appeal by the third and fourth appellants is allowed with costs.

4. The order of the court a quo in respect of the third and fourth appellants is set aside and substituted with the following: D

   "(a) The appeal is allowed with costs.

   (b) The restrictions placed on the third and fourth appellants are hereby set aside."

5. The first and second appellants are to pay the costs of this appeal save for the costs of the third and fourth appellants, jointly and severally, the E one paying, the other to be absolved.

GARWE JA and PATEL JA concurred.

Venturas & Samkange, appellant's legal practitioners F

Scanlen & Holderness, respondent's legal practitioners

1 See *ZB Financial Holdings v Manyarara* S-3-12; *Malimanji v CABS* 2007 (2) ZLR 77 (S); *Barros v Chimponda* 1999 (1) ZLR 58(S).

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[zRPz]CHIWESHE & ORS v AIR ZIMBABWE HOLDINGS (PVT) LTD 2014 (2) ZLR 837 (H)

Citation	2014 (2) ZLR 837 (H)
Case No	Judgment No. HH-688-14
Court	High Court, Harare
Judge	Mtshiya J
Heard	21 & 22 July, 5 August & 30 September 2014; *CAV*
Judgment	10 December 2014
Counsel	Ms *F Mahere*, for the plaintiff Mrs *G Dzitiro*, for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Employment C – *Labour Court – jurisdiction – employer-employee relationship no longer existing – claim for unpaid salary – Labour Court not having exclusive jurisdiction*

Employment D – *salary – claim for unpaid salary – plaintiff having left employment with defendant – employer-employee relationship no longer existing – claim merely a debt collection matter – plaintiff entitled to approach High Court for relief*

Headnote

The E plaintiffs were all former pilots with the defendant airline. Before leaving the employment of the defendant they were each owed outstanding salaries and allowances. Before they left their employment, two of the plaintiffs issued summons for the sums due, but by the time the action was dealt with they had all ceased to be employees. The defendant argued that the High Court had no jurisdiction and that the matter should be dealt F with by the Labour Court.

Held, that outside the employment arena, which is generally governed by the Labour Act [*Chapter 28:01*], this was purely a debt collection matter. In that situation, depending on the amount to be collected, the plaintiffs are free to approach either the High Court or the magistrates court. G The plaintiffs *in casu* were already in the right forum. An employer-employee relationship no longer existed: the plaintiffs were no longer performing work or services for the defendant for which they continued to be rewarded. They were claiming payment for services they rendered before terminating their contracts. To strengthen their cases, they provided schedules from the defendant where the existence of arrear salaries and H allowances was acknowledged.

2014 (2) ZLR p838

Mtshiya J

Cases referred to A

Eagle Training (Pvt) Ltd & Anor v *Employees of Eagle Training (Pvt) Ltd & Anor* S-238-91

S v *Stead* 1991 (2) ZLR 54 (S)

Legislation considered B

Constitution of Zimbabwe 2013, s 171

High Court Act [*Chapter 7:06*], s 13

Labour Relations Act [*Chapter 28:01*], s 2

Case information

Ms *F Mahere*, for the plaintiff

Mrs *G Dzitiro*, for the defendant C

Judgment

Mtshiya J: In this consolidated action, each plaintiff claims payment of salary arrears and allowances from the defendant. On 22 January 2013, Kudya J, who dealt with the pre-trial conference relating to the parties herein issued the following order:

> "IT ORDERED THAT: D
>
> 1. The parties have failed to reach a settlement.
> 2. The present matter HC 315/12 be and is hereby consolidated with the case of *Sameer Khan* v *Air Zimbabwe Holdings (Pvt) Ltd* HC 316/12 and the Matter of *Gerald Chiweshe* v *Air Zimbabwe Holdings (Pvt) Ltd* HC 1786/12 for trial.
> 3. The present matter is referred to trial on the basis of the Joint Pre-Trial Conference Memorandum dated 4 June 2012". E

The joint pre-trial conference minutes signed by the parties in HC316/12 on 4 June 2012 was endorsed by Hungwe J on 24 October 2012. It was, however, formally filed on 5 June 2012. There is therefore no doubt that the memorandum referred to in Kudya J's order is the one filed on 5 June 2012.

The said memorandum lists the issues for determination in this trial as follows: F

> "1.1 Whether or not this Honourable Court has jurisdiction to deal with the plaintiff's claims.
>
> 1.2 Whether or not the plaintiffs are collectively bound by the arbitration award which was issued in November 2011.
>
> 1.3 Whether or not any rights accrue in favour of the plaintiffs in terms of their G contract of employment.
>
> 1.4 Whether or not the schedule of the alleged sums due is an authentic document reflecting the defendant's indebtedness to the plaintiffs.

1.5 Whether or not the failure to settle the plaintiffs' salaries by the defendant is attributed to supervening impossibility.

1.6 Whether the sum claimed or any sum is due to the plaintiffs by the defendant." H

Mtshiya J

The A record shows that the award referred to in 1.2 above was actually issued on 5 October 2011. The effect of consolidation is that the above issues are the ones to be determined with respect to each of the three plaintiffs in this matter. The determination herein shall follow the manner in which the parties' legal practitioners have put forward their arguments with respect to each plaintiff. Upon dealing with the preliminary issues, counsel for the parties B then proceeded to argue the case of each plaintiff in the following order:

(a)	Gerald Chiweshe	-	first plaintiff
(b)	Sameer Khan	-	second plaintiff
(c)	Bruce Thomas	-	third plaintiff

I shall therefore be guided by the same arrangement when dealing with C each plaintiff.

The common factor in this case is that each one of the plaintiffs was at one time employed by the defendant as a pilot, with the highest rank, where applicable, being that of captain. The plaintiffs, prior to leaving the employment of the defendant, were each owed outstanding salaries and allowances. They D then, on the different dates indicated against their names here below, issued summons for the amounts also indicated against their names:

Name of plaintiff	*Date summons issued*	*Amount claimed*
1. Gerald Chiweshe	17 February 2012	US$56 511.76
2. Sameer Khan	13 January 2012	US$123 473.00
3. Bruce Thomas E	13 January 2012	US$39 779.00

I shall now proceed to deal with the preliminary issues raised by the defendant.

The first issue raised is that this court has no jurisdiction on the grounds that the plaintiffs' issues are labour disputes which should be handled by the Labour Court. Notwithstanding the fact that the first and second plaintiffs F filed summons when they were still employees of the defendant, it is accepted that they are now ex-employees. The plaintiffs are now claiming outstanding salaries from a former employer. Outside the employment arena, which is generally governed by the Labour Act [*Chapter 28:01*] ("the Act"), this becomes a purely debt collection matter. In that situation, depending on the amount to be collected, the plaintiffs are free to approach either the High G Court or the magistrates court. I therefore believe the plaintiffs *in casu* are already in the right forum.

Although specifically dealing with the definition of "employer", in the case of *S* v *Stead* 1991 (2) ZLR 54 (S), the Supreme Court, in my view, also defined the word employee. The Supreme Court in that case stated:

H "The word 'employer' is defined in s 2 of the Labour Act [*Chapter 28:01*] to mean:

Mtshiya J

> '… any person who employs or provides work for another person and A remunerates him and includes the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed".
>
> It is apparent that this definition presupposes the existence of employment. It is aimed at a person, (whether an individual, a company, an association, or the like), for whom employees work and who pays their wages or salaries". B

The above definition is in line with the current definitions of "employee" and "employer" in the Act. In s 2 the definitions are given as follows:

> "'employee' means any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person – C
>
> (a) …
>
> (b) …;
>
> 'employer' means any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and incudes
>
> (a) … control of the work upon which such other person is employed; and D
>
> (b) …"

The above definitions, in my view, relate to an *existing* employee-employer relationship. The plaintiffs *in casu* are no longer performing work or services for the defendant for which they continue to be rewarded. They are claiming payment for services they rendered before terminating their contracts and to strengthen their cases they have provided schedules from the defendant E where the existence of arrear salaries and allowances is acknowledged.

The position of the plaintiffs is further fortified by the dicta in *Eagle Training (Pvt) Ltd and Anor* v *Employees of Eagle Training (Pvt) Ltd & Anor* S-238-91, where it was said:

> "The reality of the matter is that the thirty-three employees had a civil claim for F the remaining 75 percent of their bonus against either Eagle or Belmont Heather or against both in the alternative. They should have made that claim in a civil court" (my own emphasis).

The plaintiffs have civil claims and they have, in my view, correctly apprached the Civil Division of the High Court for a remedy. It should also be noted that both the Constitution of Zimbabwe and the High Court Act G [*Chapter 7:06*] clothe this court with civil jurisdiction over the disputes that have been brought before it by the plaintiffs. Section 171(1)(a) of the Constitution states:

> "(1) The High Court –
>
> (a) has original jurisdiction over *all civil* and criminal matters throughout Zimbabwe" (my own emphasis). H

2014 (2) ZLR p841

Mtshiya J

Section 13 A of the High Court Act provides as follows:

> "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*" (my own emphasis).

The Labour Act, which *in casu* is "any other law", does not, as it stands, B expressly oust the jurisdiction that the Act cited above confer upon the High Court. This means that the plaintiffs have a legal right to approach this court even whilst still employed. Accordingly the first preliminary issue on jurisdiction cannot be upheld.

The next preliminary issue raised by the defendant is that the issues before the court were determined through arbitration when it was ruled that an C agreement entered between the plaintiffs and the defendant in 2003 was null and void. However, the plaintiffs' take the point that their contracts of employment were not subject to the said agreement of 2003 and that they were not party to the arbitral award of 5 October 2011. They argue, further, that the arbitral award had nothing to do with the payment of their arrear salaries and allowances. Apart from the arbitral award, the defendant did D not place before the court the 2003 agreement which it said was arbitrated upon. There was no evidence to prove that the plaintiffs were parties to that agreement and that their salaries were indeed governed by that agreement.

Each of the plaintiffs' testified that they had individually negotiated their own salaries upon which the salary arrears and allowances are now claimed. It E is accepted by the defendant that there are

arrears of salary and allowances in respect of each plaintiff and that there was never any specific arbitration relating to each plaintiff's arrears of salary and allowances. In short, the evidence before the court clearly distances the plaintiffs from both the agreement of 2003 and the arbitral award of 5 October 2011.

F It is also important to note that the arbitral award quoted above is based on the following terms of reference:

> "(a) to determine the appropriate salaries and allowances that must be paid to the employees (respondent).
>
> (b) to determine whether or not it is proper for the employer (applicant) to propose new contracts before fulfilling obligations of the existing contracts. G
>
> (c) to determine appropriate remedy under the circumstances".

The above terms of reference, in my view, explain why the award makes no reference to the validity of the unknown 2003 agreement. Furthermore, the operative part of the arbitral award that the defendant wants to rely on, apart from having been granted after all the plaintiffs' salaries were already H in arrears, reads as follows:

Mtshiya J

> "1. That the application be and is hereby allowed. A
>
> 2. That the respondent continues getting the National Employment Council bench-marked basic salaries.
>
> 3. That the applicant pays the respondent 45 percent of the internationally applied regime over and above respondent's salaries.
>
> 4. That the respondent receives allowances premised on productivity-based formulation whereby they are paid per hours flown. B
>
> 5. That the applicant shall meet all the arbitration costs".

Clearly the above award makes no reference to the so-called 2003 agreement that the respondent says was declared null and void. Without having seen the said 2003 agreement, it is near impossible to establish a link between it and the plaintiffs' contracts of employment. The fact that the Zimbabwe Flight C Crew Association (the Association) might have influenced the salaries of its members does not necessarily make it a party to the individual employment contracts between the defendant and the association's members or the plaintiffs. I hold the view that a finding that the award has nothing to do with the plaintiffs' contracts of employment entails that evidence given by the defendant, mainly through Mrs *Mutsinze*, relating to the arbitral award D should be totally ignored because it bears no relevance to the plaintiffs' contracts of employment and their claims.

In view of the foregoing, I am also unable to uphold the second preliminary issue (i.e. *res judicata*) raised by the defendant.

Having dismissed the two preliminary issues, I shall now turn to the merits of E the claims as they relate to each plaintiff. As already indicated, consolidation of the matters was due to the fact that the issues affecting the plaintiffs are similar. This means that, in general, findings made on one plaintiff apply to the other two plaintiffs.

1. Gerald Chiweshe – First Plaintiff F

Chiweshe gave evidence on his own behalf. He said he was claiming US$56 511.76. This claim is in respect of unpaid salaries and allowances due to him for the period February 2009 to July 2012. He said he was first employed by the defendant as a pilot from 2003 to 2010, when he resigned to relocate in Canada. He had resigned due to the failure by the defendant to G regularly pay him his salary. He said he had later returned to the employment of the defendant from the end of 2010 up to 31 March 2012. His monthly salary as at 1 June 2011 was US$4 002.76 and the salary was still the same when he left on 31 March 2012. He said he was never a member of the Association and had never paid any subscriptions to it and therefore the arbitral award had nothing to do with his case. In support of his evidence H

Mtshiya J

Chiweshe A tendered documents showing his employment history and the arrear salaries and allowances he was claiming. He said he had been given the schedule showing the total of his outstanding salaries and allowances by the defendant's accounts department.

2. Sameer Khan – Second Plaintiff B

Khan said he was employed as a pilot in the rank of captain. He is claiming his unpaid salaries and allowances for the period February 2009 to July 2012. His claim is for a total sum of US$123 473. He said his salary and allowances arrears were confirmed in a schedule bearing the defendant's official stamp. He produced the schedule. He also supported his record of employment by C producing his employment contract, letter of resignation and letter from the defendant accepting his resignation. He said his salary as at 1 January 2012 was US$7 058 per month and US$7 804 per month as at 31 July 2012 when he left the employment of the defendant.

He admitted that he was a member of the Association but was not personally D named in the dispute between the Association and the defendant i.e the dispute that was referred to arbitration. He said the arbitral award had no bearing on his claim.

3. Bruce Thomas – Third Plaintiff

Thomas testified that he was employed by the defendant as a commercial E pilot. He said his claim of US$39 779 relates to the period 1 February 2009 to 28 February 2010. He had obtained schedules from the defendant's accounts department showing the total arrears of his salary and allowances. He, however, said the amount in the schedule was not correct because:

(a) it did not take into account an amount of US$830 which the defendant F had already paid him; and

(b) the schedule incorrectly reflected that he had received an amount of US$2 000 as an advance payment; and

(c) a sum of US$22 000 had been paid to him but would not reduce his current claim due to when it was paid. G

He said a reconciliation of the figures therefore showed that the defendant still owed him US$39 779. His monthly salary as at February 2010 was US$7 239. He said he was never a member of the Association and to that end he had never paid any subscriptions and had never mandated the Association to represent him in his employment affairs. His claim therefore had nothing H to do with the arbitral award.

Mtshiya J

The defendant called two witnesses, namely Mrs Madziwana Nhira (Nhira), A the Salaries Administrator and Mrs Pamela Mutsinze, (Mutsinze), the Acting Manager – Human Resources. In the main, the evidence of both witnesses was to give effect to the already rejected issue of *res judicata* and to deny the authenticity of the schedules relied upon by all the plaintiffs. I formed the impression that these innocent ladies were brought in at the last minute to reverse what the former Manager Human Resources, Mr O Madziwa B (Madziwa) had actually authorised. They both confirmed Madziwa's status and even agreed that he had the capacity to call for salary schedules from the Accounts Department. Obviously he dealt with the schedules as he deemed fit in his capacity as Manager Human Resources. To that end, it would be improper to allow the mentioned fall out between Madziwa and C the defendant to influence the outcome of this case. He had official authority to act for the defendant.

In the case of all the plaintiffs, Nhira's evidence was that she is the one who issues salary schedules but they have to be signed by the Human Resources Manager, the General Manager Finance and the recipient. She D said the stamping of schedules without the three signatures did not make them official. She also went on to say that she had, in April 2011, issued signed salary schedules to the three plaintiffs. She said the plaintiffs were also given monthly pay slips. Unfortunately the signed schedules and pay slips were not placed before the court. E

As to Chiweshe's claim, Nhira said the defendant owed him around US$3 000. She agreed though, that the schedule attached to Madziwa's letter of 29 December 2011 came from her and also that

the other schedules produced by Khan and Thomas *were similar* to the one she prepared for Madziwa.

In his letter to Chiweshe's legal practitioners, Kantor and Immerman, dated 29 December 2011, Madziva wrote: F

> "This is to certify that *First Officer Gerald Chiweshe* is employed by Air Zimbabwe Holdings (Private) Limited, as a Pilot in the Passenger & Cargo Division. His staff number is 27286.
>
> We write to confirm that due to financial challenges, the Airline has not been able to pay salaries as and when they fall due. As a result salaries for the month G of July to December 2011 have not been paid. Hence his deferred salaries is USD 28 493 as per the attached schedule.
>
> At this point in time, we are hesitant to indicate by which date we would have paid the outstanding salaries.
>
> Your patience and cooperation with him is greatly appreciated as he is an honest and hardworking Pilot." H

Mtshiya J

It A is important to note that the schedule attached to the above letter was prepared after 5 October 2011 i.e. the date of the arbitral award. As already indicated, similar schedules were attached to the claims filed by Khan and Thomas. It was not denied that the schedules contained information relating to the period before and after the arbitral award. That shows that the arbitral award had no impact on the plaintiffs' claims. B

Notwithstanding the fact that the Human Resources Manager, Madziwa, in his signed letter to Chiweshe's legal practitioners, attached a schedule confirming the outstanding salary arrears, Nhira urged the court to reject the schedule because it was not signed by three people. However, as already stated, she was not able to place before the court either copies of the signed C schedules that she gave to the plaintiffs or pay slips. I do not believe that the defendant, given its standing in society, would take the issue of record keeping lightly as demonstrated by its failure to avail the court with what it claimed were authentic records in its custody. In view of the problems regarding non-payment of salaries and allowances, the need for such records D was paramount.

Under cross-examination, Nhira admitted that she at times issued unsigned schedules. She, however, tried to put a rider by saying she only gave the unsigned schedules to Management. She did not disclose how many schedules, in addition to the one she gave to Madziwa, she also dished out to other members of Management who might have needed them. Nhira said E she was not able to dispute Chiweshe's salary of US$4 002.67 as at the time of his departure from the employment of the defendant. She also agreed that everything relating to the plaintiffs would have been placed on record, including pay slips. I also did not hear her challenge the monthly salaries of the other plaintiffs, Khan US$7 804 per month and Thomas US$7 239 F per month).

Sadly, at the end of the day what we have *in casu* is a situation where the defendant accepts that the plaintiffs' are owed arrear salaries and allowances but simply refuses to pay or declare what those arrear salaries and allowances amount to. This is despite the fact that the defendant is the custodian of the requisite records. Given that situation, the court can only rely on the schedules G produced by the plaintiffs. Those schedules, it is my finding, emanated from officers of the defendant. The defendant did not produce counter schedules which it claimed to have given to the plaintiffs i.e in the form of reconciled schedules and pay slips.

Accordingly, in the absence of any such pay slips or reconciled schedules H from the defendant, it is difficult to reject the plaintiffs' evidence. It was not

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Mtshiya J

denied that the plaintiffs rendered services to the defendant as particularised A in their claims. The defendant has a legal obligation to pay for their services. There was also no evidence of any supervening impossibility which could have led to the defendant's failure to pay the plaintiffs their salaries and allowances. The plaintiffs have, therefore, on a balance of probabilities, proved their claims.

I therefore order as follows: B

1. The defendant be and is hereby ordered to pay the first plaintiff the sum of US$56 511.76, with interest at the prescribed rate from 1 March 2009 to date of payment in full.
2. The defendant be and is hereby ordered to pay the second plaintiff the sum of US$123 473, with interest at the prescribed rate from 1 March 2009 C to date of payment in full.
3. The defendant be and is hereby ordered to pay the third plaintiff the sum of US$39 779, with interest at the prescribed rate from 1 March 2009 to the date of payment in full.
4. The defendant be and is hereby ordered to pay the total costs of suit D incurred by the plaintiffs.

Coghlan, Welsh & Guest, plaintiffs' legal practitioners

Mutumbwa Mugabe & Partners, defendant's legal practitioners E

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[zRPz]SAKUNDA ENERGY (PVT) LTD v BAREP INVESTMENTS (PVT) LTD 2014 (2) ZLR 847 (H)

Citation	2014 (2) ZLR 847 (H)
Case No	Judgment No. HH-689-14
Court	High Court, Harare
Judge	Zhou J
Heard	26 March 2014; *CAV*
Judgment	10 December 2014
Counsel	Miss *M Gwaunza*, for the plaintiff *E Samukange,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Arbitration – *reference to – stay of court proceedings – arbitration clause in written agreement between the parties – need for a dispute to exist falling within ambit of arbitration clause – one party acknowledging* D *indebtedness to other but disagreeing on amount – not a dispute falling within ambit of arbitration clause – referral to arbitration refused*

Headnote

The plaintiff instituted an action against the defendant for payment for fuel which it had delivered to the defendant. The defendant had signed E an acknowledgment of debt, which it now claimed was induced by misrepresentation on the part of the plaintiff. Although agreeing that it owed money to the plaintiff, it said that a lower figure was due. The defendant also raised a special plea that the matter should be referred to arbitration, the relevant clause of the agreement between the

parties F providing that "Any dispute or difference between the parties relating to the rights or obligations of the parties under this agreement shall be referred to and determined by arbitration".

Held, that once it is established that a dispute falls within the ambit of an arbitration clause of a written agreement and the exceptions set out in art 8(1) of the Schedule to the Arbitration Act [*Chapter 7:02*] are not G established, a court is enjoined to stay the proceedings and refer the parties to arbitration. The existence of a dispute is a prerequisite for the staying of proceedings and the referral of a matter to arbitration. However, the question of whether or not a dispute exists is one that a court can inquire into and determine. The dispute, if established, must H be one within the terms of the arbitration clause.

Zhou J

Held, further, that the plaintiff's claim was primarily founded upon the A acknowledgement of debt signed on behalf of the defendant. The defendant now disputed the amount set out in the acknowledgement of debt. A dispute is a disagreement and the disagreement between the parties related to whether or not the amount stated in the acknowledgment of debt was owed by the defendant. The dispute was not one relating to the rights or obligations of the parties under the memorandum of B agreement. The question was whether the amount owed was as stated in the acknowledgment of debt. A determination of the dispute entailed a determination on the validity of the acknowledgment of debt, a matter which fell outside the scope of the arbitration clause

Cases cited C

Capital Alliance (Pvt) Ltd v *Renaissance Merchant Bank Ltd & Ors* 2006 (2) ZLR 232 (H)

Cargill Zimbabwe v *Culverham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H)

Communication & Allied Industries Pensioners' Assn v *Communication &Allied Industries Pension Fund* 2008 (2) ZLR 288 (S) D

PTA Bank v *Elanne (Pvt) Ltd & Ors* 2000 (1) ZLR 156 (H)

Waste Management Svcs v *City of Harare* 2000 (1) ZLR 162 (H)

ZBC v *Flame Lily Broadcasting (Pvt) Ltd* 1999 (2) ZLR 448 (H)

Legislation considered E

Arbitration Act [*Chapter 7:15*], First Schedule, art 8(1)

Case information

Miss *M Gwaunza*, for the plaintiff

E Samukange, for the defendant

Judgment

Zhou J: The plaintiff instituted an action for payment of a sum of F US$294 200.43 against the defendant. The debt which, according to the summons, is acknowledged by the defendant is due in respect of fuel sold and delivered to the defendant by the plaintiff between the months of December 2011 and April 2012. The plaintiff also claimed interest at the prescribed rate from 9 May 2012 being the date of acknowledgement of debt up to the date of payment in full as well as costs of suit. The summons was accompanied G by a declaration in which the following averments were made:

> "1. Plaintiff is SAKUNDA ENERGY (PRIVATE) LIMITED, a company duly incorporated in terms of the laws of Zimbabwe whose address for service is care of its legal practitioners Gwaunza and Mapota, 13 Maasdorp Avenue, Alexandra Park, Harare. H

Zhou J

> 2. Defendant A is BAREP INVESTMENTS (PRIVATE) LIMITED a company duly incorporated in terms of the laws of Zimbabwe operating from Stand 18253, Corner Nelson Mandela Ave and Enterprise Road, Harare, trading as Park Street Service Station.

3. The plaintiff's claim against defendant is for payment of the sum of $294 200.43, being money due and owing to it for fuel sold and delivered to the defendant from December 2011 to April 2012, which amount remains B unpaid.
4. The defendant acknowledged owing this debt on 9 May 2012 (Annexure 'A') but despite demand has failed, neglected or refused to pay.

WHEREFORE plaintiff prays for –

(a) Payment of $294 200.43, plus interest thereon at the prescribed rate C from 9 May 202 (*sic*) being date of acknowledgment of debt to date of payment in full.

(b) Costs of suit."

The defendant raised the special plea that the proceedings should be stayed pending determination by arbitration of the dispute between the parties. The D defendant also pleaded over. At the commencement of the trial the parties agreed to deal with the special plea first.

The defendant's contention, as set out in the special plea, was that the plaintiff's claim was founded upon a written memorandum of agreement of supply of petroleum products entered into on 6 December 2012. A copy of the memorandum of agreement was annexed to the defendant's special E plea. According to the defendant the matter must be referred to arbitration in terms of Clause 11 of that agreement. Clause 11.1 of the agreement provides as follows:

> "Any dispute or difference between the parties relating to the rights or obligations of the parties under this agreement shall be referred to and determined by arbitration at Harare according to Zimbabwean Arbitration Laws." F

Based on that clause, the defendant submitted that this court is enjoined to stay the proceedings and refer the matter to arbitration in terms of the provisions of article 8 of the Arbitration Act [*Chapter 7:02*]. Article 8(1) of the First Schedule to that Act provides as follows:

> "A court before which proceedings are brought in a matter which is the subject of G an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

The above provision means that once it is established that a dispute falls within the ambit of an arbitration clause and the exceptions set out in art 8(1) H are not established then the court is enjoined to stay the proceedings and

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refer the parties to arbitration. See *Capital Alliance (Pvt) Ltd* v A*Renaissance Merchant Bank Ltd & Ors* 2006 (2) ZLR 232 (H) at 236A-H; *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting (Pvt) Ltd* 1999 (2) ZLR 448 (H) at 451E-F; *Waste Management Services* v *City of Harare* 2000 (1) ZLR 172 (H) at 177G-178B.

The existence of a dispute is a prerequisite for the staying of proceedings and the referral of a matter to arbitration. As stated in Butler & Finsen B*Arbitration in South Africa Law and Practice*:

> "Arbitration is a process for resolving a dispute between the parties regarding their existing rights. The requirement of a dispute is used to distinguish arbitration from certain other contractual provisions for referring matters to a third party, namely valuation and certification. Apart from being an essential characteristic of arbitration, the existence of a dispute is necessary to render an arbitration C agreement enforceable and to establish the arbitrator's jurisdiction."

See *PTA Bank* v *Elanne (Pvt) Ltd & Ors* 2000 (1) ZLR 156 (H) at 161B-162B; *Cargill Zimbabwe* v *Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381 (H) at 382F-G.

The question of whether or not a dispute exists is one that this court can D inquire into and determine. See *PTA Bank* v *Elanne (Pvt) Ltd & Ors (supra*) at 162D. The dispute, if established, must be one which falls within the terms of the arbitration clause. See *Communication and Allied Industries Pensioners' Association* v *Communication & Allied Industries Pension Fund* 2008 (2) ZLR 288 (S) at 294A-C.

The plaintiff's claim is primarily founded upon the acknowledgement of E debt signed on behalf of the defendant acknowledging that it owes a sum of US$294 200.43 to the plaintiff. The acknowledgment of debt is annexed to the plaintiff's summons and declaration. The defendant admits that the acknowledgment of debt was signed on its behalf but alleges that it was induced to sign it by a misrepresentation made by the plaintiff. The defendant F stated that its own calculations which it

undertook after the acknowledgment of debt had been signed showed that it owed a sum of US$125 000 and not the amount stated in the acknowledgment of debt. It further pleaded that it is not bound by the acknowledgment of debt because its representative signed it in error. G

A dispute is a disagreement. The disagreement between the parties relates to whether or not the amount stated in the acknowledgment of debt is owed by the defendant. Put in other words, the dispute is not one "relating to the rights or obligations of the parties under (the memorandum of) agreement". The defendant does not dispute that fuel was delivered to it pursuant to that agreement and that it owes some money for that fuel. The simple H

Zhou J

question A is whether that amount is as stated in the acknowledgment of debt. A determination of the dispute entails a determination on the validity of the acknowledgment of debt. That matter falls outside the scope of the memorandum which contains the arbitration clause.

The dispute does not, therefore, fall within the terms of the arbitration clause. B It does not justify a stay of proceedings and referral to arbitration in terms of that clause.

In the result, it is ordered that the special plea be and is hereby dismissed with costs.

Gwaunza & Mapota, plaintiff's legal practitioners C

Venturas & Samukange, defendant's legal practitioners

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[zRPz]CHATUKUTA v NLEYA NO & ORS 2014 (2) ZLR 852 (H)

Citation	2014 (2) ZLR 852 (H)
Case No	Judgment No. HH-705-14
Court	High Court, Harare
Judge	Mawadze J
Heard	20 November; *CAV*
Judgment	19 December 2014
Counsel	*N Mugiya*, for the applicant *O Ngavi*, for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of* C *Rights – right to appeal or seek review (s 70) – right only subject to any reasonable restriction – decision of Commissioner-General of Police dismissing appeal of member of police force convicted by a single officer – appeal lying to High Court against such decision* D

Police – *discipline – trial of member by single officer for disciplinary offence in terms of s 34 of Police Act [Chapter 11:10] – appeal to Commissioner-General in terms of s 34(7) of Act – Commissioner-General dismissing such appeal – whether appeal lies to High Court against Commissioner-General's decision* E

Headnote

The applicant, a police officer, was tried by a single officer in terms of s 34 of the Police Act [*Chapter 11:10*] on a disciplinary charge. He was convicted and sentenced to nine days' F detention. He appealed to the Commissioner-General of the Police in terms of s 34(7) of the Act. On appeal the conviction was confirmed and the sentence of nine days' imprisonment was altered to four days' imprisonment. Reasons for the dismissal of the appeal were not given to the applicant. When he was informed that he was to be detained to serve the four days' imprisonment, he approached the High Court on an urgent basis, averring that the first respondent had virtually barred him from filing an appeal with the G High Court against the decision of the Commissioner-General. He contended that his constitutional rights under s 49 of the Constitution (the right to personal liberty) and s 70(5)(b) of the Constitution (the right to appeal against conviction and sentence) were being violated by the respondents. The respondents averred that no further appeal lies to the High Court against the decision of the Commissioner-General once he has dismissed H

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an A appeal in terms of s 34(7) of the Act. The Commissioner-General is the highest and final court of appeal in disciplinary matters presided over by a single trial officer in terms of s 34 of the Act, unlike the situation of a trial by a board of officers or by a magistrates court, where a right of appeal to the High Court is specifically provided for. They further argued that such a member could only approach the High Court on review, but B not by way of appeal. The question was thus whether a member tried by a single officer in terms of s 34 who has unsuccessfully appealed to the Commissioner-General in terms of s 34(7) should be denied the right to appeal to the High Court and consequently to the Supreme Court, a right enjoyed by members of the Police Force tried by either a board of officers or the magistrates court. C

Held, that the right to appeal or to seek review is now enshrined in s 70(5) of the Constitution. The courts would therefore not deprive any person of such a right unless there are reasonable restrictions prescribed by the law. The Police Act does not provide for such reasonable restrictions, but is simply silent on the right of appeal by an aggrieved member against the D decision of the Commissioner-General made in terms of s 34(7) of the Act. Under s 171 of the Constitution, the High Court, being a superior court of record, has original jurisdiction in all civil and criminal matters in Zimbabwe. The inherent jurisdiction conferred upon the High Court is exercised unless it is specifically ousted. In terms of s 171(d) the E appellate jurisdiction of the High Court may be limited by a statute; this led to the question as to whether there is indeed a statute which limits the appellate jurisdiction of the High Court in the circumstances of this case. In terms of s 13 of the High Court Act [*Chapter 7:06*], the High Court has full original civil jurisdiction over all persons and over all matters within Zimbabwe. The jurisdiction of the High Court, whether F appellate jurisdiction or otherwise, cannot be ousted by implication; it must be expressly excluded. The High Court, unlike other, inferior, courts (which may only do what the law permits), may do everything which the law does not forbid.

Disciplinary proceedings held in terms of the Police Act are of a civil rather G than criminal nature, despite the fact that convicted members of the Force may be sentenced to terms of imprisonment. In terms of s 30 of the High Court Act, the High Court can, firstly, exercise its appellate jurisdiction in respect of any proceedings of any tribunal if the relevant Act governing those proceedings provides for an appeal to the High Court. The second instance where the High Court will exercise its appellate H jurisdiction is where the relevant Act governing the proceedings of such

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Mawadze J

a tribunal does not oust the jurisdiction of the High Court. The Police A Act does not oust the appellate jurisdiction of the High Court in relation to proceedings held in terms of s 34 of the Police Act. While an appeal lies to the Commissioner-General against the decision of a single trial

officer in terms of s 34(7) of the Act, there is no provision in the Act which states that no appeal lies against the decision of the B Commissioner-General made in terms of s 34(7), nor is there a provision which bars an aggrieved member from approaching the High Court on appeal against the decision of the Commissioner-General. The appellate jurisdiction of the High Court is not specifically ousted and there was therefore no legal bar to the applicant appealing to the High Court against the decision of the Commissioner-General made in terms of s 34(7) of the Police Act. C

Case referred to

Rateyiwa v *Kambuzuma Housing Co-op & Anor* 2007 (1) ZLR 311 (H)

Legislation considered D

Constitution of Zimbabwe 2013, ss 70(5)(a) & (b), 171(1) & (2)

High Court Act [*Chapter 7:06*], ss 13, 30(1) & (2)

Police Act [*Chapter 11:10*], ss 33, 34(1) & (7)

Case information

N Mugiya, for the applicant

O Ngavi, for the respondents E

Judgment

Mawadze J: This is an urgent chamber application in which the interim relief sought by the applicant is couched in the following terms:

"INTERIM RELIEF GRANTED

Pending the confirmation of the provisional order

IT IS ORDERED THAT – F

1. The respondents be and are hereby interdicted from detaining the applicant until they serve him with a copy of the reasons for the dismissal of his appeal which shall be served through his legal practitioners who noted the appeal
2. The 1st respondent is ordered to acknowledge and date stamp the copy of G the notice of appeal for the applicants within 24 hours of date of this order
3. Once the applicant files the appeal, the respondents are barred from detaining the applicant until the appeal so filed is finalised.

SERVICE OF THIS ORDER

Service of this order shall be effected by the applicant's legal practitioners"

The terms of the final order sought are as follows: H

Mawadze J

"TERMS A OF THE FINAL ORDER

That you show cause to this Honourable court why a final order should not be made in the following terms:

1. The respondents are ordered not to interfere with the applicant's 1liberty unless in terms of the law.
2. The respondents are interdicted from barring the applicant from pursuing B his constitutional rights
3. The respondents are ordered to pay costs of suit."

The applicant is an assistant inspector in the Zimbabwe Republic Police (ZRP) and at the material time was an instructor at Ntabazinduna Training depot in Bulawayo. The first respondent, Chief Superintendent S Nleya, is the trial officer who tried the applicant in terms of the Police Act [*Chapter 11:10*]. C The second respondent is the officer in charge of Fairbridge Support Unit in Bulawayo who is cited in his official capacity and the same applies to the third respondent, the Commissioner-General of the Police.

The facts giving rise to this application are as follows:

The applicant was tried by a single officer as is provided for in s 34 of the Police Act for contravening para 34 of the Schedule to the Act which relates D to the offence defined as follows:

"Omitting or neglecting to perform any duty or performing any duty in any improper manner."

The basis of the charge is that the applicant who was an instructor at Ntabazinduna Training Depot in Bulawayo wrongfully and unlawfully E transacted with recruit trainees by selling them learning material being handout notes from the Criminal Law Code [*Chapter 9:23*] to trainee squads 126, 127, 136, 137, 142, 143, 146, 147 and 148, all of 2012, for US$6 without the Depot Commandant's authority to undertake financial dealings with recruit trainees. F

The applicant, who denied the charges, was convicted and sentenced to nine days' imprisonment at Chikurubi Detention Barracks. Dissatisfied with both the conviction and sentence, the applicant appealed to the Commissioner-General of the Police in terms of s 34(7) of the Police Act as read with s 11 of the Police (Trials and Boards of Inquiry) Regulations 1965. On appeal the conviction was confirmed and the sentence of nine days' imprisonment G was altered to four days' imprisonment as the applicant had already served five days of the nine days' imprisonment when a trial *de novo* was ordered on 20 October 2014.

It is the applicant's case that, after the appeal was dismissed by the Commissioner-General, he was not favoured with the reasons for dismissing H the appeal. Instead, on 13 November 2014 the second respondent, the Officer

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in Charge at Fairbridge Support Unit, advised the applicant that he was to be A detained for purposes of serving the four days' imprisonment, as his appeal had been unsuccessful. This prompted the applicant to approach this court on an urgent certificate seeking the interim relief in the terms already outlined.

At the time of the hearing Mr *Ngavi*, for the respondents, conceded that there was no legal basis for the respondents not to furnish the applicant with reasons B for the dismissal of the appeal by the Commissioner-General. Consequently he undertook to immediately provide Mr *Mugiya* for the applicant with the reasons for the dismissal of the appeal. This has now been done and a copy of the reasons for dismissing the appeal is now filed of record. Mr *Ngavi* also undertook that the respondents would not detain the applicant for the purposes of serving the four days' imprisonment until this matter is finalised. C This means therefore that item number (1) on the terms of the interim relief sought is no longer an issue.

What has prompted the applicant to approach this court on an urgent basis is that the first respondent had virtually barred the applicant from filing an appeal with this court against the decision of the Commissioner-General of D Police and instead has threatened to detain the applicant in order to enforce the four days' imprisonment. The applicant's contention is that his constitutional rights as enshrined in s 49 of the Constitution (the right to personal liberty) and s 70(5)(b) of the Constitution (the right to appeal against conviction and sentence) are being wantonly violated by the respondents. The applicant alleges that he has been ordered to report for work on 17 November 2014 and E there was a probability he would be detained as the respondents have shown total disdain for the applicant's fundamental human rights and freedoms, a duty or obligation the applicant contends is bestowed upon the respondents in terms of s 44 of the Constitution.

It is the applicant's case that he has no other remedy except to approach the court F on an urgent basis in order to protect his constitutional rights. The applicant contends that the respondents would suffer no prejudice if the provisional order is granted but that he, the applicant, would suffer irreparable harm if he is ordered to serve the four days' imprisonment without exhausting the available remedy of pursuing the appeal to its logical conclusion, as such an appeal would be rendered *brutum fulmen.* Attached to the applicant's G founding affidavit is the copy of the notice of appeal incorporating the grounds of appeal against conviction and sentence which the applicant intends to file with this court.

The third respondent opposed this application and took a point *in limine*. The point *in limine* taken by Mr *Ngavi* for the respondents is simply as follows: H

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that A no appeal lies against the decision of the Commissioner-General of the Police once the Commissioner-General has dismissed the appeal in terms of s 34(7) of the Police Act. Mr *Ngavi* argued that the applicant's purported appeal to this court is of no effect at law as the Police Act does not provide for any further appeal to the High Court against the decision of the Commissioner-General. The respondents contend that the Commissioner-General is the B highest and final court of appeal in disciplinary matters presided over by a single trial officer in terms of s 34 of the Police Act.

In deciding to grant or decline to grant the interim relief sought, the issue which falls for determination in this case is whether an appeal lies against the decision of the Commissioner-General of the Police where a member of C the Police Force has been tried in terms of s 34(1) of the Police Act and has unsuccessfully appealed to the Commissioner-General in terms of s 34(7) of the Police Act.

It is common cause that the Police Act in s 34 does not provide for such an appeal against the decision of the Commissioner-General. That can be D contrasted with the provisions of s 33 of the Police Act which deals with the right to appeal to the High Court against the decision of the Board of Officers which provides:

> "**33 Appeal from board of officers to High Court**
>
> (1) Any person convicted of an offence by a board of officers may appeal to the High Court against such conviction or order of such board. E
>
> (2) The provisions of the Magistrates Court Act [*Chapter 7:10*] and the High Court Act [*Chapter 7:06*] which relates to appeals from a magistrates court, the prosecution of such appeals, the power of the High Court thereon, the execution and suspension of sentence and the institution of further proceedings after a conviction has been set aside shall apply, *mutatis mutandis* to appeals from board of officers: F
>
> Provided that any reference in other provisions to the clerk of court shall be construed as reference to a chief staff officer of the Police Force."

It is important to note that this same right of appeal enshrined in s 33 of the Police Act is accorded to a member of the Police who would have been tried by the magistrates court in terms of s 32 of the Police Act. The question which G arises is therefore whether a member tried by a single officer in terms of s 34 of the Police Act who has unsuccessfully appealed to the Commissioner-General in terms of s 34(7) of the Police Act should be denied the right to appeal to the High Court and consequently to the Supreme Court, a right enjoyed by members of the Police Force tried by either a board of officers or the magistrates court. Is this a proper interpretation and construction of H the law?

Mawadze J

The starting point in my view is to consider the provisions of the Constitution; A specifically s 70(5) which provides as follows:

> **"Rights of accused persons**
>
> (1) to (4) [not relevant]
>
> (5) Any person who has been tried and convicted of an offence has a right, *subject to reasonable restriction that maybe prescribed by law to* –B
>
> (a) have the case reviewed by a higher court or
>
> (b) appeal to a higher court against the conviction and sentence" (my own emphasis).

It is therefore clear to my mind that the right to appeal or to seek review is now enshrined in our Constitution. The courts would therefore not deprive C any person of such a right unless there are reasonable restrictions prescribed by the law. The Police Act does not provide for such reasonable restrictions, but is simply silent on the right of appeal by an aggrieved member against the decision of the Commissioner-General made in terms of s 34(7) of the Act. This leads me to the question of whether an appeal lies against the decision of the Commissioner-General made in terms of s 34(7) of the Police Act. Is D an aggrieved member of the Police Force in such circumstances barred from approaching the High Court? Does the High Court have jurisdiction to deal with an appeal made by a member against the decision of the Commissioner-General made in terms of s 34(7) of the Police Act?

The respondents' argument is that such a member can only approach the E High Court on review and not appeal. In other words, the argument by the respondents is that the High Court in such

circumstances can only exercise its inherent jurisdiction in relation to review powers but cannot do the same in relation to appeals. I find this argument to be illogical.

The jurisdiction of the High Court is provided for both in the Constitution and the High Court Act.

Section 171 of the Constitution provides as follows:

> **"171 Jurisdiction of the High Court**
>
> (1) The High Court –
>
> (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
>
> (b) has jurisdiction to supervise magistrates courts and review their decisions;
>
> (c) may decide constitutional matters except those that only the Constitutional Court may decide; and
>
> (d) *has such appellate jurisdiction as may be conferred on it by an Act of Parliament* (my emphasis).

Mawadze J

> (2) An Act of Parliament may provide for the exercise of jurisdiction by the High Court and for that purpose may confer power to make rules of court."

My understanding of the above constitutional provisions is that the High Court being a superior court of record has original jurisdiction in all civil and criminal matters in Zimbabwe. The inherent jurisdiction conferred upon the High Court is exercised unless it is specifically ousted.

The respondent contends that s 171(1)(d) of the Constitution shows that an Act of Parliament may confer or remove appellate jurisdiction from the High Court. It is therefore correct that, in terms of s 171(1)(d) of the Constitution the appellate jurisdiction of the High Court may be limited by a statute. This leads to the question as to whether there is indeed a statute which limits the appellate jurisdiction of the High Court in the circumstances of this case.

Section 13 of the High Court Act [*Chapter 7:06*] (the High Court Act) provides as follows:

> **"13 Original Civil Jurisdiction**
>
> Subject to this Act or any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe."

It is clear from the provisions of the Police Act that disciplinary proceedings held in terms of the Police Act are of a civil rather than criminal nature despite the fact that convicted members or officers of the Police Force may be sentenced to terms of imprisonment. This leads me to the appellate jurisdiction of the High Court in civil matters. Section 30 of the High Court Act provides as follows:

> **"30 Jurisdiction in appeals in civil cases**
>
> (1) The High 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 High Court.
>
> (2) Unless provision to the contrary is made in any other enactment, the High Court shall hear and determine and shall exercise powers of an appeal referred to in subsection (1) in accordance with the Act."

It is clear to my mind that in terms of s 30 of the High Court Act the High Court can, firstly, exercise its appellate jurisdiction in respect of any proceedings of any tribunal if the relevant Act governing those proceedings provides for an appeal to the High Court. The second instance where the High Court will exercise its appellate jurisdiction is where the relevant Act governing the proceedings of such a tribunal does not oust the jurisdiction of the High Court. This is the simple and ordinary interpretation which should be accorded to the provisions of s 30(1) and (2) of the High Court Act.

Mawadze J

The Police Act does not at all oust the appellate jurisdiction of the High Court in relation to proceedings held in terms of s 34 of the Police Act. While an appeal lies to the Commissioner-General against the decision of a single trial officer in terms of s 34(7) of the Police Act, there is no provision in the Police Act which states that no appeal lies against the decision of the Commissioner-General made in terms of s 34(7) nor is there a provision which bars an aggrieved member from

approaching the High Court on appeal B against the decision of the Commissioner-General. Put simply, the appellate jurisdiction of the High Court is not specifically ousted.

In *Rateyiwa* v *Kambuzuma Housing Co-op and Anor* 2007 (1) ZLR 311 (H) at 314G-H Gowora J (as she then was) succinctly summarised how this court will approach the question of its jurisdiction or lack thereof as follows: C

> "… this court has full jurisdiction over all persons and over all matters in Zimbabwe. Such jurisdiction is ousted only when Parliament has specifically provided for its ouster. Even where an Act seeks to provide for the ouster of the jurisdiction of this court, this court will only admit to such ouster where the legislation in question ousts the jurisdiction in no uncertain terms. It is trite that the High Court, being a superior court with original jurisdiction, justifiably, and rightfully so, guards such jurisdiction jealously." D

The rationale for this approach is to ensure that all our citizens irrespective of their station in life should access justice. This is precisely why the jurisdiction of the High Court, whether appellate jurisdiction or otherwise, cannot be ousted by implication but has to be expressly excluded. This informs the maxim that the High Court, unlike other inferior courts which may only do E what the law permits, may do everything which the law does not forbid. See Herbstein and van Winsen *The Civil Practice of South African High Courts* 5 ed p 49.

I am therefore satisfied for the reasons stated that the Police Act does not oust the appellate jurisdiction of this court in relation to decisions made by F the Commissioner-General in terms of s 34(7) of the Police Act. There is therefore no legal bar to the applicant appealing to the High Court against the decision of the Commissioner-General made in terms of s 34(7) of the Police Act.

I am therefore inclined to dismiss the point *in limine* taken by the respondents. G

The respondents have not opposed the interim relief sought on the merits. I do not see how they would have done so successfully. While the terms of the interim relief sought are badly and clumsily drafted, it is clear that what the applicant seeks in the interim is the stay of the order committing him to prison for four days pending the return date. I am inclined to grant that interim relief. In the result, it is ordered as follows: H

Mawadze J

Pending A the finalisation of the matter –

IT IS ORDERED THAT:

The order granted by the third respondent committing the appellant to prison be and is hereby suspended. B

Mugiya & Macharaga Law Chambers, applicant's legal practitioners

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

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[zRPz]SHABTAI v BAR & ORS 2014 (2) ZLR 862 (H)

Citation	2014 (2) ZLR 862 (H)
Case No	Judgment No. HH-707-14
Court	High Court, Harare
Judge	Mafusire J
Heard	11 December 2014; *CAV*

Judgment 24 December 2014

Counsel *T Zhuwarara*, with *C Nhemwa,* for the applicant
P C Paul, for the first, second & third respondents
No appearance for fourth respondent

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Interdict – *"anti-dissipation" interdict – nature and purpose of interdict – requirements for grant of – same as any other interim interdict – reasons to grant interdict – matters which court should consider*

Headnote

An anti-dissipation interdict is just an ordinary interdict to restrain the disposal of assets. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. The usual requirements for the grant of an interdict must be met, that is: (1) a *prima facie* right, even if it be open to some doubt; (2) a well-grounded apprehension of irreparable harm if the relief is not granted; (3) that the balance of convenience favours the granting of an interim interdict; and (4) that there is no other satisfactory remedy.

In deciding whether to grant this type of interdict, one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether his continued disposal of his assets is deliberately intended to frustrate any such judgment. Justice may require that a restriction be placed on the respondent's ability to deal with his own assets where it has been shown that he has been acting *mala fide*, with the intention of rendering ineffective the judgment that the court may grant against him. This is so even where it would not normally be justified to compel him to regulate his *bona fide* expenditure so as to retain sufficient funds in his patrimony for the payment of claims. The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective. And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. Except where the respondent is a Croesus, a claim for damages

Mafusire J

buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet. The question of an alternative remedy accordingly does not arise in this sort of case.

Cases referred to

Flame Lily Invstm Co (Pvt) Ltd v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G)

Hix Networking Technologies v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A)

Knox D'Arcy Ltd & Ors v *Jamieson & Ors* 1996 (4) SA 348 (A)

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 188 (H)

Littlewoods Stores v *IRC* [1969] 1 WLR 1241 (CA)

Mcitiki & Anor v *Maweni* 1913 CPD 684

Mfune v *Mutiti & Ors* 2002 (2) ZLR 490 (H)

Northern Farming (Pvt) Ltd v *Vegra Merchants (Pvt) Ltd* 2013 (2) ZLR 343 (H)

Setlogelo v *Setlogelo* 1914 AD 221 D

Tribac (Pvt) Ltd v *Tobacco Marketing Board* 1996 (1) ZLR 289 (S)

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

Case information

T Zhuwarara, with *C Nhemwa,* for the applicant E

P C Paul, for the first, second & third respondents

No appearance for fourth respondent

Judgment

Mafusire J: In this urgent chamber application the applicant sought, as against the first, second and third respondents, an anti-dissipation interdict, F or what it called a mareva injunction. An interim anti-dissipation interdict, in the context of the present application, is simply an ordinary temporary interdict the substance of which is the preservation of an asset by prohibiting its disposal pending the determination of a dispute. The object is to give effect to the order that the court might grant by ensuring that there is an asset to attach in the event of execution. G

In this case the interim interdict was sought in respect of a certain immovable property known as Unit 8, 19 Kingsmead Road, Borrowdale, Harare (hereafter referred to as "the Kingsmead property"). The final relief sought was an order declaring this property executable in satisfaction of any order that the applicant might obtain in its action that was pending against the first and H second respondents and others. This was under the case reference number

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Mafusire J

HC 10429/14 (hereafter referred to as "the main action"). The final relief A sought seemed patently odd. But it was not for me to say at this stage.

The draft interim relief was couched in the following terms:

> "First, second and third respondents are interdicted from disposing of or mortgaging or otherwise dealing in any manner which diminishes their rights, title and or value of the immovable property known as Unit 8, 19 Kingsmead Road, Borrowdale Harare …" B

I heard argument on 11 December 2014. By consent judgment was deferred. The parties wished to talk things over out of court. The first and second respondents were husband and wife. Like the applicant, they were members of the Israeli community in Zimbabwe. The applicant said he and first respondent had been close friends. Both sides were confident that dialogue C would resolve the dispute. The parties promised that by 18 December 2014 they would advise whether or not they would have settled. If they would, no judgment would be necessary. If they would not, then I would go ahead and deliver judgment. The tentative date agreed upon for the delivery of judgment was 23 December 2014.

When 18 December 2014 came and went and I did not hear from the parties D I proceeded to prepare my judgment. This is it.

Despite the complex schemes and the seemingly multi-layered transactions, as shall soon become apparent, the nub of the matter, shorn of all those complexities, was basically that applicant desired to preserve his ultimate interest in an immovable property known as Lot 51 Hogerty Hill Township E of Hogerty Hill, Harare (hereafter referred to as "the Hogerty Hill property"). Alternatively, he sought to ensure that the first and second respondents would be disbarred from disposing of the Kingsmead property so that it would be available for possible execution by him in the event that he won the main action. That is to put it very simply. F

As I understood it, the applicant's case was this. The first and second respondents were indebted to him. The debt arose from a certain transaction that, for ease of reference and understanding, I shall simplify as "the sale deal". In reality it was far from being a straightforward sale deal. In terms of it, the first and second respondents would relinquish in favour of the G applicant all their control, all their rights and all their interest in certain two trusts, the Yoyo Family Trust and the Shemoni Family

Trust. The first and second respondents had been the settlors and trustees of those two trusts. As I understood it, the sale deal would be a fiction. The two trusts would be re-configured. The applicant would become the settlor. Together with the first and second respondents, he would become a co-trustee. The beneficiaries of H

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Mafusire J

the A reconstituted trusts would be the applicant's children. One of them went under the name Ofer Shabtai. That also was the name of the first respondent. Neither of the parties touched on this. I take it that it was of no consequence.

The consideration for the sale deal was an amount in the sum of US$650 000. The applicant would pay it to the first and second respondents. In the main action the applicant pleaded that delivery of this amount would be "by B*constitutum possessorium* arising out of the arrangements that the parties had". It was not explained what that meant. At the hearing, the applicant's counsel insisted that the applicant had indeed paid this amount to the first and second respondents. The respondents denied that there had been any payment as such. They only recognised a pre-existing indebtedness by C themselves to the applicant in the sum of US$400 000. I was left none the wiser. But this was not the main issue.

The matter gets more complex. As part of the sale deal the applicant would obtain immediate occupation of the Hogerty Hill property. This property was neither owned directly by the first and second respondents nor by those two trusts. There was another company called Gelshen Enterprises D (Private) Limited (hereafter referred to as the "Gelshen Company"). In his declaration the applicant pleaded that it was the Gelshen Company that held the rights, title and interests in the Hogerty Hill property. In turn the entire shareholding in the Gelshen Company was said to be held by those two trusts, the Yoyo Trust and the Shemoni Trust. The applicant then pleaded E the essential terms of the sale deal as I have simplified them above, namely, that in consideration of the applicant paying them US$650 000, the first and second respondents would relinquish their control, rights and interest in those two trusts. Thus, the idea was basically that the Hogerty Hill property, being owned by the Gelshen Company, which in turn was owned by those two trusts, the applicant would ultimately obtain the entire beneficial interest in F it by assuming control of the two trusts. In addition he would get immediate occupation of the property.

The applicant's case for an anti-dissipation interdict, as I understood it, and in my own words, was this. The first and second respondents had done sinister things behind his back, evidently to render nugatory any relief that he might obtain in the main action. For him to assume effective and beneficial G interest in the Hogerty Hill property, the first and second respondents had to "deliver" to him those two trusts, the Yoyo and the Shemoni. He had paid the consideration of US$650 000 aforesaid. The new trust deeds in which he would replace the first and second respondents as settlor and become a co-trustee with them had been drawn up. They had been signed by him and H the first respondent. But behind his back the second respondent had reneged

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Mafusire J

and refused to sign. So as his main relief in the main action he wanted an A order compelling the second respondent to sign.

The applicant's story went further. With the money he had paid them the first and second respondents had decided, in his own words, to "upgrade" by moving to the more upmarket Kingsmead property. The first and second respondents had done worse things. The title deed to the Hogerty Hill B property had been lodged with the conveyancers to facilitate the transactions. The applicant had moved into, and taken occupation of, the Hogerty Hill property in part execution of the sale deal. He had done renovations to it worth US$300 000. But behind his back the first and second respondents had duped the conveyancers and surreptitiously retrieved the title deed. They had gone on to mortgage the Hogerty Hill property to a third party, someone C called Edward Barry Clinton ("Clinton") for a loan of US$850 000. The applicant produced a copy of the mortgage bond.

Therefore, the applicant went on, seeing that the first and second respondents had fraudulently mortgaged away the Hogerty Hill property, thereby making Clinton's claim preferent, and in the process virtually dissipating or wiping D off his rights in respect to that property, the applicant sought an alternative relief in the main action. It was a claim for a refund of US$650 000.

The first and second respondents did not stop there, said the applicant. They wanted to skip the country and relocate to South Africa. They were stripping themselves virtually of every form of ownership of any assets in this country. The applicant said he had stumbled upon this information quite E by chance. The Hebrew community in Zimbabwe is a closely-knit society. An "impeccable source", whose identity he was not at liberty to disclose, had told him in confidence that the first and second respondents were busy disposing of their proprietary interests in Harare and Kariba. They had shut down the two businesses that they had been operating in Harare. Because F of the opaque manner in which they had chosen to hold their proprietary interests, namely through trusts and companies, nothing would be found registered in their individual names. The applicant said he happened to know about the Hogerty Hill property because he had "acquired" it. He also happened to know about the Kingsmead property because the first and second respondents had "acquired" it from the proceeds received from him. G

Therefore, in a nutshell, the applicant's case was that since the Hogerty Hill property, over which he had a vested interest, had been rendered practically valueless to him by virtue of the mortgage bond, he wanted the Kingsmead property embargoed so that in the event that his alternative claim in the main action succeeded there would be something belonging to the first and second H

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respondents A upon which execution could be levied. The whole object of the interdict was to avoid any order that this court might give in the main action becoming a *brutum fulmen*.

The first, second and third respondents opposed the application. Mr *Paul*, for the respondents, expressed astonishment on the sale deal. It was unheard of that B a trustee could relinquish his trusteeship for value in favour of someone else.

The first and second respondents denied that they were disposing of any real estate in Kariba or Harare. They denied that they were planning to re-locate to South Africa. They said that, although the first defendant travelled frequently outside the country, they were largely based here and spent most of their time here. They produced a receipt for school fees from Chisipite C Senior School for US$600 dated 18 November 2014 which they said was for their daughter for 2015. They argued that if they intended to relocate they would not be making arrangements for their daughter's further schooling in Zimbabwe.

Mr *Paul* blasted the applicant for mounting an application seeking such relief, D the effect of which would be to seriously interfere with the respondents' rights to deal with their own property, when all he had produced by way of evidence were mere rumours from unnamed sources. He argued that both the main action and the urgent chamber application were an abuse of the court process because the applicant himself had admitted to the first respondent that it had been a tactical move by him since everything could eventually be E reversed. Mr *Paul* relied on a certain "WhatsApp" message received by the first respondent a day after the urgent chamber application had been filed. It had been in Hebrew. The translation and transcription of that message had been done by the first respondent himself. It read:

> "Hi Ofer, With my lawyers decision I was forced to send to you this summons. F I should have done it immediately when I knew that you gave Ted Clinton the house deeds as collateral., and every postponement has worsened my case. This is a tactical move on my behalf and everything can be reversed. I hope that we finish this episode remaining in a good relationship."

Mr *Paul* also relied on that text message to submit that the matter was not urgent since the applicant had admitted that he realised that he could have G taken action the moment that he had become aware that the respondents had mortgaged the Hogerty Hill property. The mortgage bond was registered on 8 May 2014.

The respondents denied that the so-called consideration of US$650 000 had actually been paid. They said they had a pre-existing debt owing to the H applicant in the sum of US$400 000. That debt would be extinguished by

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the sale deal. Since the consideration for the sale deal was US$650 000 the A applicant would end up paying back to them the difference of US$250 000.

The respondents admitted registering the mortgage bond over the Hogerty Hill property. They said the applicant had breached the sale deal by failing to pay the US$250 000 top up. They had then cancelled the sale deal. The second respondent would therefore no longer sign the re-constituted trust B deeds for those two trusts. The applicant had no authority to make the application on behalf of those trusts. He was not a trustee.

Overall, Mr *Paul* attacked the propriety of the so-called anti-dissipation interdict, the result of which was effectively to levy execution before any judgment had been given.

Mr *Zhuwarara*, for the applicant, dismissed the "Whatsapp" message C as inadmissible, allegedly for want of compliance with the High Court (Authentication of Documents) Rules, 1971 (RGN 995 of 1971). However, he conceded that he had had no opportunity to take instructions from his client on whether or not he disputed the message. Therefore, he was only objecting to the form rather than the substance of the message. He argued D that in terms of those regulations, documents translated from other languages into the English language for use in court would be admissible only if the translations had been done by certified translators. The first respondent was not one of them. I shall come back to this aspect later on.

The applicant instituted the main action on 25 November 2014. He said it E was on 28 November 2014 that he had heard of the respondents dissipating their estate in order to relocate. He had filed the urgent chamber application on 5 December 2014. I am satisfied that there was no appreciable delay. The applicant had acted within a reasonable period when the need to do so had arisen: see *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H).

In *Mfune* v *Mutiti & Ors* 2002 (2) ZLR 490 (H) at 496C, Ndou J said it is trite F that the court has an inherent jurisdiction to grant an interdict. In *Northern Farming (Pvt) Ltd* v *Vegra Merchants (Pvt) Ltd* 2013 (2) ZLR 343 (H) I granted an anti-dissipation interdict for the preservation of a certain quantity of maize grain pending the determination, by arbitration, of the dispute between the parties so that should the applicant succeed the arbitration award would G not be rendered ineffective by reason that the respondent, who had been proved to be disposing of his only asset – the maize grain – had nothing left to attach. However, the application in that matter had been brought under the purview of the Model Law on International Commercial Arbitration which is a schedule to the Arbitration Act [*Chapter 7:15*]. Article 9 thereof specifically provides for the granting, under certain conditions, of an interim H

Mafusire J

order A for the preservation of any goods which are the subject-matter of the dispute at arbitration.

I agree with Ndou J that the court has an inherent jurisdiction to grant an interdict. In my view, the term "anti-dissipation interdict" should not confuse matters. In my view, it has no special legal meaning. It is just a term of B description. In *Northern Farming* above at 346D I said:

> "What is an anti-dissipation interdict? It is just an ordinary interdict to restrain the disposal of assets. In *Knox D'Arcy Ltd and Others* v *Jamieson and Others* 1996 (4) SA 348 (A) both the court of first instance and the appeal court debated the propriety of the term 'anti-dissipation interdict'. None of them found the name quite suitable and none of them, for the case before them, could quite understand the content of such interdict. In the end the appeal court was content to say that C the South African courts had recognised this type of interdict for many years without giving it any specific name."

In that judgment I referred to the debate over the name for that type of interdict as captured in the judgment of Grosskopf JA in *Knox D'Arcy supra* at 371-2:

> "It is therefore not surprising that both the name of the interdict and its essential content have been the subject of some debate. D
>
> As far as the name is concerned, the petitioners referred to it as a Mareva-type interdict after the term used in English law. The court *a quo* did not like this name since the use of the English term might suggest that English principles are automatically applicable [see 1994 (3) SA at 705A-706B]. I agree with this criticism. The alternatives suggested by Stegmann J were not, however, much more felicitous. Thus he referred to an interdict in *securitatem debiti* and an E anti-dissipation interdict. The former expression may suggest that the purpose of the interdict is to provide security for the applicant's claim. This is not so. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And 'anti-dissipation' suffers from the defect that in most cases and, certainly in the present case, the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his F hands on them.

> Having criticised the names used for the interdict I find myself unfortunately unable to suggest a better one. I console myself with the thought that our law has recognised this type of interdict for many years without giving it any specific name."

The requisites for an interdict are: G

1. a *prima facie* right, even if it be open to some doubt;
2. a well-grounded apprehension of irreparable harm if the relief is not granted;
3. that the balance of convenience favours the granting of an interim interdict; H
4. that there is no other satisfactory remedy.

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Mafusire J

See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd* v A*Tobacco Marketing Board* 1996 (1) ZLR 289 (S) at 391; *Hix Networking Technologies* v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) at 398I-399A*; Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378 (G); *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) at 238. B

In the present case, one of the respondents' major grounds of attack against the granting of the interdict was that the main action was misconceived. It was said the cause of action therein was non-existent in that by the sale deal the applicant was purporting to buy his way into the two trusts. I take it that by this argument the respondents were simply saying that the applicant had failed to establish a *prima facie* right to sustain a case for an interdict. C

It was my earnest suspicion that both the application before me, and the main action that was said to be pending, concealed more than they revealed. I acknowledge that shrewd estate planning minimises the various types of estate duty and other taxes. But it sounds rather novel for one to "sell" to another who "buys" one's trusteeship in a trust. Mr *Paul* dismissed applicant's cause of action in the main action as a "joke". D

However, at this stage my enquiry is confined to whether or not the applicant has established a *prima facie* right, as opposed to a clear right. The *prima facie* right may be open to some doubt. That will be for the trial court to evaluate eventually. At this stage, I am satisfied that the applicant has established a *prima facie* right. He has established an entitlement to the effective and E beneficial interest in the Hogerty Hill property, however it was intended to be achieved. In the main action, if he did not get the kind of specific performance that the parties had contemplated, his fall-back position would be a refund of the consideration that he said he had paid. The whole deal may have been a "joke". But the respondents were part of that "joke". Let the trial F court decipher the "joke". It was not the respondents' argument that the sale deal was unlawful in any way. They expressly admitted owing the applicant US$400 000. The applicant said it was US$650 000, plus US$300 000 for renovations. The trial court would no doubt sort out all that.

The respondents said the applicant had no well-grounded apprehension of G an irreparable harm because they were not disposing of their assets. They had not sold their businesses. They were permanently based in this country. They were not selling real estate in Kariba or Harare. It was wrong for the applicant to base his application on mere rumours.

I got the sense that the respondents were not being very open. The applicant may have heard from rumours. But he had also said that he had been close H

2014 (2) ZLR p871

Mafusire J

friends A with the first respondent and that the first respondent had previously confided in him that he had real estate in Kariba. In his affidavit the first respondent did not categorically refute that. All he said on that point was that he was not selling real estate in Kariba and Harare. That is not the same thing as denying owning real estate. The respondents should have come clean and taken the court in their confidence whether or not they had real estate B other than those two properties that the applicant had himself identified.

Whether or not the respondents had real estate in Harare and Kariba would have been of no consequence by itself. But given that they had deliberately encumbered the Hogerty Hill property knowing full well that they had "sold" it to the applicant was wrongful. They did not refute the

applicant's C categorical accusations that they had fraudulently or surreptitiously retrieved the title deed from the conveyancers. Given the huge amount of the mortgage bond in favour of Clinton, the applicant had a well-grounded apprehension of an irreparable harm. If Clinton foreclosed on that property there would be nothing left for the applicant.

The respondents argued that there was no basis for the Trinirig Company D to be muzzled in respect of its rights to deal freely with its own property, especially in circumstances in which it was not even a party in the main action. By this argument I presume that the respondents wanted to show that the balance of convenience favoured the refusal of the interdict.

In the main action, the applicant's claim was against the first and second E respondents, the Gelshen Company, Clinton and the Registrar of Deeds. It is understandable why the Trinirig Company, the third respondent herein, was not a party. Therein, the focus was on the Hogerty Hill property that was registered in the name of the Gelshen Company. The remedy sought in the main action is some kind of specific performance. Thus the Trinirig F Company would have had no business being in that action. In contrast, in the present case, although both the Hogerty Hill property and the Kingsmead property are the focus of attention, the applicant wants a remedy in respect of the Kingsmead property only. That property was registered in the name of the Trinirig Company. The shares in the Trinirig Company were in turn wholly owned by the Trinirig Trust. In turn the Trinirig Trust was controlled G by the first and second respondents.

However, the applicant's answer to the respondents' argument above was simply that the corporate veil be lifted so as to expose the true owners of those two properties.

With respect, it has required little persuasion and effort to pierce the corporate H veil in this case. It is in fact common cause that the first and second respondents

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are in reality the beneficial owners of the true properties in question. Their A two companies and their three trusts were mere fronts. They were their *alter egos*. From time to time the courts will rend a company's corporate veil to get to the members hidden behind it. This happens where, for example, the company is a sham or where it has been used as a tool to cause harm to others, or where it would be flagrantly unjust to leave the veil intact. Lord Denning MR put it this way in *Littlewoods Stores* v *IRC* [1969] 1 WLR 1241 (CA) at 1254: B

> "The doctrine laid down in *Salomon's* case[1] has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind." C

Thus, in this case, to shield the Kingsmead property behind the corporate veil of the Trinirig Company would be to cause manifest injustice. A company acts through natural beings. It was not Trinirig, the fictitious entity, which surreptitiously uplifted the title deed from the conveyancers and mortgaged away the property. It was Trinirig, the natural persons that did. An interdict against Trinirig, the natural beings, shall be an interdict against Trinirig, the fiction, and *vice versa*. D

In my view, in this type of interdict one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether his continued disposal of his assets is deliberately intended to frustrate any such judgment. In *Mcitiki and Anor* v *Maweni* 1913 CPD 684 at 686-687 Hopley J stated: E

> "It is said if one were to interdict a man like respondent in such circumstances from parting with some of his property so as to satisfy a judgment, one would be revolutionising the practice of this court. The practice of this court is to do justice between people according to the circumstances that may arise. It has, of course, long been the practice of this court that if the respondent, although an *incola*, were *in fuga*, the court would in such circumstances restrain him from F parting with certain property pending the result of an action; *and that doctrine has been extended a little further where the respondent is a prodigal wasting his money or is purposely making away with funds although remaining an* incola *of the country, so that eventually when his creditor gets the judgment it may be a barren one;* and to use a graphic phrase in one of our old law cases, when he went there with his writ of execution, such creditor would find he was 'fishing behind the net'. It is to protect a *bona fide* plaintiff against a defeat of justice in G such a case that such orders are given. The cases cited such as *David* v *Reinhard* 8 EDC 30; *Robinson, Miller and Co* v *Lennox and Another* (1908) 18 CTR 402; *Fredericks* v *Gibson* (1899) 9 CTR 445, all have their distinguishing features, *but they all proceeded upon the wish of the court that the plaintiff should not*

Mafusire J

> *have* A *an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so*" (my emphasis).

Justice requires that a restriction be placed on one's ability to deal with one's assets where it has been shown that one has been acting *mala fide* with the B intention of rendering ineffective the judgment that the court may grant against one. This is so even where it would not normally be justified to compel one to regulate one's *bona fide* expenditure so as to retain sufficient funds in one's patrimony for the payment of claims: *Knox D'Arcy Ltd & Others* v *Jamieson & Others* 1996 (4) SA 348 (A) at 372 -373, where the court said: C

> "It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer? D
>
> That is not the question which arises here. In the present circumstances *there is no question of a claim for damages being an alternative to an interdict*. The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict. *The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective. A*nd the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. *Except where the*E*respondent is a Croesus , a claim for damages buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet*. The question of an alternative remedy accordingly does not arise in this sort of case. The interdict with which we are dealing is *sui generis*. It is either available or it is not. No other remedy can really take its place (except, possibly, in certain circumstances [of] attachments or arrests" (my emphasis). F

I am satisfied that given the zigzag fashion in which the respondents own properties, even though nothing of it was proved to be unlawful, there can be no other satisfactory remedy for the applicant. Among other things, if the applicant eventually succeeds either in the main action or any other claim for damages, ultimately execution is a possibility. But the way the respondents G have regulated their proprietary affairs is such that nothing may be traced back to them directly. It was possible for the applicant to do that with the two properties in question because of the sale deal that related to the Hogerty Hill

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property directly and to the Kingsmead property indirectly. The respondents A have not said what else they own and where.

The issue of the "WhatsApp" message is inconsequential. Firstly, there is nothing in the High Court (Authentication of Documents) Rules that deals with translated documents. I presume Mr *Zhuwarara* meant to refer to the Civil Evidence Act [*Chapter 8:01*]. But again that Act does not say that it requires certified translators for translated documents to be admissible. Section B 17 provides that where it is necessary to produce in evidence a translation of a document into the English language that translation is admissible on its production by the person entitled to produce the original document if it is accompanied by an affidavit made by that person stating that he undertook the translation and that the translation is true and accurate to the best of his C ability. If the translation is challenged, all that that person needs do is to prove the accuracy of the translation.

At any rate, in terms of s 27 of that Act the evidence of a statement made by any person whether orally or otherwise, is regarded as first-hand hearsay evidence that is admissible in civil proceedings as evidence of any fact mentioned or disclosed in that statement. Therefore, in my view, the first D respondent was entitled to place by affidavit, as he did, the message that he had downloaded from his mobile telephone which he swore had been sent from the applicant's own telephone.

But be that as it may, I have placed no weight on that message. The substance of it was that the applicant's complaints before the court, both in the main E action and in this application, were not genuine, but merely tactical moves at the instance of his legal practitioners. Yet before me was a cogent complaint. The respondents had entered into the sale deal with the applicant, irrespective of

the legal soundness of that transaction. The applicant had signed. The first respondent had signed. Unbeknown to the applicant the second respondent F had reneged on signing. Also unbeknown to the applicant the respondents had purported to cancel the sale deal. They had then Nicodemusly retrieved the title deed of the Hogerty Hill property from the conveyancers and Nicodemusly mortgaged that property to Clinton when they no longer had the right to do so. Even in the absence of evidence of the respondents' ownership of other properties in Kariba and Harare, and even in the absence G of any further evidence that they were busy disposing of any such property with intention of leaving Zimbabwe, I am satisfied that the applicant placed before me sufficient grounds for an interlocutory interdict.

In the premises the provisional order is hereby granted in terms of the draft attached to the urgent chamber application. H

Mafusire J

C Nhemwa & Associates, applicant's legal practitioners A

Wintertons, first, second and third respondents' legal practitioners

1*Salomon* v *Salomon & Co* [1897] AC 22 (HL)

2 Croesus was a king of ancient Lydia, who was famed for his wealth and whose name is said to be synonymous with terms like "capitalist", "deep pocket", "fat cat", "moneybags", etc.

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[zRPz]S v C (A JUVENILE) 2014 (2) ZLR 876 (H)

Citation	2014 (2) ZLR 876 (H)
Case No	Judgment No. HH-718-14
Court	High Court, Harare
Judge	Muremba J
Heard	31 December 2014
Judgment	31 December 2014
Counsel	No details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of* C *Rights – right to freedom from torture or cruel, inhuman or degrading treatment or punishment (s 53) – no limitation on such right permissible – corporal punishment of male juveniles in terms of s 353(1) of Criminal Procedure and Evidence Act – no longer consistent with the Constitution*

Criminal procedure (sentence) – *general principles – young offenders –* D *corporal punishment of male juveniles in terms of s 353(1) of Criminal Procedure and Evidence Act – no longer consistent with Constitution – other sentencing options available*

Headnote

The accused, who was aged 15 years, was convicted of the rape of a 14-year-old E girl. He was sentenced to receive a moderate correction of three strokes with a cane, this punishment being allowed for by s 353(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It was also specifically allowed for by s 15(3) of the 1980 Constitution. The issue was whether, with the introduction of the 2013 Constitution, such punishment remained lawful. F

Held, that in the 2013 Constitution the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is provided by s 53, which states that "No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment". Section 86(3)(c) provides that no law may limit, *inter alia*, the right G not to be tortured or subjected to cruel, inhuman or degrading treatment punishment. If the legislature had intended corporal punishment to remain as part of our law, it would have limited the right by categorically stating that moderate corporal punishment inflicted in execution of the judgment or order of a court shall not be held to be in contravention of that right, as was the situation under the old Constitution. Further provisions in H

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the A new Constitution protect the right to personal security, equality and non-discrimination. Section 52(a) provides for the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private sources, while s 56(3) provides for freedom from discrimination on the grounds of, among other things, sex, gender or age. B

Held, further, that internationally, corporal punishment is regarded as violence against children and as a breach of fundamental human rights. It is considered inhuman and degrading as it violates children's physical integrity and demonstrates disrespect for human dignity and undermines the self-esteem of children. It is said to treat children as half-human C beings, thereby breaching the principle of equal protection before the law and non-discrimination. There are regional and international conventions which protect these rights and the right to freedom from torture, inhuman and degrading punishment. Zimbabwe has ratified and acceded to some of them: the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, the International D Covenant on Civil and Political Rights, and the African Charter on the Rights and Welfare of the Child.

Held, further, that becoming a State Party to these conventions, Zimbabwe agreed to be bound by these conventions. As such, it had international legal obligations to respect, protect and fulfil human rights for everyone E within its jurisdiction. As a State Party, it was duty-bound to enact the necessary legislation to give domestic effect to them. It was evident from Part 3 of Chapter 4 of the new Constitution that Zimbabwe has endeavoured to fulfil its international legal obligation in protecting the rights of the child. Section 81 thereof elaborates on the rights of children. Of significance are paras (a) and (b) of s 81(1) which make it clear that F children are not half-human beings, as they ought to be treated equally as adults and protected from all forms of abuse, including violence. It follows that the new Constitution does not allow for the imposition of corporal punishment and thus s 353 (1) of the Criminal Procedure and Evidence Act is now a law which is inconsistent with, or *ultra vires,* the Constitution. G

Held, further, that in view of the fact that the accused was sentenced after the new Constitution had come into operation, the trial magistrate ought to have employed the provisions of the new Constitution in sentencing the accused. Since the new Constitution had outlawed corporal punishment, the trial magistrate should have considered other sentencing options H in rape cases in respect of juvenile offenders. What is important when

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Muremba J

punishing juveniles is the need to have the child rehabilitated back into A society and his family. Options available include: (a) under s 351(2)(a) of the Criminal Procedure and Evidence Act, the court may refrain from passing sentence and refer the matter to the Children's Court if the juvenile is a child who is in need of care; (b) under s 351(20(b), the court may have the juvenile offender placed or institutionalized in a reformatory or in a training institution; or (c) the court may impose a B wholly suspended prison sentence.

Quaere, whether s 53 outlaws the infliction of corporal punishment on children by their parents, guardians or persons *in loco parentis*.

Editor's note: On whether corporal punishment, even in the home or school environment, is always and necessarily inhuman or degrading, the Supreme Court was split on C the issue in *S* v *A Juvenile* 1989 (2) ZLR 61.

Cases referred to

S v *M* 2009 (1) ZLR 47 (H)

S v *Mupariwa* 2000 (1) ZLR 168 (H) D

S v *Zaranyika & Ors* 1995 (1) ZLR 270 (H)

S v *Zhou* 1995 (1) ZLR 329 (H)

Legislation considered

Constitution of Zimbabwe 2013, ss 2, 52, 53, 81, 86, 167 & 175; Sixth Schedule, para 10 E

Criminal Procedure and Evidence Act [Chapter 9:07], ss 15 & 353

International Agreements, Conventions and Treaties considered:

African Charter on Human and Peoples' Rights, arts 3 & 5

African Charter on the Rights and Welfare of the Child, arts 1, 2, 3 , 16 & 17 F

Convention on the Rights of the Child, arts 1, 2, 37 & 40

International Covenant on Civil and Political Rights, arts 4(2), 7 & 26

Judgment

Muremba J: The accused, a 15-year-old juvenile was charged with and convicted of rape as defined in s 65(1) of the Criminal Law (Codification G and Reform) Act [*Chapter 9:23*].

The accused raped a 14-year-old neighbour during the night as they were both sleeping in the same hut. The accused is friends with one of the complainant's brothers. On the fateful night the accused went to the complainant's home to see his friend. Unfortunately the friend was not at home. When the H

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complainant A and her other brothers retired to bed the accused joined them. The complainant and her brothers were sleeping in the same hut. During the night the accused raped her.

The accused denied the charge and was convicted after a full trial. I find the conviction proper and it is hereby confirmed. B

The accused was sentenced to receive a moderate corporal punishment of three strokes with a rattan cane. He was sentenced on 26 September 2014 on the strength of s 353(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which allows for the imposition of corporal punishment. The section reads:

> "(1) Where a male person under the age of eighteen years is convicted of any C offence the court which imposes sentence upon him may –
>
> (a) in lieu of any other punishment; or
>
> (b) in addition to a wholly suspended sentence of a fine or imprisonment; or
>
> (c) in addition to making an order in terms of subsection (1) of section *three hundred and fifty-one*; D
>
> sentence him to receive moderate corporal punishment, not exceeding six strokes."

What gave rise to the enactment of s 353(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] was the old Constitution of Zimbabwe which permitted the imposition of corporal punishment on boys below the age of 18 years. Section 15(1) thereof reads as follows: E

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

Section 15(3) reads:

> "No moderate corporal punishment inflicted –
>
> (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are F vested any of the powers of his parent or guardian; or
>
> (b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law; shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading". G

The foregoing provision of the old Constitution made it constitutional to impose corporal punishment. The right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment was limited to the extent specified in s 15(3).

While it was constitutional under the old Constitution to impose corporal punishment, what is of significance in the present case is that the accused was H sentenced after the new Constitution, that is, the Constitution of Zimbabwe

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Muremba J

Amendment (No.20) Act 2013 had come into operation . There is need to A examine the provisions of the new Constitution and see if it is still competent for the courts to impose corporal punishment on male juvenile offenders.

In the new Constitution the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is under s 53 and it reads:

> "No person may be subjected to physical or psychological torture or to cruel, B inhuman or degrading treatment or punishment".

Section 86 thereof deals with limitation of rights and fundamental human freedoms. Section 86(3) (c) reads:

> "No law may permit the following rights enshrined in this Chapter and no person may violate them –
>
> (a) … C
>
> (b) …
>
> (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment punishment".

It is clear that the way the new Constitution is worded on the right to protection from inhuman treatment is different from the way it was worded under the old D Constitution. In the new Constitution the right is not limited at all. In fact s 86 makes it abundantly clear that no law may limit that right and provides for no exception. If the legislature had intended corporal punishment to remain as part of our law, it would have limited the right by categorically stating that moderate corporal punishment inflicted in execution of the judgment or order of a court shall not be held to be in contravention of that right as was E the case under the old Constitution. My interpretation of ss 53 and 86 of the new Constitution brings me to the conclusion that corporal punishment is now unconstitutional. What strengthens my conclusion are further provisions in the new Constitution which protect the right to personal security, equality and non-discrimination. Below are the relevant provisions. F

Section 52 (a) which deals with personal security and prohibits violence states that:

> "Every person has the right to bodily and psychological integrity, which includes the right –
>
> (a) to freedom from all forms of violence from public or private sources." G

Section 56 deals with equality and non-discrimination. It reads:

> "(1) All persons are equal before the law and have the right to equal protection and benefit of the law.
>
> (2) …
>
> (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, H

Muremba J

ethnic A or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, *sex, gender*, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock. (the emphasis is mine)

(4) A person is treated in a discriminatory manner for the purpose of subsection (3) if – B

(a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or

(b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

(5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable C in a democratic society based on openness, justice, human dignity, equality and freedom."

Internationally, corporal punishment is regarded as violence against children and as a breach of fundamental human rights. It is considered inhuman and degrading as it violates children's physical integrity and demonstrates D disrespect for human dignity and undermines the self-esteem of children. It is said to treat children as half-human beings, thereby breaching the principle of equal protection before the law and non-discrimination. There are regional and international conventions which protect these rights and the right to freedom from torture, inhuman and degrading punishment. Zimbabwe has ratified and acceded to some of them. It ratified the Convention on the Rights E of the Child on 11 September 1990 and the African Charter on Human and Peoples' Rights (ACHPR) on 30 May 1986. It acceded to the International Covenant on Civil and Political Rights (ICCPR) on 13 May 19991 and to the African Charter on the Rights and Welfare of the Child on 19 January 1995.

The African Charter on Human and Peoples' Rights, in art 3, provides: F

"1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law."

Under Article 5 –

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman G or degrading punishment and treatment shall be prohibited."

Under art 7 of the International Covenant on Civil and Political Rights provides:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment and punishment."

Under art 4(2), even in times of public emergency no derogation from art 7 H may be made.

Muremba J

Under art 26 A

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." B

Under the Convention on the Rights of the Child the following provisions are relevant.

"Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. C

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. D

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 37E

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

Under the African Charter on the Rights and Welfare of the Child the following F are the relevant provisions.

"Article 1: Obligation of States Parties

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their G Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

2. Nothing in this Charter shall affect any provisions that are more conductive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State. H

2014 (2) ZLR p883

Muremba J

3. A Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 2: Definition of a Child

For the purposes of this Charter, a child means every human being below the age of 18 years. B

Article 3: Non-Discrimination

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 16: Protection Against Child Abuse and Torture C

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.

2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for D the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

Article 17: Administration of Juvenile Justice

1. Every child accused or found guilty of having infringed penal law shall have E the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.

2. State Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment F or punishment ..."

By becoming a State Party to the above mentioned conventions, Zimbabwe indicated its consent to be bound by these conventions. As such it has international legal obligations to respect, protect and fulfil human rights for everyone within its jurisdiction. As a State Party it is duty-bound to enact the G necessary legislation to give domestic effect to them. It is evident from Part 3 of Chapter 4 of the new Constitution that Zimbabwe has endeavoured to fulfil its international legal obligation in protecting the rights of the children. Section 81 thereof elaborates on the rights of children. Of significance are sections 81(1)(a) and 81(1)(e) which make it clear that children are not half-human beings as they ought to be treated equally as adults and protected H from all forms of abuse including violence. They read as follows:

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Muremba J

"81(1) Every child, that is to say every boy and girl under the age of eighteen A years, has the right –

(a) *to equal treatment before the law*, including the right to be heard;

(b) …

(c) …

(d) …

(e) to be protected from economic and sexual exploitation, from child labour, B and from *maltreatment*, neglect or *any form of abuse"* (my emphasis).

This elaboration of the children's rights in conformity with the regional and international conventions that Zimbabwe has ratified demonstrates that the new Constitution does not allow for the imposition of corporal punishment anymore. Clearly, s 353 (1) of the Criminal Procedure and Evidence Act C [*Chapter* 9:07] is now a law which is inconsistent with or *ultra vires* the Constitution. Section 10 of Schedule 6 of the new Constitution provides that, "all existing laws continue to be in force but must be construed in conformity with this Constitution.'' Section 2(1) thereof goes on to state that

> "the 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". D

What it means under the circumstances is that whilst the Criminal Procedure and Evidence Act [*Cha*pter 9:07] remains in force its s 353(1) is now an invalid law.

Section 2(2) of the new Constitution states that: E

> "The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them".

What it means is that the courts have a duty to uphold the Constitution and to promote, respect and protect the rights and freedoms enshrined therein. I F thus declare s 353(1) of the Criminal Procedure and Evidence Act [*Chapter* 9:07] to be constitutionally invalid.

One other issue that I feel obliged to comment on, although it is not an issue before me, is that s 53 of the new Constitution seems to outlaw the infliction of corporal punishment on children by their parents, guardians or by persons *in loco parentis*. As already explained above the right not to be G tortured or subjected to cruel, inhuman or degrading treatment or punishment is an absolute right.

Under the old Constitution parents, guardians and persons *in loco parentis* were allowed to inflict moderate corporal punishment on children. It appears that that position has since changed. H

2014 (2) ZLR p885

Muremba J

In A view of the fact that the accused was sentenced after the new Constitution had come into operation the trial magistrate ought to have employed the provisions of the new Constitution in sentencing the accused. Since the new Constitution has outlawed corporal punishment, the trial magistrate should have considered other sentencing options in rape cases in respect of juvenile offenders. B

Article 17(3) of the African Charter on the Rights and Welfare of the Child states that

> "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation**.**" C

Article 40(1) of the Convention on the Rights of the Child also states that:

> "State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's D reintegration and the child's assuming a constructive role in society"

The above provisions show that what is important when punishing juveniles is the need to have the child rehabilitated back into society and his family. Fortunately, we have provisions in our Criminal Procedure and Evidence Act [*Chapter 9*:*07*] which are meant to promote the child's rehabilitation E and reintegration into society

In terms of s 351 (2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the court may refrain from passing sentence and refer the matter to the children's court if the juvenile is a child who is in need of care. Under this section it is not competent for the court to pass sentence and to refer the F child to the children's court at the same time. If the matter is referred to the children's court the juvenile offender should be dealt with in terms of the Children's Act [*Chapter 5:06*]. See also *S* v *Mupariwa* 2000 (1) ZLR 168 (H).

The other alternative that the court has is to have the juvenile offender placed or institutionalized in a reformatory or in a training institute. This is in terms of s 351(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. G This should be done after ascertaining with the Ministry of Social Welfare that accommodation is available. See also *S* v *Mupariwa* supra. The challenge that we have though with this option is that we have very few such institutions in Zimbabwe. With the economic hardships that we are facing even funding the few existing institutions is a big challenge. Again, if the H court goes for this option it should not pass sentence.

2014 (2) ZLR p886

Muremba J

The courts also have an option to impose wholly suspended prison terms. A See *S* v *M* 2009 (1) ZLR 47 (H). In some cases effective imprisonment can be imposed. Generally juveniles should not be sent to prison but in cases where there are aggravating features such as multiple counts, transmission of sexually transmitted diseases to the victim, serious psychological and or physical trauma, a high degree of violence or force used during the rape and the use of a weapon during the rape, effective imprisonment might be B called for especially if the juvenile offender is between 16 and 18 years. However, the periods of imprisonment should vary according to the age and the moral blameworthiness of the offender. See John Reid-Rowland *Criminal Procedure in Zimbabwe* p 13-10. See also *S* v *Zaranyika and Ors* 1995 (1) ZLR 270 (H).

For the court to arrive at an appropriate penalty it should consider and assess C all relevant factors and recommendations by the probation officer.

Community service should not be imposed in rape cases as this is meant for petty or non-serious offences. See *S* v *Zhou* 1995 (1) ZLR 329 (H).

In *casu* I did not have the benefit of reading the probation officer's report although the trial magistrate made reference to it in her reasons for sentence. D The report was not attached to the record when it was submitted for review. I suppose it was an oversight on the part of the trial magistrate. However, in her reasons for sentence the trial magistrate indicated that the probation officer had recommended community service, but as I have already stated above, community service should not be imposed in rape cases. Considering E the way the rape was committed, the age of the accused (15years), the age of the complainant (14 years) and that the accused is a first offender who is still in secondary school doing form 3, a wholly suspended prison sentence in the region of 3-4 years would have met the justice of the case. The accused has already been caned. There is nothing that can be done about it now. I cannot certify the sentence to be in accordance with real and substantial justice. I thus withhold my certificate. F

Although I have declared s 353 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to be constitutionally invalid, in terms of s 167(3) and s 175 (1) of the new Constitution, it is the Constitutional Court which makes the final decision on whether an Act of Parliament is constitutional. Any G order of constitutional invalidity of any law that is made by another court other than the Constitutional court has no force unless it is confirmed by the Constitutional court. In terms of s175(3),

> "Any person with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in terms of subsection (1)." H

2014 (2) ZLR p887

Muremba J

*In casu*A since this matter came before me as a criminal review I hold the view that it is the Prosecutor-General who should apply to the Constitutional Court to have the declaration of constitutional invalidity confirmed. As such, this review judgment should be brought to the attention of the Prosecutor-General.

Mawadze j concurs. B

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[zRPz]S v NYAMANDE 2014 (2) ZLR 888 (H)

Citation	2014 (2) ZLR 888 (H)
Case No	Judgment No. HH-719-14
Court	High Court, Harare
Judge	Muremba J
Heard	31 December 2014
Judgment	31 December 2014
Counsel	No details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – s 81(1)(e) – right of children to be protected from sexual exploitation* C *– mature man purporting to marry child citing religious beliefs – breach of child's constitutional rights*

Criminal procedure (sentence) – *offences under Criminal Law Code – sexual relations with a young person (s 70(1)) – large age disparity between accused and complainant – accused a member of a religious* D *sect which allowed polygamy – need to protect children – heavy term of imprisonment essential*

Headnote

The accused, a 54-year-old man, was convicted in the magistrates court of having sexual intercourse with a 14-year-old girl, contrary to s 70(1) E of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He claimed that he taken the complainant as his third wife, which was permitted by the religious sect to which he belonged. He claimed that he had been shown by "the Spirit" that the complainant was going to be his third wife. As a result, the complainant fell pregnant and dropped out of school. The magistrate sentenced the accused to 24 months' imprisonment F but suspended ten months thereof on condition of future good behaviour and ordered that the remainder of 14 months' imprisonment also be suspended on condition of performance of community service. Upon review, while confirming the conviction, it was:

Held, that the offence was so bad that it warranted the imposition of a longer G prison term and an effective custodial sentence. In Zimbabwe, there are churches, especially apostolic sects, which have religious practices that encourage members to marry young girls. They continue to do so regardless of laws which outlaw child sexual abuse such as the section of the Criminal Law Code the accused was charged with. That section attracts a maximum penalty of ten years' imprisonment. Despite the H

heavy A penalty that is prescribed by statute, these churches continue with their practices. It seems that they listen to the Spirit which leads them more than they listen to the law of the land. There also seems to be a conflict between what the Spirit tells them and what the law says.

Held, further, that child sexual abuse has effects such as pregnancy, girls B dropping out of school and the risk of contracting HIV/AIDS and other sexually transmitted diseases. Early marriages

deny girls educational opportunities, lead to poverty and economic insecurity. Because of lack of education, the capacity of these girls to make decisions is negatively affected. Other forms of gender-based violence and problems such as physical and sexual abuse are reinforced against them. Adults who C engage in child sexual abuse and marry young girls show a complete disregard of the rights of children in spite of the protection s 81(1) of the Constitution gives to those rights. In addition, Zimbabwe has ratified various international conventions which prohibit child sexual exploitation and abuse and child marriages: the Convention on the D Rights of the Child; the Convention on the Elimination of all forms of Discrimination against Women; and the African Charter on the Rights and Welfare of the Child.

Held, further, that what made the complainant *in casu* vulnerable was her young age and her church practice which brain-washed her. Adults who E take advantage of such children ought to be seriously punished. They must be sentenced to imprisonment, not only to punish them but also in an endeavour to deter others who might have similar inclinations. Heavy custodial sentences are essential if the courts are to play their role in protecting children or young people from sexual abuse by adults. If the accused had been sentenced to effective imprisonment that would have F sent a clear message to his church mates that child sexual abuse and child marriages are not tolerated by the courts and as a result other would be offenders would have been deterred from committing such crimes in future. A sentence in the region of four to five years' imprisonment with a portion suspended on condition of good behaviour would have G met the justice of the case.

Legislation considered

Constitution of Zimbabwe 2013, ss 81(1) & 81(3)

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 70(1) H

2014 (2) ZLR p890

Muremba J

Judgment

Muremba J: The accused, who was aged 54 years, pleaded guilty to A contravening s 70(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was duly convicted and I hereby confirm the conviction.

What causes disquiet is the sentence that was imposed on him. He was sentenced to 24 months' imprisonment of which 10 months' imprisonment was suspended on condition of future good behaviour. The remainder of B 14 months' imprisonment was suspended on condition of performance of community service.

What is mitigatory about this case is that the accused was aged 54 years old and was a first offender. He has a family of two wives and six children and he admitted to the charge. C

What is aggravatory about this case is that the complainant was 14 years old and was at school in form one. There is an age difference of 40 years between the accused and the complainant. It is obvious that the accused took advantage of the complainant. The two had sexual intercourse on diverse occasions stretching from the month of May 2014 to the month of November 2014, when it was discovered that the complainant was pregnant. D

In explaining why he committed the offence, the accused stated that at his church they are allowed to marry as many wives as they want. He said that he wanted the complainant to be his third wife. He said that he had been shown by "the Spirit" that the complainant was going to be his third wife.

In sentencing the accused, the trial magistrate stated that incarcerating the E accused would add to the woes of the complainant who was now pregnant, in that she would end up looking after the child alone.

Considering the gravity of the offence which was committed by the accused, I find the reasoning for sparing the accused a prison term by the trial magistrate without merit. The offence is so bad that it warranted the imposition of a F severer prison term and an effective custodial sentence.

It is pertinent to note that in Zimbabwe there are churches, especially apostolic sects, which have religious practices that encourage members to marry young girls. They continue to do so regardless of laws which outlaw child sexual abuse such as s 70 of the Criminal Law Code, which is the section

G the accused was charged with. The section even attracts a maximum penalty of 10 years' imprisonment. Despite the heavy penalty that is prescribed by statute these churches continue with their practice. It seems that they listen to "the Spirit" which leads them more than they listen to the law of the land. There also seems to be a conflict between what "the Spirit" tells them and what the law says. H

2014 (2) ZLR p891

Muremba J

Child A sexual abuse has effects such as pregnancy, girls dropping out of school and the risk of contracting HIV/AIDS and other sexually transmitted diseases. Early marriages deny girls educational opportunities, lead to poverty and economic insecurity. Because of lack of education, the capacity of these girls to make decisions is negatively affected. Other forms of gender-based violence and problems such as physical and sexual abuse are reinforced B against them. Adults who engage in child sexual abuse and marry young girls show a complete disregard of the rights of children yet our Constitution which is our supreme law protects these rights. Section 81 thereof is relevant.

Section 81(1) says

> "Every child, that is to say every boy and girl under the age of eighteen years, C has the right –
>
> (a) to (d) [not relevant]
>
> (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or a*ny form of abuse;*
>
> (f) to education" (emphasis added). D

Zimbabwe has also ratified some regional and international conventions which prohibit child sexual exploitation and abuse and child marriages: Articles 34 and 35 of the Convetion on the Rights of the Child (CRC); Articles 16(2) of the Convention on elimination of all forms of Discrimination Against Women (CEDAW). Article 21 of the African Charter on the Rights and Welfare of the Child. E

In casu the complainant, who was aged 14 years, fell pregnant and obviously dropped out of school. What made her vulnerable was her young age and her church practice which brainwashed her. Adults who take advantage of such children ought to be seriously punished. They must be sentenced to imprisonment, not only to punish them but also in an endeavour to deter F others who might have similar inclinations. Heavy custodial sentences are essential if the courts are to play their role in protecting children or young people from sexual abuse by adults.

Section 81(3) of the Constitution states that children are entitled to adequate protection by the courts. Courts should show their commitment in tackling early marriages and child sexual abuse by imposing severer penalties. If this G is done the rights of the children will be safeguarded.

In casu, if the accused had been sentenced to effective imprisonment that would have sent a clear message to his churchmates that child sexual abuse and child marriages are not tolerated by the courts and such other would-be offenders would have been deterred from committing such crimes in future. H I hold the view that in the circumstances the sentence that was imposed by

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2014 (2) ZLR p892

Muremba J

the trial magistrate is not deterrent enough. It also sends a message to these A churches that they can proceed with child sexual abuse and child marriages and get away with very light sentences. A sentence in the region of four to five years' imprisonment, with a portion suspended on condition of good behaviour, would have met the justice of the case.

The sentence is not in accordance with real and substantial justice and, as such, I withhold my certificate. B

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[zRPz]PANDHARI LODGE (PVT) LTD v CABS & ANOR 2014 (2) ZLR 893 (H)

Citation	2014 (2) ZLR 893 (H)
Case No	Judgment No. HH-720-14
Court	High Court, Harare
Judge	Mangota J
Heard	23 December 2014; *CAV*
Judgment	31 December 2014
Counsel	*T Zhuwarara,* for the applicants *T Magwaliba,* for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

CourtC – *High Court – officer – sheriff – conduct and ethics – duty to act fairly*

Practice and procedure – *execution – sale in execution – duty of sheriff to attach movable property before attaching immovable property – attachment of immovable property – obtaining of valuation before* D *attachment – sheriff's discretion – duty to act fairly*

Practice and procedure – *execution – writ – amount stated in writ no longer reflecting amount of debt – writ not amendable – duty of sheriff when true size of debt made known*

Headnote

The E applicants, in a deed of consent to judgment, acknowledged themselves indebted to the first respondent in the sum of a little over US$2 million, including interest. Three immovable properties belonging to the applicants were identified as being specially executable. The first respondent caused a writ of execution in the acknowledged sum, and the second respondent (the sheriff) proceeded to attach the properties, as well as some moveable F property belonging to one of the applicants. However, by the time he did so, the debt had been reduced to just under half, though no fresh writ was issued. The applicants brought an application to prevent the impending sale in execution, on the grounds that such a sale would be wrong at law and would inevitably cause harm to be visited upon them G in a manner that could not be rectified. They stated that it was their intention to obtain a declaratur on the return date, to the effect that the current attachment and execution of their property on the writ which the first respondent issued was illegal and defective at law. They stated that, being void, the writ which was issued had to be cancelled as, in their view, no valid execution could be based on it. They also argued H that the sheriff violated the proviso to r 326 of the High Court Rules and

that he should have attached their movable goods before proceedings A to attach their three immovable properties. They produced evidence to show that they had sufficient movable property which the sheriff could have attached and sold in execution with a view to either liquidating their indebtedness to the first respondent or, at the very least, reducing it in a very substantial manner. B

Held, that the conduct of the respondents, the first respondent in particular, prejudiced the applicants' case in a material way that could not be controverted. There was no doubt that the sum inserted in the writ persuaded the sheriff to attach three immovable properties of the applicants. The probabilities were that he would not have attached all the three properties if he had properly been informed to recover from C the applicants the sum actually outstanding. He would have proceeded to attach one or two, but not all three, of the applicants' properties.

Held, further, that the proviso to r 326 places a mandatory obligation on the sheriff to always execute court orders in the manner that the applicants stated: the sheriff's duty is to attach and sell in execution the judgment D debtor's movable goods. Only when the attached goods cannot, after the sale, satisfy the entire debt is he allowed to proceed against the judgment debtor's immovable property. There was no evidence that the sheriff satisfied himself that the applicants did not have movable property which he could have attached for sale in execution to satisfy, to a greater or lesser degree, the debt owed to the first respondent. E

Held, further, that the importance of the rule cannot be over-emphasised. It is aimed at safeguarding the immovable property or properties of a debtor. An immovable property is, by its nature, acquired after a person's effort to save his hard-earned money. That type of property which confers what are termed real rights on the title holder of the property is more F difficult to acquire than movable goods which, more often than not, fall into the hands of the holder and go away from him as quickly as they come. The amount of money which a person requires to purchase those is a lot less than what he requires to purchase an immovable property, let alone more of such properties. It is for this reason, if for no other, G that the courts insist that a party who is owed a debt by another must, as a matter of course, start by disposing of the other party's movable goods before he proceeds to dispose of his immovable goods. Forced sales do not, by their nature, allow the debtor to recover meaningfully, in monetary terms, for his property which is being sold in execution of a judgment debt. H

2014 (2) ZLR p895

Mangota J

*Held,*A further, that r 324 states that a writ of execution, once issued, remains in force until such time as the judgment has been satisfied. The rule is peremptory and offers no discretion to the parties, or to one of them, to alter or amend the writ. Had the sheriff's attention been drawn to what the outstanding debt was, the probabilities were that he would not B have attached all three properties, but only one or two of them. For this reason, if for no other, the court would invoke r 4C to depart from the peremptory nature of r 324. That departure was required in the interests of justice as between the parties. Equity and fairness, which are the hallmark of a court's work, demanded that the process be set aside in the interests of justice. C

Held, further, that r 351, which relates to valuation of property which is due for attachment, is not peremptory but discretionary. It confers on the sheriff a discretion, for purposes of equity and fairness, to appoint a fit and proper person who has no interest on either side of the divide to place a value on the property. The value so obtained will offer a guide to the sheriff when he puts the property under the hammer at a sale in D execution. The sheriff is, after all, an officer of the court who must not only act, but must also be seen to be acting, fairly in the manner that he carries out the duties which the court and the law impose upon him. The execution of court orders is a necessary corollary of the work of the courts which are enjoined to dispense real and substantial justice to all E manner of people without fear or favour. Where, therefore, the sheriff misuses the discretion which the rules of court confer upon him, he tarnishes the image of the court in an unforgivable manner and brings both the court and his office into serious disrepute.

Cases referred to

Govere v *Ordeco (Pvt) Ltd & Anor* 2013 (2) ZLR 257 (S) F

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 324, 326 & 351

Case information

T Zhuwarara, for the applicants G

T Magwaliba, for the first respondent

Judgment

Mangota J: On 2 July 2014 the applicants and the first respondent concluded two agreements. The first agreement was a consent to judgment in the sum of $1 726 192 plus interest thereon at the rate of 16 percent per H annum calculated and capitalised monthly in advance with effect from 21

August 2013 to date of payment in full. The second agreement was a deed A of settlement for the sum of $444 000 with interest thereon at the rate of 10 percent per annum calculated and capitalised every month in advance as from the date of issue of summons (i.e. 27 August 2013) to the date of payment in full. plus costs on a higher scale.

The applicants attached to their application the documents which pertain to B the above-mentioned agreements. They marked them Annexures A1 + 2 and B1 + 2 respectively. The applicants declared, in each agreement, that the property which is the subject of this application be executable in recovery of the amounts which they owed to the first respondent.

Pursuant to the said declaration, the first respondent instructed the second respondent to attach, for sale in execution, the following immovable properties C of the applicants:

(a) Stand 754 Glen Lorne Township 15 Lot 41 of Glen Lorne;

(b) Stand 739 Glen Lorne Township 15 Lot 41 of Glen Lorne; and

(c) Stand 735 Glen Lorne Township 15 Lot 41 of Glen Lorne

The applicants attached to their application the writ which instructed the D second respondent to attach the above-mentioned properties. They marked it Annexure J1 + 2. The attachment of their immovable property compelled the applicants to file the present application with the court on an urgent basis. The first respondent summed up, in a succinct manner, the concerns which the applicants are raising on the matter which pertains to the attachment of their properties. The concerns were, or are, basically that: E

(i) the first respondent is enjoined at law to *dispose of movable property* before execution on immovable property;

(ii) the first respondent did not advise the second respondent of the *amount to be realised* as the applicants have significantly reduced the debt and, therefore, the writ itself is defective; and F

(iii) the second respondent has a legal and mandatory obligation to *obtain valuations of properties* before execution (emphasis added)

They submitted that from the date of the agreements, they paid the sum of $1 060 000 towards a reduction of their indebtedness to the first respondent. G They accordingly prayed for a temporary stay of execution on the basis that the impending sale in execution which had been scheduled for 19 December 2014 was, in their view, wrong at law and would invariably cause harm to be visited upon them in a manner that could not be rectified. They stated that it was their intention to obtain a declarator on the return date, to the effect that the current attachment and execution of their property on the writ which H

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the A first respondent issued was illegal and defective at law. They stated that, being void, the writ which was issued had to be cancelled as, in their view, no valid execution could be birthed of it.

The first respondent put up a stiff opposition to the application. The second respondent did not appear in person or through legal representation. He, in B fact, said virtually nothing about the application. He was sued in his official capacity. The position which he took on the matter convinced the court that he had nothing to say other than to suggest that he was acting on the instruction of the first respondent which had obtained an order of this court which order he was enforcing in line with his duties as an officer of the court. The court therefore remains of the view that he will abide by whatever decision the C court will reach in respect of the present application.

The first respondent's attitude to the application was that as the consent order stated that the properties were declared executable, there was nothing which was irregular about executing on the immovable properties. It stated that the property which is the subject of the application was

mortgaged and, in terms D of the mortgage, the property stood to be sold in the event of a default. It contended that the applicants defaulted on their payments and it therefore had every right to dispose of the property which the applicants themselves declared, out of their own free will, executable.

The issues which fall for determination in the present matter are: E

(a) whether or not, the present application is urgent; and, if it is

(b) whether or not the applicants treated their case with the urgency which the matter deserved.

It is evident that, from the time that annexures A1 + 2 and B1 + 2 were concluded, the parties engaged themselves into some negotiations. The negotiations aimed at having an amicable resolution of the issue which F pertained to the applicants' effort to clear their indebtedness to the first respondent. In that regard, they:

(i) paid the sum of $1 060 000 to the first respondent;

(ii) entered into negotiations with the Ministry of Higher and Tertiary Education to which they wanted to sell their stand number 739 Glen G Lorne Township 15 of Lot 41 of Glen Lorne, Harare, to raise further sums of money which they said they would channel towards the liquidation of their indebtedness to the first respondent; and

(iii) made a commitment to pay a monthly sum of $20 000 which they said was designed to bridge over their indebtedness while the case of the H stand which has been referred to in para (ii) was being concluded.

Mangota J

The applicants stated that, despite indications on both sides of the divide A pointing to the fact that both parties were interested in a mutually beneficial resolution of the matter which related to the liquidation of the debt, communication regarding the collapse of the negotiations reached them on 16 December 2014. They attached to their application Annexure 1. The annexure is a letter which the first respondent's legal practitioners addressed to the applicants' legal practitioners. The letter is dated 16 December 2014. B It reads, in part:

> "… our instructions are that the sale should proceed as advertised. Whilst our client acknowledged receipt of the $5 000 payment, it has advised that such payment does not significantly reduce the debt owed by yours to ours."

It is on the basis of the abovementioned annexure that the applicants filed the C present application on the basis of urgency. The applicants attached to their applications Annexures E, F, G and H which they said were correspondences which took place between the parties during the period 8 to 16 December 2014. The annexures constitute the negotiations which the applicants said took place between the parties.

The applicants thus became aware of the first respondent's resolve to satisfy D its claim by way of attaching and selling in execution their immovable properties on 16 December 2014. They filed the present application with the court on 17 December 2014. They realised the urgency of the matter and wasted no time. There can, therefore, be no doubt that the application which the applicants placed before the court is not only urgent but also that the applicants themselves treated the application with the urgency which it E deserved.

A reading of Annexures A1 + 2 and B1 + 2 shows that, as of August 2014, the applicants owed the first respondent a staggering total sum of $2 490 782.72. The sum comprises: F

(a)	Capital (Ann. A1 & 2)	$ 1 726 192
	Interest at 16% p.a (Aug 2013-Aug 2014)	$ 27 619.72
	Subtotal	$2 002 382.72
(b)	Capital (Ann B1 & 2)	$ 444 000.00

Interest at 10% p.a (Aug 2013-Aug 2014)	$ 44 400.00
Subtotal	$ 488 400.00 G
Grand Total	$2 490 782.72

The writ which the first respondent issued out of this court aimed at recovering from the applicants the sum of $1 726 192 and interest. It was confined to that sum of money and not to any other sum which falls outside its four corners. The first respondent did not advance any reasons which persuaded H

2014 (2) ZLR p899

Mangota J

it A to recover only a part of the debt which the applicants owed to it and not the whole amount. The writ does not therefore extend to the sum of $444 000 and interest. The court, however, remains of the view that the first respondent could not include the sum of $444 000 and interest in the writ because the deed of settlement on which that amount is based had not been B translated into an order of court.

What the first respondent is entitled to recover in terms of the writ is $2 002 382.72. The applicants, it has been observed, paid the sum of $1 060 000 to the first respondent. Their aim in the mentioned regard was to reduce the capital sum of $1 726 197 and interest of $276 190.72 on the same. The applicants' letter of 8 December 2014 (Annexure E1, 2 and 3) is relevant to C the point at hand. The letter reads, in part:

> "We are also advised that when the sum of $1 060 000 was made there was a residue in the region of +/- $400 000 which CABS used to credit the mortgage account. Our client is of the view that CABS should have consulted it prior to appropriating in the manner it did. *Our client proposes that account be credit to the DIMAF account which is subject of the writ of execution.* Thereby clearing D it and the debt will remain on the mortgage facility which will then be settled with the disposal of the other property." (emphasis added)

It follows from the foregoing that the applicants reduced their indebtedness to the first respondent when they paid the sum of $1 060 000. What remained outstanding was $942 382.72 and not $1 726 192 which the first respondent instructed the second respondent to recover from them in terms of the writ. E There is a world of difference between what the second respondent was instructed to recover and what should have been recovered. A difference between the two sums of $783 809 cannot be said to be negligible in the view which the court holds of the matter. That difference is not only significant but it is also extremely prejudicial to the applicants. F

During the hearing of the application, the court was informed that some movable goods of the second applicant were attached for a sale in execution of the judgment. Reference is made in this regard to the second respondent's returns of service numbers 035982 and 045674 which are filed of record. The returns are respectively dated 2 September and 3 November 2014. The remarks portion of the first return (035 982) reads: G

> "warrant of execution enforced on the second defendant's… *goods attached*, see inventory overleaf, however, too insufficient to satisfy the debt".

The remarks on the second return (045674) reads:

> "*attached property* cannot satisfy the debt. *Nulla bona*" (emphasis added)

Whilst the value of the attached property in each case remains unknown, the fact still remains. The H fact is that the attached goods did, in the court's view,

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2014 (2) ZLR p900

Mangota J

further reduce the applicants' indebtedness to the first respondent's claim A to a sum which is less than $942 387.72. The applicants' submission that the conduct of the respondents, the first

respondent in particular, prejudiced their case in a material way cannot be controverted. There is no doubt, in the court's view, that the sum of $1 726 192, which was inserted in the writ, persuaded the second respondent to attach for sale in execution three B immovable properties of the applicants. The probabilities of the matter are that the second respondent would not have attached all the three properties if he had properly been informed to recover from the applicants the sum of $942 387.72 or less than that amount. He would, in the circumstances of this case, have proceeded to attach one or two, and not three, properties of the applicants as he did. The concerns which the applicants raised on this C aspect of the application cannot, therefore, be glossed over, so to speak. It is a real concern which is not devoid of merit.

The applicants' second line of argument was that the second respondent violated the proviso to r 326 of the rules of this court. They stated, correctly so, that the second respondent should have attached, for sale in execution, their movable goods before he proceeded to attach their three immovable D properties as he did for the stated purpose. They insisted that his conduct in the mentioned regard remained prejudicial to their interests.

The proviso upon which their submission was anchored places a mandatory obligation on the second respondent to always execute court orders in the manner that the applicants stated. It instructs the second respondent or his E deputy to, in the first place, attach and sell in execution the movable goods of the applicants. It is only when the attached goods cannot, after the sale, satisfy the entire debt that the second respondent is allowed to proceed against the immovable property or properties of the applicants.

The first respondent's answer to the above-mentioned concern was that the F second respondent complied with the proviso to the rule. It referred the court to the second respondent's return of service which the court dealt with in the foregoing portions of the judgment.

The court remains of the view that the first respondent was not candid with it on that aspect of the case. The returns, it was observed, related to the G movable goods of the second applicant only. The movable goods of the first and the third applicants were not taken into account at all. Annexures K and L which the applicants attached to their application is relevant to the matter which is in issue. The annexures show, in clear and simple terms, that the applicants have sufficient quantities of movable property which the second respondent could have attached and sold in execution with a view of either H

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liquidating A or, at the very least, reducing the applicants' indebtedness to the first respondent in a very substantial manner.

The writ, as worded, furnished the second respondent with some form of guidance as to how he should have proceeded. The first part of the writ instructed him to attach the applicants' movable property for sale in execution B of the debt of $1 726 792 plus interest. The second part instructed him to attach the applicants' immovable property. The second respondent would have gone into this second process only when he realised that the movable goods which he had attached were not, by themselves, sufficient to clear the applicants' indebtedness to the first respondent. The proviso to the rule placed a duty upon the second respondent to inquire as well as make a diligent C search of the existence or otherwise of the applicants' movable property. There is no evidence in the record which showed that the second respondent satisfied himself that the applicants did not have movable property which he could have attached for sale in execution to satisfy, to a greater or lesser degree, the debt which the applicants owed to the first respondent. There is no doubt, therefore, that the second respondent flouted the proviso of the D rule when he acted as he did. His conduct in the mentioned regard remained very prejudicial to the applicants.

The importance of the rule cannot be over-emphasised. It is aimed at safeguarding the immovable property or properties of a debtor. It goes without saying that an immovable property is, by its nature, acquired after E a person's effort to save his hard-earned money. That type of property which confers what are termed real rights on the title holder of the property is more difficult to acquire than movable goods which more often than not fall into the hands of the holder and go away from him as quickly as they come. The amount of money which a person requires to purchase those is a lot less than what he requires to purchase an immovable property, let alone more F of such properties. It is for the mentioned reason, if for no other, that the courts in their wisdom insisted that a party who is owed a debt by another must, as a matter of course, start by disposing of the

other party's movable goods before he proceeds to dispose of his immovable goods. Forced sales do not, by their nature, allow the debtor to recover meaningfully, in monetary G terms, for his property which is being sold in execution of a judgement debt.

The properties which are the subject of this application are situated in what is regarded as one of the upmarket areas of the City of Harare. One or two, or all of those properties is, or are, of a commercial nature. Their forced sale would have caused the applicants insurmountable prejudice as well as challenges which, in the court's view, are difficult for the applicants to countenance. H The fact that they would have been sold to recover for the first respondent

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a sum of money which, in monetary terms, is less than $1 000 000, spells a A real mockery of the country's system of justice delivery.

Mr *Magwaliba*, for the first respondent, made a statement which relates to a well-known principle of law. The principle is that when a mortgage bond is registered against an immovable, the creditor obtains a real right over the property. He developed an argument on the known principle and submitted B that the right which the creditor obtains in the mentioned regard entitled the creditor to sell the property in execution without first exhausting the movable assets of the debtor.

The court does not associate itself with the submissions of counsel on the matter which is in issue. The argument which he developed does not at all agree with r 326 as read with the remarks of Patel JA who, in C*Govere* v *Ordeco (Pvt) Ltd & Anor* 2013 (2) ZLR 257 (S) at 262, clarified the import and meaning of the rule in the following words:

> "… the rule does not … differentiate as between secured and unsecured creditors. It applies to both without distinction … the plain meaning of this rule is that the judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both D movable and immovable property. In either event, *before proceeding to attach immovable property, the sheriff or his deputy is enjoined to satisfy himself that the judgment [debtor] does not own any or has insufficient movable property to satisfy the judgment debt*" (emphasis added).

What Patel JA stated is more in accord with the law of this country than it is in discord with it. The remarks which the learned judge of appeal made E have, in addition, a binding effect on the court. They cannot, therefore, be departed from unless there is a substantial justification for the court to disregard them in preference to the submissions which counsel made on this aspect of the case.

The applicants' third line of argument centred on the meaning and import of F r 324 of the rules of this court. They submitted that the amount which was in the writ was significantly reduced when they paid the first respondent the sum of $1 060 000. They insisted that the writ which contained the sum of $1 726 192 was misleading and should, therefore, be amended to allow it to reflect what they actually owed to the first respondent. F

The first respondent argued to the contrary on this aspect of the application. It stated that the applicants made a partial satisfaction of the debt. It remained of the view that there was, therefore, no need of an amended writ. The writ, it said, remained valid and execution should proceed. It was its view that there was no legal basis for suspending the sale or cancelling the same on the basis that some amount had been paid. The first respondent submitted G

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that A what was required in the circumstances of this case was to advise the second respondent that it had been paid a certain sum of money.

Rule 324 states that a writ of execution, once issued, remains in force until such time as the judgment has been satisfied. The rule is peremptory. It offers no discretion to the parties, or to one of them, to alter or amend it. B The question which begs an answer is whether or not the second respondent would have attached the applicants' three immovable properties if his attention had been drawn to the fact that the debt which remained outstanding was not $1 726 192 but was a sum which is below $1 000 000. The probabilities are that he would not have attached the three properties. He would, in the court's view, have attached one property or two depending on the inquiry C which he should have made in terms of the proviso to r 326.

The first respondent's argument which is to the effect that the writ remains valid and enforceable against the applicants, if allowed to stand, would cause the latter persons to be visited with uncountenanced injustice. Their three immovable properties have already been attached. Insisting that the D sale in execution must proceed means that all the three properties will be placed under the hammer and most probably the three of them would, as a forced sale, fetch far less than they would have fetched if they were sold on the open market. They would be sold in circumstances where the court has already made some findings which are to the effect that the conduct of the respondents prejudiced the applicants' case and should, therefore, be corrected. E

The courts as an institution should dispense justice instead of injustice. The procedural irregularities which pertain to the issuance and execution of the writ were, or remained, the main reason which compelled the applicants to approach the court for redress on the basis of urgency. It is for the mentioned reasons, if for no other, that the court will invoke r 4C of its rules to depart F from the peremptory nature of the rule which is under consideration. That departure is required in the interests of justice as between the parties. It will, in terms of r 4C, not allow the writ to stand.

The court states with little, if any, emphasis that process which, through the over-reaching conduct of one party, visits the other party with substantial prejudice as is the case *in casu,* cannot be allowed to stand let alone be G enforced. Equity and fairness which are the hallmark of a court's work demand that the process be set aside in the interests of justice.

Rule 351 which relates to valuation of property which is due for attachment is not peremptory but discretionary. The rule confers on the second respondent a discretion to, for purposes of equity and fairness, appoint a fit and proper H person who has no interest on either side of the divide to place a value on the

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property. The value so obtained will offer a guide to the second respondent A when he puts the property under the hammer as a sale in execution. The rule is a *sine qua non* of what are regarded as fair and reasonable attachments and sales in execution. Its aim and object are to enable the second respondent to avoid disputes which, more often than not, tend to arise out of forced sales such as the present one. The sheriff is, after all, an officer of the court who, in earnest, must not only act, but must also be seen to be acting, fairly in B the manner that he carries out the duties which the court and the law impose upon him. He is, if a comparison may be favoured, an extension of the court and the country's system of justice delivery. Whatever good thing he does in the execution of his duties goes to the credit of the judicial spectrum as a whole. He must not depart materially from the dignity and decorum which parties who appear before the court expect of the court and all its officials. C

Execution of court orders are a necessary corollary of the work of the courts which are enjoined to dispense real and substantial justice to all manner of people without fear or favour. Where, therefore, the Sheriff misuses the discretion which the rules of court confer upon him, he tarnishes the image of the court in an unforgivable manner. He must exercise his discretion in D as judicious a way as the rules and the law allow him to do. Where he fails in the mentioned regard he, apart from causing the court to be involved in a multiplicity of litigations, places both the court and his office into serious disrepute.

The current case is a classic one where the second respondent did not E exercise his discretion in a judicious way. If he had done so, the present application would not have carried the argument which it contains. He acted as it were on impulse and proceeded to attach three immovable properties of the applicants for a sale in execution. He did not seek the assistance of an independent person to value the three properties to enable him to assess whether or not he had to attach one or two or all three properties. His conduct F in the mentioned regard compelled the applicants to approach the court as they did. They remained of the view that the apparent over-attachment which he did was prejudicial to them in a very serious way.

When all has been said and done, therefore, there is no doubt that the conduct of the respondents told, or tells, a sad story of over-reaching litigants. The G applicants' case succeeds on all the matters which they raised with the court. They established their case on a balance of probabilities, against the respondents. Their prayer was, or is, that execution be stayed pending the return date. They, however, did not and do not dispute their liability to the first respondent. What they disputed

was the wrong information which was in the writ and the second respondent's apparent irrational way of over- H

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attaching A their properties. Both respondents stand accused of the shoddy manner in which they conducted themselves in this regard.

The court has considered all the merits and demerits of this application. It accordingly orders as follows:

That the application be and is hereby granted with costs. B

Mahuni & Mutatu Attorneys, applicants' legal practitioners

Gill, Godlonton & Gerrans, first respondent's legal practitioners

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