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2015

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ZETDC v BINDURA RDC & ORS 2015 (1) ZLR 1 (H)

Citation	2015 (1) ZLR 1 (H)
Case No	Judgment No. HH-102-15
Court	High Court, Harare
Judge	Dube J
Heard	3 October 2014; *CAV*
Judgment	4 January 2015
Counsel	*T Mpofu,* for the applicant Mr *Warara,* for the first, sixth, eighth, ninth, eleventh, twenty-eighth, thirty-first, forty-first, forty-fifth, forty-sixth and forty-seventh respondents *L Mazonde,* for the thirteenth respondent Mrs *J B Wood*, for the thirty-fourth respondent *W Chagwiza,* for the fifty-fourth and fifty-sixth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Local governmentC – *rural district councils – charges which may be levied – right to charge for services rendered or permits granted – right to charge electricity authority for installation of power lines and associated substations and other equipment – no right to charge unit tax or development levy to electricity authority*

Practice and procedureD – *parties – joinder – multiple respondents – questions of law common to all respondents though not all such questions applicable to each respondent – substantially same issues applicable – convenient to join all respondents in one application*

Headnote

The E applicant, the country's principal supplier and distributor of electricity, has transmission lines and substations throughout the country. Some of these passed through areas falling under the jurisdiction of the first respondent and that of many other rural district council and. These councils had been charging the applicant a "unit tax" or "way leave tax" F and a "development levy" in consequence of the applicant's transmission lines and substations. The applicant avers that the charges levied against it were unsustainable and constituted a threat to its ability to service the country and were arbitrary and without lawful foundation. It was submitted that the unit tax could only be charged on A1 and A2 farmers in terms of s 97A of the Rural District Councils Act [*Chapter 29:13*], G but not on the applicant. "Way leave" charges were not supported by the Act. Land development tax could be charged on a person carrying on a "specified business" as set out in s 95 or on owners of rural land. The term "specified business" excludes the applicant's business.

The respondents argued that "way leave" charges were levied on a one-off H basis and were lawful under s 76 of the Act. The charges were in respect

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of power lines in the rural district council areas and substations erected A in their respective areas. They contended that this was a practice that had been in existence over time and has been accepted by both the councils and the applicant. Objections were also raised to the joinder of some 60 rural district councils, only 15 of which opposed the application. While each of the respondents charged one or more of the taxes or levies complained of, they did not all charge the same taxes or levies. B

Held, that there is no law that limits the number of respondents that can be brought in an action or application. It is permissible at common law to join a number of defendants in one action or application, as long as a common question of law or fact arises with respect to all the respondents and the relief sought is dependent upon the determination of substantially C the same question of law. The justification for this practice is based on convenience and equity, and the need to avoid a multiplicity of actions. It is sanctioned by r 85 of the High Court Rules 1971. Here, the question of law required to be determined is whether rural district councils have the right to levy the different charges complained against. Although the councils have not all charge the taxes or charges in question, they were D jointly interested in the common questions of law that arises. Joinder is permissible where a litigant has different causes of action against different defendants, as long as it is shown that the defendants are jointly interested in the causes of action and a question of fact or law common to all the defendants will arise in the proceedings. A defendant need not E defend all the relief sought. The fact that one or more of the councils may not be charging all the rates in issue is neither here nor there. The relief sought is dependent upon the determination of substantially the same legal issue. It is convenient that all the councils be joined so that the court could pronounce the legal position with respect to the different charges and taxes levied which are of interest to all the respondents. The F court would be required to give judgment according to the relief sought and proved. What made this application suitable for joinder was that all the respondents were charging one or more of the charges and taxes in issue. In any event, under r 87, the misjoinder or non-joinder of a party could not defeat the cause or matter. G

Held, further, that s 76(1) permits the fixing of charges, levies or taxes by resolution only where a council is empowered in terms of the Act to do so. Where a rural district council has issued a certificate, licence or permit, carried out inspections, rendered services or let out a property, it is entitled to raise a charge or tariff in respect thereof in terms of s 76. The section empowers a council, by way of resolutions, to fix charges H

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or A tariffs of charges payable in terms of the Act. The applicant was in occupation of parts of rural land in the different rural district councils' areas through its substations and the transmission lines that cut across the different council areas. In any case, where a rural district council has let its property, fixed a rental on it, issued a licence, certificate or permit, or inspected

or rendered any services on such land, it is entitled B to levy or charge the holder of such rights in terms of s 76.

Held, further, that "way leave" means "access to property granted by a landowner for payment". What the respondents were charging for was the right of way over their land or property. They do so by charging "way leave" charges. They are entitled to charge for such rights or access in C terms of the section. In the case of substations, the respondents were entitled to charge if they could show that the applicant had been granted access to their property.

Held, further, that unit tax could only be levied in respect of owners of farms or leases or holders of offer letters or land settlement permits. The applicant was not a farmer nor did it hold an offer letter, lease D agreement or settlement permit, so a unit tax could not be levied against the applicant. Similarly, a land development levy in terms of s 96 could only be levied on persons who were owners of rural land within a council's area or licensed dealers who carried on a specified business on rural land within a council's area. The applicant was not an owner of land, nor did E it operate a "specified business", as defined in s 95.

Cases cited

Amalgamated Engineering Union v *Min of Labour* 1949 (3) SA 637 (A)

BHT Water Treatment (Pty) Ltd v *Leslie & Anor* 1993 (1) SA 47 (W)

Johnsen v *AFC* 1995 (1) ZLR 65 (H)

Legislation considered F

Communal Land Act [*Chapter 20:04*], s 59

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

High Court Rules 1971 (RGN 1047 of 1971), rr 85 & 87

Rural District Councils Act [*Chapter 29:13*], ss 8, 76, 89, 95, 96 & 97A

Case information

T Mpofu, for the applicant G

Mr *Warara,* for the first, sixth, eighth, ninth, eleventh, twenty-eighth, thirty-first, forty-first, forty-fifth, forty-sixth and forty-seventh respondents

L Mazonde, for the thirteenth respondent

Mrs *J B Wood*, for the thirty-fourth respondent H

Dube J

W Chagwiza, for the fifty-fourth and fifty-sixth respondents A

Judgment

Dube J: This is an application for a declaratory order. The applicant is ZETDC (Pvt) Ltd, a corporate body whose mandate is the transmission of electricity in Zimbabwe. The respondents are the 60 rural district councils dotted across Zimbabwe.

The applicant is in the business of transmission and distribution of electricity B services. The applicant has various transmission lines that cut across the length and breadth of the country. It also has various substations located across the country. Some of these lines and substations are located in the areas that fall under the jurisdiction of the respondent rural district councils. The rural district councils charge applicant a "unit tax" or "way leave tax" C and a "development levy" in consequence of the applicant's transmission lines and substations that pass through or are in the various areas of the district councils concerned. The charges range from $20 000 to $50 000. The applicant avers that the charges levied against it are unsustainable and constitute a threat to the applicant's ability to service the country and are D arbitrary and have no lawful foundation. All the 60 councils have been joined in one application. The applicant submitted that it is convenient that the court hears one application rather than sit over 60 appeals or various issues arising out of the same

issue from the various rural district councils. It maintains that the declaration will assist the parties in the future and settle a cogent and topical issue. E

At the hearing of this matter, Mr *Mpofu* raised concern over the taxes being levied against the applicant which include unit taxes, way leave charges and a land development levy. He submitted that the taxes cannot be competently charged as they do not apply to the applicant. He contended that if the taxes are being charged, the question of their legality arises. He urged the court if F it finds that the charging is unlawful, to grant the declaratur.

Mr *Mpofu* then proceeded to demonstrate that the taxes are actually being charged. He drew the court's attention to para 6 (e) of the thirteenth respondent's affidavit where it accepts that way leave charges are being levied by the respondent council. In paras 6(a) and 7(a) the thirteenth respondent also G accepts that it charges a development levy.

The eleventh respondent in para 8 of its opposing affidavit concedes charging unit taxes for each unit of land. The forty-second respondent in para 14, accepts that it charges unit tax. In para 15 it accepts that it charges way leave charges. H

Dube J

The A thirty-fourth respondent in para 14 of its opposing affidavit concedes that the respondents charges a specified business levy which is a land development levy. In para 15 it concedes that it charges way leave charges.

The fifty-sixth respondent in para 11.2 admits to charging way leave charges.

Mr *Mpofu* submitted that all these charges are not lawful. He submitted B that unit tax can only be charged on A1 and A2 farmers as set out in s 97 A of the Rural District Councils Act [*Chapter 29:13*], hereinafter referred to as the Act. The applicant contended that unit tax cannot be charged on the applicant. He also submitted that way leave charges are not supported and that the Act does not give the respondent the power to charge way leave charges. Mr Mpofu conceded that the land development tax is charged on a C person carrying on a specified business or owners of rural land. He contended, however, that the term specified business as set out under s 95 excludes the applicant's business. That the land development levy is unlawful and cannot be levied on the applicant.

The applicant contends that the levying of the taxes is unlawful and must be D declared so. The terms of the order sought are as follows:

> "TERMS OF THE ORDER SOUGHT
>
> IT IS DECLARED THAT
>
> 1.1 The levying by the respondents on applicant of "Unit Tax" and "Way Leave charges" is outside the provisions of the Rural District Councils Act or any other law and is therefore unlawful.
>
> FURTHER THAT
>
> 1.2 Respondents can only lawfully charge such tax or levies as is set out under the provisions of the Rural District Councils Act or any E other law for the time being in force in the republic and have no power to raise any charges which are not supported by any statutory provision.
>
> IT IS CONSEQUENTLY ORDERED THAT F
>
> a. Any tax or levies charged by respondent and which have not been the subject of a judicial determination are unlawful and cannot be enforced in any court of law
>
> b. Respondents shall jointly and severally, the one paying the others to be absolved meet the costs of this application."

The G following respondents defended the application: the first, eighth, ninth, eleventh, twenty-eighth, thirty-first, thirty-eighth, fortieth, forty-fifth, forty-seventh, thirteenth and thirty-forth. The first 10 respondents were represented by Mr *Warara*, whilst the thirteenth respondent was represented by Mr *Mazonde*; Mrs *Wood* represented the thirty-fourth respondent, whilst H Mr *Chagwiza* represented the fifty-sixth and fifty-fourth respondents.

Dube J

Mr *Warara* acknowledged that his client charges way leave charges. He A submitted that way leave charges are not a tax and that not every charge raised by the respondent is a tax. He referred the

court to s 76 of the Rural District Councils Act [*Chapter 29:13*] for that proposition. He argued that s 76 is wide and does not restrict charges to taxes; that councils can impose once off charges; that way leave charges are raised after a service has been rendered and that it cannot be a tax; and that way leave charges are a once B off charge. He further submitted that the land development levy charged is a tax which is charged on any allottee of rural land for a specified business in terms of s 95. That the charge is raised for a permit. He submitted that the permit charge for a power station is a once off payment. He conceded that a unit tax is a charge for a specific piece of agricultural land and is reserved C for farmers. He contended that the applicant is not being charged unit tax by his clients and that the applicant has not shown that it is paying unit tax.

Mr *Mazonde* stood by his heads and adopted the submissions of Mr *Warara*. He briefly submitted that the hardship related to the excessiveness of the charges and taxes allegedly charged that the applicant complains about, has D no place in tax law. He conceded that his client charges way leave charges as a once off payment. Mr *Chagwiza*, representing the fifty-sixth respondent, did not make any oral submissions and elected to associate himself with the arguments of Mr *Mazonde* and Mr *Warara*.

Mrs *Wood* took up a number of preliminary issues. She objected to the joinder of the 60 rural district councils in one application. She contended E that bringing a joint action is confusing and that it is inappropriate to lump together councils with different offences and have a blanket order against them. She submitted that the thirty-fourth respondent, as well as the councils represented by Mr *Warara*, deny charging unit tax. She contended that there is a dispute of fact that arises on the papers on the basis that some councils were not charging the charges or levies in issue. F

Mrs *Wood* also submitted that there are many unit taxes, such as special unit tax, land development levy charged under s 96 and another unit tax chargeable under the Third Schedule. Another tax is charged per unit and then supplementary charges under ss 89(3)(g) and 89(4)(e). She argued that the G applicant has failed to tell the court why it is required to pay for these taxes which concern urban land and rural land, to which different considerations apply. She called upon the court to investigate each council, and determine what it is charging and what it is called, its nature and where the land in question is situated. She maintained that this was a misjoinder as there is no unanimity. That the more the respondents there are the more confusion. H

Dube J

Mrs *Wood*A contented that the draft order which deals with unit charges and a development charge cannot be granted without the court being satisfied that every respondent council is charging those taxes. She argued that as some of the respondents are not charging those taxes, the court can make an order dismissing the claim against a council not charging the particular tax. It was inappropriate to lump together councils with different offences and B seek a blanket order against them. She gave an example of the thirty-fourth respondent, which denies charging unit tax, and councils represented by Mr *Warara* which denied charging unit tax.

She submitted that para 1 of the draft order deals with unit charges and way leave charges. Development charges come in another paragraph. She urged C the court not to grant the order sought without being satisfied that every other council is charging these taxes. She urged the court to dismiss the claim against a council if it is shown that it is not charging a particular tax.

Mrs *Wood* also submitted that the applicant's allegation that the councils' charges are unlawful and excessive is misplaced, as this is not a review. She submitted that there is no point of seeking a declaratory order when D some cases that have already resolved the dispute. She contended that this application will not overturn the orders already granted against the applicant. That is not an appeal. She insisted that the preliminary points raised dispose of the application and urged the court to dismiss the application.

On the merits, the thirty-fourth respondent denies charging unreasonable E sums and contends that it is not doing what is alleged. It contends that it is levying the land development levy because council owns the land on which the substation is. *Mrs* Wood criticised the applicant for failure to specify the type of land it is referring to. She contended that the respondent is entitled to charge a land development levy on land owned by the applicant. She submitted that councils can charge for permits in terms of s 59 of the Communal Land Act F [*Chapter 20:04*] and by resolution in terms of s 8 of the Rural District Councils Act. She contended further that way leave charges are not taxes as

applicant is given use of the land and is given a permit. She contended that the application has no merit and she .urged the court to dismiss the application.

The councils that did not oppose this application are deemed to have admitted G the applicant's claim. I will deal first with the points *in limine* raised by Mrs *Wood.*

Permissive joinder

There are 60 respondent councils cited in this application. Only 15 of them opposed the application. The various councils were represented by four legal H practitioners. The cause of action against them is based on the allegation

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that they do not have statutory authority for the charges or taxes they are A levying against the applicant. Each one of the respondents charges one or more of the charges complained of. They do not all charge the same charges.

The applicant seeks a declaratur pronouncing that the levying by respondents on the applicant of "unit tax" and "way leave charges" is outside the provisions of the Rural District Councils Act or any other law and, further, that the B respondents are entitled to charge only such tax or levies as is set out under the Rural District Councils Act.

It was not disputed that all the councils do not charge all the charges complained against. For example, whilst the thirteenth respondent, is charging way leave charges and a development levy, it does not charge unit tax. The eleventh respondent charges for provision of land on which the applicant C has subtractions and transmission levies. It admits that it charges "unit tax" and "way leave charges."

The forty-second respondent denies charging unit tax in terms of s 97A of the Rural District Councils Act but admits charging for each unit of land utilized by the applicant. It acknowledges that the tariff serves the same purpose D as unit tax. It admits that it charges way leave charges. The thirty-fourth respondent admits that it charges applicant a business levy and way leave charges, and does not charge a unit tax. The fifty-sixth respondent admits charging way leave charges but disputes that it charges unit tax.

Herbstein and van Winsen *The Civil Practice o f the High Courts of South Africa* ed 5 p 208 says the following of joinder of parties: E

> "Parties are often joined for reasons of convenience and equity, to avoid oppression or a multiplicity of actions. Apart from considerations of convenience, however there are circumstances in which it is essential to join a party because of the interest that party has in the matter".

There is no law that limits the number of respondents that can be brought in F an action or application. It is permissible at common law to join a number of defendants in one action or application, as long as a common question of law or fact arises with respect to all the respondents and the relief sought is dependent upon the determination of substantially the same question of law. See *Amalgamated Engineering Union* v *Minster of Labour* 1949 (3) SA 637 (A) for that proposition. Sometimes this is done out of the realisation G that the party or parties so joined have an interest in the matter: *BHT Water Treatment Pty Ltd* v *Leslie* 1993 (1) SA 47 (W).

The justification for this practice is based on convenience and equity and the need to avoid a multiplicity of actions. Our own rules record the same position under r 85 as follows: H

> "85 Joinder of parties A
>
> Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where –
>
> (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and B
>
> (b) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions."

A court may in its discretion allow joinder of two or more persons where a common question of law or fact arises. The relief sought should arise out of the same transaction or series of transactions. This is done for the C convenience of the parties as it is less costly and has the result of curtailing a multiplicity of actions. The question of law required to be determined here is whether rural district councils have the right to levy the different charges complained against. Although the councils do not all charge the taxes or charges in question they are jointly interested in the common questions of D law that arise. Joinder is permissible where a litigant has different causes of action against different defendants and as long as it is shown that the defendants are jointly interested in the causes of action and a question of fact or law common to all the defendants will arise in the proceedings. A defendant need not defend all the relief sought. The fact that one or more of the councils may not be charging all the rates in issue is neither here nor E there. The relief sought is dependent upon the determination of substantially the same legal issue. It is convenient that all the councils be joined in this application as it makes it possible for the court to pronounce the legal position with respect to the different charges and taxes levied which are of interest to all the respondents. The court will be required to give judgment according to relief sought and proved. What makes this application suitable for joinder F is that all respondents are charging one or more of the charges and taxes in issue. I have in the exercise of my discretion decided to allow the joinder.

One also has to have regard to r 87. It provides as follows:

> "87 Misjoinder or nonjoinder of parties
>
> (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or G questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The court is at liberty to proceed with the application as no cause or matter shall be defeated by reason of the misjoinder of any party. The court will proceed and determine the issue or questions in dispute in so far as they H affect the rights and interests of the persons who are parties in this dispute.

Dube J

Disputes of fact A

Mrs *Wood* submitted that there is a dispute of fact on the basis that all the councils do not charge all the taxes in issue and have denied that they do not charge all the taxes, levies and charges in issue. The resolution of the question of joinder disposes of the issue regarding the existence of disputes of fact arising on the papers. It is accepted that the different councils charge B different types of taxes or levies. The court has ruled that the joinder in the circumstances of this case is permissible. There is no need for any factual resolution. This is not evidentiary application were one is required to outline the specifics of the claims or charges against the applicant. The issue remains simply whether the councils are charging the levies complained against and whether it is competent for them to do so. The dispute that exists between C the parties is purely legal and relates to entitlement to charge the taxes in issue. There are no disputes of fact existing on the papers.

Remedy sought

Mrs *Wood* took issue with the fact that the declaratory order is being sought three years after the charges were levied. She submitted that the applicant D did nothing to set down the application. She contended that the application should have been brought within a reasonable time. She contended that there was no point in bringing the application when some cases have resolved the dispute. She said that this application would not overturn the orders already granted against the applicant. She argued that hypothetical issues cannot E form the basis of a declaratory order.

The applicant submitted that it is not concerned with those matters where default judgment was granted against it and is prepared to let due process take its course. What the applicant simply requests is resolution of a dispute where it claims that there is legal uncertainty and it is entitled to do so. This F application was lodged in September 2011 and has been pending since then. The applicant is not responsible for the set down of matters. Section 14 of the High Court Act [*Chapter 7:06*] empowers this court to deal with declaraturs and provides as follows:

> "The High Court may, in its discretion, at the instance of any interested person, G inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot

claim any relief consequential upon such determination."

This court has in its discretion decided to entertain the application. This is a proper case for a declaratur. All the parties have an interest in "an existing, future or contingent right or obligation": see *Johnsen* v *AFC* 1995 (1) 65 (H) H

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for A that approach. I agree with Mr *Mpofu* that the decision in this matter will resolve a topical issue.

The merits

The dispute is over rural land where the applicant's substations are located and which its power lines traverse. The papers disclose that the various B councils charge the following charges: way leave charges, unit tax on land, business development levy or land development levies. The issue that this court is being called upon to determine is whether the applicant is required in terms of the law, to pay the taxes or levies or charges in issue. Whether the applicants pay these amounts annually or periodically is not the issue.

Way leave charges C

A number of rural district councils concerned stated that they charge way leave charges. This charge is usually charged as a once off payment. They averred that these charges are in respect of power lines in the rural district area and substations erected in their respective areas. They contended that this is a practice that has been in existence over time and has been accepted by D both the councils and the applicant. Other councils argued that councils are entitled to charge a land levy in respect of its land occupied by the applicant and for services rendered and do so by charging this levy or charge. They contended that councils are entitled to grant authority for the establishment of the electricity transmission lines and that this constitutes a service as E contemplated by s 76(1) of the Act. The issue was not about the name or label attached to a particular levy or charge but rather whether the respondent councils are entitled to levy the applicant in a particular instance. Section 76(1) only permits the fixing of charges, levies or taxes by resolution where it is empowered in terms of the Act to do so. Section 76(1) reads as follows:

"Charges, rents and deposits by resolution

(1) F A council may, by resolution passed by a majority of the total membership of the council –

(a) fix charges and tariffs of charges payable in respect of certificates, licences or permits issued, inspections carried out, services rendered or any act, matter or thing done by the council in terms of this Act;

(b) fix rents and other charges payable in respect of property let by the council;

(c) fix G deposits payable in connection with any services provided by the council in terms of this Act:

Provided that, in any specified area or in such other part of the council area as may be prescribed or as may be notified to the council by the Minister –

(a) no charges, rents or deposits of any kind, other than those in connection with H the supply of electricity, may be fixed by a council in respect of residential

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accommodation or services provided specifically to or in connection with A such accommodation, otherwise than by by-laws made or in force in terms of this Act;

(b) a council may, subject to the approval of the Minister, fix in any lease or agreement entered into by it the charges, rents or deposits which shall be payable by the lessee in respect of the occupation of any premises."

Where a rural district council has issued a certificate, licence, permit, carried B out inspections, rendered services, or let out a property, it is entitled to raise a charge or tariff in respect thereof in terms of s 76. This section empowers a council by way of resolution to fix charges or tariffs of charges payable in terms of the Act. It is common cause that the applicant is in occupation of parts of rural land in the different district councils through occupation of C its substations and transmission lines that cut across the different council areas. There were suggestions that the applicant had

entered into agreements or been given permits by the various councils for the erection of the power lines and substations. In any case where a rural district council has let its property, fixed a rental on it, issued a licence, certificate, permit or inspected or rendered any services on such land, it is entitled to levy or charge the D holder of such rights in terms of s 76.The respondents is entitled to do so as long as there is a contract to use or pass through their areas.

The respondents have been levying the applicant for services rendered and where they have granted the applicant a permit to use its land .The charge which they levy under s 76 is understood as a way leave charge .The E*English Collins Dictionary* defines "way leave" as "access to property granted by a landowner for payment". There is no mystery over this charge. What the respondents are charging for is the right of way over their land or property. They do so by charging way leave charges. The fact remains that they are entitled to charge for such rights or access in terms of the Act. They are F charging for a right of way over their property in respect of the power lines. In the case of substations, the respondents are entitled to charge if they can show that the landowner has been granted access to their property. The fact that they have labelled charges they levy in terms of s76 as "way leave" charges does not defeat the charge. I find that the respondents are entitled to charge way leave charges in terms of s 76. G

The unit tax

This tax is levied in terms of s 97A(2), which reads as follows:

> "Every council shall impose a special unit tax which all persons who, on or after the 1st of January 2011, are or become owners of farms or leases or holders of after letters or land settlement permits." H

Dube J

This A tax is capable of being levied in respect of owners of farms or leases or holders of offer letters or land settlement permits. The applicant is not a farmer, nor does it hold an offer letter, lease agreement or settlement permit. A unit tax cannot be levied against the applicant in the circumstances of this case.

Land development levy

This B levy is provided for in s 96(1)(e). It is a levy that is levied on persons who are owners of rural land within council area or licensed dealers who carry on a specified business on rural land within council area in terms of s 96(1)(e). Section 96 reads as follows:

> "96 Levies in rural areas
>
> (1) Subject to this Part, a council may impose a land development levy upon C all persons who, on the fixed date, are or who, at any time during the period of twelve months next following the fixed date, become –
>
> (a) owners of rural land within the council area:
>
> Provided that –
>
> (i) …
>
> (ii) …; or
>
> (b) …; or D
>
> (c) licensed dealers who carry on the business in respect of which their licences are issued on rural land within the council area; or
>
> (d) owners of land which is deemed to be rural land by virtue of a resolution of the council in terms of section *one hundred and two*; or
>
> (e) either persons who carry on a specified business on rural land within the council area or the owners of rural land within the E council area on which a specified business is carried on:
>
> Provided that a land development levy may be imposed in respect of any particular specified business upon either the owner of the rural land concerned or upon the person who carries on the specified business but not upon both such owner and such person; or
>
> (f) holders of permits issued in terms of section 9 of the Communal Land Act F [*Chapter 20:04*], authorising the occupation and use of any portion of rural land within a communal ward of the council."

This section permits the levying of charges on operators of specified businesses or owners of rural land. The applicant is not an owner of rural land within council area as envisaged by s 96 but may only be required to pay the levy G if it carries on a "specified business" in terms of s 96(1)(e). "Specified business" is defined in s 95 as follows,

> "Specified business" means the business of –
>
> (a) extracting sand; or
>
> (b) extracting gravel; or
>
> (c) extracting H clay or making bricks or clay products or some or all of them; or

Dube J

> (d) extracting and additionally, or alternatively, crushing stone; or A
>
> (e) operating a saw-mill;
>
> whether carried on as a principal business or incidentally to or in connection with any other business:
>
> Provided that the carrying on of any such business by –
>
> (a) the owner of a mining location for the purpose of using all of the products of such business on his mining location; or B
>
> (b) a farmer for the purpose of using all of the products of such business on any farm on which he conducts farming operations;
>
> shall not be regarded as the carrying on of a specified business;"

The applicant does not carry out any of the specified activities falling under the definition of "specified business." Its business is not specified in terms C of the Act. It is not competent to levy on the applicant a land development levy. The fact that council may have passed a resolution authorising the levying of charges does not imply that the applicant is required to pay such levy because it is not empowered to do so in terms of the Act.

The applicant is partly entitled to the declaratur sought. I am unable to D accede to the request to bar the respondents from levying any other charge or levy which was not the subject of this judicial determination. Paragraph 1.2 of the draft is superfluous. I do not consider it necessary to deal with the applicant's argument that the charges are too excessive as not sufficient detail was made available for me to make an informed decision. As regards costs, I have considered that the applicant has been partially successful in this E matter. I do not view that the respondent councils have been unreasonable in their stance in this matter. None of the councils insisted that the unit tax is legitimate. There shall be no order as to costs.

In the result it is declared as follows,

1. The levying by the respondents on applicant of "Unit Tax" is outside F the provisions of the Rural District Councils Act [*Chapter 29:13*] or any other law and is therefore unlawful.
2. The levying by the respondents on the applicant of "Way leave charges" under s76 of the Rural District Councils Act [*Chapter 29:13*] is *intra vires* the Act and is lawful.
3. No order as to costs. G

Muza & Nyapadi, applicant's legal practitioners

Calderwood, Bryce Hendrie & Partners, first respondent's legal practitioners

Matizanadzo & Warhurst, thirty-fourth respondent's legal practitioners H

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MAKARUDZE & ANOR v BUNGU & ORS 2015 (1) ZLR 15 (H)

Citation 2015 (1) ZLR 15 (H)

Case No	Judgment No. HH-08-15
Court	High Court, Harare
Judge	Mafusire J
Heard	23 October 2014; *CAV*
Judgment	7 January 2015
Counsel	*A Debwe,* for the plaintiffs *J Mambara,* for the defendants
Case Type	Stated case
Annotations	No case annotations to date

Flynote

Administrative law C – *domestic remedies – exhaustion of before approaching court – domestic remedies must be adequate to provide relief – no provision in constitution of organisation to provide such relief – party entitled to approach court for relief*

Employment D – *Labour Court – appeal from to Supreme Court – does not suspend operation of order appealed against – remedies available to appellant seeking execution or stay of execution pending appeal*

Employment – trade union – membership – who may be a member – only person employed by some employer in relevant undertaking or industry E *eligible for membership in union*

Headnote

The constitution for the third defendant, the Harare Municipal Workers' Union, was registered in 1962. One of its 11 listed objects was to regulate the relations between members and their employers, and to protect and further the interests of members in relation to their employers. Membership was F open to employees of the Harare City Council. The governing body of the Union was the second defendant, the Executive Committee, members of which would be elected at the annual general meeting and would serve for one year. They would be eligible for re-election. They could be removed from office on the decision of a general meeting, as well as by G resignation, suspension, or expulsion from the union or absenteeism. The first defendant was the chairman of the executive committee. The first plaintiff was the vice-chairman and the second plaintiff was chairman of a sub-committee of the union.

The plaintiffs sought a declaratur that the executive committee's term of office had expired; that the seats on the committee were vacant; and that H the first defendant had ceased to be a member of the union, having been

dismissed by the council. They sought a consequential order directing A the union to hold elections for the executive committee.

The defendants opposed the relief sought, arguing (1) that the plaintiffs, being mere members of the union, had no *locus standi*; (2) that the plaintiffs had not exhausted their domestic remedies and should not have approached the court; (3) that there had been an elective general meeting in 2012; (4) that the first defendant was appealing against the B ruling of the Labour Court upholding the determination of an arbitrator that he had been dismissed in 2010 and consequently the arbitrator's ruling was suspended; and (5) that the union had a new constitution which opened up membership, not only to employees, but to "any person" which wished to abide by the requirements of the constitution. C

Held, that *locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the subject-matter and outcome of the litigation. Such an interest is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court. The court will be slow to deny *locus standi* to a D litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in a position of authority, power or influence abuses that position to the detriment of members or followers. If the plaintiffs seriously felt that the first defendant had become ineligible to hold any office within the union, let alone to continue clinging onto E the position of chairman, such a state of affairs would be so intolerable that the court would not fetter itself by pedantically circumscribing the class of persons who might approach it for relief. There could be no better demonstration of, or justification for, *locus standi in judicio* than the plaintiffs' position in this matter. Undoubtedly, they had a direct and substantial interest in the management of the affairs of the union. F

Held, further, that the general view is that a litigant should be discouraged from rushing to the courts before he has exhausted such domestic procedures or remedies as may be available to his situation in any given case. He is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so. However, the domestic G remedies must be able to provide effective redress to the complaint. Furthermore, the alleged unlawfulness complained of must not be such as would have undermined the domestic remedies themselves. The court will not insist on an applicant first exhausting domestic remedies where they do not confer better and cheaper benefits. Here, the constitution of the union had no provision dealing directly or indirectly with the H

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plaintiffs' A grievances. The first defendant had avoided or prevented the holding of any of the constitutional meetings of the union at which the plaintiffs' grievances might have been heard.

Held, further, that, in terms of s 4 of the Labour Act [*Chapter 28:01*], it is a fundamental right of an employee to be a member or officer of a trade union. The thrust of the Act is that a trade union is an organisation B for employees, not for just "any other person". The union was a trade union. To allow a person who is not an employee to become a member of a trade union in a particular undertaking is a concept alien to trade unionism. Although s 28(1)(b)(ii) of the Act refers to "the right of any person to membership if he is prepared to abide by the rules and C conditions of membership", that reference is to any person employed in that undertaking or industry. To open up membership of a trade union in a particular undertaking to a person who may not be employed by an employer in that undertaking or industry, as the defendants contended, would lead to monstrous absurdities. Consequently, if the first defendant had been dismissed from the council's employment he lost the right to D keep his membership, let alone to become an office bearer in the executive committee, unless he had been conferred with honorary membership in terms of clause 5(k) of the new constitution, in which event he would have no right to hold office or to vote.

Held, further, that the common law is clear that a notice of appeal, save E in certain exceptional cases, automatically suspends the execution of the judgment appealed against. However this rule only applies to the superior courts of inherent jurisdiction; the Labour Court, as a creature of statute, is not such a court. Unless empowered by law to do so, an inferior court or tribunal or other authority has no power to order the suspension of its own orders or judgments. The noting of an appeal F against the judgment or order of such a court, tribunal or other authority, in the absence of statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is to be appealed against. There is no provision in s 92F of the Labour Act (which allows for appeals from the Labour Court to the Supreme Court on points of law only, and only with leave) which empowers the Labour Court G to make interim determinations pending the determination of an appeal. An aggrieved party who desires a stay of execution, or execution pending appeal is not without a remedy. He can approach the High Court for appropriate interim relief, or the Supreme Court, where the appeal will be pending. In any event, all that was pending was an application H for leave to appeal, not the actual appeal.

Cases cited A

AAIL (SA) v *Muslim Judicial Council* 1983 (4) SA 855 (C)

ANZ v *Min of State for Information & Publicity & Ors* 2005 (1) ZLR 222 (S)

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

Chawora v *RBZ* 2006 (1) ZLR 525 (H)

Chematron Products (Pvt) Ltd v *Tenda Transport (Pvt) Ltd & Anor*B 2013 (2) ZLR 365 (H)

Dalrymple & Ors v *Colonial Treasurer* 1910 TS 372

Deary NO v *Acting President & Ors* 1979 RLR 200 (G)

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

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Econet (Pvt) Ltd v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H)

Geffen v *Strand Motors (Pvt) Ltd* 1962 R&N 259; 1962 (3) SA 62 (SR)

Henri Viljoen (Pty) Ltd v *Awerbuch Brothers* 1953 (2) SA 151 (O)

Levin v *Felt and Tweeds Ltd* 1951 (1) SA 213 (C)

Longman Zimbabwe (Pvt) Ltd v *Midzi & Ors* 2008 (1) ZLR 198 (S) D

Malan v *Tollekin* 1931 CPD 231

Molotlegi & Anor v *President of Bophuthatswana & Ors* 1989 (3) SA 119 (B)

Moyo v *Forestry Commission* 1996 (1) ZLR 173 (H)

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Musandu v *Cresta Lodge Disciplinary and Grievance Committee* HH-115-94

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Mafusire J

United Watch Diamond Co (Pty) Ltd & Ors v *Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C)A

Vengesai & Ors v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H)

Verkouteren v *Savage* 1919 AD 183

Wood NO v *Edwards & Anor* 1966 RLR 336(G)

Zimbabwe Teachers Assn & Ors v *Min of Education* 1990 (2) ZLR 48 (H) B

Legislation considered

Labour Act [*Chapter 28:01*], ss 4(1), 28(1)(b)(ii), 92E(1), (2) & (3), 92F(1), & 98(10)

Case information

A Debwe, for the plaintiffs

J Mambara, for the defendants

Judgment

Mafusire J: The constitution for the third defendant (hereafter referred to as "the Union") was registered with the then Industrial Registrar in 1962. It listed eleven objects. The first of these was to regulate the relations between members and their employers, and to protect and further the interests of members in relation to their employers. The membership clause was couched as follows:

> "5 MEMBERSHIP
>
> (1) Membership of the Union shall be open to employees in Salisbury Municipality Undertaking who are employed in the occupations listed in the schedules 'A' and 'B'."

Schedule "A" had cashiers, health aids, constables, telephone attendants, messengers, assistant projectionists, welfare assistants and cooks. Schedule "B" had labourers.

In terms of that constitution the second defendant (hereafter referred to as "Excom") would constitute the governing body of the Union. The members of Excom would be elected at the annual general meeting and would serve for one year. They would be eligible for re-election. They could be removed from office by the decision of a general meeting. General meetings would be held once every three months. There were other ways in which members of Excom could vacate office. These were:

- resignation;
- suspension;
- expulsion from the Union;
- absenteeism;

At all relevant times the plaintiffs and the first defendant were all members of the Union. The first defendant was the chairman of Excom. The first

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plaintiff was the vice-chairman. The second plaintiff was chairman of one of the sub-committees of the Union. On 10 May 2011 the plaintiffs issued a summons against the first defendant, Excom and the Union. Apart from costs they sought three declaratory orders and one directive. The three declaratory orders sought were these:

(1) that Excom's term of office had expired;

(2) that the "seats" in Excom had become vacant;

(3) that the first defendant had "legally ceased" to be a member of the Union and was no longer entitled to hold any office in it.

The directive sought was thisthat the Union had to hold elections for Excom within 45 days of the date of the court order.

The basis for seeking a declaratur that Excom's term of office had expired and that the "seats" in it had become vacant was that it and the first defendant had been elected way back in February 2006 and yet neither any other elective general meeting nor the triennial meetings had ever been held since then.

The basis for seeking the declaratur that the first defendant had "legally ceased" to be a member of the Union and that he was no longer eligible to hold any office in it was that he had been dismissed from the employment of the Harare City Council, the employer, (hereafter referred to as "Council"). The plaintiffs' argument on that point was that membership of the Union was open to Council employees only. It was common cause that following the judgment of an independent arbitrator on 24 June 2012, the first defendant had been dismissed from Council's employment for absenteeism with effect from 2010.

The defendants contested the plaintiff's claims. Their defence was both on technical and substantive grounds. The first technical ground was that the plaintiffs, being mere members of the Union, had no *locus standi* to bring the action. In addition, the defendants contended that the plaintiffs

themselves F had been expelled from the membership of the Union. On this the defendants relied on the first defendant's two letters to the plaintiffs, both dated 31 May 2011. He had signed them as "Executive Chairman".

The second technical ground relied upon by the defendants was that the plaintiffs had not exhausted their domestic remedies and that this court had G no jurisdiction to entertain their case in such circumstances. The full argument on this was that the election of members of Excom and their removal from office was something governed by the constitution. Among other things, the defendants argued, the plaintiffs could themselves have motivated the calling and holding of the elective general meetings and moved motions to remove from office those members of Excom whose terms of office would H

Mafusire J

have A expired. Having failed or neglected to do so, the plaintiffs were non-suited before this court.

With regards to the expiry of Excom's term of office, the declaration of vacancies, and the directive to hold elections within 45 days, the defendants' substantive defence on the merits was that there had been an elective general B meeting in 2012. A new Excom had been incepted. The first defendant had been elected Executive Chairman. Therefore, the remedies sought by the plaintiffs in that regard had fallen away.

With regard to the order that the first defendant had "legally ceased" to be a member of the Union and was no longer eligible to hold any office in it by reason of his dismissal from employment, the defendants' substantive C defence on the merits was three-pronged. Firstly, they contended that the first defendant was appealing against that dismissal. It seems that the first defendant had appealed to the Labour Court against the arbitrator's decision. But the Labour Court had dismissed that appeal. He had then filed an application for leave to appeal to the Supreme Court. At the time of the hearing before D me that application was still pending. The first defendant's argument was that an appeal to the Supreme Court against a decision of the Labour Court automatically suspends that decision. As such, the Labour Court's upholding of the arbitrator's decision ordering his dismissal from employment stood suspended. Therefore, he could continue in office with the Union.

Secondly, E the defendants contended that a new constitution of the Union had been registered in December 2013. It had amended the old constitution in several ways. On membership, the new constitution had opened up membership, not only to all employees, as before, but also to "... any other person ..." who wished to abide by the requirements of the constitution. The material portion of the new clause on that point read as follows:

> "5 MEMBERSHIP AND THE ROLE OF MEMBERS? F
>
> (a) Membership of the Union shall be open to all employees from grade 5 to grade 16 in Harare Municipal Undertaking who wish to abide by the requirements of this Constitution and conditions of membership other than Executive employees and any other person who wishes to abide by the requirements of this constitution other than executive employees who should be prepared to abide by this constitution and the rules and conditions G of membership.
>
> (b) For the avoidance of doubt, membership of the Union being a fundamental constitutional right to freedom of association, no employer or his/her agent shall interfere or question any individual's membership of the Union. The determination of membership shall be at the absolute and sole prerogative of the Union through its Executive Committee in terms of the HMWU H Constitution."

Mafusire J

Thirdly, the defendants argued that in terms of the new constitution, the A position of chairman of Excom had been turned into an executive, full-time and salaried one. The incumbent would be in charge of the day-to-day management of the Union. It was argued that it did not require that the incumbent be a member of the Union.

The plaintiffs denied that they had been expelled from the Union. They B dismissed the first defendant's letters aforesaid. They said they had not been called to any hearing to answer any charges. They argued that the new constitution was not relevant to their case. The purported election of the first defendant as executive chairman was a nullity. Among other things, it had been done before the new constitution had become operational. The new constitution did not operate retrospectively. C

Regarding the first defendant's alleged appeal to the Supreme Court and the argument that the Labour Court's decision had automatically been suspended, the plaintiffs challenged the defendants to produce the evidence of such an appeal. They contended that an application for leave to appeal was not an appeal. Therefore, there had been no suspension of the Labour Court's D decision by the mere application for leave.

Regarding the new constitution allegedly opening up membership of the Union, not only to all employees of Council, but also to "… any other person …" who wished to abide by its requirements, the plaintiffs argued that this had to be read in context. The Union was a trade union to advance the interests E of Council employees. Trade unions were governed by the Labour Act, [*Chapter 28:01*]. Only employees in a particular undertaking could form, register and become members of a trade union, not "… any other person …"

Regarding the position of the executive chairman being a full-time and salaried office that did not require the incumbent to be a member of the F Union first, let alone to be an employee of Council, the plaintiffs dismissed the defendants' contention as one that would lead to untold absurdities. Trade unions cannot be run by persons that are neither members nor employees of the undertaking to which the employees and the employers belong.

In a nutshell, that was the case before me. The action had been referred to G court as a special case in terms of Order 29 of the rules of this court. The issues, as agreed upon at the pre-trial conference, had been condensed to three, namely:

- …whether the High Court had jurisdiction to entertain the plaintiffs' action;
- …whether the plaintiffs had the *locus standi* to institute the proceedings; and H

Mafusire J

- …whether A the first defendant was still eligible to be a member of the Union after his dismissal from employment.

I propose to deal with the question of plaintiffs' *locus standi* first. If they did not have the requisite *locus standi in judicio* to bring these proceedings, then that will be the end of their case.

(i) Plaintiffs' *locus standi* B

Locus standi in judicio refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a *direct and substantial interest* in the subject-matter and outcome of the litigation: see *Zimbabwe Teachers Association & Ors* v *Minister ofC Education and Culture* 1990 (2) ZLR 48 (H). In that case Ebrahim J, as he then was, stated at pp 52-53:

> "It is well settled that, in order to justify its participation in a suit such as the present, a party … has to show that it has a direct and substantial interest in the subject-matter and outcome of the application."

The "direct and substantial interest" test has been followed in a plethora D of cases. See *Dalrymple & Ors* v *Colonial Treasurer* 1910 TS 372; *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers* 1953 (2) SA 151 (O); *United Watch Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C); *Deary NO* v *Acting President & Ors* 1979 RLR 200 (G); *PE Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd*E1980 (4) SA 801 (T); *AAIL (SA)* v *Muslim Judicial Council* 1983 (4) SA 855 (C); *SA Optometric Association* v *Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O); *Molotlegi & Anor* v *President of Bophuthatswana & Ors* 1989 (3) SA 119 (B). In *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers* it was held to connote at p 167: F

> "… an interest in the right which is the subject-matter of the litigation and … not thereby a financial interest which is only an indirect interest in such litigation."

Corbett J (as he then was), in *United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Anor,* elucidated it at p 415H as follows:

> "This view of what constitutes a *direct and substantial interest* has been referred to and adopted in a number of subsequent decisions, including two in this G Division … and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court (see *Henri Viljoen*'s case *supra* at 167)".

Recently, in *Sovereign Empowerment Centre-Tutorial Trust* v *Old Mutual Investment Group Property Investment Zimbabwe (Pvt) Ltd & Anor*H HH-351-13 and three other cases that were consolidated and heard together,

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Mangota J considered the dictionary meanings of *locus standi*. At p 10 of A the judgment the learned judge said:

> "I must confess that the legal practitioner's argument left me wondering as to what exactly he meant to convey. Because of the confused state in which his argument on the matter was couched, I took the trouble to read around the Latin phrase *locus standi* in an effort to appreciate what he was driving at.
>
> *Wikipedia*, the free encyclopaedia, refers to the phrase *locus standi* to mean: B
>
> > '… the right to bring an action, to be heard in court or to address the court on a matter before it … *locus standi* is the ability of a party to demonstrate to the court sufficient connection to, or harm from, the law or action".
>
> Free Dictionary.com states that:
>
> > '… *Locus standi* is the right of a party to appear and be heard before a court…" C
>
> *Wisegeek.com* discusses the phrase and stresses that:
>
> > '… *locus standi* refers to the fact of whether or not someone has the right to be heard in court… As a general rule, a person has *locus standi* in a given situation if it is possible to demonstrate that the issue at hand is causing harm and that an action taken by the court could redress that harm…'"

The debate on *locus standi* in most cases cropped up in situations where D proceedings had been brought by someone in a representative capacity, such as a trade union, or some such organisation representing some common interest of its members. In the present case the plaintiffs did not bring the action in a representative capacity. They stated that they were full time members of the Union. They said that, as members, they had been aggrieved by the manner in which Excom, which the first defendant chaired and controlled, E had continuously flouted the constitution. In their original claim, apart from the complaint about the first defendant's failure or refusal to convene any of the constitutional meetings, the plaintiffs complained further that no books of accounts had been produced since 2007 and that Excom had failed or neglected to amend the constitution which had become out-dated. F

In my view, and in the words of Beck J (as he then was) in *Deary NO* v *Acting President & Ors* 1979 RLR 2090 (G) at 203A, the court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in a position of authority, power or influence, abuses that position to the detriment of members or followers. G

If the plaintiffs seriously felt that the first defendant had become ineligible to hold any office within the Union, let alone to continue clinging onto to the position of chairman, such a state of affairs would be so intolerable that the court would not fetter itself by pedantically circumscribing the class of persons who might approach it for relief. There could be no better demonstration H

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of, A or justification for, *locus standi in judicio* than the plaintiffs' position in this matter. Undoubtedly, they had a *direct and substantial interest* in the management of the affairs of the Union. They have demonstrated a *sufficient connection* to the subject-matter of their complaint. If an alien, in the sense of someone having lost the capacity to remain a member of the Union, let B alone of Excom, continued to cling onto that position, then a member or members of the Union, individually or collectively, would certainly have the right, power and authority to approach the courts for relief.

The defendants contended that the plaintiffs had been expelled from the Union. They relied on the first defendant's two letters aforesaid. The one C addressed to the first plaintiff read as follows:

> "RE: EXPULSION FROM THE HMWU MEMBERSHIP MR J MAKARUDZE HM NO. 405043
>
> This is to advise that the HMWU resolved to expel you from HMWU structures and membership with effect from 23rd May 2011 due to the fact that you took the Union to the Court over an internal matter without following the normal D procedure due to your enjoinment with M Munondo of Public Safety Dept.

You are and were aware that the issue of the Executive Chairman was a result of the resolution of the HMWU National Council which is Congress in between Congress of which you were party. You were and are also aware that the same meeting resolved that the Elections would be held pending Conclusion of the Executive Chairman's case vs City of Harare. You were also aware that the City E of Harare, following the Labour Court Case involving 75 HMWU representatives of the National Council of which the Employer intended to dismiss them on the ground that they had participated in a job action allegedly against partly the dismissal of the HMWU Executive Chairman.

You are also aware that your name and that of Munondo did not appear on the list of HMWU Workers leaders the employer intended to dismiss although you F were present at Town House and the employer did not include your 2 names due to your relationship with the same which is against the HMWU and its member. You are also aware of the striking similarities between your present High Court Case No. 4406/11 and the employer's Supreme Court Appeal in Case No. LC/ORD/H/29/10 wherein the employer is opposing the Labour Court Judgement hence this confirms your close relationship contrary to the HMWU ethics and that G you are raising similar allegations against the HMWU as those of the employer.

You are also aware that a meeting was held at the Union Office wherein the issue of elections was raised by your colleagues and you also advised that since we have a pending case with the City of Harare it was only logical that we defer the HMWU Supreme Union Committee elections and request our lawyers to advise us on the issues jointly, i.e., election for HMWU Supreme Union Committee H and Congress.

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The union also learnt that you are party of the people against the HMWU yet A you are aware that as a democratic organization we have internal structure which deal with members concerns."

The other letter addressed to the second plaintiff read:

"RE: EXPULSION FROM THE HMWU MEMBERSHIP MR M MUNONDO HM NO. 607851

The HMWU hereby advises you that it resolved to expel you from the Union B membership with effect from 23rd May 2011.

This is due to the fact that without the locus standi you have deliberately defied the Union by initially requesting for the HMWU validation from the employer for the purpose of creating a parallel structure to the HMWU being HM 2. Secondly you took the HMWU to court over an internal matter which ought to have been addressed internally since you are aware of the procedures thereof. C

You are also aware of the Labour Court Case as regards the intended dismissal of 75 workers leaders of which the Union won the case at the Labour Court LC/ORD/H/29/10 and the employer subsequently appealed and strange enough your name did not appear on the list because of your close relationship with the employer and the similarities between your High Court Case No. 4406/11 and the employer's Supreme Court appeal are not a coincidence.." D

The first defendant's letters were patently a dog's breakfast. Demonstrably, they were self-serving. The first defendant was being vindictive against the plaintiffs for having sued him. By whose authority had the plaintiffs been expelled? In terms of what procedure? The plaintiffs maintained that no hearings had ever been held to try them. The defendants had no answer to E this. In any event, in May 2011 there was no office within the Union known as "Executive Chairman". That position was created by the new constitution that was registered only in December 2013. Furthermore, even if I were to recognise the alleged election of the new Excom in 2012, which the plaintiff maintained they did not, the question of the first defendant's eligibility to come back into office in any capacity, let alone as chairman of Excom, very F much hung in the balance by reason of his dismissal from employment with Council. Finally, the plaintiffs' summons pre-dated the purported expulsions anyway. In the premises I find that the plaintiffs had the requisite *locus standi in judicio* to bring these proceedings.

Having disposed of the question of *locus standi* in favour of the plaintiffs, G logically the next aspect to consider is that of the jurisdiction of this court to determine the case.

(b) Jurisdiction of this court

During argument, in response to a query by myself, Mr *Mambara*, for the defendants, conceded that it was not a question of this court lacking jurisdiction H

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to A determine the dispute between the parties, but rather the fact that the plaintiffs had allegedly not exhausted their domestic remedies when they had "rushed" to this court. As mentioned earlier, the argument by the defendants was that the constitution provided ways and means of terminating someone's office. It was argued that the plaintiff had not followed those channels.

The B general view is that a litigant is discouraged from rushing to this court before he or she has exhausted such domestic procedures or remedies as may be available to his or her situation in any given case. He or she is expected to obtain relief through the available domestic channels unless there are good reasons for not doing so: see *Moyo* v *Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H); See also *Musandu* v *Cresta Lodge Disciplinary and Grievance Committee*C HH-115-94; *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H); *Tuso* v *City of Harare* 2004 (1) ZLR 1 (H); *Chawora* v *Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H) and *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H)

However, it is also the general view that the domestic remedies must be D able to provide effective redress to the complaint. Furthermore, the alleged unlawfulness complained of must not be such as would have undermined the domestic remedies themselves: see *Tutani* v *Minister of Labour & Ors, supra,* at 95D; *Moyo* v *Forestry Commission, supra*, at 191 and *Musandu* v *Chairperson of Cresta Lodge Disciplinary and Grievance Committee, supra* . The court will not insist on an applicant first exhausting domestic E remedies where they do not confer better and cheaper benefits: *Moyo* v *Forestry Commission*, *supra*, at 192.

In casu, it was rather a long shot for the defendants to pitch an argument on the so-called domestic remedies. There was no such thing. The constitution of the Union had no provision dealing directly or indirectly with the plaintiffs' F grievances. Evidently, the defendants had to stitch together some disparate provisions of the constitution in order to craft the "*domestic remedies*" argument. They relied on the following clauses:

- clause 10(1)(b), which provided for the composition of Excom and the one year tenure of office;
- clause 10(2), which said a member whose subscriptions were in arrears G was ineligible for a position in Excom;
- the same clause 10(2) which said a member on suspension was not eligible for election into Excom;
- clause 10(4), which said a member of Excom could vacate office if he resigned, or was suspended or expelled, or if he missed three consecutive H sittings.

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The defendants' argument was that there was nothing stopping the plaintiffs A from requisitioning annual general meetings or triennial general meetings and sponsoring motions to vote out stale office bearers.

The plaintiffs' grievance was that as chairman, the first defendant wielded enormous influence and control of the Union. As part of their proof for that proposition, they pointed to the amended constitution. They said it was B contrived to deal with such of the complaints against the first defendant as they had brought to court. That sounded plausible enough to me. Clause 5(b) of the new constitution, highlighted above, is certainly a curious provision. It is demonstrably an emotional outburst against the employer or his agent questioning any individual's right to membership of the Union. The same C emotions are exuded in the first defendant's so-called letters of expulsion to the plaintiffs. Undoubtedly, in this action the first defendant regarded the plaintiffs as nothing more than mere surrogates for Council. According to him, their court case, this case, was nothing but a hatchet job to get rid of him.

The plaintiffs complained that using his vantage position as chairman, the first defendant had avoided or prevented the holding of any of the D constitutional meetings of the Union. The defendants did not deny that since 2007 no meeting of any sort had been held. The one finally held in 2012 was undoubtedly a response to the plaintiffs' court case. The plaintiffs' action had been instituted in May 2011. Therefore, even if I had been persuaded that there had been adequate or effective domestic remedies to deal with the plaintiffs' grievances, which I was not, still the first defendant had undermined E the plaintiffs' rights thereto.

Having disposed of their two technical objections in favour of the plaintiffs, I now deal with the defendants' substantive defence on the merits; namely that the first defendant had not "legally ceased" to be a member of the Union, in that firstly, the new constitution had opened up membership of the Union, F not only to employees of Council, but also to "… any other person …" who wished to abide by it; and secondly that, at any rate, the first defendant had appealed to the Supreme Court against his dismissal from employment and that such dismissal stood suspended.

(c) That first defendant had "*legally ceased***" to be a member of** G **the Union by reason of his dismissal from employment**

(i) That membership of the Union was open to "…any other person…"

Just like employment codes of conduct, governing statutes of private bodies such as the constitution of the Union *in casu* have to be interpreted sensibly. H

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Furthermore, A regard must be had to the provisions of the governing statute, in this case, the Labour Act (hereafter referred to as "the Act").

In terms of the Act, it is a fundamental right of *an employee* to be a member or an officer of a trade union. Specifically, s 4(1) reads:

> "4 Employees' entitlement to membership of trade unions and workers' B committees
>
> (1) Notwithstanding anything contained in any other enactment, every *employee* shall, *as between himself and his employer,* have the following rights –
>
> (a) the right… to be a member or an officer of a trade union;
>
> (b) ...
>
> (c) ...
>
> (d) ... C
>
> (2) Every *employee* shall have the right to be a member of a trade union which is registered for the undertaking or industry *in which he is employed* if he complies with the conditions of membership" (emphasis added).

Sections 27 and 50 of the Act provide for the rights of employees to form D trade unions. Section 54 empowers a trade union to receive an employee's trade union dues directly from the employer. Thus, the scheme of the Act is such that a trade union is an organisation for employees, not for just "any other person". The Union was a trade union. Therefore, that "… *any other person* …" who is not an employee can become a member of a trade union in a particular undertaking is a concept alien to trade unionism. It was also E the same concept in both the old and the new constitution of the Union. Membership was open to all employees in those grades as specified.

It is noted that in terms of s 28 of the Act, every trade union is required to adopt a written constitution and that such constitution must provide for, among other things, the right of "… any person …" to membership if he is F prepared to abide by the rules and conditions of membership. Presumably, it is such wording as was adopted in the new constitution of the Union. However, the reference to "… any person …" in s 28(1)(b)(ii) of the Act is, in my view, a reference to any person as employed in that undertaking or industry. To open up membership of a trade union in a particular undertaking G to "… any other person …" who may not be employed by some employer in that undertaking or industry, as the defendants contended, would lead to monstrous absurdities. For example, what would stop an air hostess employed by some airline anywhere in the world, or even some vagabond somewhere, coming forward to become a member of the Union, and even taking up positions in Excom, for as long as they wished to abide by the conditions H of the constitution? Mr *Mambara* said Excom vets any prospective member

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and screens unqualified aspirants. But using what qualifying criterion other A than the fact of employment by Council?

It could not have been the intention of the Legislature in s 28 of the Act, or the drafters of the constitution of the Union, to open up membership of a trade union to all manner of people who may

not be employed in the particular undertaking to which the trade union was formed. B

The first defendant argued that the position of executive chairman to which he was appointed was a salaried one that did not require him to be a member of the Union. However, that argument was fallacious. The position of executive chairman was created by the new constitution. That constitution was only registered in December 2013. Yet the first defendant's purported appointment had been in 2012. It was a nullity. C

At any rate, holistically, the scheme of both the Act and the old constitution of the Union in general, but clause 10 in particular, was such that members of Excom were elected, not appointed, from the generality of the membership of the Union at an elective general meeting. Excom consisted of the chairman, his or her vice, and six members. Among other things, and as I highlighted D at the beginning, a member whose subscriptions were three months in arrears, or was on suspension, would be ineligible to be elected a member of Excom. It would be such an anomaly that an important, influential and central position, such as that of chairman, could be occupied by an alien, who, among other things, would be naturally immune to all the disabilities E that members might suffer from, such as, for example, ineligibility due to a failure or inability to pay subscriptions, or ineligibility due to suspension.

In the circumstances, I find that despite the seemingly open-endedness of the constitution of the Union, membership was restricted to employees of Council. It follows that if the first defendant had been dismissed from Council employment he lost the right to keep his membership, let alone to become F an office bearer in Excom, unless he had been conferred with honorary membership in terms of clause 5(k) of the new constitution, in which event he would have no right to hold office or to vote.

(ii) That first defendant had appealed to the Supreme Court

At the close of argument, and seeing that the parties had paid scant regard G to the question of the effect of the first defendant's alleged appeal to the Supreme Court against the decision of the Labour Court, I directed the filing of supplementary submissions to deal solely and squarely with the point. Interestingly, in their supplementary heads of arguments, Counsel have adopted diametrically opposed views. But most ironically, each one's H

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conclusion A is the complete opposite of their own cases, and the direct support of the other's!

Mr *Debwe*, for the plaintiffs, gave the matter the most cursory treatment in his brief supplementary heads. In this regard I would like to associate myself with the complaint by Gillespie J in *Vengesai & Ors* v *Zimbabwe*B*Glass Industries Ltd* 1998 (2) ZLR 593 (H) on the conduct of some legal practitioners who do not carry out proper research. He said at 596D-E:

> "I have to say that argument on the law, with appropriate citation of all relevant cases, including adverse decisions, is as rare amongst legal practitioners as are hens' teeth. Yet it is to counsel that a judge must look for appropriate research and argument if he is to be able to give judgments efficiently and correctly. It is C that duty of him who would undertake the responsibility of an advocate, a duty owed both to the client and the court, to do all relevant research and to present that research to the court. A judge cannot be expected to undertake himself all the original research in every case."

From his research, Mr *Debwe* concluded that an appeal to the Supreme Court automatically suspends the judgment of the Labour Court appealed against, D in line with the common law rule of practice. Nonetheless, he persisted with his clients' case on the basis that there was no appeal pending by the first defendant, but merely an application for leave to appeal.

On the other hand, Mr *Mambara*, in his more elaborate and well researched heads, concluded that an appeal to the Supreme Court does not automatically E suspend the Labour Court's judgment because the common law rule of practice that has that effect only applies to superior courts of inherent jurisdiction. He pointed out that in this jurisdiction there have been divergent and conflicting views on this point.

The common law rule of practice in the superior courts is that execution of a F judgment appealed against is automatically suspended unless leave to execute is granted: see *Wood NO* v *Edwards & Anor* 1966 RLR 336 (G); *Oliphant's Tin 'B' Syndicate* v *de Jager* 1912 AD 477; *Verkouteren* v *Savage* 1919 AD 183; *Malan* v *Tollekin* 1931 CPD 231; *Reid* v *Godart* 1938 AD 511; *Levin* v *Felt and Tweeds Ltd* 1951 (1) SA 213 (C); *Geffen* v *Strand Motors (Pvt) Ltd* 1962 R&N 259;

1962 (3) SA 62 (SR); *South Cape Corporation (Pty) Ltd* v G*Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A); *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) *Vengesai & Ors, supra,* and *Chematron Products (Pvt) Ltd* v *Tenda Transport (Pvt) Ltd & Anor* 2013 (2) ZLR 365 (H).

In terms of that common law rule, the party that succeeds in the court of first H instance has to seek the leave of the court to execute the judgment whilst

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the appeal is pending. In *Levin's* case above van Winsen AJ explained the A rule at 217F as follows:

> "The common law is clear that a notice of appeal, save in certain exceptional cases, automatically suspends the execution of the judgment appealed against. No application by the appellant is necessary to ensure this result. If the party who succeeded in the judgment against which the notice of appeal has been lodged wishes to execute upon the judgment then it is he who is required to B make an application to do so."

In *South Cape Corporation, supra* at p 544H-545B, Corbett JA put it as follows:

> "Whatever the true position may have been in the Dutch courts, and more particularly the Court of Holland … it is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically C suspended upon the noting of an appeal… The purpose of this rule … is to prevent irreparable damage from being done to the intended appellant."

However, as Mr *Mambara* noted, on this point the structure and wording of the Act is a cause of some confusion. Section 92E is headed "Appeals to the Labour Court generally". Subsection (1) then provides that an appeal D "… in terms of *this Act* …" may address the merits of the determination or decision appealed against. It does not say an appeal "… in terms of *this section …*" It does not refer to other provisions dealing with appeals to the Labour Court, for example, s 92D and s 98(10).

With regards to appeals to the Supreme Court, s 92F of the Act is headed "Appeals against decisions of Labour Court". Subsection (1) expressly E provides for appeals from the Labour Court to the Supreme Court, but only on questions of law. The confusion may arise in that whilst it seems settled that an appeal from the decision of an arbitrator to the Labour Court in terms of s 98(10) of the Act is not suspended automatically because of the provisions of s 92E, there is nothing expressly stated in respect of the effect F of noting an appeal from the Labour Court to the Supreme Court. Yet subs (1) of s 92E refers to appeals "… in terms of *this Act*". This seems to suggest that any appeal whatsoever, to and from wherever, does not automatically suspend the decision appealed against, for as long as that appeal is one "… in terms of *this Act*".. An appeal from the decision of an arbitrator is one "… in terms of *this Act*". But so is an appeal from the Labour Court to the G Supreme Court.

However, in my view, the reference in s 92E to "[a]n appeal in terms of *this Act …*" does not include an appeal to the Supreme Court. It is a reference to appeals to the Labour Court only. Section 92F deals specifically and expressly with appeals from the Labour Court to the Supreme Court. But H

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it A does not deal with the effect of such an appeal on the decision appealed against as does s 92E.

Some decisions of this court have held the view that subs (2) of s 92E expressly reversed the common law rule: see *Baudi* v *Kenmark Builders (Pvt) Ltd* HH-4-12; *DHL International (Pvt) Ltd* v *Madzikanda* 2010 (1) ZLR 201 (H) B; *Samudzimu* v *Dairibord Holdings Ltd* 2010 (2) ZLR 357 (H); and *Dhlomo-Bhala* v *Lowveld Rhino Trust* 2013 (2) ZLR 179 (H). In *Dhlodhlo* v *Deputy Sheriff, Marondera & Ors* 2011 (1) ZLR 416 (H) and *Mvududu* v *Agricultural and Rural Development Authority* 2011 (2) ZLR 449 (H) it was accepted or assumed that in the absence of a legislative provision to the contrary the common law rule applied in respect of appeals C to the Labour Court.

Be that as it may, whatever confusion may arise on the interpretation of s 92E and s 92F of the Act, it seems settled that the common law rule of practice only applies to the superior courts of inherent jurisdiction. Contrary to the views in the earlier cases, it seems that in s 92E(2) of the Act, Parliament re-stated, rather than reversed, the common law in regards to an inferior D court such as the Labour Court. In *ANZ* v *Min of State for Information and Publicity & Ors* 2005 (1) ZLR 222 (S),

Chidyausiku CJ singled out the High Court and the Supreme Court as the superior courts of inherent jurisdiction in this country. He went on to say at 254D-E:

> "Courts created by statute do not have inherent jurisdiction and consequently do E not have power to order execution of their judgments unless such jurisdiction is conferred on them by statute."

The Labour Court is not a court of inherent jurisdiction. It is a creature of statute. As such, and in my view, the aforesaid common law rule does not apply to it. In *Vengesai, supra*, Gillespie J stated at p 597C:

> "In F my opinion, the *dictum* of Corbett JA, cited above and approved in the various judgments referred to, *does not, and was not intended, to apply to a judgment of any court, tribunal or authority other than a superior court of inherent jurisdiction*" (my emphasis).

In *Longman Zimbabwe (Pvt) Ltd* v *Midzi & Ors* 2008 (1) ZLR 198 (S) at 204G-205D, Garwe JA quoted with approval the further remarks by Gillespie J G in *Vengesai, supra*, as follows:

> "In *Vengesai & Ors* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H), Gillespie J, after considering a number of earlier decisions on the matter, remarked at p 598E-F:
>
> 'In stating the common law, Corbett JA referred to the automatic stay of execution upon the noting of (an) appeal, as a rule of practice. That is not H a firm rule of law, but a long established practice regarded as generally

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> binding subject to the court's discretion. The concept of a rule of practice A is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation.'

The learned judge continued at 599A-D:

> '… the grant or withholding of a stay of execution is, at common law, a matter of discretion reserved to a court in which such a discretion is imposed. B It follows that, in the absence of any statute specifically conferring such a discretion on an inferior tribunal or authority, or otherwise regulating the question of enforcement of judgments pending an appeal from that authority, no such discretion can exist. Such a court or authority can exercise only the powers conferred by statute. It cannot order the suspension of its own judgment pending an appeal. It has no discretion to enforce its C own judgment, notwithstanding an appeal. The only basis upon which its judgment or order can be supposed to be stayed is where its enabling statute provides for the situation.
>
> … the grant, whether automatic or not, of a stay of execution of a judgment pending appeal is an inseparable part of an exercise of discretion by the court from which the appeal lies, to order the enforcement of its judgment notwithstanding the appeal or any temporary stay. *It follows that the*D*question of enforcement pending appeal of judgments from an inferior court or authority cannot possibly be regulated according to a rule of practice, derived from the common law, and applicable in superior courts of inherent jurisdiction*'" (my emphasis).

Thus, in *Longman*, the Supreme Court, on the basis that the common law rule of practice applies to the superior courts of inherent jurisdiction only, E reversed the judgment of this court that had held that the decision of the Rent Board, a quasi-judicial body established in terms of the Housing and Building Act [*Chapter 22:07*], had automatically been suspended by an appeal against that decision to the Administrative Court. At 206A-B the Supreme Court said;

> "The position may now be accepted as settled in this jurisdiction that, unless F empowered by law to do so, an inferior court, tribunal or other authority has no power to order the suspension of its own orders or judgments *and, further, that the noting of an appeal against the judgment or order of such a court, tribunal or other authority, in the absence of a statutory provision to that effect, does not have the effect of suspending the operation of the judgment or order that is sought to be appealed against*" (emphasis added). G

It follows that, whatever may have been the intention of the Legislature in crafting ss 92E and 92F of the Act, the common law rule of practice that has the effect of automatically suspending the decision appealed against, does not apply in respect of the Labour Court because it is not a superior court of inherent jurisdiction. Although the remarks of the learned Chief Justice in H

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Associated Newspapers of Zimbabwe were made in relation to a matter that had been determined by the Administrative Court, Garwe JA, in *Longman*, pointed out at 205G that they apply with equal force to judgments and orders made by all inferior courts and tribunals.

In the Act, s 92E(3) empowers the Labour Court to make interim determinations pending the determination of an appeal that is pending before it. Mr *Mambara* submitted that in practice the provision has been employed to regulate the execution of judgments of those bodies or authorities inferior to it, such as arbitrators. That may be the position. But there is no corresponding provision in s 92F. That seems to fortify the view that the Labour Court has no power or discretion to order a stay or to authorise execution of its decision where it has been appealed against, and that the common law rule of practice does not apply to it. But, as Gillespie J noted in *Vengesai* at p 599D-E, an aggrieved party who desires a stay of execution, or execution pending appeal, is not without a remedy. He can approach this court for appropriate interim relief, or, in my view, the Supreme Court where the appeal will be pending.

Coming back to the first defendant's situation with regards the status of his appeal to the Supreme Court, it seems that all that was pending at the Labour Court was his application for leave to appeal, not the actual appeal itself. I have gathered from the papers in the court record that such leave was applied for on 22 January 2014. I heard argument in this case on 23 October 2014. The parties filed their supplementary heads of argument on 10 and 12 November 2014. There was no indication as to the fate of the leave application. Despite that, Mr *Mambara* had originally argued that the leave application had the same status as the actual appeal, namely that it had automatically suspended the decision of the Labour Court, because it is a necessary step in the noting of an appeal.

Given the conclusion that I have arrived at above, namely that an appeal to the Supreme Court does not automatically suspend the Labour Court's decision that has been appealed against, and given Mr *Mambara's* concession in his supplementary heads of argument, it follows that his earlier argument that the leave to appeal was on the same footing as the substantive appeal automatically falls away.

(c) Disposition

In the premises, judgment is hereby entered in favour of the plaintiffs. Costs were sought against the first and second defendants only. Therefore, it is ordered as follows:

1 This court had jurisdiction to determine the plaintiffs' action;

2 The plaintiffs had *locus standi* to institute these proceedings;

Mafusire J

3 The first defendant is not eligible to be a substantive member of the Harare Municipal Workers' Union, let alone to be elected or appointed to any position in it;

4 The costs of this action shall be borne by the first and second defendants, jointly and severally.

Debwe & Partners, plaintiffs' legal practitioners

J Mambara & Partners, defendants' legal practitioners

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RABEKA v STOCKIL & ORS 2015 (1) ZLR 37 (H)

Citation 2015 (1) ZLR 37 (H)

Case No Judgment No. HB-1-15

Court High Court, Bulawayo

Judge Makonese J

Heard 30 October 2014; *CAV*

Judgment 8 January 2015

Counsel Miss *T Moyo*, for the applicant
Steven Collier, for the first respondent

Case Type Application for maintenance

Annotations No case annotations to date

Flynote

Customary law – *marriage – cannot be entered into between persons who are not of African descent*

Family law – *marriage – customary law marriage – cannot be entered into between persons who are not of African descent*

Will – *right to inherit – legitimate child born after will made – child born of informal relationship – no right to inherit unless legitimated or adopted*

Headnote

The first respondent was the daughter of the deceased by his first marriage, which had ended in divorce. The deceased was of Portuguese nationality and European descent. At the time of the divorce, the deceased bequeathed his entire estate to the first respondent. After his divorce, the deceased entered into a relationship with the applicant. The applicant's mother was of African descent and the applicant herself was of mixed race. Five children were born of this relationship. The applicant claimed that she had entered into an unregistered customary law union with the deceased and that her children were entitled to inherit from the deceased as legitimate children, in terms of s 18(1) of the Wills Act [*Chapter 6:06*].

Held, that it was common cause that neither the applicant nor the deceased could enter into a customary law union, and such a union would be alien to them. African customary law unions are usually between persons of African descent and follow the rules and customs of African customary law. The two parties never claim to have entered into a union in accordance with the customary practices and were therefore not subject to customary law. Their relationship or union could never be elevated to a customary law union. There was, in any event, no evidence of any customary law marriage having taken place. It followed that the children born of the relationship were illegitimate.

2015 (1) ZLR p38

Makonese J

Held, further, that under s 18 of the Act, an illegitimate child is only entitled to benefit from the testator's estate where that illegitimate child of the testator is legitimated. The fact that the father's name appears on the child's birth certificate (which only applied to two of the five children *in casu*) would not have the effect of legitimating the child. The children born out of the union between the applicant and the deceased were not entitled to inheritance in terms of s 18(1).

Cases referred to

Katedza v *Chunga & Ors* 2003 (1) ZLR 470 (H)

Khanye v *Msipha NO & Ors* HB-51-05

Matibiri v *Kumire* 2000 (1) ZLR 492 (H)

Mtuda v *Ndodzo* 2000 (1) ZLR 710 (H)

Muringaniza v *Munyikwa* 2003 (2) ZLR 342 (H)

Legislation considered

Wills Act [*Chapter 6:06*], s 18(1)

Case information

Miss *T Moyo*, for the applicant D

Steven Collier, for the first respondent

Judgment

Makonese J**:** The applicant has filed an application for maintenance in terms of the Wills Act [*Chapter 6:06*]. In particular, reliance was placed on the provisions of s 18 of the Act. The relief sought by the applicant in the E draft order is as follows:

> "IT IS ORDERED THAT:
>
> The estate of the late Manuel Arthur da Silva shall be distributed in terms of section 18 of the Wills Act [*Chapter 6:06*]."

The applicant claims that she was married to the late Manuel Arthur da Silva F (the deceased) in terms of an unregistered customary law union in 1990, with whom she had five children, three of them being minors. The deceased having died on 28 August 2006, the applicant claims that her children are entitled to inherit from the deceased in their capacity as legitimate children.

The application is opposed by the first respondent who denies that the applicant G was married to the deceased in terms of customary law. Further, the first respondent denies that the applicant's children are entitled to inherit from the deceased as legitimate children. It is not in dispute that the deceased and the first respondent's mother were divorced in 1978. In 1979 the deceased then proceeded to write a will bequeathing his entire estate to his daughter, the first respondent. The deceased's estate was registered with this court under H

Makonese J

DRB No. 855/06. A The first respondent was appointed executrix dative on 27 August 2006. The estate has since been wound up.

Preliminary issue

Before I deal with the matter on the merits, I propose to dispose of the preliminary issue that has been raised by the first respondent. It has been B argued by the first respondent that the application is defective and should be struck out as it is irregular. The contention by the first respondent is that the application states on the face of it that it is "Court Application for Maintenance in terms of the Wills Act [*Chapter 6:06*]", but does not reflect in the founding affidavit that an application is being made for maintenance in terms of the Wills Act. In any event, it is argued, the relief sought in terms C of the draft order annexed to that application does not make any reference to any amount of maintenance being claimed by the applicant. The first respondent points out, correctly in my view, that the form of the application is guided by the provisions of r 227(2)(a) of the High Court Rules 1971, which provides as follows: D

> "Every written application and notice of opposition shall –
>
> (a) state the title of the matter and a description of the document concerned."

The first respondent avers that the form and content of the application before the court is irregular, and must be struck out as being fatally defective. I do not agree that the irregularity complained of goes to the root of the substance and form of the application. The applicant is entitled to be heard on the E merits and there is no prejudice to the first respondent. I would, accordingly, dismiss the point *in limine*.

The merits

The applicant claims in the founding affidavit that she entered into an unregistered customary law union with the late Manuel Arthur da Silva F sometime in 1990. The same averment is boldly asserted in the applicant's heads of argument. The applicant has chosen not to place before the court any evidence whether verbal or written to prove that indeed there existed a customary marriage between the applicant and the late Manuel Arthur da Silva. It is not entirely clear why the applicant took it for granted that the G court would on her mere say-so agree that there existed such a customary union. It has not been disputed that the applicant is of mixed race, colloquially referred to as "coloured". The deceased was of Portuguese nationality and European descent. It is common cause that neither the applicant nor the deceased could enter into a customary law union, and such a union would be alien to them. African customary law unions are usually between persons H of African descent and follow the rules and customs of African customary

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law. The two parties, the applicant and the deceased, could never by any A stretch of the imagination claim to have entered into a union in accordance with the customary practices and are therefore not subject to customary law. Their relationship or union could never be elevated to a customary law union. The applicant has not provided the court with any evidence that the marriage between the parties was solemnized in terms of customary law. B There is no evidence that the deceased undertook the requisite procedural requirements to solemnize a customary law union and no *lobola* was paid.

The first respondent's legal practitioner referred the court to *Khanye* v *Msipha NO & Ors* HB-51-05. The matter is relevant to the present case. In that matter, the applicant could not provide any evidence as to the existence C of a customary marriage. Ndou J alluded to the fact that it was important to file affidavits from relevant parties, such as aunts and go-betweens, as proof of the existence of a customary marriage. The learned judge also cited with approval *Mtuda* v *Ndodzo* 2000 (1) ZLR 710 (H), *Ntini* v *Masuku* 2003 (1) ZLR 638 (H), *Muringaniza* v *Munyikwa* 2003 (2) ZLR 342 (H) and *Matibiri* v *Kumire* 2000 (1) ZLR 492 (H). D

In casu the applicant has failed to discharge the onus to prove on a balance of probabilities, that she entered into a valid customary law union with the deceased. It follows, therefore, that once the finding has been made that the applicant was not customarily married to the deceased, the children born of such purported customary marriage are illegitimate. E

The applicant has sought to place reliance on the provisions of s 18(1) of the Wills Act, which provides as follows:

> "Effect of subsequent birth, legitimation or adoption of children on will
>
> (1) If, after a testator has made a will –
>
> (a) a child is born, of whom the testator is the mother or, the child being F legitimate, the father; or
>
> (b) an illegitimate child of the testator is legitimated or, in accordance with customary law, is legitimated or otherwise acknowledged or recognised as a child of its father; or
>
> (c) the testator adopts a child in accordance with the law relating to adoption; G
>
> then, unless the will makes some other provision for the child or unless it clearly appears that the testator intended otherwise, the child shall be entitled to the following benefits from the testator's estate –
>
> (i) if the will makes no provision for any child of the testator, the child shall be entitled to any benefit that he would have received if the testator had died intestate; or H

> (ii) if A the will makes provision for any other child or children of the testator, the child shall be entitled to the same benefits as, or to benefits of equivalent value to, those that are receivable under the will by –
>
> A. the other child or children, where there is only one such other or where the will treats all such other children equally; or
>
> B. the other child or other children, as the case may be, who receive B the benefits of smallest value, where the will treats the other such children differently.
>
> (2) The benefits payable in terms of this section to a child referred to in paragraph (a), (b) or (c) of subsection (1) shall be deemed to be –

(a) a legacy payable under the will concerned, if the will makes no provision for any child of the testator or if the will provides for a legacy to be paid to each other such child or to the child who receives the benefits of smallest C value, as the case may be …"

The applicant has made the bold allegation that all the five children were fathered by the late Manuel Arthur da Silva without providing any evidence, save that two of the children, namely, Trent da Silva and Eliza da Silva, have birth certificates in which their last name is recorded as da Silva. D As provided in s 18(1) of the Wills Act, an illegitimate child can only be entitled to benefit from the testator's estate where that illegitimate child of the testator is legitimated. It is now settled law that the fact that the father's name appears on the child's certificate does not mean that the father has any rights of guardianship or custody. Needless to say, the fact that the father's name appears on the child's birth certificate does not have the effect of E legitimating the child. See *Katedza* v *Chunga & Ors* 2003 (1) ZLR 470 (H). The applicant did not attempt to explain how the children born out of the union with the deceased were legitimated. It ought to be noted that, in terms of our law, the natural father may adopt the child or make application for guardianship under the Guardianship of Minors Act [*Chapter 5:08*].

In casu, F notwithstanding the fact that the deceased may have maintained the children he had with the applicant, and that two of the children's birth certificates bear the surname of their father, there is no indication that he undertook to take any lawful steps recognized under our law to legitimate the children. I am satisfied that, on the facts presented by the parties, the applicant's illegitimate children have not been legitimated for the purposes G of s 18(1) of the Wills Act.

I have no difficulty in concluding that the applicant has failed to prove that she entered into a customary law union with the deceased and consequently any children born out of such a union were illegitimate children.

In the result, the children born out of the union between the applicant and the H deceased are not entitled to inheritance in terms of s 18(1) of the Wills Act.

2015 (1) ZLR p42

Makonese J

I therefore dismiss the applicant's claims with costs. A

Zimbabwe Women Lawyers Association, applicant's legal practitioners

Webb Low and Barry, first respondent's legal practitioners

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CHIFAMBA v CHIFAMBA 2015 (1) ZLR 43 (H)

2015 (1) ZLR p43

Citation	2015 (1) ZLR 43 (H)
Case No	Judgment No. HH-28-15
Court	High Court, Harare
Judge	Tsanga J & Chitakunye J
Heard	28 October 2014; *CAV*
Judgment	15 January 2015
Counsel	*C M Jakachira,* for the appellant

E R Samukange, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Costs C – *maintenance enquiry – maintenance court may not award costs against unsuccessful party – court may make an award of expenses – such award having effect of civil judgment*

Family law – *maintenance – maintenance enquiry – nature of proceedings – not an ordinary civil action – successful party not entitled to costs –* D *court's discretion to award expenses*

Family law – *maintenance – order for – may not be made retrospectively – failure to contribute to maintenance before order for maintenance made – may be taken into account in assessing claimant's future needs*

A E maintenance order cannot be made with retrospective effect. A claim for arrears of maintenance can only be entertained in relation to an order previously made by a court in terms of s 6 of the Maintenance Act [*Chapter 5:09*]. However, where there has been a previous failure to maintain, such failure may be relevant in assessing how much maintenance should be F paid in the future. The more a claimant's resources have been depleted by a defendant's neglect in the past to contribute to maintenance, the greater her need for future maintenance might be. This means that, although a maintenance order cannot be made in respect of the past, it can take the past into account.

A G maintenance enquiry is very different from an ordinary civil matter. The expenses that may be incurred by a party in relation to a maintenance enquiry are not synonymous with costs that are awarded in civil matters where, as a general principle, a party who is successful is entitled to claim them. Under s 31 of the Act, where a maintenance court makes a determination, the court *may* make an award of expenses where it appears H just to do so, taking into account the means of the other person. Such an

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award has the effect of a civil judgment in favour of the party concerned. A However, an appeal against the ruling of a maintenance court is in the nature of civil proceedings and courts of appeal may, in appropriate cases, make an order regarding the costs of the appeal.

Cases cited B

Africa v *Africa* 1985 (1) SA 792 (SWA)

Dreyer v *Dreyer* 1984 (2) SA 483 (O)

Keates v *Keates* HH-89-95

Oberholzer v *Oberholzer* 1947 (3) SA 294 (O)

Reid v *Reid* 1992 (1) SA 443 (E)

S v *Frieslaar* 1990 (4) SA 437 (C) C

Woodhead v *Woodhead* 1955 SR 70; 1955 (3) SA 138 (SR)

Legislation considered

Maintenance Act [*Chapter 5:09*], ss 5, 13 & 31

Matrimonial Causes Act [*Chapter 5:13*], s 7 D

Case information

C M Jakachira, for the appellant

E R Samukange, for the respondent

Judgment

Tsanga J: This was an appeal heard by this court on 28October 2014 against an order for maintenance granted by the magistrates court. The matter E was remitted back to the magistrates court for a proper enquiry to be made on the income and expenditure of the respondent and that of the applicant (who was appellant in this matter), where applicable.

The reasons for remitting the matter to the magistrates court are hereby explained so as to guide the magistrate in re-hearing the matter taking into account the grounds that informed the appeal. F

The brief facts are that the magistrates court awarded the appellant a sum of US$500 a month as maintenance against an original claim of $1475. The respondent had offered to pay $300. The respondent has custody of the minor child and is responsible for paying all expenses including those of another child who is attending university overseas. Taking into account G these realities, the magistrate concluded that an offer of US$300 would be too little and that $500 would be justified since this was also what the parties had initially agreed to| at one stage when they attempted to broker an agreement regarding their divorce settlement. The agreement has, however, not been enforced and parties still have a pending divorce matter before the High Court which includes the division of the matrimonial assets. H

2015 (1) ZLR p45

Tsanga J

The A appeal against the magistrate's decision was brought on the following five summarised grounds:

1. That the court misdirected itself by simply awarding a figure of US$500 per month without issuing a detailed judgment explaining how it arrived at the figure.
2. The B court *a quo* misdirected itself by failing to make a finding that respondent deliberately refused to disclose his income as well as some of his expenditure.
3. The court *a quo* further misdirected itself by failing to appreciate the fact that the amount it awarded is inadequate to enable the appellant to C meet her average monthly expenditure including accommodation.
4. The court *a quo* also misdirected itself by failing to address the appellant's claim for arrear maintenance notwithstanding the evidence adduced before the court on that aspect of the appellant's claim.
5. The court *a quo* erred by failing to address the question of costs notwithstanding the fact that they formed part of the appellant's claim.

The D appellant's prayer was for the magistrate's decision to be set aside and for a sum of $1 000 to be accorded to her as monthly maintenance. She also prayed for the sum of $12 935 as arrear maintenance and for costs of application in the court below and for the appeal.

The matter is being remitted back to the same magistrate where practical E to hear evidence relating to the first three grounds of appeal in particular in accordance with s 5 of the Maintenance Act [*Chapter 5:09*], which requires the court to enquire fully into the matter of the complaint. The fourth and fifth grounds of appeal are disposed of by this appeal court as also explained more fully below.

Regarding F the first ground of appeal, it is indeed not clear from the record how the figure of $500 was arrived at as being adequate maintenance, other than that the figure was initially proposed as part of a settlement claim which included the sharing of property, but which was never implemented in accordance with the agreement.

On the second ground of appeal, which centres on non-disclosure of earnings, G the record does not indicate at all what evidence was placed before the court to reflect the respondent's earnings or indeed if any effort was made to get the respondent to disclose his earnings. Indeed, the only reference to the respondent's earnings in the record is made by his counsel where he says his client gets between $6 000 and $7 000 per month as an independent H contractor. No evidence was produced to support this claim.

2015 (1) ZLR p46

Tsanga J

Section 13(c) of the Maintenance Act makes it clear that the court has power A "to call for the production of any book or document and to examine any witness on oath". To the extent that the respondent is self-employed, the evidence of how much he makes through his business should have been placed before the court for a proper assessment to be made of his earnings. It is this that the magistrate must do in accordance with the law. Although B the applicant is unemployed, her expenses must also be fully justified so as to arrive at an appropriate figure regarding her needs.

With regard to the third ground of appeal which essentially challenges the adequacy of the amount ordered, maintenance pending divorce is supposed, as much as possible, to allow a party to lead the lifestyle that they were C accustomed to. In other words, the marital *status quo* is to be preserved as much as possible pending the final divorce which will resolve issues fully with regards to the sharing of matrimonial assets. It is not clear from the record how the magistrate arrived at $500 as being sufficient for all the applicant's needs including accommodation, given that the respondent has exclusive use of the marital home together with the child in his custody. D The applicant states that she is staying with her parents as a result of being unable to afford accommodation. Clearly, it is not the legal obligation of her parents to provide her with accommodation and the magistrate should therefore make a proper assessment of how much is to be paid taking into account the major categories of expenses that the applicant will incur inclusive of accommodation. E

The above are the three issues which the magistrate should give attention to in re hearing the matter.

The appellant also appealed on the grounds that arrear maintenance had not been granted by the court below. The issue of arrear maintenance for a spouse is one that is fairly settled as discussed in the case of *Keates* v *Keates*F 1995 (1) ZLR 380 (H) in which Robinson J explained the position as follows:

> "... it appears that the applicant's claim for arrear maintenance founders on the maxim deriving from Voet 2.15.15 – '*non emim quisquam praeterium vivit aut alendus est*', meaning, according to Gane's translation, 'a person does not live nor have to be maintained in arrear ...'"

Robinson J discussed a number of local as well as South African cases that G have dealt with and applied this principle. See *Oberholzer* v *Oberholzer* 1947 (3) SA 294 (O) at 298; *Woodhead* v *Woodhead* 1955 SR 70 at 71; 1955 (3) SA 138 (SR); *Africa* v *Africa* 1985 (1) SA 792 (SWA) at 794 (d). In *Woodhead*'s case s*upra* Beadle CJ stressed the existence of an agreement or a court order as a legitimate basis for seeking arrear maintenance. H

Tsanga J

Section 7(5) A of the Matrimonial Causes Act permits the court in granting divorce to make an order in relation to distribution of assets and maintenance that is in accordance with the written agreement of the parties. *In casu*, although the parties purported to enter into an agreement as part of their divorce settlement, the agreement was never operationalized and it has not been incorporated into any divorce settlement since the divorce remains B pending and disputes remain concerning matrimonial assets. There can therefore be no finalised agreement to talk about. In fact in the record the respondent dismisses the agreement as an out of court settlement which has no bearing on him which is indeed true since the agreement has not been made into a court order. The applicant herself acknowledges in the record that the agreement has not been honoured and that she has not been receiving C the US$500 a month which was supposed to be a part of the settlement.

But aside from the agreement not being incorporated as an order of court, s 6 of the Maintenance Act, under which the claim was brought, which deals with the making of an order by the court, is clearly couched from the time the order is made going forward. It is in the present and the future and is D not retrospective. Arrears are accumulated only in relation to an order so made by the court and not in relation to the past. So, for example, in *S* v *Frieslaar* 1990 (4) SA 437 (C) an accused had been arraigned for failure to pay arrear maintenance in respect of expenses incurred on behalf of the child before the order was made. On review it was held that the order under which he was obliged to pay was invalid in so far as it provided for him E to pay arrear maintenance. It was also emphasised that in making an order for maintenance, a court could not make an order with retrospective effect. However, as articulated by Conradie J in that case at 440 B, failure to maintain is not entirely without relevance in seeking an effective maintenance order going forward. As he explained: F

> "The more a claimant's resources have been depleted by a defendant's neglect in the past to contribute to maintenance, the greater her need for future maintenance might be. This means that although a maintenance order cannot be made in respect of the past it can take the past into account".

In light of the fact that a maintenance order does not operate retrospectively and that the agreement that the applicant purports to draw strength from has G not been incorporated into any divorce order and has also not been followed, the claim for arrear maintenance is dismissed.

The final ground of appeal to be addressed relates to the alleged failure by the court below to address costs. Maintenance matters are conducted in the form of an enquiry and the Act itself articulates the parameters within which H expenses related to a maintenance enquiry are to be addressed. In s 31 it

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allows for reimbursement of expenses where the court considers it just to A do so. The section is couched as follows:

> "(1) Where, in terms of this Act, a maintenance court makes an order or direction or orders any variation, extension, rescission or discharge thereof or refuses to make any such order, direction, variation, extension rescission or discharge, it may, *where it appears just to do so,* in addition to the other order of the court, make an award of such amount as it may specify against any person in favour B of another in respect of the reasonable expenses incurred by the latter, directly or indirectly, in connection with the proceedings concerned:
>
> Provided that in making such an award the maintenance court shall have regard to the means of the person against whom the award is intended to be made.
>
> (2) An award in terms of subsection (1) shall have the effect of a civil judgment in the magistrates court, and the provisions of the Magistrates Court Act C [*Chapter 7:10*] and rules made thereunder relating to the enforcement of judgments shall, *mutatis mutandis*, apply to such award.
>
> (3) The clerk of the maintenance court which has made the award in terms of subsection (1) shall, on behalf of the person in whose favour the award was made, take all such steps for the civil enforcement of that award as may be necessary" (my emphasis). D

There are two issues which emerge from the above provisions. The first is that the award of expenses is at the discretion of the court where it appears just to do so, taking into account the means of the other person. What s 31 (1) suggests is that the award of expenses in a maintenance enquiry is not a *fait accompli* since s 31(1) clearly uses the word "may" rather than "shall" in E relation to the award of expenses. The second point is that subsections (2) & (3) of the above section bolster the point that a maintenance enquiry is very different from an ordinary civil matter. These provisions make it clear that it is where an award relating to expenses has been granted that such award of expenses is in the nature of an ordinary civil claim governed by the general rules as contained in the Magistrates Court Act. A maintenance enquiry is F thus distinct from the rules applicable to other general civil matters – a fact which is of relevance to the approach of costs.

To enable the court to exercise its discretion on whether it is just to award expenses with respect to such enquiries, it would seem to follow that the party wishing such expenses to be reimbursed must fully bring the nature G of the expenses to the attention of the court for it to make an informed consideration. The expenses referred to in relation to a maintenance enquiry are clearly not synonymous with costs that are awarded in civil matters where as a general principle a party who is successful is entitled to claim them. The purpose of awarding such costs to a successful litigant in civil matters is to recompense them for expenses that have been incurred initiating or defending H

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litigation A but these are not articulated fully before the court as distinct to the expenses envisaged under s 31 of the Maintenance Act. From the applicant's heads of argument, it is evident that the costs that counsel alludes to as not having been addressed by the court are costs in general civil matters which generally follow the cause.

The record does not show any evidence that expenses were brought to the B attention of the court or that s 31 was what was being alluded to in relation to the claim. Therefore the court below cannot be faulted for not addressing the issue of expenses in the maintenance claim, since the relevant provision allows for an exercise of the court's discretion where it appears necessary and just to do

so. It also has to be borne in mind that the evidence that was placed before the maintenance court was not of total neglect but rather a C case where the applicant was more in quest of a consistent enforceable order.

Indeed in the South African case of *Dreyer* v *Dreyer* 1984 (2) SA 483 (O) it was emphasised that the intention of their Maintenance Act (also along the same lines as ours) is an enquiry and that the power to make an order for costs cannot be read into the Act where it has not been expressly provided D for. In *Reid* v *Reid* 1992 (1) SA 443 (E) it was also emphasised that the maintenance court does not have the power to award costs but that on appeal such an order of a maintenance court is in the nature of civil proceedings and courts of appeal may in appropriate cases make orders regarding costs of appeal. Section 27(1) & (2) of our Maintenance Act stipulates that an appeal from a maintenance court which lies to the High Court is indeed in E the form of civil proceedings.

On appeal, the applicant as the appellant was successful on at least three grounds of appeal which go to the gist of her claim, in the sense that this court has referred the matter back for a proper enquiry to be heard. As such the applicant is awarded the costs of appeal.

As F earlier stated, for expediency the matter is being referred to the same magistrate who heard the matter. However, in the event that for any reason the matter cannot be heard by the same magistrate, then it should be heard by any other appropriate magistrate using the issues highlighted as guidelines for the conduct of a thorough hearing.

CHITAKUNYE J concurred. G

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LEAST SUPPLIES (PVT) LTD v TIB INSURANCE BROKERS & ANOR 2015 (1) ZLR 50 (H)

Citation	2015 (1) ZLR 50 (H)
Case No	Judgment No. HB-9-15
Court	High Court, Bulawayo
Judge	Takuva J
Heard	16 June 2014; *CAV*
Judgment	15 January 2015
Counsel	*L Mpofu,* for the applicant *S Chamunorwa,* for the respondents
Case Type	Application for joinder
Annotations	No case annotations to date

Flynote

Insurance – *broker – nature of relationship between broker and other parties to insurance contract – obligations and liability to insured – insured entitled to rely on broker's skill and efficiency* D

Headnote

After its insurer refused to pay a claim submitted by the applicant for goods that were lost in transit, the applicant brought an action against the insurer for the amount of its loss. The applicant then sought to join the insurance broker as a second defendant, arguing that the broker had a E direct or substantial interest in the result of the litigation and that the broker's interests might be prejudicially affected and accordingly should be afforded an opportunity to be joined as a party. The broker argued that it had no interest in the matter, that it was not a party to the contract and that it was an agent only and thus not liable. It was a mere negotiator between the principals. F

Held, that, a broker in a contract of sale is a middle man or intermediary whose office it is to negotiate between two parties until they are *ad idem* as regards the terms upon which they are prepared to buy and sell. A person described in a contract as a broker will normally be taken to be the agent of both parties, but his capacity as agent of both parties must G not be pushed to extremes, as it cannot be presumed that it had the power to bind both parties to the contract. It is, in fact, an intermediary rather than a business plenipotentiary. The business of an insurance broker (who must be registered under s 35 of the Insurance Act [*Chapter 24:07*]) is to familiarize itself with the details of the policies offered and premiums charged by different insurers and obtain appropriate insurance cover H

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for A its clients at competitive rates. It must not be assumed that, because he is described as a broker, he is the agent of both parties and in fact it commits a breach of its duty to its principal, the insured, if without his consent it acts on instructions from the insurer. It owes a duty to its principal to obtain a policy in accordance with his instructions, and if it obtains one that is not in accordance with his instructions it will be liable B for a breach of its contract of agency, even if it has sent the policy to the insured and the insured has not complained about its terms. The insured is under no obligation to read the policy, but is entitled to rely on the skill and efficiency of the broker. The broker must make the necessary inquiries of the insured to ascertain all material facts and must disclose C them to the insurer. Failure to discharge this duty renders it liable to the insured or the insurer, which ever has suffered loss through its failure.

Held, further, that the broker negotiated the terms and conditions of the contract which contained the rights and obligations of the parties. It was this contract whose interpretation and formation were now in dispute. D There was a serious allegation that the broker breached its duty to the applicant by failing to disclose material facts relating to the applicant's rights and obligations under the contract. Finally, the insurer denied the broker's averment that the broker was the insurer's agent.

Held, further, that the presence of the broker in the proceedings was necessary to ensure that all matters in dispute in the cause might be effectually and E completely determined and adjudicated upon.

Cases cited

Anabas Svcs (Pvt) Ltd v *Ministry of Health & Ors* 2003 (1) ZLR 247 (H)

Fowler v Hollings (1872) LR 2 QB 616 F

Glass v Hendrie & Co (Pvt) Ltd 1957 R & N 44

Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 (O)

Smith v Len's Agencies (Pvt) Ltd S-117-92

Syfin Hldgs Ltd v Pickering 1982 (1) ZLR 10 (S)

Legislation considered G

High Court Rules 1971 (RGN 1047 of 1971), r 87

Insurance Act [*Chapter 24:07*], s 35

Case information

L Mpofu, for the applicant

S Chamunorwa, for the respondents H

Takuva J

Judgment

Takuva J: This is an application for joinder of parties in terms of Order A 13 r 87(2)(b) of the High Court Rules 1971.

The facts are simple and largely undisputed. They are as follows.

The applicant is involved in the business of buying and selling cell phones and cell phone accessories, which it normally imports from Dubai. Sometime in 2012 the applicant approached the first respondent who are the second B respondent's insurance brokers and requested insurance cover for possible losses that could arise during importation of cell phones from Dubai. The second respondent then undertook to indemnify the applicant.

In September 2012 the applicant lost a consignment of cell phones valued at US$57 285 whilst being transported from Dubai to Bulawayo. The applicant then duly completed claim forms and submitted them to the second respondent. C Subsequently the applicant's lawyers wrote to the first respondent, pointing out that the applicant did not at any time sign any policy document and that none was ever availed to the applicant by the first respondent. This letter was written after the first respondent submitted a report from New Generation Loss Assurers which indicated that the applicant was not entitled D to be indemnified, because it allegedly breached some conditions relating to the declaration conditions, terms and conditions relating to packaging and warranties, and clauses therein.

After the second respondent refused to compensate the applicant the latter issued summons under case number HC 364/13 claiming payment of US$57 285, being the value of the cell phones. The parties have closed E pleadings and a round table conference was held wherein it emerged that most of the triable issues centre around the role played by the the first respondent as an insurance broker in the contract.

The applicant then applied for joinder of the first respondent as a the second defendant under case number HC 364/13. The first respondent has opposed F the application. Consequently, the broad issue is whether or not the first respondent should be joined as a defendant under case number HC 364/13.

The applicant relies on r 87(2)(b) and (3) of the High Court Rules 1971, which provides as follows:

> "(2) At any stage of the proceedings in any cause or matter the court may G on such terms as it thinks just and either of its own motion or on application –
>
> (a) …
>
> (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or mater may be effectually and completely determined and adjudicated upon, to be added as a party; H

Takuva J

> but A no person shall be added as a plaintiff without his consent signified in writing or in such other manner as maybe authorized..
>
> (3) A court application by any person for an order under sub-rule (2) adding him as a defendant shall, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter."

The B applicant also relied on *Henri Viljoen (Pvt) Ltd* v *Awerbuch Bros* 1953 (2) SA 151 and *Anabas Services (Pvt) Ltd* v *Ministry of Health & Ors* 2003 (1) ZLR 247 (H). The principle in these cases is that a party who has a direct or substantial interest in the result of any litigation and whose interests might be prejudicially affected thereby must be afforded an opportunity to be joined as a party thereto. It was also submitted by the applicant, quoting M F B Reinecre C and S W J van der Merwe *General Principles of Insurance* at 135 that "An agent who is guilty of a misrepresentation is personally liable for the damage caused by him."

On the facts, the applicant submitted that the fact that the second respondent denies in case number HC 364/13 that the first respondent was its agent in the insurance contract means that there is a real chance that a decision D prejudicial to the first respondent might be made especially if a finding of misrepresentation on its part is made. Also, it was submitted that the fact that the principal is known is not a bar to joining an agent to proceedings in that what should be considered is whether the party which is sought to be joined has a direct or substantial interest. Finally, it was submitted that the presence of the first respondent before the court is necessary to ensure E that all matters in dispute in the cause may be effectively an completely determined and adjudicated upon.

The first respondent opposed the application on the following grounds:

(a) the first respondent has no interest in the matter under case number HC 364/13 because the cause of action arises from a contract to which it is F not a party;

(b) the first respondent, being an agent, cannot be liable based on the insurance contract *per se* where no relief is sought against it.

In its heads of argument, the first respondent insisted that an agent cannot be sued and submitted that the first respondent is the second respondent's G agent and not the applicant's agent. Therefore, the applicant cannot sue the first respondent in line with the decision in *Smith* v *Len's Agencies (Pvt) Ltd* S-117-92 and *Fowler* v *Hollings* (1872) LR 7 & B 6.6 at 623 where a broker was defined as

> "an agent employed to make bargains and contracts between persons in matters of trade, commerce and navigation. Properly speaking, a broker is a mere negotiator H between other parties …"

Takuva J

Finally, the first respondent submitted that the *Anabas* case is distinguishable A from the one *in casu*, in that the the first respondent will not be affected by the order that the court will make as it has no direct and substantial interest in that order.

In order to resolve the above issue it is necessary to examine the status and role of a broker in an insurance contract. R H Christie *Business Law in Zimbabwe* at p 33 defines a broker as B

> "a middle man or intermediary whose office it is to negotiate between two parties until they are *ad idem* as regards the terms upon which they are prepared to buy and sell."

In *Glass* v *Hendrie & Co (Pvt) Ltd* 1957 R & N 44 48 it was held that

> "a person described in a contract as a broker *will normally be taken to be the*C*agent of both parties* … But his capacity as agent of both parties must not be pushed to extremes, as it cannot be presumed that he had the power to bind both parties to the contract. He is, in fact, an intermediary rather than a business plenipotentiary" (my emphasis).

At pp 232-233 Christie *op cit* states:

> "The business of an *insurance broker* (who must be registered under the D Insurance Act [*Chapter 196*] s 27) is to familiarize himself with the details of the policies offered and premiums charged by different insurers and obtain appropriate *insurance cover* for his clients at competitive rates. It must not be assumed that *because he is described as a broker he is the agent of both parties and in fact he commits a breach of his duty to his principal, the insured,* if without his consent he acts on instructions from the insurer. He owes a duty to his principal E to obtain a policy in accordance with his instructions, and if he *obtains one that is not in accordance* with his instructions he will be liable *for a breach of his contract of agency,* even if he has *sent the policy to the insured and the insured has not complained about its terms.* The *insured is under no obligation to read the policy, but is entitled to rely on the skill and efficiency of the broker. The broker must make the necessary inquiries of the insured to ascertain all material facts and must disclose them to the insurer.* Failure to discharge this F duty renders him *liable to the insured* or the insurer, which ever has suffered loss through his failure" (my emphasis).

In *Syfin Holdings Ld* v *Pickering* 1982 (1) ZLR 10 (S), 1982 (2) SA 255 (ZS), it was held that

> "the insured's cause of action in such a case does not arise until he suffers damage …" G

Applying these principles *in casu*, I find that it is outright mischievous for the the first respondent to claim that it has no interest in the matter. The notice of opposition constitutes a devious act, in my view. Contracts of insurance from their very nature require utmost good faith (*uberrima fides*) on each side. Failure to disclose material facts entitles a party to avoid the policy. H

Takuva J

It A is for this reason that the first respondent's role in the formation of the contract must be exposed fully.

On the facts of this matter, it is accepted by the first respondent that it negotiated the terms and conditions of the policy in its capacity as an insurance broker. It is this insurance contract which contains the rights and obligations of the parties. It is the same contract whose interpretation and B formation are now in dispute. Further, there is a serious allegation that the first respondent breached its duty to the applicant (the insured) by failing to disclose material facts relating to the applicant's rights and obligations under the contract.

Also, it appears from the papers that while the first respondent admits that C it acted as agent of the second respondent, the latter denies this fact casting doubt on whose mandate the first respondent was fulfilling. It is surprising that the first respondent has chosen not to deal with this aspect in its opposition, choosing instead to just generalize its role as an agent, without specifically indicating whose agent it is.

It is baffling to note that the written contract the first respondent harps on D is not even attached to its opposing papers. All that the first respondent did was to give a broad and unsubstantiated averment in para 7.2 of its opposing affidavit to the effect that the policy was reduced into writing and forwarded to the applicant who then paid premiums. It does not say how this was done or why the contract was not signed by the parties.

For E these reasons, I am of the view that the presence of the first respondent in proceedings under case number HC 364/13 is necessary to ensure that all matters in dispute in the cause may be effectually and completely determined and adjudicated upon.

Accordingly, it is ordered that:

(1) the first F respondent be and is hereby joined as the second defendant in the proceedings under case number HC 364/13.

(2) the first respondent be and is hereby ordered to file its defence to the claim under case number HC 364/13 in terms of the Rules of this court with the claim calculated from the date of granting of this order.

(3) costs shall be in the cause. G

R Ndlovu & Co, applicant's legal practitioners

Calderwood, Bryce Hendrie & Partners, respondents' legal practitioners

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S v FM (A JUVENILE) 2015 (1) ZLR 56 (H)

Citation	2015 (1) ZLR 56 (H)
Case No	Judgment No. HH-112-15
Court	High Court, Harare
Judge	Tsanga J
Heard	16 January 2015
Judgment	16 January 2015

Counsel

No counsel details supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – juvenile offender – C approach to be taken – need to detain accused for shortest possible time – need to look at broader perspective when dealing with juvenile offenders*

Headnote

The accused, a 17-year-old male, was convicted on eight counts of unlawful D entry into premises and eight counts of theft from those premises. He had targeted business premises in Chipinge for unlawful entry accompanied by theft. He would access these premises through the roof and ceiling traps. The nature of property stolen varied, depending on premises targeted. The value under each count also varied, from as little as US$42 E per count to $779 on the most serious count. He was sentenced to a total of nine years' imprisonment.

Held, that the court *a quo* was faced with an unrelenting offender whom the probation officer had recommended appear in court due to his propensity to commit crimes. Although acknowledging his youth in sentencing him, F blameworthiness and protection of the community were among the factors taken into account by the court in sentencing the accused. The sentence appeared to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender. Yet the risks of incarcerating such a young offender over a lengthy period of time should not be so easily accepted for the sake of expediency. G

Held, further, that our Constitution, in s 81(h)(i), adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort – an obligation that is found in international law, as exemplified by art 37(b) of the United Nations Convention on the Rights of the Child to which Zimbabwe is a party. In terms of art 40(1), the treatment of a child should take into account the child's age and seek to H

promote A reintegration in society. Giving a 17-year-old an effective nine year sentence runs contrary to the letter and spirit of this constitutional imperative, when it is considered that he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children's rights, custodial punishment is regarded as criminally damaging B for children due to the criminogenic influences of prison. Section 81(2) of the Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children. Clearly the magistrate did not fully take into account these constitutional provisions which emphasise the duty to respect and protect children's rights in dealing with children under the age of 18.

Held, C further, that the probation officer's report said that poor family ties and lack of proper supervision predisposed the accused to anti-social behaviour. Sentencing him as an adult offender lacked justification when the factors surrounding his home environment were taken into account. There was no evidence that he had ever been referred to a juvenile D institution or of a history of prior intervention appropriate to juveniles. The fact that the probation officer had recommended that the accused be tried as an adult indicated that the provisions of ss 351 and 352 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which allow such juveniles to appear before a children's court and also to be placed in a training institute or reform school, were not regarded as options. E The probation officer had recommended a combined effort to rehabilitate the accused. This appeared to suggest that what the probation officer had in mind was a solution that would bring in a variety of players, including the community. A wider multi-disciplinary approach to crafting a solution was what was favoured, but this was not pursued. Although F the primary duty of the courts is to apply the law, failure to pay heed to wider dialogue is a cautionary example of the criticism that law tends to exclude other disciplines as irrelevant, preferring to see issues from the narrow prism of state law in particular. It is important that

courts, when presented with an opportunity to understand and craft solutions on critical issues affecting juveniles from a broader perspective, seize G the opportunity to do so. It is a crucial way of ensuring that courts are not out of touch with reality in the solutions they impose. It also ensures that the sentences that they pass are best from a holistic and informed perspective. A lengthy prison sentence was not the "combined effort" H the probation officer had in mind in rehabilitating the juvenile.

Tsanga J

Cases cited A

S v *CM (a juvenile)* HB-67-03

S v *Mahove & Ors* 2009 (2) ZLR 19 (H)

S v *Mavasa* 2010 (1) ZLR 28 (H)

S v *Nemukuyu* 2009 (2) ZLR 179 (H)

S v *Nyathi* 2003 (1) ZLR 587 (H) B

S v *TM (a juvenile)* HH-65-03

Legislation considered

Constitution of Zimbabwe 2013, s 81(1)(h)(i) & (2)

*International instruments*C

United Nations Convention on the Rights of the Child, arts 37(b) & 40(1)

Judgment

Tsanga J: The accused, aged 17, was convicted of eight counts of unlawful entry into premises as defined in s 131(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. In addition he was also convicted of eight counts under s 113(1)(a) of the same Act, which provision relates to theft. D For purposes of sentencing, the counts for both unlawful entry and those for theft were paired alongside into eight counts.

Factually the accused targeted business premises in Chipinge for unlawful entry accompanied by theft. He would access these premises through the E roof and ceiling traps. The nature of property stolen varied from items such as recharge cards and cell phones to groceries and cash, all depending on the premises targeted. The value under each count equally varied from as little as US$42 per count to as much as $779 on the most serious count. He was thus sentenced as follows:

1. Count 1 & 2 he received 24 months' imprisonment with none suspended. F (The value of the stolen property amounted to US$600)
2. Count 3 & 4, a sentence of 12 months wholly suspended on usual the conditions. (The value of goods involved amounted to $42, of which $27 was recovered).
3 Count 5 & 6, a sentence of 12 months wholly suspended on the usual G conditions. (Goods amounted to $70).
4. Count 7 & 8, a sentence of 12 months' imprisonment. (Goods amounted to $91 in value, of which $40 was recovered).
5. Count 9 & 10, a sentence of 12 months' imprisonment. (Goods amounted to $54.10). H

Tsanga J

6. Count 11 & 12, A a sentence of 24 months of which six months were suspended. (Amount of goods involved was $681).
7. Count 13 & 14 a sentence of 12 months' imprisonment. (Goods involved $52)
8. Count 15 & 16 he received 36 months' imprisonment of which six B months was suspended. (Value of goods was $779).

The sum total of years which he is expected to serve effectively amount to nine years.

The court was indeed faced with an unrelenting offender whom the probation officer had recommended appear in criminal court due to his propensity to C commit crimes. While the convictions are proper, the sentence induces a profound sense of shock for one so young. In *S* v *Mavasa* 2010 (1) ZLR 28 (H) it was stated that it is wrong to sentence juvenile offenders as if one is dealing with an adult offender. Courts were admonished to be slow to expose a convicted juvenile to the same rigours of punishment that it would impose on an adult. D

Although acknowledging his youth in sentencing him, blameworthiness and protection of the community were among the factors taken into account in sentencing the accused. The fact that two other records for which he had been convicted and sentenced had been in court on the same day as his sentence, put him in less favour with the trial magistrate in sentencing him. E He also took into account the fact that the accused had no capacity to pay restitution. The fact that he worked as tout or rank marshal were taken by the magistrate to be indicative of his emancipation and hence the justification for sentencing him as an adult.

The sentence appears to be clearly dictated by the need to protect the public F from a perceived delinquent and incorrigible young criminal offender. Yet the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency, as our courts have always emphasised. See *S* v *TM* HH-65-03; *S* v *CM* HB-67-03. Each sentence must also suit the offence and the offender. See *S* v *Nemukuyu* 2009 (2) ZLR 179 (H). G

Our Constitution adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort – an obligation that is found in international law as exemplified by art 37(b) of the United Nations Convention on the Rights of the Child, to which we are a party. Furthermore, in terms of art 40(1) the treatment of a child should take into account the H child's age and seek to promote reintegration in society.

2015 (1) ZLR p60

Tsanga J

Section 81(1)(h)(i) of the Constitution of Zimbabwe 2013 provides that a A person under 18 has the right "not to be detained except as a measure of last resort". Also, if detained he or she has the right to be detained *for the shortest appropriate period* (my emphasis).

Giving a 17-year-old an effective nine year sentence runs contrary to the letter and spirit of this Constitutional imperative when it is considered that B he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children's rights, custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison. The Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children. See s 81(2). Clearly the magistrate did not fully take into account these constitutional provisions which emphasise the duty to respect and protect children's rights C in dealing with children under the age of 18.

Some effort was however made, bearing in mind that the referral of the matter to be treated in criminal court was on the strength of a probation officer's observations. Where a juvenile commits an offence, the procedural safeguard of roping in the assistance of those with the requisite expertise in D dealing with juveniles in order for the court to make an informed decision is one that should be taken seriously by both the probation officer and the magistrate. The report details a life foot-printed by loss at an early age. The accused's mother died when he was two years old in 1999. While indeed a probation officer's report was sought and availed, an unexplained detail in E the report is the custody of the accused in the hands of his uncle, one Mr Cosmos Mtetwa, said to be currently 27 years old, which would mean that as the custodian he was 12 years old and a child himself when he was left with the responsibility of taking care of the accused. Even the other mentioned custodian in the report who is said to have stayed with him when he started his habit of running away from home, is only two years older than the said F Cosmos. These facts suggest an upbringing at an early age in what appears to be essentially child-headed households. If, as the report suggests, poor family ties and lack of proper supervision are what predisposed the accused to anti-social behaviour, it was certainly misplaced on the part of the magistrate to impose a heavy imprisonment sentence as a correctional measure. This G is clearly a case where the proportionality of the sentence should have been guided by the circumstances that fuelled the behaviour. In *S* v *Mahove & Ors* 2009 (2) ZLR 19 (H) it was stated that it is an act of dishonesty to tell an accused person that the court has considered their personal mitigatory features when in fact no such features have been considered. With a nine year sentence, a substantial part of his youthful life stands to be spent in prison. H

Tsanga J

Sentencing A him as an adult offender lacks justification when the factors surrounding his home environment are taken into account, if we are to go by what is contained in the probation officer's report. There was no evidence that he had ever been referred to a juvenile institution or of a history of prior intervention appropriate to juveniles. Rather than rushing to impose adult punishment in the form of a lengthy prison sentence that may merely B accentuate his path to becoming a hardened criminal, it seems to me at 17, he could have been given a chance by being referred to an appropriate juvenile institution for rehabilitation. It is the responsibility of the state and its officials who come into contact with cases of need to reduce chances of recidivism by thoroughly examining the range of possible interventions. It is C also the responsibility of all officials involved both judicial and non-judicial to be thorough in their assessments so as to give each accused child a real chance at being justly treated.

The probation officer's report had indicated that he be tried as an adult and therefore impliedly the provisions of s 351 and 352 of the Criminal Procedure and Evidence Act [*Chapter:9:07*] (which allows such juveniles to appear D before a children's court and also to be placed in a training institute or reform school) were not regarded as options. Regarding the rehabilitation of the juvenile, the probation officer's report made the following observations:

> "This is one of the few cases in Chipinge that has left residents with fear and shock and one would wonder what has befallen our children. Felix committed E a series of offences that we greatly condemn and corrective measure should be taken swiftly… *It is against this background that we call for a combined effort so as to rehabilitate the juvenile*..." (my emphasis).

Articulation and clarity of the meaning of this "combined effort" in reforming the juvenile as suggested in the probation officer's report is a call that the court ought to have paid heed to. This is more so in light of the fact that F the benefit of treating him as a child had been excluded. Reference to a "combined effort" would appear to suggest that what the probation officer had in mind was one that would bring in a variety of players including the community. A wider multi-disciplinary approach to crafting a solution was what was favoured. Yet this angle was not pursued. G

Although the primary duty of the courts is indeed to apply the law, failure to pay heed to wider dialogue is a cautionary example of the often made criticism that law tends to exclude other disciplines as irrelevant, preferring to see issues from the narrow prism of state law in particular. It is important that courts presented with an opportunity to understand and craft solutions on critical issues affecting juveniles from a broader perspective, seize the H opportunity to do so. It is a crucial way of ensuring that courts are not out

Tsanga J

of touch with reality in the solutions they impose. It also ensures that the A sentences that they pass are at least approached from a holistic and informed perspective. A prison sentence of nine years is not the "combined effort" the probation officer had in mind in rehabilitating the juvenile. It is a sentence that effectively removes the accused from society by locking him up and throwing away the keys for a very long time. B

I confirm the convictions in all 16 counts. However, on sentencing, I am of the view that this is indeed one of those cases where multiple counts are involved that are closely connected in nature to justify treating them together for sentencing as a way of ensuring that the cumulative effect is not too harsh. Although the general practice is to sentence each count separately with the option of some sentences running concurrently, where there is justification C the counts can be treated together. See *S* v *Nyathi* 2003 (1) ZLR 587 (H). In this case, doing so would be in line with the spirit of s 81(1)(h)(i) of the Constitution, aimed at minimising custodial punishment for children.

In view of the circumstances of the case and the counts involved, the sentence for all counts is altered as follows:

> Three years' imprisonment for all counts, of which one year is suspended D for five years on condition the accused does not during that time commit any offence involving unlawful entry for which he is sentenced to a term of imprisonment without the option of a fine.

The altered sentence should be brought to the attention of the accused.

Muremba J concurs. E

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ZFC LTD v KM FINANCIAL SOLUTIONS (PVT) LTD & ANOR 2015 (1) ZLR 63 (H)

Citation	2015 (1) ZLR 63 (H)
Case No	Judgment No. HH-47-15
Court	High Court, Harare
Judge	Zhou J
Heard	15 January 2015; *CAV*
Judgment	20 January 2015
Counsel	*T Mpofu,* for the applicant *C Nhemwa,* for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *judicial management – order for provisional judicial management – may contain directions staying proceedings against company – such directions only applicable to proceedings in existence at time of* D *provisional order – institution of proceedings not prohibited*

Headnote

Where a company is placed under provisional judicial management, the court's order may, in terms of s 301(1) of the Companies Act [*Chapter 24:03*], contain directions that while the company is under judicial management E all actions, applications and execution of writs and summonses against the company be stayed. The court has a discretion as to whether to issue such directions. The words "be stayed" mean that the section applies to actions, proceedings, writs, summonses and other processes already in existence at the time that the provisional order is granted. It does not, however, prohibit the institution of proceedings against the company, in F contra-distinction to the provisions of ss 209 and 213 of the Act, which provide that where a company is being wound up no action may be commenced against the company without the leave of the court.

Cases referred to

Irvin & Johnson Ltd v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (E)G

Samuel Osborn (SA) Ltd v *United Stone Crushing Co (Pty) Ltd* 1938 WLD 229

Legislation considered

Companies Act [*Chapter 24:03*], ss 209, 213 & 301(1) H

2015 (1) ZLR p64

Zhou J

Case information

T Mpofu, for the applicant A

C Nhemwa, for the first respondent

Judgment

Zhou J: This is an application for an order for the provisional winding up of the first respondent and for the appointment of a provisional liquidator. The application is being made on the grounds set out in s 206(f) and (g) of B the Companies Act [*Chapter 24:03*] that the respondent is unable to pay its debts and, further, that it is just and equitable that the respondent company be wound up. The first respondent is a company which was placed under provisional judicial management by an order of this court granted in Case No. HC 8479/13. The application is opposed by the provisional judicial manager of the first respondent. At the hearing of the application, Mr *Mpofu*C for the applicant applied for this application to be heard together with case No. HC 8479/13, which is now due for the confirmation or discharge of the provisional order of judicial management. The second respondent objected to the request and insisted on determination of the point *in limine* taken in its opposing papers *viz*. that the application is invalid as it was instituted without obtaining the leave of this court. I therefore heard argument on the D question of the validity or otherwise of the instant application and indicated that my conclusion on that point would inform the decision on whether or not to direct that this matter be set down for argument together with case No. HC 8479/13.

The brief background facts to the dispute between the parties are as follows: E

The first respondent applied for and was granted an order placing it under provisional judicial management in case No. HC 8479/13. The order was granted on 12 March 2014. According to the order, the return date was 30 July 2014. The applicant is one of the creditors of the first respondent. The applicant filed opposing papers in case No. HC 8479/13, in which it contested F the placement of the respondent under judicial management. Case No. HC 8479/13 is still pending. On 17 July 2014 the applicant instituted the instant application for an order for the provisional winding up of the respondent on the grounds referred to above.

The provisional judicial manager's contention is that the instant application is null and void as it was instituted without first obtaining the leave of this G court. Mr *Nhemwa*, who appeared for the second respondent, submitted that the application is invalid for want of compliance with the provisions of s 301(1) of the Companies Act [*Chapter 24:03*], as read with para 1(e) of the provisional judicial management order given in case No. HC 8479/13.

Section 301(1) of the Companies Act provides as follows: H

2015 (1) ZLR p65

Zhou J

> "A A provisional judicial management order shall contain –
>
> (a) the date of the return day, which shall not be less than sixty days from the date of the grant of the provisional judicial management order; and
>
> (b) directions that the company named therein shall be under the management, subject to the supervision of the court, of a provisional judicial manager appointed in terms of section *three hundred and two*, and that any other B person vested with the management of the company's affairs shall from the date of the making of the order be divested thereof; and
>
> (c) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, C as the court may consider necessary;
>
> and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court."

Paragraph 1(e) of the order granted in HC 8479/13 reads: D

> "All actions and applications and the execution of all writs, summons (*sic*) and other process against the applicant company shall be stayed and not proceeded with without the leave of this Honourable Court."

This matter turns on whether the provisions of s 301(1) and the relief granted in the order quoted above invalidate any proceedings which are instituted E after a company has been placed under provisional judicial management.

The first point to be made is that the staying of actions, applications and execution of writs and summonses in terms of s 301(1) is not an automatic or inevitable consequence of an order of provisional judicial management. Rather, it is relief which the court in its discretion may grant. See *Samuel Osborn (SA) Ltd* v *United Stone Crushing Co (Pty) Ltd* 1938 WLD 229; F*Irvin & Johnson Ltd* v *Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 237. That the court has a discretion whether or not to grant that relief is evident from the use of the word "may" in the section. Put in other words, the court is not enjoined to grant an order staying actions, proceedings and execution of writs in all circumstances when it grants an order for provisional judicial G management. Only the contents set out in paras (a), (b) and (c) of s 301(1) are peremptorily provided for as required in any provisional judicial management order. The consequences which ensue automatically upon the granting of a provisional judicial management order are those set out in s 301(2) of the Companies Act, namely, that all the property of the company is upon the granting of the order deemed to be in the custody of the Master, but as soon H as the provisional judicial manager assumes office the property will be in his

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custody. Put differently, the effect of a judicial management order is to take A away management and control of a company from the directors and place it in the hands of the judicial manager or his nominees: *Cilliers & Benade Corporate Law* 3 ed by H S Cilliers *et al* p 483; N Chadwick & P L Volpe *Zimbabwe Company Law* 2 ed p 172.

The second aspect is that the use of the words "be stayed and be not proceeded B with" in s 301(1) means to me that the section applies to actions, proceedings, writs, summonses and other processes already in existence at the time that the provisional order is granted. In the *Longman Dictionary of Contemporary English* the word "stay" is explained as follows: "to stop from going on, moving or having effect; hold back." Put in other words, it is only an action, proceeding, writ, *etc*. which is already in existence which can be stayed. If it C is not yet in existence, then there would be nothing to stay. If the legislature had intended that once an order of provisional judicial management has been granted, the instituting of proceedings against the affected company should be prohibited then it would have expressed the provision in the appropriate language. The language used in ss 209 and 213 of the Companies Act which relate to the winding up of a company illustrates the distinction between D "staying" of proceedings and prohibition of commencement of proceedings against a company. In s 213(a) the words used are:

> "no action or proceeding shall be *proceeded with* or *commenced against* the company except by leave of the court" (my emphasis).

In that section the expression "proceeded with" would apply to actions E or proceedings already in motion at the time that the winding up process is instituted, while the term "commenced" would apply to actions and proceedings which have not yet been instituted. In the light of the above analysis of the meaning of s 301(1) of the Act and para 1(e) of the order given in HC 8479/13, the application *in casu* is not invalid. The application F is not defective. The point *in limine* taken on behalf of the second respondent is therefore dismissed.

The other two objections *in limine* taken by the second respondent in its heads of argument were not argued. I therefore make no determination on them, and will leave them for argument when there is full argument on the matter. G

In view of the conclusion which I have reached that the instant application is not invalid by reason of the fact that no leave of this court was granted before it was instituted, I consider it appropriate that it be dealt with together with case No. HC 8479/13. That course is appropriate to avoid the potentiality of having two inconsistent orders relating to the same company. Such an undesirable scenario could arise if the court grants a final order for judicial H

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management A or discharges the provisional order in case No. HC 8479/13 and an order for the provisional winding up of the first respondent is granted in the instant application. I consider, too, that if the two matters are heard together the court will be in a position to dispose of both of them one way or the other given that in terms of s 305(1) of the Companies Act on the return day of a provisional judicial management order the court has the power to grant a final B judicial management order or discharge the provisional judicial management order or "make any order that it thinks just". The moratorium granted to the second respondent to prevent attachment of its goods by creditors is not in any way prejudiced by having the two matters heard together.

Both counsel argued that their clients be awarded costs in the event that C they succeeded. I prefer to leave the question of costs to be dealt with by the court when it determines the two applications. Accordingly, I will make no order as to costs in this matter.

In the result, it is ordered as follows:

1. Case No. HC 8479/13 shall be set down for hearing together with Case No. D HC 5984/14.
2. The question of costs shall be considered at the time that the two matters are heard together.

Gill, Godlonton & Gerrans, applicant's legal practitioners

C Nhemwa & Associates, first respondent's legal practitioners E

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MADYAUTA v MADZIVA 2015 (1) ZLR 68 (H)

Citation	2015 (1) ZLR 68 (H)
Case No	Judgment No. HH-22-15
Court	High Court, Harare
Judge	Uchena J & Mwayera J
Heard	20 December 2014; *CAV*
Judgment	21 January 2015
Counsel	Miss *R Bwanali,* for the appellant *T Nyakunika,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court – *local court – customary law procedure applicable rather than general* C *law – functus officio principle – applicable to proceedings in local courts*

Headnote

The law does not ordinarily allow a judicial officer to preside over the same case more than once. The *functus officio* principle simply means D that, after hearing a case for the first time, the judicial officer will have completed his functions over that case, and cannot hear it again. This rule is of universal application and ensures that justice is seen to be done. Allowing a judicial officer to preside over the same case more than once opens him to giving conflicting decisions. E

Under s 20(1) of the Customary Law and Local Courts Act [*Chapter 7:05*], "the procedure and law of evidence in local courts shall be regulated by customary law and not by the general law of Zimbabwe, and the proceedings in such courts shall be conducted in as simple and informal a manner as is reasonably possible and as, in the opinion of the person presiding over the court, seems best fitted to do substantial justice". F The intention of the Legislature is clearly to bar the application of general law principles of procedure and evidence from customary law proceedings. However, this provision does not mean that the *functus officio* principle does not apply to local courts. Under ss 23 and 24 of the Act, any person who is dissatisfied with the decision of a primary G court or headman's court may appeal to the community court; and an appeal lies from a decision of the community court to the provincial magistrate of the area. This means that these courts are not allowed to hear the same case again after determining it for the first time. To use the general law principle, they become *functus officio* after determining a customary law case. H

Uchena J

Cases cited A

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

Nissan Zim (Pvt) Ltd v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S)

Trustees, Leonard Cheshire Homes in Zim Central Trust v *Chite & Ors* 2010 (2) ZLR 631 (H)

ZESA v *Bopoto* 1997 (1) ZLR 126 (S) B

Legislation considered

Customary Law and Local Courts Act [*Chapter 7:05*], ss 20 & 29

Case information

Miss *R Bwanali,* for the appellant

T Nyakunika, for the respondent C

Judgment

Uchena J: The appellant and the respondent had a dispute over land which they took to Headman Ganje for determination. Headman Ganje presided over the same dispute twice giving two different judgments. He initially found in favour of the appellant, but subsequently found in favour D of the respondent. The respondent was aggrieved by Headman Ganje's second judgment, and appealed against it to Chief Saunyama's Court. Chief Saunyama found in favour of the appellant. The respondent then appealed to the Magistrate's court, which set aside Chief Saunyama's decision. The appellant then appealed to this court.

The appellant E raised several grounds of appeal, which will be considered if the point of law raised on appeal does not resolve the appeal. The appellant's counsel raised the issue of *functus officio* in her heads of argument. It is trite that a point of law can be raised at any stage even on appeal. See *Trustees, Leonard Cheshire Homes Zimbabwe Central Trust* v *Chite & Ors* 2010 (2) ZLR 631 (H), *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157, F*Nissan Zimbabwe (Pvt) Ltd* v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S), *ZESA* v *Bopoto* 1997 (1) ZLR 126 (S). It has therefore been properly raised and should be determined before the other grounds of appeal can be considered. If it succeeds it has the effect of resolving the appeal without considering the other grounds of appeal

Miss *Bwanali*G for the appellant submitted that the first judgment of Headman Ganje remains extant, so the Headman was *functus officio* when he presided over the same dispute for the second time. It is common cause that the headman presided over the same dispute twice. The law does not ordinarily allow a judicial officer to preside over the same case more than once. The *functus officio*

principle simply means after hearing a case for the first time H the judicial officer will have completed his functions over that case, and

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Tsanga J

cannot hear it again. This rule is of universal application and ensures that A justice is seen to be done. Allowing a judicial officer, to preside over the same case more than once opens, him, to giving, conflicting decisions, as happened in this case.

Mr *Nyakunika*, for the respondent, submitted that s 20(1) of the Customary Law and Local Courts Act [*Chapter 7.05*], provides against applying common law principles in customary law cases. It provides as follows; B

> "Subject to this Act, the procedure and law of evidence in local courts shall be regulated by customary law and not by the general law of Zimbabwe, and the proceedings in such courts shall be conducted in as simple and informal a manner as is reasonably possible and as, in the opinion of the person presiding over the court, seems best fitted to do substantial justice." C

The intention of the legislature is clearly to bar the application of general law principles of procedure and evidence from customary law proceedings. Miss *Bwanali*, for the appellant, while not disputing the clear meaning of s 20, took the court back into the provisions of the Customary Law and Local Courts Act in ss 23(1) and 24(1), which she submitted introduced the D principle of *functus officio* into customary law proceedings. Sections 23(1)and 24(1) provide as follows:

> "23 (1) Any person who is dissatisfied with any decision of a primary court may, in the time and manner prescribed, appeal against such decision to the community court within whose area of jurisdiction the primary court is situated. E
>
> 24 (1) Any person who is dissatisfied with any decision of a community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the community court is situated."

Sections 23(1) and 24(1) clearly provide for an appeal to the next higher court if a party is dissatisfied by a decision of the trial court, at primary court and community court levels. This means these courts are not allowed F to hear the same case again after determining it for the first time. They, to use the general law principle, become *functus officio* after determining a customary law case.

The facts of this case establish that the appeal against the primary court's second decision has scaled the hierarchy of the courts right up to this court G without being shot down for being a nullity. Each court laboured in vain on this nullity, on which nothing can depend. It remains a nullity and must now be correctly defined. It should never have been given a status while the real judgment of the primary court remained unnoticed. A nullity does not gain status because it has erroneously been worked on by higher courts. It has never been and will never be a valid decision of the primary court. If H

Tsanga J

any A party is aggrieved by the first and valid decision of the primary court it must start from there and not this nullity.

In view of the above, I find that the appellant's appeal is against a nullity and must therefore be up held. The respondent shall pay the appellants costs of suit.

MWAYERA J concurred. B

Mahuni & Matatu, appellant's legal practitioners

Chibaya & Partners, respondent's legal practitioners.

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JOHN v PRINCIPAL IMMIGRATION OFFICER & ANOR 2015 (1) ZLR 72 (H)

Citation	2015 (1) ZLR 72 (H)
Case No	Judgment No. HH-36-15
Court	High Court, Harare
Judge	Musakwa J
Heard	22 October, 5 November 2014; CAV
Judgment	21 January 2015
Counsel	*T M Kanengoni,* for the applicant *S Chihuri,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Costs – *security for – appeal from magistrates court – failure by appellant to provide security – not in itself ground for dismissing appeal – need for respondent to have obtained order compelling respondent to provide security* D

Immigration – *prohibited person – appeal by such person to magistrates court – determination in appellant's favour – not competent for immigration authorities to appeal against such determination – only recourse is to request magistrate to reserve question of law for Supreme Court* E

Headnote

The applicant had been declared a prohibited person by the first respondent. In terms of s 21 of the Immigration Act [*Chapter 4:02*] he appealed to the magistrates court, which upheld his appeal on the grounds that he had acquired domicile in Zimbabwe. The first respondent did not request the magistrate to reserve for the decision of the Supreme Court any question F of law which arose upon the appeal to the magistrates court, a question of domicile being, in terms of s 21(3) of the Act, a question of law. Instead, he sought to appeal to the High Court against the magistrate's decision. The applicant applied for the appeal to be struck out. He also raised issue with the respondents' failure to provide security for costs. G

Held, that if the respondents had a point of law that required determination, they ought to have stated their case through the immigration officer. This they should have done at the time of hearing of the appeal before the magistrates court. They could not seek to do so later by way of appeal. Their failure to exercise that option meant that they forfeited that right. The appeal noted was therefore a nullity and should be struck out. H

Musakwa J

Held, A further, that the Magistrates Court (Civil) Rules 1980 are silent as to what happens when an appellant does not furnish security for costs. It does not follow that where an appellant fails to furnish security for costs, the appeal should be dismissed. However, a respondent can apply for an order to compel an appellant to furnish security for costs. If such an order is not complied with, the court may order compliance within B a stated time. The applicant had not sought an

order compelling the respondents to furnish security for costs and it would not be competent to strike out a notice of appeal for that reason.

Case cited

Bheka v *Disablement Benefits Bd* 1994 (1) ZLR 353 (S) C

Legislation considered

Immigration Act [*Chapter 4:02*], ss 21 & 22

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 3 r 2; Order 31 r 2; Order 33 r 1

Supreme Court Rules 1964 (RGN 380 of 1964), r 36 D

Case information

T M Kanengoni, for the applicant

S Chihuri, for the respondents

Judgment

Musakwa J: E This is an application to strike out the appeal noted by the respondents in case number CIV "A"503/10 for being void.

The first respondent previously declared the applicant a prohibited person in terms of s 21 as read with s 22(1) of the Immigration Act [*Chapter 4: 02*]. The applicant lodged an appeal with the magistrates court. The appeal was F upheld on 23 June 2010. It is against the decision of the magistrates court that the first respondent noted an appeal with this court.

The grounds of appeal in the notice in contention are as follows:

"1. The magistrate erred in law in finding that the respondent's status as a prohibited person be set aside and that his deportation be declared null and void. G

2. The magistrate erred in law in finding that the respondent had acquired domicile and was therefore protected from being declared a prohibited person in terms of section 14 (1) of the Immigration Act [*Chapter 4:02*]."

In seeking to have the above-cited notice of appeal struck off, the applicant contends that there is no provision to appeal against the decision of the H magistrates court when one has regard to s 21(3) of the Immigration Act. It

is also contended that the respondents should have sought a referral of the A issue relating to domicile to the Supreme Court.

The applicant also raises issue with the respondents' failure to provide security for costs as prescribed in Order 31 r 2(b) of the Magistrates Court (Civil) Rules 1980.

In an opposing affidavit deposed to by Prosper Kambarami, it is contended B that the High Court has jurisdiction to hear the appeal. It is further contended that the magistrates court may, on its own accord refer a question of law for determination by the Supreme Court. There was no response to the allegation of failure to provide security for costs.

In support of this application, Mr *Kanengoni* submitted that they sought the striking off of the notice of appeal because the appeal process is taking too C long. This has created uncertainty on the part of the applicant as he has to plan his life. Mr *Kanengoni* also submitted that the appeal is defective as no security for costs was furnished.

On the other hand, Ms *Chihuri* for the respondents did not make submissions. She chose to abide by the heads of argument filed of record. D

Section 21(1), (2) and (3) of the Immigration Act reads as follows:

"(1) Subject to subsection (2), subsection (2) of section *eighteen* and section *twenty-two*, any person who receives notice in writing in terms of paragraph (a) of subsection (4) of section *eight* that leave to enter Zimbabwe has been refused or that he is a prohibited person, may appeal to the nearest magistrates E court against the refusal of leave to enter Zimbabwe or the allegation that he is a prohibited person, as the case may be.

(2) An appeal in terms of subsection (1) shall be noted –

(a) where the person is in Zimbabwe when he receives the notice referred to in that subsection, not later than three days, Saturdays, Sundays and public holidays excluded, after receiving such notice; F

(b) where the person is outside Zimbabwe when he receives the notice referred to in that subsection, not later than ten days, Saturdays, Sundays and public holidays excluded, after receiving such notice.

(3) A magistrates court –

(a) may, of its own motion, and shall, at the request of the appellant or of an immigration officer, reserve for the decision of the Supreme Court any G question of law which arises upon an appeal heard before such magistrates court; and

(b) shall state such question in the form of a special case for the opinion of the Supreme Court and transmit such special case to the registrar thereof; and for the purpose of paragraph (a) a question of domicile shall be treated as a question of law." H

2015 (1) ZLR p75

The A contention by the applicant is that there is no right of appeal against the decision of the magistrates court following a determination made in terms of s 21. As can be noted from subs (3), the appellant or an immigration officer may state a case arising from such appeal for determination by the Supreme Court.

In support of the contention that no appeal lies against the decision of the B magistrates court, counsel for the appellant cited the Supreme Court decision in *Bheka* v *Disablement Benefits Board* 1994 (1) ZLR 353 (S). In that case the Supreme Court had to decide on the import of a provision in the State Services (Disability Benefits) Act [*Chapter 16:05*], which is almost similar to that in s 21(3) of the Immigration Act. In that regard s 13(4) thereof states that: C

> "Where in the opinion of the Appeal Board any matter to be determined by it rests wholly or partly on a point of law, the Appeal Board may on application by the appellant or the Board state a case for the determination of such question of law by the Supreme Court."

In interpreting the provision in the State Services (Disability Benefits) Act Gubbay CJ had this to say at 356: D

> "This provision envisages that where a matter brought before the Appeal Board concerns a point of law, the Supreme Court becomes involved in an advisory capacity if a case is stated to it. The application to state a case must be made to the Appeal Board by either the appellant or the Board. Once made, the Appeal Board is vested with a discretion whether to grant or refuse the application. Obviously it will not state a case if of the opinion that the point of law is of a E trivial nature or one directly covered by judicial authority. Nor will it state a case *mero motu.* What is plain is that the application to the Appeal Board must be made during the hearing of the matter and precede its determination of the appeal. It cannot be moved once the appeal has been upheld or dismissed. Upon referral, the Supreme Court sits as a court of first instance and does not exercise appellate jurisdiction. See *McTaggart* v *Disabled Benefits Board* 1975 (1) RLR 53 (A). F After the stated question of law has been answered, the hearing before the Appeal Board is resumed. It is that body which must then render its decision on the appeal before it.
>
> No such application was made to the Appeal Board, either on behalf of the appellant or the Board. Consequently access to this court under s 13(4) was lost.
>
> Mr *Mutsonziwa*, who appeared for the so-called appellant, correctly conceded G that the decision of the Appeal Board was final and that the present appeal had been improperly enrolled. He sought to argue, however, that in the exercise of this court's inherent jurisdiction it should set aside the decision of the Appeal Board and remit the appeal to it, thereby enabling the appellant to present the requisite application under s 13(4)."

Applying the reasoning in *Bheka*'s case, it follows that, if the respondents H had a point of law that required determination, they ought to have stated their

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2015 (1) ZLR p76

case through the immigration officer. This they should have done at the time A of hearing of the appeal before the magistrates court. They cannot seek to do so by way of appeal which they have noted. Their failure to exercise such an option means they forfeited that right and cannot do so by way of appeal. It therefore means that the appeal noted is a nullity and should be struck out.

On the issue of security for costs, Order 31 r 2(2) of the Magistrates Court (Civil) Rules provides that: B

"An appeal shall be noted by –

(a) the delivery of notice; and

(b) unless the court of appeal otherwise directs, giving security for –

(i) the respondent's costs of appeal to the amount of one hundred dollars; C

(ii) the costs of the preparation of a copy of the record to the amount estimated by the clerk of the court:

Provided that a clerk of the court may, in his discretion, accept a written undertaking from the appellant to pay for the costs of the preparation of the record."

The rules are silent on what happens when an appellant does not furnish security for costs. It does not follow that where an appellant fails to furnish D security for costs, the appeal should be dismissed. In this respect see Order 33 r 1(1) of the Magistrates Court (Civil) Rules which states:

"Except as is otherwise provided in these rules, failure to comply with these rules or with any request made in pursuance thereof shall not be a ground for judgment against the party in default."

Contrast this provision with r 36 of the Rules of the Supreme Court which E provides:

"(1) If an appellant who is required to furnish security for the respondent's costs of appeal fails to furnish such security within the period prescribed in subrule (5) of rule 46, the respondent may forthwith give notice to the appellant that, on the date specified in the notice, being not less than five days after service of the notice, he will apply to a judge for dismissal of the appeal by reason of F such failure, and for such other order specified in the notice as he may require."

In the absence of such a provision in the Magistrates Court (Civil) Rules, it means then that a respondent can apply for an order to compel an appellant to furnish security for costs. In this respect see Order 33 r 1(2) of the Magistrates Court (Civil) Rules which states that: G

"Where any provision of these rules or any request made in pursuance of any such provision has not been fully complied with, the court may on application order compliance therewith within a stated time."

The applicant did not seek an order compelling the respondents to furnish security for costs. Therefore it would not be competent to strike out a notice of appeal on that basis. H

In A the result, it is ordered as follows:

1. The notice of appeal filed by the respondents in Civ 'A' 503/10 be and is hereby struck out.
2. The respondents shall pay the applicant's costs. B

Nyika, Kanengoni & Partners, applicant's legal practitioners

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

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WENZHOU ENTERPRISES v CHEN 2015 (1) ZLR 78 (H)

Citation	2015 (1) ZLR 78 (H)
Case No	Judgment No. HH-61-15
Court	High Court, Harare
Judge	Makoni J
Heard	24 July 2014; CAV
Judgment	21 January 2015

Counsel *S M Chisoko*, for the applicant
J Samukange, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Court – *jurisdiction – peregrinus – how jurisdiction acquired – submission to* C *jurisdiction – when party may be said to have submitted to jurisdiction*

Headnote

The general rule in our civil practice and procedure is that a person domiciled and resident in a foreign country cannot be sued in our courts as they do D not have jurisdiction over that person. For that reason there is usually need for an attachment *ad fundandam jurisdictionem* of that person or his property in order to make him amenable to the jurisdiction of the court. Such person or his property can only be attached while he it is within the jurisdiction of the court and only after the attachment order E has been issued by the court. Although the main object of the attachment is to find or confirm jurisdiction, a further object of the attachment is to furnish an asset against which execution can be levied to satisfy the judgment which may be given so that the court's sentence will not be rendered nugatory. However, a *peregrinus* may submit to the jurisdiction of the court. Submission can take many forms, which can run from a F formal consent contained in a written contract to a consent from the bar. Submission can also be implied. An implied submission to jurisdiction must be clear so as to establish it as a legal certainty. Failure to defend legal proceedings instituted does not necessarily constitute submission to the jurisdiction of the court, nor can the fact that a defendant contested another issue, in addition to the issue of jurisdiction, be construed as G a clear tacit acceptance by the defendant of the court's jurisdiction. However, where the defendant pleads to the merits without contesting the court's jurisdiction, or files a notice of opposition and heads of argument, it can be said that he has submitted to the court's jurisdiction. If there had ever been an intention to contest jurisdiction, the issue should have H

Makoni J

been A raised *in limine*, before the adjudication on the merits. Raising the issue only on the day of the hearing would indicate that there never was an intention to contest the issue of jurisdiction.

Cases referred to

Chirongoma v *TDG Logistics & Anor* 2011 (1) ZLR 98 (H)

Wong & Ors v *Liu & Anor* 2013 (2) ZLR 576 (H) B

Maschinen Frommer GmbH & Co KG v *Trisave Eng Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C)

Mashingaidze v *Mashingaidze* 1995 (1) ZLR 219 (H)

Supercat Inc v *Two Oceans Marine CC* 2001 (4) SA 27 (C)

Zimbabwe Bonded Fibre Glass (Pvt) Ltd v *Peech* 1987 (2) ZLR 338 (S) C

Case information

S M Chisoko, for the applicant

J Samukange, for the respondent

Judgment

Makoni J: The applicant approached this court seeking interdictory relief D against the respondent. The applicant holds mining rights to a mining location called Eldorado Mine. It was incorporated on 29 May 2009 and the respondent and his daughter, Chen Xiandong, were the initial directors and subscribers who held sixty and forty ordinary shares respectively.

The applicant's position is that at a later stage the respondent took on board E one Charles Fredrick Jones and one Kennedy Piti who were issued with 4900 and 200 ordinary shares respectively. In May 2012 the respondent and Jones sold their entire shareholding in the applicant, with Jones transferring his shareholding to one Tafirenyika Kambarami and the respondent and his daughter transferring their shareholding to Haixi Zhou, the deponent to the founding affidavit. A new register of directors was lodged with the Registrar F of Companies wherein the respondent, his daughter and Jones resigned as directors. The respondent surrendered the company documents to the new directors. He also, without the approval of the applicant's board of directors, lodged a fraudulent CR14 in which he appointed himself as a director without authority from the applicant's directors, and withdrew a total of $32 800 from the applicant's bank account. It is for the above reasons that the applicant G seeks the interdictory relief.

The respondent's position is that he is a shareholder and a director of the applicant. He owns 24.5 per cent of the applicant, just as the deponent to the founding affidavit who owns 24.5 per cent. He disputes that he at one point issued shares to Jones. He puts in issue the signature that appears on H the allotment return. He did not sell his shares to Zhou neither did he resign

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as a director of the applicant. He also avers that he is the sole signatory to A the applicant's bank account.

At the hearing of the matter, Mr *Samukange* took two points *in limine*

(i) That this court has no jurisdiction to hear the matter as the respondent is a *peregrinus*.

(ii) That there are material disputes of fact which cannot be resolved on the B papers.

I will deal with the points *in limine* in *seriatum*.

Jurisdiction

Mr *Samukange* submitted that this court has no jurisdiction to hear this matter as the respondent's property. It has also not tendered security of costs. He C referred the court to *Wong & Ors* v *Liu & Anor* 2013 (2) ZLR 576 (H) and *Chirongoma* v *TDG Logistics & Anor* 2011 (1) ZLR 98 (H) at 102.

Mr *Chisoko* conceded that the respondent is a *peregrinus* but argued that he had submitted to the jurisdiction of the court. Furthermore, the subject matter at issue is within the jurisdiction of the court. D

The above issue of where an *incola* intends to sue a *peregrinus* was dealt with by Mathonsi J in *Wong & Ors supra,* at 581, where he stated:

> "…. our civil practise and procedure is clear that a person domiciled and resident in a foreign country cannot be sued in this court as it does not have jurisdiction over that person. For that reason there is need for an attachment *ad fundandam jurisdictionem* of that person or his property in order to make him amenable to E the jurisdiction of the court. Such person or his property can only be attached while he or it is within the jurisdiction of the court and only after the attachment order has been issued by the court."

See also Herbstein and van Winsen *Civil Practice of the High Courts of South Africa* 5 ed Vol 1 p 96. The object of attachment was clearly stated by the above authors on p 97 when they stated: F

> "Although the main object of the attachment is to find or confirm jurisdiction, a further object of the attachment is to furnish an asset against which execution can be levied to satisfy the judgement which may be given so that the courts sentence will not be rendered nugatory or, as it has been called a *brutum fulmen*."

From the above, it is clear that where an *incola* intends to sue a *peregrinus*, G an attachment to find or confirm jurisdiction is necessary in order to make the *peregrinus* defendant amenable to the jurisdiction of the court. Mr *Chisoao*, whilst conceding that the defendant is a *peregrinus*, argued that he submitted himself to the jurisdiction of the court by responding to the application.

Did the respondent submit to the jurisdiction of the court? Submission to jurisdiction can take many forms which can run from a formal consent H

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Makoni J

contained A in a written contract to a consent from the bar. The applicant is relying on implied consent. Herbstein and van Winsen *op cit* at p110 state:

> "A submission to jurisdiction must be clear so as to establish it as a legal certainty. Failure to defend legal proceedings instituted does not necessarily constitute submission to the jurisdiction of the court, nor can the fact that a defendant contested another issue, in addition to the issue of jurisdiction, be construed as B a clear tacit acceptance by the defendants of the court's jurisdiction."

In casu, the respondent filed a notice of opposition and heads of argument. He did not contest the court's jurisdiction in those pleadings. It is only on the day of hearing that the respondent raised the issue *in limine*.

In *Mashinen Frommer GmbH & Co KG* v *Trisave Engineering Machinery Supplies*C*(Pty) Ltd* 2003 (6) SA 69 (C) at 81 van Reenen J stated the following:

> "C F Forsyth *Private International Law* 3 ed at 26e stated that there are no decided cases in which submission by conduct has been accepted or rejected as a means of conferring international competence on a foreign court which it would otherwise not possess. Taking guidance from matters of internal competence, D where submission by conduct is not readily inferred, but it is required that the defendant's conduct 'must be of such a nature that the court is able to say that it is consistent only with acquiescence' (per Vieyra AJ in *du Preez* v *Philip King* 1963 (1) SA 80 1 (W) at 803, he submits that courts should exercise caution and not find that there has been submission to jurisdiction unless the parties have clearly accepted the foreign court's jurisdiction, for example where a defendant E pleads to the merits without contesting a court's jurisdiction."

Van Reenen J at p 52 quoted Conradie J (as he then was) with approval in *Supercat Incorporated* v *Two Oceans Marine CC* 2001 (4) SA 27 (C) at 32f where he stated that the enquiry into whether there has been submission by conduct concerns the defendant's state of mind as evidenced by his/her/its F conduct.

Looking at the circumstances of this matter, it is my view that the respondent submitted to the jurisdiction of the court. In our jurisdiction, we have the procedural regime where a plea of lack of jurisdiction is adjudicated upon *in limine* prior to the adjudication of the merits of the matter. If the respondent G did not intend to submit to the jurisdiction of the court he would have raised the issue *in limine* in his notice of opposition. His conduct, *in casu*, clearly points to a person who had no intention whatsoever to contest the jurisdiction of the court. It came as an afterthought, after he had pleaded to the merits of the matter.

I H will therefore make a finding that the court has jurisdiction in this matter

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Makoni J

Material disputes of facts A

From the way I outlined the facts of this matter at the onset, it is clear that there are material disputes of facts. The versions of the parties as to the events in this matter are so divergent that this court cannot reconcile them on the papers. Both deponents to the affidavits in this matter aver that they are the shareholders and directors of the applicant. They both produce share B certificates and allege that the other's share certificates are fake. The deponent to the founding affidavit avers that he purchased the respondent's shares. There is no agreement attached.

Mr *Chisoko* did not make any meaningful submissions on this issue. It is clear that there are material disputes of fact which cannot be resolved on the papers. The respondent applied for the application to be dismissed on C that basis. It must have been clear to the applicant that there is a "*bona fide* and not mere illusion of dispute of fact". See *Zimbabwe Bonded Fibre Glass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339C. The same approach was adopted in *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) at 221G-222A where Robinson J stated:

> "It is necessary to discourage the too-oft recurring practice whereby applicants D who I know or should know, as was the case with the applicant in this matter, that real and substantial disputes of fact will or

are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, at the worst, they can count on the court to stand over the matter for trial.

Unless this practice is seen to be curbed, applicants will continue to believe that they have nothing to lose and, indeed, everything to gain tactically by embarking E upon application proceedings notwithstanding their knowledge or belief at the time of doing so that the respondent will be able to show that genuine and serious dispute of fact exist on the papers."

I will have no difficulty in dismissing the application.

I will grant the point *in limine* and proceed to grant the following order. F

It is ordered that

1. The application is dismissed.
2. The applicant to pay the respondent's costs.

Tamuka Moyo Attorneys, applicant's legal practitioners G

Chibune & Associates, respondent's legal practitioners

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S v MALUNDU 2015 (1) ZLR 83 (H)

Citation	2015 (1) ZLR 83 (H)
Case No	Judgment No. HH-68-15
Court	High Court, Harare
Judge	Kudya J and Assessors
Heard	6 & 7 June 2011; 4 June & 14 July 2014; 14 & 16 January 2015; *CAV*
Judgment	23 January 2015
Counsel	*B Murevanhema,* for the State Mrs *W Kaneta,* for the accused person
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *offences under Criminal Law Code – murder – death penalty – when may be imposed – only may be imposed where* D *murder committed aggravating circumstances – procedure to be followed*

Headnote

Section 48 of the Constitution of Zimbabwe provides for the right to life to every person. Subsection (2) provides that a law may permit the death penalty to be imposed only on a person convicted of

murder committed in aggravating circumstances. That law must permit the court a discretion E as to whether or not to impose the death penalty. No law to this effect is yet in place.

Section 336(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] empowers the High Court to impose the death penalty. Section 337 mandates the imposition of the death penalty in the absence of extenuating circumstances. There was a recognisable distinction in our F law and practice between extenuating circumstances and aggravating features before the new constitutional dispensation.

Until a law contemplated by the Constitution is promulgated, the Criminal Procedure and Evidence Act must be interpreted in conformity with the Constitution. The effect of such an interpretation is that extenuation is no longer relevant and the death penalty is no longer mandatory. It may G only be imposed where the sentencing court finds that the murder was committed in aggravating circumstances. The procedure should be along these lines: the court is addressed in mitigation by the accused, followed by aggravation by the State and thereafter the court determines in the normal way whether aggravating circumstances exist that warrant the H death penalty.

Kudya J

Cases referred to A

S v *Gatsi* S-37-90

S v *Jacob* 1981 ZLR 1 (S)

S v *Mutsinze* HH-645-14

S v *Mutsunge & Anor* 1987 (1) ZLR 53 (S)

S v *Sibanda* HB-30-13 B

S v *Tshuma* 1991 (1) ZLR 166 (S)

Legislation considered

Constitution of Zimbabwe 2013, s 48

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 336(1)(a)

Case information

B Murevanhema, for the State C

Mrs *W Kaneta,* for the accused person

Judgment

Kudya J: The accused person was charged with the murder of Nyamitumba Saopa who died at Ealing Farm Beatrice on 13 October 2008. He was alleged to have assaulted the deceased with a rubber baton, resulting in hypovolemic D shock, laceration of the spleen and pulmonary haemorrhage from which the deceased died. He denied the charge.

[*The learned judge then considered the evidence and concluded*:]

Accordingly, we return a verdict of guilty of murder with constructive intent in terms of s 47(1)(b) of the Criminal Law (Codification and Reform) Act E [*Chapter 9:23*].

Sentence

Section 48 of the Constitution of Zimbabwe 2013 provides for the right to life to every person. Subsection (2) thereof states:

> "(2) A law may permit the death penalty to be imposed only on a person convicted F of murder committed in aggravating circumstances, and –
>
> (a) the law must permit the court a discretion whether or not to impose the penalty".

The contemplated law that complies with this constitutional provision is not yet in place. Part XVIII of the Criminal Procedure and Evidence Act [*Chapter 9:07*] comprehensively deals with the

punishments that may be imposed for G all criminal offences in Zimbabwe. Section 336(1)(a) empowers the High Court to impose the death penalty. Section 337 mandated the imposition of the death penalty in the absence of extenuating circumstances.

There was a recognisable distinction in our law and practice between extenuating circumstances and aggravating features before the new H

Kudya J

constitutional A dispensation. *S* v *Jacob* 1981 ZLR 1 (S), *S* v *Mutsunge & Anor* 1987 (1) ZLR 53 (S) and *S* v *Tshuma* 1991 (1) ZLR 166 (S) underline the distinction and may throw light on the meaning of the present constitutional provision.

My view is that, until a law contemplated by the Constitution is promulgated, B the Criminal Procedure and Evidence Act, *supra*, must be interpreted in conformity with the Constitution. The effect of such an interpretation is that extenuation is no longer a requirement and the death penalty is no longer mandatory. It may only be imposed where the sentencing court finds that the murder was committed in aggravating circumstances. The procedure envisaged may very well be along the lines intimated by Ebrahim JA in *S* v *Tshuma*C*supra* at 170B. The court is addressed in mitigation by the accused, followed by aggravation by the State and thereafter the court determines in the normal way whether aggravating circumstances that warrant death exist. This appears to have been the approach adopted by Hungwe J in *S* v *Mutsinze* HH-645-14. It is the approach that commended itself in the present matter.

In D arriving at the appropriate sentence, I took into account the personal circumstances, social and health status of the accused as outlined by his counsel. He is a 49-year-old first offender with a wife and two minor children who look up to him for sustenance. He also supports his elderly and blind mother and three nieces and nephews. He is the sole breadwinner. He was employed as the head of security at the farm in question. He will lose his job E as a result of the conviction. He is of ill health. The case has been pending for the past six years. Even though he was on bail, he suffered the agony and anxiety associated with criminal trials while awaiting the conclusion of this matter. All these constitute mitigation.

In aggravation, he killed a fellow employee and breadwinner with two others F who are at large. He abused his position of authority over the deceased. The assault which resulted in death was brutal and callous. It was inflicted on a defenceless deceased whom he suspected of theft of irrigation pipes. He took the law into his own hands. He used a rubber baton. His duty after apprehending the deceased was to hand him over to law enforcement agents G for investigation. He did not protect the deceased from harm.

The circumstances in which the crime was committed and the nature of the crime far outweigh the mitigatory features advanced by the accused. The aggravating features found do not, however, call for the imposition of the death penalty. The appropriate sentence, in line with precedent, for a conviction of murder with constructive intent is a term of imprisonment. See *S* v *Sibanda*H HB-30-13, a culpable homicide conviction, where a 39-year-old son who

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Kudya J

killed his mother with a brick was sentenced to eight years' imprisonment A and *S* v *Gatsi* S-37-90 where a wife who poisoned her husband in retaliation of a brutal assault perpetrated on her was on appeal found guilty of murder with constructive intent and sentenced to eight years' imprisonment. Society looks up to the courts for the protection of the sanctity of life.

The appropriate sentence that reflects society's disapproval of his actions but takes into account his mitigation is one of ten years' imprisonment. B

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

W O M Simango & Associates, accused's legal practitioners

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MUSIMWA & ASSOCIATES & ANOR v ZILINDA & ANOR 2015 (1) ZLR 87 (H)

Citation	2015 (1) ZLR 87 (H)
Case No	Judgment No. HH-20-15
Court	High Court, Harare
Judge	Uchena J & Mwayera J
Heard	18 November 2014; *CAV*
Judgment	21 January 2015
Counsel	*K Musimwa,* for the appellants *R Dembure,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Legal practitionerC – *conduct and ethics – appearance in court – practitioner appearing as party in one matter – also engaged as counsel in a superior court – duty to appear in matter in which he is a party, irrespective of hierarchy of courts – must seek leave to be excused*

Practice and procedureD – *judgment – default judgment – grounds – wilful default – party to matter a legal practitioner – also engaged as counsel in a superior court – duty to appear in matter in which he is a party, irrespective of hierarchy of courts – must seek leave to be excused*

Headnote

The E appellants were sued by the respondents in the magistrates court. They entered appearance to defend and pleaded to the respondents' claim, leading to the case being set down for a pre-trial conference. The appellants did not attend the pre-trial conference, leading to the respondents applying for a default judgment, which was granted, although the magistrate found that the appellants were not in wilful default. In an application for F rescission, the appellants told the magistrate that they had not attended court because the second appellant was appearing in the High Court, which should be given precedence if a legal practitioner's attendance is required in both courts. The respondents submitted that a litigant cannot choose to go to work instead of going to court. The issue on appeal was G whether the precedence created by the hierarchy of courts applies where a legal practitioner chooses to go to work instead of attending court as a litigant; in other words, can a litigant deliberately choose to go to work instead of attending court, and not be in wilful default?

Held, that a litigant in a lower court cannot hide behind the hierarchy of the courts to avoid attending his case at the lower court. There is a H vast difference between a legal practitioner appearing for litigants in

Uchena J

the High Court and the magistrates court, and one who is a litigant in A the magistrates court and is also to be representing a client in the High Court. In the former situation, his appearance in the High Court takes precedence. In the latter, his appearing in the magistrates court should take precedence. The reason is simple. A litigant cannot come before the court and say "I did not come to court to defend myself against the B plaintiff's case, because I had gone to work". A legal practitioner goes to the courts to work for his clients. When he is required to go to court as a litigant, he is going there to represent himself as a litigant, and cannot give priority to his own work. A litigant who chooses to go to work instead of going to court to prosecute or defend his case, will obviously be in wilful default. This is because attending court takes precedence over C going to work. Litigants should excuse themselves from their work so that they can attend court. A reasonable litigant seeks a postponement of one of the cases when two cases he is involved in – one as a legal practitioner and one as a litigant – are set down for hearing at the same time. He cannot just stay away in the hope that he will thereafter apply for rescission on the grounds that he was appearing in a superior court D for his client. The appellant's failure to contact the magistrates court and the legal practitioner for the respondents or to ask to be excused from one of those appearances were indications that the appellants were in wilful default.

Cases cited E

Fletcher v *Three Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S)

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

Nissan Zim (Pvt) Ltd v Hopitt (Pvt) Ltd 1997 (1) ZLR 569 (S)

Trustees, Leonard Cheshire Homes in Zim Central Trust v Chite & Ors 2010 (2) ZLR 631 (H) F

ZESA v Bopoto 1997 (1) ZLR 126 (S)

Case information

K Musimwa, for the appellants

R Dembure, for the respondents

Judgment

Uchena J: The appellants were, according to a lease agreement they and the G Estate late Givie Chizema signed, the respondents' tenants. The respondents are co-executors of the estate of the late Givie Chizema.

The appellant's were sued by the respondents in the magistrates court. They entered appearance to defend and pleaded against the respondent's claim leading to the case being set down for a pre-trial conference. The appellants H

Uchena J

did A not attend the pre-trial conference, leading to the respondents' applying for default judgment, which was granted.

The appellants applied to the court *a quo* for the rescission of the default judgment. The court *a quo* dismissed the appellant's application. The appellants appealed to this court against the dismissal of their application for recession. B

The appellants premised their appeal on the following grounds of appeal:

1. The magistrate in the court *a quo* erred by failing to find out that only one of the appellants was part of the lease agreement.
2. The magistrate erred by failing to find out that the matter was *res judicata*.
3. The magistrate erred by failing to find out that the respondents were C representing a deceased estate and therefore had to furnish the court with properly issued out letters of administration.
4. The magistrate misdirected himself by failing to find out that the appellants were not in wilful default of court and that the explanation given was reasonable, as the appellants' representative is a sole legal practitioner and was attending a matter in the High Court. D

5. The magistrate misdirected himself by failing to find that the appellants had a bona fide defence to the respondent's claim.
6. The magistrate also erred by failing to find out that the lease agreement was not properly drawn out and therefore invalid.
7. The magistrate failed to find out that the appellants' at all material times E defended the matter and as such the matter needed to be determined on the merits and not on technicalities.

One appellant

The appellant's allegation that there is only one appellant is not supported by the facts the appellants placed before the court. The lease agreement on F the record indicates that the first appellant was the tenant, represented by the second appellant. The first appellant, in its founding affidavit for the application for rescission, said:

> "The first respondent is a law firm and has never operated from 51 Kambanji Drive, Glen Lorne, Harare; which is a residential place. The only reason it was joined as a party was that the second respondent who rented the place is a main G partner in the first respondent".

This is not correct because the lease agreement indicates that the first appellant is the leasee represented by the second appellant. This confusion was created by the appellants who unnecessarily involved a law firm in the second appellant's lease agreement. Mr *Dembure* for the respondents H therefore correctly pointed out that second appellant,

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> "used the first appellant as a vehicle to create legal complications, yet he negotiated A the lease for his own benefit and comfort".

It is apparent from the record that the second appellant is the *alter ego* of the first appellant. He seems to have used the law firm to drag his weight around and end up bullying the respondents as he seems to be doing. That could only have been unravelled at the trial. As things stand, both appellants have B been correctly cited as they are indistinguishable parties. The first appellant is the lessee, while the second appellant is the occupant. It is therefore clear that the first appellant is involved as the lessee, while the second appellant is the one who stayed at the leased property. There is therefore no merit in this ground of appeal.

Res Judicata C

The appellants alleged that this case was *res judicata* because case No. 27732/12 between the same parties and on the same facts was dismissed by the court *a quo* on 30 January 2013 and that summons issued under case No. 24504/12 were withdrawn. It is common cause, that case No. 27732/12 was dismissed for want of proper citation of the parties. It was not heard on the D merits. It is therefore not *res judicata*. The withdrawal of the summons in case No. 24504/12, did not dispose of the matter on the merits. The principle of *res judicata* only applies, were the case has been determined on the merits between the same parties. There is therefore no merit in this ground of appeal.

Respondent's letters of administration E

The appellants submitted that the respondents, who were representing a deceased estate, should have furnished the court with properly issued out letters of administration. The issue of *locus standi* should be raised as a special plea or a preliminary issue which can be determined separately before the hearing or at the hearing of the case at the instance of the aggrieved party. There is F no evidence on record that it was raised as a special plea and set down for determination. The appellants should therefore have attended court to raise it as an issue for trial. Their failure to attend the pre-trial conference deprived them of an opportunity to raise it as an issue for trial. The appellants therefore denied themselves an opportunity to raise this issue. It cannot therefore be raised on appeal against the dismissal of their application for recession. G

Wilful default

The appellants erroneously appealed against the magistrate's decision on this aspect. The magistrate had found them to not have been in wilful default. In his reasons for judgment the magistrate said: H

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Uchena J

> "An A applicant must satisfy two requirements for the application to succeed. Firstly, that he was not in wilful default and he has a *bona fide* defence to the claim. On the first requirement the applicant without more passes."

The magistrate had clearly found that the appellant was not in wilful default.

It is strange that the appellants appealed against a finding in their favour. This has, however, brought before the court a point of law which must be B corrected. The appellants had in their application for rescission told the court *a quo* that they had not attended court because the second appellant was appearing in the High Court, which should be given precedence if a legal practitioner's attendance is required in both courts. The respondent in responds to this ground of appeal submitted that a litigant cannot choose to C go to work instead of going to court and thereafter say that he was not in wilful default. It seems the respondent was also of the mistaken view that the magistrate had found in the respondent's favour on this aspect.

When the court *mero motu* raised this issue, which it was entitled to do, the parties fully ventilated it. It is now trite that a point of law can be raised at any stage even on appeal. See *Trustees, Leonard Cheshire homes Zimbabwe Central Trust*D v *Chite & Ors* 2010 (2) ZLR 631 (H), *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157, *Nissan Zimbabwe (Pvt) Ltd* v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S), *ZESA* v *Bopoto* 1997 (1) ZLR 126 (S). The point of law which arises in this case is this: does the precedence created by the hierarchy of courts apply in cases where a legal practitioner chooses E to go to work instead of attending court as a litigant? Put differently, can a litigant deliberately choose to go to work instead of attending court, and not be in wilful default?

The appellants were given notice of the set down of a pre-trial conference. They do not say they were not aware of the set down date. They say their representative, one Kelvin Musimwa, is the only legal practitioner in the F law firm. He was appearing in the High Court, hence did not appear in the magistrates court where he and his law firm were litigants. Mr *Dembure* for the respondent submitted that a legal practitioner who is a litigant in a lower court cannot hide behind the hierarchy of the courts to avoid attending his case at the lower court. I agree. There is a vast difference between a legal G practitioner appearing for litigants in both the High Court and the magistrates court, and a legal practitioner who is a litigant in the magistrate's court and has a case he should be representing in the High Court. In the former situation, his appearance in the High Court takes precedence. In the latter, his appearing in the magistrates court should take precedence. The reason is simple. A litigant cannot come before the court and say "I did not come H to court to defend myself against the plaintiff's case, because I had gone to

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Uchena J

work". A legal practitioner goes to the courts to work for his clients. When A he is required to go to court as a litigant, he is going there to represent himself as a litigant and cannot give priority to his own work. A litigant who chooses to go to work instead of going to court to prosecute or defend his case will obviously be in wilful default. This is because attending court takes precedence over going to work. Litigants should excuse themselves from their work so that they can attend court. B

In this case, the second appellant, fully aware of the need to attend court with the the first appellant as co-litigants, chose to go to work to represent clients instead of attending their own case. The first appellant also chose not to attrend. The second appellant's explanation that the case he was representing in the High Court was rolled over to the afternoon is not supported by the C purported affidavit of Prince Hurungudo, because it was not signed by the deponent, nor commissioned by a commissioner of oath. There is no supporting affidavit by Prince Hurungudo before the court. Even if it was not defective, it would not have been of any assistance to him because it does not state that he asked to be excused on account of the case at the magistrates court. D The appellants' own affidavits do not state that they sought to be excused from the High Court case or sought the postponement of their case in the magistrates court. A reasonable litigant seeks a postponement of one of the cases when two cases he is involved in as a legal practitioner and a litigant are set down

for hearing at the same time. He cannot just stay away, in the E hope that he will thereafter apply for rescission on the ground that he was appearing in a superior court for his client. The appellant's failure to contact the magistrates court and the legal practitioner for the respondents or to aver that he asked to be excused from appearing in the High Court or the magistrates court, are indications that the appellants were in wilful default.

Once a magistrate finds that a party was in wilful default that should be end F of the inquiry. This was clearly spelt out in *Fletcher* v *Three Edmunds (Pvt) Ltd*; *Vishram* v *Four Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S) at p 260 B 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 a magistrate has no power to rescind where the default was wilful. The enquiry G 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."

It therefore follows that nothing turns on the magistrate's consideration of the merits. He should not have taken them into consideration. H

Uchena J

The A finding of wilful default renders unnecessary the consideration of grounds of appeal numbers 5 to 7, which are premised on the merits of their case and their having always wanted to defend the case.

The appellants' appeal is therefore dismissed with costs.

MWAYERA J concurred. B

Musimwa & Associates, appellants' legal practitioners

Zuze Law Chambers, respondents' legal practitioners

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FIRSTEL CELLULAR (PVT) LTD v NET•ONE CELLULAR (PVT) LTD 2015 (1) ZLR 94 (S)

Citation	2015 (1) ZLR 94 (S)
Case No	Judgment No. S-1-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Patel JA
Heard	14 February 2014; *CAV*
Judgment	27 January 2015
Counsel	*T Magwaliba*, with him *J Muchada*, for the appellant *D Ochieng,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Agency – *principal and agent – when agency exists – need for contractual nexus to exist between principal and parties with whom alleged agent contracted – no agency relationship where no such nexus – alleged agent an independent contractor* D

Contract – *impossibility – when impossibility may relieve party of obligations under contract – need for impossibility to be objective and absolute – subjective or temporary impossibility insufficient*

Practice and procedure – *affidavit – formalities – status of commissioner of oaths – stamp should clearly identify person before whom affidavit is* E *deposed and office or capacity in which such person acts as commissioner*

Headnote

Summary judgment was granted against the appellant arising out of money owed to the respondent under a service provider agreement concluded between the parties. The agreement required the appellant to pay the sums due thereunder within thirty days of receiving the respondent's F invoices. The appellant had opposed the grant of summary judgment, arguing that there had been supervening impossibility of performance, that recovery from its customers was a condition precedent for payment, and that there was a principal and agent relationship between the parties, whereby the appellant was an agent of the respondent in sourcing G customers for post-paid cellular airtime usage, collecting payments for the airtime used or sold, and then remitting payments to the respondent after deducting its commission. Consequently, since payments to the respondent would only be due upon the appellant recovering the same from its customers, payment by the latter was a condition precedent to any payment to the respondent. The appellant's failure to recover the H

payments A from its customers constituted a supervening impossibility, suspending the appellant's obligation to remit payments to the respondent, there being nothing to remit until such time as payments had been made by, or recovered from, the customers. This impossibility was occasioned, so it was argued, by the advent of dollarization between January and March 2009 when, for some unexplained reason, a significant number B of the appellant's customers defaulted on their payments.

Held, that there is no specific legislation in this jurisdiction regulating the issue of whether the stamp used by a commissioner of oaths must clearly indicate the status of the commissioner of oaths. The matter is one that is governed by practice. What is required is that any stamp that is used C to designate a commissioner of oaths should clearly identify the person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner.

Held, further, that it was necessary to examine the true nature and substance of the agreement and not merely its form. The description of the parties contained in the agreement was not necessarily conclusive, as D it disguised the true nature of their principal and agent relationship. An examination and an analysis of the agreement showed the true nature of the relationship between the parties. The appellant would go to the airtime market and source its own customers for the network services to be provided by the respondent. The respondent did not decide who those E customers would be or which of them would receive network service on credit. More significantly, it was the appellant itself that carried the risk of default by its customers. The respondent had no right, except where this was ceded to it by the appellant in terms of clause 17.1, to sue the appellant's customers in order to enforce and collect any payments due and outstanding from them. There was simply no *nexus* or privity of F contract between the respondent and the appellant's customers. If the appellant was merely an agent for the respondent as its principal, those customers would have been directly liable to the respondent. It was clearly contemplated by the parties that the appellant would be engaged as an independent contractor to distribute to its own customers the network G services provided by the respondent.

Held, further, that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arm's length. Thus, the suspension of a contractual obligation by dint of *vis major* or *casus fortuitus* can only be allowed in very

compelling circumstances. The courts are enjoined to consider the nature of the H contract, the relationship between the parties, the circumstances of the

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Patel JA

case and the nature of the alleged impossibility. In particular, it must be A shown that the impossibility is objective and absolute in contradistinction to one that is merely subjective or relative. Again, the contract must have become finally and completely impossible of performance, as opposed to the situation where one party is only temporarily disabled from fulfilling its obligations. The appellant failed to demonstrate why its customers B failed to meet their bills and how that alleged failure necessarily and definitively precluded it from meeting its payment obligations *aliunde* or from recovering the outstanding amounts from its customers at some later stage. The appellant's subjective inability to pay its debts could not be confused with the objective impossibility that must prevail for its plea of supervening impossibility to succeed. C

Cases cited

Beretta v *Rhodesia Railways Ltd* 1947 SR 48

Chiraga v *Msimuko* 2002 (2) ZLR 368 (H)

S v Deyi [2013] ZAGPPHC 75 D

Moyo & Anor v *Intermarket Discount House Ltd* 2008 (1) ZLR 268 (S)

Musadzikwa v *Min of Home Affairs & Anor* 2000 (1) ZLR 405 (H)

Mutangadura v *TS Timbers Building Supplies* 2009 (2) ZLR 424 (H)

NUST v *NUST Academic Staff & Ors* 2006 (1) ZLR 107 (H)

Nhundu v *Chiota & Anor* 2007 (2) ZLR 163 (S)

Watergate (Pvt) Ltd v *CBZ* 2006 (1) ZLR 9 (S) E

Case information

T Magwaliba, with him *J Muchada*, for the appellant

D Ochieng, for the respondent

Judgment

Patel JA: This is an appeal against the decision of the High Court granting summary judgment against the appellant in the sum of US$8 330 470.52 F together with interest at 2.5 per cent per annum above the prime overdraft bank rate and costs of suit.

The claim against the appellant arose from a service provider agreement concluded between the parties on 10 March 2006 (the agreement). The agreement required the appellant to pay the sums due thereunder within G 30 days of receiving the respondent's invoices. It is common cause that the appellant owed the respondent the outstanding amount claimed as at 30 September 2010. The respondent issued summons on 16 November 2010 and, following the appellant's appearance to defend, applied for summary judgment on 14 February 2011. H

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The A court *a quo* held that the respondent's claim was unimpeachable and that the appellant had no plausible defences to the claim. In particular, the court found that there was no supervening impossibility due to the currency regime changeover between January and March 2009, entailing any objective impossibility of recovering debts from the appellant's customers. Additionally, there was no condition precedent in the agreement that those customers B should first pay the appellant before it became obliged to pay the respondent. Lastly, there was no principal and agent relationship between the parties to preclude the recovery of payments from the appellant upon presentation of the respondent's invoices.

The grounds of appeal herein arise from the defences raised in the High Court, c*viz.* supervening impossibility of performance, recovery from customers as a condition precedent for payment, and the existence of a principal and agent relationship between the parties. In essence, the question to be determined is whether the learned judge was correct in holding that the respondent's claim was unassailable and that the appellant had no *bona fide* defences to D that claim.

In addition, the appellant's heads of argument raise a further ground of appeal not pleaded in its notice of appeal. It is argued that the order granted by the court *a quo* is vague as it does not specify the applicable rate of interest and the dates when the amounts due accrued interest.

A further procedural point taken at the hearing of the appeal relates to the E respondent's founding affidavit in support of its application for summary judgment. Counsel for the appellant submits that this affidavit is flawed in that the status of the commissioner of oaths before whom it was deposed is not clearly identified.

Vagueness of court order

The F court *a quo* granted summary judgment as prayed for in terms of the draft order. The latter is regrettably terse and simply orders that summary judgment be entered in terms of the summons. In the summons, the respondent's claim is for payment of the sum of US$8 330 470.52 with:

> "interest thereon at a rate of 2.5 per cent per annum above the prime overdraft rate of the Standard Chartered Bank of Zimbabwe, from the date each payment G was due to the date of payment."

Mr *Magwaliba* for the appellant contends that this part of the court order is vague and unclear as regards the rates of interest applicable and their respective dates of application. As I have already indicated, this is not a ground of appeal that was raised in the notice of appeal. Nevertheless, it is H a point of law that can be raised at any stage of the proceedings, provided

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that the other party is not thereby prejudiced. Mr *Ochieng* for the respondent A accepts that it would not be improper or prejudicial to the respondent for the point to be addressed and determined at this stage.

In my view, there is nothing vague or unclear in the court order as read with the summons. The applicable rates of interest are undoubtedly available from the bank cited and the dates from which those rates apply will be apparent B from the relevant tax invoices presented by the respondent to the appellant. In any event, this is an issue that should most appropriately be agreed between the parties themselves or, failing such agreement, be referred to the court *a quo* for determination and quantification.

Identity and status of commissioner of oaths C

The respondent's founding affidavit in the court below was sworn before one Raymond Moyo, a registered legal practitioner, who appended his signature above the designation "Commissioner of Oaths". The stamp used for the purpose is one that would ordinarily have been used to certify copies of original documents as being true and correct. However, it also denotes Raymond Moyo as a commissioner of oaths and notary public. D

Counsel for the appellant cites *S* v *Deyi* [2013] ZAGPPHC 75 for the proposition that the stamp adopted must clearly indicate the status of the commissioner of oaths. In that case, the court was called upon to apply the directory provisions of regulations, made under the South African Justices of the Peace and Commissioners of Oaths Act 1963, which require a E commissioner of oaths to state his or her designation and the area for which he or she holds his appointment of office. The commissioner in question was evidently a police constable, but the stamp that was used was that of a magistrate. The court found that this stamp misrepresented the office of the commissioner and was likely to cause confusion in that regard. Consequently, it declined to exercise its discretion in favour of receiving the document F relied upon in that case as a sworn affidavit.

It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identify the person before whom G an affidavit is deposed and the office or capacity in which he or she acts as a commissioner.

In casu, it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognised commissioner of oaths. The respondent has therefore verified its cause of action in an affidavit, deposed by its functionary duly authorised thereto, before a clearly identified commissioner of oaths. That, in my view, suffices for the intended purpose H

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of A adducing evidence under oath and renders the validity of the respondent's founding affidavit manifestly impervious to challenge.

Grounds of appeal

The grounds of appeal set out in the notice of appeal appear to have conflated the three defences raised in the court *a quo*. The essence of these grounds B is that the relationship between the parties, based on their conduct after the inception of the agreement, was one of principal and agent, whereby the appellant was an agent of the respondent in sourcing customers for post-paid cellular airtime usage, collecting payments for the airtime used or sold, and then remitting payments to the respondent after deducting its commission. Consequently, since payments to the respondent would only be due upon C the appellant recovering the same from its customers, payment by the latter was a condition precedent to any payment to the respondent. This applies to the entire amount of US$8 330 470.52 claimed by the respondent. Again, on the same footing, the appellant's failure to recover the payments from its customers constituted a supervening impossibility suspending the appellant's obligation to remit payments to the respondent, there being nothing to remit D until such time as payments had been made by or recovered from the customers.

Principal and agent relationship

The appellant's position, as I understand it, is as follows. Although not expressly stated in the agreement, the common understanding of the parties E was that the appellant would be paid by its customers for network service usage and would then deduct its commission and pass on the balance to the respondent. This position appears to be buttressed by para 3 of the respondent's declaration which states that the appellant would collect payments for airtime used by its customers and remit the collected amounts less its commission to the respondent. In this connection, Mr *Magwaliba* submits that the court F must look at the true nature and substance of the agreement and not merely at its form. The description of the parties contained in the agreement is not necessarily conclusive as it disguises the true nature of their principal and agent relationship. I note in this regard the remarks of Silke *The Law of Agency in South Africa* 3 ed at pp 32-33, where the learned author adverts to the difficulties in ascertaining the true nature of an agency relationship.

Turning G to the provisions of the agreement itself, clause 2 thereof sets out the principal rights and obligations of the parties. The respondent undertakes to supply and distribute terminal equipment and network services to the appellant's customers (clause 2.1). In turn, the appellant *may from time to time* order and purchase quantities of smartcards from the respondent H (clause 2.2.1). The respondent is then obliged to make the network service

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available *to the appellant for onward supply to the appellant's customers*A (clause 2.2.2 as read with clause 6.1). The smartcards ordered and purchased by the appellant are *allocated by it to its own customers* (clause 4.1). The appellant is liable to the respondent for all charges generated in respect of *each smartcard activated by the appellant* with effect from the date of such activation (clauses 4.5.1 and 4.5.2). The respondent is then entitled to raise call charges, monthly service charges and all other charges *for the account of*B*the appellant* (clause 8.1). Thereafter, all charges invoiced by the respondent to the appellant *shall be paid* by the appellant to the respondent *within 30 days of the date of the relevant tax invoice* (clause 8.3).

My reading of the afore-cited provisions of the agreement is that they clearly spell out the true nature of the relationship between the parties. In essence, it C was agreed that the appellant would go to the airtime market and source its own customers for the network services to be provided by the respondent. The respondent did not decide who those customers would be or which of them

would receive network service on credit. More significantly, it was the appellant itself that carried the risk of default by its customers. As was quite correctly conceded by Mr *Magwaliba*, the respondent had no right, except D where this was ceded to it by the appellant in terms of clause 17.1, to sue the appellant's customers in order to enforce and collect any payments due and outstanding from them. There was simply no nexus or privity of contract between the respondent and the appellant's customers. If the appellant was merely an agent for the respondent as its principal, those customers would have been directly liable to the respondent. E

The apparent admission of agency emanating from para 3 of the respondent's declaration is not, in my view, of any material significance. The importance of pleadings should not be unduly magnified so long as there is no likelihood of prejudice being occasioned to any of the parties. While the parties should ordinarily be restricted to the averments in their pleadings, the courts should F not enslave themselves to the pleadings in complete disregard of their duty to decide the real dispute between the parties so that justice is eventually attained. See in this context the very pertinent observations of Chatikobo J in *Musadzikwa* v *Minister of Home Affairs & Another* 2000 (1) ZLR 405 (H) at 412H-413H, and the authorities there cited, which were subsequently applied by this court, *per* Ziyambi JA, in *Moyo & Another* v G*Intermarket Discount House Ltd* 2008 (1) ZLR 268 (S) at 272A-G. In short, pleadings cannot be construed so as to compromise the delivery of justice.

In the instant case, although para 3 of the declaration is somewhat ineptly worded, it cannot be elevated above the entire declaration and the clear terms of the agreement itself. In any event, that paragraph makes explicit reference H

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to A the agreement itself. More importantly, it is immediately followed by para 4 which captures the essence of the appellant's obligation to pay in terms of the agreement, *i.e.* to make payment for all charges within thirty days of receiving the respondent's tax invoice.

Having regard to the agreement as a whole, I am unable to discern from its B express provisions anything approximating the principal and agent relationship espoused by the appellant. It was clearly contemplated by the parties that the appellant would be engaged as an independent contractor to distribute to its own customers the network services provided by the respondent.

Condition precedent for payment

The C supposed common understanding between the parties is also relied upon by the appellant as the basis for its contention that payment by its customers was a condition precedent to any payment becoming due to the respondent. Although this contention flies in the face of the express provisions of the agreement, it is one that the appellant intends to substantiate by extrinsic evidence to be adduced should the matter be allowed to proceed to trial. As D is correctly argued by Mr *Ochieng*, this is clearly impermissible by virtue of the so-called parol evidence or integration rule. Generally speaking, although the integration rule may not invariably apply where the true nature of an agreement is in issue, extrinsic evidence cannot be allowed to negate the express and clear terms of the agreement. See the remarks of Ziyambi JA in *Nhundu* v *Chiota & Anor* 2007 (2) ZLR 163 (S) at 166C-H. This is E particularly so where, as in this case, the agreement constitutes the entire contract between the parties (clause 20.3) and any variation, addition, deletion or waiver is ineffective unless reduced to writing and specifically subscribed by the parties (clause 20.5).

Supervening impossibility

The F final defence advanced by the appellant is that of supervening impossibility – that its failure to recover payments from its customers constituted a supervening event suspending its obligation to remit payments to the respondent. This was occasioned, so it is argued, by the advent of dollarization between January and March 2009 when, for some unexplained reason, a significant number of the appellant's customers defaulted on their payments.

It G is trite that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arms length. Thus, the suspension of a contractual obligation by dint of *vis major* or *casus fortuitus* can only be allowed in very compelling

circumstances. The courts are enjoined to consider the nature of the contract, the relationship H between the parties, the circumstances of the case and the nature of the alleged

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impossibility. See *Watergate (Pvt) Ltd* v *Commercial Bank of Zimbabwe*A 2006 (1) ZLR 9 (S) at 14B-F. In particular, it must be shown that the impossibility is objective and absolute in contradistinction to one that is merely subjective or relative. See *Chiraga* v *Msimuko* 2002 (2) ZLR 368 (H) at 380C-E, where it was held that shortage of foreign currency did not constitute an absolute supervening impossibility. Again, the contract must have become finally and completely impossible of performance as opposed to the situation where one B party is only temporarily disabled from fulfilling its obligations. See *Beretta* v *Rhodesia Railways Ltd* 1947 SR 48 at 49-50; *NUST* v *NUST Academic Staff & Ors* 2006 (1) ZLR 107 (H) at 109A-D; *Mutangadura* v *TS Timber Building Supplies* 2009 (2) ZLR 424 (H) .at 429C-F.

In the instant case, the appellant has dismally failed to demonstrate why its C customers failed to meet their bills and how that alleged failure necessarily and definitively precluded it from meeting its payment obligations *aliunde* or from recovering the outstanding amounts from its customers at some later stage. In other words, the appellant's subjective inability to pay its debts cannot be confused with the objective impossibility that must prevail for its plea of supervening impossibility to succeed. D

Availability of *bona fide* **defence**

It is apparent from all of the foregoing that the appellant has not been able to proffer any plausible defence to the respondent's claim. The court *a quo* was therefore perfectly correct in concluding that the appellant had no *bona fide* defence to the respondent's unassailable claim for summary judgment. E

In the result, the appeal must fail and it is accordingly dismissed with costs.

ZIYAMBI JA and GARWE JA concurred

Dube, Manikai & Hwacha, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners F

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LOCAL AUTHORITIES PENSION FUND v NYAKWAWA & ORS 2015 (1) ZLR 103 (H)

Citation	2015 (1) ZLR 103 (H)
Case No	Judgment No. HH-60-15
Court	High Court, Harare
Judge	Mafusire J
Heard	28 October 2014; *CAV*
Judgment	28 January 2015
Counsel	*T Mpofu,* for excipient (or fifth defendant) *E T Matinenga,* for respondent (or plaintiff)

Case Type Opposed application – exception

Annotations No case annotations to date

Flynote

Delict – *liability – breach of statutory duty – need to show duty towards plaintiff – need for plaintiff to specify what statutory provisions were breached* D

Delict – *liability – vicarious liability – principles – theft of goods by defendant's employee – need for plaintiff to have entrusted goods to defendant*

Delict – *negligence – liability for – need for duty of care to plaintiff to exist – negligence in the air insufficient – bank employees creating fraudulent accounts to store money stolen from plaintiff by plaintiff's employees* – E *plaintiff not a customer of bank – no duty of care owed*

Practice and procedure – *exception – purpose of – allegation that declaration does not disclose cause of action – pleading only excipiable if no possible evidence can disclose cause of action*

Headnote

The F plaintiff brought an action against two of its employees, two employees of the fifth defendant (a bank with whom the plaintiff had no other connection) and the bank itself. For more than three years the pair employed by the plaintiff was stealing from the plaintiff. They were conniving with the pair from the bank to store the stolen funds in fictitious bank accounts opened by them with the bank. The *modus operandi*G was this. The plaintiff's employees would identify pensioners to whom lump sum benefit payments were due. They would forward the details to the bank pair, who would open fraudulent bank accounts in the names of the pensioners, at one of the bank's branches. The bank pair would then illicitly facilitate the storage of the stolen monies in those H accounts. Afterwards the plaintiff's employees, with the assistance of

the bank pair, would then withdraw the loot and share it amongst the A four of them. The plaintiff claimed that the bank was vicariously liable for the actions of its employees; alternatively, that it was negligent in the conduct of its operations. In respect of the latter allegation, the plaintiff averred that the bank was under a statutory duty and obligation to take measures to prevent its institutions or the services its institutions offer from being used to commit or facilitate financial crime; that the bank had B poor internal standards, inadequate policies and procedures and internal controls that promote high ethical and professional standards and poor to non-existent "know your customer" procedures, all of which amounted to negligence on the part of the bank; and that there was a causal link between the bank's negligence and the defrauding of the plaintiff. The C bank excepted to the claim, on the basis that there was no duty of care to the plaintiff; that the creation of the irregular accounts did not amount to a delict on the bank's part; and that there was no basis for imputing vicarious liability to the bank.

Held, that an employer is liable for the wrongs done by his employee to another person in the course and scope of that employee's employment. That D an innocent employer should be liable for the wrongs committed by his employee during the course and scope of that employee's employment is a matter of public policy. The rationale is that the employer's work is done "by the hand of the employee". The employer creates a risk of harm to others should the employee prove to be negligent, inefficient E or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee's improper or negligent conduct in carrying on his work. The employee's wrongful act can either be *culpa* (negligence), or *dolus* (intention), or both. This, the theft by of an employee, can render the employer liable for the loss suffered by the victim of the theft. The test is whether the goods stolen F had been entrusted to the employee's care by his employer. If they had not, the theft is outside the scope of his employment and the employer is not vicariously liable. Here, it was not the bank's employees that were stealing from the plaintiff. It was the plaintiff's own employees. The theft by the pension fund employees was *perfecta* by the time the loot was transferred and stored in the bank. The bank pair neither stole G monies entrusted to them nor stole from the plaintiff at all. All they did was to provide storage facilities for the funds stolen by the plaintiff's own employees.

Held, further, that negligence is the failure, judged objectively, to exercise that degree of care expected in any given circumstances. It involves a H

duty A of care and a breach of that duty. To found a cause of action there must have been a duty of care owed to the plaintiff that the defendant ought reasonably to have guarded against. Negligence in the air does not suffice. The plaintiff was not a customer of the bank. If the bank was negligent in the manner that it ran its operations, then such negligence was classically negligence in the air. There was simply no nexus between B such negligence and the misfortunes of the plaintiff at the hands of its own employees.

Held, further, that although the plaintiff had referred to a breach of statutory obligations, it did not specify what these statutory provisions were. There were two possible statutes, but even if the plaintiff meant to plead C that the bank breached some of the provisions of those Acts and would therefore be liable to suffer criminal sanction, that breach would still not transform into civil liability to the plaintiff. As with negligence in the air, this would be "criminality in the air" in relation to the plaintiff.

Held, further, that an exception is a legal objection to a pleading. It complains of a defect inherent in the pleading. For the purposes of an exception D the facts pleaded must be accepted as correct. The main purpose of an exception is to obtain a speedy decision upon a point of law apparent on the face of the pleading attacked**,** so as to settle the dispute in the most economical manner by having the faulty pleading set aside. The main purpose of an exception that a declaration does not disclose a cause of E action is to avoid the leading of unnecessary evidence at the trial. If evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. Evidence that the bank might have breached the statutory provisions referred to would not establish the plaintiff's F claim against the bank.

Cases cited

Arun Property Development (Edms) Bpk v *Stad Kaapstad* 2003 (6) SA 82 (C)G

Barclay's National Bank Ltd v *Thompson* 1989 (1) SA 547 (A)

Bourhill v *Young* [1943] AC 62; [1942] 2 All ER 396 [HL]

City of Harare v *D & P Invstms (Pvt) Ltd & Anor* 1992 (2) ZLR 254 (S)

Commr, SARS & Anor v *TFN Diamond Cutting Works (Pty) Ltd* 2005 (5) SA 113 (SCA)

Controller of Customs v *Guiffre* 1971 RLR 91 (G);1971 (2) SA 81 (R)H

Dharumpal Tpt (Pty) Ltd v *Dharumpal* 1956 (1) SA 700 (A)

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Dube v *Banana* 1998 (2) ZLR 92 (H) A

Fawcett Security Ops (Pvt) Ltd v *Omar Entprs (Pvt) Ltd* 1991(2) ZLR 291 (S)

Feldman (Pty) Ltd v *Mall* 1945 AD 733

Fundstrust (Pty) Ltd (in liq) v *van Deventer* 1997 (1) SA 710 (A)

McKelvey v *Cowan NO* 1980 ZLR 235 (G); 1980 (4) SA 525 (Z)B

Marney v *Watson & Anor* 1978 (4) SA 140 (C)

Min of Finance & Ors v *Gore NO* 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA)

Minister van Veiligheid en Sekuriteit v *Japmoco Bpk* 2002 (5) SA 649 (SCA)

Mkize v *Martens* 1914 AD 382C

Nott v *ZANU (PF)* 1983 (2) ZLR 208 (S)

Palsgraf v *Long Island Rly Co* 248 NY 339 (1928)

Patel v *Controller of Customs & Excise* 1982 (2) ZLR 82 (H)

South British Ins Co v *du Toit* 1952 SR 239; 1952 (4) SA 313 (SR)

Workmen's Compensation Commissioner v *de Villiers* 1949 (1) SA 474 (C)D

Case information

T Mpofu, for excipient (or fifth defendant)

E T Matinenga, for respondent (or plaintiff)

Judgment

Mafusire J: This was an exception. The facts are taken "as is" from the plaintiff's declaration. There were two sets of employees. It was their E nefarious activities that caused the plaintiff to clash with the fifth defendant, two parties that otherwise had no relationship between them. The one pair of employees was employed by the plaintiff (hereafter referred to as the "pension fund"). The other pair was employed by the fifth defendant (hereafter referred to as "the bank"). F

For more than three years the pair employed by the pension fund was stealing from their employer, the pension fund. For more than three years the pair employed by the bank was conniving with the pair from the pension fund to store the stolen funds in fictitious bank accounts opened by them with the bank. The *modus operandi* was this. The pension fund pair would identify G pensioners to whom lump sum benefit payments were due. They would forward the details to the bank pair. The bank pair would "… *during the scope and course of their employment* …" with the bank, open "… *fraudulent bank accounts* …" in the names of the pensioners, at one of the bank's branches. The bank pair would then illicitly facilitate the storage of the stolen monies in those "… *fraudulent … accounts* …" Afterwards the pension fund pair, H

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with A the assistance of the bank pair, would then withdraw the loot and share it amongst the four of them. The amount involved was US$ 926 392.72.

The pension fund's summons was against its own pair, as first and second defendants; the bank pair, as third and fourth defendants; and the bank, as fifth defendant. From the declaration the cause of action against the bank, as I understood it, was twofold. The first was based on vicarious liability. B It was pleaded this way:

> "2.6 The fifth defendant is liable vicariously for the mismanagement of its business by the first and second [the defendants] which resulted in the plaintiff being defrauded as particularised in Paragraphs 2.4 and 2.5 above."

The second cause of action, pleaded in the alternative, was based on negligence. C It was put this way:

> "2.7 Alternatively, and in any event the fifth defendant was negligent in that it failed to take requisite measures which include:
>
> (a) verifying and/or ensuring the verification of the identity of its customers and the capacity in which its customers will (sic) be acting when they transact. D
>
> (b) establishing internal reporting structures to deal with suspicious acts of money laundering.
>
> (c) having in place adequate policies and procedures and internal controls that promote high ethical and professional standards and prevent its institutions from being used, intentionally or unintentionally, by criminal elements. E
>
> (d) having in place a sound Know Your Customer ("KYC") policy and procedure."

The rest of the averments in the plaintiff's declaration seemed an amplification of the alternative cause of action, the one based on negligence. They were these: F

> "2.8 The fifth defendant is under a statutory duty and obligation to take measures to prevent its institutions or the services its institutions offer from being used to commit or facilitate financial crime.
>
> 2.9 The fifth defendant at the time of the fraudulent activities, had poor internal standards, inadequate policies and procedures and internal controls that promote high ethical and professional standards and poor to non-existent G KYC procedures all of which amount to negligence on the part of the fifth defendant and a breach of statutory duty for which it is criminally and civilly liable.

2.10 The first, second, third and fourth defendants jointly and severally, took advantage of the opportunity created by the fifth defendant s negligence and breach of statutory duty, to open and use fictitious accounts to defraud H the plaintiff.

Mafusire J

2.11 There exists a causal link between the fifth defendant 's negligence and the A first, second, third and fourth defendants' success in defrauding the plaintiff such that were it not for the fifth defendant's negligence, the defrauding of the plaintiff would not have occurred.

2.12 Accordingly, the joint and concurrent wrongful, negligent and intentional actions of the defendants caused substantial patrimonial loss to the plaintiff."

The bank's exception was that the pension fund's claim against it disclosed B no cause of action cognizable at law. The exception was pleaded as follows:

"a. No special duty of care is at law or on the pleaded facts owed by the fifth defendant to plaintiff.

b. No basis exists at law or on the alleged facts for concluding that the creation of irregular accounts by first and second defendants amounts to a delict on C fifth defendant's part.

c. The criminal allegation raised against first and second defendants do not relate to the theft of goods stored with them as part of their employment duties and there is consequently no basis at law upon which vicarious liability for their thefts could be imputed upon fifth defendant.

d. There is no basis at law or on the alleged facts for the view that the storage D of stolen funds renders the storing banking institution liable for such thefts."

I now consider the claim against the exception.

(a) Is the bank vicariously liable to the pension fund for the theft by the employees concerned?

An employer is liable for the wrongs done by his employee to another person E in the course and scope of that employee's employment: *Mkize* v *Martens* 1914 AD 382; *Feldman (Pty) Ltd* v *Mall* 1945 AD 733; *South British Insurance Company* v *du Toit* 1952 SR 239; 1952 (4) SA 313 (SR); *Nott* v *ZANU (PF)* 1983 (2) ZLR 208 (S); *Fawcett Security Operations (Pvt) Ltd* v *Omar Enterprises (Pvt) Ltd* 1991(2) ZLR 291 (S); *Minister van Veiligheid*F*en Sekuriteit* v *Japmoco Bpk* 2002 (5) SA 649 (SCA); *Commissioner for the South African Revenue Service & Anor* v *TFN Diamond Cutting Works (Pty) Ltd* 2005 (5) SA 113 (SCA) and *Minister of Finance & Ors* v *Gore NO* 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA).

That an innocent employer should be liable for the wrongs committed by his employee during the course and scope of that employee's employment is a G matter of public policy: *Commissioner for the South African Revenue Service & Anor* v *TFN Diamond Cutting Works (Pty) Ltd, supra*. The rationale is that the employer's work is done "by the hand of the employee". The employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to H

Mafusire J

ensure A that no injury befalls others as a result of the employee's improper or negligent conduct in carrying on his work: *Feldman's* case, *supra*, at p 741.

The employee's wrongful act can either be *culpa* (negligence), or *dolus* (intention), or both. In *TFN Diamond's* case Ponnan JA said at p 117G:

> "Counsel for the defendant conceded that had Matshiva been negligent in B safeguarding the contents of the safe there would have been no doubt that his employer would have been vicariously liable for any loss occasioned in consequence thereof. Negligence is but a form of fault. So, too, is intention. If liability were to attach to the defendant in consequence of Matshiva's negligent failure to safeguard the diamonds, why, it must be asked, would it escape liability if he acted intentionally?" C

Thus the criminal conduct of an employee can render the employer liable for the loss suffered by the victim of the theft. In *Fawcett* Gubbay CJ said at p 294C-E:

> "It was formerly thought that an employer could not be held vicariously liable for a theft committed by his employee on the ground that the act of stealing necessarily took the employee out of the course of

his employment. Dishonesty D or fraud by the employee for his *own* benefit did not render the employer liable.

This view of the law no longer prevails. It is now recognised and accepted that theft by an employee to whom the goods concerned have been *entrusted* is, in fact, an improper and dishonest mode of performing what he is employed to do, namely, to take care of the goods. In such circumstances, the employee is acting nonetheless in the course of his employment, and so the employer is vicariously E liable for the loss of the goods."

There are several limitations to the scope of vicarious liability. The one relevant to this case is that stated by the learned Chief Justice in *Fawcett*. At p 295E-F he said:

"Where an employee has committed a theft, the test to be applied is to enquire F whether the goods stolen had been *entrusted* to his care by his employer. If they had not, the theft is outside the scope of his employment and the employer is not vicariously liable. The theft is the act of the employee pursuing his own selfish ends – something he has done entirely on his own account."

In my view, it will be ridiculous to stretch vicarious liability to the kind of G actions disclosed in this case. It was not the bank's employees that were stealing from the pension fund. It was the pension fund's own employees. Understandably, the bank retorted that for more than three years the pension fund had failed to detect the theft in its own backyard by its own people and that, instead of suing it, the pension fund was better advised suing its own auditors who had let it down. The pension fund retorted back saying H it was none of the bank's business to advise it who to sue. But I guess if

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the pension fund is suing it then the bank may be justified in deflecting the A blow elsewhere.

The basis of the pension fund wanting vicarious liability extended to the bank in the circumstances of this case was that but for the facilitation provided by the bank employees, the pension fund employees would not have been successful in their criminal enterprise. I do not agree. The theft by the pension B fund employees was *perfecta* by the time the loot was transferred and stored in the bank. Theft may be a continuing offence. And as already pointed out, an employer may be liable for the theft of goods by its own employees. But there is a world of difference between the circumstances under which an employer may be liable for the theft of someone's goods by his employees and the circumstances of this case. In *Fawcett*, it was stressed that the liability C of the employer attaches where the goods had been *entrusted* (emphasis by the Chief Justice) to the thieving employee. This was not the case in this case. The bank pair neither stole monies entrusted to them nor stole from the pension fund at all. All they did was to provide storage facilities for the funds stolen by the pension fund's own employees. There can be no vicarious liability in such a situation. D

In *Fawcett's* case, the victim of the theft was a supermarket. The culprit was a security guard employed by the security company that the supermarket had contracted to provide security services. The security guard not only stole from the supermarket himself, but he also allowed other people to steal from it. On vicarious liability, the Supreme Court held that it could not be E said that the goods in the supermarket had been *entrusted* to the thieving guard. In order for an employer to be liable under such circumstances the goods must in some way or other have been *entrusted* into the possession or charge of the employee.

As was stated by Salmon LJ in *Morris* v *C W Martin & Sons Ltd* [1965] 2 All ER 725 (CA) at p 740G-H(quoted by Gubbay CJ in *Fawcett* at p 295B-C); F

"The mere fact that the master, by employing a rogue, gives him the opportunity to steal or defraud does not make the master liable for his depredations."

In the circumstances, I find that there is no principle of law that extends the concept of vicarious liability to the bank in this matter.

(b) Was the bank negligent in relation to the pension fund? G

Negligence is the failure, judged objectively, to exercise that degree of care expected in any given circumstances: R G McKerron *The Law of Delict* 7 ed pp 25-26. It involves a duty of care and a breach of that duty. To found a cause of action there must have been a duty of care owed to the plaintiff that the defendant ought reasonably to have guarded against. Negligence in the air H

Mafusire J

does A not suffice. This is illustrated by the remarkable facts of the well-known American case of *Palsgraf* v *Long Island Rly Co* 248 NY 339 (1928). The English case of *Bourhill* v *Young* [1943] AC 62; [1942] 2 All ER 396 (HL), and the South African case of *Workmen's Compensation Commissioner* v *de Villiers* 1949 (1) SA 474 (C) also do help illustrate the point.

In B this case, it was common cause that the pension fund was not a customer of the bank. The plaintiff's declaration does not specify what kind of duty of care was owed by the bank to the pension fund that the bank breached. If the bank was negligent in the manner that it ran its operations, then such negligence was classically negligence in the air. In the American case aforesaid, a railway employee tried to assist a passenger board a train. The employee C negligently knocked down a package in the passenger's arms. The package contained fireworks. This was unknown to the employee. There was a violent explosion. A chain reaction followed. A weighing scale some considerable distance away was knocked over by the force of the explosion. As it fell, the scale injured the plaintiff, a woman passenger who intended to board another train. The New York Court of Appeal exonerated the railway company. It D held that the conduct of the railway employee might have been a wrong in relation to that passenger from whom the package had been knocked, but not in relation to the plaintiff standing far away.

In the South African case of *Workmen's Compensation Commissioner* the defendant was the driver of a lorry. He drove his lorry into a municipal market. E At the entrance he bumped the door of the market slightly. Unbeknown to him, there was a carpenter who was standing on a ladder that was propped up against the inside of that door. The carpenter was dislodged and injured. It was held that the defendant, the lorry driver, was not liable to the carpenter. The presence of that carpenter behind the door could not have been reasonably foreseeable. The lorry driver might have owed a duty of F care to the municipality, but not to the carpenter.

In casu, even if the bank was somehow negligent in the manner it ran its operations in the branches, there is simply no nexus between such negligence and the misfortunes of the pension fund under the hands of its own employees. Such negligence would not be negligence in relation to the pension fund. In G my view, the bank owed no duty of care to the pension fund.

In addition to the American and South African cases above, the English case of *Bourhill, supra,* also helps bring out the concept of duty of care. Admittedly, the facts in all these cases are far different from those of the present case. But the principle is the same. In the English case, the appellant, a fishwife, H was unloading her fish basket from the offside of a tram. She was pregnant.

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A motorcyclist who was travelling at an excessive speed sped past the tram A and crashed into a motor-car several metres away. The cyclist was thrown onto the street. He sustained severe injuries from which he died. The fishwife did not see the accident. However, the sound of the collision gave her such a shock that a month later she suffered a miscarriage. But the House of Lords exonerated the estate of the cyclist. The cyclist might have been negligent in relation to the owner of the car, but not in relation to her. B

I am mindful that in the passage in *Fawcett*, at p 295F, part of which I have quoted above, Gubbay CJ went on to say this:

> "The employer may, of course, be liable on the ground of his negligence in selecting the employee, or because the theft was induced by his own negligence, or because of the negligence of some other employee to whom the charge of the C stolen property had been committed."

Certainly, the Supreme Court did find the supermarket's claim based on the negligence of the security company *not* excipiable, even though it had been pleaded inelegantly. However, there is still a world of difference from the present case. In the *Fawcett* case there was a contractual relationship D between the parties. The negligence sought to be pleaded was contractual, not delictual as in the present case. It was the same situation in the English authorities considered by the Supreme Court in that case. A duty of care could arise in contract. In this case there was no contractual relationship or a relationship of any sort between the pension fund and the bank.

Evidently, appreciating the thin ice on which it was skating by relying E on negligence, the pension fund tried to bolster its case by invoking the provisions of some unnamed statute. But the plaintiff's declaration in this regard would still be deficient. If reliance is placed on implied provisions of a statute, that fact as well as the contents of the implied provisions must be pleaded to clearly bring that issue to the notice of the court and the other parties so as to avoid vagueness and embarrassment: see F*Fundstrust (Pty) Ltd (in liq)* v *van Deventer* 1997 (1) SA 710 (A) at p 725 and *Arun Property Development (Edms) Bpk* v *Stad Kaapstad* 2003 (6) SA 82 (C) at 90-92.

It seems the failure by the pension fund to specify the statute on which it relied in paragraphs 2.8, 2.9 and 2.10 of its declaration, manifestly led counsel G of both parties to shoot in the dark. The language used in those paragraphs, and para 2.7 as well, strongly resembled that of the Bank Use Promotion Act [*Chapter 24:24*], and the Money Laundering and Proceeds of Crime Act [*Chapter 9:13*].

In his heads of argument, filed in June 2014, Mr *Mpofu*, for the bank, evidently assumed that the reference to "… *financial crime …*" in the plaintiff's H

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declaration A was a reference to one of these Acts. He referred to what he termed "Bank Use Promotion and Suppression of Money Laundering Act", the old name by which the Bank Use Promotion Act was known before its amendment in 2013. Mr *Mpofu* went on to quote *in extenso* s 32 as one which created some criminal offences and penalties for a failure by a designated B institution to *inter alia* comply with certain disclosure orders. But with all due respect to counsel, the whole of Part IV of the Bank Use Promotion Act, comprising ss 23 to 32 that dealt with the suppression of money laundering, was repealed in 2013 by the Money Laundering and Proceeds of Crime Act.

On his part, Mr *Matinenga*, for the pension fund, referred in his heads of argument, filed in July 2014, to the "Bank Use and Suppression of C Money Laundering Act [*Chapter 24:24*]", again the same mistake. He referred to ss 24 to 28 of that Act and said they placed certain obligations on financial institutions and their employees, *inter alia*, to verify the identity of their customers; to keep a record of the transactions; to report any suspicious conduct regarding any transaction, *et cetera*. Evidently, counsel must have meant the Money Laundering and Proceeds of Crime Act. It came into operation on D 28 June 2013. It is the one with those provisions counsel alluded to.

The above confusion serves to emphasise the importance of elegance and precision in pleadings. The statutory provisions being relied upon for any cause of action have to be identified. But be that as it may, even if it was E the pension fund's intention to rely on the Bank Use Promotion Act, or the Money Laundering and Proceeds of Crime Act, in my view it still comes short. Even if it was meant to plead that the bank breached some of the provisions of those Acts and would therefore be liable to suffer criminal sanction, that breach would still not transform into civil liability to the pension fund. In my view, as with negligence in the air, this would be "criminality in the air" F in relation to the pension fund. The causal link would be absent.

The question of causation, even though formulated by law, is one of fact: *Minister of Finance & Ors* v *Gore NO*, *supra*. Cameron JA said in that case at 125, para 32 the time-honoured way of formulating the question is in the form of the "*but for"* test. Can it be said that, *but for* the wrongful G act complained of, the loss concerned would not have ensued? In the next paragraph, the learned judge of appeal, criticising some mathematical and the all-or-nothing approach that seemed to have crept into the test, said:

> "Application of the '*but for*' test is not based on the mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life H experiences."

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Quoting from *Minister of Safety and Security* v *Duivenboden* 2002 (6) SA 431 (SCA)A Nugent JA said at 449E:

> "A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics." B

In *Gore NO* both the central government and the provincial government were held vicariously liable for the corrupt conduct of certain of their employees that had manipulated certain tenders in favour of one of the bidders who had bribed them and with whom they had eventually got employed. In *TFN Diamond*, the collector of revenue and the government were held vicariously C liable for the theft of diamonds by an employee of the collector of revenue to whom the plaintiff had been obliged to entrust those diamonds as he travelled abroad. In *Japmoco Bpk* the government was found liable for the criminal conduct of a policeman who connived with a car thieving syndicate to which he provided false vehicle clearance certificates for a fee which would then be used to register stolen vehicles and sell them. D

Although these cases were on vicarious liability, which I have already dealt with, they are also relevant on the question of causation. In my view, the cases are distinguishable. In them the loss that befell the victims was the direct and proximate cause of the wrongful actions of the employees. Not in this case. The pension fund's loss was caused by the acts of its own employees. E That the bank's employees participated in the storage and distribution of the spoils was not the direct cause of such loss. Therefore, even accepting that the bank breached the provisions of the aforesaid anti money-laundering statutes in the manner alleged, that would not render it liable to the pension fund. On the facts as pleaded, it was the pension fund pair that supplied the details of the pensioners in whose names the accounts with the bank would F be opened. It was the pension fund pair that hived off the money from the pension fund pool and transmitted it to the bank. It was the pension fund pair that withdrew the proceeds, albeit with the facilitation of the bank pair. I do not see how any breach of the provisions of the statutes in the manner alleged would be a wrong in relation to the pension fund. In other words, it cannot be said that *but for* the actions of the bank pair the pension fund pair G would not have stolen from their employer.

Mr *Matinenga* argued that it would be premature at this stage to shut out the pension fund's claim against the bank when evidence at the trial might well establish the complaint and the bank's culpability. Among other things, he said that whether or not the obligations imposed in terms of the Acts were H

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met A was a matter of evidence. Upholding the exception would be tantamount to deciding the matter on speculation.

What then is an exception, and what is its purpose?

(c) Exception and its purpose

An B exception is a legal objection to a pleading. It complains of a defect inherent in the pleading: H J Erasmus *Superior Court Practice*, p B1-151. For the purposes of an exception the facts pleaded must be accepted as correct: *Marney* v *Watson & Anor* 1978 (4) SA 140 (C) at p 144F-G. The main purpose of an exception is to obtain a speedy decision *upon a point of law apparent on the face of the pleading attacked* so as to settle the dispute C in the most economical manner by having the faulty pleading set aside *City of Harare* v *D & P Investments (Pvt) Ltd & Anor* 1992 (2) ZLR 254 (S) at 257 (my emphasis).

In *Barclay's National Bank Ltd* v *Thompson* 1989 (1) SA 547 (A) and *Dharumpal Transport (Pty) Ltd* v *Dharumpal* 1956 (1) SA 700 (A) it was D accepted that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial. In *McKelvey* v *Cowan NO* 1980 ZLR 235 (G); 1980 (4) SA 525 (Z), it was held that in dealing with matters of exception, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no E possible evidence led on the pleading can disclose a cause of action.

Cause of action, as *per* Smith J in *Dube* v *Banana* 1998 (2) ZLR 92 (H) at 95, means the combination of facts that are material for the plaintiff to prove in order to succeed in his action. The facts must enable the court to reach a conclusion regarding unlawfulness, fault and damages: see also *Controller*F*of Customs* v *Guiffre* 1971 (2) SA 81 (R) at 84A; 1971 RLR 91 (G)and *Patel* v *Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 85.

As I have already demonstrated, evidence that the bank might have breached the statutory provisions alluded to would still not establish the pension fund's claim as against the bank. It will be

irrelevant. G

In my conclusion, the pension fund's declaration, in its entirety, does not disclose a cause of action against the bank. There is simply nothing that the evidence on any aspect of the claim as pleaded, if led, will establish the claim. There was no vicarious liability on the part of the bank on the facts pleaded. There was also no wrongful action on the part of the bank in H relation to the pension fund.

Mafusire J

Disposition A

In the circumstances, the exception is upheld. The plaintiff's claim against the fifth defendant is hereby dismissed with costs.

Atherstone & Cook, legal practitioners for the excipient (or fifth defendant)

Dube, Manikai & Hwacha, legal practitioners for the plaintiff (or respondent) B

James Makiya Legal Practitioners, legal practitioners for first and second defendants

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DELTA BEVERAGES (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 117 (H)

Citation	2015 (1) ZLR 117 (H)
Case No	Judgment No. HH-129-15
Court	High Court, Harare
Judge	Makoni J
Heard	25 July 2013; *CAV*
Judgment	29 January 2015
Counsel	*A P de Bourbon SC,* for the applicant *T Magwaliba,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Revenue and public finance – income tax – provisional tax paid on estimates of profits – under-estimating tax due – interest payable – proviso stating that interest must be waived if taxpayer fails to estimate tax within ten D *per cent – ordinary meaning of words must be given effect – contra fiscum rule of interpretation of tax statutes*

Headnote

The applicant company was obliged, under s 72(2) of the Income Tax Act [*Chapter 23:06*], to pay provisional tax based on estimates of its E profits per quarter year. During the financial years 2009 and 2010, the applicant underestimated its profits, resulting in an underpayment by it for provisional tax. The under-estimation exceeded 10 per cent. The respondent demanded, in terms of s 72(7), payment of interest in respect of the underpayments. The applicant disputed liability, arguing that at that time there was a proviso to s 72(7), which stated that "the Commissioner F shall waive interest under circumstances where the taxpayer fails to forecast profits within a ten per centum margin of error". The respondent argued that the proviso should be read as though the words "fail to" were not there. The applicant contended that the position adopted by the respondent, in effect, asked the court to re-write the legislation, something the court could not do. In the interpretation of tax legislation G which is uncertain, the *contra fiscum* maxim applies.

Held, that in enacting s 72(7), the legislature changed the concept in the proviso from one being a penalty to one requiring the payment of interest. This amendment was made during the hyper-inflation period, where taxpayers might have problems to estimate their provisional tax with H any accuracy. The golden rule of interpretation of statutes is that, where

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the language used in a statute is plain and unambiguous, it should be A given its ordinary meaning, unless that would lead to some absurdity or inconsistency with the intention of the legislature. Intention is not to be ascertained by surmise, however probable such surmise may be. When to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the B legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature. Here, the court was dealing with interpretation of tax legislation. In the case C of ambiguity arising during the interpretation of fiscal legislation, the *contra fiscum* rule will be applicable. This is a common law principle stipulating that should a taxing statutory provision reveal ambiguity, the ambiguous provision must be interpreted in a manner that favours a taxpayer or imposes the smaller burden on the taxpayer. When Parliament subsequently amended s 72(7) by repealing the proviso, it did not make D the changes retrospective, as it could have. The existing rights given in terms of the proviso to s 72(7) were not affected.

Cases referred to

Badenhorst v *CIR* 1955 (2) SA 207 (N)E

Bellairs v *Hodnett & Anor* 1978 (1) SA 1109 (A)

Car Rental Svcs (Pvt) Ltd v *Director of C&E* 1988 (1) ZLR 402 (S)

Endeavour Foundation & Anor v *CoT* 1995 (1) ZLR 339 (S)

Ex p *Lynn & Ors* 1987 (1) SA 797 (N)

Meman & Anor v *Controller of C&E* 1987 (1) ZLR 170 (S) F

Ex p *Minister of Justice*: In re *R* v *Jacobson & Levy* 1931 AD 466

Mxumalo & Ors v *Guni* 1987 (2) ZLR 1 (S)

Pretorius v *Minister of Defence* 1980 ZLR 395 (A)

Scoin Trading (Pty) Ltd v *Bernstein NO* 2011 (2) SA 118 (SCA)

Legislation considered G

Income Tax Act [*Chapter 23:06*], s 72(7)

Case information

A P de Bourbon SC, for the applicant

T Magwaliba, for the respondent H

Makoni J

Judgment

Makoni J: A The applicant (Delta) approached this court seeking a declaration in the following terms:

> "1. It is declared that the provisions of the proviso to section 72(7) of the Income Tax Act [*Chapter 23:06*] prior to the repeal of that proviso by section 3(a) of the Finance Act 2012 obligated the Commissioner–General of the Respondent to waive any interest due by the applicant in respect of any B underestimation of its profits for the years 2009 and 2010, and in respect of any underpayment of provisional tax in respect of those two years.
>
> 2. It is declared that the applicant has no liability to pay the sum of $698 864.48 demanded by the respondent in respect of interest on the underpayment of provisional tax for the years 2009 and 2010.
>
> 3. The respondent shall pay the costs of this application." C

The facts of the matter are that the applicant (Delta) is a tax payer. In terms of s 72(2) of the Income Tax Act [*Chapter 23:06*] (the Act), the applicant was to pay provisional tax based on estimates of its profit per every quarter of the year. During the 2009 and 2010 financial years, Delta underestimated its profits, resulting in an underpayment by it of amounts of provisional tax if regard is had to the assessment made as to the total tax payable by it in D respect of both years. In each of the years in question, the margin of error in the underestimation of the amount of provisional tax payable exceeded 10 per cent and that the forecast of profits by Delta did not fall within a 10 per cent margin of error.

The respondent ("ZIMRA"), by letter dated 15 August 2012 demanded E the payment of interest in respect of the underpayment of amounts due as provisional tax in terms of s 72(7) of the Act. It demanded a total of US$698 864.48. Delta disputes liability to pay the interest as claimed and it filed the present proceedings.

The dispute between the parties concerns the interpretation of the proviso F to s 72(7) of the Act.

By the time this matter was heard, the proviso had been repealed by s 3(a) of the Finance Act 2012. The issues at hand were dealt with more fully in a substituted subs (11) to s 72. The amendments did not have a retrospective effect.

It is important at the outset to set out terms of the proviso. It provides: G

> "Provided that, for the avoidance of doubt, the Commissioner shall waive interest under circumstances where the taxpayer fails to forecast profits within a ten per centum margin of error."

It is Delta's contention that the clear meaning of the proviso requires the Commissioner to waive interest in the circumstances of this matter on the H underpayment of provisional tax for 2009 and 2010. ZIMRA's contention is

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that such a result fails to punish tax payers such as Delta who underestimated A their taxable income in advance and therefore underpay provisional tax. ZIMRA contends that this leads to an absurdity. It contends that the proviso must be looked at as though two critical words "fails to" were not there.

A historical context in relation to coming into effect of the proviso will assist in the determination of the matter and in particular ZIMRA's contention B regarding punishing those who underestimate their taxable income. The proviso came into effect on 1 January 2005 through the Finance (No 2) Act 2006. Section 72(7) of the Act was repealed and substituted and the original word "penalties" was substituted by the word interest.

Mr *de Bourbon* submitted that interest cannot be regarded as a punishment C as contended by ZIMRA. Interest is a payment made for use of money or upon the late payment of monies due whereas a punishment by its very nature imputes improper or unlawful conduct. He referred to *Scoin Trading (Pty) Ltd* v *Bernstein NO* 2011 (2) SA 118 (SCA) at 121 (para 14) following *Bellairs* v *Hodnett & Anor* 1978 (1) SA 1109 (A) at 1145 where Pillay AJA had this to say: D

> "If a debtor's obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to perform on or before the time agrees upon the damage. They follow naturally from such failure will be

> interest a *tempore morae* or *mora* interest. The purpose of *mora* interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking." E

I agree entirely with the submissions by Mr *de Bourbon*. The legislature changed the concept in the proviso from one being a penalty to one requiring the payment of interest. This must have been for a purpose which will become clearer later on in this judgment. This is taking into account that these amendments were introduced just before the hyper inflationary environment. F

Mr *de Bourbon* further submitted that the wording of the proviso is such that, adopting the plain meaning of the words, leads to the understanding that there is no doubt on the matter between the Commissioner and the taxpayers. The Commissioner must waive interest on any outstanding amounts of provisional tax not paid on the due instalment date if the taxpayer fails to forecast his yearly profits within a 10 per cent margin of error. The interpretation by G ZIMRA creates the doubt that the legislative intended to avoid. He further submitted that the position adopted by the respondent, in effect, asks the court to re-write legislation with this court cannot do.

He further submitted that in the interpretation of tax legislation which is uncertain the *contra fiscum* maxim applies. H

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Mr *Magwaliba*A submitted that the interpretation of the proviso to s 72(7) ascribed to it by the applicant is too literal as to lead to an absurdity and unconscionable results as would never have been contemplated by the legislative. He further submitted that the interpretation ascribed to the proviso by Delta arises as a result of poor draftmanship which the legislature has B subsequently clarified.

He contended that ZIMRA, cognisant of the fact that the estimates of provisional tax may not always be accurate, provided a margin of error of 10 per cent in respect of which the taxpayer would not be liable to interest. For errors above this margin, the taxpayer would be liable for interest as a C penalty for the error.

He urged the court to look at the context in which the proviso was enacted. He urged the court to look at the provisions of s 72(9) and s 72(11) as read with s 71(2). The construction of s 72(11) must therefore be such as to be in harmony with the provision in s 72. He contended that the *contra fiscum* rule does not apply in this matter as to do so would be to use it as a tool to D escape clear liability.

He contended that, to clarify the proviso, Parliament in the Finance Act (No 4) 2012 repealed the proviso to s 72(7) and makes it clear that interest is payable on provisional tax unless a waiver has been granted special circumstances.

The golden rule of interpretation of statutes is that where the language used E in a statute is plain and unambiguous it should be given its ordinary meaning unless that would lead to some absurdity or inconsistency with the intention of the legislature. This is trite.

From the nature of the dispute before me, it is clear that the proviso to s 72(7) is capable of two constructions: the one contended by the Delta and the other suggested by ZIMRA, where it suggests the court ignores certain words in F reading the proviso. In Ex p *Minister of Justice*: in re *R* v *Jacobson & Levy* 1931 AD 466 at 480 it was stated:

> "The function of the court of law is to construe the language of the legislature and arrive at its intention in that way; it has no power to re-draft or alter the language. But intention is not to be ascertained by surmise however probable G such surmise may be."

This approach was adopted by Gubbay JA (as he then was) in *Mxumalo & Ors* v *Guni* 1987 (2) ZLR 1 (S) at 8 where he stated:

> "The language used is plain and unambiguous and the intention of the Law Society is to be gathered therefrom. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from H the language used."

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Makoni J

To similar effect are the statements by Shearer J in Ex p *Lynn & Ors*A1987 (1) SA 797 (N) at 802-803. There the learned judge said:

"The test to be applied has been authoritatively laid down by Innes CJ in *Venter v R* 1907 TS 910 at 914-915:

'… it appears to me that the principle we should adopt may be expressed somewhat in this way – that when to give the plain words of the statue their ordinary meaning would lead to absurdity so glaring that it could B never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.'

In *R* v *Patel & Another* 1944 AD 379 at 388 Centlivres JA, referring to *Venter's*C case *supra*, *R* v *Jaspan & Another* 1940 AD 9 and *Storm & Co* v *Durban Municipality* 1925 AD 49, said:

'These cases are, however, authorities for cutting down or restricting the language used by the Legislature when that course is justified by a consideration of the intention and object of the Legislature. They are not authorities for adding to the language used by the Legislature.' D

To the same effect is the judgment of de Villiers JA in *Principal Immigration Officer* v *Hawabu & Another* 1936 AD 26 at 31:

'It is true that, even where the words of an Act are capable of one meaning only, there is an exceptional class of extreme cases in which courts of law have felt themselves compelled to "modify" or "cut down" or "vary" the words used by the Legislature. In a sense this might be called amputation rather than interpretation.'"

These are general rules of interpretation but, *in casu*, we are dealing with interpretation of tax legislation. In the case of ambiguity arising during the interpretation of fiscal legislation, the *contra fiscum* rule will be applicable. The *contra fiscum* rule is a common law principle stipulating that should a taxing statutory provision reveal ambiguity, the ambiguous provision must be interpreted in a manner that favours a taxpayer. See *Badenhorst* v *CIR* 1955 (2) SA 207 (N) at 215. Put in simple terms, where a tax provision is capable of two constructions, the court will adopt the construction that imposes the smaller burden on the taxpayer. See *Endeavour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at 362D-E where Gubbay CJ stated:

"To put it at its highest for the Commissioner, para 10 of the Thirteenth Schedule reveals a manifest ambiguity with regard to whether the amount for the payment of which the employer is liable is a 'tax' or simply 'an amount'. Consequently, the *contra fiscum* principle must be applied and the provision interpreted so as to impose the smaller burden on the Company. For s 47 allows the Commissioner a

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summary remedy for the recovery of tax, whereas under para 10 he has to institute action in a court of competent jurisdiction. See *Est Reynolds & Ors* v *CIR* 1937 AD 57 at 70; *Israelsohn* v *CIR* 1952 (3) SA 529 (A) at 540 F-H; *Sekretaris van Binnelandse Inkomste* v *Raubenheimer* 1969 (4) SA 314 (A) at 322D.

See also *Meman & Anor* v *Controller of Customs and Excise* 1987 (1) ZLR 170 (S) at 174G-H and 175A. In view of the above, I am inclined to agree with the interpretation by Delta which imposes a smaller burden on it.

It must be borne in mind that it is within the Commissioner's powers to approach Parliament to have taxing legislation amended to avoid an ambiguity such as happened *in casu* and Parliament has the power to make any such amendment retrospective. Parliament was approached to amend the proviso to s 72(2) but it determined that the proviso be repealed and the issue be dealt with in a substituted subs (11) to s 72. It did not choose to make those changes retrospective. Delta submits that this was deliberate as the Commissioner was already appraised of the dispute existing this matter. What this means is that the existing rights as given in terms of the proviso to s 72(7) cannot be affected. This position was made clear in *Pretorius* v *Minister of Defence* 1980 ZLR 395 (A) at 401 where Fieldsend CJ stated:

"… The well recognised principle relied upon … that statutes will not be held to take away existing rights retrospectively unless they so provide expressly or by necessary intendment. Such a principle applies with increased force where, as here, a right is created by a statute, and is purported to be taken away by subsidiary legislation made under that statute which gives no specific power to legislate retrospectively."

The respondents, relying on the memorandum to the Finance Bill, contends that the amendments made to s72 by s 3 of the Finance Act 2012 are simply to clarify the existing law. This assertion is not correct if regard is had to the fundamental changes introduced by the amendments. Had it been a simple matter of clarification, then the words ZIMRA wished to be ignored could simply have been

deleted from the proviso. In its opposing affidavit ZIMRA proposes that the words "fails to" in the provision to s 72(7) be rejected and be disregarded by the court as surplusage. In its heads of argument, ZIMRA suggests that the

> "literal interpretation of the word 'shall' in the proviso must be modified to mean 'may', in which event the proviso, read together with the rest of the section and in particular subs (11), will mean the Commissioner General may upon consideration of the circumstances set out in subs (11), waive interest that was otherwise due in terms of subs (9)."

ZIMRA has asked this court to do what it cannot do. See *Car Rental Services (Pvt) Ltd* v *Director of Customs & Exercise* 1988 (1) ZLR 402 (S) at 409 where Gubbay JA (as he then was) had this to say:

> "It is not for the courts to legislate or to attempt to improve on the situation achieved by parliament through the language it has chosen in its enactment. Effect must be given to what the Act says or permits and not to what it may be thought it ought to have said or prohibited. If there is a *casus omissus* in the Act, and if it could lead to undesirable consequences, the court has no power to fill it. It is a matter for the legislature."

From the above I am inclined to agree with the position advanced by Delta that the proviso to s 72(7) must be given it ordinary meaning, namely, that where the underestimation of profits is more than 10 per cent of the final figure, the Commissioner is obligated to waive interest. I am fortified in this view by the fact that the legislature found in it fit in the Finance (No 2) Act 2006 to repeal the word "penalty" and substitute it with "interest". The legislature removed the punishment element taking into account that the country was getting into a hyper-inflationary environment where taxpayers might have problems to estimate their provisional tax with some accuracy.

Accordingly, I will make the following order:

> "1. It is declared that the provisions of the proviso to section 72(7) of the Income Tax Act [*Chapter 23:06*] prior to the repeal of that proviso by section 3(a) of the Finance Act 2012 obligated the Commissioner-General of the respondent to waive any interest due by the applicant in respect of any underestimation of its profits for the years 2009 and 2010, and in respect of any underpayment of provisional tax in respect of those two years.
> 2. It is declared that the applicant has no liability to pay the sum of $698 864.48 demanded by the respondent in respect of interest on the underpayment of provisional tax for the years 2009 and 2010.
> 3. The respondent is to pay the costs of this application."

Gill, Godlonton & Gerrans, applicant's legal practitioners

Legal and Corporate Service Division, respondent's legal practitioners

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ZIMBABWE PLATINUM MINES (PVT) LTD v ZIMBABWE REVENUE AUTHORITY & ORS 2015 (1) ZLR 125 (H)

Citation	2015 (1) ZLR 125 (H)
Case No	Judgment No. HH-169-15
Court	High Court, Harare
Judge	Makoni J
Heard	17 March 2013; *CAV*

Judgment 29 January 2015

Counsel *F Girach,* for the applicant
T Magwaliba, for the first respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Mines and minerals – *special mining lease in terms of s 167 of Mines and Minerals Act [Chapter 21:05] – royalty clause in such lease – royalties less than those provided for in Part XIV of Act – provisions of lease* D *taking precedence over rates provided for in Part XIV*

Practice and procedure – *application – disputes of fact on papers – when oral evidence required – dispute essentially one of interpretation of documents – oral evidence unnecessary*

Practice and procedure – *parties – Zimbabwe Revenue Authority – proceedings* E *against – not governed by State Liabilities Act [Chapter 8:14]*

Revenue and public finance – *Zimbabwe Revenue Authority – proceedings against – not governed by State Liabilities Act [Chapter 8:14]*

Headnote

The applicant was the holder of a special mining lease issued by the Minister F of Mines in terms of the Mines and Minerals Act [*Chapter 21:05*]. It was also a party to a mining agreement (MA) with the Government of Zimbabwe. Both documents were executed in August 1994. Up until December 2003, the applicant paid a flat royalty rate of 2.5 per cent across the board for all products as per the royalty rate contained in the MA. G The payments were made quarterly. From January 2004 to September 2010, the applicant paid royalties according to the rates stipulated in the Act, but according to dates as provided for in the MA. The reason for this was that the applicant expected a substantive agreement and performance by the Government on the change of the tax regime by it. The parties had at one point contemplated revisiting the tax regime H applicable to the applicant. A framework for the agreement contemplated

was signed and executed by the parties, but an actual agreement to A vary the MA never saw the light of day. When the Government failed to implement the new tax regime, the applicant reverted to the original royalty provisions as provided by the MA. The first respondent claimed royalties from the applicant using the rates set out in the Act. When the applicant did not pay the amounts claimed, the first respondent issued a garnishee order to the applicant's bank. The applicant brought B proceedings for a declaratory order, alleging that there was no legal basis for collection of royalties by the first respondent in terms of the Act as opposed to the MA. It was argued that, in terms of s 243 of the Act, the rates as promulgated in terms of s 245 did not apply to the applicant as it was a holder of a MA. If the words of s 243 are given their ordinary grammatical meaning, they clearly exclude the application of s 245 to C anyone who holds a mining lease.

The first respondent opposed the application on the basis that the terms of the MA did not exempt the applicant from paying the legislated rates of royalties. It argued that s 243 only gives precedence to a MA if it is properly entered into in terms of s 167; and an agreement is properly D entered into in terms of s 167 if the rates payable are made in terms of the Act. Section 167 allowed parties to enter into an agreement and agree on rates as set in terms of the Act or above it. In any event, even if the MA superseded those rates, the applicant had waived the benefit of the MA. As such, it could not unilaterally revert to the rates specified in the MA. E

Other points raised by the first respondent *in limine* were (a) that the application was invalid and a legal nullity for want of compliance with the mandatory provisions of the State Liabilities Act

[*Chapter 8:14*]; (b) that the first respondent was an agent of the Government and attracted no personal liability from the transactions subject to the claim by the applicant; the substantive claim should have been against the Minister; and (c) that there F were material disputes of fact not capable of resolution on the papers.

Held, that s 3 of the Revenue Authority Act [*Chapter 23:11*] provides that the first respondent can be sued. The intention of the Legislature was to establish an agent *sui generis* capable of assuming liability for its wrongful conduct. It was the first respondent which made the erroneous G assessment and collected the revenue, not the third respondent (the Minister). This took the first respondent out of the purview of the State Liabilities Act. The acts complained of by the applicant were effected by the first respondent, who was seized with the responsibility of assessing and collecting revenue due to the State. The applicant was taking issue with the first respondent's statutory obligation to assess and collect H

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revenue. A It was the first respondent who was disputing the applicant's entitlement to assessment of royalties at the rate stipulated in the MA. The Minister was not opposing the application. The first respondent was therefore rightly before the court.

Held, further, that with regard to the alleged disputes of fact, the issue before the court was a question of law: whether or not Part XIV of the Mines and B Minerals Act applied in ascertaining what royalties the applicant should pay. The applicant had placed before the court facts which were not disputed by the first respondent. It had placed before the court the MA, as well as all the correspondence between it and the fourth respondent, which the fourth respondent has not challenged. The court was being C merely asked to interpret the documents and apply the law. It is difficult to appreciate what greater advantages the court would derive from *viva voce* evidence than from the affidavits and written documents, when all the court was being asked to do is ascertain which law to apply.

Held, further, that there was a glaring discrepancy between the MA and the provisions of ss 244 and 245 of the Act. The MA provides for a fixed D rate of 2.5 per cent, payable quarterly. The Act provides for various rates, based on the mineral produced, which are generally higher than those provided for in the MA and which are payable monthly. In terms of Part IX of the Act, special mining agreements were set up, *inter alia*, in order to encourage investment in the mining sector. The lease holders E would exploit the resources, at the same time creating employment. Section 243 was put in place to deal specifically with situations such as the present one, where there are inconsistencies between a special mining agreement and Part XIV of the Act, which regulates royalties. The section gives precedence to the mining agreements. To interpret it in the manner suggested by the first respondent would be to defeat F the intention of the Legislature in setting up the special mining leases. The question would be: why would an investor enter a special mining lease, which must contain a royalty clause in terms of s 167, and at the same time have royalties regulated in terms of Part XIV which royalties, invariably, would be higher than the rates in the MA? Such an interpretation would lead to an absurdity. G

Held, further, that the MA contained a non-variation clause and a non-waiver clause. These clauses were carefully and extensively worded. A non-waiver clause negates any raising of a waiver or any estoppel, in that it amounts to notice, given in advance, acknowledged by the other party, that conduct which might otherwise be a waiver or give rise to H an estopped, may not be taken to be such conduct. The first respondent

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could not place reliance on the unilateral conduct of the applicant of A departing from the written MA, as such conduct would not preclude the applicant from thereafter enforcing the right or provision of the agreement being indulged.

Cases cited B

AFC v *Pocock* 1986 (2) ZLR 229 (S)

Evins v Shield Ins Co Ltd 1980 (2) SA 814 (A)

Mashingaidze v Mashingaidze 1991 (1) ZLR 219 (H)

Mpumela v Berger Paints (Pvt) Ltd 1999 (2) ZLR 146 (S)

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

Room Hire Co (Pvt) Ltd v Jeppe Street Mansions (Pvt) Ltd 1949 (3) SA 1155 (T)C

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

Legislation considered

Income Tax Act [*Chapter 21:05*], s 58

Mines and Minerals Act [*Chapter 21:05*], ss 167, 243, 244 & 245 D

Revenue Authority Act [*Chapter 23:11*], ss 3 & 4; Second Schedule para 22

State Liabilities Act [*Chapter 8:14*], ss 2 & 6

Case information

F Girach, for the applicant

T Magwaliba, for the first respondent E

Judgment

Makoni J: The applicant approached this court seeking a declaratur and consequential relief in the following terms:

"1. The application for a declaratur is hereby granted.

2. The garnishee order issued on 16 November 2011 by the first respondent to the second respondent against the applicant is invalid. For the avoidance F of doubt, it is specifically declared that:

2.1. The definition of taxes under Income Tax Act [*Chapter 21:05*] does not include royalties under the Mines and Minerals Act (read with Chapter VII of the Finance Act [*Chapter 23:04*]).

2.2. the first respondent acted *ultra vires* when it used the power granted unto it under section 58 of the Income Tax Act [*Chapter 23:06*] for G enforcing payment of taxes under that Act, in an attempt to enforce payment of royalties under Part XIV Section 245 of the Mines and Minerals Act [*Chapter 21:05*] as read with Chapter XII section 26, section 37 and section 37A of the Finance Act [*Chapter 23:04*].

3. Owing to the operation of Part XIV Section 243 of the Mines and Minerals Act [*Chapter 21:05]*, the applicant's mining agreement with the Government H

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of A Zimbabwe takes precedence over Part XIV section 244 and section 245 of the Mines and Minerals Act [*Chapter 21:05*] and takes precedence over Chapter VII section 36, section 37 section 37A and the Schedule of the Finance Act [*Chapter 23:04*]. For the avoidance of doubt, it is specially declared that:

3.1. the applicant is liable to pay royalty rates at 2.5% of the fair market B value of all products produced from the mining area, and not 5% or any other rate appearing [in the Schedule under Chapter VII of the Finance Act [*Chapter 23:04*] enacted by the Mines and Minerals Act [*Chapter 21:05*];

3.2. The applicant overpaid royalty rates to the first respondent for the period of 1 January 2004 to 30 September 2010 when it paid at the legislative C rate of 3% and 3.5% instead 2.5%. The applicant is entitled to recover the amount overpaid in the sum of US$6 057 146 (six million fifty seven thousand one hundred and forty six United States Dollars) by way of set off royalties which are due and payable for the period of 1 October 2010 to 31 March 2011.

4. Each party shall bear its own costs." D

The background to the matter is that the applicant is the holder of a special mining lease issued by the Minister of Mines to the applicant, in terms of Mines and Minerals Act [*Chapter 21:05*] (the Act). It is also a holder of a mining agreement (MA) signed between it and the Government of Zimbabwe (the Government). Both documents were executed on 24 August 1994. E Up until December 2003, the applicant paid a flat royalty rate of 2.5 per cent across the board for all products as per the royalty rate contained in the mining agreement. The payments were made quarterly. From January

2004 to 30 September 2010, the applicant paid royalties according to rates stipulated in the Act but according to dates as provided for in the MA. The F reason given by the applicant for such payments is that it anticipated a substantive agreement and performance by the Government on the change of the tax regime by it. The parties had at one point contemplated revisiting the tax regime applicable to the applicant. A framework for the agreement contemplated was signed and executed by the parties. The actual agreement to vary the MA never saw the light of day. When the government failed to G implement the new tax regime, the applicant reverted to the original royalty provisions as provided by the MA. The first respondent claimed royalties from the applicant using the legislature rates. When the applicant did not pay the amounts claimed by the first respondent, the first respondent issued a garnishee to the second respondent against the applicant. The applicant H then instituted the present proceedings.

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It is the applicant's case that there is no legal basis for collection of royalties by A the first respondent in terms of the Act as opposed to the Mining Agreement. The first respondent therefore collected in excess of the rates applicable to the applicant and has therefore been over compensated. The applicant overpaid the first respondent in the sum total of $6 057 146.

It also avers that the first respondent was not entitled, at law, to recover B royalties falling due under the Act by way of the power conferred on it under the Income Tax Act [*Chapter 23:06*] namely to attach debts owed to the debtor.

The first respondent opposed the application. It raised four points *in limine, viz*:

(i) The court application is invalid and constitute a legal nullity for want of compliance with the mandatory provisions of the State Liabilities Act [*Chapter 8:14*]. C

(ii) The applicant approached the court with dirty hands by approaching the court without complying with the requirements of the law.

(iii) The first respondent is an agent of the Government of Zimbabwe and attracts no personal liability from the transactions subject to the claim by the applicant. D

(iv) There are material disputes of fact not capable of resolution on the papers.

On the merits, the first respondent opposes the application on the basis that the terms of the MA do not exempt the applicant from paying legislated E rates of royalties. It further avers that, in the event that the court finds that the MA superseded legislated rates, it will be argued that the applicant waived the benefit of the MA. As such, it cannot unilaterally revert to the rates specified in the MA.

It further avers that the first respondent was lawfully entitled to rely upon the powers set out in the Income Tax Act to enforce the payment of royalties F levied in terms of the Act as read with the Finance Act [*Chapter 23:04*].

I first of all deal with the points *in limine*.

Dirty hands

It was the first respondent's contention that the applicant had duty to comply G with the law, whether arising from a court order or a legal instrument or provide an explanation for non-compliance. The applicant must pay all the royalties that have been assessed or evince an intention to want to pay before seeking the court's protection in the form of declaratur.

As it turned out, by the time the matter was heard, the applicant had settled the outstanding royalties in full and it was paying, on a without prejudice H

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basis, A royalties at the rates set out in terms of the Act. Correspondence to that effect was produced.

The issue was therefore resolved and therefore did not require a determination.

Invalidity of proceedings

I B will deal with grounds (i) and (ii) together as they are interlinked. It was submitted on behalf of the first respondent that the relief sought by the applicant is divided into two: a declaratur and consequential relief. The ultimate relief includes the recovery of am amount of ± $6 000 000. In terms of s 3 of the Revenue Authority Act [*Chapter 23:11*], the first respondent is a legal entity. The revenue that it collects is not of its own account. It collects as an agent and remits the revenue to the relevant ministry. The applicant must C therefore pursue the first respondent and the principal ministries involved. The ministries were cited but no substantive relief is being sought against them. The notice in terms of s 6 of the State Liabilities Act [*Chapter 8:14*] ought to have been given. It was submitted that in view of the flagrant violation of the State Liabilities Act there was no complete cause of action and the D proceedings were therefore invalid. Mr *Magwaliba* referred the court to *Murphy* v *Director of Customs & Excise* 1992 (1) ZLR 28 (H) and *Evins* v *Shield Insurance Co Ltd* 1980 (2) SA 841 (A) at 8338D. These cases *inter alia* deal with the proper legal meaning of the expression "cause of action." He further submitted that in respect of claims against the State, in terms of s 6 of State Liabilities Act, while all of the other requirements at common E law would have accrued, the full cause of action does not accrue until notice has been given to the defendant or the respondents as the case may be.

The first respondent further contended that it is an agent for the third respondent and ought not to have been sued. In terms of s 4 of the Revenue Authority Act [*Chapter 23:11*] the functions of the respondent are to act F as an agent of the state in assessing, collection and enforcing the payment of all revenues. The ordinary consequences as between a principal and an agent are applicable in the relationship between the first respondent and the State. The first respondent cannot therefore be sued with its principals the third respondent. The applicant elects who to sue. It is misleading for the G first respondent to argue that the applicant's cause of action is incomplete.

The applicant contented that the State Liabilities Act does not apply to this matter. It only applies to claims against the State, as defined in s 2 of the State Liabilities Act. Further, the claim by the applicant is not for money or delivery. It is for a declaratur. The applicant further contends that it is not correct that the first respondent is merely an agent *ejusdem generis* or a H collecting arm of the State. Section 3 of the Revenue Authority Act [*Chapter*

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23:11] provides that the first respondent can be sued. The intention of the A legislature was to establish an agent *sui generis* capable of assuming liability for its wrongful conduct. It is the first respondent who made erroneous assessment and collected the revenue and not third respondent.

The answer to the above arguments is to be found in the Revenue Authority Act. Section 3 of that Act provides: B

> "There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate capable of suing and being sued in its own name and subject to this Act, of performing all acts that bodies corporate may by law perform."

Section 4 sets out its functions and powers and one of such functions is to act C as an agent for the State in assessing, collecting and enforcing the payment all revenues. Paragraph 22 of the Second Schedule to the Revenue Authority Act which lays out the powers of the Authority, provides as follows:

> "On behalf of the State, to institute and maintain proceedings in any court or tribunal for the recovery on any revenues and to take such steps as may be necessary to recover the revenues." D

My view is that these provisions take the first respondent out of the purview of the State Liabilities Act. The clear intention of the legislature was to create a separate legal entity in the respondent capable of suing and being sued. The State Liabilities Act is applicable to acts of the State as defined in s 2 of that Act. E

The acts complained of by the applicant were done by the first respondent who is seized with the responsibility of assessing and collecting revenue due to the State. According to the applicant's averments, it has made a wrong assessment and collected the amounts due. The applicant is taking issue with the first respondent's statutory obligation to assess and collect revenue. In any F event it is the first respondent who is disputing the applicant's entitlement to assessment of royalties at a particular rate stipulated in the Mining Agreement between it and the third respondent. The third

respondent has not opposed the application. The first respondent is therefore rightly before the court.

I agree entirely with the submission by the applicant that it is misleading G to argue that there is no complete cause of action unless and until notice is given in terms of State Liabilities Act.

Having defined "cause of action" correctly, it should have been clear to the first respondent that the material averments to found a cause of action are premised on the substantive elements of a particular action and not on procedural requirements. The *Murphy* case s*upra* was quoted out of context. H

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What A the court was saying in the matter is that the preliminary notice must state the cause of action "clearly and explicitly."

The first respondent cannot succeed on this point.

Disputes of facts

The respondents contented that there are material disputes of fact that cannot B be resolved on the papers. The applicant ought to have known of these material disputes of fact before embarking on the present proceedings. This is more particularly so as the applicant initially filed an urgent chamber application which was dismissed. The respondents, in those proceedings, pointed out to the applicant the existence of the material dispute of fact. The respondents C made reference to *Zimbabwe Bonded Fibre Glass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) at 339C and *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (G) at 221G-222 A.

The disputes of fact are contained in para 45 of the respondents' heads of argument and they centre on the fact that the applicant relies upon certain undertakings given to it by the Government of Zimbabwe. These were not D placed before the court. If the undertakings were accepted then the applicant, as it contends, acted upon such undertakings. There was a contract between the Government of Zimbabwe and the applicant other than the contracts attached to the applicant's founding affidavit.

The applicant alleges breach of the contract by the Government. The material E terms of the contract have not been placed before the court. The applicant also attempted to give a breakdown of the amounts it alleges to have overpaid and expects the court to accept its statements on its mere say so.

The applicant contends that the issue before the court is a question of law and the applicant has furnished the courts with the necessary affidavits and written documents attached thereon from which the court can ascertain the F facts and apply law to establish a declaratur. The applicant referred to *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA (T) at 1155 and *Mpumela* v *Berger Paints (Pvt) Ltd* 1999 (2) ZLR 146 (S).

In *Room Hire Co* s*upra* Murray AJP observed pertinently that, apart from those matters where the procedure is proscribed by law, such as matrimonial G matters and illiquid claims, among others, in which motion proceedings are not permissible at all –

> "There is an area in which according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact … the deciding factor is the existence of a dispute of fact, not as to law, H and it is (with respect) difficult to appreciate what greater advantages are denied

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> by a judicial officer from *viva voce* evidence, then from affidavits when he has A to ascertain only the law to be applied."

I agree with the position adopted by the applicant that the issue that is before the court is a question of law. The issue is whether or not Part XIV of the Act applies in ascertaining what royalties the applicant pays of the Mining Agreement. The applicant has placed before the court facts, which are not B disputed, by the first respondent. It has placed before the court the Mining Agreement. There is no dispute as to whether it was amended. It has placed on record all the correspondence

between it and the fourth respondent which the fourth respondent has not challenged. The court is being merely asked to interpret the documents attached and apply the law. As was stated by Murray AJP in *Room Hire Co (Pvt) Ltd supra*, it is difficult to appreciate C what greater advantages the court would derive from *viva voce* evidence other than from affidavits and written documents attached hereon when all the court is being asked to do is ascertain which law to apply.

In view of the above, I will dismiss the point *in limine*.

Validity of the garnishee D

The applicant had taken issue with the definition of taxes under the Income Tax Act [*Chapter 21:05*], in that it does not include royalties under the Mines and Minerals Act as read with Chapter VII of the Finance Act [*Chapter 23:04*]. It argued that the first respondent acted *ultra vires* when it used the powers granted unto it under s 58 of the Income Tax Act [*Chapter 23:06*] for enforcing the payment of taxes under that Act. E

By the time the matter was heard, s 58 of the Income Tax Act had been amended in the definition of "tax" by the Finance Act 4 of 2012 by the repeal of para (e) and the substitution of "(e) any levy or sum payable in terms of the Charging Act". Act 4 of 2012 came into effect on 17 September 2012. The applicant decided not to pursue the issue. It will not be necessary F therefore to determine the issue.

The royalties regime which applies to the applicant

The issue for determination is whether it is the MA regime or the legislature regime which applies in the assessment of royalties payable by the applicant. G

Mr *Girach* contended that clause 6 of MA provides for the payment and levying of royalties due by the applicant. Paragraph 6.1 thereof prescribes the rate of 2.5 per cent of the fair market value determined in accordance with clause 11 thereof, payable on a quarterly basis. He further contended that s 244 and s 245 of the Act do not apply to the applicant as he is a holder of a MA. H

2015 (1) ZLR p135

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Mr *Magwaliba*A submitted that s 167 of the Act provides that you cannot enter into an agreement which is inconsistent with the Act. The Act, in s 244 and 245, provides for royalties which fluctuate and are payable monthly. The MA provides for 2.5 per cent. If s 244 and 245 are read together with s 167, the MA falls foul of the law.

Section 167 provides: B

> "The Minister, with the approval of the president, may enter into an agreement, not inconsistent with the Act, with any person regarding
>
> (a) …
>
> (b) …
>
> (c) the liabilities and obligations of the person in terms of any special mining C lease that may be issued to him, including payments by way of royalties, rents and fees; and
>
> (d) …"

Section 243 of the Act provides:

> "This Part shall apply to the holder of a special mining lease only to the extent D that the terms and conditions of his special mining lease or of any agreement entered into with him in terms of section *one hundred and sixty seven* are consistent with this Part."

It is common cause that the MA was entered into in terms of s 167 of the Act. It has a royalty clause as provided for in the section. The parties differ on the interpretation of s 167 as read with s 243, s 244 and s 245. Mr *Girach*E contends that in terms of s 243 the rates as promulgated in terms of s 245 do not apply to it as it is a holder of a MA. He submitted that if the words of s 243 are given their ordinary grammatical meaning, they clearly exclude the application of s 245 to anyone who holds a mining lease. Section 243 gives precedence to the MA.

Mr *Magwaliba*F contends that s 243 only gives precedence to a MA if it is properly entered into in terms of s 167. According to his interpretation, an agreement is properly entered into in terms of s

167 if the rates payable are made in terms of the Act. He argued that s 167 allows parties to enter into an agreement and agree on rate as set in terms of the Act or above it.

What is clear from the above is that there is an obvious and glaring discrepancy G in clause 6 of the MA and the provisions of s 244 and 245 of the Act. The MA provides for a fixed rate of 2.5 per cent, payable quarterly. The Act provides for various rates based on the mineral produced which are generally higher than those provided for in the MA and which are payable monthly.

In terms of Part IX of the Act, Special Mining Agreements were set up, H*inter alia*, in order to encourage investment in the mining sector. The lease

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holders would exploit to the resources while at the same time creating A employment. Section 243 was put in place to specifically deal with situations such as the present one, where there are inconsistencies between a special mining agreement and Part XIV of the Act, which regulate royalties. The provision gives precedence to the mining agreements. To interpret it in the manner suggested by the respondent would be to defeat the intention of the B legislature in setting up the special mining leases. The question would be why enter into the special mining lease, which must contain a royalty clause in terms of s 167, and at the same time have royalties regulated in terms of Part XIV which invariably, will be higher than the rates in the MA. Such an interpretation will lead to an absurdity.

I agree with Mr *Girach* that s 243 specifically confers precedence to the MA C and the respondent had no legal basis to levy royalties against the applicant in terms of the legislature regime.

Waiver and estoppel

Mr *Magwaliba* submitted that in the event of the court finding in favour of the applicant in respect of the rate of the royalty, the court must find that D the applicant abandoned any reliance on the MA to the extent that it set the rates of the royalties payable. For a period of over 6 years the applicant paid the higher and legislated rates. During the entire period it was aware of its rights in terms of the MA. It did not insist on the enforcement of such rights. The first respondent is therefore entitled to regard the conduct of the applicant as a clear and unequivocal abandonment of any perceived rights to E pay reduced rates of royalties in terms of the MA. The non variation clause and the waiver clause will not assist the applicant.

Mr *Girach* submitted that as a result of an error on the part of the applicant it paid royalties in terms of the legislated rates. This did not amount to estoppel in view of clause 29.2 of the MA. F

The MA contains a non-variation clause and a non-waiver clause in clauses 29.1 and 29.2 respectively. The clauses are carefully and extensively worded. What is the combined effect of such clauses in a contract. The head note in *Agricultural Finance Corporation* v *Pocock* 1986 (2) ZLR 229 (S) sums it all up.

> "A non-variation clause in a contract entrenches the requirement that any variation G has to be in writing but does not prevent a party for whose benefit it is inserted from waiving the requirement.
>
> A non-waiver clause negates any raising of a waiver or any estoppel in that it amounts to notice given in advance, acknowledged by the other party, that conduct which might otherwise be a waiver or give rise to an estoppel, may not be taken to be such conduct. H

> The A combined effect of the two clauses is that two parties to a written agreement containing carefully and extensively worded non-variation and non-waiver clauses cannot enter an enforceable oral agreement departing from the written terms since to the extent it is a variation of the contract it is precluded by non-variation clause whereas if it be said to be a waiver or conduct giving rise to an estoppel then the non-waiver clause provides the complete answer to the point.

Clause 29.2 B provides a complete answer to the issue raised by the first respondent. It cannot place reliance on the unilateral conduct of the applicant of departing from the written MA as such conduct will not preclude the applicant from thereafter enforcing the right or provision of the agreement being indulged. There is nothing on the papers to show that the MA has been varied. The first

respondent cannot therefore successfully rely on either C waiver or estoppel. The effect of clause 29.2 is to negate both defences.

Over-payment of royalties

This issue was not persisted by the applicant in its submissions. I will take it that the applicant abandoned the claim, and rightly so in my view. The applicant had not, in its founding papers, illustrated to the court how the D alleged overpayment was made in respect of each year.

Accordingly, I will make the following order:

It is ordered that:

1. Owing to the operation of Part XIV s 243 of the Mines and Minerals Act [*Chapter 21:05*], the applicant's Mining Agreement with the Government E takes precedence over Part XIV s 244 and s 245 of the Mines and Minerals Act [*Chapter 21:05*] and takes precedence over Chapter VII s 36, s 37, s 37A and the Schedule of the Finance Act [*Cha*pter *23:04*]. For the avoidance of doubt, it is specifically declared that:
   1.1. The applicant is liable to pay royalty rates at 2.5 per cent of the fair market value of all products produced from the mining area, and not F 5 per cent or any other rate appearing in the Schedule under Chapter VII of the Finance Act [*Chapter 23:04*] enacted by the Mines and Minerals Act [*Chapter 21:05*];
2. Each party shall bear its own costs. G

Scanlen & Holderness, applicant's legal practitioners

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

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MC PLUMBING (PVT) LTD v HUALONG CONSTRUCTION (PVT) LTD 2015 (1) ZLR 138 (H)

Citation	2015 (1) ZLR 139 (H)
Case No	Judgment No. HH-85-15
Court	High Court, Harare
Judge	Chigumba J
Heard	15 January 2015; *CAV*
Judgment	4 February 2015
Counsel	*M Chijara,* for the plaintiff *A Chizikani,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure – *absolution from the instance – application made at close of plaintiff's case – principles – when application may be granted*

Headnote

The test to be applied to the question of whether to grant absolution from the D instance to a defendant at the close of the plaintiff's case is as follows:

(1) whether there is any evidence at the close of the plaintiff's case, upon which a court, directing its mind reasonably to such evidence, could or might find for the plaintiff;

(2) whether there is any special consideration or reason why the court E should reject the evidence adduced on behalf of the plaintiff (for example glaring inconsistencies or unacceptable variance with the pleadings filed of record);

(3) whether the plaintiff has failed to adduce any evidence, or adduced insufficient evidence to establish an essential element of its claim; and F

(4) whether an overall assessment of all the evidence adduced on behalf of the plaintiff – the pleadings filed of record, the annexures, the exhibits, all the discovered documents, coupled with the *viva voce* evidence – falls short of establishing the plaintiff's case, on the face of it (*prima facie*). G

Cases cited

Bailey NO v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H)

Efrolou (Pvt) Ltd v *Muringani (2)* 2013 (1) ZLR 309 (H)

Gascoyne v *Paul and Hunter* 1917 TPD 170

Katerere v *Standard Chartered Bank Zim Ltd* HB-51-08 H

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Lourenco v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) A

Mazibuko v *Santam Insurance Co Ltd & Anor* 1982 (3) SA 125 (A)

Muguti v *Sunduza* HH-45-11

Supreme Service Station (1969) (Pvt) Ltd v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) B

Theron v *Behr* 1918 CPD 443

United Air Charters (Pvt) Ltd v *Jarman* 1994 (2) ZLR 341 (S)

Case information

M Chijara, for the plaintiff

A Chizikani, for the defendant

Judgment

Chigumba J: The plaintiff was a subcontractor to the defendant in respect of plumbing work done on or about May 2011, on a project called the Gushungo Dairy Project. Both the plaintiff and the defendant are companies which are duly registered in accordance with the laws of Zimbabwe. The dispute between the parties relates to: D

(a) the value of the certified work done by plaintiff for the defendant in terms of their contract.

(b) whether the plaintiff was paid at all by the defendant.

(c) whether there is any balance of payment due to the plaintiff from the defendant. E

The issue that rose for determination at the close of the plaintiff's case was whether the plaintiff had adduced enough evidence of the terms of the contract between the parties to enable a determination to be made as to what the plaintiff was entitled to be paid by the defendant. The plaintiff filed summons on 8 January 2014, claiming payment of US$119 033.91 from the defendant, for F services rendered in terms of a subcontracting agreement for work done, as well as interest

thereon at the prescribed rate, and costs of suit. The plaintiff averred that defendant undertook to pay for all plumbing work done upon receipt of payment from the principal for work specifically completed by the plaintiff. The plaintiff averred further, that, despite being paid in full by the principal for the work done by the plaintiff, the defendant made a partial G payment and has failed, refused or neglected to pay the balance outstanding.

In its plea, filed of record on 26 February 2014, the defendant denied having any knowledge of the plaintiff and that any contractual relationship existed between itself and the plaintiff. The defendant pleaded to having dealt with one Munyaradzi Chafa in his personal capacity and denied ever dealing with H his company, the plaintiff. The defendant averred that it had paid Munyaradzi

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Chafa in full for all the plumbing work done in the construction of Gushungo A Dairy. The defendant filed a counterclaim, a sum of US$29 603.38 in damages for the alleged malicious concealment of the drainage system by the plaintiff, leading to a leakage and flooding, which had to be rectified by the defendant.

At the hearing of the matter plaintiff led evidence through its managing director, Mr Munyaradzi Chafa, who said that he has been working as a qualified class 7 plumber for 21 years, after undergoing training at the Polytechnic. He told B the court that the plaintiff and the defendant have a contractual relationship, in terms of which defendant subcontracted plaintiff to do plumbing work, that is, all the piping, drainage, sewer and water reticulation at the factory. Three interim payment certificates dated 14 June 2011, 14 October 2011, and 14 November 2011 were produced in support of the plaintiff's claim. C The first one was addressed to "Classic Project Managers", in connection with Gushungo Dairy Project, and headed "Plumbing Works IPC number 1 for M & C Plumbers". The witness explained to the court that an IPC was an interim payment certificate. On IPC no. 1, it was certified that the plaintiff had completed plumbing works to the value of US$44 333.54. The amount was due for ground floor drainage, and extra drainage work D done. Engineer T Chitakara of ProStruct Consulting Engineers certified that he had checked and corrected the claim submitted by the plaintiff and recommended payment of the confirmed value of the work done. The IPC included a detailed description of the measured work done by the plaintiff.

The second IPC was dated 14 October 2011, and it was in regards to civil E works, ground floor drainage and sewer reticulation. It certified that the amount provisionally payable was US$43 669.87. It stated that IPC no. 1 had been incorporated therein, but that the work for ground floor drainage had been done twice because the pipes initially laid had to be changed, from those originally used to stainless steel pipes. The last IPC was dated 14 November 2011, and it was in regards to ground floor drainage and F sewerage. It certified that the amount payable was US$47 376.52, and that this sum excluded water reticulation. The court noted that all the IPCs gave details of the material supplied by the plaintiff, and that they all stated that the plaintiff's submitted value for the work done had been checked and verified by ProStruct Engineers. The payment certificates all stated that the claim submitted by the plaintiff had been checked and corrected, and G recommended a certain sum for payment. The payment certificates also stated that the assistance of the quantity surveyor would be called for, in coming up with the correct figure for final payment.

Mr Chafa told the court that the total amount due to the plaintiff on the three IPCs was US$135 000. He produced a letter, dated 3 July 2014. It is H

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addressed A to Classic Project Management, by ProStruct Consulting Enginers, and copied to the plaintiff, and to Mahachi Gwaze & Partners, the quantity surveyors. ProStruct stated that it had been approached by the plaintiff, who had been a subcontractor of the defendant, and that the total amount paid for all measured civil works at the Gushungo Dairy Project, i.e. roads and storm B water, sewer reticulation, water reticulation and external drainage amounted to US$1 044 954.12. Of that sum, the amount payable to plaintiff for external drainage and sewer reticulation was US$135 379.94. A breakdown of the total amount paid to the defendant was given, which showed the sums paid for sewer reticulation, external drainage, water reticulation, bulk earthworks, roads and storm water drains. The sum for water reticulation was subject C to certification by the water authority, ZINWA, or by the quantity surveyor.

The witness told the court that, of the certified US$135 379.94 due to it, the defendant paid US$59 095.67, leaving a balance outstanding of US$119 033.91, which is claimed in the summons. Finally, the witness denied being responsible for the alleged malicious concealment of the drainage system D and any resultant damages. During cross examination, Mr Chafa told the court that he had responded to an advertisement flighted by the defendant in a local newspaper, and submitted the winning bid to be defendant's subcontractor to plumbing works on the Gushungo Dairy project. He denied that he had initially worked for the defendant in a personal capacity, and pointed out that the advertisement had specifically requested that registered companies only E should apply for the subcontract. He admitted to being paid allowances by the defendant for odd jobs which he did before the plumbing work started. He said that the project was delayed by five months initially.

Mr Chafa told the court that his contract with the defendant was to do plumbing and to be paid everything minus five per cent. He said that it was F a fix and supply contract, and that the agreement was oral. The witness told the court that he had a cordial relationship with the previous management of the defendant and that they operated on trust, and that trouble arose when the last manager of defendant returned to China, and the current manager took over. He denied the allegation of wrongdoing by allegedly conniving with the project engineers to procure certification of the value of the work G done by the plaintiff, directly, which was an alleged anomaly due to the fact that payment could only correctly be certified as being due to the main contractor. The court did not formulate the impression that this witness was incredible or that he was misleading it. Although he was a nervous witness and somewhat sarcastic at times, during cross examination, he did not change H his testimony. The court believed him.

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The plaintiff's second witness was Mr Audily Chatora, the project manager A of the Gushungo Dairy project. He told the court that his role was to coordinate the functions of the main contractor and to approve and certify payments due to consultants and to the contractors. He said that the process of certification generally is that architects, engineers and quantity surveyors perform certain duties in the certification process. The role of the architect B is to confirm that works done are fit and due for payment. The role of the engineer is to inspect, and certify as fit, and due for payment, works done by contractors. The role of quantity surveyors is to qualify and check the engineer's certificates and produce all encompassing certificates which are sent to the project manager, who checks and concurs or disagrees with the certified value of the work done. The project manager issues an approval C certificate, which the client relies on before paying.

The witness confirmed that ProStruct Engineers were the project engineers. He told the court that there was nothing inappropriate about the payment certificated which had been produced by the plaintiff as evidence in support of its claim. The fact that the plaintiff was mentioned by name on the payment D certificate did not mean that the plaintiff would be paid directly for the value of the work done. The defendant would be paid directly, and was paid directly, and in full, for the total value of the work done, by plaintiff and any other subcontractors hired by the defendant. Mr Chatora admitted that he authored the letter of 21 July 2014, addressed to Lawman Chimuriwo Legal Practitioners. In the letter he stated that Classic Project Managers were not E privy to the domestic arrangements between the plaintiff and the defendant. He did however, confirm that the value of the work done by the plaintiff was US$135 379.94, and that this valuation includes both materials and labour.

The letter also stated that any and all materials and plant which were procured and provided by the client on the ground could not be credited to the plaintiff. F Mr Chatora told the court that the project managers did not have any queries regarding the interim payment certificates, and that the penultimate certificate incorporated what had been certified previously, in the interim certificates. He told the court that he was not privy to the quantum of remedial work allegedly done by the defendant. He confirmed that all the works that needed G rectification had been drawn to the attention of the defendant. During cross examination, Mr Chatora told the court that he had certified the amount of money due to the plaintiff. He said that the IPCs were issued correctly because they were addressed to the project manager, even though it was irregular that they referred to a sub contractor directly and by name. He pointed out that the penultimate certificate number 10, which was admitted into evidence, H

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showed A that all payments due were to be paid directly to the defendant, the main contractor, and not to the plaintiff.

The witness stressed that the role of the engineer is to authenticate the work done, to design, monitor, inspect and certify work done, to quantify the work done, and to certify its value. On being asked how the engineer could possibly B have known what rate to use in quantifying the work done by the plaintiff, not being privy to the terms of the contract between the plaintiff and the defendant, the witness told the court he was happy with the quantification because there are three levels of price checks, and that the certification of the value of the plaintiff's works passed all three levels of checks so the project manager found no reason to query it. Finally, Mr Chatora told the court that if C the client had bought any material or supplied any plant and equipment, the value would have been automatically deducted when the IPCs were issued, because their accounting system was designed to be self-levelling, that is to deduct value due to the client before a final valuation of work done is certified. The plaintiff's second witness came across as a poised and confident professional who exhibited useful knowledge about the roles played by the D different players to the certification process. The court was grateful to him for the insight that he provided. He did not exhibit bias towards any party.

The plaintiff then closed its case. The defendant then applied for dismissal of the plaintiff's case, on the basis that the plaintiff's claim, being based on contract, had not been established because insufficient evidence had been E led to establish the terms of the contract, its operation, whether the contract had been breached, the amount due to the plaintiff, what had been paid to the plaintiff and the balance due if any. It was submitted on behalf of the defendant that the question to ask at the close of the plaintiff's case is whether the plaintiff had established a *prima facie* case against the defendant. The definition of *prima facie*, is literally "at first glance", or "on the face of it", F which means, on initial examination or consideration. It means that the plaintiff's case must be clear from the first impression, legally sufficient, or sufficient in law to establish a case or a fact, unless disproved. In my view, establishing a case "at first glance" implies that the degree of scrutiny of the evidence adduced by the plaintiff is of a lower standard, at this stage.

Let G us turn to the law for guidance on what ought to happen when a defendant applies for discharge, at the close of the plaintiff's case. It is accepted that after a plaintiff has closed its case, a defendant, before commencing his own case, may apply for dismissal of the plaintiff's claim. Should the court accede to this application, the judgment will be one of "absolution from the instance". See Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa*H 4 ed p 681. A decree of absolution from the instance is derived

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from Roman-Dutch law. It is the appropriate order to make, when, after all A the evidence the plaintiff has not discharged the ordinary burden of proof. If at the end of the plaintiff's case there is insufficient evidence upon which a reasonable man could find for him, the defendant is entitled to absolution. See L H Hoffmann & D T Zeffertt *South African Law of Evidence* 4 ed p 507.

It has also been said that the term "absolution from the instance" is used B to describe the finding that may be made at either of two distinct stages of trial. In both cases it means that the evidence is insufficient for a finding to be made against the defendant. The defendant will be "absolved from the instance" if upon an evaluation of the evidence as a whole, the plaintiff's burden of proof has not been discharged. See P-J Schwikkard & S E van der Merwe *Principles of Evidence* 3 ed p 578. Absolution from the instance C means that the plaintiff has not proved a case against the defendant, and it is to be distinguished from a positive finding that no claim exists against the defendant. Where a defendant has been absolved from the instance, the plaintiff may reinstitute the action, provided that it has not prescribed. The rationale behind absolving a defendant from the instance is that, due to the insufficiency of the plaintiff's evidence and failure to establish an essential D element of its claim, the defendant should be spared the trouble and the expense of continuing to mount a defence to a hopeless claim.

In *Lourenco* **v***Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 156-158**, t**he Supreme Court had occasion to discuss the various cases which ought to be relied on in determining an application for E absolution from the instance. The first case to be referred to was *Mazibuko* v *Santam Insurance Co Ltd & Anor* 1982 (3) SA 125 (A) at 133, where the court said, at 132H:

> "In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the court must address itself is *whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff;* in other words whether plaintiff has made out a *prima facie* case".

The next case referred to by the Supreme Court is *Gascoyne* v *Paul and Hunter* 1917 TPD 170 where the court said at 173:

> "The question therefore is, at the close of the case … was there a p*rima facie* case against the defendant Hunter; in other words, *was there such evidence before the court upon which a reasonable man might, not should, give judgment against Hunter?*" (my emphasis).

The Supreme Court then discussed the celebrated case of *Supreme Service Station (1969) (Pvt) Ltd* v *Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5F-G as one of the leading cases on the question of when absolution from

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Chigumba J

the instance ought to be granted at the close of the plaintiff's case, before the defence case is opened. It is trite that the court cannot *meru motu* consider whether absolution must be granted. It is an option which is available to the defendant, on application. It was held in that case that when an application for absolution from the instance is made at the end of the plaintiff's case the test is: what *might* a reasonable court do, i.e. is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff; if the application is made after the defendant has closed his case the test is: what *ought* a reasonable court do **(**the emphasis is mine).

The difference in the two tests, in my view, is in the differing levels of proof required in order to discharge the onus on any party who will have made any allegation, be it in the plaintiff's claim, or in the defence proffered by the defendant. At the close of the plaintiff's case, the burden of proof on the plaintiff is to make a prima facie case (on the face of it). The standard of proof is lower (what might the court do – the court may or may not). At the close of the defendant's case, in my view, the standard of proof is higher. Having heard the plaintiff and defendant's evidence, the court must decide what the balance of probabilities favours; it must decide what it ought to do, not what it may or may not do. In deciding what a court may or may not do, there is an implication that the court may make an incorrect decision, because at the close of the plaintiff's case, it will not have heard all the evidence.

Counsel for the plaintiff referred the court to two recent cases High Court which were instructive, and persuasive. The first case, Katerere v Standard Chartered Bank Zimbabwe Ltd HB-51-08, at p 2, exhorted a court to be –

> "... chary of granting absolution at the close of the plaintiff's case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff's evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of the plaintiff's case may be granted if the plaintiff has failed to establish an essential element of his claim: *Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (A); *Marine & Trade Insurance Co Ltd* v *van der Schyff* 1972 (1) SA 26 (A); *Sithole* v *PG Industries (Pvt) Ltd* HB-47-05".

The second case that counsel for the plaintiff referred the court to was that of *Muguti* v *Sunduza* HH-45-11**.**

It has been said that judges should be loath to decide upon questions of fact without hearing all the evidence on both sides. See Theron v Behr 1918 CPD 443, per Juta J at 451**.** In *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) **,** it was said that the test for determining whether a defendant

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Chigumba J

should be absolved from the instance is now settled in this jurisdiction. The test was set out at 343 as follows:

> "… A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him".

My interpretation of the test to be applied to the question of whether to grant B absolution from the instance to a defendant at the close of the plaintiff's case is as follows:

1. The first question to be considered is whether there is any evidence in at the close of the plaintiff's case, upon which a court, directing its mind reasonably to such evidence could or might find for the plaintiff? C
2. The second question to be asked is whether there is any special consideration or reason why the court should reject the evidence adduced on behalf of the plaintiff, (for example, glaring inconsistencies, or unacceptable variance with the pleadings filed of record).
3. The third question that may be asked is whether the plaintiff has failed to adduce any evidence, or adduced insufficient evidence to establish an essential element of its claim. D
4. Lastly, whether, an overall assessment of all the evidence adduced on behalf of the plaintiff, the pleadings filed of record, the annexures, the exhibits, all the discovered documents, coupled with the *viva voce* evidence, falls short of establishing the plaintiff's case, on the face of it (*prima facie*). E

On the question of the discharge of the burden of proof in a civil case, especially in an application for absolution from the instance, see *Bailey NO* v *Trinity Engineering (Pvt) Ltd* 2002 (2) ZLR 484 (H) (an application for absolution from the instance, which quoted *Supreme Service Station supra* with approval) and *Efrolou (Pvt) Ltd* v *Muringani (2)* 2013 (1) ZLR 309 (H) F (an application for absolution from the instance in which the applicable test is discussed at length) It is my considered view that, in this case, there is evidence upon which this court, directing its mind reasonably to such evidence, could or might find for the plaintiff. The defendant's submission that the plaintiff failed to establish that there was a contract between the parties is belied by its own express admission to the nature and identity of G the plaintiff and of the existence of a contractual relationship between the parties. The admission forms part of the joint pre-trial conference minute filed of record on 8 July 2014, and admitted into evidence.

In my view, it cannot be said that there is no evidence of the terms of the contract between the parties. Mr Chafa told the court that the contract was a H

Chigumba J

verbal A one to fix and supply and provide plumbing services of which plaintiff would be paid the full value of, less five per cent which would accrue to the defendant, the main contractor. That is evidence of the terms of a contract on which a court, directing its mind reasonably could or might find in favor of the plaintiff. It is therefore disingenuous, in my view, to aver that there was no evidence to establish what the parties agreed, what was to be paid B to the plaintiff, whether anything was actually paid, and what the balance outstanding was. The plaintiff submitted Interim Payment Certificates, whose authenticity was not disputed by the defendant, and which show how the sum of approximately US$136 000 is computed, including details of materials allegedly supplied and work done.

The C evidence of Mr Chatora was clear and unequivocal in regards to the certification of the value of the work done by the defendant as a whole, and by the plaintiff in particular. The plaintiff admitted to being paid an approximate sum of US$59 000, and stated that the balance due to it is US$119 033.91, as claimed in the summons. I found no special consideration for rejecting the evidence adduced on behalf of the plaintiff. In my view, the plaintiff did D not fail to establish any essential element of its claim. Both the plaintiffs' witnesses were found to be credible by the court. There is no reason why their evidence should not be believed by the court, on the face of it. There was no unacceptable variance with the pleadings or glaring inconsistencies. All in all the court finds that the plaintiff established its claim, on a *prima facie* basis. The defendant's application for absolution from the instance is E not sustainable. It is baseless and without foundation. It is dismissed. Costs shall remain in the cause.

Lawman Chimuriwo, Attorneys at Law, plaintiff's legal practitioners

A R Chizikani, defendant's legal practitioners F

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S v PHIRI 2015 (1) ZLR 148 (H)

Citation	2015 (1) ZLR 148 (H)
Case No	Judgment No. HH-116-15
Court	High Court, Harare
Judge	Chigumba J
Heard	4 February 2015
Judgment	4 February 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – unlawful entry into* C *premises (s 131(1)) – allegation that offence committed in aggravating circumstances as defined in s 131(2) – need for State to allege such circumstances in charge and to prove them – failure to prove aggravating circumstances – effect*

Headnote

Under s 131(1) of the Criminal Law Code [*Chapter 9:23*], any person who D intentionally and without permission from the lawful occupier of the premises, or other lawful authority, enters a premises shall be guilty of unlawful entry. The penalties are higher if the offence is committed in any of the aggravating circumstances set out in s 131(2). These include the fact that the premises were a dwelling house and the fact that the E accused committed or intended to commit some other crime. Where a person is charged with the crime of unlawful entry into premises, it is necessary to determine, from the facts set out in the outline of the State case, whether the crime was committed in aggravating circumstances. In passing sentence, failure to consider whether there were any aggravating circumstances has the same effect as failing to consider any mitigating F factors, or whether special circumstances exist. If the accused is alleged to have broken into a dwelling house and stolen property, the charge should allege a contravention of s 131(1) as read with 131(2)(a) and 131(2)(e). If the State wishes to rely on any aggravating circumstances when it comes to sentence, it is not enough to rely on the State outline or G agreed facts or on the prosecutor's address in aggravation. The particulars of the alleged aggravating features must be specifically charged and proved, by the State, as part and parcel of the essential elements of the offence. Where the State fails to allege and prove the aggravating circumstances, the accused can be convicted only of simple unlawful entry, and the fact of aggravation cannot be taken into account for the H

Chigumba J

purposes A of assessing and imposing the more severe sentence stipulated by that provision, or for ordering restitution.

Cases cited

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

S v *Moyo* 1984 (1) ZLR 74 (H) B

S v *Ngulube* 2002 (1) ZLR 316 (H)

S v *Sparks & Anor* 1972 (3) SA 396 (A)

S v *Zhakata* 2013 (1) ZLR 58 (H)

Legislation considered

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

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 139 & 146(2)(a)

Judgment

Chigumba J: This matter was placed before me in chambers for review, in terms of s 57(1), as read with s 57(4), of the Magistrates Court Act [*Chapter 7:10*], D as read with s 29(1) and (5) of the High Court Act [*Chapter 7:06*]. The High Court is clothed with powers to automatically review any and all matters in which a magistrate passes a sentence of 12 months' imprisonment or more, and where the accused person was not legally represented, or a private limited company. In this case the sentence imposed was 14 months, E of which four months were suspended for five years on condition of good behavior, another four months was suspended on condition of restitution and a six month custodial sentence imposed. The grounds of review are set out in s 29 of the High Court Act. Although the process of conviction is in order, the framing of the charge warrants further scrutiny.

Magistrates should be alive to their duty to ensure that the charges brought F against an accused person are proper and competent. Before charges are put to the accused, there is a duty on the presiding officer to cross check the efficacy of the charges, i.e.

(a) to check that the charges are spelt out correctly and cited in full;

(b) to ensure that the charges are properly formulated as provided in terms G of the Code;

(c) to check that the facts as set out in the summary of the State case are sufficient to support the charge, not only in terms of particularity, but in terms of appropriateness.

The accused was charged with the crime of "unlawful entry" as defined in H s 131 of the Criminal Law Codification and Reform Act, [*Chapter 9:23*],

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Chigumba J

(the Code). It was alleged that on 19 December 2014, at house number 300 A Devonshire, Sakubva, in Mutare, the accused person intentionally and without permission or authority from Kabhaso Yvonne, the lawful occupier of the premises concerned, or any other lawful authority, entered the premises and took some DVDs and cash amounting to US$80. According to the outline of the state case, the accused unlawfully entered the complainant's premises B and took the complainant's tops, some DVDs and US$80. When the accused was arrested a Vodafone cellular phone and DVDs were recovered. The total value of the stolen items was US$200. The value of the recovered items was US$100.

According to s 139 of the Criminal Procedure and Evidence Act [*Chapter 9: 07*] (the CPEA): C

> "Where a public prosecutor has, by virtue of his office, determined to prosecute any person in a magistrates court for any offence within the jurisdiction of that court, he shall forthwith lodge with the clerk of the court a statement in writing of the charge against that person, describing him by his forename, surname, place of abode and occupation and setting forth shortly and distinctly the nature of the offence and the time and place at which it was committed". D

The question that arose before me was whether the statement in writing lodged by the prosecutor, detailing the charge against the accused person in this case, set forth the "nature of the offence" distinctly, as stipulated by s 139 of the CPEA. We are guided further by s 146(2)(a) of the CPEA which stipulates that it is essential that the charge sets forth the offence in such a manner, and with such particulars as to the alleged time and place E of committing the offence, that the accused may be reasonably sufficiently informed of the nature of the charge. If the wording of the description of

the offence matches the wording found in the enactment creating the offence, this shall be sufficient to reasonably inform the accused of the charge against him.

The accused was charged with contravening s 131(1) of the Code, which F provides that any person who intentionally and without permission from the lawful occupier of the premises, or other lawful authority, enters that premises, shall be guilty of unlawful entry into premises and liable to:

(a) a fine up to level thirteen or up to twice the value of the property stolen, destroyed or damaged as a result of the crime, or to imprisonment G for a period up to fifteen years' imprisonment, or both such fine and imprisonment if the crime was committed in one or more of the aggravating circumstances set out in subsection (2);

(b) in any other case, a fine up to level ten or not exceeding twice the value of the property stolen, destroyed or damaged or imprisonment for a period up to ten years. H

2015 (1) ZLR p151

Chigumba J

It A is my view that, for every case in which an accused person is charged with the crime of unlawful entry into premises, it is necessary to determine, from the facts set out in the outline of the State case, whether the crime was committed in aggravating circumstances. Failure to consider whether there were any aggravating circumstances has the same effect as failing to consider any mitigatory factors in passing sentence, or whether special circumstances B exist. The legislature very graciously assisted us by proceeding to define aggravating circumstances in s 131(2), as follows:

> "(2) for the purposes of paragraph (a) of subsection (1), the crime of unlawful entry into premises is committed in aggravating circumstances if, on the occasion on which the crime was committed, the convicted person – C
>
> (a) entered a dwelling-house; or
>
> (b) knew there were people present in the premises; or
>
> (c) carried a weapon; or
>
> (d) used violence against any person, or damaged or destroyed any property, in effecting the entry; or
>
> (e) committed or intended to commit some other crime." D

The outline of the State case clearly tells us that the accused person entered a dwelling house with intent to steal and that he did steal various items valued at US$200. It is my view that the accused ought to have been properly charged with the offence of contravening s 131(1) as read with s 131(2)(a) and s 131(2)(e), "unlawful entry into premises with intent to enter a dwelling E house and commit the crime of theft".

An alternative couching of the charge would be "unlawful" entry into premises in aggravating circumstances, where the prosecutor is unsure whether technically the accused gained entry or if, after gaining entry, any crime was committed inside the dwelling. It is important to note that not F all premises are "dwellings". For example company offices, or a clinic, or a school may well qualify to be regarded as premises, but they are not "dwellings". The intention of the legislature was to punish more severely an accused person who enters a place where people reside. It is a violation of the sanctity and privacy of one's home that is cherished in a civilized G society. So, it is considered aggravating simply to enter into a place where people live without invitation or authority. It is even more aggravating to enter into a place where people live, with intent to commit some other crime.

The High Court has had occasion in the past to guide magistrates on the question of framing of the charges in circumstances similar to this case under consideration. In *S* v *Zhakata* 2013 (1) ZLR 58 (H) it was said that the crime of H unlawful entry into premises is a statutory offence which repeals and replaces

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2015 (1) ZLR p152

Chigumba J

the common law crime of burglary or housebreaking with intent to steal, but A with certain additional features. By virtue of para (a) of subs (1) of s 131, as read with paras (a) to (e) of subs (2), the offence is aggravated by any of the circumstances set out in subs (2). In *S* v *Chirinda & Ors* 2009 (2) ZLR 82 (H) the court said that this offence does not create a combined offence of unlawful entry and theft. What it does is to aggravate the offence of unlawful entry, by prescribing a

more severe penalty therefore, in the event of any B one or more of the circumstances enumerated in subs (2) being established.

I wish to add my voice to that of other judges before me, who respectfully disagree with the position that the elements of theft or other aggravating circumstance need not be stated in the charge and can merely be mentioned in the State outline or agreed facts or in the prosecutor's address in aggravation. C It is my view that it is necessary for the State to prove or otherwise establish the relevant aggravating factor if it is to sustain a charge under s 131(1) as read with s 131(2)(a)(e). The example has already been alluded to above that there is a difference between "mere unlawful entry into premises" and "unlawful entry into a dwelling". It would be necessary for the state to prove whether the accused entered into any other premises, or a dwelling. Where D an accused enters into a dwelling that is a further aggravating circumstance, as distinguished from entering any other premises such as a clinic. In some circumstances, unlawful entry into a church for example, might provide greater aggravation, depending on what the accused is alleged to have done on gaining entry into the church. Perhaps he might be alleged to have desecrated some holy relics held dear by the followers of that church, to E such an extent that a severe sentence might be called for as a deterrent to other would be offenders. For these reasons in my view, it is necessary that the particulars of the alleged aggravating features be specifically pleaded and proved by the state, as part and parcel of the essential elements of the offence. Addressing the court on alleged aggravating factors from the bar F is not the same as being required to prove, beyond a reasonable doubt, the essential elements of an offence, that the accused did indeed enter unlawfully onto premises in one or more aggravating circumstances. If the aggravating circumstances are not proved beyond a reasonable doubt, as part of the essential elements of the offence, how can a court rely on bald allegations by the prosecution from the bar? The allegations will constitute facts which G must be proved, not matters of law.

It follows that where the State fails to prove the essential elements of the unlawful entry or any of the aggravating circumstances, the fact of aggravation cannot be taken into account for the purposes of assessing and imposing the more severe sentence stipulated by that provision (or for ordering restitution). H

2015 (1) ZLR p153

Chigumba J

Once A this is accepted, it seems to me unavoidable that the aggravating factor or circumstance be specifically pleaded and spelt out in any charge under s 131(1) as read with s 131(2)(a)(e). Where the State fails to prove any of the aggravating circumstances the accused can be convicted of simple unlawful entry. A criminal indictment must clearly set out all the particulars of the charge so that the accused fully grasps the basis of the B charge so as to enable him to prepare his defence. If the charge does not particularize the alleged aggravating circumstances, the accused would obviously be prejudiced in the preparation and presentation of his defence.

In *S* v *Ngulube* 2002 (1) ZLR 316 (H) at 318-319 it was emphasised that the sentencing court, in deciding upon the appropriate punishment, must C strive to find a punishment which will fit both the crime and the offender.

> "The sentence must be fair and just instead of excessive, savage and draconian – see *A Guide to Sentencing in Zimbabwe* by G Feltoe at p 1. The punishment must fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy – see *Sparks & Anor* 1972 (3) SA 396 (A). In light of those sentencing principles, it was said to be essential that D magistrates should equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. 'The needs of the individual and the interests of society should be balanced with care and understanding' - see *S* v *Moyo* HH-63-84. Pre-sentencing information is very important. Whilst the age, marital and family status, employment, savings and assets are important E aspects in the assessment of sentence, magistrates should always bear in mind that the reason why the accused committed the offence and the circumstances of the offence is of equal importance. In some cases the reason is evident from the facts of the case. In other cases it is not. In such cases the magistrates must canvass these aspects with an unrepresented accused. Generally all the mitigatory and aggravating factors must be canvassed…"

The F record does not show that the magistrate was aware of the need to canvass aggravating circumstances as part of the essential elements of the offence, or even as part of the sentencing procedure. The conviction stands because the trial court satisfied itself that the essential elements of unlawful entry into premises were proved beyond a reasonable doubt, and meted out an appropriate

sentence. For an appropriate example of how to correctly G couch the charge, see pp 4-5 of *S* v *Zhakata, supra*. Similarly in this case, the charge is amended to read as follows:

> Contravening s 131(1) as read with s 131(2)(a) and 131(2)(e), i.e. unlawful entry into premises in aggravating circumstances, in entering into a dwelling house with intent to enter into a dwelling house and with H intent to steal, and to commit the offence of theft.

Chigumba J

The conviction was proper so we will not interfere with it. With the A amendment of the charge, we accordingly certify that the proceedings are now in accordance with real and substantial justice.

Tagu J concurs. B

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S v BM (A JUVENILE) 2015 (1) ZLR 155 (H)

Citation	2015 (1) ZLR 155 (H)
Case No	Judgment No. HH-106-15
Court	High Court, Harare
Judge	Tsanga J
Heard	5 February 2015
Judgment	5 February 215
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *offences under Criminal Law Code – sexual* C *relations with young person – both parties young – approach to be taken to extra-marital sex between young persons*

Headnote

The accused was convicted of contravening s 70(1) of the Criminal Law Code [*Chapter 9:23*] which deals with having sexual intercourse with D a young person. He was 17. She was 15. They were boyfriend and girlfriend. As is prone to happen when unprotected sex occurs, she fell pregnant. He was sentenced to two years' imprisonment, all of which was suspended, eight months on conditions relating to future good behaviour and 16 on condition that he perform 525 hours of community service at a primary school. E

Held, that the sentence was excessive. Section 70(1) is gender neutral in its thrust, in that it seeks to protect both girls and boys from extra-marital sex when they are young persons. Where the parties involved are both under 16, there can be no prosecution since both parties are effectively young persons under the age of 16. Even juvenile sex offenders who commit the more serious crime of rape are not sentenced to imprisonment. Ignoring F the reality of consensual sex among teenagers and adopting an overly formalistic approach to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender.

Held, further, that in the context of the prevalence of sexually transmitted G diseases, including HIV/AIDS, and the very real dangers of teenage pregnancy (as resulted in this case), it is understandable that the law, as well as public opinion, discourages sex with and among adolescents. Male and female adolescents also do not suffer the same consequences from the act of teenage sexuality. The risks for girls are far graver due to the very real risk of pregnancy and the attendant problems associated H with early motherhood that arise from such unprotected sex. There are

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also risks that arise from illegal abortions using crude means that A range from drinking detergent to use of sticks to extract the foetus.

Held, further, that sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer. The law can only do so much to protect teenagers by discouraging sex with young B persons by criminalising the act. Increasing the age that defines a young person to 18 would not only accord with the constitutional definition of a minor, but would hopefully also help to protect girls from adult predators in particular. Even then the reality is that the law on its own in such instances cannot be the panacea to problems that have deep social C contexts. The law does not operate in a vacuum. To stem the dangers that arise, for girls in particular, from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions, such as making contraceptive protection available and considering a more rigorous and open approach to what is actually taught as sex education in schools. D

Held, further, that community service in this case was sufficiently rehabilitative and more in tune with a policy approach towards juvenile justice which places emphasis on rehabilitation rather than branding such a youth as a criminal. The sentence would be reduced to one 210 hours of community service. E

Cases referred to

S v *C (a juvenile)* 2014 (2) ZLR 876 (H)

S v *CF (a juvenile)* 2011 (2) ZLR 48 (H)

S v *A Juvenile* HB-18-03 F

S v *M (a juvenile)* 2009 (1) ZLR 47 (H)

Judgment

Tsanga J: The accused was convicted of contravening s 70 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] which deals with having sexual intercourse with a young person. The facts upon which he was G convicted are commonplace among sex experimenting youths. He was 17. She was 15. They were boyfriend and girlfriend. Unfortunately, as is prone to happen from the risks of unprotected sex, she fell pregnant. He was reported for having sex with a young person and received the following sentence:

"24 months' imprisonment of which – H

(a) A 8 months' imprisonment is suspended for 5 years on condition the accused is not convicted of any offence of a sexual nature committed within that period for which he is sentenced to imprisonment without the option of a fine.

(b) The remaining 16 months' imprisonment is suspended on condition the accused completes 525 hours of community service at Chivaka Primary School B on the following terms:

(i) The community service starts on 17/11/14 and must be completed within 18 weeks of that date.

(ii) The community service must be performed between the hours 8 am to 1 pm and 2 pm and 4 pm each Monday to Friday which is not a public C holiday to the satisfaction of the person in charge at the said institution who may, for good cause grant the accused leave to be absent on a particular day or days or during certain hours. Any such leave of absence shall not count as part of the community service to be completed."

Although the conviction is proper, in that it is in accordance with the law as it stands, my view is that the sentence is manifestly excessive, given the D overall context under which the offence occurred. Section 70(1) is gender neutral in its thrust, in that it seeks to protect both girls and boys from extra-marital sex when they are young persons. Where the parties involved are both under 16, our courts have held that there can be no prosecution in such instances since both parties are effectively young persons under the E age of 16. See *S* v *CF (a juvenile)* 2011 (2) ZLR 48 (H), which followed the reasoning in *S* v *A Juvenile* HB-18-03 decided under the then Sexual Offences Act [*Chapter 9:21*], as still applicable under the current Criminal Law Code. Even juvenile sex offenders who commit the more serious crime of rape are not sentenced to imprisonment. See *S* v *M (a juvenile)* 2009 (1) ZLR 47 (H). While corporal punishment was discussed as an alternative F in that case, it is no longer among the options available for non-custodial remedies following it being outlawed as unconstitutional. See *S* v *C (a juvenile)* 2014 (2) ZLR 876 (H).

Perpetrators of the crime of sex with a young person under s 70 often constitute the predatory male adult who preys on a young girl, albeit with her consent. G However, in addition to adult males as predominant perpetrators, those who have equally fallen foul of the provision are adolescent boys over the age of 16 but still children under the Constitution in terms of s 81(1). They are not young persons as defined by s 70 of the Criminal Law Code. Unlike in some jurisdictions, ours does not exempt from prosecution adolescent violators H of such provisions when the parties are within a similar age bracket by two

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or three years above the minimum [1] . Youthful violators over 16 have to deal A with the actuality of punishment which is often tempered down due to their age where the circumstances permit. Sentences, however, can still be harsh.

Reports in the local media suggest that 66 per cent of teenagers between the ages of 15 and 19 indulge in unprotected sex. [2] Ignoring the reality of consensual sex among teenagers and adopting an overly formalistic approach B to the crime can result not only in an unnecessarily punitive sentence, but also a criminal record and stigmatisation as a sex offender.

In the context of the prevalence of sexually transmitted diseases (STDs) including the Acquired Immune Deficiency Syndrome (HIV/AIDS), and the very real dangers of teenage pregnancy as resulted in this case, it is understandable that the law, as well as public opinion, discourages sex with, C and among, adolescents. Male and female adolescents also do not suffer the same consequences from the act of teenage sexuality. The risks for girls are far graver due to the very real risk of pregnancy and the attendant problems associated with early motherhood that arise from such unprotected sex. There are also risks that arise from illegal abortions using crude means that span from drinking detergent to use of sticks to extract the foetus. D

Sex among peers is a reality of adolescent sexuality. It does not justify a suspended imprisonment term for the teen male offender who has had sex as part of a romantic relationship with a peer.

Also, the law can only do so much to protect teenagers by discouraging sex with young persons by criminalising the act. It can also only go thus far to E protect adolescent violators by taking age into account so as not to weigh too heavily on consenting peers. From a law reform standpoint, increasing the age that defines a young person to 18 would not only accord with the constitutional definition of a minor but would hopefully also help to protect girls from adult predators in particular. Even then the reality is that the law F on its own in such instances cannot be the panacea to problems that have deep social contexts. The law does not operate in a vacuum. To stem the dangers that arise for girls in particular from teenage sex, part of the answer would appear to lie in policy makers and society accepting the prevalence of youth sex and fashioning appropriate interventions. Availing contraceptive protection is one such intervention. A more rigorous and open

approach G to what is actually taught as sex education in schools is also another. This seems imperative since the dominant message of abstinence has obviously not succeeded in keeping the youth from having sex among their group.

2015 (1) ZLR p159

Tsanga J

In A this case, the sentence of eight months' imprisonment, albeit suspended on condition that the accused does not commit any crime of a sexual nature, is totally uncalled for, given the fact that the accused was also sentenced to community service. At 525 hours, the length of community service is equally excessive. It amounts to about 75 working days based on a 7 hour working day. B

The suspended prison sentence suggests that the accused belongs to the category of offenders that poses some danger to society, hence the need to put him on terms of good sexual behaviour. Yet in the same breath, if his actions pose any danger, he is being asked to serve his community service at a primary school where there are many young girls who could easily put C him into temptation. Clearly, given the circumstances of the case, he cannot be said to pose the same danger as the predator who seeks underage girls for sex hence the reason for placing him at a school to perform his community service.

Community service, under the circumstances of this case, is sufficiently rehabilitative and more in tune with a policy approach towards juvenile D justice, which places emphasis on rehabilitation rather than branding such a youth as a criminal.

Accordingly, for the above reasons the sentence in this case is altered as follows:

The accused is sentenced to 210 hours of community service at Chivaka E Primary School on the following terms:

(i) The community service starts on 17/11/14 and must be completed within 16 weeks of that date.

(ii) The community service must be performed between the hours of 8 am to 1 pm and 2 pm and 4 pm each Monday to Friday which is not a public F holiday to the satisfaction of the person in charge at the said institution who may, for good cause grant the accused leave to be absent on a particular day or days or during certain hours. Any such leave of absence shall not count as part of the community service to be completed.

Mwayera J agrees. G

1 Such as in some states in the United States of America

2 See *Daily News* Wednesday 28 January 2015.

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S v MANASE 2015 (1) ZLR 160 (H)

2015 (1) ZLR p160

Citation	2015 (1) ZLR 160 (H)
Case No	Judgment No. HH-110-15
Court	High Court, Harare
Judge	Muremba J

Heard 5 February 2015

Judgment 5 February 2015

Counsel No counsel details supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – mandatory minimum* C *sentence – requirement for special circumstances to exist to avoid imposition of such sentence – procedure to follow where accused is not represented – right of accused and State to lead evidence and address court on matter* D

Headnote

With regard to mandatory minimum sentences, the sentences are considerably longer than would normally be imposed for the crime in question. To ensure that the mandatory sentence is not imposed in all the cases, the legislature adds the rider that the minimum sentence does not have to be E imposed if there are special circumstances justifying the non-imposition of the sentence. It is thus a procedural irregularity for a magistrate to simply make a finding that there are no special circumstances without exploring them.

A number of magistrates do not really know the procedure in canvassing special circumstances. Special circumstances should be canvassed F immediately after the court has pronounced the verdict of guilty. This means that this has to be done before mitigation is recorded from the accused. Where the accused is legally represented, defence counsel will address the court on the accused's behalf. However, where the accused is not legally represented, the court has a duty to explain fully and clearly G to the accused, in a language that he or she understands, that he or she is in jeopardy of having a heavy minimum sentence imposed upon him or her and that he or she can avoid this by showing special circumstances. The court should explain what is meant by special circumstances, and invite the accused to address it on special circumstances. The court should also record its explanation in the record. The accused's response should H

2015 (1) ZLR p161

Muremba J

also A be recorded in full. It should be explained to the accused that, in addressing the court on special circumstances, it is his or her right to lead evidence from witnesses if he or she so wishes. In terms of s 70(1)(h) of the Constitution of Zimbabwe 2013, an accused has a right to adduce evidence. The right is even greater in circumstances where the accused B is at risk of being sentenced to a minimum mandatory sentence upon failure to satisfy the court that there are special circumstances justifying the non-imposition of the mandatory minimum sentence. According the accused such an opportunity is also in line with s 69 of the Constitution, which states that an accused has a right to a fair hearing. If the accused leads evidence from witnesses, the State should be given a chance to C cross-examine those witnesses. After the accused's explanation the State should be invited to respond, irrespective of whether or not the accused is legally represented. It also has the right to adduce evidence, if it so wishes and if it does, the accused or his defence counsel should be given the opportunity to cross-examine the State witnesses. It is the accused's right to challenge evidence adduced against him: see s 70(1)(h) D of the Constitution. Thereafter the court should make a ruling on the existence or otherwise of special circumstances. After that the court should proceed to record mitigation and then sentence the accused.

Cases cited

Attorney-General v *Jasi & Anor* S-2-87 E

S v *Chaerera* 1998 (2) ZLR 226 (S)

S v *Kaja* S-129-89

S v *Maharangwe* S-5-90

S v *Makawa & Anor* 1991 (1) ZLR 142 (S)

S v *Mbewe & Anor* 1998 (1) ZLR 7 (H) F

Legislation considered

Constitution of Zimbabwe 2013, ss 69 & 70

Magistrates Court Act [*Chapter 7:10*], s 5(1)

Judgment

Muremba J: The accused prospected for gold without a prospecting licence G or a permit in contravention of s 368(1) as read with s 368(4) of the Mines and Minerals Act [*Chapter 21:05*].

Although the accused denied the charge he was convicted after a full trial. I find the conviction unassailable and I thus confirm it.

Following his conviction, the accused was sentenced to the minimum H mandatory sentence of two years' imprisonment.

Muremba J

The relevant provisions with which the accused was charged with read as A follows:

> "368 Prospecting prohibited save in certain circumstances
>
> (1) Subject to subsections (2) and (3), no person shall prospect or search for any mineral, mineral oil or natural gas except in the exercise of rights granted under a prospecting licence, exclusive prospecting order or special grant or unless B he is the duly authorized representative of the holder of such licence, order or special grant and acting in the exercise of such rights.
>
> (2) ...
>
> (3) …
>
> (4) Any person who contravenes subsections (1), (2) or (3) shall be guilty of an offence and liable – C
>
> (a) if there are no special circumstances in the particular case, to imprisonment for a period of not less than two years; or
>
> (b) if the person convicted of the offence satisfies the court that there are special 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 D exceeding level ten."

Put simply, in terms of s 368(4)(a) the court is only entitled to sentence an accused to the minimum mandatory sentence if there are no special circumstances in the particular case. In cases where there are special circumstances the court can, in terms of s 368(4)(b), impose a sentence of E a fine not exceeding level ten or imprisonment not exceeding two years.

According to s 368(4)(a) and (b), it is a requirement that the court sentencing the accused should record special circumstances from the accused. The section makes it clear that it is the duty of the accused to satisfy the court that there are special circumstances in the case which warrant the non-imposition F of the mandatory sentence. If he or she fails to satisfy the court of their existence the court should impose the mandatory sentence. So the essence of this section is that the court should call upon the accused to address it on special circumstances.

In casu what is notable is that the court did not canvass special circumstances. G The record shows that after convicting the accused, the court went on to record mitigation. Thereafter the accused was sentenced. In his reasons for sentence the trial magistrate said that the offence of prospecting for minerals without a licence is a serious offence which the legislature viewed so gravely that it prescribed a minimum sentence of two years' imprisonment for it. The magistrate went on to say that he had made a finding that there were no H

Muremba J

special A circumstances in the case. Consequently he sentenced the accused to the minimum mandatory sentence of two years' imprisonment.

Thinking that the magistrate had omitted to attach to the record the pages relating to special circumstances I raised a query with him. In his response he said that he had omitted to canvass special circumstances before deciding B whether or not to impose the mandatory minimum sentence. He said it was an oversight that he made.

I must say such an oversight is a serious misdirection and dereliction of duty. Minimum mandatory sentences are very heavy and harsh sentences. Judicial officers need to apply their minds fully when sentencing offenders in such cases, otherwise a serious miscarriage of justice can result, as what C happened in this case.

With minimum mandatory sentences, the sentences are considerably longer than would normally be imposed for the crime in question. To ensure that the mandatory sentence is not imposed in all the cases, the legislature added the rider that the minimum sentence does not have to be imposed if there D are special circumstances justifying the non-imposition of the sentence. So it is a procedural irregularity for a magistrate to simply make a finding that there are no special circumstances without exploring them.

The magistrates court is a court of record: s 5(1) of the Magistrates court Act [*Chapter 7:10*]. So the record must show that special circumstances were E canvassed. Failure to record special circumstances amounts to a misdirection, rendering the sentence incompetent. See *S* v *Mbewe & Another* 1998 (1) ZLR 7 (H) and *A-G* v *Jasi & Anor* S-2-87.

The critical question is how does the court canvass special circumstances? From the matters involving special circumstances that have been placed F before me for review, I have noticed that quite a number of magistrates do not really know the procedure in canvassing special circumstances. In *S* v *Mbewe & Anor supra* it was stated that special circumstances should be canvassed immediately after the court has pronounced the verdict of guilty. This means that this has to be done before mitigation is recorded from the accused. G

Cases wherein the accused is legally represented should not pose any problems at all, because the defence counsel will address the court on the accused's behalf. The court should simply ask the defence counsel to address it on special circumstances. However, in cases where the accused is not legally represented the court has a duty to explain fully and clearly to the accused in H a language that he understands that he or she is in jeopardy of having a heavy

Muremba J

minimum sentence imposed upon him and that he or she can avoid this by A showing special circumstances. *S* v *Makawa & Anor* 1991 (1) ZLR 142 (S).

The court has a further duty to explain what is meant by special circumstances. See *S* v *Chaerera* 1998 (2) ZLR 226 (S), *S* v *Maharangwe* S-5-90; *S* v *Kaja* S-129-89.Thereafter the court should invite the accused to address it on special circumstances. The court should also record its explanation in the B record. The accused's response should also be recorded in full. It should be explained to the accused that in addressing the court on special circumstances it is his right to lead evidence from witnesses if he or she so wishes. In terms of s 70(1)(h) of the Constitution of Zimbabwe 2013, an accused has a right to adduce evidence. The right is even greater in circumstances where the accused is at the risk of being sentenced to a minimum mandatory sentence C upon failure to satisfy the court that there are special circumstances justifying the non-imposition of the mandatory minimum sentence. According the accused such an opportunity is also in line with s 69 of the Constitution, which states that an accused has a right to a fair hearing. If the accused leads evidence from witnesses, the State should be given a chance to cross-examine those witnesses. D

After the accused's explanation the State should be invited to respond, irrespective of whether or not the accused is legally represented. It also has the right to adduce evidence if it so wishes and, if it does, the accused or his defence counsel should be given the opportunity to cross-examine the State witnesses. It is the accused's right to challenge evidence adduced against E him: see s 70(1)

(h) of the Constitution. Thereafter the court should make a ruling on the existence or otherwise of special circumstances. After that the court should proceed to record mitigation and then sentence the accused.

The accused was sentenced on 10 June 2014. Because of the procedural irregularity I will set aside the sentence that was imposed by the trial magistrate and remit the matter back to the trial magistrate for sentencing afresh. The F magistrate should canvass special circumstances in the manner prescribed above. If he makes a finding that there are no special circumstances in the case, he should not sentence the accused to a period of more than two years and the period that the accused has already served should be taken into account so that the accused does not serve more than two years in prison.

Mawadze J agrees. G

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EX P **NHERERA 2015 (1) ZLR 165 (H)**

Citation	2015 (1) ZLR 165 (H)
Case No	Judgment No. HH-117-15
Court	High Court, Harare
Judge	Muremba J
Heard	6 February 2015
Judgment	6 February 2015
Counsel	No counsel details supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

Family lawC – *child – guardianship – application – to children's court – may only be made where child has no natural guardian or tutor testamentary – where child's natural guardian is still alive, application for guardianship must be made to High Court*

Headnote

In D terms of s 9(1) and (2) of the Guardianship of Minors Act [*Chapter 5:08*], the children's court may appoint a person to be a guardian of a minor child, but only where such child has no natural guardian or a tutor testamentary. So as long as the minor's natural parents or one of the natural parents is still alive or may be alive, an application for guardianship cannot be made to the children's court. Such an application must be made to the E High Court, which is the upper guardian of minor children.

Legislation considered

Constitution of Zimbabwe 2013, ss 81 & 171

Guardianship of Minors Act [*Chapter 5:08*], ss 4 & 9

High Court Act [*Chapter 7:06*], s 13

Judgment

Muremba J: This matter was dealt with by a magistrate on 16 January 2015. It involves the application for guardianship of a minor child aged 14 years.

The applicant is the minor's paternal uncle. The father of the minor child who was a brother of the applicant is deceased. However, the minor child's mother is still alive.

On 16 January 2015 the applicant made an application for guardianship of the minor child before the children's court at Harare magistrates court. The mother of the child deposed to an affidavit consenting to the application. This application was made in terms of s 9(1) of the Guardianship of Minors Act [*Chapter 5:08*]. The magistrate granted the application.

Muremba J

However, upon sending the record for review in terms of s 9(6) of the said Act, the magistrate attached a note to the effect that she had erroneously granted the application without realising that one of the biological parents of the minor child was still alive. She was seeking guidance on how to proceed.

In terms of s 9(1) and (2) of the Guardianship of Minors Act [*Chapter 5:08*] the children's court may only appoint a person to be a guardian of a minor child who has no natural guardian or a tutor testamentary. It reads:

> "(1) Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of section 74 of the Administration of Estates Act [*Chapter 6:01*], the children's court may, on application in terms of this section, appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.
>
> (2) Where a minor has no natural guardian or tutor testamentary –
>
> (a) a relative or person having the care and custody of the minor; or
>
> (b) a probation officer;
>
> may apply to the children's court by way of an application lodged with the clerk of that court for the appointment of a person as guardian of the minor, and such application may propose the appointment of a specified person as the guardian."

So the magistrate was quite correct in her observation that she had no jurisdiction to entertain the application. The unfortunate part is that she made this realisation after she had already granted the application. The children's court's jurisdiction is limited to circumstances or situations where the minor has no natural guardian or tutor testamentary. The magistrates court, being a creature of statute, cannot exercise jurisdiction which is not conferred upon it by statute. So as long as the minor's natural parents or one of the natural parents is still alive or may be alive, an application for guardianship cannot be made to the children's court.

For parents who are both alive, but are divorced or living apart, the parent who wishes to have sole guardianship of the minor child can make an application to this court in terms of s 4(1)(b) of the Guardianship of Minors Act [*Chapter* 5:08]. The provision reads:

> "The High Court or a judge thereof may –
>
> (a) ...
>
> (b) on the application of either parent of a minor whose parents are divorced or are living apart;
>
> if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage, or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other than the survivor shall be the guardian of the minor, to the exclusion of the survivor or otherwise."

Muremba J

However, A the Guardianship of Minors Act does not cover a scenario like the present scenario where the natural guardian is alive and a relative wants guardianship. Since the magistrates court has no jurisdiction in such a scenario, the application must be made to the High Court on the basis that it is the upper guardian of minor children. Section 81(3) of the Constitution of Zimbabwe 2013 states that B

> "Children are entitled to adequate protection by the courts, in particular by the High Court as the upper guardian."

The High Court also exercises jurisdiction on the ground that it has inherent jurisdiction based on s 171(1)(a) of the Constitution which states that

> "the High Court has jurisdiction over all civil and criminal matters throughout C Zimbabwe."

Section 13 of the High Court Act also states that

> "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."

This therefore means that the applicant ought to have made his application D to this court instead of making it at the magistrates court.

The children's court's decision is therefore null and void. It is hereby set aside in terms of s 9(7)(a) of the Guardianship of Minors Act [*Chapter 5:08*]. The magistrate is directed to instruct the clerk of court to notify the applicant accordingly and to advise him to apply to this court for guardianship if he E still wishes to pursue the matter.

Mawadze J agrees.

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MATTHEWS v EBRAHIM NO & ORS 2015 (1) ZLR 168 (H)

Citation	2015 (1) ZLR 168 (H)
Case No	Judgment No. HH-103-15
Court	High Court, Harare
Judge	Zhou J
Heard	22 October 2014; *CAV*
Judgment	11 February 2015
Counsel	*A P de Bourbon,* for the applicant *T Magwaliba,* for the second & third respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Arbitration – *arbitrator – appointment of expert by arbitrator – need for expert* C *to report back to arbitrator – request to expert to make determination – such request elevating expert to position of arbitrator – not permissible unless parties otherwise agree*

Arbitration – *award – setting aside of – grounds – allegation that award* D *contrary to public policy – what must be shown for public policy argument to succeed*

Headnote

In exercising the powers given in terms of arts 34 and 36 of the First Schedule to the Arbitration Act [*Chapter 7:15*], the High Court is not sitting E as an appellate court. It is not, therefore, required to embrace what it would consider to have been the correct decision. It is only when "the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception F of justice in Zimbabwe would be intolerably hurt by the award" that the court would interfere with the award on the ground of it being contrary to the public policy of the country. Not every mistake, be it of fact or law, warrants the setting aside of an arbitral award in terms of art 34 on the grounds of it being contrary to the public policy of Zimbabwe. G For it to merit the intervention of the court the incorrectness must be so serious as to constitute a subversion and negation of justice and fairness.

Where an arbitrator appoints an expert to report to the arbitrator on specific issues, those issues would then have to be determined by the arbitrator. Further, if a party so requests or the arbitrator considers it necessary, after delivery of his report to the arbitrator the expert is then required to take H

Zhou J

part A in the hearing and may be asked questions by the parties. The parties are entitled to lead expert evidence in respect of the matters for which the expert was appointed. It is only when the parties agree otherwise that the arbitrator is excused from complying with the requirements of sub-articles (1) and (2) of art 26 of the First Schedule. The reason for requiring an expert to be appointed by the arbitrator to report to B the latter is to ensure that the arbitral tribunal remains seized with the matter until it is finalised. Permitting the parties to put questions to the expert and/or to lead their own expert evidence is meant to ensure that the proceedings comply with the rules of natural justice, particularly the *audi alteram partem* rule, by giving the parties an opportunity to C cross-examine the expert witness and to lead their own evidence either to support or to contradict the evidence of the expert appointed by the arbitral tribunal. When the arbitral tribunal leaves it to a third party to appoint an expert, as was done *in casu*, then he loses control of the matter. If there is disagreement on the determination rendered by the expert the D parties would not know what to do to resolve that disagreement. If the expert is appointed for the purpose of making a determination on the quantum, then clearly his determination is not meant for consideration by the arbitrator but is intended to be binding on the parties. That approach elevates the expert to the position of an arbitrator. E

Cases cited

Beazley NO v *Kabell & Anor* 2003 (2) ZLR 198 (S)

City of Harare v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H)

Delta Ops (Pvt) Ltd v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S)

Muchaka v *Zhanje & Anor* 2009 (2) ZLR 9 (H)

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

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, arts26(1)(2), 34(2)(b)(ii) & (5)(a) & (b), & 36

Case information

A P de Bourbon, for the applicant G

T Magwaliba, for the second & third respondents

Judgment

Zhou J: This is an application in terms of art 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*] for the setting aside of an arbitral award H dated 20 December 2011. The award was rendered by the first respondent in

Zhou J

a dispute between the applicant, and the second and third respondents. The A application is opposed by the first and second respondents.

The background facts are largely common cause and are ably set out in the arbitral award. They are as follows. In 2003 a trust was constituted by the applicant under the name "The Matthews Family Trust" (hereinafter referred to as "the Trust"). One Peter Lewis Bailey was the trustee. The beneficiaries B were the applicant and his children. The Trust was the sole shareholder in four companies referred to in the papers as "the Craster Group of Companies". In September 2008 the Deed of Trust constituting the Trust was amended by making the applicant and the second and third respondents the beneficiaries. A memorandum of agreement was signed between the Trust represented by the applicant and the second and third respondents. The agreement was signed C on 25 September 2008 but its commencement date was 1 September 2008. In terms of that agreement the applicant was to surrender his control of the company to the two respondents over a period of three years as detailed in Clause 3 of the memorandum which provided the following:

> "3. NEW BENEFICIARIES FROM EFFECTIVE DATE D
>
> Mr Kotecha and Mr Desai shall be declared and noted as additional beneficiaries, from the effective date onwards, to all assets and future net income of the Trust and companies, detailed as follows:
>
> (i) Mr Richard Alwyn Matthews and/or his family as detailed in the new "Letter of Wishes"
>
> 49% - from 01 September 2008 to 31 August 2009. E
>
> 32% - from 01 September 2009 to 31 August 2010
>
> 16% - from 01 September 2010 to 31 August 2011
>
> 0% - from 01 September 2011 onwards
>
> (ii) Mr Kotecha and/or his nominee
>
> 38.25% - from 01 September 2008 to 31 August 2009
>
> 51% - from 01 September 2009 to 31 August 2010
>
> 63% - from 01 September 2010 to 31 August 2011 F
>
> 75% - from 01 September 2011
>
> (iii) Mr Desai and/or his nominee
>
> 12.75% - from 01 September 2008 to 31 August 2009
>
> 17% - from 01 September 2009 to 31 August 2010
>
> 21% - from 01 September 2010 to 31 August 2011
>
> 25% - from 01 September 2011" G

Clause 7 of the memorandum of agreement provided as follows:

> "7. RISK AND PROFIT
>
> 7.1 Notwithstanding any other clauses in this agreement, the control and management of the companies, by way of the 'Letter of Wishes' of the Settlor of the Trust and by permission of the Trustee by signing this agreement, shall vest in the additional beneficiaries as follows: H

Zhou J

> a. 51% from the effective date. A
>
> b. 68% not later than 31 August 2009.
>
> c. 84% not later than 31 August 2010.
>
> d. 100% not later than 31 August 2011.
>
> From these dates the risk in the companies and the property shall pass on to the additional beneficiaries. The profits in the companies shall be shared B as follows:
>
> e. 50% each to Mr Richard Alwyn Matthews and the additional beneficiaries for the first twelve months from the effective date.

f. 75% to the additional beneficiaries and 25% to Mr Richard Alwyn Matthews during month 13 to month 36 from the effective date.

g. 100% to the additional beneficiaries after 36 months from the effective date. C

7.2 On the effective date, all debtors, liquid assets, creditors, inventory, guarantees for fulfilment of obligations, foreign creditors and any other liabilities shall be disclosed by the existing shareholder and appended to this agreement and shall be received and liquidated, as the case may be, by Mr Matthews and the additional beneficiaries on a 50/50 basis. Any other liabilities that emerge after the effective date shall be for the account of Mr Richard Alwyn Matthews D if the liabilities arose before the effective date."

The liabilities of the Craster Group of Companies were not disclosed at the time that the agreement became effective. They were only availed on 26 August 2009. The figures availed at a meeting of 4 September 2009 revealed that a loss of US$935 626.40 had been incurred for the period 26 August 2008 to 31 July 2009. A dispute arose as to how, if at all, the loss referred E to above should be shared, as well as the quantum of the loss. That is the dispute which was referred to arbitration before the first respondent. The applicant's case before the arbitrator, which he persists with *in casu*, was that the agreement had no provision for the sharing of losses. On that basis his contention is that he should be absolved from liability for the said losses. On F the other hand, the second and third respondents contended that the losses should be shared in the proportions set out in Clause 7.1 of the agreement. The first respondent came to the conclusion that the trading losses be shared in the same proportions as the risk. Thus the losses were, according to the arbitral award, to be shared as follows:

"51% - 49% from September 2008 to 31 August 2009; G

68% - 32% from 1 September 2009 to 31 August 2010;

84% - 16$ from 1 September 2010 to 31 August 2011."

The arbitrator also ordered that the parties should agree on the quantum of losses within thirty days of the award being rendered. In the event that they failed to reach agreement as directed the issue of the quantum was to H be referred for determination by a Chartered Accountant to be appointed

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by the President of the Institute of Chartered Accountants. The Chartered A Accountant would be acting as an expert and not an arbitrator in rendering the determination on the quantum. The applicant takes issue with that relief as well.

The applicant's case is that the award is in conflict with the public policy of Zimbabwe. Article 34(2)(b)(ii) of the UNCITRAL Model Law contained in B the First Schedule to the Arbitration Act [*Chapter 7:15*] provides as follows:

"An arbitration award may be set aside by the High Court only if –

(a) …

(b) the *High Court* finds that –

(i) …; or

(ii) the award is in conflict with the public policy of Zimbabwe." C

Article 34(5) provides the following:

"For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –

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

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

The approach of the courts has been to interpret the above provisions restrictively in order to give efficacy to the need for finality in arbitrations. In *ZESA* v *Maposa* 1999 (2) ZLR 452 (S) at 465D, that approach is underscored in the following terms: E

"In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of law or morality or justice is violated. This is illustrated by dicta in many cases ..." F

See also *Beazley NO* v *Kabell & Anor* 2003 (2) ZLR 198 (S); *City of Harare* v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H) at 493A-C.

Consistent with the interpretation articulated above, the court recognises that in exercising the powers given in terms of arts 34 and 36 it is not sitting as an appellate court. It is not, therefore, required to embrace what it would G consider to have been the correct decision. It is only when "the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award" that the court would interfere with the award H

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on A the ground of it being contrary to the public policy of the country: *ZESA* v *Maposa supra* at 466E-G; *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007(2) ZLR 81 (S) at 85C-D; *Beazley NO* v *Kabell & Anor supra* at 201D-E; *Muchaka* v *Zhanje & Anor* 2009 (2) ZLR 9 (H) at 11E-G.

What emerges from the authorities referred to above is that not every mistake, B be it of fact or law, warrants the setting aside of an arbitral award in terms of art 34 on the grounds of it being contrary to the public policy of Zimbabwe. For it to merit the intervention of the court the incorrectness must be so serious as to constitute a subversion and negation of justice and fairness.

The agreement between the applicant and the second and third respondents did not expressly deal with the question of the sharing of losses. What is clear, C however, is that the applicant did not immediately relinquish his control of the business of the Craster Group of Companies when the agreement was concluded. Instead, he opted to relinquish his control in stages as detailed in the agreement itself and observed in the arbitral award. Put in other words, for a period of three years after the agreement was concluded he benefited from the companies in the proportions set out in the agreement. This is not D a case in which the arbitrator failed to realise that risk in a contract of sale passes once the contract is *perfecta*. This was not an ordinary agreement of sale. The consideration paid was for the purposes of making the second and third respondents beneficiaries of the Trust rather than for a sale of a *merx* in the ordinary sense of the word. Further, the agreement itself provided for the E passing of risk. It did not leave that aspect to be regulated by the common law principles. What the agreement did not do was to expressly state how the losses of the companies in which the Trust was the sole shareholder were to be shared. The arbitrator determined that the risk should pass in the same proportions and on the same dates as the control of the companies of the Trust. He then held that the losses be shared in the same proportion as the F risk. That conclusion, in my view, does not constitute a palpable inequity warranting the setting aside of the award.

The second complaint by the applicant relates to the portion of the award in terms of which the arbitrator deferred the quantification of the losses to an expert in the event of the parties failing to reach agreement thereon. The G dispute, as outlined by the parties in the pre-arbitration meeting of 4 October 2011, related to how, if at all, the losses incurred by the companies owned by the Trust were to be apportioned, as well as the extent of the losses. The arbitrator answered the first part by specifying the proportions in terms of which the losses were to be shared. He then deferred the second part to an expert. Article 26 of the Schedule to the Arbitration Act provides as follows H in relation to the appointment of an expert by an arbitrator:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal – A
>
> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
>
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to any relevant document, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral B tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points in issue."

In terms of the above provision it is the arbitrator who has the authority to C appoint an expert. The expert appointed is to report to the arbitrator on the specific issues to which the appointment relates. Those issues would then have to be determined by the arbitrator. Further, if a party so requests or the arbitrator considers it necessary, after delivery of his report to the arbitrator the expert is then required to take part in the hearing and may be asked questions by the parties. The parties are entitled to lead expert evidence in D respect of the matters for which the expert was appointed. It is only when the parties agree otherwise that the arbitrator is excused from complying with the requirements of sub-articles (1) and (2). The reason for requiring an expert to be appointed by the arbitrator to report to the latter is to ensure that the arbitral tribunal remains seized with the matter until it is finalised. Permitting the parties to put questions to the expert and/or to lead their own E expert evidence is meant to ensure that the proceedings comply with the rules of natural justice, particularly the *audi alteram partem* rule, by giving the parties an opportunity to cross-examine the expert witness and to lead their own evidence either to support or to contradict the evidence of the expert appointed by the arbitral tribunal. When the arbitral tribunal leaves it to a third party to appoint an expert, as was done *in casu*, then he loses control F of the matter. If there is disagreement on the determination rendered by the expert the parties would not know what to do to resolve that disagreement. More fundamentally, the appointment of the chartered accountant would clearly be contrary to the provisions of the law. Also, if the expert is appointed for the purpose of making a determination on the quantum then clearly his G determination is not meant for consideration by the arbitrator but is intended to be binding on the parties. That approach elevates the expert to the position of an arbitrator then, contrary to the statement in the arbitral award that the accountant would not be acting as an arbitrator. For the foregoing reasons, I am convinced that the award is contrary to the public policy of Zimbabwe. It was made contrary to the express provisions of the law to the extent that H

Zhou J

it A delegates the power to appoint an expert to the President of the Institute of Chartered Accountants and makes no provision for that accountant to report to the arbitrator. Also, the award makes no provision for the parties to put questions to the expert so appointed, or to lead their own evidence from other experts. See *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* s*upra* at 87A. B

Accordingly, the award must be set aside. In terms of the law the court will leave it to the parties to determine the future course of the matter: *ZESA* v *Maposa supra* at p 467B; *Origen Corporation (Pvt) Ltd* v *Delta Operations (Pvt) Ltd* 2005 (2) ZLR 349 (H) at 356E-357A.

In the result, it is ordered that: C

1. The arbitral award rendered by the first respondent on 20 December 2011 be and is hereby set aside.
2. The second and third respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved. D

Atherstone & Cook, applicant's legal practitioners

Dube, Manikai & Hwacha, second and third respondents' legal practitioners

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D BANK LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 176 (H)

Citation 2015 (1) ZLR 176 (H)

Case No Judgment No. HH-135-15

Court	Special Court for Income Tax Appeals
Judge	Kudya J
Heard	1 & 3 September 2014; *CAV*
Judgment	11 February 2015
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 – assessment – previous ruling on* E *similar subject – when revenue authority bound by such ruling – ruling based on error of law – authority not bound*

Revenue and public finance – *income tax – gross income – deductions –* D *expenditure for purpose of trade or production of income – distinction from capital expenditure – expenditure with enduring benefit – acquisition of computer software to run bank's accounts – expectation that system would be in use for some years – such expenditure constituting capital expenditure and not deductible from gross income*

Revenue and public finance – *income tax – gross income – gain arising from* E *use of capital – distinction between fixed and floating capital – gain arising from floating capital constituting gain of revenue nature, not capital nature*

Revenue and public finance – *income tax – gross income – grant – distinction* F *from loan – whether monies received by taxpayer constitute grant or loan – ostensible loan agreement – when can be treated as simulation*

Headnote

The appellant bank had made tax deductions which were disallowed by the respondent. The claims fell into four categories: expenditure on G computer software, foreign currency accruals derived from leveraging a dividend pay-out by a public company quoted on both the Zimbabwe Stock Exchange and the Johannesburg Stock Exchange, a purported loan, advanced to the appellant by a related foreign bank ("the related party"), that was subsequently purportedly written off and the penalty imposed on the appellant by the respondent over the dividend leverage. H

In A respect of the expenditure on computer software for its banking, the appellant contended that it was for the purposes of trade or the production of income and therefore deductible in accordance with s 15(2)(a) of the Income Tax Act [*Chapter 23:06*]. Its purchase and installation had been necessary because of the hyper-inflation that took its toll on the B Zimbabwean economy. The previous system could not cope with the numbers that ensued. There was a risk of complete system failure. The appellant also averred that it had purchased the right to use the software, as opposed to purchasing the software itself. It had a personal, non-exclusive and non-transferrable licence for the use of the software and documentation in exchange for maintenance and services set out in the C agreement. If the appellant effected modifications to the software, these vested in the supplier, who could credit the appellant with a proportion of the income received from third parties. In that respect, the software was an income producing machine.

It was admitted that the economic benefit of the system did not just have a probable future economic benefit beyond one year, but was still in use D five years later. The respondent contended that the future economic benefit that accrued to the appellant was synonymous with the enduring benefit test, which is that where an expenditure is made with a view to bringing into existence an asset or an advantage for the enduring benefit of trade, there is very good reason for treating such expenditure E as properly attributable to capital and not to revenue.

The second issue, also relating to the software, was whether or not the respondent was bound by a decision made by its predecessor, the Department of Taxes, in 1999 regarding the treatment of

the cost of acquitting computer software when computing taxable income. In that year, after correspondence between a tax consultant employed by the F bank and the Department, computer software was treated as a consumable item and expenditure either by purchase or development was regarded as revenue expenditure deductible in terms of s 15(2)(a) of the Act. It was common cause that that decision was not a generally binding ruling and did not meet the criteria set out in schedule 4 of the Revenue Authority Act [*Chapter 23:11*]. G

The third issue related to a dividend transaction. In December 2008 the appellant was requested by a foreign based company to act as its agent in payment of an interim dividend for its Zimbabwe registered shareholders. A capital amount to pay the dividends was paid into the appellant's account in South African currency. Portion, to pay non-resident H shareholders, was converted to US dollars, and the balance, to

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pay local shareholders, was converted to local currency, which was still A in use. The appellant used its own stock of the equivalent amount of local currency to pay the local shareholders, and retained the equivalent in US dollars in its US bank account. It sold under half of the dollars. When the local currency fell into abeyance, the bank debited the balance of US dollars and made a corresponding credit entry in its Zimbabwe dollar balance sheet. It excluded local currency in its US dollar denominated B financial statements. Its capital account showed the remaining balance of the US dollars. All this was to complete the double entry accounting framework. It was not income, and the bank claimed that it was an asset of a capital nature. The respondent disallowed the claim, saying that it constituted income. C

The fourth issue was whether an amount of some ZAR27 million provided to the bank by the related party was a genuine loan or a grant camouflaged as a loan. The related party had undertaken to meet the financial obligations of the appellant to the software supplier in the event that the appellant failed to pay for the supplies within 30 days of the due date of invoice. The bank and the related party were both subsidiaries of a foreign holding D company. The related party duly honoured the amounts invoiced. Portion of the total was paid by the bank to the related party, but the balance was cancelled because of the need to recapitalize the appellant in the wake of new US dollar denominated prescribed minimum capital requirements stipulated by the Reserve Bank of Zimbabwe. The respondent treated E the ZAR27 million as a grant or subsidy and added it to the appellant's tax return for the relevant year. It said that the loan agreement was a simulated agreement.

Held, that the computer software was intended to procure an advantage for the enduring benefit of the appellant's banking business. It was not transient but durable in nature. The two year notice period to discontinue use and F the length of the future economic benefit of up to ten years enunciated in the accounting policy was clear testimony of the enduring nature of the software. Applying the practical business and sound accounting principles that informed the treatment of software as an amortised intangible asset in the financial accounts of the appellant for three consecutive years, G all expenditure attaching to computer software was of a capital nature. The expenditure on the software thus amounted to capital expenditure and was thus not deductible.

Held, further, that an opinion wrong at law cannot establish a practice. The respondent was therefore, not precluded by proviso (i) to s 47(1) of the Act from issuing an amended assessment. H

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Held, A further, that the commercial concept of a bank is to mobilise deposits for purposes of earning revenue income from charges and fees, interest and investments. The obvious stock-in-trade of a bank, amongst others, is money. The deposits the bank mobilises are owned by the bank, in the sense that the bank has ultimate control of those funds. The deposits held by a bank would constitute trading capital for the bank. It is accepted in B banking law and practice that capital exists in two forms. It may either be fixed capital or floating/circulating capital. Floating capital is consumed or disappears in the very process of production, while fixed capital does not; though it produces fresh wealth, it remains intact. Thus the capital with which a trader buys goods circulates; he parts with it, and with the C goods bought by it, intending to receive it back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money, and thus circulates it, hoping and intending to receive it back with interest. A gain or loss arising from fixed capital would be of a capital nature, while a loss or gain arising from

floating capital would be of a revenue nature. Here, the Zimbabwe currency used to D pay the shareholders was consumed and disappeared in the very process of production. It did not remain intact. It was therefore floating capital.

Held, further, that the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably, where parties structure a transaction to achieve an E objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. Here, the loan agreement contained the essential features that constitute such an agreement. The loan amount was not specifically stated but it was easily ascertainable. F The loan agreement also stated the date on which repayment of the loan was due.

Cases referred to

Amway India Enterprises v *Deputy CIT* (2008) 111 ITD 112

British Insulated and Helsby Cables Ltd v *Atherton* [1926] AC 205 (HL) G

CIR v *George Forest Timber Co Ltd* 1924 AD 516

Commr for SA Revenue Svcs v *MWK Ltd* 2011 (2) SA 67 (SCA); (2011) 73 SATC 55

CoT v *New Consol Goldfield Ltd* 1962 (1) SA 886 (FS)

CoT v *Rendle* 1964 RLR 463 (A); 1965 (1) SA 59 (SRA)H

LW v *CoT* 1967 (1) RLR 118 (G); 1967 (3) SA 70 (R)

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Meman & Anor v *Controller of C&E* 1987 (1) ZLR 170 (S) A

Natal Estates Ltd v *Sec for Inland Revenue* 1975 (4) SA 177 (A)

NCGF Ltd v *CoT* 1960 (4) SA 919 (SR)

Solaglass Finance Co (Pty) Ltd v *CIR* 1991 (2) SA 257 (A)

Standard Chartered Bank Zimbabwe Ltd v *China Shougang Intl* 2013 (2) ZLR 385 (S)

X v *CoT* 1977 (2) RLR 223 (G); 1978 (1) SA 605 (R)B

Legislation considered

Income Tax Act [*Chapter 23:06*], ss 8(1)(m), 15(2)(a), 47(1); Schedule 4, paras 2 & 5(3)

Case information

A P de Bourbon SC, for the appellant C

T Magwaliba, for the respondent

Judgment

Kudya J: This appeal deals with five issues in four categories arising from the disallowance of the tax deductions that were claimed by the appellant in the tax year ending December 2009. The four categories are in respect D of expenditure on computer software; foreign currency accruals derived from leveraging a dividend pay-out by a public company quoted on both the Zimbabwe Stock Exchange and the Johannesburg Stock Exchange; a purported loan advanced to the appellant by a related foreign bank (hereinafter referred to as "the related party") that was subsequently purportedly written off; and the penalty imposed on the appellant by the respondent over the E dividend leverage.

The appellant company is a registered commercial bank. The respondent is a statutory body established in terms of the Zimbabwe Revenue Authority [*Chapter 23:11*].

At the appeal hearing, the appellant called the testimony of six witnesses F and produced five bundles of documents. Three of the witnesses flew from the headquarters of the foreign based banking group that controls both the appellant and the related party. These were the group general

counsel, who has been with the group since 2002, the financial controller, who has been with the banking group since 2008, and the head of central finance G and chief finance officer of the Africa Division of the banking group. The last three witnesses were the chief finance officer and the head of global markets and treasury of the appellant and a tax consultant with a local firm of chartered accountants. The five bundles were the 71 paged bundle 1 of the correspondence between the parties in the period 15 May 2012 to 21 November 2013, the 83 paged bundle 2, of which pp 11-83 cover the licence H

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and A service agreements and the main agreement between the appellant and the main software licensor, the 41 paged bundle 3 that contains the Reserve Bank of Zimbabwe monetary policy statement on capitalisation of financial institutions, the 29 paged bundle 4 that covers the information on the dividend transaction and the 41 paged bundle 5 that contains the loan agreement and other ancillary documents between the appellant and the foreign related B banking group. The respondent did not lead any oral evidence but was content to rely on its 57 paged commissioner's case.

On 18 November 2012, the respondent issued to the appellant three amended assessments in respect of income tax for the tax years ending December 2009, December 2010 and December 2011. The appellant objected to these C assessments and penalties on 17 December 2012 in accordance with the provisions of s 62 of the Income Tax Act [*Chapter 23:06*]. The respondent failed to determine the matter within three months. By virtue of s 62(4) of the Income Tax Act, the objection was deemed disallowed. An appeal was duly noted to this court on 27 March 2013. The noting of the appeal triggered a belated response dated 19 April 2013 to the earlier objection. D The response disallowed every objection except the one on interest earned on Nostro accounts and partially allowed the objection to penalties. On 29 April the respondent issued a further amended assessment, annexure G of the respondent's case, for the year ending December 2009. Objection to the further amended assessment resulted in yet another corrected assessment issued on 20 May 2013, annexure H of the respondent's case. The appellant E paid the assessed tax on 20 May 2013 in the sum of USD2 038 425.86 in three instalments between 1 June and 1 August 2013.

This appeal, by consent of the parties, is restricted to the objections in respect of the deductions that were disallowed in the tax return for the year ending 31 December 2009. The appellant indicated its intention to proceed with F the other aspects of the appeal, placed in abeyance, soon after the delivery of judgment in this appeal.

The computer software

The first issue for determination in regards to the software was whether the G expenditure on the software was of a revenue or capital nature.

The appellant contended that the installation of new software for its banking business at a cost of US$2 329 776.85 was for the purposes of trade or the production of income and therefore deductible in accordance with s 15(2)(a) of the Income Tax Act. The respondent disallowed it on the ground that the expenditure was an expense of a capital nature and was therefore not H deductible under that section.

The evidence led by the appellant on the new software explained the A justification for the software and how it was implemented. The appellant established through the evidence of both the local and group chief finance officers the objective necessity for the new software. In 2008, world record hyperinflation took its toll on the Zimbabwean economy. The Public Accountants and Auditors Board, Zimbabwe Accounting Practices Board and Institute of Chartered Accountants of Zimbabwe issued a persuasive B but not prescriptive 33 page *Guidance: Change in Functional Currency 2009* document for use by preparers and auditors of International Financial Reporting Standards compliant financial reports in Zimbabwe (pp 9 to 41 of bundle 3). On the basis of hyperinflation estimated by the World Bank at 500 billion per cent by the end 2008, multiple exchange rates escalating at corresponding rates and multiple interest rates ranging from 100 per cent to C 10 000 per cent per annum, the document categorised our moribund economy as a dysfunctional economy.

The digits in our currency grew exponentially to millions, billions, trillions and quintillions. The monetary authorities removed a total of 25 zeroes from the local currency (3 in 2006, 10 in August 2008 and 12 in January 2009). D The core banking system, Bankmaster 7, of the appellant could cope with up to 12 digits. Once the balance reached 1 trillion, the system failed to cope and posted wrong customer transaction values and account balances. Internal creation of secondary accounts by splitting customer balances and in some instances splitting a customer's account into 20 accounts to hold various E balances just in order to contain the figures, using the manual system and constant removals of zeroes by the bank in addition to those at the national level and advising the customer to multiply by a given figure to know the correct balances to reduce the digits offered temporary rather than permanent relief. These measures failed to curtail the presence of poor accounting records at some of the branches of the appellant as at 13 May 2008 as highlighted F in the e-mail at pp 1-4 of bundle 2. The risk of a complete system failure was highlighted by both auditors and internal oversight committees of the bank such as the Executive Management Committee, the Board Audit Committee and the board of directors. Permanent relief came with the use of a new core banking system from Misys International Banking Systems G (Pty) Ltd (Misys) that had capacity to accommodate up to 25 digits. The upgrade commenced with the execution of the agreement on 31 May 2008. It was test run on 15 November 2008 and was completed in July 2009 at a total cost of US$2 329 776.85. The total cost of installation was not disputed by the respondent. The computation of the cost is set out at p 20 of bundle 2 and I reproduce it below: H

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Total A cost of MUB system

	GBP	USD
Initial licence fees (BA89-ZIM)	250 000.00	(361 300.00)
System customisation and field configurations (ONO 9232-ZIM)	77 668.00	(112 245.79)
System customisation and field configurations B (ONO 9232-ZIM)	56 118.00	(81 101.73)
User acceptance testing, conversion preparation; end user training and go-live (BA92 (1) ZIM)	424 342.00	(613 259.06)
Post go-live support (BA 93 (1) ZIM)	113 600.00	(164 174.72)
Administering support, analysing support requests, C providing resolution, testing/validating the support request resolution (BA 93 (1) ZIM)	313 819.00	(453 531.22)
Accommodation at Meikles for project team		295 000.00
VAT paid		179 151.00
Project overheads		70 013.33

TOTAL		
D	1 235 547.00	544 164.33
RATE	1.45	1.00
TOTAL (USD EQUIVALENT)	1 785 612.52	544 164.33
GRAND TOTAL		2 329 776.85

The main factual dispute between the parties was whether the appellant E purchased the computer software or not. The appellant stated that it purchased the right to use the software and not the software. The respondent contended that it purchased a copy of the computer software and not merely the right of use.

The local chief finance officer of the appellant chaired the implementation F team for the new system and was involved in the implementation of the whole project. He described the software that was installed by Misys. It was an intangible program loaded on disc. The licence and services agreement #BA 89-LA was executed on 31 May 2008 between the licensor Misys of Dublin, Ireland, the intervener/guarantor for payment by the licensee, the related party and the appellant as the licensee.

The G licence was a personal, non-exclusive and non-transferrable one for the use of the software and documentation in exchange for maintenance and services set out in the agreement. Clause 8.0(i) bestowed:

> "all intellectual property rights in any tailoring or additional functionality either created using the facilities of the software or within the software developed by the licensee pursuant to clause 6 [the right of appellant to alter the software H to suit peculiar operational requirements for itself or other users] above shall

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> as between the licensor and the licensee vest absolutely in the licensor and A the licensee shall deliver such developments to the licensor and execute such instruments as the licensor may reasonably request, at the licensor's expense to give effect to the licensor's rights as aforesaid."

In terms of clause 8(ii)(c), where the licensor licenced any additional functionality to other customers, it was obliged to provide a credit voucher to the appellant. The maximum value for the appellant was set at 50 per cent B of the contract value paid to the licensor by such new customer. The amount due to the appellant was based on the total development time and related expenses incurred in creating such additional functionality. The appellant could offset the credit value against 50 per cent of the prevailing recurring licence fee or 25 per cent of the initial licence fee due. Where it had not been licensed to another, it remained vested in the licensor. In terms of clause C 8(iv) the licensee had the right to withhold the additional functionality from the licensor. The licensor was permitted to develop similar additional functionality on its own initiative but could not utilise inside information to copy, decompile, disassemble, reverse engineer or search for source codes or underlying algorithms of such modifications. The licensor was protected from liability and could be indemnified by the appellant for any claims by D other customers arising from the use of the modification.

While the import of clause 8 was to vest the modifications to the software by the appellant to the licensor, the benefit that accrued to the licensee from use of that software by third parties, in my view, demonstrated that such software was an income producing machine. E

Clause 15.0 provided a notice period of termination by either party of two years and clause 16 placed the duty to pay for the software and other supplies on the related party within 30 days of the due date of invoice once the appellant failed to honour such invoice.

The four schedules to the main agreement are set out on pp 21 to 69 of F bundle 2. These four schedules to the agreement came into force on the same day as the main agreement. In case of conflict between the documents, the schedules superseded the main agreement.

Schedule No #BA91(1)–ZIM spells out the services to be provided to the licensee by the licensor in terms of the main agreement. It is in two parts. G The first part deals with the time and material services to be supplied to support user acceptance test, conversion preparation, end-user training and go-live. It sets out the criteria for costing the time and material services provided. The broad areas covered for costing were based on notice period of the personnel and each personnel grade daily fee rate, overtime, travel, accommodation and visa costs. Part two set out the provisions expected from H

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the A licensee for the implementation of the project. These were grouped into three categories of technical facilities, business provisions and software. Under technical facilities are listed eight stages of implementation, the first being the provision of infrastructure described as entire hardware, operating system and standard software necessary for overall licensee solution. The other stages involved connectivity with third-party systems B and provision of documentation, installation of operating and other system software and configuration of the hardware. Under business provisions fall testing concepts based on test cases, test data and testing activities, training concepts, documents and training implementation and management of the implementation process. C

Schedule No. #BA93(1)-ZIM for time and materials was also in two parts. It listed the personnel expected from the licensee from administrative support, analysts to validators and the criteria for the invoicing of the licensee by the licensor. The technical facilities, business provisions and software required were similar to those set out in #BA92(1)ZIM part 2. Schedule No. #BA89-ZIM was a statement of the software and documentation to be licenced and D maintenance to be provided to the licensee by the licensor. The licensed software was identified as BankFusion Universal Banking (BFUB) release 1.0 consisting of 10 modules and 39 sub-modules, BankFusion Integration Framework for Universal Banking (BFIFUB) release 1.0 consisting of four modules and 12 sub-modules; BankFusion Design Workbench (BFDW) E release 1.0 consisting of 7 modules and 22 sub-modules. The licenced software was further confirmed at p 33 of bundle 2.

The BFUB modules and sub-modules in parenthesis that were provided were Foundation services (data management, financial processes, charges, interest, limits, static data management, process scheduler, security framework, event framework for authorisations and alerts), customer party management F (customer acquisition, party-relationship management), retail deposits (current, time, notice, savings), retail lending (origination, mortgages, consumer loans, commercial loans, offsets), Treasury-Money market (Bills, CDs, securities, bonds), Treasury–foreign exchange (spots, forwards, options, swaps), payments (standing orders, sweeps, batch payment processing, money transmission services), international payments (including SWIFT), G outward defined list of messages supported, SWIFT statements, financial management (general ledger, profit and loss, balance sheet, FX revaluation, accruals) and collateral management.

The BF Integrated Framework for Universal Banking release 1.0 consisted of Interaction methods being inward notifications, outward notifications, H request-response; integration protocols (XML, Byte Stream, SMTP, WSDL

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JMX) application specific interfaces (branchpower, CR2 ATM Sparrow A system, IBSnet, MoneyGram, Fontis) external job scheduler gateway.

The BankFusion Design Workbench release 1.0 consisted of the following modules and sub-modules: Producer design, Process design (business object connector, sub-processor execution, process flow branching, for loop, Do-while loop, While-do-loop, table loop); external interaction-screen designer B (attribute Type definition, Attribute Type validation, screen style definition, attributable event/rule

definition, sub-process calling function), External Interaction-message builder (byte stream, XML, Email (SMTP), Web services, expression/rules builder), software component builder (activity step, feature, extension points) and Business object component builder[user-definition attributes, attribute ID generator, attribute ID valuator. C

I have listed the modules and sub-modules of the software to dispel any mystique that may be attached to the term. In my view, the modules and sub-modules listed on pp 29-30 of bundle 2 of the appellant's case were the basic structures (frameworks) which produced the income for the bank, D they were not the income. They formed an integral and indivisible part of the income generating machine for the bank. They were much like the hardware for the bank.

The initial licence fee (ILF) of GBP250 000 incurred was due on the effective date of schedule #BA 89-ZIM and thereafter a recurring licence fee (RLF) E of GBP37 500 was due and payable in advance on 1 May each calendar year following delivery.

Schedule No. ONO 9232-ZIM was the statement of the services provided to the licensee for specified scope of works. A fixed price of GBP77 668 was set for the installation, configuration and system test of the software and thereafter appropriate training based on technical facilities, business provisions and F software stated on p 37 of bundle 2. The phases of implementation were set out at pp 41-43. The key activities and responsibilities of the parties were shown on pp 44 to 48. Interface with third parties was the subject of pp 45 to 51 and deliverables and change of control from licensor to licensee were stated from 49 to 61. G

In the excerpts to the financial statement of the appellant, from annexure J to annexure M3 to the Commissioner's case, covering the 2009, 2010 and 2011 financial years the appellant treated the computer software as an intangible asset and amortised it. In the notes of its accounting policies replicated in the three financial years in annexure M1, M2 and M3, the appellant stated that: H

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> "Intangible A assets: computer software:
>
> Generally, costs associated with developing or maintaining computer software programmes and the acquisition of software licenses are recognised as an expense as incurred. However, direct computer software development costs that are clearly associated with an identifiable and unique system, which will be controlled by the bank and have a probable future economic benefit beyond B one year, are recognised as intangible assets. Capitalisation is further limited to development costs where the bank is able to demonstrate its intention and ability to complete and use the software, the technical feasibility of the development, the availability of resources to complete the development, how the development will generate probable future economic benefits and the ability to reliably measure costs relating to the development. Direct costs include employee costs arising from software development and an appropriate portion of relevant C overheads. Subsequent expenditure on computer software is capitalised only when it increases the future economic benefits embodied in the specific asset to which it relates. Direct computer software development costs recognised as intangible assets are amortised on the straight line basis at rates appropriate to the expected useful lives of the assets (two to 10 years) and are carried at cost less accumulated amortisation and accumulated impairment losses. The carrying amount of capitalised computer software is reviewed annually and is written D down when impaired."

The economic benefit of the MUB system, as conceded by the local chief finance officer, did not just have a probable future economic benefit beyond one year, but was still in use even as he testified on 1 September 2014, some five years later. The respondent contended that the future economic benefit E that accrued to the appellant was synonymous with the enduring benefit test propounded in *British Insulated and Helsby Cables Ltd* v *Atherton* [1926] AC 205 (HL). It was held in that case that where an expenditure was made with a view to bringing into existence an asset or an advantage for the enduring benefit of trade, there was very good reason for treating such expenditure F as properly attributable to capital and not to revenue.

In my view, the computer software installed by the appellant was intended to procure an advantage for the enduring benefit of the appellant's banking business. It was not transient but durable in nature. The two year notice period to discontinue use and the length of the future economic benefit of up to ten years enunciated in the accounting policy is clear testimony of G the enduring nature of the software. The expenditure on the software thus amounted to capital expenditure.

The respondent also relied on *Amway India Enterprises* v *Deputy CIT* (2008) 111 ITD 112 for the submission that software expenditure was of a capital rather than revenue nature. The case

extensively surveyed the Indian tax topography and extensively examined American cases in point. In paras H [43] and [44] it unveiled the "three tests generally applied to decide the

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nature of expenditure as to whether it is capital or revenue, [as] the test A of enduring benefit, ownership test and functional test" that are based on practical and business point of view and sound principles of accountancy. In India expenditure is treated as capital expenditure either when it results in the acquisition of ownership of a capital asset (ownership test) or when it results in the accrual of an advantage of an enduring nature to the user in the capital field (the enduring and functional test). Accrual of benefit in the B capital field was defined in para [44] to mean a benefit that forms part of the profit–making apparatus of the taxpayer's business.

In the present matter, I agree with Mr *de Bourbon* that the appellant did not acquire ownership of the software. The first arm of the test does not apply to it. The use of the software by the appellant's own admission resulted in C accrual of an enduring benefit to its business. The treatment of the software as an intangible asset, albeit in compliance with International Financial Reporting Standards and the recommendations of the Public Accountants and Auditors Board, the potential to derive revenue from tailoring or additional functionality of the software and the close affinity of the software to computer hardware (incorporation of information in the software into the user's D computer-programmed at user's site or from remote supplier site by wireless or use of punch cards, discs magnetic tapes), in my view, all form part of the profit making apparatus of the appellant's business. After all, software, in my view, constitutes the living and inseparable force of a computer.

My conclusions in this regard resonate with those of the Special Bench in the E*Amway* case *supra*. That Special Bench was set by the President of India, in terms of Indian tax legislation, to determine the issue whether software was of a capital or revenue nature in view of the many conflicting decisions of various Division Benches in India. It was to provide a holistic determination on the issue. The facts were that the assessee, Amway, claimed a deduction for expenditure incurred for software in its tax return for 2001-2002 tax year. F It acquired eight computer application software programmes whose nature and purpose were outlined in the judgment. The assessee contended that the expenditure was incurred in obtaining the licence to use the application software was of a revenue nature as it only facilitated its day to day operations and that the life of such software was invariably short and bound to become G technically obsolete pretty quickly. The assessing officer found all the software hand long lasting use of between three and four years. He dismissed the claim on the basis that the software was part of the plant and machinery of the assessee and gave an enduring benefit to it. The taxpayer appealed to the Division Bench. The taxman contended that acquiring a licence to use software was the common mode of "purchase" of software and that expenditure H

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incurred A of such software that gave an enduring benefit to the assessee was of a capital nature. The Division Bench held that computer software was an intangible asset that constituted an integral part of a computer and without which a computer could not function, was of a capital nature.

The appeal was set before the Special Bench. The taxpayer argued before B the Special Bench much along the lines followed by Mr *de Bourbon* in the present matter, that it was a mere non-exclusive licensee with no title for improvements, modifications and derivatives as these were vested in the licensor. The Special Bench held firstly, in paras [55] and [61] on the authority of various Supreme Court of India cases that software was not an intangible but a tangible asset "though a licensee, the person purchasing the C disk or other medium containing the software is owner to the extent of the rights comprised in the license." Secondly, that the acquisition of computer software or for that matter the licence to use such software amounted to an acquisition of a tangible asset for which the assessee became the owner thereof; thirdly that where the life span of the software was under two years it could be considered as revenue expenditure but where the utility value D went beyond two years, as long as it met the functional test such expenditure would be considered an accrual of an enduring nature; and lastly that the application of the functional test was more important and relevant to the consideration of whether software expenditure was of a revenue or capital nature regard being had to its use in the business of the taxpayer.

I E am satisfied that applying practical business and sound accounting principles emanating from International Financial Reporting Standards that informed the treatment of software as an amortised intangible asset in the financial accounts of the appellant for three consecutive years all expenditure attaching to computer software was of a capital nature. I, therefore, agree with Mr *Magwaliba* that *Commissioner of Taxes* v *Rendle* 1964 RLR 463 (A) at F 466-467 dealt with deduction of designed and fortuitous expenditure of a revenue nature and does not apply in the instant case.

The first issue referred for determination, whether the cost of computer software acquired by the appellant was a revenue expense which was allowable as a deduction in terms of s 15(2)(a) of the Income Tax Act or G constituted an expenditure of a capital nature and thus not allowable as a deduction is answered in favour of the respondent. The cost of the computer software acquired by the appellant was not deductible as it constituted capital expenditure. It was properly disallowed.

The second issue was whether or not the respondent was bound by a decision made by the Department of Taxes in 1999 regarding the treatment of the H cost of acquitting computer software when computing taxable income. It

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was common cause that the 1999 decision was not a general binding ruling A and had no binding effect in 2009 or at all. It does not meet the criteria set out in the 4th Schedule of the Revenue Authority Act [*Chapter 23:11*]. The decision does not bind the respondent. The tax consultant testified on the purported existence of a tax practice since 18 May 1999. He further indicated that the claim for deduction in the 2009 tax return was submitted on the basis B of the purported practice. He stated that the appellant became aware of the change in the purported practice on receipt of the first set of amended tax returns disallowing the claim. In the notice of objection, notice of appeal, appellant's case and reply to the commissioner's case, the appellant raised the doctrine of legitimate expectation arising from the communication of 18 May 1999 between a firm of chartered accountants that acted as the tax C consultant to the appellant and the respondent (annexure I of respondent's case and pp 17-19 of bundle 2). In that letter, the respondent treated computer software as a consumable item and classified expenditure either by purchase or development as revenue expenditure deductible in terms of s 15(2)(a) of the Income Tax Act. It was common cause that the general letter of enquiry and the response did not constitute a general binding ruling contemplated D in general by the 4th Schedule of the Revenue Authority Act, *supra*, and in particular by para 5(3) thereof.

Mr *de Bourbon* submitted that proviso (i) of s 47(1) of the Income Tax Act precludes the respondent from issuing an amended assessment on a tax return submitted in terms of the purported departmental practice reflected in the E letter from the respondent of 18 May 1999. The proviso reads:

> "47 Additional assessments
>
> (1) If the Commissioner, having made any assessment on any the tax payer, later considers that –
>
> (a) an amount of taxable income which should have been charged to tax has F not been charged to tax; or
>
> (b) in the determination of an assessed loss … or
>
> (c) any sum granted by way of credit should not have been granted;
>
> he shall adjust such assessment so as to charge to tax such amount of taxable income or to reduce such assessed loss or to withdraw or vary such credit, and G if any tax is due either additionally, or alternatively, call upon the taxpayer to pay the correct amount of tax:
>
> Provided that –
>
> (i) no such adjustments or call upon the taxpayer shall be made if the assessment was made in accordance with the practice generally prevailing at the time the assessment was made; H

> (ii) subject A to proviso (i), no such adjustment or call upon the taxpayer shall be made after 6 years from the end of the relevant year of assessment, unless the Commissioner is satisfied that the adjustment or call is necessary as a result of fraud, misrepresentation or wilful non-disclosure of facts, in which case the adjustment or call may be made at any time thereafter;

(iii) the B powers conferred by this subsection shall not be construed so as to permit the Commissioner to vary any decision made by him in terms of subsection (4) of section *sixty-two*."

I was able to find four cases from this jurisdiction that dealt with the precursor proviso (1) to s 47(1). These are *X* v *Commissioner of Taxes* 1977 (2) RLR 223 (G); C1978 (1) SA 605 (R) at 614H-615A, 618A and 619G, where the taxpayer was obliged to establish on a balance of probabilities the existence of the alleged practice by cogent and not vague evidence; *LW* v *Commissioner of Taxes* 1967 (1) RLR 118 (G); 1967 (3) SA 70 (R) at 77D; *NCGF Ltd* v *Commissioner of Taxes* 1960 (4) SA 919 (SR) at 922 and *Commissioner of*D*Taxes* v *New Consolidated Goldfield Ltd* 1962 (1) SA 886 (FS) at 891-2.

It does not appear to me that the tax consultant established a practice generally prevailing at the time the assessment was made. The tenor of his evidence was a carry-on of the averments in the objection of the existence of a tax ruling issued in 1999. It was clear to me that the letter in question was not a tax ruling. It did not satisfy the requirements of paras 2 and 5 of the 4thE Schedule of the Revenue Authority Act. The erroneous cancellation of the purported tax ruling by the respondent's chief investigator in the present case in his letter of 7 August did not confirm the existence of the practice. Section 3(4) that he sought to rely on for the cancellation was repealed in its entirety without substitution by the Finance Act No. 8 of 2011 with effect F from 16 September 2011. The existence of such practice was disputed by the respondent in its case and was put in issue during the cross examination of the tax consultant. In my view, an opinion wrong at law cannot establish a practice. The respondent was therefore, not precluded by proviso (i) to s 47(1) of the Income Tax Act from issuing an amended assessment.

In G the light of these findings, I agree with Mr *de Bourbon* that the respondent is obliged to allow the deduction of special initial allowance on the cost of the software in question at the rate prescribed in the Income Tax Act.

I, therefore, hold that software expenditure was of a capital nature. The respondent correctly disallowed the claim for deduction of US$2 329 776.85 H from the appellant's tax return for the year ending 31 December 2009.

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The dividend transaction A

The third issue was whether the amount obtained by the appellant in the dividend transaction should be treated as the appellant's taxable income or as non-taxable income when calculating the appellant's taxable income.

The facts relating to the dividend transaction were common cause. The head of global markets for the appellant and the local chief finance officer B testified on what transpired. The 29 paged bundle 4 confirmed the paper trail of the events.

On 17 December 2008 the appellant was requested by a foreign based company to act as its agent in payment of an interim dividend for its Zimbabwe registered shareholders. The time table for the last day of trade for receipt of dividend, 2 January 2009, the ex-dividend share trade, 5 January 2009, the C currency conversion date, 9 January 2009 and the dividend payment date, 12 January 2009 were all provided. ZAR45 580 500, described by the local chief finance officer as a capital amount to pay the dividend, was transferred into the Nostro account of the appellant on 8 January 2009. It was instructed to pay the non-resident shareholders on the Zimbabwe register in United States D dollars. The sum of R366 503.40 was converted to US$38 989.72, according to p 17 of bundle 4, at the rate ZAR9.40: US$1 and appropriated for that purpose. The balance of ZAR45 213 996.60, equivalent to US$4 521 340, was converted to ZW$158 729 988 063 723 967.24 (ZW$158.7 trillion), which at that time was the functional local currency, for payment to local registered shareholders. The exchange rate used for the conversion on 9 January 2009 E was ZW$3 510 638 287.87 to ZAR1.00 (pp 9 and 16 of bundle 4). On 12 January 2009 the appellant transferred the sum of ZW$158.7 trillion to the local transfer secretaries for payment. The local resident shareholders were duly paid in the local functional currency.

The appellant utilized its own stock of local currency of ZW$158.7 trillion F and retained the equivalent sum of US$4 521 340 in its New York Nostro account. Between 13 and 16 January 2009, the appellant sold US$2 million, inclusive of commission of 5 per cent amounting to US$100 000 to

the Reserve Bank of Zimbabwe and remained with a balance of US$2 521 340. The commission was accounted for in its income tax return for the tax year ending December 2009. G

The introduction of the multicurrency regime on 29 January 2009, practically though not legally, rendered the local currency defunct. In line with the requirements of the International Financial Reporting Standards and recommendations from the Public Accountants and Auditors Board of Zimbabwe the appellant debited the sum of US$2 521 340.44 in its United H

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States A dollar balance sheet and made a corresponding credit entry in its Zimbabwe dollar balance sheet. It excluded local currency in its United States dollar denominated financial statements for the period 1 January to 31 December 2009. Its capital account showed United States dollar assets had increased by US$2 521 340.44. A corresponding accounting entry was B posted to the income statement to balance the account. The amount was not shown as income but was treated in the same way as were other assets such as buildings, furniture and foreign currency balances acquired in local currency. These were revalued into United States dollar balances and an accounting credit entered in the income statement representing current year reserves, merely to complete the double entry accounting framework. C It was the local chief financial officer's uncontroverted testimony that the US$2 521 340.44 was credited to the income statement to fulfil these double entry accounting requirements prompted by dollarization. It did not represent taxable income. In the tax return submitted to the respondent, the appellant claimed a deduction against income for the sum in issue. The respondent D disallowed the claim made by the appellant that this amount constituted an asset of a capital nature and added it back to income for the appellant for the year ending December 2009 as being an exceptional gain made as result of the introduction of the multicurrency regime. The appellant's objection was disallowed, hence the present appeal.

The appellant contended that the sum of US$ 4 521 340 from which the E balance of US$2 521 340 derived was of a capital nature and could not be assessed to tax as income. The respondent contended that it was income.

The local chief finance officer and head of global banking averred that the ZW$158.7 trillion exchanged for US$4 521 340.44 was capital in the hands of the appellant. The appellant used the local currency to purchase the United States F dollars, which remained a financial asset in its hands. His evidence was that one asset was disposed of and another purchased. The amount in issue did not change character merely because the appellant held on to it. The basis on which the respondent treated the amount as income is not apparent. Four reasons were advanced in the determination of the respondent G of 30 November 2012. The first was the purported absence of proof that the money came from the foreign based company. The second was the absence of communication between the appellant and the foreign based company in regards to purchase of the dividend outlay. The third was the absence of instructions to transfer the amount to the transfer secretaries and the fourth was the exceptional foreign exchange gain derived from the appellant's H ordinary course of trade. The fourth reason was cast in different wording in

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paras 17 and 19 of the Commissioner's case where it was contended that the A appellant benefited from purchasing the amount at favourable exchange rates.

Mr *de Bourbon* contended, on the authority of *Meman & Anor* v *Controller of Customs & Excise* 1987 (1) ZLR 170 (S) at 173G and *Standard Chartered Bank Zimbabwe Ltd* v *China Shougang International* 2013 (2) ZLR 385 (S) at 388, that the appellant became the owner of the funds on deposit. He B accordingly submitted that the funds were capital assets in the hands of the bank from which it could derive income.

The approach to adopt was spelt out in *Natal Estates Ltd* v *Secretary for Inland Revenue* 1975 (4) SA 177 (A) at 202G-203A thus:

> "In deciding whether a case is one of realising a capital asset or of carrying on a C business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case. Important considerations include, *inter alia*, the intention of the owner; both at the time of buying the land and when selling it (for his intention may have changed in the interim), the objects of the owner, if a company, the activities of the owner's *ipse dixit* as to intention, where the owner subdivides

> the land, the planning extent , duration, nature, degree, organisation and marketing operations of the enterprise; and D the relationship of all this to the ordinary commercial concept of carrying on business or embarking on a scheme for profit. Those considerations are not individually decisive and the list is not exhaustive. From the totality of the facts one enquires whether it can be said that the owner had crossed the Rubicon and gone over to the business, or embarked upon a scheme, of selling such land for profit, using the land as his stock-in-trade. Lastly one does not lose sight of the incidence of onus of proving non-liability, imposed by s 82 of the Act, on the E person claiming such non-liability, in this case the appellant"

The commercial concept of a bank is to mobilise deposits for purposes of earning revenue income from charges and fees, interest and investments. The obvious stock-in-trade of a bank, amongst others, is money. The deposits the bank mobilises, according to *Meman* and *Standard Chartered Bank Ltd*F cases, *supra,* are owned by the bank in the sense that the bank has ultimate control of those funds. It would seem to me that the deposits held by a bank would constitute trading capital for the bank. It is accepted in banking law and practice that capital exists in two forms. It may either be fixed capital or floating/circulating capital. In *Solaglass Finance Co (Pty) Ltd* v *CIR* 1991 (2) SA 257 (A) at 269I-270G Friedman AJA stated: G

> "As what the appellant lost was capital which it advanced to the various debtors and which has become irrecoverable, it is necessary to decide whether the capital thus lost was fixed or floating (sometimes called circulating) capital. If it was fixed capital, the loss was of a capital nature; and if it was floating, the loss was of a revenue nature. See *Stone* v *Secretary for Inland Revenue* 1974 (3) SA 584 (A) at 595A-B. H

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> The A distinction between fixed and floating or circulating capital was explained by Innes CJ in *Commissioner for Inland Revenue* v *George Forest Timber Co Ltd* 1924 AD 516 at 524, as follows:
>
> 'Capital, it should be remembered, may be either fixed or floating. I take the substantial difference to be that floating capital is consumed or disappears in the very process of production, while fixed capital does not; though it B produces fresh wealth, it remains intact.'
>
> See also the *New State Areas* case *supra* at 620-1 where Watermeyer CJ, after quoting the above passage, stated:
>
> 'As to the latter (expenditure of a capital nature), the distinction must be remembered between floating or circulating and fixed capital. When the capital employed in a business is frequently changing its form from money C to goods and *vice versa* (eg the purchase and sale of stock by a merchant or the purchase of raw material by a manufacturer for the purpose of conversion to a manufactured article), and this is done for the purpose of making a profit, then the capital so employed is floating capital. The expenditure of a capital nature, the deduction of which is prohibited under s 11(2), is expenditure of a fixed capital nature, not expenditure of a floating capital D nature, because expenditure which constitutes the use of floating capital for the purpose of earning a profit, such as the purchase price of stock in trade, must necessarily be deducted from the proceeds of the sale of stock in trade in order to arrive at the taxable income derived by the taxpayer from that trade.'

In *Ammonia Soda Co* v *Chamberlain* [1918] 1 Ch 266 Swinfen Eady LJ defined E fixed capital as follows at 286:

> 'That which a company retains, in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income, independent of any further action by the company, or being retained by the company are made use of to produce income or gain profits.'

At 286-7 he described circulating capital in the following terms:

> 'It F is a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion. Thus the capital with which a trader buys goods circulates; he parts with it, and G with the goods bought by it, intending to receive it back again with profit arising from the resale of the goods. A banker lending money to a customer parts with his money, and thus circulates it, hoping and intending to receive it back with interest.'"

The distinction and its tax ramifications was approved by Botha JA, who delivered the majority decision in *Solaglass*, *supra*, at 277J-278A in these H words:

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> "I have had the benefit of reading the judgment of my brother Friedman. In A his judgment it is held (a) that the capital which the appellant lost as a result of being unable to recover the loans in question was not fixed, but circulating capital, and therefore of a revenue nature, and that the losses in question were accordingly deductible in terms of s 11(a); and (b) that the losses were not disqualified from deduction by reason of the provisions of s 23(g). I agree with (a), but I respectfully differ on (b)." B

The principle that I extract from the distinction set out in the above cited cases is that a gain or loss arising from fixed capital would be of a capital nature while a loss or gain arising from floating capital would be of a revenue nature.

The appellant did not disclose whether ZWD158.7 trillion was fixed capital or floating capital. The evidence of both the local chief financial officer C and global head of banking disclosed that the amount in question was derived from the appellant's own funds. The impression I had was that the witnesses were referring to floating capital. In the words of Innes CJ in *George Forest Timber* case, *supra*, the ZW$158.7 trillion was consumed and disappeared in the very process of production. It did not remain intact. It was therefore floating capital. The new product was ZAR45 213 996.60, which was soon thereafter converted to US$4 521 340.40. D

Mr *Magwaliba* submitted that the appellant made a profit of US$2 521 340.40 on the dividend transaction for which he is liable to income tax. He relied on the appellant's statement on page 7 of bundle 1. The tax consultant wrote to the appellant on 5 September 2012 that: E

> "As explained in the letter of 6th June 2012, [the foreign company] transferred ZAR45 580 499.95 to [the appellant] to fund dividend pay-outs to their shareholders (resident and non-resident shareholders in Zimbabwe in January 2009. As the economy had not yet dollarized in January 2009, the dividend pay-out to Zimbabwean shareholders was to be in Zimbabwe dollars thus [the appellant] negotiated with the Reserve Bank of Zimbabwe (RBZ) for a rate for the transaction in comparison to the official ZWD:USD exchange rates obtaining F then. The ZAR:USD exchange rate at the time resulted in the ZAR amount translating to USD 4 560 330.16. USD2 000 000.00 of this was sold to the RBZ in exchange for ZWD. A further USD38 989.72 was paid out to non-resident shareholders, and [the appellant] then provided the ZWD equivalent of USD2 521 340.44 that was paid to the Zimbabwe residents. This is reflected in the table provided to you showing:" [The table did show that the amount converted to ZWD158.7 trillion was the sum of USD4 521 340.44 and not USD2 521 340.44.] G

Mr *Magwaliba* reasoned that the equivalent amount to ZAR45 213 996.60 of US$4 521 340.40 should have been exchanged at the official exchange and not at the favourable exchange rate negotiated with the Reserve Bank of Zimbabwe. He contended that the favourable exchange rate resulted in the disposal of US$2 million for ZWD158.7 trillion that was paid out to the H

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local A registered shareholders while the balance of USD2 521 340.40 accrued to the appellant as profit. He suggested that had the appellant exchanged the whole amount at the official rate all the US$4 521 340.40 would have been taken up by the reserve bank and the local shareholders would have received the correct value on the dividends while the appellant as a middleman would have maintained a zero balance. He found confirmation for his contention in B annexure N to the Commissioner's case, the tax computation by the appellant for the tax year ending December 2009 in which it claimed a deduction of the alleged profit from taxable income as a revaluation of investment property.

The contentions and submissions by Mr *Magwaliba* are not supported by the evidence led in this court. The evidence was that the balance of the rands C that remained after appropriating payment for foreign shareholders on the Zimbabwe register was all converted to Zimbabwe dollars at the favourable rate negotiated with the central bank. There is no evidence to support the suggestion that US$2 million was converted to ZWD158.7 trillion. Had such evidence been adduced, the submission might have had merit. The tenor of the contentions and submissions seeks to deny the appellant the right it D exercised to interpose as the purchaser of the rands directly converted into Zimbabwe dollars in accordance with the mandate of the foreign company that paid out the dividend.

In my view, the rands did not constitute revenue income but remained floating capital of equivalent value, albeit in form of foreign currency. It seems to E me that the ZAR45 million when resident in the Rand Nostro account of the appellant was not revenue income. It was floating capital from which revenue income would be earned on disposal as clearly exemplified by the sale of the US$2 million

to the Reserve Bank of Zimbabwe or on investment. It would be illogical to aver that the appellant purchased the foreign currency that it already owned. The two local employees of the appellant testified that F ZW$158.7 trillion constituted capital in the possession of the appellant. It would also be illogical to aver that the appellant exchanged the local currency it owned for the United States dollars it already owned. In *Meman's* case at 173G McNally JA warned that:

> "whether you could call that the Bank's own money, would depend on the context, G in particular what you are contrasting it with."

In the context of the present matter, the ZAR45 million did not become the appellant's money. It was deposited with specific instructions to transmit it in functional currency to the transfer secretaries for payment of dividends to shareholders in the Zimbabwe register. In my view, whoever the owner of the funds was between the company that transmitted them to the Nostro H account of the appellant, the transfer secretaries and the shareholders in the

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Zimbabwe register, what is clear is that these funds were held in trust by A the appellant. The appellant could not in context be the owner of the funds at that stage. The instructions from the company that declared the dividend were that the rands be converted to United States dollars for the payment of the 106 foreign shareholders registered on the Zimbabwe register and the balance in Zimbabwe dollars for the account of the local shareholders. The documentation establishes that this was done at the rate of ZAR9.40 to B US$1 and ZW$3.5 billion to ZAR1. The appellant utilised its own Zimbabwe funds to purchase the rands. The evidence of two of its local employees that it utilised local capital funds to purchase the rands was not disputed. It thereafter converted the rands into United States dollars a portion of which it sold to the Reserve Bank of Zimbabwe. It earned commission from the C sale. The respondent did not question this transaction but was happy to treat the amount sold to the RBZ as the income earning apparatus. I am unable to distinguish between the portion that was sold to the RBZ and the one that remained in the appellant's possession. It seems to me that both sums were capital in nature. I am unable to conceptualize how a capital sum in Zimbabwe dollars that is utilised to purchase an equivalent amount in South African D rands that are converted to United States dollars could be apportioned to revenue. The RBZ transaction suggests that had the local currency remained functional, the appellant would have had at some stage to dispose it to best advantage or utilize it to earn income.

I am satisfied that the appellant has discharged the onus on it to show on a E balance of probabilities that the sum of US$2 521 340.40 constituted capital and not revenue. While I find in favour of the appellant in regards to the nature of the amount in issue, I hold also that it was remiss of the appellant to claim this amount as an allowable capital deduction, in circumstances that are not sanctioned by the Income Tax Act, from taxable income.

Loan agreement or bestowed benefit F

The fourth issue for determination was whether the amount of R27 632 759.71 that was provided to the appellant by the related party was a genuine and *bona fide* loan or was in effect a grant camouflaged as a loan.

The facts on this issue are generally common cause. The parties disagree G on their interpretation. All the three foreign based witnesses called by the appellant and the local chief financial officer testified on what transpired. The documents in the 41 paged bundle exhibit 5 cover the events connected to this issue.

The appellant executed an agreement of supply with the supplier of the MUB core banking system on 31 May 2008. In terms of clause 16 of that H

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agreement A the related party undertook to meet the financial obligations of the appellant to the supplier in the event that the appellant failed to pay for the supplies within 30 days of the due date of invoice.

The appellant entered into an undated one paged loan agreement on pp 2, 4 and 25 of bundle 5 with the related party. The related party and the appellant B are both subsidiaries of a foreign based

holding company. The agreement was witnessed by two separate witnesses for each signatory. The related party advanced a temporary interest free loan facility to the appellant to cover the costs incurred by the appellant in the development and implementation of the new MUB core banking system already dealt with under the first issue. The loan facility was advanced to enable the appellant to settle financial C obligations in foreign currency for the MUB core banking system. It was structured in such a way that the related party paid the relevant charges due from the appellant from 1 May 2008 directly to the suppliers of the hardware and software of the core banking system. The appellant undertook to repay all funds paid by 31 December 2009.

The D suppliers of the hardware and software invoiced the appellant within 30 days of rendering each supply and service. The invoiced amounts were honoured by the related party within a further 30 days of the invoiced date. The related party was invoiced with a charge of GBP250 000, equivalent to ZAR4.3 million, by MIBS for BankFusion software supplied to the appellant. On 20 October 2008 the related party successfully applied for E exchange control authority from the South African Reserve Bank to make payment even though it had committed itself to pay without exchange control approval. The retrospective approval of the incurred contractual obligation and authority to make prospective payment dated 12 November 2008 were premised on the undertaking by the related party that the appellant would be F invoiced separately to reimburse the related party and that no offset against management fees was contemplated. Again on 14 May 2009 the related party applied to the exchange control authority in its country of domicile for payment of US$294 681.94, equivalent to ZAR2 504 796, to TCL of the United Kingdom due for computer parts and accessories essential to G support the appellant's IT systems infrastructure supplied to the appellant. It confirmed that the appellant held Reserve Bank of Zimbabwe exchange control authority to pay but was unable to do so due to the endemic shortage of foreign currency in Zimbabwe. Further, it confirmed that it would recover the amount from the appellant once it was in a position to pay. The application was approved on 25 May 2009 on the basis of the anticipated H recovery. The appellant established through the evidence of its witnesses

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and the documents in bundle 5 that the related party paid the equivalent of A the total sum of ZAR27 632 795.71 to the three suppliers.

The appellant repaid ZAR3 597 753.73 to the related party in three tranches on 19 January, 18 June and 6 August 2009. The dates of repayment and amounts paid are set out in the appellant's bank statement of 3 January 2010 with the related party at p 11 of bundle 5. The debts incurred by the related party B on behalf of the appellant between 19 August and 30 September 2008 were all cleared with the payment on 16 January 2009 of a lump sum of ZAR2 million equivalent, to US$200 000, for which exchange control applications to purchase such foreign currency was made to the RBZ on 15 June 2009 (for US$150 000) and 4 August 2009 for US$50 000 for IT support and development costs. The US$200 000 was transmitted from the appellant's C Nostro account with the Deutsche Bank Trust Company in New York to the related party on 23 June and 5 August 2009 The related party, however, paid the suppliers of the appellant the debit balance due of ZAR24 035 041.98 between 24 March and 6 August 2009. The related party paid the equivalent of ZAR17 723 954 to MIFS for system development and implementation, ZAR654 429 to TGL for hardware and ZAR656 659 to OT for training D purposes. The breakdown of these payments is set out in the Zimbabwe New Account reconciliation of 19 August 2009 on p. 10 and 35 of bundle 5.

The outstanding loan amount owed by the appellant as at 30 November 2009 in the sum of ZAR24 035 042 was cancelled by the related party on 31 December 2009. The signatory to the loan agreement and his two previous E witnesses appended their signatures on the loan facility cancellation document. The cancellation recorded that the total loan amount paid to the three vendors was in the sum of ZAR24 035 042 being payments of ZAR17 723 954 to MIFS for system development and implementation, ZAR654 429 to TGL for hardware and ZAR656 659 to OT for training purposes.

The cancellation, according to the evidence of the general group counsel, F the head group central finance/chief finance officer, the financial controller of the related party and the local chief finance officer, was prompted by the need to recapitalize the appellant in the wake of new United States dollar denominated prescribed minimum capital requirements for all financial institutions mandated by SI 178 of 2008 and decreed by the Reserve Bank G of Zimbabwe in a mid-monetary policy statement dated 30 July 2009. The statement recognised the existence of capital erosion and

diminution of bank balances of financial institutions denominated in local currency by chronic hyperinflation and the change-over to the multicurrency system. A phased plan for enforcement of the prescribed minimum capital requirements was outlined. All financial institutions were required to meet one-half of the H

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prescribed A capital levels, being US$6.25 million by 30 September 2009 and the full levels of US$12.5 million by 31 March 2010 for commercial banks such as the appellant.

The e-mail exchanges between the local and group chief finance officers commencing on 4 November and ending on 9 December 2009 are covered B on pp 15-17 of bundle 5. The appellant requested for its sundry creditors account of liabilities as at 31 October 2009. It also requested for the account to be dispatched every month end. The indebtedness as at 12 November 2009 was indicated. In consequence of the write-off of the outstanding debt as at 30 November, a nil debtor book balance was submitted on 8 December 2009. On 9 December the local chief finance officer wrote to his head office C counterpart that the write-off would "definitely go a long way toward our capitalisation exercise." He was advised in the response of the same day that the group general counsel was making progress on the legal issue with a likelihood of the related party directors signing off some proposed resolution on capitalisation (transfer to reserves). The e-mail supports that the appellant D tracked the debt and the write-off was linked to capitalisation.

In the monetary policy statement, the Reserve Bank of Zimbabwe indicated that the recapitalisation plans submitted by financial institutions showed that capital injections were expected from holding companies, private placements, rights issues, mergers and strategic partnerships with new investors. The appellant did not produce to the respondent or this court the recapitalisation E plan it submitted to the Reserve Bank of Zimbabwe. Neither did it produce the resolution, if any, that the directors of the related party passed in regards to the capitalisation of the appellant.

In response to an enquiry of 12 March 2013 from SARS the related party revealed on 5 July 2013, amongst other things, that the standard repayment F terms availed to the appellant was 30 days from the date of payment to the supplier. The related party was invoiced by the suppliers on 24 March, 28 April, 20 May and 8 June 2009. Save for the repayment of ZAR3 597 753.73, the appellant was unable to pay. For tax purposes, the related party debited the appellant's loan account and credited its own income statement. It did G not make any tax adjustment in the 2009 income tax return but claimed the loan write off as a deduction of a money lender. The related party wrote off the outstanding loan account. The related party cleared the appellant's loan account in its balance sheet with a corresponding expense in the related party's income statement.

The evidence of the group general counsel of the holding company and H the financial controller of the related party established that intra-group

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loan agreements were deliberately short form memorials that served the A dual purpose of creating joint contractual obligations on the one hand and accounting and audit trail on the other. The group general counsel further established that s 70A of the South African Bank Act of 1990 requires a bank controlling holding company for which the group general counsel worked and which owned both the related party and appellant to meet the minimum capital requirements prescribed by the relevant regulatory authorities in the B jurisdiction its subsidiaries operated in. The holding company complied with the Reserve Bank of Zimbabwe directive to recapitalize the appellant by waiving the loan repayment and appropriating the proceeds to capital.

The legal arguments

The respondent basically contented that the appellant and the related C party consummated a simulated loan agreement to camouflage a grant or subsidy advanced to the appellant. Accordingly, it treated the sum of ZAR27 632 795.71 as a grant or subsidy as contemplated s 8(1)(m) of the Income Tax Act and added it back to gross income in the appellant's 2009 tax return.

Mr *de Bourbon* for the appellant submitted that the appellant had discharged D the onus on it to establish that the amount in issue constituted a loan and was therefore not subject to income tax.

Mr *Magwaliba*, submitted on the authority of *Commissioner, SA Revenue Services* v *MWK Ltd* 2011 (2) SA 67 (SCA); (2011) 73 SATC 55 that the loan agreement was a simulated agreement. At para 55 Lewis JA stated that: E

> "In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the F purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation."

He contended that the loan agreement was not a genuine one, notwithstanding G that three repayments were made. The disquieting features he advanced were the short form nature of the agreement. It was interest free. It was not dated. It did not set out specific repayment dates. It was apparent that the appellant would not be able to repay within 30 days of the related party's payment. The related party was not the parent company and did not bear the legal obligation to capitalize the appellant both under South African legislation and H

Zimbabwean A law. He contended that the cumulative effect of these factors was that the loan agreement did not make commercial sense and submitted that the real substance and purpose of the loan agreement was to benefit the appellant by bestowing a grant or subsidy to it.

In my view, the loan agreement contained the essential features that constitute B such an agreement. The loan amount was not specifically stated but it was easily ascertainable. It was constituted by "all the costs incurred (from 1 May 2008) by the appellant relating to the development and implementation of a new MUB core banking system" paid by the related party to the vendor and suppliers of hardware equipment required to support the new system. It was common cause that the amount expended for this purpose was in the sum C of ZAR27 632 795.71. The loan agreement also stated the date on which repayment of the loan was due. It was 31 December 2009. The uncontroverted oral testimony of the group finance officer and the financial controller of the related party was that the understanding between the parties was that repayment was due on each paid invoice thirty days after such payment. The group chief finance officer testified to numerous e-mails and telephone D calls made to the appellant for payment of the amounts whenever they fell due while the financial controller stated that she used to dispatch intra-group debtor's statements on a monthly basis to all African entities that fell within her purview reflecting all payments made on their behalf by the related party.

That the amount that was eventually written off constituted a loan was E apparent from the short form agreement, the existence of an agreement with the suppliers, the applications to the South African Reserve Bank exchange control for approval to make payments and the reimbursement undertakings made therein. That the loan agreement was genuine was also demonstrated by the three repayments of 19 January, 18 June and 6 August 2009 in the aggregate sum of ZAR3 597 753.73. It was common cause during the trial that F proof of these repayments were supplied to the respondent on 12 September 2012 notwithstanding the averment in paras 22 and 25 of the respondent's case filed on 23 August 2013 disputing the submission of such proof. It was established by the appellant that it cleared its indebtedness as at 19 January 2009. The e-mail communication between the local chief finance officer and various personnel in the related party's office culminating in the e-mail of G 9 December 2009 established the negotiations preceding the loan cancellation.

The three witnesses from the related party justified the use of the short form agreement. It was an intra-group agreement for which detailed terms and conditions redolent in similar agreements with unrelated parties was not necessary. It was meant to record the existence of the loan and to satisfy H accounting and audit requirements. In my view, it does not appear that at

the date the agreement was concluded, which preceded the first application A to the South African Exchange Control of 20 October 2008, the parties had foreknowledge that Zimbabwe would

introduce the multicurrency regime on 29 January 2009 and thereafter rebase capital requirements for financial institutions through the mid-year monetary policy of July 2009. That the related party was not the bank holding company responsible for recapitalizing B the appellant actually reinforces the genuineness of the loan. In any event, it cannot from the facts be found that the only purpose for concluding the loan agreement was to evade tax. Accordingly, I hold that the loan agreement did not constitute a simulated agreement.

I am satisfied that the appellant established on a balance of probabilities C that the loan amount constituted part of its working capital and not revenue income in its hands. The character of the loan as capital income could not have changed to revenue income by reason of cancellation, for the simple reason, amongst others, that it had already been consumed by capital goods.

The appeal in respect of the loan write-off is allowed. D

Penalties

In the light of my finding that the amount that accrued to the appellant from the dividend transaction was capital and not revenue, the appeal against the penalty imposed must succeed and is accordingly allowed. Mr *de Bourbon* prayed for costs. I do not consider the appellant to have succeeded to a E substantial degree. I believe that this is a proper case to request each party to bear its own costs.

Disposition

Accordingly: F

1. The appeal against the disallowance on the claim for deduction of software expenditure in the sum of US$2 329 776.85 is dismissed.
2. The appeal against the dividend transaction and the loan write-off is allowed.
3. The amended assessment of 20 May 2013 for the year ended 31 December 2009 G together with the penalty imposed therein is set aside.
4. The respondent is directed to issue a further amended assessment for the year ending 31 December 2009:
   (a) disallowing the deduction of software expenditure in the sum US$2 329 776.85; H

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   (b) allowing A the deduction of the prescribed special initial allowance in terms of the Income Tax Act in respect of the expenditure on software in (a) above;
   (c) disallowing the deduction of US$2 521 340.44 from the taxable income of the appellant;
   (d) exempting B the loan write-off of US$ 485 059.93 from the taxable income of the appellant;
5. The respondent shall refund the balance due to the appellant arising from the implementation of the directive in para 4(a) to (d) above from the US$2 038 425.86 adjustment paid by the appellant to the respondent between 1 June and 1 August 2013. C
6. Each party shall bear its own costs.

Atherstone & Cook, the appellant's legal practitioners

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MLAMBO v CHIKATA 2015 (1) ZLR 206 (H)

Citation 2015 (1) ZLR 206 (H)

Case No	Judgment No. HH-134-15
Court	High Court, Harare
Judge	Zhou J
Heard	11 February 2015
Judgment	11 February 2015
Counsel	No counsel details supplied
Case Type	Chamber application for default judgment
Annotations	No case annotations to date

Flynote

Contract – *enforceability – illegal contract – contract in breach of legislation* C *– payment made under contract – merx not delivered – remedies open to plaintiff – may seek refund of money paid, to prevent unjust enrichment – not entitled to order for specific performance*

Headnote

The applicant brought an action against the respondent, arising out the D sale of a piece of land by the respondent to the applicant. The sale was subject to a subdivision permit being granted in terms of the Regional, Town and Country Planning Act [*Chapter 29:12*]. The agreement was for the sale of five acres of land, but only four acres were delivered. The applicant demanded the delivery of the further acre, alternatively E a sum representing the current market value of such piece of land. The demand not being met, and the respondent not having entered appearance to defend, the applicant applied for default judgment. The court pointed out that the original agreement was illegal, being contrary to the Act. The applicant admitted the illegality of the agreement, but submitted that this was an appropriate case for the court to enforce an illegal contract F in order to prevent unjust enrichment to the respondent. He submitted that the court had authority to relax the application of the *in pari delicto potior est conductio possidentis* rule in an appropriate case.

Held, that in an appropriate case the rule could be relaxed, in order to prevent injustice, on the basis that public policy should properly take into G account the doing of simple justice between man and man. However, the applicant was not asking for a refund of what he had paid for the portion of land which he alleged was not delivered. Instead, he was asking for specific performance, in that he wanted an order for the delivery of one acre of land, alternatively the payment of damages. In other words, he was not asking for relaxation of the *par delictum* rule but was seeking H

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enforcement A of the agreement. If the court were to grant that relief, it would be upholding an illegality. That the court would not do. The application would therefore be dismissed.

Cases cited

Dobrock Hldgs (Pvt) Ltd v *Turner & Sons (Pvt) Ltd & Ors* 2006 (2) ZLR 353 (H) B

Evans v *Snapper* 2004 (2) ZLR 121 (S)

Gambiza v *Taziva* 2008 (2) ZLR 107 (H)

Greebe & Anor v *Famaps Invstms (Pvt) Ltd* 2004 (1) ZLR 522 (H)

Logan v *Sibiya* 2002 (1) ZLR 531 (H)

Madziyira v *Makwabarara & Ors* 2011 (1) ZLR 131 (H) C

Mikesome Invstms (Pvt) Ltd v *Silcocks Invstms (Pvt) Ltd* 2003 (2) ZLR 56 (H)

Tsamwa v *Hondo & Ors* 2008 (1) ZLR 401 (H)

X-Trend-a-Home (Pvt) Ltd v *Hoselaw Invstms (Pvt) Ltd* 2000 (2) ZLR 348 (S) D

Legislation considered

Regional, Town and Country Planning Act [*Chapter 29:12*], s 39

Judgment

Zhou J: This matter was placed before me as a chamber application for default judgment in terms of r 57 of the High Court Rules, 1971. Ordinarily I E would not have written a judgment in such a matter. However, for the reasons which appear below it is necessary for me to give a written judgment on the matters which arise from the chamber application. The brief background to the matter is as follows.

On 11 March 2013 the plaintiff instituted an action against the defendant. F The relief claimed as set out in the summons is as follows:

> "(a) Delivery (of) one acre of land in Gweru Town or alternatively payment in the sum of US$52 000 being current market value thereof together with interest thereon at the prescribed rate of interest with effect from date of summons to the date of payment in full.
>
> (b) Costs of suit." G

According to the plaintiff's declaration the claim was founded upon an agreement concluded in March 2000 in terms of which the defendant sold to the plaintiff "five acres of land which was a portion of Gwelo Smallholding 1A".

The plaintiff makes the following further averments in his declaration:

> "4. In terms of the agreement the sale was subject to a subdivision permit being H granted in terms of the Regional, Town and Country Planning Act.

Zhou J

> 5. There were delays in the subdivision of the property and the plaintiff left A for the United States of America for studies.
>
> 6. In 2011 defendant delivered to plaintiff a subdivision of four (4) which he represented to be five (5) acres.
>
> 7. Upon discovering the discrepancy plaintiff demanded delivery of the remaining one (1) acre and defendant agreed to deliver the additional one acre. B
>
> 8. The equivalent (*sic*) current market value of one acre of land in the area is $52 000.
>
> 9. Despite demand defendant has failed, neglected and or refused to deliver the remaining one acre of land or to pay the current market value of such land in the City of Gweru in the sum of US$52 000."

The summons and declaration were served upon the defendant on 26 April 2014. C The defendant did not enter an appearance to defend and was accordingly barred. Following the automatic barring of the defendant the plaintiff made a chamber application for default judgment. The application was accompanied by an affidavit and a draft order in terms of which the plaintiff asked for the same relief set out in the summons. In para 7 of that affidavit the plaintiff avers that "the figure of US$52 000 is the current monetary equivalence of D one acre piece of land in the City of Gweru". He further states the following in para 8 of the same affidavit:

> "To arrive at this figure, I made consultations with the city of Gweru, who advised me that currently they are selling properties in similar areas for US$13 per square metre. I also consulted private estate agents in the City of Gweru who advised E me that US$13 per square metre is actually a conservative price. I attach hereto an extract from the Herald dated 11 July 2013 which shows that private estate agents actually sell low density properties like the one I bought for US$15 per square metre as Annexure A."

The plaintiff attached a copy of a page from the classified advertisements section of a newspaper as well as well as a copy of the agreement of sale F between him and the defendant. Clause 4 of the agreement of sale states the following:

> "That notwithstanding the signing of here, this agreement is subject to the Seller applying for and obtaining a subdivision permit in terms of the Regional, Town and Country Planning Act." G

When the matter was placed before me I raised two queries. The first issue related to the validity of the agreement of sale given the express admission in both clause 4 of the memorandum of agreement and para 4 of the plaintiff's declaration that there was no subdivision permit which had been granted by the local authority at the time that the agreement was concluded. The second query was whether the claim for the value of a one acre property made in H

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the A alternative was a liquidated claim or a claim for a debt which could be made through the chamber book in terms of r 57. I also pointed out that in any event the affidavit filed did not prove the amount claimed. The plaintiff initially responded to the queries by letter but subsequently filed heads of argument. Nothing turns on whether the claim was for a debt or liquidated B demand for the purposes of this judgment.

As there was no subdivision permit in place at the time that the agreement of sale was concluded, the agreement contravened s 39(1) of the Regional, Town and Country Planning Act [*Chapter 29:12*], which provides as follows:

> "Subject to subsection (2), no person shall –
>
> (a) …
>
> (b) C enter into any agreement –
>
> (i) for the change of ownership of any portion of a property, or
>
> (ii) …
>
> (iii) …; or
>
> (c) …
>
> except in accordance with a permit granted in terms of section *forty*."

When D I raised the issue of the validity of the agreement of sale I drew the attention of the plaintiff's legal practitioner to the case of *X-Trend-a-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S). In that case the court held that a contract made in contravention of the provisions of s 39(1) cited above was illegal and unenforceable. See also *Tsamwa* v *Hondo & Ors* 2008 (1) ZLR 401 (H); *Mikesome Investments (Pvt) Ltd* v E*Silcocks Investments (Pvt) Ltd* 2003 (2) ZLR 56(H) at 61F-62E.

The plaintiff admits the illegality of the agreement. He, however, submits that this is an appropriate case for the court to enforce an illegal contract in order to prevent unjust enrichment to the defendant. Reliance has been placed on the authority of the court to relax the application of the *in pari*F*delicto potior est conductio possidentis* rule in an appropriate case. That rule means that where the parties to a contract are in equal guilt the party in possession will prevail. The implications of the rule were explained in the following terms by Gowora J (as she then was) in the case of *Madziyire* v *Makwabarara & Ors* 2011 (1) ZLR 131 (H) at 138E-G:

> "The effect of this rule is that where something has been delivered pursuant to G an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money (and) incorporeal rights in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy 'should properly take into account the doing of simple justice between H man and man'."

The authority of the court to relax the application of the *par delictum* rule in A appropriate cases is settled: *Evans* v *Snapper* 2004 (2) ZLR 121(S); *Logan* v *Sibiya* 2002 (1) ZLR 531(H); *Greebe & Anor* v *Famaps Investments (Pvt) Ltd* 2004 (1) ZLR 522(H); *Gambiza* v *Taziva* 2008 (2) ZLR 107(H)

However, as in *Madziyira* v *Makwabarara & Ors, supra,* at 138G-H, the plaintiff *in casu* is not asking for a refund of what he paid for the portion of B land which he alleges was not delivered. Instead, he is asking for specific performance, in that he wants an order for the delivery of one acre of land. The plaintiff makes an alternative claim for payment of damages. In other words, the plaintiff is not asking for relaxation of the *par delictum* rule but is seeking enforcement of the agreement. If the court was to grant that relief, which is for specific performance or payment of damages, then it would be C lending itself to an illegality: *Dobrock Holdings (Pvt) Ltd* v *Turner & Sons (Pvt) Ltd & Ors* 2006 (2) ZLR 353(H). That the court will not do. That is the approach which is consistent with the preponderance of judicial thinking in relation to agreements concluded in contravention of the provisions of s 39(1) of the Regional, Town and Country Planning Act.

As for the question of costs there was no opposition from the defendant. D Accordingly, it is appropriate to make no order as to costs.

In the result, it is ordered that he plaintiff's claim be and is hereby dismissed, with no order as to costs.

Mundia & Mudhara, plaintiff's legal practitioners E

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S v CHIREMBWE 2015 (1) ZLR 211 (H)

Citation	2015 (1) ZLR 211 (H)
Case No	Judgment No. HH-162-15
Court	High Court, Harare
Judge	Tsanga J
Heard	16 February 2015
Judgment	16 February 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence)C – *offences under Criminal Law Code – rape – approach to be taken – not enough to compare with other offences against the person – rape is a serious form of gender-based violence against women, affecting their constitutional rights – sexual violence is a deeply engrained societal problem and sentences should acknowledge this*

Headnote

The D accused was convicted on 12 counts of unlawful entry into property and nine counts of rape. The trial magistrate sentenced him separately for each count. Seven of the counts of unlawful

entry were committed under aggravated circumstances, five of which excluded rape. In one instance, there were three counts of rape against the same complainant. E The offences took place between September 2011 and October 2012. The accused would break into domestic premises at night, armed with items such as a knife and/or hammer, and a cell phone with a torch. Once in the room, he would wake up his victim, threaten her with death and then demand money, cell phones and laptops. Coupled with unlawful entry F and theft, sexual violence was a tool used by the accused to exercise power and control over the victim in selected cases. It essentially became an adventure to his repertoire. The magistrate sentenced him to a total of 290 years imprisonment, of which 60 years were suspended. None of the sentences were ordered to run concurrently.

Held, that the sentence induced more than a sense of shock, to the point of G being ridiculous, given that no one lives for 290 years and none of it ran concurrently. As such, much of it served no purpose other than being of shock value. The competing interests of society and the accused person must be balanced in arriving at a desirable sentence. While deterrence is a valid consideration, judicial officers must avoid giving H the impression that a sentence is a tag which society must read for it

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to be deterred. Increasing public sentiment, especially from women's A groups, against perceived leniency in meting out sentences to rapists, given the prevalence of sexual offences against women and girls, appear to have influenced the sentence.

Held, further, that although a life sentence is the maximum for rape, and ordinarily murder, the worst crime against the person, attracts a sentence of 14 to 20 years, this only constitutes a starting point when sentencing B multiple counts of rape. However, this approach skirts the issue of the vast implications of sexual violence on a range of fundamental rights for women and girls. An informed assessment of the sentence to be imposed in cases such as this cannot be reached without utilising a gender-based approach to this area of criminal law, as well as engaging C a constitutional and human rights perspective. The enjoyment of rights such as bodily and psychological integrity, freedom from violence and inherent dignity take on their specific meaning in the lives of men and women when real life experiences are examined with gender lenses. For women and girls, the fear of violence is generally that which arises from the actions of non-state actors. Rape is a particularly serious form D of gender violence against women and girls which impacts on their ability to enjoy certain guaranteed rights, as contained in international instruments that we have signed, as well as articulated in ss 51, 52, 53 and 56 of the Constitution. The accused's actions clearly trampled on these fundamental rights. It is not only the right to personal security that E is at stake when women experience forms of gender-based violence as exemplified by rape, but it is also rights such as freedom from cruel and degrading treatment and the right to equality and non-discrimination. It is the pervasive nature of sexual violence and the reality that women and girls have to live in constant fear of it from childhood to old age, that continues to hamper true equality between men and women. It is F the responsibility of the State, not just to protect women against any such violations which encroach on their fundamental rights, but also to prosecute and punish appropriately as part of its exercise of due diligence. The courts cannot adopt an overly "softly, softly" approach under the guise of comparative sentencing, completely oblivious to the reality G that gender-based violence is so pervasive in our society and largely indicative of its treatment of women and girls as sexual objects, such as to impact on their right to enjoy fundamental freedoms. Even when society's interests are balanced against those of the individual, sight should not be lost of the fact that sexual violence is a deeply ingrained societal problem and the approach to sentencing should acknowledge, H

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rather A than skirt this reality. Gender-based violence against women is regarded as a form of sex discrimination because of the distinct effects it has on the lives of women which prevents them from enjoying equality as envisaged by Art 1 of the Convention on All Forms of Discrimination against Women.

Held, further, that in dealing with multiple counts and deciding whether to B apply a globular sentence the factors to be taken into account include whether the offences are the same or of a

similar nature; whether the offences are closely linked in time; and whether the offences arise out of the same transaction. This was not a case for a globular sentence as the offences did not arise from the same transaction. They were C distinct in time and nature and should be approached as such. There are two permissible approaches to sentence where multiple counts are involved: sentencing as one those similar in nature; or where counts are individually sentenced, ordering the sentences to run concurrently. The latter approach was appropriate here. The sentence would be altered to make an effective total of 73 years, of which 18 years are suspended. D

Cases cited

S v *Chayisva* 2004 ZLR (1) 80 (H)

S v *Mukome* 2008 (2) ZLR 83 (H)

S v *Muyambo* HH-52-94

S v *Ndlovu* 2012 (1) ZLR 393 (H) E

S v *Nemakura* 2009 (2) ZLR 179 (H)

S v *Nyathi* 2003 (1) ZLR 587 (H)

Legislation considered

Constitution of Zimbabwe 2013, ss 51, 52, 53 & 56

Criminal Law (Codification and Reform) Act *[Chapter 9:23*], s 65(3) F

International instruments

Convention on the Elimination of All Forms of Discrimination Against Women, art 1

International Covenant on Civil and Political Rights, arts 7 & 9 G

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, arts 3, 4 & 17

Judgment

Tsanga J: The accused was charged with a combined 30 counts of contravening s 131(1) & 2 (unlawful entry) and s 65 (rape) of the Criminal H law (Codification and Reform) Act [*Chapter 9:23*]. Of the total 30 counts, 13

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were counts of rape, whereby after entering 10 domestic premises accused A committed the rapes. He was however convicted of 21 of the 30 counts as the complainants and witnesses in other nine counts had moved or were out of the country.

For the 21 counts for which he was convicted, he received a total sentence of 290 years. Of these, 60 years was suspended for five years on condition B he did not commit a crime involving unlawful entry, violence on the person of another, or an offence of a sexual nature.

The regional magistrate who handled the case referred the case after sentencing for review and consideration of whether the charges had been split unnecessarily. In arriving at the cumulative sentence, each count of unlawful entry was sentenced separately from the crime of rape that had C been committed by the accused at the relevant premises and for which he had been convicted. To put the cumulative sentence into perspective, he was sentenced as follows:

Count 1	10 years (unlawful entry) [1]
Count 2	20 years (rape) D
Count 5	10 years (unlawful entry)

Count 7	10 years (unlawful entry)
Count 8	10 years (unlawful entry)
Count 9	20 years (rape)
Count 10	10 years (unlawful entry)
Count 11	20 years (rape) E
Count 13	10 years (unlawful entry)
Count 14	20 years (rape)
Count 15	10 years (unlawful entry)
Count 16	20 years (rape)
Count 19	10 years (unlawful entry) F
Count 20	10 years (unlawful entry)
Count 21	10 years(rape)
Count 22	10 years (unlawful entry)
Count 23	10 years (unlawful entry)
Count 24	20 years (rape)
Count 25	20 years (rape) G
Count 26	20 years (rape)
Count 30	10 years(unlawful entry)
Total	**290 years**

Tsanga J

To A put the 21 counts for which he was convicted into further perspective, 14 of the counts included seven for unlawful entry under aggravated circumstances and another seven for rape in respect to each of those unlawful entries. In one of these cases of unlawful entry the accused had committed three counts of rape against the victim. There were therefore five counts related to unlawful entry under aggravated circumstances that excluded rape. B

The counts that included unlawful entry and rape against seven different complainants were the following:

Counts 1 & 2 (unlawful entry with rape)

Counts 8 & 9 (unlawful entry with rape)

Counts 10 & 11 (unlawful entry with rape) C

Counts 13 & 14 (unlawful entry with rape)

Counts 15 & 16 (unlawful entry with rape)

Counts 21 & 21 (unlawful entry with rape)

Counts 23, 24, 25 & 26 which involved unlawful entry and three counts of rape against the same complaint

The counts which involved unlawful entry under aggravated circumstances D where property was stolen were as follows:

Count 5

Count 7

Count 19

Count 22

Count 30 E

The offences took place between September 2011 and October 2012. The accused would basically break into domestic premises at night either through toilet or kitchen windows or the roof. He would be armed with items such as a knive, and or hammer, a cell phone with a torch. Once in the room, he would wake up his victim, threaten them with death and would demand money cell F phones and laptops. Coupled with unlawful entry and theft, sexual violence was a tool used by the accused to exercise power and control over the victims in selected cases. It essentially became an adventure to his repertoire.

His luck ran out when he returned to the premises of one complainant where he had previously been. No doubt traumatised by her previous experience, G upon hearing noises she had immediately managed to make contact with a relative in the police force using her cell phone. The response had been swift and accused had been apprehended whilst inside the house. Thereafter some of the complainants had identified him at an identification parade. The accused had also taken the police to other premises where he had committed the crimes and had given indications of how he had committed the offences H at the relevant premises.

Tsanga J

The convictions, in my view, are proper, but the sentence induces more than A a sense of shock to the point of being ridiculous, given that no one lives to 290 years, and none of it runs concurrently. As such, much of it serves no purpose other than being of shock value. As stated in *S* v *Mukome* 2008 (2) ZLR 83 (H) the competing interests of society and the accused persons must be balanced in arriving at a desirable sentence. While deterrence is a valid consideration, the view expressed in *S* v *Nemakuru* 2009 (2) ZLR 179 (H) – B that in sentencing, judicial officers must avoid giving the impression that a sentence is a tag which society must read for it to be deterred – seems apt in this instance. *In casu*, increasing public sentiment especially from women's groups against perceived leniency in meting out sentences to rapists, given the prevalence of sexual offences against women and girls appear to have C influenced the sentence. Although regional magistrates generally impose fairly stiff sentences for rape often in the range for 15 to 20 years for a count of rape, some such sentences involving multiple counts are often reduced on review perhaps feeding into perceptions of the "permissive court".

For instance, in *S* v *Ndlovu* 2012 (1) ZLR 393 (H) the view was expressed by D Kamocha J on review that ordinarily the sentence for rape should not exceed the sentence for murder or culpable homicide. In that case, a 43-year-old accused had been charged with five counts of raping his biological daughters aged between seven and four years. The four-year-olds were twins. He was sentenced to 20 years in respect of each count giving him a total period of 100 years in prison. The sentence in one count was made to run concurrently with E another involving the same complainant. A further 20 years was suspended on good behaviour. The total effective sentence was accordingly 40 years.

In reviewing the sentence, Kamocha J emphasised that life imprisonment is indeed the maximum sentence permissible for rape under the criminal code, and that this should be reserved for the

worst examples of the crime. He F reasoned that the worst crime under crimes against the person is the crime of murder and in the past unless there were no extenuating circumstances the sentence would be death. He further reasoned that in those cases where the death penalty was not warranted the sentence imposed is generally between 14 and 20 years. He also noted that in cases of attempted murder the penalty G rarely exceeds 10 years. Although acknowledging its traumatising effects in his view a sentence of 20 years for a single count of rape was excessive. As he put it:

> "It seems to me that a sentence of 20 years on a single count of rape is completely out of steps with sentences imposed in respect of other crimes against a person as outlined above. It seems to me that rape should also attract a sentence from H

Tsanga J

> five A to 10 years. Only the very bad cases of rape should attract a sentence beyond ten years and the worst ones should attract imprisonment for life.
>
> Since the court was initially dealing with five counts of rape it should have borne in mind the cumulative effect of the sentences on the five counts and imposed a sentence which is not so excessive as to induce a sense of shock".

He accordingly reduced the sentences on the three counts for which he B found him to have been rightly convicted to six years per count, giving a total of 18 years.

Also, in *S* v *Nyathi* 2003 (1) ZLR 587 (H), a 30 year sentence had been imposed on a father for 30 counts of rape on his 16-year-old daughter. The 30 year sentence was deemed excessive and reduced to 18 years. C

The yardstick by Kamocha J is somewhat useful, in so far as it purports to give a bench mark figure of what should constitute a starting point when sentencing multiple counts of rape. However, akin to comparing oranges to apples as fruits in the same basket, it seems to me to skirt the point of the vast implications of sexual violence for the enjoyment of a range of fundamental rights for women and girls. In my opinion, an informed assessment of the D sentence to be imposed in cases such as this cannot be reached without utilising an engendered approach to this area of criminal law, as well as engaging a constitutional and human rights perspective.

The enjoyment of rights such as bodily and psychological integrity, freedom from violence, inherent dignity take on their specific meaning in the lives of E men and women when real life experiences are examined with gender lenses. For women and girls the fear of violence is generally that which arises from the actions of non-state actors. Rape is a particularly serious form of gender violence against women and girls which impacts on their ability to enjoy certain guaranteed rights as contained in international instruments that we have signed as well as articulated in our Constitution. F

Freedom from violence is guaranteed in our Constitution, s 52 of which states that:

> "Every person has the right to bodily and psychological integrity which includes the right ... to freedom from all forms of violence *from both public and private sources*" (my emphasis). G

Section 51 is also useful in providing protection from violence in that it protects the right to human dignity. It is couched as follows:

> "Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected".

There is no doubt that the accused's actions clearly trampled on these H fundamental rights. It is not only the right to personal security that is at stake

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Tsanga J

when women experience forms of gender based violence as exemplified by A rape, but it is also rights such as freedom from cruel and degrading treatment and the right to equality and non-discrimination. (See ss 53 and 56 of the Constitution). It is the pervasive nature of sexual violence and the reality that women and girls have to live in constant fear of it from childhood to old age that continues to hamper true equality between men and women. The bottom line is that it is the responsibility of the State not just to protect B women against any such violations which encroach on their fundamental rights, but to also prosecute and punish appropriately as part of its exercise of due diligence. The courts cannot adopt an overly "softly, softly" approach under the guise of comparative sentencing, completely oblivious of the reality that we are dealing with a problem of

gender based violence so pervasive C in our society and largely indicative of its treatment of women and girls as sexual objects, such as to impact on their right to enjoy fundamental freedoms. Even when society's interests are balanced against those of the individual, sight should not be lost of the fact that sexual violence is a deeply engrained societal problem and the approach to sentencing should acknowledge rather than skirt this reality. D

The provisions discussed above in our Constitution are examples of concerted efforts to tailor local legislation to meet global norms. Of relevance for instance are art 9 of the International Covenant on Civil and political rights which deals with the rights to security of the persons and art 7 which prohibits cruel and degrading treatment. The Convention on the Elimination of All Forms of E Discrimination against Women is also significant in that its provisions have been interpreted by the CEDAW committee in Recommendation No. 19 to specifically cover gender-based violence against women as a form of sex discrimination. It is regarded as discrimination because of the distinct effects it has on the lives of women which prevents them from enjoying equality as envisaged by art 1 of the Convention. Equally significant are provisions F to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, whereby art 3, for example, guarantees the right to dignity for women and the protection of their human and legal rights. Article 4(2)(e) in particular addresses violence against women including the punishment of perpetrators. Women also have a right to live in a positive cultural context in terms art 17. Rape is a form of gender-based violence G that emanates from cultural attitudes towards women that permit the use of sex as an instrument of power and control.

In my view, whilst there was no misdirection in the splitting of charges for unlawful entry and those of rape. The misdirection was in sentencing each count of unlawful entry separately from rape, given the cumulative effect H

Tsanga J

of A the sentence. Also, the sentence for each count was excessive and the sentences could have been made to run concurrently given their similarity in nature and proximity in time in the commission of some of the offences. There is however no doubt that the court was faced with a serial rapist and an unrelenting one for that matter for whom a stiff sentence was called for. Having said that, the 290 year sentence with 60 years suspended makes no B sense and certainly arises from sentencing the counts separately without any of them running concurrently.

In dealing with multiple counts and deciding whether to apply a globular sentence, it was stated in *S* v *Chayisva* 2004 (1) ZLR 80 (H) that the factors to be taken into account include whether the offence is the same or similar C nature; whether the offences are closely linked in time; and whether the offences arise out of same transaction. I do not think that this is a case for a globular sentence as the offences did not arise from the same transaction. They were distinct in time and nature and should be approached as such. In *S* v *Muyambo* HH-52-94 it was stated that there are two permissible approaches to sentence where multiple counts involved: sentencing as one D those similar in nature; or where counts are individually sentenced, ordering the sentences to run concurrently. It is the "concurrent" approach which in my view would be partly appropriate in this case in terms of rationalising the sentence.

The sentence is accordingly altered as follows for the counts involving E unlawful entry under aggravated circumstances and rape;

Counts 1 & 2:	10 years' imprisonment
Counts 8 & 9:	10 years' imprisonment
Counts 10 & 11	10 years' imprisonment
Counts 13 & 14	10 years' imprisonment
Counts 15 & 16	10 years' imprisonment F
Counts 21 & 21	8 years' imprisonment

Counts 23, 24, 25 & 26	15 years' imprisonment

For the above counts, the accused is accordingly sentenced to a total of 73 years of which 18 years is suspended for five years, on condition accused does not commit a crime involving unlawful entry, violence on the person G of another or an offence of a sexual nature.

For the following counts involving unlawful entry under aggravated circumstances without rape the accused is sentenced as follows.

Count 5	3 years (unlawful entry)
Count 7	3 years (unlawful entry) H
Count 19	3 years (unlawful entry)

2015 (1) ZLR p220

Tsanga J

Count 22	3 years (unlawful entry) A
Count 30	3 years (unlawful entry)

The cumulative sentence of 15 years for these counts to run concurrently with the effective sentence of 55 years.

Tagu J agrees. B

1 The indications of the crime in brackets are for ease of reference as to what the count related to.

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GOBA v ZIMBABWE REVENUE AUTHORITY & ANOR 2015 (1) ZLR 221 (H)

2015 (1) ZLR p221

Citation	2015 (1) ZLR 221 (H)
Case No	Judgment No. HH-159-15
Court	High Court, Harare

Judge Hungwe J

Heard 18 February 2015

Judgment 18 February 2015

Counsel *J S Samukange,* for the applicant
S P Musithu, for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

Customs and excise – *duty – rebate of duty granted to immigrant or returning resident – when former resident may be taken to have returned permanently – person coming back as a visitor and leaving again – necessary for person to indicate that he has returned permanently – residence status in another country – not relevant to enquiry*

Headnote

The applicant was a Zimbabwean citizen who had been resident in Namibia since 1998 when he accompanied his father who was employed by the Namibian government. As such he enjoyed permission to remain in Namibia by virtue of being part of a family. His father's contract of employment terminated on or about 31 December 2010. Temporary residence permits were endorsed in his passport until 31 December 2010. Whenever his father's contract of employment was renewed, the applicant's permit was also extended. After his father's contract of employment expired, the Namibian government extended the temporary residence permit for his family, including the applicant, for the purposes of winding up their affairs. This was done in writing, although there was no such endorsement to this effect in their passports. The applicant finally left Namibia on 3 September 2011. Before that final departure he returned to Zimbabwe on a visit in January 2011, where he remained until he returned to Namibia late in August 2011.

In August 2011 the applicant bought a car from a dealer in Japan and paid for it in full before he returned to Zimbabwe in September. When he entered Zimbabwe he was admitted as a returning resident coming back to resume permanent residence and his passport was endorsed as such. However, when the vehicle arrived in November 2011 the first respondent detained it, demanding duty and other charges. The respondents claimed that the applicant was disqualified from claiming a returning resident's

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Hungwe J

rebate since, by the time he acquired the motor vehicle, he was no longer lawfully resident in Namibia. They argued that the applicant's "time of arrival" in terms of s 105(1)(b) of the Customs and Excise (General) Regulations 2001 (SI 154 of 2001) was in January 2011, when, they said, he came back as a returning resident.

Held, that the final date of return could only be ascertained from the returning resident himself, by the immigration authorities. The general expectation is that it is up to the immigration official to ask a returning resident whether he has come back for good or not. If he has, he naturally will indicate this and will be interviewed for the purpose of deciding whether he wishes to exercise the right to an immigrant's rebate there and then or at some later stage when his household goods arrive in the country. Even if the applicant had gone back to Namibia as a visitor in August 2011, that would not detract from his status in Zimbabwe on 3 September 2011 when he was interviewed and accepted as a returning resident. His status in another jurisdiction was not relevant for the purpose of determining whether the applicant met the criteria set out in s 105. The Regulations were meant to encourage migration back into Zimbabwe by benefiting those of the immigrants who have previously been residents of this country. To give an interpretation that

fettered or oppressed that class for whose benefit the regulations were meant would be to frustrate the object, purpose and intention of the legislature. The Regulations had been in force for a considerable period. The right to E benefit from the provisions of the Regulations had created a substantive legitimate expectation for permanent returning residents to Zimbabwe to enjoy the associated benefits which flow from the Regulations. The authorities administering the regulations must do so rationally, fairly, non-arbitrarily and in an unbiased manner. If a denial of a legitimate expectation in a given case amounts to denial of a right guaranteed or F is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on well-known grounds of review. The respondents did not establish from the applicant in January 2011 that he was returning permanently. They were not obliged to do so if the applicant did not indicate that he wished to claim a benefit under the Regulations. G

Cases cited

Affretair (Pvt) Ltd v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

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

Metsola v *Chrmn, PSC & Anor* 1989 (3) ZLR 147 (S) H

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PF-ZAPU v *Min of Justice (2)*A 1985 (1) ZLR 305 (S); 1986 (1) SA 532 (ZS)

R (Bhatt Murphy) v *Secretary of State for the Home Department* [2008] EWCA Civ 755

Legislation considered

Customs and Excise (General) Regulations 2001 (SI 154 of 2001), B s 105(1)(b)

Case information

J S Samukange, for the applicant

S P Musithu, for the respondents

Judgment

Hungwe J: C The applicant is a Zimbabwean citizen who has been resident in Namibia since 1998 when he accompanied his father who was employed by the Namibian government. As such he enjoyed permission to remain in Namibia by virtue of being part of a family. His father's contract of employment terminated on or about 31 December 2010. Temporary residence permits were endorsed in his passport until 31 December 2010. Whenever D his father's contract of employment was renewed, the applicant's permit was also extended. After his father's contract of employment expired in 2010, the Namibian government extended the temporary residence permit for his family including the applicant, for the purposes of winding up their affairs. This was done in writing although there was no such endorsement to this effect in their passports. The applicant contends that his temporary E residence in Namibia subsisted until his final departure on 3 September 2011. Prior to this final departure the applicant returned to Zimbabwe on a visit on 30 January 2011.

In August 2011 the applicant had purchased a motor vehicle from a dealer based in Japan. He paid for it in full on 29 August 2011. Upon his return to F Zimbabwe through Kazungula border post he was admitted into Zimbabwe as a returning resident, coming back to resume permanent residence in Zimbabwe. His passport was endorsed as such. As a returning resident, the applicant was eligible for an immigrant rebate in respect of his personal effects including one motor vehicle. The applicant's motor vehicle arrived G at the Beit Bridge border post on 19 November 2011. The first respondent detained it. The applicant approached the first respondent's offices to make representations and claim the motor vehicle under the immigrant's rebate scheme. His representations were denied on the pretext that he did not qualify for such rebate as he had finally returned to Zimbabwe on 30 January 2011. His appeal to the second respondent against this ruling did not meet H with success nor was it responded to. Instead they demanded payment of

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duty in the sum of US$2 907 or R22 460 over and above storage charges A of US$410 per day.

The respondents contend that the applicant was disqualified from claiming a returning resident's rebate since by the time he acquired the motor vehicle in question, on 29 August 2011, he was no longer lawfully resident in Namibia. In dismissing an appeal by the applicant the first respondent wrote to the applicant in the following terms: B

> "Having carefully considered the appeal, I wish to advise that the appeal has not been successful for the following reasons.
>
> Section 105(1)(b) of the Customs and Excise (General) Regulations in SI 154 of 2001 defines 'time of arrival' in relation to an immigrant who has previously resided or has been employed in Zimbabwe and who has been on contract of C employment, the first occasion on which he returns to Zimbabwe after the expiry of such contract; or if he has been on an extended absence for any other reason, the first occasion on which he returns to Zimbabwe.
>
> Your client came back to Zimbabwe on 30th of January 2011 because his residence permit in Namibia had expired and therefore was not 'legally resident' in Namibia after 30th of January 2011. The Ministry of Home Affairs in Namibia, D in a letter dated 4 February 2011 specifically rejected your client's application for an extension of stay and gave him 30 days to wind up and leave the country.
>
> The fact that your client re-entered Namibia on the 22nd of August 2011 on a 'visitor' permit underlines the fact that he was no longer a legal resident of Namibia and his time of arrival he remains a fugitive of January 2011 which was *'the first occasion'* he returned to Zimbabwe after the expiry of the father's contract of employment which was tied to the appellants resident permit. E
>
> After the expiry of the permanent resident permit, your client naturally reverted to his Zimbabwe permanent resident status and this occurred on the 30th of January 2011, when immigration correctly endorsed the 'RR' in his passport.
>
> I therefore advise that duty and storage charges remain payable on the vehicle."

Faced with this attitude, the applicant has applied to this court for an order F in the following terms:

1. That the decision of second respondent rejecting the applicant's claim for immigrant's rebate be and is hereby set aside.
2. That the first respondent be and is hereby ordered to release the applicant's motor vehicle without any conditions. G
3. The first respondent pays the costs of suit on an attorney and client scale

In their heads of argument resisting the grant of the order sought, the respondents argue that since the applicant's father's work permit expired on 30 December 2010, this becomes the date on which the applicant's residence permit expired for the purpose of the law. However, the respondents accept H

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when A the applicant's father was denied a work permit he was given 90 days from 19 April 2011 within which to exclusively wind up his affairs and depart from Namibia. Therefore, according to the respondents, the applicant's father would have been staying in Namibia illegally from 1 August 2011. Consequently, so the argument went, the applicant would have similarly been illegally staying in Namibia. On the applicant's return to Zimbabwe B on 30 January 2011, he was accepted as a "returning resident", hence his lengthy stay in Zimbabwe from that date until he returned to Namibia on 22 August 2011. On that occasion he was accepted as a "visitor" and given until 5 September 2011 to remain in Namibia.

This matter turns on when exactly was the applicant's time of arrival for the C purposes of s 105 of the Regulations. Was it 30 January 2011, as submitted by the respondents, or 3 September 2011, as submitted by the applicant? If I find that the applicant arrived in Zimbabwe on the first occasion on 30 January 2011, then the issue whether he qualifies for a returning resident's immigration rebate does not arise. It will only arise if the court finds that for the purposes of the Regulations, the applicant arrived in Zimbabwe on D 3 September 2011.

The Regulations define time of arrival for the purposes of determining whether a person qualifies for an immigrant's rebate as follows:

> "'time of arrival' means –
>
> (a) in relation to an immigrant who has not previously resided or been employed E in Zimbabwe, the first occasion on which he enters Zimbabwe after the grant of his employment or residence permit:

Provided that the time of arrival of a person who enters Zimbabwe as a visitor, but remains to take up employment or permanent residence and does not depart from Zimbabwe, shall be deemed to be the first occasion he imports any personal and household effects and other goods in terms of F this section within three months from the date of grant of his employment or residence permit;

(b) in relation to an immigrant who has previously resided or been employed in Zimbabwe and who –

(i) has been on a course of study, the first occasion on which he returns to Zimbabwe after successfully completing such course of study; or G

(ii) has been on contract employment, the first occasion on which he returns to Zimbabwe after the expiry of such contract; or

(iii) has been on an extended absence for any other reason, the first occasion on which he returns to Zimbabwe:

Provided that the time of arrival of a former resident who enters Zimbabwe as a visitor and does not depart from Zimbabwe shall be deemed to be the H first occasion on which he imports any personal and household effects and

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other goods in terms of this section within three months from the grant of A his permanent returning resident status;

(c) in relation to a former diplomat who remains in Zimbabwe to take up employment or permanent residence, the first occasion he imports any personal and household effects and other goods in terms of this section within three months from the date of grant of his new employment permit or residence permit. B

The respondents contend that the applicant was not resident in Namibia by virtue of him undertaking some studies or employment. He was staying with his parents. As such, for the purposes of the Regulations, he was on an extended absence for any other reason contemplated by para (b)(iii) which defines time of arrival. In terms of the said paragraph, the "time of arrival" C of a person who has been on an extended absence for any other reason is *the first occasion* on which he returns to Zimbabwe. The respondents argue that the applicant came to Zimbabwe at a time when his father's permit had expired. He came back as a returning resident and was accepted as such by Zimbabwe immigration authorities. He was not accepted into Zimbabwe as a visitor D when he came on 30 January 2011. If he had been accepted as a visitor, his passport would have been so endorsed and he would have been allowed up to a maximum of 30 days usually permitted or granted to Zimbabweans permanently resident in other countries. The applicant's passport does not bear an endorsement to suggest that he was given an extension of stay in Zimbabwe as a visitor. E

In my view, this is quite a strong argument especially when literally read in the context of the thrust of the regulations. Interpreted strictly, this paragraph places the burden to declare a status on the returning resident. He must, without being warned of the consequences, F elect the status under which his papers upon re-entry into Zimbabwe ought to be processed. The returning resident is presumed, by this interpretation, to be aware of the consequences of failure to indicate whether one wishes to be treated as a visitor or as a permanent returning resident who wishes to resume his permanent stay in Zimbabwe. In my view, if this was intended, the Regulations would have said so. The fact that there was no endorsement that the applicant was accepted as a G visitor does not in my view, imply that he was accepted as a returning resident. If this were so the corollary of this ought to apply: there ought to have been such an endorsement by the immigration authorities to that effect. Even if there was such an endorsement, in my view, the phrase "the first occasion on which he returns to Zimbabwe" may be interpreted to mean that where a Zimbabwean citizen resident abroad wishes to return for some reason – say vacation, holiday bereavement and so on – once he sets H

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foot A into the country, but without the intent to settle permanently, then he forfeits his or her entitlement to a returning resident's rebate when he/she finally returns home. This clearly could not have been the intended object of the Regulations. Zimbabweans resident abroad are aware that when they finally return, they will be entitled to the rebate. This final date of return can only be ascertained from the returning resident himself or herself. B

The general expectation is that it is up to the immigration official to ask a returning resident whether he has come back for good or not. If he has, he naturally will indicate this and will be interviewed for the purpose of deciding whether he wishes to exercise the right to an immigrant's rebate there and then or at some later stage when his household goods arrive in the country. C

The respondents also rely on their interpretation of the endorsements in the applicant's passport by the Namibian immigration authorities in urging this court to find that the applicant was accepted into that country as a visitor on 22 August 2011. I decline that invitation. It is merely an expression of opinion as to what the practice in Namibia is on the issue. There is no basis for this court to accept that indeed that interpretation is correct. No expert D opinion evidence regarding this aspect of Namibian law or practice was tendered in support of the averment.

Even if that interpretation were correct, that alone in my view would not detract from the applicant's status in Zimbabwe on 3 September 2011 when he was interviewed and accepted as a returning resident. There is no history E of such an interview prior to this one. It seems to me that the respondents would have been on firmer ground were they able to point to such an interview where the applicant's decision to return permanently was established without the applicant claiming a rebate within the period stipulated by the Regulations. The reason for coming to this conclusion is as follows. This court cannot be asked to consider the applicant's status in a foreign country F in an effort to persuade the court to interpret the applicable regulations in Zimbabwe when clearly the permanent residence status was granted to that person and endorsed in his passport as such. The applicant's passport was endorsed "Acc R/R" upon his return to Zimbabwe on 3 September 2011. The applicant argues that this denotes that the respondents accepted him as G a permanent returning resident. It seems to me that it was only then that the first respondent inquired of the applicant whether he wished to exercise his right to an immigrant's rebate since he was returning to Zimbabwe after "an extended period of absence for any other reason." The Regulations provide that the time of arrival of a former resident who enters Zimbabwe as a visitor and does not depart from Zimbabwe shall be deemed to be the first occasion H on which he imports any personal and household effects and other goods in

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terms of this section within three months from the grant of his permanent A returning resident status. The one interpretation to be given to this provision is that one must have initially entered Zimbabwe as a visitor and then decide to remain there and imports his household effects within three months of having arrived. The other interpretation is that having been interviewed for the purposes of making a determination on whether the applicant qualified for an immigrant's rebate the returning resident must import his goods and B household effects within three months in order to benefit from the permanent retuning resident status in terms of the Regulations. On his return to Zimbabwe on 3 September 2011, the applicant was interviewed and an endorsement to that effect made, accepting him as a returning resident. The applicant contends that the respondents cannot, after granting him the returning resident C status, turn around and claim that he was illegally staying elsewhere so he does not qualify for the rebate. His status in that other jurisdiction in my view is not relevant for the purpose of determining whether the applicant meets the criteria set out in s 105 of the Regulations. I say this because the regulations spell out the criteria. The legality or otherwise of the claimant's status in some other jurisdiction cannot have been within the contemplation D of the framers of the regulations. The Regulations are meant to encourage migration back into Zimbabwe by benefitting those of the immigrants who have previously been resident of this country. To give an interpretation that fettered or oppressed that class for whose benefit the regulations were meant would, in my view, be to frustrate the object, purpose and intention of the legislature. The Regulations have been in force for a considerable period. E The right to benefit from the provisions of the Regulations has created, in my view, a substantive legitimate expectation for permanent returning residents to Zimbabwe to enjoy the associated benefits which flow from the Regulations. The authorities administering the regulations must do so rationally, fairly, non-arbitrarily and in an unbiased manner. If a denial of a legitimate expectation in a given case amounts to denial of a right guaranteed F or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on well-known grounds of review.

In *R (Bhatt Murphy)* v *Secretary of State for the Home Department* [2008] EWCA Civ 755 at para 50, Laws LJ expressed how, arising from the doctrine G of legitimate expectation, an abuse of power may be established:

"A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it H

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has A distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in B the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power."

The respondents argue that the first occasion on which the applicant returned ought to be 30 January 2011. This cannot be so for the further reason that the C respondents themselves never sought to establish, on that occasion, whether, by his return on the date, the applicant wished to be treated as harbouring an intent to settle permanently or only wished to visit. Had this been the case, then the applicant's passport would have carried the endorsement one way or the other. In my view, it is irrational, and therefore unreasonable, D irregular and unfair to deprive the applicant a right which accrued to him as a returning resident in the circumstances of this case.

The applicant seeks a review of the decision of the second respondent dismissing his claim under the immigrant rebate on the grounds of gross irrationality in his assessment of the evidence before him and misdirection E at law in the second respondent's application of s 105 of the Customs and Excise (General) Regulations, SI 154 of 2001.

In *Affretair (Pvt) Ltd* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at 21E-22C McNally JA said:

"The duty of the courts is not to dismiss the authority and take over its functions, F but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say `the result is so bizarre that the process by which it G was reached must have been unfair or lacking in transparency'.

So, in the result, the courts will expect from administrative bodies decisions that are:

1. *Legal*, in the sense that they are made within the framework of the law which empowers them to make the decision, and after the application of H the appropriate criteria laid down in the statute or statutory instrument;

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2. *Rational*, in the sense that they are not so wrong as to lead to the conclusion A that they could only have been reached by a failure to apply the right criteria or by the application, whether deliberately or not, of the wrong criteria.
3. *Procedurally proper*, in the sense that the appropriate procedures required by the statute have been followed *and* that the principles of natural justice have been observed.
4. *Justifiable,* in that the administrative body will give its decision, at least B when the decision is challenged, *with reasons*. The purpose of requiring reasons is that the court can then more readily determine the propriety and reviewability of the decision."

See also *Metsola* v *Chairman, PSC & Anor* 1989 (3) ZLR 147 (S); *PF-ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S) at 327-8; 1986 (1) SA 532 (ZS) at 548D. C

The decision by the respondents qualifies, in my view, to be described as

"so outrageous in its defiance of logic or accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it"

(*per* Lord Diplock in *Council of Civil Service Unions & Ors* v *Minister*D*for the Civil Service* [1984] 3 All ER 935 (HL) at 954g). The applicant was an immigrant because he was on an extended absence from Zimbabwe for more than two years. In order to establish whether he was returning

permanently or not, the respondents were enjoined to interview him as they did on 3 September 2011. The respondents did not establish such purpose from him on 30 January 2011. They were not obliged to if the applicant did E not indicate that he wished to claim a benefit under the regulations. This was the only occasion on which the applicant was granted permanent residence. Accordingly, for the purpose determining "time of arrival" the "first occasion" of his return for the purpose of permanent returning residence status became 3 September 2011. F

As to whether by 3 September 2011 the applicant had fully paid for the motor vehicle, I come to the conclusion that the correct position is that he had fully paid for it by 29 August 2011 as reflected by the FNB invoice. He therefore owned the vehicle from 29 August 2011 and consequently was entitled to claim an immigrant's rebate at the time of arrival on 3 September 2011. I am G unable to find that the applicant was an illegal resident of Namibia. There is just no evidence of this besides the bald claim by the respondents. The respondents' assertion in this regard is illogical and therefore unreasonable and irrational in the sense that no evidence of this claim was tendered in proof of the allegation. In any event, in my respectful view, the applicant's status is as it presented itself on 3 September 2011. There was no legal impediment H

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to A his claim for an immigrant's rebate. The refusal to accede to his claim for a rebate in terms of the Regulations, seen in this light, is unreasonable and therefore irrational. Consequently that decision is set aside.

It is ordered as follows:

1. "That the decision of second respondent rejecting the applicant's B claim for immigrants' rebate be and is hereby set aside.
2. That the first respondent be and is hereby ordered to release the applicant's motor vehicle without any conditions.
3. The first respondent pays the costs of suit."

*Venturas*C*& Samukange,* applicant's legal practitioners

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GWARADZIMBA v MERCURI NO & ANOR 2015 (1) ZLR 232 (H)

Citation	2015 (1) ZLR 232 (H)
Case No	Judgment No. HH-168-15
Court	High Court, Harare
Judge	Mwayera J
Heard	26 November 2014; *CAV*
Judgment	18 February 2015
Counsel	*E T Matinenga*, for the appellant Ms *H Moyo*, for the first respondent
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *pleadings – amendment of – substitution of name* C *of plaintiff – plaintiff erroneously described as executor – amendment to substitute name of real executor allowed*

Headnote

The applicant sought to amend the name of the plaintiff in a matter concerning D a deceased estate. The matter had been brought in the applicant's name, purportedly as the executor of the estate. He had been given a power of attorney by the surviving spouse and executrix of the estate. He wished to substitute the name of the surviving spouse for his as plaintiff, arguing that he was not in fact the executor but simply instituted the proceedings E on the basis of the power of attorney. The respondents argued that as he was not the executor, there were no valid proceedings before the court and that to amend the summons would be akin to amending a nullity.

Held, that without a plaintiff there can be no claim. A claim by a non-existent person is null and void as far as institution of the claim is concerned. Here, though, the plaintiff did exist, though he was not the executor. The F real executor had issued a power of attorney for him to represent her, but that did not make him the executor. Under r 132 of the High Court Rules, the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and or such terms as may be just and all such amendments shall be made as may be necessary for G the purpose of determining the real question in controversy between the parties. Here, the matter was centred on the estate. No prejudice would be occasioned having the executor of the estate appear as the plaintiff without changing the nature and subject of the cause of action. No *mala fides* was shown. The widow was the executrix, and no injustice would be occasioned by the requested amendment of pleadings. H

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Cases referred to A

Chikadaya v *Chikadaya* 2001 (1) ZLR 421 (S)

Coetzee v *Steyn* 1955 (3) SA 48 (O)

Commercial Union Assurance Co Ltd v *Waymark NO* 1995 (2) SA 72 (TkG)

J D M Agro-Consult & Mktg (Pvt) Ltd v *Editor,* The Herald *& Anor* 2007 (2) ZLR 71 (H) B

Moolman v *Est Moolman & Anor* 1927 CPD 27

Old Mutual Asset Mgmt (Pvt) Ltd v *F & R Travel Tours & Car Sales* HH-53-07

Stewart Scott Kennedy v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S) C

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

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 132, 134 & 226

Case information

E T Matinenga, for the appellant D

Ms *H Moyo*, for the first respondent

Judgment

Mwayera J: In this application the applicant sought to amend the name of the plaintiff in case no. HC 13277/12 so as to read Margaret Chivimbiso Mwamuka and not Arafas Mtausi Gwaradzimba NO.

The first respondent E is opposed to the application.

The brief background of the matter is that the applicant issued summons in HC 13277/12 in his official capacity as executor of the estate of the late Vernon Nathaniel Mwamuka. The applicant assumed this title by virtue of a power of attorney given by Margret Mwamuka, the surviving spouse and F executor of the estate of Vernon Mwamuka. It became apparent on the papers that the applicant is in fact not an executor. Notice of intention to amend pleadings to reflect Magret Mwamuka was communicated to the respondents as way back as 2013.

The application was filed on 24 October 2013 and was opposed at pre-trial G conference stage, hence the current opposed formal application. The basis of the applicant's application is to amend the plaintiff who instituted the proceedings on the basis of a power of attorney given by the executrix Margret Mwamuka. The anomaly that can be discerned easily from the papers is that the plaintiff is referred to as an executor when in actual fact his basis of issuing summons was per the power of attorney and not that he is H the or executor. The respondent in opposition of the application premised its

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argument along the lines that there are no valid proceeding before the court A given that plaintiff is cited in his official capacity as executor in an estate, a position which is not factual. The respondent argued that the plaintiff assumed a position he did not hold. The respondent sought to rely on *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S), arguing that the person who ought to issue summons, did not exist thus rendering the proceedings invalid. The crux of the respondent's argument is that the B plaintiff assumed the office of executor dative, which office he does not hold. The respondent argued that the request to amend the summons by substituting himself with Mrs Mwamuka in the circumstances would be akin to requesting the court to amend a nullity which is a legal impossibility.

The respondent argued that the applicant has no *locus standi* to bring the C application before the court. Further, the respondent argued that the application, if granted, would prejudice the respondent, given the line of defence to the claim. The respondent further argued that the application was fatal in that it failed to join the substitute plaintiff Mrs Margaret Mwamuka. The respondent sought to rely on *Coetzee* v *Steyn* 1955 (3) SA 48 (O).

Given the background of the case, and the applicant and respondent's D arguments, I propose to recount where necessary the circumstances of this case relating it to the law and case law alluded to by the parties.

It is not in dispute that without a plaintiff there can be no claim. In other words, a claim of a non-existing person is null and void as far as institution of the claim is concerned. The same reasoning was well propagated in E*Stewart Scott Kennedy* v *Mazongoro Syringes supra*. The plaintiff in that case was non-existent since the partnership had been dissolved. This scenario meant the summons was invalid and therefore could not be rectified by amendment. A reading of that case and *Old Mutual Asset Management (Pvt) Ltd* v *F & R Travel Tours and Car Sales* HH-53-07 surely depicts a distinguishable scenario from the circumstances of the present case. It is crystal clear in the F two cases mentioned above that the proceedings were instituted by a non-existent person and hence void *ab initio.* They were incapable of amendment as they were a nullity in the first place. In this case, the plaintiff, Gwaradzimba, is a person in existence who, albeit not an executor, was referred to in the claim as one. It is not in dispute that Mrs Margret Mwamuka, the executor, G issued a power of attorney for the applicant to represent her but such does not qualify Gwaradzimba as the executor. It is that anomaly of the applicant not being properly cited as executor which the applicant seeks to amend by substitution of the plaintiff in HC 13277/12 with Mrs Margret Mwamuka, the executor. In the present case the validity of the proceedings emanates from by the fact that a real person is cited on a power of attorney, albeit H

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wrongly A referred to as executor. The fact that the plaintiff is existent gives a different complexion in that the proceedings in the first instance are valid. *J D M Agro-Consult and Marketing (Pvt) Ltd* v *Editor,* The Herald *& Anor* 2007 (2) ZLR 71 (H) is instructive. The substitution sought is to facilitate the amendment.

The other argument advanced in opposition is with regard to the fact that B Mrs Margret Mwamuka is not a party to the proceeding. It is clear from the papers filed that in an answering affidavit Mrs Magret Mwamuka, the executor of estate late Vernon Nathaniel Mwamuka, confirmed having given Afaras Mtausi Gwaradzimba authority to issue summons in case HC 13277/12 under a power of attorney which she granted, although inadvertently describing C the applicant as the executor. This is also clear from the applicant's legal practitioner's affidavit, which affidavit is properly before the court since a lawyer is not precluded from giving evidence of a legal nature and of facts he has knowledge of.

The applicant's supporting affidavit in answer also crystalizes the circumstances under which he was authorised by Margret Mwamuka to issue D summons under case HC 13277/12. The purpose of an answering affidavit among others is to answer issues raised by the opposition and such evidence cannot be disregarded. In answering affidavits, the applicant is accorded an opportunity to answer issues raised in opposition papers. It is clear the applicant was authorised by Mrs Mwamuka to issue summons. E

The law on amendments is very clear. The application was made on notice. Rules 132 and 134 of the High Court Rules are apposite on amendments of pleadings. Rule 132 reads:

> "Subject to rules 134 and 151, failing consent by all parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such a manner and or such terms as may be just, and all such F amendments shall be made as *may be necessary for the purpose of determining the real question in controversy between the parties*" (my emphasis).

Attention should also be paid to r 226, whose import is to allow applications for whatever purpose to be made in writing. In *ZFC Ltd* v *Taylor* 1999 (1) ZLR 308 (H) Gillespie J referred to written applications for amendment in G the event of parties not consenting. The learned judge correctly spelt out the procedure where there is need to amend. The application ought to be supported by an affidavit showing good cause and must be accompanied by a draft order. Given the circumstances of this case, the applicant has approached the court with a written application on notice to amend the summons by substitution of the plaintiff. This is on the basis that the plaintiff was inadvertently referred to H as executor on the grounds of a power of attorney from the official executor.

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Generally, amendments shall be made as may be necessary to determine the A real question in controversy between the parties. In this case, the matter is centred on the estates. There is no prejudice which will be occasioned having the executor of the estate appear as the plaintiff without changing the nature and subject of the cause of action.

In *Moolman* v *Estate Moolman & Anor* 1927 CPD 27 at 29 Watermeyer J B said that amendments, in situations where the applications are not *mala fide,* ought to be granted. I subscribe to these same sentiments which have also been echoed in our own jurisdiction. See *Chikadaya* v *Chikadaya* 2001 (1) ZLR 421 (S). Also, in *Commercial Union Assurance Company Ltd* v *Waymark NO* 1995 (2) SA 72 (TkG), White J set out general principles governing applications for amendment of pleadings. He opined that it would C not be appropriate to refuse an application for amendment simply to punish the applicant for somewhat dilatory and negligent notification in delay in bringing the application. I subscribe to the reasons in that case, moreso given that in our jurisdiction, the amendment of pleading, as provided by our rules, may be entertained at any stage upon application in writing or orally.

The court however has a discretion to grant or refuse the application. The D central aspect in the exercise of its discretion is what is just and necessary for purposes of determining the real question in controversy between the parties.

In the circumstances of this case, it is clear that the application brought before the court is very procedural. The issue of delay in bringing the application cannot stand in the way given the interest of justice on whether or not the E amendment would turn out to be prejudicial to the other party. The application to amend the summons by substituting the plaintiff in HC13277/12 with Mrs Margret Mwamuka, the executor, in her late husband Venon Mwamuka's estate, appears to have been motivated by genuineness as opposed to malice. Mrs Mwamuka, the executor, had given a power of attorney to Mr Arafus Gwaradzimba F to administer the estate. To have him cited as an executor would be erroneous. It is this anomaly which the amendment seeks to correct. I find no reason why

I should read *mala fides* in such a scenario. It is crystal clear Mrs Margret Mwamuka is the executor, and no injustice would be occasioned by amendment of pleadings by substitution of the plaintiff.

The application for amendment is genuine in that as it seeks to facilitate G proper ventilation of the disputes between the correct and or appropriate parties relevant to the issue.

In my view, in deciding whether to grant or refuse the application, what is central to this exercise of discretion is what is just and necessary for purposes of determining the real question of controversy. I do not perceive H

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any A prejudice which would be occasioned by having the executor as party to the proceedings which is not curable by remedies available readily to the respondent.
It is accordingly ordered:

1. That the summons current plaintiff in case 13277/2012 be and is B hereby substituted by Margaret Chivimbiso Mwamuka (in her capacity as executrix of the estate of the late Vernon Nathaniel Mwamuka)
2. That the plaintiff's declaration filed of record in case HC13277/12 be and is hereby amended by deletion, wherever it appears, of the name "Afaras Mtausi Gwaradzimba" and substitution thereof with C the name "Margaret Chivimbiso Mwamuka".
3. That costs of this application be costs in the cause.

Chihamba, Mutizwa & Partners, appellant's legal practitioners

Joel Pincus, Konson & Wolhuter, first respondent's legal practitioners D

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S v GUDYANGA 2015 (1) ZLR 238 (H)

2015 (1) ZLR p238

Citation	2015 (1) ZLR 238 (H)
Case No	Judgment No. HH-167-15
Court	High Court, Harare
Judge	Chigumba J
Heard	18 February 2015
Judgment	18 February 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *statutory offences – breaches of Domestic* D *Violence Act [Chapter 5:16] – matters to be considered – use of counsellors – Delict*

Headnote

It is not a hard and fast rule that, because the purpose of the Domestic Violence Act [*Chapter 5:16*] is to bring families closer together, custodial sentences must not be imposed. It depends on the circumstances. It is one of the factors that ought to guide a court in assessing sentence, but it is not the only relevant factor. Some, but not all, of the factors that a trial court may take into consideration in assessing sentence include:

(a) the extent of the complainant's injuries, as evidenced by the medical affidavit;

(b) the possibility of permanent injuries; E

(c) whether any of the complainant's property was damaged;

(d) the relationship between the complainant and the accused (brother and sister/husband and wife);

(e) whether the parties still reside at the same premises;

(f) whether the accused pleaded guilty or showed contrition; F

(g) whether the relationship between the parties is now sour or still acrimonious, or whether the parties have reconciled their differences;

(h) whether the accused made reparations or amends;

(i) whether the accused was previously convicted of contravening the Act; G

(j) the accused's explanation as to why he committed the act of domestic violence;

(k) whether the parties are willing to undergo counselling.

The Act is unique in its recognition and promotion of family values, of adhesion and cohesion of the nuclear family. In recognition of its objective to bring families together, as opposed to contributing to their break- H

Chigumba J

up, A provision is made in the Act for the appointment of anti-domestic violence counsellors by the Minister responsible for social welfare, health, child welfare and gender or women's affairs. There is a panel of such counsellors drawn from social welfare officers, members of private voluntary organizations that deal with domestic violence issues, chiefs or headmen. The functions of these counsellors include advising, B counselling and mediating the solution of any problems in personal relationships that are likely to lead to domestic violence, investigating the financial status of the parties at the request of the court, investigating and making immediate accommodation arrangements for complainants prior to the issue of protection orders and, arranging medical treatment and examination of any minors who are complainants. In carrying out C these duties, the counsellors may call upon the police for assistance. Judicial officers are reminded of the need to send families for counselling where the domestic violence complained of continues despite initial conviction or sentencing.

Cases cited D

Barros & Anor v *Chimpondah* 1991 (1) ZLR 58 (S)

S v *Muchekayawa* 2012 (1) ZLR 272 (H)

Legislation considered

Domestic Violence Act [*Chapter 5:14*], ss 3, 4 & 10 E

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

Judgment

Chigumba J: This matter was placed before me for review by the regional magistrate for the Eastern Division in Mutare. In his letter to the review judge, penned ten days after the accused was sentenced, on 7 November 2014, the F regional magistrate advised that he had sent the record for

review without seeking comments from the trial magistrate for fear of further prejudicing the accused because of lapse of time.

The opinion of the regional magistrate was that the sentence imposed was too harsh in the circumstances and would alienate the parties and destroy their marriage. In his view a community service sentence would have met G the justice of the case.

The approach to sentencing by judicial officers who are faced with accused persons charged with contravening the provisions of the Domestic Violence Act has been heavily criticized by the High Court in numerous review judgments, and appeals. The main concern appears to be that judicial officers H misdirect themselves by failing to consider that the intention of the legislature

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2015 (1) ZLR p240

Chigumba J

in enacting the Domestic Violence Act [*Chapter 5: 16*] (the DVA) was not A only to promote the eradication of domestic violence, but to promote harmony in families. This has been interpreted to mean that a custodial sentence, especially for a first offender, is not only inappropriate, it is incompetent.

The accused was charged with physical abuse, as defined in s 4(1)(a), as read with s 3(1)(9a) of the DVA, it being alleged that, on 15 October 2014 B at Gudyanga homestead, he unlawfully slapped Delly Gororo several times on her face with open hands intending to cause bodily harm or realizing that there was a real risk or possibility that bodily harm would result.

According to the outline of the state case, the complainant is an 18-year-old female, and the accused is a 20-year-old, male, and unemployed. They are C husband and wife. It is alleged that the accused assaulted the complainant over a denial of conjugal rights. The complainant sustained a swollen mouth and did not seek medical attention. The accused was sentenced to two months' imprisonment. A further two months' imprisonment which had been suspended on CRB N332/14 was brought into operation, and the effective custodial sentence of four months' imprisonment was imposed. D

In mitigation, the accused had submitted that he and the complainant had a minor child together aged one year. He had no money, no assets of value, and was unemployed. In assessing sentence, the court considered that the accused person had pleaded guilty and not wasted its time, that he showed contrition, and that he was frustrated by the denial of conjugal rights. In aggravation, the court took into consideration the fact that the accused person was a repeat E offender who had previously been convicted of a similar offence. As stated in the headnote to *S* v *Muchekayawa*2012 (1) ZLR 272 (H):

> "Cases of domestic violence are on the increase and in some instances, death has resulted. Unless sufficiently deterrent sentences are imposed by the courts as provided by the Domestic Violence Act … the whole purpose of this piece of legislation will never be realized. Men will continue to brutalise their wives and, equally so, some men will continue to be subjected to physical abuse by their spouses in the knowledge that they will go to court and pay a small fine. Whilst each case should be decided on its own merits, in serious cases custodial sentences are appropriate".

In that case Makonese J found the sentence to have been "disturbingly G lenient". The accused in that case was aged 29 and employed as a small scale miner. He pleaded guilty to contravening s 4(1) as read with s 3 of the DVA. He was sentenced to pay a fine of USD$150 or in default thirty days' imprisonment. In addition, three months' imprisonment was wholly suspended for three years on condition that he refrained from committing a similar offence. The facts of the matter were that the accused had assaulted H

2015 (1) ZLR p241

Chigumba J

the A complainant all over her body with a log until she fell to the ground. She had sustained a deep cut over her right eye when the accused had stoned her while she was on the ground. The trial magistrate in his reasons for sentence had considered that the complainant did not sustain serious injuries as evidenced by the fact that she did not seek medical attention. B

The learned judge had this to say at 273F-G

> "Magistrates should always request the complainants in such cases to obtain medical reports for the court to assess not only the degree of injuries suffered but the likelihood of any permanent disability I note

here that both prosecutors and magistrates pay scant regard to section 5 of the Domestic Violence Act which places duties on police officers in relation to domestic violence in the C following terms under s 5(2):

> 'A police officer to whom a complaint of domestic violence is made or who investigates such complaint shall…obtain for the complainant, or advise the complainant how to obtain, shelter or medical treatment, or assist the complainant in any other suitable way".

Muchekayava's case can be distinguished from the case under consideration D for a number of reasons, the first of which is that the reviewing judge in that case found the sentence imposed to be too lenient as opposed to this case where we have been asked to consider whether the sentence imposed is so severe as to induce a sense of shock. The second thing is that from the circumstances described in *Muchekayava*, the complainant sustained more serious injuries, although in both cases the complainants did not seek medical E attention, and were not guided to seek medical attention for the assistance of the court by the police, by the court, or by the prosecutor. Finally, the accused person in this case is not a first offender.

The grounds for review are set out in s 27(1) of the High Court Act [*Chapter 7: 06*] as follows:

F "(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) gross irregularity in the proceedings or the decision." G

In my view the ground set out in s 27(1)(c) would appear to most suit the nature of the query raised by the regional magistrate. The issue that falls for consideration in matters of this nature is what are the circumstances in which it is appropriate to interfere with the exercise of discretion by a judicial officer (in this case sentencing discretion), on the basis of gross irregularity H in the proceedings or decision. The following *dicta* of the Supreme Court

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related to the exercise of judicial discretion in a civil appeal. In my view, A any exercise of judicial discretion, whether on review or appeal, which is brought up for assessment of propriety by a higher court, should be held up to the following standard, as stated in the headnote to *Barros & Anor* v *Chimpondah* 1999 (1) ZLR 58 (S):

> "The exercise of this discretion may only be interfered with on limited grounds. It B is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations."

It has been suggested by the regional magistrate that the trial magistrate ought C to have considered imposing a community service sentence, as opposed to sending the accused person to prison. For that reason it is postulated that the sentence imposed was too harsh in the circumstances, more particularly because the imposition of a custodial sentence was likely to break up the family, which runs contrary to the purpose of the DVA. What this court needs to consider is whether the trial magistrate, by imposing a custodial sentence, D made an error in the exercise of his discretion. Did the trial magistrate act on a wrong principle, or allow extraneous or irrelevant considerations to affect the sentencing process? Did the trial magistrate make any mistakes of fact or fail to take into account relevant considerations in sentencing the accused person? We know from the reasons for sentence that the accused was not a first offender. E

The DVA, in s 10(8), prescribes the penalty for repeat offenders:

> "Any respondent, who repeatedly breaches a protection order, whether or not that respondent has been previously prosecuted for such breach, shall be guilty of an offence and liable to imprisonment for a period not exceeding five years". F

My reading of s 10(8) is that, once a court makes a finding that the respondent is a repeat offender in terms of the DVA, or that he has breached a protection order repeatedly, there is a custodial sentence, of up to five years' imprisonment. In this case, the accused was a repeat offender who had one previously imposed custodial sentence that had been suspended on condition of good behaviour brought into effect. It is unfortunate that the regional magistrate G in his wisdom decided not to solicit the views of the trial magistrate before referring the record of proceedings to us. It is also unfortunate that the record of proceedings relating to the accused's previous conviction was not

referred to us. We are hamstrung by the lack of detail regarding the circumstances of the accused's initial conviction.

Clearly the sentence imposed fell within the purview of s 10(8) of the DVA. H

2015 (1) ZLR p243

Chigumba J

Where A is the misdirection on the part of the trial magistrate? On the one hand, sentences are being criticised as being too lenient. Now the charge is that the sentence was too harsh, because the purpose of the DVA is to bring families closer together. In order for us to interfere with the sentence we must find a misdirection on the part of the trial court.

It would assist us to gauge the severity of the sentence imposed by the trial B magistrate if we had knowledge of the accused's actions in the first charge, the severity of the complainant's injuries, whether permanent disability occurred, and most importantly, the sentenced imposed by the trail magistrate. As it is we cannot even consider the basis on which the regional magistrate is advocating for a sentence of community service. Was he himself privy to the contents C of the record of proceedings of the accused's first conviction? We are not at liberty to substitute the exercise of discretion by the trial court with our own discretion just because we would have come to a different conclusion. There is nothing in the record of proceedings that was placed before us which convinces us that there were any gross irregularities in the exercise of sentencing jurisdiction by the trial magistrate. The sentence imposed is D provided for in the DVA. The accused had a previous conviction. It cannot be said that taking his previous conviction into account amounted to taking into account an irrelevant consideration. As previously stated, insufficient information was placed before us to justify coming to the conclusion that the sentence imposed by the trial magistrate is so severe as to induce a sense of shock, and to warrant interference. E

It is not a hard and fast rule that because the purpose of the DVA is to bring families closer together, custodial sentences must not be imposed. It depends on the circumstances. It is one of the factors that ought to guide a court in assessing sentence, but it is not the only relevant factor. Some but not all of the factors that a trial court may take into consideration in assessing F sentence include:

(a) the extent of the complainant's injuries as evidenced by the medical affidavit
(b) the possibility of permanent injuries
(c) whether any of the complainant's property was damaged.
(d) the G relationship between the complainant and the accused (brother and sister/husband and wife
(e) whether the parties still reside at the same premises
(f) whether the accused pleaded guilty/showed contrition
(g) whether the relationship between the parties is now sour or still H acrimonious, or whether the parties have reconciled their differences

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Chigumba J

(h) whether the accused made reparations/amends A
(i) whether the accused was previously convicted of contravening the DVA
(j) the accused's explanation as to why he committed the act of domestic violence.
(k) thether the parties are willing to undergo counselling.

The DVA is unique in its recognition and promotion of family values, of B adhesion and cohesion of the nuclear family. In recognition of its objective to bring families together as opposed to contributing to their break-up, provision is made in the act for the appointment of anti-domestic violence councilors by the Minister responsible for social welfare, health, child welfare and gender or women's affairs. There is a panel of anti-domestic violence counsellors drawn from social welfare officers, members of private voluntary C organizations that deal with domestic violence issues, chiefs or headmen.

The functions of anti-domestic violence counsellors include advising, counselling and mediating the solution of any problems in personal relationships that are likely to lead to domestic violence, investigating the financial status of the parties at the request of the court, investigating and D

making immediate accommodation arrangements for complainants prior to the issue of protection orders, arranging medical treatment and examination of any minors who are complainants. In carrying out these duties, the anti-domestic violence counsellors may call upon the police for assistance. Judicial officers are reminded of the need to send families for counselling where the domestic violence complained of continues despite initial conviction or sentencing. E

We find no misdirection on the part of that magistrate for the reasons stated above.

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INNSCOR AFRICA (PVT) LTD v GWATIDZO 2015 (1) ZLR 245 (S)

Citation	2015 (1) ZLR 245 (S)
Case No	Judgment No. S-5-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gwaunza JA & Patel JA
Heard	25 September 2014; *CAV*
Judgment	19 February 2015
Counsel	*B Peresu,* for the appellant *D Mwonzora,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

EmploymentC – *dismissal – grounds for – failure to obey lawful order – when order is lawful – unreasonable order – what must be shown – wilful disobedience – what constitutes – moral excuse for disobedience – irrelevance of*

Headnote

The D respondent was employed by the appellant. The appellant requested its employees to report for emergency overtime duty. All complied except the respondent, who was on authorized time off. When he returned to work, his supervisor asked him to write a report stating why he had not E reported for emergency duties. The respondent refused to do so, arguing that his time off had been properly sanctioned and, therefore, there was no need for him to write a report on his time off. He was of the firm view that the appellant had no right to ask him to write the report, particularly as the appellant was aware that he was on authorised time off. He felt that the instruction given by his superior was an invasion of his privacy.

He F was charged with two acts of misconduct: refusal to work overtime in a case of emergency and wilful disobedience to a lawful order from his superior. He was acquitted on the first count but convicted on the second and his dismissal was ordered. The Labour Court upheld the respondent's appeal, finding that the order to write a report was so unreasonable as G to be

unlawful. Therefore, the respondent's refusal to comply with that order was not an act of insubordination. The employer appealed to the Supreme Court, on the grounds that the court *a quo* applied the wrong test in holding that the order given to the respondent was so unreasonable as to be unlawful; and that the court consequently erred in finding that the respondent's refusal to write the report did not constitute wilful H disobedience of a lawful order given by his superior.

2015 (1) ZLR p246

Held, that the test for evaluating the lawfulness of an order is whether the order A is capable of being carried out by the employee is for the advancement of the employer's business; is closely related to the duties of the employee; constitutes an instruction to the employee to perform a lawful act; and is not unreasonable in the circumstances of the case.

Held, further, that wilful disobedience and insubordination, although treated separately in case authority, are two sides of the same coin. An employee B will be guilty of insubordination where he wilfully disobeys a lawful order. Wilful disobedience connotes a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial – not simply C an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and the employee, going to the very root of the contract of employment. Where the order is lawful, the existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful. D

Held, further, that, here, the order given to the respondent to write the report was capable of being carried out by him. Additionally, it was procedurally necessary for each one of its employees to account for his absence in writing so as to maintain discipline at the workplace. In that sense, the order was not only in the interests of, and for the advancement, of the E appellant's business but also closely related to the duties of the respondent. Lastly, the instruction given to the respondent was one to perform a lawful act. The respondent was not asked to explain where he was or what he was doing during his time off. He was simply asked to formalise his non-attendance at work. In the circumstances, the order could not be regarded as being an invasion of his privacy or so unreasonable as to be F unlawful. He was thus guilty of wilful disobedience and subordination. The appeal would therefore be upheld.

Cases cited

Chironda v *Swift Transport* 1996 (1) ZLR 142 (S) G

Matereke v *C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S)

PTC v *Chihoro* 1997 (1) ZLR 148 (S)

Case information

B Peresu, for the appellant

D Mwonzora, for the respondent H

2015 (1) ZLR p247

Patel JA

Judgment

Patel JA: A This is an appeal against the decision of the Labour Court, setting aside the respondent's dismissal from employment and ordering his reinstatement. The pertinent facts of the matter are as follows.

The respondent was employed as a pastry maker in the appellant's pie division. On 9 October 2005, the appellant requested its employees to report for emergency overtime duties. Except for the respondent, who was on B authorised time off, all of the other employees reported for duty. Upon the respondent's return to work, his supervisor asked him to write a report stating why he had not reported for emergency duties. The respondent refused to do so, arguing that his time off had been properly sanctioned and, therefore, there was no need for him to write a report on his time off. C

The respondent was later charged with two acts of misconduct, *i.e.* refusal to work overtime in case of emergency and wilful disobedience of a lawful order given by his superior. The appellant's disciplinary committee acquitted the respondent on the first charge but found him guilty on the second charge. It then ordered his dismissal with effect from 26 October 2005 and its decision was subsequently upheld by the appellant's appeals committee. D

On appeal by the respondent against his dismissal, the Labour Court found that, because it was known that the respondent was on authorised time off, the order to write a report was so unreasonable as to be unlawful. Therefore, the respondent's refusal to comply with that order was not an act of insubordination. The court allowed the appeal and ordered the appellant E to reinstate the respondent or pay damages in lieu of reinstatement.

The grounds of appeal herein are essentially twofold: that the court *a quo* applied the wrong test in holding that the order given to the respondent was so unreasonable as to be unlawful; that the court consequently erred in finding that the respondent's refusal to write the report did not constitute F wilful disobedience of a lawful order given by his superior.

A further aspect, arising from submissions made by counsel at the hearing of the matter, relates to the penalty that was imposed upon the respondent. It was contended on behalf of the respondent that the penalty of dismissal was unduly harsh on the facts of the case and, additionally, that it did not G conform with the penalty prescribed under the appellant's code of conduct. For the appellant, it was argued that the respondent's misconduct went to the root of his contract of employment and therefore warranted his dismissal. Whatever the merits or demerits of these submissions, the propriety of the penalty on the above grounds was not raised before the Labour Court. Consequently, this is an aspect that cannot be addressed and determined on H appeal to this court.

Patel JA

Lawfulness and reasonableness of order A

In principle, every employee has a duty to obey any lawful order given by his or her employer. See *Matereke* v *CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) at 212E-213F, where the meaning of what constitutes a lawful order is explained by Gubbay JA (as he then was) as follows:

> "The second requirement, that the disobedience be directed at 'a lawful order', B means simply that the employee is not bound to obey an order to do something not properly appertaining to the character or capacity of his contract of employment. An order which involves a reasonable apprehension of immediate danger to the employee's life or injury to his person, not reasonably contemplated at the time he entered the employment, is unlawful and he is justified in refusing to obey it. For instance, an order to remain in a place in which his personal safety is endangered by violence or disease. See *Bouzourou* v *The Ottoman Bank*C [1930] AC 271 (PC) at 276. The position would be otherwise were the employee a fireman, a policeman or a member of the armed forces. See Scoble *op cit* at p 147; *Chitty on Contracts* 25 ed vol 2 para 3510.
>
> The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful. This proposition is well illustrated by the old English case of *Turner* v *Mason* (1845) 14 M & W 112; D 153 ER 411, in which a domestic servant – quite deliberately because she had made a request which was rejected – absented herself during a night when she should have been on duty. Her plea of justification was that her mother was desperately ill, though it is not clear that she so informed her employer. She was summarily dismissed and the Court of Exchequer upheld the dismissal. Parke B remarked that even if the employer had been made aware of the cause E of her request to absent herself, it would not have been sufficient to justify her disobedience to his order ...
>
> The order to vacate the office did not involve a contravention of any law or any improper conduct on the part of Bowring. It did not expose the appellant to any risk or danger. In fact it only required him to return to his own office. That order was not so unreasonable as to be unlawful." F

As for the element of reasonableness, Korsah JA made the following remarks in *PTC* v *Chihoro* 1997 (1) ZLR 148 (S) at 153F-154C:

> "What is a reasonable order must necessarily rest on the circumstances of each case. There is no requirement that a lawful order must in addition be reasonable. If an order be so unreasonable as to defy common sense then it cannot be a G lawful order. For instance, if the respondent herein had been ordered to go and deliver the telegrams immediately after suffering an epileptic seizure the order would have been so unreasonable that it could not be categorised as lawful, and disobedience to it would not justify summary dismissal. Similarly, if the respondent had been requested to deliver the telegrams at a

place where a riot was in progress it may well be that his refusal to comply with the order would not justify his summary dismissal. H

2015 (1) ZLR p249

Patel JA

It A is not an offence to refuse to obey an unreasonable order, for such an order is not a lawful order: *R* v *Qumba* 1930 CPD 396. And in the Indian case of *Punjabhai* v *Bhagwandas* (1928) ILR 53 Bom 309 (C) (cited in *Words and Phrases Judicially Defined*) Mirza J expressed the view that –

'Lawful is what is in conformity with (or frequently not opposed to) the principle or spirit of the law whether moral or judicial.' B

An order so unreasonable as to oppose the principle or spirit of the law cannot be lawful. What I said in the *National Foods* case *supra* should be read in this light. Implicit in lawful is what is not unreasonable."

What I glean from these remarks is that although there is no positive requirement for an order to be reasonable, an order that is shown to be C unreasonable is unlawful and need not be obeyed. I would add that it would be necessary to show that the order is unreasonable in the given circumstances of the case. To put it differently, an order or instruction is unlawful where it is so unreasonable that no reasonable person in the position of the employer would possibly issue it with the expectation that any employee would comply with it. D

In summation, the test for evaluating the lawfulness of an order, as derived from the cases, is whether the order: is capable of being carried out by the employee; is for the advancement of the employer's business; is closely related to the duties of the employee; constitutes an instruction to the employee to perform a lawful act; and is not unreasonable in the circumstances of the case. E

Wilful disobedience and insubordination

In essence, wilful disobedience and insubordination, although treated separately in case authority, are two sides of the same coin. In other words, an employee will be guilty of insubordination where he or she wilfully disobeys a lawful order. F

In *Matereke's* case s*upra* at 211G-212A, it was held *per* Gubbay JA that wilful disobedience connotes:

"a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial - not G simply an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and employee, going to the very root of the contract of employment."

Similarly, as was observed by Korsah JA in *Chironda* v *Swift Transport* 1996 (1) ZLR 142 (S) at 146F:

"Surely, the omission to comply with a lawful order is not necessarily born out of a H defiance of authority. Unless the proved facts lead irresistibly to an intention to

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2015 (1) ZLR p250

Patel JA

hold authority at defiance, it is a serious misdirection to hold that the appellant's A omission to comply with an order was wilful."

According to Grogan *Dismissal, Discrimination and Unfair Labour Practices* 2 ed at p 307, insubordination arises when an employee refuses to accept the authority of his employer or superior. The employee must by his act of insubordination challenge the authority of his employer and thereby B undermine their contractual relationship. There must be a calculated breach by the employee of his duty to obey his employer. In short, he must intend to defy the employer's order or instruction.

Disposition

In the present case, there can be no doubt that the order given to the respondent C to write the report was capable of being carried out by him. Additionally, although there is no reporting requirement spelt out in the appellant's code of conduct, I see no reason to disagree with the appellant's position that it was procedurally necessary for each one of its employees to account for

his or her absence in writing so as to maintain discipline at the workplace. In that sense, the order was not only in the interests of and for the advancement of D the appellant's business but also closely related to the duties of the respondent. Lastly, it cannot be gainsaid that the instruction given to the respondent was one to perform a lawful act.

The order given to the respondent was to put in writing the reason for his non-attendance for overtime duty. He was not asked to explain where he was E or what he was doing during his time off. He was simply asked to formalise his non-attendance at work. In the circumstances, I do not think that the order can be regarded as being an invasion of his privacy or so unreasonable as to be unlawful.

The respondent refused to write the report as instructed because he was of the firm view that the appellant had no right to ask him to write the report, F particularly as the appellant was aware that he was on authorised time off. He felt that the instruction given by his superior was an invasion of his privacy. Therefore, he deliberately and consciously disobeyed the instruction.

As was made clear in *Matereke's* case *supra* at 212G-213C, the existence of a moral excuse for disobedience does not make the employee's disobedience G any less wilful or the employer's order any less lawful. Thus, the fact that the respondent vehemently believed that he was justified in refusing to obey the order does not diminish the wilfulness of his disobedience or affect the lawfulness of the order. Nor does it matter that the appellant was aware of the cause of the respondent's absence from work. That awareness did not relieve the respondent from his duty to obey the lawful instruction given to him. H

Patel JA

The A instruction was issued by the respondent's immediate supervisor who held a position of authority over the respondent. Consequently, the respondent had a duty to obey the instruction irrespective of the belief, which he openly proclaimed, that there was no need for him to submit the report. His refusal and failure to obey the order constituted an attack on the authority of his employer and undermined their contractual relationship. Moreover, he compounded B his defiance of authority at the disciplinary hearing, by refusing to answer the questions put to him or to explain his earlier defiance. It is abundantly clear on the facts that he intended to defy his superior and ultimately his employer. In the event, there can be no doubt that he was guilty of wilful disobedience and insubordination.

The Labour Court found that the order given to the respondent to write the C report was unreasonable and therefore unlawful. It accordingly found that he was not obligated to comply with the order and that his refusal to do so did not amount to insubordination. Having regard to the position that I have taken, the court *a quo* clearly misdirected itself and erred in its findings. In the result, the appeal against its decision must be upheld, with costs inevitably D following the cause.

It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The decision of the court *a quo* is set aside and substituted as follows:

   "The appeal be and is hereby dismissed with costs." E

ZIYAMBI JA and GWAUNZA JA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Mwonzora & Associates, respondent's legal practitioners

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CHIOZA v SIZIBA 2015 (1) ZLR 252 (S)

Citation	2015 (1) ZLR 252 (S)
Case No	Judgment No. S-4-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Omerjee AJA
Heard	13 November 2012; *CAV*
Judgment	23 February 2015
Counsel	Mrs *J B Wood*, for the appellant *B Chikowero*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Contract – *illegality – contract involving contravention of statute – contract* D *unenforceable – court cannot be party to illegality – par delictum rule – departure from – relaxation of rule where defendant would be unjustly enriched*

Headnote

The respondent, having seen an advertisement for a stand in a Harare suburb, visited the estate agents who placed the advertisement, then viewed the property and declared his desire to buy it. He transferred the asking price to the estate agents' bank account, then went to the estate agents' office to sign the agreement of sale with the appellant, the seller. The appellant E asked the estate agent to reflect the purchase price in the agreement as being about one third of the price actually paid and to back-date the agreement to nearly four months earlier. This the estate agent reluctantly did. The appellant's request was based on a desire to evade stamp duties on the transfer. The estate agent subsequently requested the conveyancers to attend to the transfer; the conveyancers asked the appellant for the title F deeds for the whole property, as well as the permit to subdivide. Vacant possession was given to the respondent about a month later, early in 2007. A few months after that, the respondent was told by the appellant that when the surveying process was complete he might stand to lose or gain about 100 square metres. In the event, he gained 47 square metres, G for which an agreed price was paid by the respondent to the appellant.

The documents for conveyancing had still not been produced by January 2009, and the conveyancers again requested the appellant to supply them. The appellant's legal practitioners wrote to the respondent's legal practitioners alleging, *inter alia,* that their client was resiling from the agreement, which they alleged was illegal. They tendered the purchase H

price, A should any remain, after deducting rentals calculated from the date of occupation by the respondent two years earlier. The respondent lodged a court application seeking an order compelling the appellant to pass transfer of the property to him, on the grounds that he had paid the purchase price for the property and that the appellant was not entitled B to be unjustly enriched at his expense. The appellant argued that the agreement, being in contravention of the Stamp Duties Act [*Chapter 23:09*], and *in fraudem legis,* was illegal and could not be enforced by the court. The appellant also disputed the claim by the respondent that the purchase price had been paid in full. He counter-claimed for the eviction of the respondent.

The C respondent, however, sought the relaxation of the application of the *in pari delicto* rule on the grounds of public policy which should properly take into account the doing of simple justice between man and man. The illegality – the understatement of the purchase price – having been instigated by the appellant, the court ought to take cognizance of the moral blameworthiness of the parties in determining where the justice D of the case lay. It was submitted that it was contrary to public policy for a party to persuade another to commit a wrong, as did the appellant, and then use that wrongful act as a defence to a legitimate suit by the respondent for his bargain. The court *a quo* found that the purchase price had been paid and granted the order sought by the respondent.

The appellant appealed. E

Held, that there being no misdirection alleged as to the facts, it was not open to the appeal court to substitute its own findings of fact for those of the trial court. The probabilities supported the respondent.

Held, further, that the contract was illegal, being in contravention of s 44 of the Stamp Duties Act. The sale also contravened s 39 of the Regional, F Town and Country Planning Act [*Chapter 29:12*], in that the agreement was for the sale of an unsubdivided portion of a stand and that, at the date of conclusion of the agreement, there was, in existence, no permit granted in terms of s 40 of the Act for the subdivision. The grant of the remedy sought by the respondent in the court *a quo* would amount G to an enforcement of the illegal contract. An illegal agreement which has not yet been performed either in whole or in part will never be enforced by the court. This rule is absolute and admits of no exception. It is expressed in the maxim *ex turpi causa non oritur actio*. It is based on the principle, expressed variously, that the court cannot aid a party to defeat the clear intention of an ordinance or statute; that courts of H justice cannot recognize and give validity to that which the legislature

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has declared shall be illegal and void; and that the courts will not permit A to be done indirectly and obliquely what has expressly and directly been forbidden by the legislature. The order of the court *a quo* would have such an effect and could not be allowed to stand.

Held, further, that the effect of the *in pari delicto* rule is that where something has been delivered pursuant to an illegal agreement, the loss lies B where it falls, the objective of the rule being to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. However the general rule expressed in the maxim is not one that can or ought to be applied in all cases and it is subject to exceptions which in each case must be found to exist only by reference to the principle of public C policy. Where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment. Where a party to an illegal contract seeks not to enforce the illegal contract but to obtain relief from the consequences of his illegal action, the courts have, in order to prevent an injustice or to satisfy the D requirements of public policy, or obviate a situation where one party is unjustly enriched at the expense of the other, intervened and granted relief from the rigid application of the rule.

Held, further, that it was quite clear that the appellant sought to benefit, unjustly, from the transaction. Having sold the property and received E the proceeds through his agent, he now sought the return of the property and thus, have his cake and eat it. The respondent, on the other hand, had parted with the full value of the property and stood to incur great financial prejudice if an order for eviction were to be granted.

Held, further, that a strict application of the *par delictum* rule would result F in a situation where the appellant held the title deeds but the respondent retained possession of the property. While neither party could resort to the courts for enforcement of the contract, it was quite conceivable that the appellant could transfer title to a third party against whom the respondent might have no recourse. Public policy would not countenance the unjust enrichment of the appellant at the expense of the respondent. G Indeed it might well be thought that the respondent had been the subject of a great injustice and the court would be expected to come to his assistance. A failure by the court to assist the respondent might, far from deterring illegality, prove to be to the advantage of some unscrupulous members of the public. H

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Held, A further, that this was a suitable case for making an exception to the strict application of the *par delictum* rule. The justice of the case would be met by remitting the matter to the court *a quo*. Such a course would enable the respondent to recover the value of the money paid under the illegal contract and the appellant, on payment of compensation, to B recover possession of the property.

Cases referred to

Brandt v Bergstedt 1917 CPD 344

Dube v *Khumalo* 1986 (2) ZLR 103 (S)

Hama v *NRZ* 1996 (1) ZLR 664 (S)

Jajbhay v *Cassim* 1939 AD 537C

Logan v *Sibiya* 2002(1) 531 (H)

X-*Trend-A-Home (Pvt) Ltd* v *Hoselaw Invstms (Pvt) Ltd* 2000 (2) ZLR 348 (S)

York Ests Ltd v *Wareham* 1949 SR 197; 1950 (1) SA 125 (SR)

Legislation considered D

Regional, Town and Country Planning Act [*Chapter 29:12*], s 39

Stamp Duties Act [*Chapter 23:09*]

Case information

Mrs *J B Wood*, for the appellant

B Chikowero, for the respondent E

Judgment

Ziyambi JA:

[1] During the week ending 29 December 2006, the *Herald* newspaper carried an advertisement inserted by Murenga Estate agents ("Murenga") wherein stand No. 1759 of 323 Midlands, Waterfalls, was being advertised F for sale at a purchase price of twenty five million dollars. The respondent was interested in the property and visited Murenga's offices where he spoke to a Mrs Madziva, a sales agent thereat. He was referred to Stand 323 Thorn Road and, having viewed the property, returned to Murenga and expressed his desire to purchase the property at the asking price of $25 000 000. He was given Murenga's bank account number wherein he could transfer the G purchase price. Later that week, having effected the transfer as directed, he met with the appellant at Murenga's offices where they were to sign the agreement of sale.

[2] According to the respondent, the appellant pleaded with Mrs Kasenza who drafted the agreement of sale to reflect the purchase price as $8 000 000 H instead of the actual price of $25 000 000 that he had paid. Mrs Kasenza was

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reluctant to understate the purchase price but following consultations with her A superior, Mr Murenga, and more pleading from the appellant, who claimed to be heavily indebted with medical bills and the like, the respondent, after an initial objection to this proposal since he had already paid $25 000 000, and it was generally known that properties in the area were fetching prices in excess of $8 000 000, finally agreed to the appellant's suggestion that the B agreement be back-dated to 8 September 2006 and the purchase price be understated. The appellant, however, states that it was the respondent who requested the understatement of the price in order to evade stamp duties on transfer.

[3] Following these events and on 29December 2006, the appellant, as seller, and the respondent, as purchaser, concluded an agreement for the sale of: C

"certain piece of land situate in the District of Salisbury being subdivision of 323 Midlands Township 2 of Upper Waterfalls Estate called Stand No. 1759 measuring 2 167 square metres. A residential stand with staff quarters partly walled measuring 2 167 square metres."

[4] In terms of the agreement, the purchase price was $8 000 000 (eight D million dollars) which was to be deposited with Murenga and held by them pending transfer. Clause 2 of the general conditions provided that the seller was to tender transfer of the property within a reasonable period of the date of acceptance of this offer and the purchaser was to provide the seller's conveyancers with the requirements specified in clause 2 within fourteen days E of the date of such tender of transfer. The conveyancers were to be Messrs Gutu & Chikowero. Vacant possession was to be given to the purchaser by mutual agreement.

[5] It is common cause that the agreement, notwithstanding the actual date of its conclusion and signature (29 December 2006), was dated 8 September 2006. F

[6] On 10 January 2007, Murenga wrote to the conveyancers with instructions to attend to the transfer of the property, advising in the letter that the purchase price had been paid direct to the appellant. The conveyancers, in turn, wrote to the appellant on 3 January 2007 requesting the title deeds for the whole property as well as the permit to subdivide, among other things, to enable them to attend to the transfer. G

[7] Vacant possession of the property was given to the respondent on or about 1 February 2007. In or about April 2007, the appellant advised the respondent that when the surveying process was completed he might expect to lose or gain 100 square meters. After the completion of the process it turned out that the respondent had gained 47 square metres. The appellant asked H

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him A to pay 10 million dollars for this extra piece of land but he could only afford $3 000 000 which, and that is common cause, he paid to the appellant.

[8] Thereafter matters dragged on until 5 January 2009 when the conveyancers wrote again to the appellant's legal practitioners requesting the documents necessary to process the transfer and advising that the purchase price had B been paid to the appellant. The response was a request for proof of payment of the purchase price. On 30 January 2009, proof of payment in the form of a letter of confirmation by Murenga that the purchase price had been paid, was forwarded to the appellant's legal practitioners.

[9] On 3 February 2009 the appellant's legal practitioners wrote to the respondent's legal practitioners alleging, *inter alia,* that their client was C resiling, on their advice, from the agreement which they alleged was illegal. They tendered the purchase price, should any remain, after deducting rentals calculated from the date of occupation by the respondent on 1 February 2007.

[10] It was following these events that the respondent lodged a court application in the court *a quo* seeking an order compelling the appellant to D pass transfer of the property to him failing which the Sheriff or his lawful deputy be authorized to effect the transfer on the appellant's behalf. He based his application on the fact that he had paid the purchase price for the property and that the appellant was not entitled to be unjustly enriched at his expense.

[11] The application was opposed by the appellant who, in turn, filed a E counter application for the eviction of the respondent from the property as well as payment of rentals at the rate of US$250 per month from 1 February 2009. The basis of the counter application was that the respondent had not paid the purchase price of the property.

[12] On behalf of the appellant, it was argued before the court *a quo* that the F agreement being in contravention of the Stamp Duties Act, and in *fraudem legis,* was illegal and could not be enforced by the court.

[13] The respondent however sought the relaxation of the application of the in *pari delicto* rule on the grounds of public policy which, it was submitted, should properly take into account the doing of simple justice between man and G man. It was submitted on his behalf that the illegality – the understatement of the purchase price – having been instigated by the appellant, the court ought to take cognizance of the moral blameworthiness of the parties in determining where the justice of the case lay. It was submitted that it was contrary to public policy for a party to persuade another to

commit a wrong, as did the appellant, and then use that wrongful act as a shield of defence in H the face of a legitimate suit by the respondent for his bargain.

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[14] The court *a quo* found that it was the appellant who had hatched the plan A to understate the purchase price of the property in order to avoid payment in terms of the Stamp Duties Act [*Chapter 23:09*]. It found further that the appellant, through his agent, Murenga, had received the full purchase price of the property. It granted the order sought by the respondent for the transfer to him of the property and dismissed the counterclaim by the appellant. B

The issues on appeal

[15] The grounds of appeal, as amended, raise three issues, namely: the correctness of the finding of the court *a quo* that the respondent had paid the full purchase price of the property; whether the court erred in enforcing a contract which was found by it to be illegal and which was, in any event, C prohibited by s 39 of the Regional Town and Country Planning Act; and whether the court erred in finding that the appellant would be unjustly enriched if the counterclaim were granted. I deal with each issue in turn.

Whether the court erred in finding that the purchase price of the property was paid in full to the appellant D

[16] The court *a quo* made factual findings in this regard. The general rule regarding factual findings made by a trial court is that they will not be upset by an appellate court unless there has been such a gross misdirection by that court on the facts so as to amount to a misdirection in law in the sense that no reasonable tribunal applying its mind to the same facts would have arrived E at the conclusion reached by the lower court. As it was put by Korsah JA in *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670A:

> "… there can be *misdirection as to the law* applicable to the case being tried; and there can be *misdirection as to the evidence* in the case. For an appellant to avail himself of a misdirection as to the evidence, the nature and the circumstances of the case must be such that it is reasonably probable that the Tribunal would F not have determined as it did had there been no misdirection; in other words, that the determination was irrational….
>
> The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or G of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon* v *Rosenberg* 1936 AD 380 at 395-7; *Secretary of State for Education and Science* v *Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA) at 671E-H; *CCSU* v *Minister for the Civil Service*, *supra*, at 951A-B; *PF-ZAPU* v *Minister of Justice (2)* 1985 (1) ZLR 305 (S) at 326E-G". H

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In A the absence of such a misdirection (and none has been alleged by the appellant), it is not open to this court on appeal to substitute its own findings of fact for that of the trial court.

[17] In any event, the probabilities clearly support the factual conclusions reached by the court *a quo*. The respondent produced the RTGS transfer form B showing the transfer of $25 000 000 into the bank account of Murenga; the respondent was given vacant possession of the property; four months after the agreement was concluded, and in April 2007, the appellant approached the respondent to ask for an additional $10 000 000 for the 47 square meters which he had gained after the subdivision and received, from the respondent, payment in the sum of $3 000 000. C

[18] It seems unlikely that the respondent would have been given vacant possession of the property by the appellant if the purchase price had not been paid as required by clause 2 of the agreement. Further, the fact that four months later, at a time when the respondent was already in occupation of the property, the appellant claimed from the respondent only the value of the D additional 47 square metres and not the full purchase price of the property is supportive of the respondent's evidence that payment for the property had been made in terms of the agreement.

[19] This court can take judicial notice of the fact that during that period, hyperinflation was taking its toll on the economy and it was in the interest of sellers of property to recover the sale proceeds as quickly as possible E rather than await the tedious process of transfer by which time the money paid (or agreed as the purchase price) would have lost some of its value. Clause 2 of the special conditions of the agreement (which were to prevail over the general conditions) bears this out. The purchase price was to be paid in cash. Clause 2 reads in part:

> "2. This sale is conditional upon the purchaser being able to raise cash on the F property of not less than $8 000 000.00 …"

[20] In addition to the above, the appellant's agents, on two occasions, confirmed, in writing, that the purchase price had been paid. In my view, the conclusion reached by the court *a quo* is unassailable.

Whether the court erred in enforcing a contract which was found G by it to be illegal and which was, in any event, prohibited by s 39 of the Regional Town and Country Planning Act

[21] The court *a quo* decided the matter on the basis that it was dealing with a contract that was illegal by virtue of its contravention of s 44 of the Stamp Duties Act [*Chapter 23:09*] ("the Stamp Duties Act"). For completeness the H section is set out below:

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> "44 Agreements to evade duty shall be void A
>
> Every contract, agreement or undertaking made for the purpose of evading, defeating or frustrating the requirements of this Act as to the stamping of instruments, or with a view to precluding objection or inquiry relative to the due stamping of any instrument shall be void."

[22] In his heads of argument, as also in his submissions before this court, B counsel for the respondent made the concession that the agreement of sale between the parties also contravened the provisions of s 39 of the Regional Town and Country Planning Act [*Chapter 29:12*] and that consequently, the appeal from the court *a quo's* judgment ordering the transfer of the stand ought to succeed. He submitted, however, that since both parties were in the wrong, this court should relax the *in pari delicto* rule and remit the matter C to the court *a quo* to ascertain the present value of the property with a view to granting a refund to the respondent of the value paid for the property in order to avoid a situation where the appellant is enriched at the expense of the respondent. This submission was resisted by Mrs *Wood* who, on behalf of the appellant, contended that the court *a quo* ought to have granted the counter-application as it was the respondent who would be enriched at the D expense of the appellant.

[23] Although the issue as to the illegality of the agreement by virtue of its contravention of s 39 of the Regional Town and Country Planning Act was not argued in the court *a quo,* it is a point of law and, there being no prejudice caused to the respondent by the taking of the point for the first time on appeal, E counsel for the respondent, therefore, acted properly both in allowing the point to be raised by the appellant unopposed and in making the concession.

[24] Section 39 of the Regional Town and Country Planning Act [*Chapter 29:12*] ("the Act") reads, in relevant part, as follows:

> "(1) Subject to subsection (2), no person shall – F
>
> (a) subdivide any property; or
>
> (b) enter into any agreement –
>
> (i) for the change of ownership of any portion of a property; or
>
> (ii) …
>
> (iii) …
>
> (iv) … G
>
> (c) consolidate two or more properties into one property;
>
> except in accordance with a permit granted in terms of section *forty:*"

It is common cause that the agreement *in casu* was for the sale of an unsubdivided portion of a stand and that at the date of conclusion of the agreement, there was, in existence, no permit granted in terms of s 40 of the H

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Act. A Therefore, in terms of clear authority emanating from this court, the agreement was illegal and unenforceable at law. See *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S) where McNally JA at 348F stated as follows:

> "… s 39 forbids an agreement for the change of ownership of any portion of a B property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."

It follows from the above that the grant of the remedy sought by the respondent C in the court *a quo* would amount to an enforcement of the illegal contract. That was the substance of the concession made by counsel for the respondent.

[25] It is now established that an illegal agreement which has not yet been performed either in whole or in part will never be enforced by the court. See *York Estates Ltd* v *Wareham* 1949 SR 197; 1950 (1) SA 125 (SR) at 128 D where Lewis ACJ said:

> "The court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. See *Matthews* v *Rabinowitz* 1948 (2) SA 876 (W). In fact the court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties. *Cape Dairy and General Livestock Auctioneers* v *Sim supra*E

This rule is absolute and admits of no exception. It is expressed in the maxim *ex turpi causa non oritur actio*. See *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at p 109. It is based on the principle, expressed variously, that the court cannot aid a party to defeat the clear intention of an ordinance or statute; that courts of justice cannot recognize and give validity to that which the legislature has declared shall be illegal and void; and that the courts will not F permit to be done indirectly and obliquely what has expressly and directly been forbidden by the legislature.

[26] In *Dube* v *Khumalo* at 109D Gubbay JA (as he then was), put it this way:

> "There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will G never be enforced. *This rule is absolute and admits no exception*. See *Mathews* v *Rabinowitz* 1948 (2) SA 876 (W) at 878: *York Estates Ltd* v *Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio possidentis*" (my emphasis).

The principle which emerges from the decided cases is that the courts will H not enforce an agreement prohibited by law. The order of the court *a quo*,

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having, as it did, the effect of enforcing the illegal contract concluded by the A parties, cannot be allowed to stand. However that is not the end of the matter.

I turn to determine the third issue which will involve a consideration of the application of the second maxim.

Whether the court erred in finding that the appellant would be unjustly enriched if the counterclaim were granted: the *par* B *delictum* (or the *in pari delicto*) rule

[27] The name derives from the maxim *in pari delicto potior est conditio defendentis* which literally means that if the plaintiff and the defendant are tainted by turpitude ("in the wrong"), the position of the defendant is stronger, and that the plaintiff must fail[1]; or *in pari delicto potior est conditio possidentis*, which may be translated as meaning "where the parties are C equally in the wrong, he who is in possession will prevail". The effect of the rule is that where something has been delivered pursuant to an illegal agreement, the loss lies where it falls, the objective of the rule being to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction: *Dube* v *Khumalo supra*D

[28] The distinctive character of the two maxims was explained by Stratford CJ in *Jajbhay* v *Cassim* 1939 AD 537 at p 540 as follows:

"In my view the first maxim prohibits the enforcement of immoral or illegal contracts and the second curtails the right of the delinquents to avoid the consequences of their performance or part performance of such contracts." E

And at p 542:

"I repeat that the two maxims, although they have a common inspiration and purpose, are clearly distinct in that they deal with different types of claim. The maxim *ex turpi causa* is self-explanatory and requires no elucidation. It is complete and unquestioned in our courts as in the courts of England. But we must F leave it in its own department where it reigns supreme and not unwarrantably extend it to the province of the other maxim which is designed to supplement the deficiencies of the first in regard to deterring illegality. The two separately operating and properly applied are, I venture to think, adequate for that designed purpose. When I say that the law is not settled, I mean in regard to the application only of the second maxim *in pari delicto potior conditio defendentis.* This is G the only maxim which, in my judgment, concerns us in the present case, for the appellant is not seeking enforcement of the illegal contract but seeks release from its operation. This maxim is not so self-explanatory as the first, for the nature of the plaintiff's claim is not immediately indicated and the degree and nature of the delinquency is but vaguely defined." H

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[29] A The harsh effect of the unqualified application of the *par delictum* rule is illustrated in *Brandt v Bergstedt* 1917 CPD 344. The plaintiff, who had sold his cow to the defendant on a Sunday in contravention of an ordinance which prohibited any form of trading on a Sunday, was not assisted by the court when he sought payment from the defendant for the cow. The defendant B had set up the defence *inter alia* that he was not obliged to pay because the sale was prohibited by statute. [2] No doubt there are many similar cases in which the courts have strictly applied the maxim.

[30] However, in *Jajbhay* v *Cassimsupra* the Appellate Division of the Supreme Court of South Africa, headed by Stratford CJ, held that the general C rule expressed in the maxim is not one that can or ought to be applied in all cases and that it is subject to exceptions which in each case must be found to exist only by reference to the principle of public policy.

It was there said that:

"Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which D underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it E of the other by enriching one to the detriment of the other. And it follows from what I have said above, *in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment*" [3] (my emphasis).

[31] At p 543 of the judgment the learned Chief Justice expressed his view that:

"The case of *Brandt* v *Bergstedt* 1917 CPD 344 and the decision of the Transvaal F Provincial Division in *R* v *Maseko* 1915 TPD 1 appear to me to be in conflict. In the first the reasoning implies that the learned judge felt himself bound by the authorities he quoted to refuse relief to the plaintiff, whereas I respectfully suggest that *he should have approached the matter from the more fundamental point of view as to whether public policy was best served by granting or refusing the plaintiff's claim. If the learned judge had so approached the case and had*G*considered that as an equitable judge he was free (as I think he was) to order the restoration of the cow, I cannot doubt that he would have granted the relief*

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prayed. Indeed the facts of that case afford a typical example which called for a A decision on which side public policy is best served" [4] (my italics for emphasis).

[32] Where a party to an illegal contract seeks not to enforce the illegal contract but to obtain relief from the consequences of his illegal action, the courts have, in order to prevent an injustice or to satisfy the requirements of public policy, or obviate a situation where one party is unjustly enriched at the expense of the other, intervened and granted relief from the rigid B application of the rule.

Thus while the general rule is that illegal transactions will be discouraged by the courts, the exceptions show that where it is necessary to prevent injustice or to promote public policy the courts will not rigidly enforce the general rule. The identification of the exception to the rule, however, is a task C which the court must undertake in each case. As Watermeyer JA observed in Jajbhay v Cassim at 555:

> "the real difficulty lies in defining with any degree of certainty the exceptions to the general rule which it [the court] will recognize."

In the *Dube* v *Khumalo* case*supra* it was said at 109F that: D

> "… in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy "should properly take into account the doing of simple justice between man and man."

[33] It would seem quite clear that the appellant seeks to benefit, unjustly, from the transaction. Having sold the property and received the proceeds E through his agent, he now seeks the return of the property and thus, so to speak, "have his cake and eat it". The respondent, on the other hand, has parted with the full value of the property and stands to incur great financial prejudice if an order for eviction is granted in terms of the counter claim. It would appear then, that the court *a quo* was correct in its finding that the appellant sought to benefit from its own wrongdoing. It said: F

> "It is clear to me that the first respondent seeks to benefit from its own wrong doing. Therefore rigid application of the *ex turpi causa* rule will result in an unjust enrichment of the party who engineered the result of the illegality. It is on this basis alone that the counter application should fail. In the result therefore the application is granted and the counter application dismissed with costs".

Disposition G

[34] Both parties sought the enforcement in whole or in part of the illegal agreement. The respondent, in moving the court to order the transfer to him of the property on the basis that he had paid the full purchase price of the H

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property, A prayed, in effect, for specific performance of the contract. The appellant, in his counter application for eviction on the basis that vacant possession of the property was given by him to the respondent in the mistaken belief that the latter had complied with clause 2 of the general conditions of the agreement and paid the purchase price when in fact he had not, was B seeking relief from the court on the basis of an alleged breach of the illegal contract by the respondent.

[35] While the provisions of s 39 of the Act may not have been present to their minds at the time of conclusion of the agreement in this matter, no comfort can be gained by the parties from that fact since ignorance of the law is no excuse. In any event, the contravention of the Stamp Duties Act C was agreed upon by both parties albeit with some persuasion, as the court found, from the appellant. They were both in the wrong. They fell squarely within the ambit of the *in pari delicto* maxim.

[36] After hearing submissions by counsel at the hearing of the appeal the parties were afforded time in which to attempt a settlement of the matter. Part of the delay in writing this judgment is attributable to this postponement D of the hearing. Needless to say, the parties were unable to reach agreement and I must now consider the real issue to be determined in this appeal which is whether the present case is a suitable one for a departure from the general rule or, as it was put by the parties, for a relaxation of the *par delictum* rule E by the court.

[37] In that connection, it appears that the court *a quo* confused the two maxims. It referred to relaxing the *ex turpi causa* rule. The tenor of the judgments of this court is that the *ex turpi causa* rule does not admit of exceptions (*York Estates* v *Wareham supra*; *Dube* v *Khumalo supra*). It cannot be relaxed. Different considerations apply however where the *in*F*pari delicto* maxim is concerned: *Dube* v *Khumalo supra*. Judging by the reference to his judgment in *Logan* v *Sibiya* 2002 (1) 531 (H) it seems likely that the learned judge meant to relax the application of the *in pari delicto* maxim. In that case, where an applicant sought the return of money paid to a respondent in pursuance of an illegal contract, the court found it to be an appropriate case in which to relax the *par delictum* rule in order to prevent G the unjust enrichment of the respondent at the expense of the applicant.

[38] A strict application of the *par delictum* rule in the instant matter would result in a situation where the appellant holds the title deeds but the respondent retains possession of the property. While neither party could resort to the courts for enforcement of the contract, it is quite conceivable that the appellant H could transfer title to a third party against whom the respondent might have no

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Ziyambi J

recourse. In the circumstances of this case it seems to me that public policy A would not countenance the unjust enrichment of the appellant at the expense of the respondent. Indeed it might well be thought that the respondent had been the subject of a great injustice and the court would be expected to come to his assistance. A failure by the court to assist the respondent might, far from deterring illegality, prove to be to the advantage of some unscrupulous members of the public. In this regard I am in respectful agreement with the B following remarks by Stratford CJ in *Jajbhay* v *Cassim* at 543-4:

> "It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his ill-gotten gains. I cannot agree with this view, which I think would not so much discourage such transactions but would tend to promote a more reprehensible C form of trickery by scoundrels without such honour as even thieves are sometimes supposed to possess, and public policy should properly take into account the doing of simple justice between man and man."

[39] In my judgment this is a suitable case for making an exception to the strict application of the *par delictum* rule. The justice of the case would be met by remitting the matter to the court *a quo* for the reasons advanced D by counsel for the respondent. Such a course would enable the respondent to recover the value of the money paid under the illegal contract and the appellant, on payment of compensation, to recover possession of the property.

[40] On the question of costs, since both parties have achieved some measure of success, I deem it reasonable that each party should pay its own costs on appeal. E

[41] Accordingly it is ordered as follows:

1. The appeal is allowed in part with each party paying its own costs.
2. The judgment of the court *a quo* ordering transfer of the property to the respondent is set aside with each party to pay its own costs; F
3. The matter is remitted to the court *a quo* for hearing of evidence to enable it to determine:
   (i) the value of the property including any improvements made thereon by the respondent;
   (ii) the amount by which the appellant has been enriched at the expense G of the respondent;
   (iii) the amount by which the respondent should be compensated by the appellant; and
   (iv) to make such order as to it seems appropriate in order to achieve justice between the parties. H

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   (v) an A order in terms of para (iv) herein may set a period during which the amount determined in para (iii) shall be paid by the appellant to the respondent failing which payment the Deputy Sheriff shall transfer the property to the respondent.

GARWE JA and OMERJEE AJA concurred B

Sakutukwa & Partners, appellant's legal practitioners

Gutu & Chikowero, respondent's legal practitioners

1 du Plessis The South African Law of Unjust Enrichment at p204.

2 The court in Jajbhay v Cassim was of the view that this was one of the cases where the plaintiff ought to have been assisted by the court. See para [31].

3 At pp 544-545. The above passage was quoted with approval by Gubbay JA in Dube v Khumalo supra.

4 See also at p 558

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DUNCAN v LOUW 2015 (1) ZLR 268 (H)

Citation	2015 (1) ZLR 268 (H)
Case No	Judgment No. HH-201-15
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	24 February 2015
Judgment	24 February 2015
Counsel	*M D Hungwe*, for the applicant *F A Rudolph,* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Family law – *child – custody – right of custodian parent* C *– custodian parent relocating with child to another country – rights of non-custodian parent – must show that relocation not in child's best interests – access rights – inability of non-custodian parent to exercise such rights due to lack of means – irrelevance of*

Headnote

The applicant and respondent were father and mother of a child who was D born out of wedlock. The child's given surname was that of the applicant. Two years after the child was born the parties separated. After various legal actions in the High Court, the respondent was granted custody of the child and the applicant was given access rights. E

The respondent was later granted residence visas for herself and the child in Australia. The applicant sought an order to prevent her from taking the child out of Zimbabwe, arguing that as a parent with access rights to the minor child the respondent had no right to remove the child to Australia without his consent. The applicant had no intention of settling in Australia. The child, he said, should be close to both parents and F that could only be achieved if the child were kept in Zimbabwe. His means did not allow him to visit the minor child in Australia. It was his argument that the right of custodian that the respondent had was limited by his right of access.

Held, that there is generally a presumption in favour of the custodial parent's G right to relocate with a child. The burden is on the non-custodial parent to show that such relocation is not in the best interests of the child. The court will only interfere with the decision of the custodial parent where such removal would prejudice the rights or welfare of the child. This is so because the child's

relationship with the custodial person is the most important factor affecting the child's welfare. The courts have generally H

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Matanda-Moyo J

recognised A that the well-being of the child is fundamentally interrelated with the well-being of the custodial parent and that the custodial parent is the best person suited to make decisions affecting the child, such as where they would reside. Judicial interventions should be limited in these matters, except in extreme cases, where the child's interests are most likely to be adversely affected. The applicant had a burden to B establish any risk of harm to the child that may arise from the relocation to Australia. Instead he concentrated on his own circumstances, like the fact that he did not have the financial capacity to visit Australia. Such a consideration has never been used to allow the courts to interfere with the custodian parent's rights to determine where she and the child lives. C

Cases referred to

Bailey v *Bailey* 1979 (3) SA 128 (A)

Cruth v *Manuel* 1999 (1) ZLR 7 (S)

Hardy v *Skaramangas* 2000 (1) ZLR 196 (H)

Hughson & Anor v *Greyling* 2000 (1) ZLR 434 (H) D

Samudzimu v *Ngwenya* 2008 (2) ZLR 228 (H)

Case information

M D Hungwe, for the applicant

F A Rudolph, for the respondent

Judgment

Matanda-Moyo J: The applicant is seeking the following order: E

"TERMS OF FINAL ORDER SOUGHT

1. The respondent be and is hereby barred, interdicted and stopped from removing the minor child CD from within the borders of the Republic of Zimbabwe.
2. The applicant be and is hereby declared and confirmed to be the sole F custodian of the minor child CD as ordered by the children's court under case number JCC 371/11.
3. …

INTERIM RELIEF GRANTED

1. The respondent is interdicted, barred and stopped from removing the minor child CD from within the borders of the Republic of Zimbabwe.
2. In G the event that the respondent has already removed CD from Zimbabwe, the respondent is hereby ordered to return the child to Zimbabwe immediately.
3. Respondent to immediately surrender the minor child CD's passport to the Registrar of the High Court until finalisation of this matter.

SERVICE OF THE PROVISIONAL ORDER

The applicant's legal practitioners are hereby given leave to serve this order H on the respondent."

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Matanda-Moyo J

The brief facts are that the applicant is the father of a minor child born out A of wedlock, CD, born on 29 June 2007. The applicant and the respondent stayed together for two years after CD's birth and separated. Upon separation, the respondent took custody of the minor child. On 15 November 2011 the magistrates court granted custody of the said minor child to the applicant – case no JCC 371/11 refers. Aggrieved by that ruling, the respondent on B 12 December 2011 sought and obtained a provisional order from this court which granted her custody of the minor child pending confirmation of the order. On 6 August 2012 such order was confirmed by consent. This put to rests the question of who is the custodian of the minor child. It is clear that in terms of the High Court order of 6

August 2012 in case no. HC 11389/11 the respondent is the custodian of the minor child. The applicant has access C rights to such minor child in terms of this court order HC 4747/12 granted on 22 May 2012.

The respondent has applied for and been awarded visas for herself and the minor child to reside in Australia until October 2017. The respondent intends to travel to Australia on 23 February 2015.

Firstly, in bringing this application, the applicant is labouring under a D misconception that he is the custodian of the minor child. He relied on an order by the magistrates court JCC 371/11. However, subsequent to that on 12 December 2011 this court granted an interim order that:

> "The applicant (respondent herein) shall have custody of the minor child CD (born 29 June 2007), pending the confirmation or discharge of this matter …" E

On 6 August 2012 the provisional order above was confirmed by consent of both parties. It effectively meant the respondent herein was confirmed the custodian of the minor child. This court had earlier, on 16 July 2012, granted the applicant herein access rights to the said minor child.

The applicant attempted to argue that there was an appeal filed against the F decision of the magistrate which granted custody rights to the applicant, which appeal the applicant submitted was dismissed. Based on that purported dismissal of the appeal the applicant argued that he is the custodian of the minor child. Unfortunately, there is no proof before me that there was such an appeal pending before this court. Our law places the onus of proof on him G who alleges. The applicant has failed to place any evidence before me in support of his submission. Without any substantive evidence the court threw out the submission as baseless, leaving me with the conclusive evidence of the confirmation order by this court of 6 August 2012 which conferred custodianship of the minor child upon the respondent. It is my finding therefore that the custodian parent of CD is the respondent and not the plaintiff. The H

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applicant A could therefore only approach this court as a parent with access right and not custodian rights. Any submissions by the applicant purportedly as the custodian of the minor child automatically fell away.

The applicant made an application for deferment of the matter to Monday 23 February 2015 to enable him to file the appeal papers. I dismissed such B application. An applicant who approaches a court on an urgent basis should make sure he or she has all the information relied upon. The applicant in an urgent matter is saying: "With all the information in my possession the matter cannot wait." To file piece meal applications firstly tend to show that the application is based on suppositions and postponing the matter would defeat the whole purpose of urgency. Secondly, there was no mention of C the appeal case number and I was convinced that postponing the matter served no purpose. By 23 February 2015 the applicant would most likely not have the papers. Besides, a litigant who fails to place evidence within his possession on each before the court should not find mercy from the court, unless he adequately explains why such information could not be presented on the outset. D

The applicant submitted that, as a parent with access rights to the minor child as determined by this court, the respondent had no right to remove the child to Australia without his consent. The applicant also submitted that he had no intentions of settling in Australia. The child should be close to both parents and that could only be achieved if the child is kept in Zimbabwe. He E also submitted that his means do not allow him to visit the minor child in Australia. It was his argument that the right of custodian that the respondent had was limited to his right of access.

There is generally a presumption in favour of the custodial parent's right to relocate with a child. The burden is on the non-custodial parent to show F that such relocation is not in the best interest of the child. The court will only interfere with the decision of the custodial parent where such removal would prejudice the rights or welfare of the child. This is so because the child's relationship with the custodial person is the most important factor affecting the child's welfare. The courts have generally recognised that the well-being of the child is fundamentally interrelated with the well-being of the custodial parent and that G the custodial parent is the best person suited to make decisions affecting the child, such as where they would reside. Judicial interventions should be limited in these matters except in extreme cases where the child's interests are most likely to be adversely affected.

In this case the applicant has a burden to establish any risk of harm to the H child that may arise from the relocation to Australia. Instead, the applicant

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Matanda-Moyo J

herein concentrated on his own circumstances, like the fact that he did not A have the financial capacity to visit Australia. The applicant has not placed before the court any evidence which showed that the move was not in the best interests of the child and was designed to frustrate his access rights.

In *Cruth* v *Manuel* 1999 (1) ZLR 7 (S) at 14F-G Muchechetere JA said:

> "The trigger that warrants any interference must therefore be an allegation that B the rights are not being exercised properly and it is therefore in the interests of the child that those rights be interfered with. The welfare of the child in cases of this nature only becomes an issue when there is an allegation that the exercise by the mother of her rights causes some concern …"

The court cannot substitute its own decision for that of a custodial parent where such person has not been shown to be incompetent to make such a C decision. The question to be answered is whether the applicant has provided some basis to conclude that the court should usurp the functions of the respondent in making crucial decisions that affect the minor child.

The respondent submitted that the decision to move to Australia is in the best interest of the child as there are more opportunities for the child than D opportunities presently here. I fully agree with her. The respondent referred me to a plethora of cases which streamlines the occasions where courts may interfere with the lawful decision of a custodian parent, like *Samudzimu* v *Ngwenya* 2008 (2) ZLR 228 (H) at 232D-E; *Bailey* v *Bailey* 1979 (3) SA 128 (A). The courts will generally look at the best interests of the child. E

The respondent submitted that she informed the applicant of the relocation to enable him to enforce his access rights. The respondent submitted she is prepared to enter into a consent order regarding such access rights as the applicant may require. I do not see any ill intentions on the part of the respondent in exercising her rights as the custodian of the minor child. There F is no proof that her relocation to Australia is meant to place impediments in the way of the applicant's rights to access. The applicant has not discharged the onus on him to show that the relocation is meant to frustrate his access rights. See *Hardy* v *Skaramangas* 2000 (1) ZLR 196 (H) and *Hughson & Anor* v *Greyling* 2000 (1) ZLR 434 (H).

I have considered the applicant's submissions that he lacks the means to G exercise his access rights once the respondent relocates with the minor child to Australia. Case law has been clear that it is the duty of the parent with access rights to exercise those rights using his own means. Such consideration has never been used to allow court to interfere with the custodian parent's rights to determine where she and the child lives. H

Matanda-Moyo J

Accordingly, A I am of the view that the applicant has failed to discharge the onus placed upon him to give this court powers to interfere with the relocation. The application accordingly fails.

The respondent requested costs on a higher scale. I do not believe these circumstances warrant such costs. The applicant indeed has access rights B to the minor child and approached the court to protect such rights. Such application was not frivolous and I see no reason to punish the applicant for trying to protect his rights.

In the result the application is dismissed with costs.

Kadzere, Hungwe & Mandevere, applicant's legal practitioners C

Scanlen and Holderness, respondent's legal practitioners

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MAKONI v THE COLD CHAIN (PVT) LTD 2015 (1) ZLR 274 (H)

Citation	2015 (1) ZLR 274 (H)
Case No	Judgment No. HH-197-15
Court	High Court, Harare
Judge	Chigumba J
Heard	9 February 2015; *CAV*
Judgment	25 February 2015
Counsel	*A P de Bourbon SC,* for the applicant *L Uriri,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *judgment – alteration of – judgment for damages* C *given in Zimbabwe currency, before multi-currency system adopted – amendment of judgment to express loss in foreign currency terms – court having no jurisdiction to alter judgment – no system for allowing execution in foreign currency of judgment given in Zimbabwe currency* D

Headnote

The applicant had, in January 2008, obtained judgment against the respondent, for damages arising out of a motor vehicle accident (which occurred in 2002) for which the respondent was held vicariously liable. Part of the judgment was expressed in Botswana currency; that part was paid by the E respondent. The balance was expressed in Zimbabwe dollars, that being the currency in use at the time. The respondent had tendered payment of the Zimbabwe currency portion of the judgment to the applicant. The respondent had also paid a considerable sum in US dollars to the applicant. The applicant had not sought to execute in respect of the Zimbabwe dollar component at the date of the judgment. In February F 2009 a multi-currency regime was adopted. The applicant sought an amendment of the judgment to express in US dollars the various items that had been in Zimbabwe dollars. It was common cause that after the accident the applicant was disabled. He averred that he needed funds for further medical treatment. The respondent denied that claim, arguing that the appellant's claims were fraudulent. G

There were three issues for determination: (a) whether the court had jurisdiction to entertain this matter; (b) whether it was competent for the court to award payment in US dollars, in respect of a judgment sounding in Zimbabwe dollars: and (c) whether it was competent to determine the rate of exchange by which the conversion may be made. H

Held, A that it would not be proper to rely on principles which were enunciated in the context of labour disputes, which differ materially from the matter under consideration, and in respect of which certain principles underline their conduct, which were not applicable here, such as social justice and equity. The High Court had no jurisdiction similar to that of the Labour Court, to determine disputes on the basis of social justice, or principles B of equity. On the introduction of

the multi-currency basket in January 2009, Parliament did not see fit to introduce any legislation to enable the court to look at judgments given before January 2009. In the absence of legislative authority that enabled the court to look at judgments given in Zimbabwe dollars before dollarization in January 2009, the court must C be guided by the usual common law rules.

Held, further, that the court was being asked, not to supplement, clarify or correct the judgment of January 2008, but to alter its substance. The alterations were not incidental or consequential corrections, but went to the very heart of the orders made. In respect of towing charges and medical expenses already incurred, the purpose of the application was D to change the very basis of the currency in which those special damages were incurred. In respect of the three headings of general damages, the application intended to change the basis on which those damages were sought when those damages were suffered in Zimbabwe, in the currency of payment then prevailing.

Held, E further, that on the issue of currency nominalism, while on the whole the court had inherent jurisdiction to ensure that the process of execution was neither abused nor unfair, it did not have jurisdiction to rewrite an order in the manner sought by the applicant. The court could not revalue an order for the purpose of execution, let alone completely rewrite an order granted nearly seven years earlier. Any such power would have G to be the consequence of legislation, which currently does not exist in Zimbabwe. Under the common law, and as a protection against loss of value of a judgment, where a litigant has suffered a loss that can properly be expressed in a foreign currency, the court can enter judgment in the foreign currency, but payment must be made in local currency converted H as at the date of payment. Had the judgment in this matter been sought and made after the January 2009, even in respect of an accident that occurred before that date, judgment could be granted in a foreign currency as being the effective currency to redress the loss. However, judgment was sought prior to January 2009, specifically in Zimbabwe dollars, and quite clearly Zimbabwe dollars was the currency in which the losses H were sustained. The local currency had not yet been demonetised or

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formally abolished. If any conversion is to take place for the purposes of A allowing the enforcement of a judgment granted before February 2009 in Zimbabwe currency, it must be done at the rate prevailing on the date of payment, not the date of judgment. If the applicant's judgment has been rendered incapable of being satisfied through lack of a legislative framework that regulates its execution, then the applicant's remedies must lie with the legislature. B

Held, further, that the applicant had his "once and for all" right to claim damages for the injuries which he sustained in the accident. He elected to litigate for those damages in 2008. He claimed those damages, partly in Zimbabwe currency and partly in Botswana pula. He received the awards he sought. He had a further opportunity to recast his case before C the Supreme Court in October 2010 when the appeal was heard, which was after dollarization. He chose not to do so, or to seek the leave of the Supreme Court to have the Zimbabwe dollar component of the judgment converted to a currency that he could use. The Supreme Court, on application for its leave, would have had an opportunity for judge-made law to decide whether to remit the matter back to the D High Court for evidence to be adduced, on the question of the conversion of the Zimbabwe dollar component of the judgment, to a currency of the applicant's choice.

Held, further, that the court was thus *functus officio* and the matter was *res judicata*. E

Cases cited

Custom Credit Corporation (Pty) Ltd v *Shembe* 1972 (3) SA 462 (A)

Dajen (Pvt) Ltd v *Durco (Pvt) Ltd* 1998 (2) ZLR 235 (S)

Dir of Hospital Svcs v Mistry 1979 (1) SA 626 (A)

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)F

Fleximail (Pvt) Ltd v Samanyau & Ors S-21-14

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

Madhatter Mining Co v Tapfuma 2014 (2) ZLR 125 (S)

Maheya v Independent Africa Church 2007 (2) ZLR 319 (S)

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

Mangwiza v Ziumbe NO & Anor 2000 (2) ZLR 489 (S) G

Matanhire v BP Shell Marketing Svcs (Pvt) Ltd 2004 (2) ZLR 147 (S)

Mukorera v Ocean Breeze Engine & Cooling Systems 2011 (2) ZLR 340 (H)

Nzuma & Ors v Hunyani Paper & Packaging Civil appeal No. SC 137/11

Oslo Land Co Ltd v *Union Government*1938 AD 584H

2015 (1) ZLR p277

Chigumba J

Poseidon Ships Agencies (Pty) Ltd v *African Coaling & Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D)A

Shava v *Bergus Invstms (Pvt) Ltd* 2011 (2) ZLR 340 (H)

Standard Chartered Bank of Canada v *Nedperm Bank Ltd* 1994 (4) SA 747 (A)

Stuart v *National Railways of Zimbabwe* HB-7-12 B

Union Wine Ltd v *Snell & Co Ltd* 1990 (2) SA 189 (C)

West Rand Estates Ltd v *New Zealand Insurance Co Ltd*1926 AD 173

Legislation considered

Labour Act [*Chapter 28:01*], s 89 C

Reserve Bank of Zimbabwe Act [*Chapter 22:15*], ss 41,44 & 44A

Case information

A P de Bourbon SC, for the applicant

L Uriri, for the respondent

Judgment

Chigumba J: D Should our courts be courts of law or courts of justice? One would presuppose that the law is justice and that justice is the law. To the ordinary man, i.e. one who is untutored in the practice of the law and the pursuit of justice, it would appear that law and justice have a symbiotic relationship; one is nothing without the other. Yet, those who practice the law, will know that, often times than not, the rigid application of the law E may lead to a palpable injustice. That is why the law is fluid, meaning that its application depends on the circumstances before the court. The law must be applied to avoid perpetrating an injustice, especially where the extent of the injustice would be the non suiting of a litigant, leaving the litigant with nowhere else to turn, as it were. That is not to say that non deserving F litigants should be shielded from the inevitable consequences that flow from a correct application of the law. On the contrary, it is my view that, our courts should be courts of law that derive their authority and legitimacy from a fair and impartial application of the law, in the pursuit of justice, and fairness.

The applicant filed a court application before this court on 8 May 2011 seeking an order for the amendment of the judgment handed down by this G court on 23 January 2008, under case number HC 4252/2001. The order of January 2008 reads as follows:

Judgment is entered in favor of the plaintiff as follows: That defendant pays:

(a) BWP63 750 as replacement value for his damaged vehicle.

(b) $83 717.09 for medical expenses. H

(c) BWP 1 800 000 for loss of income.

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Chigumba J

(d) $3.50 for towing charges. A

(e) BWP12 000 for car hire charges.

(f) $2 000 000 for pain and suffering.

(g) $850 000 for disability.

(h) $1 000 000 for future medical expenses.

(i) Costs of suit.

The order sought by the applicant in this matter relates to the Zimbabwe dollar component of that order. The applicant seeks an order that the judgment of this honorable court in case number HC 4252/2001, dated 23 January 2008 be amended as follows:

That the defendant pays to the plaintiff:

1. US$ 2 790.60 for medical expenses.
2. US$ 116.66 for towing charges.
3. US$66 666.67 for pain and suffering.
4. US$28 333.30 for disability.
5. US$66 666.67 for future medical expenses.
6. Interest at the prescribed rate of 5 per cent per annum calculated from the date of judgment to the date of payment.
7. Costs of suit.

It is common cause that the respondent has paid in full for the component of the 2008 judgment which provides for payment in Botswana pula, in terms of the order of the Supreme Court dated 28 February 2012. It is common cause that payment of the Zimbabwe dollar component of the 2008 judgment remains outstanding, although the respondent has tendered this payment to the applicant. It is common cause that the applicant did not attempt to execute in respect of the Zimbabwe dollar component at the date of the judgment in 2008, and that, in 2009, Zimbabwe adopted a multicurrency regime. It is also common cause that after the accident the applicant was disabled. The applicant has come before this court and avers that he requires urgent medical attention. He has attached a quotation from a medical specialist Mr Bijay B Garach, dated 23 March 2012, to show that he requires an estimated US$279 400 for surgery in Durban, South Africa. The purpose of the surgery is to correct a condition of stiffness in the right knee which is possibly related to a fracture and muscle tightness, and to an associated knee joint injury. Mr. B A V Ncube, a specialist orthopedic surgeon, certified that the applicant is in pain and gross discomfort in his right foot, on 4 June 2012, and that he needs further surgery to remove the implants and to fuse his mid-foot and correct his mal-aligned toes.

Chigumba J

The applicant is currently unemployed and has urgent need for funds in order to access the medical assistance he requires. On 24 October 2012, the applicant's legal practitioners addressed a letter to the respondent, to which they attached the judgment of 23 January 2008. In the letter, the respondent was reminded that the Zimbabwe dollar component of the judgment remained unpaid, in a total of ZW$4 937 217.09. It is common cause that the Zimbabwean dollar has fallen into disuse. The respondent was advised that the applicant had approached the Reserve Bank of Zimbabwe which had confirmed that as at 23 January 2008, one United States dollar was equivalent to ZW$30 000. Converting ZW$3 937 212 10 to USD translates into US$164 573.90. Interest at the prescribed sum translates to US$41 143.47. The total demanded from the respondent is US$205 717.38.

In a letter dated 8 November 2012, the respondent, through its legal practitioners, tendered the ZW dollars to the applicant, on the basis that the Zimbabwean dollar was still valid currency, and that, it being the currency of the judgment which the applicant was seeking to enforce, that is the currency in which applicant should be paid. The computation of the interest was brought into question. In a letter dated 19 November 2012, applicant's legal practitioners explained that interest had been calculated at the prescribed rate of interest from February 2008. In para 12.1-14 of the founding affidavit applicant avers that:

> "I need to execute against the respondent. I need to have the judgment in my favor sounding in Zimbabwe dollars *amended* to reflect United States dollars so that I am paid in a currency that I will be able to use. I submit that the Zimbabwe dollar is now moribund and has fallen into disuse. It is no longer the currency in use at the moment. There is no point in giving me, as the respondent contends, the Zimbabwe dollars as I will not be able to use them to access the medical attention that I so badly and

urgently require. I submit that I am entitled to effective remedies and giving me Zimbabwean dollars is hardly such effective F remedies" (my emphasis).

The notice of opposition was filed of record on 30 May 2013. Mr Charles Stewart Gardiner deposed to the opposing affidavit on behalf of the respondent. He is a son of the managing director of the respondent, and himself a director of the respondent company. He averred that the applicant should apply to the G court which granted the judgment in question for the judgment to be corrected in accordance with the rules of this court. Mr Gardiner denied that applicant had a right to correct the judgment in terms of the rules of this court. He denied that the applicant was permanently disabled, although he accepted that the applicant was injured in the accident. He emphatically declared that the applicant was dishonest and that he had fraudulently exaggerated H his injuries and allegations of disability. He denied that the applicant is in

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urgent need of medical attention. He reiterated that applicant has already A received a sum of US$90 332.24 from the respondent and averred that this amount ought to have been more than sufficient to fund whatever medical attention applicant allegedly requires.

It was admitted that the respondent is bound by the terms of the Supreme Court order. The respondent expressed certainty that the applicant's awards which B emanated from this court were based on fraud, fraudulent documents and perjured evidence, and referred the court to its application for leave to adduce further evidence which it filed before the Supreme Court simultaneously with its appeal under case number SC19/2008. Mr Gardiner averred that the court should have regard to the independent expert evidence that was filed before the Supreme Court to prove the allegations of fraud against the C applicant. He reiterated that the respondent believed that it was obliged to effect payment in the amount claimed by the applicant and awarded to him by the court. It was denied on behalf of the respondent, that it was to blame for the applicant's hardship because the basis of the liability of the respondent arises entirely from a finding of vicarious liability for the negligence of its former employee. D

Three issues fall for determination by this court. The first one is whether this court has jurisdiction to entertain this matter. The second issue for determination is whether it is competent for this court to award payment in United States dollars, in respect of a judgment sounding in Zimbabwean dollars. Finally, we must determine whether it is competent to determine the E rate of exchange by which the conversion may be made.

Jurisdiction

It was submitted on behalf of the applicants that the High Court has jurisdiction to deal with any matter that is placed before it and that, there is nothing amiss in this court dealing with a matter arising out of a judgment of this F court. The court was referred to *Fleximail (Pvt) Ltd* v *Samanyau & Ors* S-21-14 as authority for this proposition. The court perused the judgment of the court *a quo (Samanyau & Ors* v *Fleximail (Pvt) Ltd* 2011 (1) ZLR 527 (H)). The issue for determination, as it was understood by that court was that the applicants had approached that court since it was the only court G with inherent jurisdiction seeking a *declaratur* that the principle of currency nominalism has no place in labour law (i.e. a common law principle) as it would be at variance with the Labour Act's aim of achieving social justice. The applicants sought a further *declaratur* that to the effect that damages in lieu of reinstatement have to be paid in an effective manner, that is, in an amount, currency and quantity that achieves fairness as required by the H

Labour Act. A A further order compelling the respondent to pay damages in USD was sought. The principle relied on by the applicants was that a successful appellant ought to have the discretion to choose payment of damages in the currency that will redress the injury suffered and adequately compensate him for the loss as well as fulfill the objectives of the Labour Act.

The respondent had opposed the relief sought by the applicants before the B High Court, on the basis that the matters raised had been canvassed and dismissed by the Labour Court and were therefore *res judicata,* that this matter was purely a labour issue by virtue of s 89(6) of the Labour

Act [*Chapter 28:01*], that the court was being asked to usurp the role of Parliament by repealing the common law principle of currency nominalism and that the court was C being asked to "overrule" those decisions of the Supreme Court which had already made the point that in quantifying damages in labour disputes, the rates that are applicable are those that applied at the time of dismissal or suspension. The High Court (Mutema J) took the view that it was the only court with power to issue declaratory orders. On the issue of usurping the role of Parliament, the High Court took the view that D

> "it is not impermissible for the judiciary to make law by way of decided cases if an opportunity presents itself to plug a legislative gap especially where not to do so will leave many an unlawfully dismissed employee languishing in an asylum of financial misery".

On p 5 of the judgment the High Court postulated the question of whether, in the circumstances of the case before it, it ought to declare that E

> "*in the realm of employment relations, the principle of nominalism has for now, no place until economic normalcy has been restored*" (my emphasis).

Clearly the High Court limited the application and scope of its judgment, to the realm of employment relations, and to the period during which there was lack of economic normalcy. It applied the principles of equity, and enjoined F itself to "tread a path that will avoid iniquity and injustice where legislative intervention is not forthcoming". The High Court ordered the respondent to pay damages in US dollars using the official exchange rate obtaining as at 5 July 2007. The respondent appealed. The appeal and cross appeal came before a five member bench of the Supreme Court on 11 September 2013. G The judgment of the Supreme Court was to allow the appeal to the extent of setting aside the judgment of the High Court for lack of jurisdiction. It was held, with the consent of both parties, that the matter should have been determined by the Labour Court.

It is this court's view that it would not be proper to rely on principles which were enunciated in the context of labour disputes, which differ materially H from the matter under consideration, and in respect of which certain principles

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underline their conduct, which are not applicable here, such as social justice A and equity. The court is bolstered in its view by the recent judgment of the Supreme Court in *Madhatter Mining Co* v *Tapfuma* 2014 (2) ZLR 125 (S), where the court stated that the *Samanyau* judgment had been overturned on appeal and could no longer be cited as authority or as a basis on which a court can convert damages awarded in Zimbabwe dollars to United States dollars. The vexing question of whether the US dollar amount would give B true value to the damages that the respondent would be entitled to was posed by the court. True value was defined as a value that would "neither overcompensate the respondent nor inadequately do so". Other pertinent considerations for a court faced with the question of converting Zimbabwe currency to US dollars were the issue the two main Zimbabwe dollar to C US$ exchange rates which obtained prior to 2009, i.e. the official and the unofficial rates. See p 136 of the judgment.

Finally the Supreme Court emphasized that it is the Labour Court – and not the Supreme Court – which in endowed with jurisdiction to apply principles of equity in its determination of labour disputes, based on the provisions of s 2A of the Labour Act. See *Nzuma & Ors* v *Hunyani Paper & Packaging*D Civil Appeal SC137/11**.** I accepted the submission made on behalf of the respondent that this court has no similar jurisdiction to that of the Labour Court, to determine disputes on the basis of social justice, or principles of equity.

The Labour Court in the *Madhatter* case was then given guidance by the E Supreme Court, and the matter was remitted back to it for the determination of the following issues:

(a) What is the effect of the change of currency effected in February 2009 on debts occurring before the effective date?

(b) Does the Labour Court have power to order payment in the operational currency (the United States dollar) of debts incurred under the Zimbabwe F dollar currency which, though not demonetized, is no longer in use?

(c) Has the principle of currency nominalism any application to the circumstances of this case?

(d) The method of calculating the quantum of the debt in current realizable currency if the conclusion of the above issues is in favor of payment in G United States dollars.

These questions given for the guidance of the Labour Court are restated here, in the realization that these are the same questions that this court may have to determine if the question of jurisdiction in this matter before it is resolved in favor of the applicant. H

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In A defence of this claim, the respondent raised the main point of the absence of jurisdictional basis on which the court can "change" or "convert" a judgment that was given by it, in January 2008. I am grateful to counsel for the respondent for the extensive heads of argument filed of record, which appeared to have been tailored to respond to the questions for guidance which were issued by the Supreme Court as listed above, for the guidance of the B Labour Court. It was submitted on behalf of the respondent, that if there is such a jurisdiction, there is a dispute as to whether it can be exercised five years after the original judgment and one year after the judgment of the Supreme court in which the matter was not raised, whether the conversion is to take place on the date of the judgment or on the date on which payment C is made, what the proper rate of exchange would be, whether the conversion can be made in respect of those heads of damages which were incurred and paid for in Zimbabwe dollar currency and awarded as special damages at trial, and finally the *bona fides* of the applicant.

The respondent submitted that medical expenses and towing charges are D special damages which were incurred in Zimbabwe dollars, not United States dollars. The loss was incurred 15 years ago in Zimbabwe dollars, the damages were alleged and proved seven years ago in Zimbabwe dollars, the respondent disputed the applicant's entitled to interest at the prescribed rate, or at any rate, on the basis that the prescribed rate of interest sought to be relied on was only introduced on 23 October 2009 by SI 164 of 2009, E and backdated to 23 October 2008. Finally, the respondent submitted that, in respect of the three heads of general damages that applicant now seeks payment for in foreign currency, which was not available to him, and which he did not seek, at the time of the trial, those damages are not due to him in any other currency other than the currency that he claimed them in.

It F is trite that the cause of action for the relief being sought must be found in the founding affidavit. See *Poseidon Ships Agencies (Pty) Ltd* v *African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) *; Director of Hospital Services* v *Mistry* 1979 (1) SA 626 (A) at 635H-636B*; Dajen (Pvt) Ltd* v *Durco (Pvt) Ltd* 1998 (2) ZLR 235 (S) at 257; *Mangwiza* v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (S) at 429. It was submitted on behalf of the G respondent that the founding affidavit does not disclose the cause of action to support the relief sought. It was submitted, correctly in my view, that the applicant's need for urgent medical attention is not a jurisdictional basis for the relief sought. It was contended that the fact that the Zimbabwe dollar is now moribund and has fallen into disuse, and that, there is no point making H payment in it, again affords the applicant no jurisdictional basis for the relief

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Chigumba J

sought. Finally, it was submitted that to plead a*d misericordiam* that he is A entitled to an effective remedy does not assist the applicant at all.

It is common cause that upon the introduction of the multi-currency basket in January 2009, Parliament did not see fit to introduce any legislation to enable this court to look at judgments given before January 2009. It was contended that, in the absence of legislative authority that enables this court to look at B judgments given in Zimbabwe dollars before dollarization in January 2009, we must be guided by the usual common law Rules. I find myself in full agreement with these statements of the law as it currently stands. However, in case I am wrong in my view that there is no jurisdictional basis on which this court may grant the relief sought by the applicant, I will proceed to deal with the merits of the matter. C

The law that underlies the legal principle of *functus officio* was summarized in *Firestone South Africa (Pty) Ltd* v *Genticuro AG* 1977 (4) SA 298 (A) at 306-307as follows:

> "The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, D alter, or supplement it. The reason is that it thereupon becomes *functus officio*, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased. See *West Rand Estates Ltd* v *New Zealand Insurance Co*

Ltd 1926 AD 173 at 176, 178, 186-7 and 192; *Estate Garlick* v *Commissioner of Inland Revenue* 1934 AD 499 at 502 … There are however a few exceptions to the rule which are mentioned in the old authorities and have been authoritatively accepted by this court … provided the court is approached E within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

(i) the principal judgment or order may be supplemented in respect of accessory or consequential matters for example costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant…

(ii) the court may clarify its judgment or order if on a proper interpretation, F the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order…

(iii) the court may correct a clerical, arithmetical or other error in its judgment in order to give effect to its true intention…

(iv) where counsel has argued the merits and not the costs of a case…but the G court makes an order granting costs…it may thereafter correct, supplement or alter the order…"

The submission that none of these exceptions apply to the applicant was accepted by the court, as well as reference that the principle of finality in litigation (*interest reipublicae ut sit finis litium)* is a part of our law. See *Matanhire* v *BP Shell Marketing Services (Pvt) Ltd* 2005 (1) ZLR 140 (S) H

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at A 146-147*, Maheya* v *Independent Africa Church* 2007 (2) ZLR 319 (S) at 324H-325B **.** This court also accepted as correct the submission made on behalf of the respondent, that the present application is not intended to supplement, clarify or correct the judgment of January 2008, but to alter its substance. The alterations are not incidental or consequential corrections, but go to the very heart of the orders made. In respect of towing charges and B medical expenses already incurred, the purpose of the application is to change the very basis of the currency in which those special damages were incurred. In respect of the three headings of general damages, the application intends to change the basis on which those damages were sought, when those damages were suffered in Zimbabwe, in the currency of payment then prevailing.

It C is common cause that there was a considerable delay by the applicant, in bringing this application, the original judgment having been handed down in January 2008 and the use of the United States dollar having been authorized by January 2009. The appeal was heard in October 2010 and the Supreme Court judgment handed down in February 2012. Nearly 15 years have passed since the accident in question and four and half years since dollarization. No D explanation was given by the applicant for the inordinate delay in making this application. Any application to correct or supplement an order, whether in terms of the common law or under r 449 of the High Court Rules 1971, must be brought as soon as possible, or at the very least within a reasonable period. See *West Rand Estates Ltd* v *New Zealand Insurance Co Ltd*1926 E AD 173 at 179***.***

The leading cases on currency nominalism in this court merit discussion. In *Shava* v *Bergus Investments (Pvt) Ltd* 2011 (2) ZLR 340 (H) **,** a full bench of this court, through my brother Mutema (Chiweshe JP concurring), held that a party cannot revalue a judgment debt for purposes of execution. Citing *Mukorera* v *Ocean Breeze Engine and Cooling Systems* HH-13-08 F (unreported), the court held it to be trite that the principle of currency nominalism was part of the law of Zimbabwe. The court held that, to allow a party to change the currency of the judgment was "not only incompetent for arbitrariness but offended against the time honored principle of currency nominalism". The court said the following at 343E:

> "That G principle holds that a debt sounding in money has to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of the currency".

The court also said at 344:

> "It is beyond argument that the first respondent's debt sounded in money and the judgment was given in March 2008 with the specific directive that the values of H whatever was damaged by the appellant were to be as at the time of judgment.

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> The values were in Zimbabwe dollars and not in US dollars. The principle of A currency nominalism was therefore still applicable. It was accordingly idle for the first respondent to revalorize its claim on execution. *It ought to have made a court application for the conversion of the currency*" (my emphasis).

Mr *de Bourbon*, for the respondent, submitted that, before this court came to the above conclusion, it ought to have examined in greater detail, the impact of the "once and for all rule" and of the submission that the court cannot B "convert" the currency on application because it will be *functus officio.* I found this view persuasive. It was submitted, further, that reliance on the *Mukorera* case should not have led the court to the conclusion that it came to, because in that case, the court was emphatic in its view that:

> "…the distortions caused by inflation in the economy should not lead to the C wholesale distortion of legal principles that have withstood the test of time in a bid to find legal solutions to a problem that is not legal in nature and origin and may prove to be transient. I am yet to be persuaded that revalorization is part of our law of debt collection".

In conclusion, this court's opinion on the issue of currency nominalism, in the circumstances of this case, is that, while on the whole this court has inherent jurisdiction to ensure that the process of execution is neither abused nor D unfair, it does not have jurisdiction to rewrite an order in the manner sought by the applicant. I hold the considered that, this court cannot revalue an order for the purpose of execution, let alone completely rewrite an order granted nearly seven years ago. Any such power would have to be the consequence of legislation, which currently does not exist in Zimbabwe. E

Under the common law, and as a protection against loss of value of a judgment, where a litigant has suffered a loss that can properly be expressed in foreign currency the court can enter judgment in foreign currency, but payment must be made in local currency converted as at the date of payment. See *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil Company of Zimbabwe*1988 (2) ZLR 482 (S) at 492**,** where the court said that: F

> "Fluctuations in world currencies justify the acceptance of the rule not only that a court order may be expressed in units of foreign currency, but also that the amount of the foreign currency is to be converted into local currency at the date when leave is given to enforce the judgment. Justice requires that a plaintiff should not suffer by reason of devaluation in the value of the currency between G the date on which the defendant should have met his obligation and the date of actual payment or the date of enforcement of the judgment. Since execution cannot be levied in foreign currency, there must be a conversion into local currency for this limited purpose and the rate to be applied is that obtaining at the date of enforcement".

See also *Standard Chartered Bank of Canada* v *Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 777**,** where it was stated that H

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> "… A the damages to be awarded in this case should be expressed in US dollars. It is implicit in any order to this effect that the judgment debt may be satisfied in South Africa by payment in the foreign currency or by payment of its equivalent in rand when paid".

This court is persuaded by the contention, which is supported by various decisions by the Supreme Court and the High Court, that, had the judgment B in this matter been sought and made after January 2009, even in respect of an accident that occurred before that date, judgment could be granted in foreign currency as being the effective currency to redress the loss. As further authority for this proposition, see *Kwindima* v *Mvundura*2009 (1) ZLR 168 (H) **.** However, in this case judgment was sought prior to January 2009, specifically in Zimbabwe dollars, and quite clearly Zimbabwe dollars C is the currency in which the losses were sustained. Section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:1*5] reads:

> "41 Legal tender of banknotes
>
> (1) A tender of a banknote which has been issued by the Bank and which has not been demonetised in terms of subsection (2) shall be legal tender in payment within Zimbabwe of the amount expressed in the note. D
>
> (2) The President may, by statutory instrument, call in and demonetise any banknotes issued by the Bank, and shall likewise determine the manner in which and the period within which payment for such banknotes shall be made to the holders thereof."

It is common cause that the President has not demonetized the Zimbabwe currency in terms of the Presidential Powers (Temporary Measures) (Currency E Revaluation and Issue of New Currency)

Regulations 2009, as confirmed by the Finance Act 2009, and that he had not done so at the time that this application was filed, on 8 May 2013

Section 44 of the Reserve Bank of Zimbabwe Act provides that:

> "44A Legal tender of foreign currencies
>
> The Minister may, in regulations made under section 64, prescribe that, subject F to such conditions as may be specified in the regulations, a tender of payment in any currency other than Zimbabwean currency shall be legal tender in all transactions or in such transactions as may be specified in the regulations."

It is submitted on behalf of the respondent, quite correctly in my view, that this provision does not render the Zimbabwe currency to be moribund, but G that it allows foreign currencies to be treated as legal tender, in addition to the Zimbabwe currency. It was correctly submitted, in my view, that there is no statute or other legal instrument that has abolished or suspended the existence of the Zimbabwe currency. Accordingly, as a matter of law, if not practice, the Zimbabwe currency still exists. See *Stuart* v *National Railways of Zimbabwe* HB-7-12 (unreported)**.** If any conversion is to take place for the H purposes of allowing the enforcement of a judgment granted before February

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2009 In Zimbabwe currency, it must be done at the rate prevailing on the A*date of payment,* not the date of judgment (my emphasis). The Legislature in its wisdom only enacted s 44A of the Reserve Bank Act, and did see fit to provide a further framework to guide us on how to dispose of these matters. If the applicant's judgment has been rendered incapable of being satisfied through lack of a Legislative framework that regulates its execution, then applicant's remedies must lie with the Legislature. B

The applicant seeks to use the date of judgment as the date on which conversion into US dollars is to be made, and seeks to use the rate of exchange allegedly applicable on that date. However, it is pertinent to note that, at the date of the judgment, January 2008, the use of United States dollars in Zimbabwe was not permitted, and any judgment given in United States dollars as C being the currency in which the loss was sustained could only be satisfied by the payment of Zimbabwe currency as at that date. This court lacks that jurisdictional basis to make any conversion as at the date of judgment because such conversion would at that time have been contrary to exchange control legislation. Any attempt to do a conversion as at the date of the judgment would in effect be to render a completely new judgment, in breach of the D once and for all rule.

The "once and for all rule" is a common law rule that stipulates that a plaintiff must claim in a single action compensation for the damage he has already suffered and the prospective loss which he reasonably expects to suffer in future. See *Oslo Land Co Ltd* v *Union Government*1938 AD 584 at 589 and E*Custom Credit Corporation (Pty) Ltd* v *Shembe* 1972 (3) SA 462 (A) at 472**.**

P Q R Boberg *The Law of Delict* sums up the common law position as follows:

> "A single wrongful act gives rise to a cause of action for all damage – past and future – that it causes. This means that a plaintiff cannot claim compensation piecemeal for his various losses as they occur: he must sue 'once and for all' for F the whole of his damage, seeking redress not only for the harm he has already suffered (actual or accrued loss) but also for the harm he expects to suffer in the future (prospective loss). And if he succeeds he will generally be awarded damages in a lump sum, payable immediately, in respect of both past and future losses".

See also *Evins* v *Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835A-E where the court said: G

> "The 'once and for all' rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract … Expressed in relation to delictual claims, the rule is to the effect that in general a plaintiff must claim in one action all damages … This rule appears to have been introduced into our practice from English law. Its introduction and the manner of its application by our courts have been subject to criticism … but H

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> it A is a well entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action to ensure that there is an end to litigation".

In *Dube* v *Banana* 1998 (2) ZLR 92 (H) at 94 and 105 the law in Zimbabwe was stated by Smith J in the following terms:

> "Our law recognizes the 'once and for all rule' which states that a plaintiff, when B suing for damages, must sue for all his damages in a single action, both for loss suffered and for prospective loss … In my opinion the once and for all rule should be modified. I consider this can best be done by an Act of Parliament rather than by 'judge made' law, which is, by its very nature haphazard and piecemeal. The Law Development Commission of Zimbabwe issued a report entitled report No. 43: 'Once and for all rule in claims for damages', in which, as the title suggests, it examined the rule and in which it made recommendations for its reform". C

Parliament has not intervened to change the law.

This court accepts as a correct application of the law to the circumstances of this case that the applicant has had his once and for all right to claim damages for the injuries which he sustained in the accident. He elected to litigate for those damages in 2008. He claimed those damages partly in Zimbabwe D currency and partly in Botswana pula. He received the awards he sought. He had a further opportunity to recast his case before the Supreme Court in October 2010 when the appeal was heard, which was after dollarization. He chose not to do so, or to seek the leave of the Supreme Court, to have the Zimbabwe dollar component of the judgment "converted" to a currency E that he could use. The Supreme Court, on application for its leave, would have had an opportunity for "judge made law" to decide whether to remit the matter back to this court for evidence to be adduced, on the question of the 'conversion' of the Zimbabwe dollar component of the judgment, to a currency of the applicant's choice. The applicant cannot now come back to this court seeking to change the judgment given to him. The applicant has F already had his day in court he cannot now come for a second judgment arising out of the same circumstances as the first.

Res judicata is a rule that matters which have already been adjudicated upon between the same parties cannot be adjudicated again. It is a consequence of the "once and for all rule". In *Union Wine Ltd* v *Snell and Co Ltd* 1990 (2) SA 189 (C)G at 196 van Deventer AJ said:

> "Although it is not clear from the cases whether the 'once and for all' rule is just a manifestation of the *exceptio rei judicatae* or whether it has a wider range than the latter, it is settled practice in South Africa that where a cause of action gives rise to more than one remedy a plaintiff who pursues one of those remedies and has obtained a judgment thereupon can be met with a plea of *res judicata* if he H should institute a second action to pursue one of the other remedies".

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It is common cause that the parties before this court are the same as those A before the court in 2008. It is common cause that the cause of action is the same, and that damages are being sought pursuant to that cause of action. In the January 2008 judgment this court decided that the applicant had suffered damages which required to be redressed by the payment of Zimbabwe currency. This court accepts that all those issues are now *res judicatae* and cannot be re-opened. B

In the result, this court finds that it has no jurisdiction to grant the relief sought by the applicant, and that, no factual basis has been laid in the founding affidavit to justify granting the relief sought. The court is *functus officio,* the damages which the applicant seeks to be "converted" to another currency now, were assessed and awarded in 2008. Any attempt to re-assess the award C made in 2008 now, even if such assessment involves the calculation of the value of the damages in a different currency, would amount to changing the nature of the judgment given in 2008, a power which is only available to a superior court, on appeal. The matter cannot properly be determined by the improper use of this court's inherent jurisdiction. This court's inherent jurisdiction does not cloak it with power to re-determine issues between the D same parties, which have already been conclusively determined. It may only do so on limited grounds, where it is directed to do so by a higher court, the Supreme Court, and on very specific directions. There being no such direction from the Supreme Court, to this court, it is trite that the issues between the parties are *res judicatae.*E

This court has no jurisdiction to exercise the same principles of social justice and equity as the Labour Court, and any attempt to rely on labour matters, as the basis for inviting this court to exercise powers that are specific to and pertinent to the Labour Court, will find no truck with this court. In the circumstances of this case, where "accident damages" were assessed and awarded as special damages and general damages, under the law of delict, it is F my view that, there is no factual or legal basis in the papers filed of record, on which this court can "convert" a 2008 judgment made in Zimbabwe currency to United States dollars. Despite this finding, this court

respectfully declines to exercise its discretion and grant punitive costs against the applicant, as advocated for by counsel for the respondent.

Accordingly, the application is dismissed with costs on the ordinary scale. G

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners

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NET•ONE CELLULAR (PVT) LTD v MINISTER OF LABOUR & ANOR 2015 (1) ZLR 291 (H)

Citation	2015 (1) ZLR 291 (H)
Case No	Judgment No. HH-211-15
Court	High Court, Harare
Judge	Makoni J
Heard	28 February 2013; *CAV*
Judgment	25 February 2015
Counsel	*D Ochieng,* for the applicant *C Mucheche*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 16 – protection against deprivation of property – s 21 – right to freedom of association – requirement for employer to register with* D *National Employment Council for industry and to pay subscriptions to council – breaches of employer's constitutional rights – statutory provision that employers in particular industry bound by CBAs for that industry – not a breach of employer's constitutional right to freedom of association*

Court – *High Court – jurisdiction – constitutional matters – court having* E *power to issue declaratur in such matters and to strike down legislation*

Employment – *employment councils – right of employer not to be member of council and not to pay subscriptions – collective bargaining agreement – binding nature of – binding on employers in industry even if employer* F *not a member of employment council*

Headnote

In an application brought before the coming into effect of the 2013 Constitution, the applicant sought to challenge the constitutionality of s 82(1)(a) of the Labour Act [*Chapter 28:01*] and ss 2(a), 33 and 36 of the Collective Bargaining Agreement (CBA) for the Communications and Allied G Services Industry, published in SI 1 of 2012, in terms of which the Agreement was deemed to be binding on the applicant, although it had not been a party to its formulation and had no wish

to be a member of the relevant national employment council. It argued that its rights of freedom of association under s 21(1) of the 1980 Constitution were being infringed and that its right under s 16 not have its property compulsorily acquired H was infringed by being made to pay subscriptions. The respondents

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argued that the High Court had no jurisdiction in constitutional matters A and that the matter should be decided in the Labour Court.

Held, that the High Court has jurisdiction in constitutional matters and is entitled to rule on whether breaches of the Declaration of Rights or other violations have occurred. Under s 13 of the High Court Act [*Chapter 7:06*], the court has "full original civil jurisdiction over all persons and B over all matters within Zimbabwe". A civil matter is any case or matter which is not a criminal case or matter, and clearly includes constitutional matters.

Held, further, that the Labour Court had no power to decide disputes about alleged violations of the Constitution, nor to strike down legislation, nor to issue declaraturs. C

Held, further, that s 82 of the Act brings in the element of the binding nature of registered CBAs. It provides that a registered CBA shall be binding on the parties to the agreement, including all the members of such parties, and all employers, contractors and their employees in the undertaking or industry to which the agreement relate. But who are the parties to the CBA? Section 2(a) of the CBA states that it applies to all employers in D the communications and allied services industry. In other words, even if the applicant had no part in the agreement, whether as principal or agent, it is bound by the CBA by virtue of it being an employer in the communications industry. The applicant was being compelled, against its will, to be bound by the provisions of the CBA and as a consequence register with the second respondent and pay dues due to the second E respondent. Section 21 of the Constitution provides the right to freedom of association, which embraces the right to form and join associations and the right not to be compelled to belong to any association. Section 21(3)(c) recognises that the formation and activities of employees associations are an exercise of the right of freedom of associations. Section 36 of F the CBA violated the applicant's rights, in so far as it compelled the applicant to behave as though it was the second respondent's member by requiring it to register with it.

Held, further, that the applicant, whether as a principal or through an agent, did not participate in, neither did it sign, the agreement. The whole G fabric of the process of collective bargaining and enforceability is meant to protect the interests of those parties that are affected by it. The law maker determined that the registration of the CBAs shall have the effect of binding all players in the industries to which they apply. Not to do so would defeat the objectives of collective bargaining, some of which are to restore the unequal bargaining position between employers and H

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employees A and to peg minimum conditions of employment to ensure adequate protection of the weaker party to the employment contract i.e. the employee. Statutory intervention is justified to deter some unscrupulous employers from abusing and trampling upon the rights of employees with impunity. The fact that the applicant had a functional workers' committee and had been working together with it on issues such B as improvement of conditions of service was neither here nor there. The fact that the applicant paid wages higher than those set by the second respondent was commendable but could not detract from the fact that it has to be bound by the law governing the operations of its industry. This did not detract from the applicant's right to freedom of association.

Editor's note: C under s 85(1) of the 2013 Constitution, any person listed in the subsection is entitled to approach a court, alleging that a fundamental right or freedom enshrined in the Declaration of Rights is being infringed. However, the Constitutional Court must confirm any order of constitutional invalidity made by another court before that order has any force (s 167). The High Court is specifically given the power under s 171(1)(c) to decide D constitutional matters except those that only the Constitutional Court may decide. See also the decision of Mathonsi J in *Gurta AG* v *Gwaradzimba NO* 2013 (2) ZLR 399 (H) (judgment no. HH-353-13), where the learned judge held that, under the previous Constitution, the High Court had no jurisdiction to issue declaraturs in constitutional matters. E

Cases referred to

Banana v *A-G* 1998 (1) ZLR 309 (S)

Capital Radio (Pvt) Ltd v *Broadcasting Authority of Zimbabwe Ors* 2003 (2) ZLR 236 (S)

Chituku v *Minister of Home Affairs and Ors* 2004 (1) ZLR 36 (H) F

Gomba v *Assd Mine Workers Union* HH-118-05

Mushoriwa v *Zimbank* 2008 (1) ZLR 125 (H)

Narasha v *Old Mutual Life Assurance Co Ltd* 2000 (2) ZLR 197 (H)

National Constitutional Assembly v *The President & Ors* 2005 (2) ZLR 301 (H)

Nyambirai v *NSSA* 1995 (2) ZLR 1 (S) G

Zimbabwe Banking & Allied Workers Union & Anor v *Beverley Bldg Soc & Ors* 2007 (2) ZLR 117 (H)

Legislation considered

Collective Bargaining Agreement for the Communications and Allied Services Industry H (SI 1 of 2012), ss 2(a), 33 & 36

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Constitution of Zimbabwe 1980, ss 16, 21 & 81 A

High Court Act [*Chapter 7:06*], s 36

Labour Act [*Chapter 28:01*], ss 27, 56, 74(2), 79, 80, 82(1)(a) & 89(6)

Case information

D Ochieng, for the applicant

C Mucheche, for the second respondent B

Judgment

Makoni J: The applicant approached this court seeking the following relief:

"IT IS DECLARED AS FOLLOWS:

1. The application to the applicant of the provisions of a collective bargaining agreement born of a process to which the applicant was not party is a C violation of the applicant's constitutional right to freedom of association.
2. The imposition upon the applicant of the requirement to register with the second respondent is a violation of the applicant's constitutional right to freedom of association.
3. The mandatory payment of dues by the applicant to the second respondent is a compulsory acquisition of the applicant's property in violation of the D applicant's constitutional right to protection from the compulsory acquisition of property without compensation.
4. Section 82(1)(a) of the Labour Act [*Chapter 28:01*] and ss 2(a) and 36 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (SI 1 of 2012) are in violation of s 21 of the Constitution to the extent that they provide for the infringements declared in paras A1 E and A2 of this order.
5. Sections 33 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (SI 1 of 2012) is in violation of s 16 of the Constitution by reason of the infringement declared in para A3 of this order.

IT IS ORDERED THAT: F

1. Sections 2(a), 33 and 36 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (SI 1 of 2012) are struck down.
2. Section 82(1)(a) of the Labour Act [*Chapter 28:01*] is struck down to the extent of deleting the words, 'and all employers, contractors and their respective employees in the undertaking or industry to which the agreement G relates'".

The background to the matter is that the applicant is in the business of providing cellular communications. The second respondent is a council established in terms of s 56 of the Labour Act

[*Chapter28:01*] ("the Act") for the communications services sector.

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Sometime in 2010 the second respondent, after having followed the due process provided for in the Act, varied its scope to include, *inter alia,* cellular communications.

In a letter dated 9 January 2012 the second respondent advised the applicant that a Collective Bargaining Agreement for the Communications and Allied Services Industry (the (CBA) had been published on 6 January 2012, in SI 11 of 2012. It further invited the applicant to register with the second respondent and pay the dues as stipulated in the CBA. The applicant objected and the second respondent threatened to have the applicant arrested. The applicant then instituted the present proceedings.

The applicant avers that, despite being the biggest employer in the communications industry, it was not aware of and did not participate in the creation of either the second respondent or the CBA. It has no wish to be a member of second respondent nor does it wish to pay dues to it. It has notified the second respondent which has sought to compel the applicant to submit to membership and remit dues in terms of the provisions of the CBA and the Act.

It further avers that s 82(1)(a) of the Act makes CBAs apply to entire industries without regard to whether the participants have adopted the instrument. It is not a member of the employers association that is party to the CBA and is not aware whether any of its employees belong to a union party. Section 82(1)(a) therefore violates its right to freedom of association and is therefore inconsistent with s 21 of the Constitution. Sections 2 (a) and (b) of the CBA are unconstitutional for the same reasons.

The applicant further avers that s 33 and 36 of the CBA are unconstitutional. Section 33 effects a compulsory acquisition of the applicant's funds by requiring the applicant to pay dues to second respondent. This violates s 16 of the Constitution. Section 36 compels the applicant to join the second respondent thereby violating the applicant's rights under s 21 of the constitution. The second respondent went to the extent of violating the applicant's rights by making a report to the police and persuading the police to arrest officers of the applicant.

In opposition the second respondent initially raised two points *in limine* namely:

(1) whether this court has jurisdiction to entertain the present matter.

(2) whether the applicant is approaching the court with dirty hands.

On the merits the application is opposed on the basis that the applicant is bound by the CBA as it is registered with the respondent in terms of the

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law. The CBA is registered to cover the entire communications industry. The applicant is bound by the CBA as it is an employer in the Communication and Allied Services Industry. The publication of the CBA as SI 1 of 2012 was constructive notice to the applicant about its coming into being.

At the hearing of the matter, the second respondent abandoned the issue of dirty hands. It will not be necessary to make a determination on it.

The second respondent approached the issue of lack of jurisdiction of this court from two angles *viz*:

(i) that this court has no jurisdiction to declare legislation unconstitutional

(ii) that this court has no jurisdiction, at first instance, to entertain the application as the matter emanates from the provisions of the Act.

I will deal with the points *seriatim,*

Lack of jurisdiction to declare legislation unconstitutional

Mr *Mucheche* submitted that the issue for determination by this court is captured in para 5 of the applicant's founding affidavit.

He contended that this court has no jurisdiction, at first instance, to determine D a constitutional application. Under the then Constitution, that jurisdiction was the preserve of the Supreme Court sitting as a constitutional court. The Supreme Court was approached either by way of referral in terms of s 24(2) or a direct application in terms of s 24(1).

He further contended that, although the application is for a declaratur, it in E fact a disguised constitutional application. He submitted that the court should look at the grounds on which the application is based rather than the order sought. He concluded by submitting that the relief sought by the applicant can only be obtained in the Supreme Court. He cited *Narasha* v *Old Mutual Life Assurance Co Ltd* 2000 (2) ZLR 197 (H).

Mr *Ochieng* submitted that in terms of s 13 of the High Court Act F [*Chapter 7:06*] this court has jurisdiction to entertain the matter. The Supreme Court will then confirm the order of the High Court.

In my view, it is trite, that this court has jurisdiction in constitutional matters. This court is entitled to rule on whether breaches of the Declaration of Rights or other violations have occurred. For the benefit of the second respondent, G and like other minded litigants, I will restate the law on this point in the hope that this point will not detain courts in the future

Section 81 of the Constitution provides:

> "(1) There shall be a High Court which shall be a Superior Court of record and shall have jurisdiction and powers as may be conferred upon it by or in terms of the Constitution or any Act of Parliament" H

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Section 13 A of the High Court Act [*Chapter 7:06*] provides:

> "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".

Civil matters are defined as any case or matter which is not a criminal case or matter. Clearly this includes constitutional matters.

This B position was re-enforced in *Capital Radio (Pvt) Ltd* v *Broadcasting Authority of Zimbabwe Ors* 2003 (2) ZLR 236 (S) at 243C-D. Chidyausiku CJ spoke of a litigant's right to institute a constitutional application in the High Court when he stated:

> "The provisions of s 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High Court the common law test, namely C having an interest in the matter under adjudication, is sufficient to establish *locus standi*. In a constitutional application in the High Court all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter".

In any event there is a plethora of cases in our jurisdiction where the High Court has dealt with constitutional matter. See *Zimbabwe Banking & Allied Workers Union & Anor* v *Beverley Building Society & Ors* 2007 (2) ZLR 117 (H); D*Chituku* v *Minister of Home Affairs & Ors* 2004 (1) ZLR 36 (H); *Banana* v *Attorney-General* 1998 (1) ZLR 309 (S). See also Greg Linnington *Constitutional Law of Zimbabwe* (2001) pp 18-20.

Labour dispute

Mr *Mucheche* submitted that, although the applicant is seeking for a declaratur, E the court must look at the nature of the dispute and see whether the legislature has not provided relief in another forum. The issue of CBAs fall under the domain of Labour Court. The Labour Act provides for adequate remedies to address peculiar circumstances of an employer or employee such as that fact that section 81 of the Act provides for an appeal to the Labour Court.

He F further submitted that in terms of s 89(6) of the Act no other court in Zimbabwe is competent to deal with labour matters other than the Labour Court. The applicant is taking issue with provisions that regulate the administration of CBAs. The provisions are within the ambit and shape of the Labour Act and the forum of first instance is the Labour Court and not any other court. G

Mr *Ochieng* contended that the dispute between the parties relate to violations of the applicant's constitutional rights and the Labour Court is not empowered to grant such relief. He further contended that the Labour Court has no power to issue declaraturs.

Paragraph 5 of the applicant's founding affidavit is very clear on the H nature of the application before me. The application seeks to challenge the

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constitutionality of s 82(1)(a) of the Act and s 2(a), 33 and 36 of SI 1 of 2012. A It is a dispute over the violations of the applicant's constitutional rights and is not the sort of dispute that is reserved for the Labour Court by s 89(6) of the Act. The Labour Court is a creature of statute and is empowered only to grant the forms of relief that are specified in the relevant statute. See *Gomba* v *Associated Mine Workers Union* HH-118-05. B

There is nothing in the enactment that empowers the Labour Court to determine disputes as to violations of the Constitution and strike down legislation. In any event it is settled law that the Labour Court has no power to issue declaraturs. See *Mushoriwa* v *Zimbank* 2008 (1) ZLR 125 (H) at 129 A-C.

It is clear from the above that from whichever angle you look at this issue, this court has jurisdiction to determine the dispute before it. C

Violation of s 21(1) of the Constitution

Mr *Ochieng* contended that the nub of the issue is that by compelling the applicant to register with the second respondent the CBA forces the applicant into a position where it is a member of the second respondent and deprives D the applicant of its property. The applicant is being compelled to associate with the second respondent. Such conduct is a negation of the freedom that s 21 of Constitution serves to uphold. In addition to the forced association, s 33 of the CBA, reinforced by s 2(a) of the CBA and s 82(1)(a) of the Act, compel the applicant to pay levies to the second respondent against its will. E

Mr *Ochieng* contended that voluntary participation in the process and conscious submission to agreed terms are essential elements of collective bargaining. This is confirmed by the fact that participation in collective bargaining is not made mandatory by s 74(2) of the Act. It uses the permissive "may" in relation to collective bargaining. Mr *Ochieng* further contended that levies being demanded by the second respondent do not constitute a rate F or tax that is reasonably justifiable in a democratic society and therefore not a permissible derogation from s 16(1) of the 1980 Constitution.

Mr *Mucheche* submitted that the second respondent is a legal body set up in terms of s 56 of the Act. It has authority to regulate conditions of employment in the communications industry. The fact that the applicant professes ignorance of its existence does not take away its legal authority. G He further contended that CBAs created minimum conditions of employment in an industry and are justified in democratic society. They harmonise the interests of employers and employees. The applicant is bound by operation of the law as it is operating in that industry and cannot seek to escape the minimum conditions of that industry. The applicant did not take advantage H

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of A the domestic remedies provided for in the Act if it had any issues with the coming into being of the CBA that binds it.

The ILO Right To Organise And Collective Bargaining Convention (No. 98) 1949 describes collective bargaining as:

> "Voluntary negotiation between employees or employer's organisations and B workers organisations, with a view to the regulation of terms and conditions of employment by collective agreement".

Some of the essential features of collective bargaining are:

> "(i) It is a method used by trade unions to improve the terms and conditions of employment of their members.
>
> (iii) It seeks to restore the unequal bargaining position between employer and C employee".

An agreement recorded as the outcome of a collective bargaining is binding on the parties to the agreement. Collective bargaining legislation imposes obligations on the parties to adhere to the

terms of the agreement. See Collective Bargaining by Dr I Chanetsa in *PE COP Journal of Social and Management Sciences* p 6. D

In our jurisdiction, CBAs are entered into in terms of s 74(2) which reads:

> "(2) Subject to this Act and the competence and authority of the parties trade unions and employers or employees organisations may negotiate collective bargaining agreements as to any conditions of employment which are of mutual interest to the parties thereto ..." E

Section 79 of the Act provides for the registration of the CBA by the Registrar of Labour. In terms of s 80(1) the registration of the CBA, the Minister of Labour shall publish agreement as a statutory instrument. In terms of s 80(2):

> "The terms and conditions of the collective bargaining agreement shall become effective and binding –
>
> (a) from the date of publication of the agreement in terms of subsection (1) or F
>
> (b) from such other date as may be specified in the agreement".

The impugned s 82(1)(a) provides:

> "82 Binding nature of registered collective bargaining agreements
>
> (1) Where a collective bargaining agreement has been registered it shall – G
>
> (a) with effect from the date of its publication in terms of section *eighty-five*, or such other date as may be specified in the agreement, be binding on the parties to the agreement, including all the members of such parties and all employers, contractors and their respective employees in the undertaking or industry to which the agreement relates".

Section 2(a) of the CBA provides:

> "This H collective bargaining agreement shall apply to –

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> (a) all employers in the communication and allied services industry i.e A telecommunications, postal services, cellular communications, courier services, phone shops and public financial series within the communications sector.
>
> (b) All non-managerial employees (including contract or fixed period employees in the communications and allied services, in the area of Zimbabwe".

What comes out from the definition of collective bargaining in the convention B and from s 74(2) of the Act is the voluntary element in collective bargaining. Voluntary participation in the process and conscious submission to the agreed terms are essential elements.

Section 82 brings in the element of the binding nature of registered CBAs. It provides that a registered CBA shall be binding on the parties to the C agreement, including all the members of such parties, and all employers, contractors and their employees in the under taking or industry to which the agreement relate. As the applicant asks, who are the parties to the CBA? The answer is to be found in s 2(a) of the CBA, which states that it applies to all employers in the communications and allied services industry. In other words, even if the applicant had no part, whether as principal or agent, in D the agreement it is bound by the CBA by virtue of it being an employer in the communications industry. The applicant complains that it is being compelled to register with the second respondent i.e. associate with the second respondent against its will.

It is not in dispute that the applicant is being compelled, against its will, to E be bound by the provisions of the CBA and as a consequence register with the second respondent and pay dues due to the second respondent.

The applicant contends that s 21(3) recognises that the formation and activities of employers associations are an exercise of the freedom of association. The exercise is especially insulated from derogations that are permissible in the case of other associations of persons. F

Mr *Mucheche*, on the other hand, contends that s 27(3) provides an exception or derogation to s 21(1) and that the registration of a CBA does not run foul to s 21(1) of the Constitution.

Section 21 provides:

> "(1) Except with his own consent or by way of parental discipline, no person G shall be hindered in his freedom of assembly and association that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

(2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association. H

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(3) A Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) …

(b) …

(c) for the registration of companies, partnerships, societies or other associations B of persons, *other than political parties, trade unions or employers organisations*; or

(d) …

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society" (my emphasis). C

I find merit in the submissions by Mr *Ochieng.* Section 21(3)(c) recognises that the formation and activities of employees associations are an exercise of the right of freedom of associations. He concludes on p 80 of the heads of argument by saying:

"So special is that exercise, that it is specifically insulated from derogations that are permissible in the case of other associations of persons". D

In other words, there are derogations in respect of other associations but not in respect of trade unions or employers' associations.

As is clear from s 21 of the Constitution, the right to freedom of association embraces the right to form and join associations and the right not to be E compelled to belong to any association. *National Constitutional Assembly* v *The President & Ors* 2005 (2) ZLR 301 (H) at 316G reinforced the point when Guvava J (as she then was) stated:

"I know of no right in the constitution which forces person to associate against their will. Indeed, it would be a total negation of that very freedom which s 21 of the constitution strives to uphold particularly the freedom of association" F

I would agree with the applicant that s 36 of the CBA violates the applicant's rights in so far as it compels the applicant to behave as though it was the second respondent's member by requiring it to register with it. As regards s 82 of the Act, my view is that the issue for determination is whether the applicant can be bound by the provisions of the CBA in issue. It is common G cause that the applicant, as a principal or though an agent, did not participate in, neither did it sign, the agreement. I find merit in the submissions made by Mr *Mucheche* that the whole fabric of the process of collective bargaining and enforceability is meant to protect the interests of those parties that are affected by it. The lawmaker determined that the registration of the CBAs shall have the effect of binding all players in the industries to which they H apply. Not to do so would defeat the objectives of collective bargaining, some

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of which are to restore the unequal bargaining position between employers A and employees and to peg minimum conditions of employment to ensure adequate protection of the weaker party to the employment contract i.e. the employee. Statutory intervention is justified to deter some unscrupulous employers from abusing and trampling upon the rights of employees with impunity.

The whole essence of collective bargaining was aptly under scored by B Archibold Cox *Labour Law, cases and Materials* 13 ed 2001 at p 200 where he stated:

"Genuine collective bargaining is the only way to attain equality of bargaining power. The greatest obstacle to collective bargaining are employer dominated unions, which have multiplied with amazing rapidity since Industry Recovery C Act. Such a union makes a sham of equal bargaining power.

Only representatives who are not subservient to the employer with whom they deal can act presently in the interest of employees. For these reasons the very first step towards genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with grievances, labour disputes, wages rated, or hours of employment." D

At p 289, the learned author reinforces the importance of collective bargaining at industry level as follows:

> 'The perceived benefits of multiemployer bargaining are several. For both the employers and the union, it brings less expensive, less frequent and mare informed negotiations than would obtain on an individual-employer basis. Workers desire E industry-wide bargaining also because it may help the union insure gains which no one employer can grant for fear of competitive disadvantage."

The fact that the applicant has a functional workers' committee and has been working together with it on issues such as improvement of conditions of service is neither here nor there. The fact that the applicant pays wages F higher than those set by the second respondent is to be commended but cannot detract from the fact that it has to so bound by the law governing the operations of its industry.

I do not see how the applicant's right to freedom of association is violated. In any event, s 34 of SI 1 of 2012 provides adequate remedies to address the peculiar circumstances of the applicant. In terms of s 34 of SI 1 of 2012, the G respondent, may in its sole discretion, grant exemptions.

In my view it will not be necessary to determine the issue of the violation of s 16 of the Constitution in view of my finding that the applicant cannot be compelled to register with the second respondent. Registration would have entailed that the applicant pays dues to the second respondent. H

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The A applicant did not seek an order for costs against the respondents. It has succeeded in part. The respondent sought costs on a higher scale. It raised points *in limine* which unnecessarily detained the court. Taking into account that the issue that was raised by the applicant was important, I will not make an order of costs against either party. See *Nyambirai* v *NSSA* 1995 (2) ZLR 1 (S) at 16B. B

In the result I will make the following order.

A. IT IS DECLARED AS FOLLOWS

1. The imposition upon the applicant of the requirement to register with the second respondent is a violation of the applicant's constitution right to freedom of association. C
2. The Collective Bargaining Agreement for the Communications and Allied Services Industry (SI 1 of 2012) are in violation of s 21 of the Constitution to the extent that they provides for the infringements declared in paragraphs of this order.

B. IT IS ORDERED THAT: D

1. Sections 2(a), 33 and 36 of the Collective Bargaining Agreement for the Communications and Allied Services Industry (SI1 of 2012) are struck down.
2. There will be no order as to costs. E

Coghlan Welsh & Guest, applicant's legal practitioners

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

Matsikidze & Mucheche, second respondent's legal practitioners F

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S v MOTSI 2015 (1) ZLR 304 (H)

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Citation 2015 (1) ZLR 304 (H)

Case No Judgment No. HH-185-15

Court High Court, Harare

Judge Hungwe J & Bere J

Heard 15 January 2015; *CAV*

Judgment 25 February 2015

Counsel *P Nyeperai,* for the appellant
E Makoto, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Evidence – *expert evidence – approach to be taken to – must be considered* C *in conjunction with rest of evidence, not in isolation – expert evidence only admissible where relevant*

Headnote

The function of an expert witness is to assist the court to reach a conclusion on D a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive, but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can E decide without receiving expert opinion is in principle inadmissible because of its irrelevance.

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves: no more, no less. The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other F evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Two critical matters spring to mind as a consequence.

Firstly, expert evidence does not "trump all other evidence". It should be tested against known facts, as it is the primary factual evidence which G is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision. A court is not compelled to accept the evidence of an expert but is entitled to accept or reject that evidence like any other, bearing in mind the whole of the evidence in the case. H

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Secondly, A a court must not consider expert evidence in a vacuum. It should not therefore be artificially separated from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and *vice versa*. B A court should not therefore allow an expert merely to present his conclusion without also presenting the analytical process by which he reached that conclusion.

Cases cited

Annama v *Chetty & Ors* 1946 AD 142C

Glenister v *President, Republic of SA & Ors* [2013] ZACC 20; 2013 (11) BLCR 1246 (CC)

HKSAR v *Chan Sze Pui, Gloria* [2004] HKCU 298

R v *Nyamayaro* 1967 (4) SA 263 (RA); 1967 (3) RLR 228 (AD)

Routestone Ltd v *Minories Finance Ltd & Anor* [1997] BCC 180; [1997] D 1 EGLR 123

R v *Sibanda* 1963 (4) SA 182 (SR); 1963 (2) R & N 601 (B)

Stewart v *Glaze* [2009] EWHC 704 (QB)

van der Westhuizen & Anor v *SA Liberal Ins Co Ltd* 1949 (3) SA 160 (C)

Woodhouse v *Britannic Assurance plc* [2004] All ER 166 (D); UKEAT E 0132/03/RN

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 51(1), 54 & 258(2)

Case information

P Nyeperai, for the appellant F

E Makoto, for the respondent

Judgment

Hungwe J: The appellant was jointly charged with two other persons with two counts; namely attempted murder in contravention of s 189 as read with s 47 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] G and unlawful possession of a firearm in contravention of s 4 of the Firearms Act [*Chapter 10:09*]. After a protracted trial, he was convicted on both counts. In respect of the attempted murder charge he was sentenced to four years' imprisonment of which one year was suspended for five years on the usual conditions of good behaviour. In respect of the firearms charge, he H was sentenced to 12 months' imprisonment of which five months or were

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suspended for five years on the usual conditions of good behaviour. The A firearm was forfeited to the State. He now appeals against both conviction and sentence in respect of both counts.

Of the several grounds of appeal raised in the notice and grounds of appeal by the appellant, a reading of the heads of argument reveals that only two grounds are relied upon on appeal. These grounds may be summarised B as follows. In respect of the first count of attempted murder the appellant contends that the court *a quo* erred in relying on the ballistic evidence tendered by Detective Assistant Inspector Dube to convict. In respect of the second count, the contention is that the court *a quo* erred in admitting into evidence an extract of the police diary or notebook made by Detective Inspector Jachi as it was inadmissible. It is critically important to set out the evidence upon C which the criticism on appeal is based and assess the impact of the evidence on the nature of the case against the appellant.

The court *a quo* heard evidence from seven witnesses called by the state. Only the complainant in the attempted murder charge was a non-police witness. The rest were. I will discuss the evidence of Detective Assistant D Inspector Dube and its probative value *vis-à-vis* the appellant's conviction on the first count of attempted murder.

The appellant was convicted for attempted murder on the basis that the expert evidence from the ballistic examination identified the weapon recovered from the appellant's residence as the one that was fired at the complainant in the E attempted murder charge. In respect of this count the following facts were largely not in dispute. On 29 February 2012 the complainant was trailed by two motor vehicles as he drove home from town. The one vehicle gave up the pursuit before the complainant went out of town. The other pursued him out of town. When he got to a certain spot, the complainant decided to pull off the road and see whether his pursuers would drive past. They did F not. They pulled up alongside his vehicle and opened the off-side doors. The complainant saw the barrel of a gun and decided to speed off. He was shot at, with one bullet head lodging in the boot of his motor vehicle. He later discovered another lodged in a loaf of bread. After the assailants drove back into town, the complainant drove to the nearest police station. He took G two police officers to the scene of the shooting that same night. The police officers recovered three spent cartridges from the tarred road at the scene of the shooting and one bullet head from the complainant's motor vehicle boot. These were taken to Marlborough Police Station. The investigating officer, Detective Inspector Brian Maigeta, conveyed these items to Assistant Inspector Innocent Dube ("Dube") of the Police Ballistics Laboratory for H

Hungwe J

examination A and further processing on 6 March 2012. Dube produced a report on 12 March 2012 in which he stated the following:

> "REPORT
>
> On 6 March 2012 the following were received per hand of number 056826 R Detective Sergeant Maigeta:
>
> (a) 3 x 9 x19mm Fired cartridge cases B
>
> (b) 1 x bullet head
>
> Examination of exhibit (a) showed that they are 9 x19 mm fired cartridge cases which were discharged from the same weapon that chambers 9 x19 mm live ammunition.
>
> Examination of exhibit (b) showed that it is a 9 mm bullet head which was C discharged from a weapon that chambers 9 mm live ammunition.
>
> Exhibits (a) and (b) did not match any outstanding scenes in the laboratory."

On 23 May 2012 Dube produced another report in the same format to the following effect. He had received from Detective Sergeant Nhokwara ("Nhokwara") a 9 mm CZ pistol serial number 20799/ BSAP 423 and a .38 Special Taurus revolver without a serial number as it had been erased. The D two firearms were functional. He wrote:

> "Examination of the chambers and barrels of exhibits (a) and (b) showed some deposits of gunshot residue an indication that weapons (a) and (b) were fired but cannot ascertain when they were fired.
>
> Test cases from exhibit (a) matched exhibits (a) and (b) in FB65/2012, (CID E HOMICIDE HARARE, MARLBOROUGH CR 12/3/2012, ATTEMPTED MURDER, CORNER ALENDALE ROAD AND KATHLEEEN CHRISTON BANK ON 29/02/2012).
>
> Test cases fired from exhibit (b) did not match any outstanding scenes in the laboratory.
>
> Weapons (a) and (b) were manufactured after 1900." F

On 18 May 2012 a team of detectives led by Detective Inspector Alexander Jachi of the Criminal Investigating Department's Vehicle Theft Squad, investigating some other offences, received a report concerning the appellant and others. That report gave them reasonable cause to believe that they might be able to recover firearms from the appellant. Acting on this piece G of information the team proceeded to Dema. They found the appellant at his uncle's homestead and placed him under arrest. They asked him to take him to his residence which was a single flat-roofed room some 200 m away. In the presence of his uncle, a search of the appellant's room yielded a CZ pistol from between the mattress and base-bed. There is dispute as to whether the appellant and his uncle voluntarily signed an acknowledgement of the H recovery of the fire-arm. This is the pistol handed to Dube on 21 May 2012

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by Nhokwara. This information was relayed to Detective Sergeant Maigeta A ("Maigeta") who is the investigating officer for the Christon Bank attempted murder report. The appellant and his co-accused were then charged with attempted murder and unlawful possession of fire-arms.

The defence attacked the ballistics reports as so lacking in detail that it could not possibly be the basis for the conclusions made by Dube. In court Dube suggested that the weapon recovered at the appellant's Dema residence was B the same weapon which was fired during the commission of the attempted murder charge. Despite the heavy criticism of the lack of detail in the report by the defence, the learned trial magistrate went on to accept the report by Dube as sufficient evidence to link the appellant to the attempted murder of the complainant. The trial magistrate also pointed to the fact that the C appellant was known to his erstwhile co-accused as another factor which strengthened the case against the appellant since, according to the court *a quo*, that other co-accused was linked to the break-in in Bulawayo in which the pistol was stolen. He accepted that there was no eye witness to the shooting which placed the appellant at the scene but still held it proper to convict the D appellant. He reasoned that because the pistol found inside the appellant's residence was found to have been fired, therefore it was the appellant who fired it. He convicted the appellant of illegal possession of the firearm too. Mr *Nyeperai*, for the appellant, persisted with his argument that there was no sufficient evidence that the CZ pistol was the same pistol fired in the attempted murder incident at Christon Bank. It was incumbent on the expert witness E to have recorded the similarities which he testified to in court as the basis of the opinion which he expressed

in court that the pistol recovered from the appellant is the same one fired at the complainant. Because he did not, the opinion he expressed ought not to have been accepted by the court below.

The Constitutional Court of South Africa expressed itself on the subject of expert witnesses in *Glenister* v *President of the Republic of South Africa & Ors*F [2013] ZACC 20; 2013 (11) BLCR 1246 (CC) at para [7]:

> "In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the G reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance. The rule was crisply stated in *Genticuro AG* v *Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616H:
>
> > '[T]he true and practical test of the admissibility of the opinion of a skilled witness is whether or not the court can receive "appreciable help" from that witness on the particular issue'. H

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> Expert A witness testimony on an ultimate issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. On the other hand the opinion of the witness is excluded not because of a need to preserve or protect the fact-finding duty of the court, but because the evidence makes no probative contribution."

Expert testimony, like all other evidence, must be given only appropriate B weight. It must be as influential in the overall decision-making process as it deserves: no more, no less. The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Two critical matters spring to mind as a consequence. Firstly, expert evidence C does not "trump all other evidence": *Woodhouse* v *Britannic Assurance plc* [2004] All ER (D) 166 (Sep); UKEAT 0132/03/RN

Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, D against which actions are then to be rigidly judged with a mathematical precision: *Stewart* v *Glaze* [2009] EWHC 704 (QB). In *HKSAR* v *Chan Sze Pui, Gloria* [2004] HKCU 298 it was held that a court is not compelled to accept the evidence of an expert but is entitled to accept or reject that evidence like any other, bearing in mind the whole of the evidence in the case. The court had placed the expert testimony in the context of the whole E of the evidence and determined what weight could be placed upon it.

Secondly, a court must not consider expert evidence in a vacuum. It should not therefore be artificially separated from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more F persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa.

Similarly, the South African courts have said that expert testimony can serve as a useful tool or guide against which the reliability of the testimony of eyewitnesses can be checked and tested: *van der Westhuizen & Anor* v *SA Liberal Insurance Co Ltd* 1949 (3) SA 160 (C). It is for the court to determine, G on the balance of probability, on all the evidence, where the probabilities lie.

In *Routestone Ltd* v *Minories Finance Ltd & Another* [1997] BCC 180; [1997] 1 EGLR 123, Jacob J observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and H the reasons for it. The judge pithily commented "(if) the reasons stand up

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the opinion does, if not, not" (at p 188). A court should not therefore allow A an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

In *R* v *Nyamayaro* 1967 (4) SA 263 (RA); 1967 (3) RLR 228 (A), Beadle CJ adopted the well-known *dicta* of Greenberg JA in *Annama* v *Chetty & Ors* 1946 AD 142 at p 155 where the learned judge of appeal said, in speaking of the evidence of a handwriting expert: B

> "His function is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors." C

See also *R* v *Sibanda* 1963 (4) SA 182 (SR); 1963 (2) R& N 601 (SR).

The fact of the matter in the present case is that the expert witness Dube did not compile his report in a manner which would permit a court to understand and follow the reasoning behind his conclusions. He sought to excuse the scanty nature of his report by stating that although it was desirable to include D the detail which would allow the court to follow his reasoning, this was not a legal requirement for the sufficiency of his report. In maintaining this stance, he failed to play his role as an expert. Dube ought to have demonstrated those grooves, if such were present, their similarities in their location on both sets and so on, in order to enable the trial court to make its own conclusion as to the probative value of his expressed opinion regarding the issue to be E decided. It is clear his testimony in its present form could not possibly have helped the court to decide the question it was faced with. I am persuaded by the argument so clearly laid down in the case law, in this and other jurisdictions, that there has to be such evidence laid before the trier of fact as sufficient for him or her to make up his own mind as to the correctness of any proposition which the expert makes in his testimony. F

Clearly there is nothing, besides Dube's say-so, to enable the court *a quo* to have arrived at the conclusion that the bullet which was fired at the complainant in the Christon Bank incident was discharged by the pistol recovered from the appellant. As such one cannot state with certainty that this was indeed the G case, as the prosecution argued. Without this detail, the trial court was not entitled to find, as it did, that the expert's evidence was admissible. It was not. His opinion was not backed by evidence. It remained that; an opinion; and was therefore irrelevant to the issue to be decided. Without the ballistic expert's evidence, there is no evidence linking the appellant to the shooting at Christon Bank. H

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There A is another basis for coming to the same conclusion. Even assuming that the ballistic report, as amplified by the oral testimony by Dube, was strong enough to place the CZ pistol at Christon Bank on 29 February 2012, the evidence on the record shows beyond doubt how fluid the movement of this particular pistol was. It was allegedly stolen in Bulawayo during a break-in at a police officer's residence. One Gerald Mugabe and the appellant's B co-accused are said to have at some point dealt with it. Who then fired it on 29 February 2012? Could it be that a similar pistol was fired by someone on that day? It is in my view quite probable that a similar pistol out there may have been fired. This is why the ballistic report ought to have been detailed as to exclude this possibility. It has not been excluded. There is no date given C for this break-in, nor when the officer, from whom it was stolen, gave his report. This was extremely crucial and critical as the record states that this type of pistol is a standard police issue firearm. The possibility of a similar one D having been fired by someone else was not in my view eliminated. On that basis, it was unsafe to convict on the charge of attempted murder, without further evidence. In any event, the appellant was not identified as having been present when the complainant was shot at. As such, it is difficult to find any basis for a sound conviction on a charge of attempted murder.

In the result he ought to have been acquitted on this count.

As for the second count I am not persuaded by the argument put forward by the appellant. In short, the argument is that he was convicted on the basis of E inadmissible evidence. I disagree.

The evidence shows that the police detectives upon arresting the appellant decided to conduct a search of his premises. He indicated the house which was subject of the search. They had no search warrant but in terms of s 51(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the police details F were entitled to conduct the search. That section states:

> "51 Search and seizure without warrant
>
> (1) A police officer may, without warrant, search any person or container or premises for the purposes of seizing any article referred to in section *forty-nine* and additionally, or alternatively, seize any such article

– G

(a) if the person concerned consents to the search for and additionally, or alternatively, the seizure of the article in question or if a person who may consent to the search of the container or premises consents to such search and additionally, or alternatively, the seizure of the article in question; or

(b) if he on reasonable grounds believes that –

(i) a warrant would be issued to him in terms of paragraph (a) of subsection (1) H of section *fifty* if he applied for one; and

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(ii) the delay in obtaining a warrant would prevent the seizure or defeat A the object of the search, as the case may be."

See also s 54.

The appellant contends that the police had not properly warned and cautioned him before they asked him to sign the diary in which a "mute confession" in the form of an acknowledgement of the fact of the recovery of the pistol was B made. If I understand this argument, the appellant contests the admissibility of the diary entry by D/S Jachi which the court *a quo* ruled admissible. Even if it were conceded that the procedure required to admit this type of evidence was not strictly followed, I come to the conclusion that the fact of recovery of the pistol is still saved by s 258(2) of the Act. It provides:

"258 Admissibility of facts discovered by means of inadmissible confession C

(1) It shall be lawful to admit evidence of any fact otherwise admissible in evidence, notwithstanding that such fact has been discovered and come to the knowledge of the witness who gives evidence respecting it only in consequence of information given by the person under trial in any confession or statement which by law is not admissible in evidence against him on such trial, and notwithstanding that the fact has been discovered and come to the knowledge of the witness against the wish or will of the accused. D

(2) It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial."

The appellant pointed out his residence. A search without warrant followed on E the basis that the police had reason to believe that they would recover firearms (s 258(2)). The search was conducted in his presence. That search yielded a CZ pistol. The magistrate correctly rejected the claims that police planted the firearm which was recovered. The appellant's witnesses who testified to the circumstances surrounding the search at the appellant's residence F were correctly ruled unreliable by that court. The fact that the firearm was recovered from the appellant's house is, in my view admissible. Reliance can be placed on the statutory provisions set out above. The irregularity posed by the admission of the police diary cannot in my view be said to be so gross as to vitiate the conviction. With or without that piece of evidence, the fact is the pistol was found in appellant's possession. He was, in my G view, properly convicted.

In the premises the appeal against conviction in the second count fails. As for sentence passed in respect of that count, I find no basis to disturb it as it is eminently fair in all the circumstances of this case. I therefore make the following order: H

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1. The A appeal against conviction for attempted murder succeeds. The conviction in the court *a quo* is set aside and the sentence passed in respect of that count is quashed.
2. The accused is found not guilty and is acquitted in count 1.
3. The appeal against conviction and sentence in count 2 is dismissed. B

BERE J concurred.

Costa & Madzonga, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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ZB BANK LTD v ERIC ROSEN (PVT) LTD & ORS 2015 (1) ZLR 314 (H)

Citation	2015 (1) ZLR 314 (H)
Case No	Judgment No. HH-183-15
Court	High Court, Harare
Judge	Mafusire J
Heard	15 January 2015; *CAV*
Judgment	25 February 2015
Counsel	*O Mutero,* for the plaintiff *T K Hove,* for the defendants
Case Type	Opposed application; special case
Annotations	No case annotations to date

Flynote

Interest – *rate of – when interest charged can be said to be usurious – when interest rate charged in contract can be said to be unfair in terms of Consumer Contracts Act or a penalty out of proportion to prejudice suffered by creditor – need for evidence to be led* C

Headnote

The plaintiff was a registered commercial bank. The first defendant, D undoubtedly the *alter ego* of the second and third defendants – themselves husband and wife – obtained from the plaintiff a revolving credit facility to boost working capital. Repayments would be made in instalments over twelve months. Interest would be charged at a flat rate of 30 per E cent per annum. In the event of a default, the penalty rate of interest was pegged at 50 per cent per annum. It would change from time to time. The second and third defendants bound themselves as sureties and co-principal debtors with the first defendant for the due repayment of the loan. The plaintiff duly disbursed the loan and the first defendant duly utilised the proceeds. However, it failed to repay as per the agreement F and eventually the plaintiff issued summons.

The defendants' defence was that the plaintiff's penalty rate of interest at 50 per cent per annum was usurious, contrary to public policy and therefore unlawful. They referred to a number of statutes. The first was the Prescribed Rate of Interest Act [*Chapter 8:10*], which empowers G the Minister of Justice, with the approval of the Minister of Finance, to prescribe or fix the rate of interest on certain debts. The rate at the time of this case was 5 per cent. The next statute was the Moneylending and Rates of Interest Act [*Chapter 14:14*]. By s 8, no lender can stipulate, demand or receive from the borrower, interest (on money lent and advanced) at a rate greater than the prescribed rate. The third was the H

Consumer A Contracts Act [*Chapter 8:03*]. By its preamble, the purpose of the Act is to provide relief to parties to consumer contracts which are unfair or contain unfair provisions. In terms of s

2 a "consumer contract" is defined to mean a contract for the sale or supply of goods or services or both. The defendants argued that a loan agreement was a contract for the supply of services, namely banking services. The court B may grant various forms of relief if satisfied that a consumer contract is "unfair". The final statute was the Contractual Penalties Act [*Chapter 8:04*]. The preamble to this Act says, *inter alia*, it is an Act to provide for the enforcement of penalty clauses in contracts. A "penalty" is defined to include any money C which a person is liable to pay, or any money which a person is liable to forfeit under a penalty stipulation. A "penalty stipulation" is defined to include a contractual provision under which a person is liable to pay any money as a result, or in respect of, an act or omission in conflict with a contractual obligation.

The defendants' argument was that the penalty rate of interest was excessive, burdensome, oppressive and out of proportion to any prejudice that it D may have suffered by reason of the defendants' failure to pay the rest of the debt on time; that an interest rate of 50 per cent was usurious and contrary to public policy, particularly as the inflation rate was no more than 5 per cent. The rate charged by the plaintiff was far higher than that charged by other commercial banks. The court should put a cap on E the maximum rates of interest.

The plaintiff argued that where parties have entered into a contract freely and voluntarily its validity ought to be preserved. It was submitted that, other than the Contractual Penalties Act, none of the other pieces of legislation referred to by the defendants was applicable. With regards the Consumer Contracts Act in particular, that applied only to contracts F for the sale or supply of goods or services. Banks lend money. To offer loans is not to sell or supply goods or services. The onus had been on the defendants to provide empirical evidence to show that a penalty rate of 50 per cent per annum was disproportionate to the cost incurred by the plaintiff in procuring the money that it had lent to the defendants. Without that evidence, the court could not possibly grant relief. G

Held, that the Prescribed Rate of Interest Act was not applicable, as the prescribed rate does not apply to interest-bearing debts governed by an agreement. The Moneylending and Rates of Interest Act did not apply to money-lending by a bank. The definition of "consumer contract" in the Consumer Contracts Act was wide enough to encompass a contract H of loan, so that Act had to be considered as well.

Held, further, that it was necessary for the defendants to show, whether under A the Consumer Contracts Act or the Contractual Penalties Act, that the penalty rate of 50 per cent was excessive and oppressive.

Held, further, that since the beginning of time the question of interest has vexed lenders, borrowers, rulers and virtually every society. The basic question has been to find the right balance between the competing interests of lenders and borrowers. Since time immemorial, interest ceased to be B a private concern of the individual parties to the transaction. It became very much a public policy issue. In the field of commerce, interest is to the lender the profit on the loan. To the borrower, it is the cost on the loan. It is not the purpose of interest to preserve the real value of the sum due or to provide protection against inflation. A number of factors C are taken into account in arriving at the rate of interest in any given situation. These include the cost of the funds to the lender; the risk associated with the borrower, taking into account his creditworthiness, or lack of it; the lenders' overheads and the margin of profit desired; the country risk, and so on.

Held, further, that in Roman and Roman-Dutch times the question of interest, D as in Biblical times, continued to be a cause for concern amongst the authorities. The charging of interest on monies lent was permissible, but with some restrictions, such as prohibiting the levying of interest on interest and the prohibition against interest *in duplum.* Although there is a general acceptance that in some situations there may be a need E to intervene and protect the borrower, eminent judges and jurist have sometimes differed sharply and contradicted one another in the process.

Held, further, that at common law there is no fixed customary rate that can be described as a standard rate beyond which it can be said that a transaction becomes usurious. Rates of interest vary with the nature of the financial transaction, the social and economic standing of the parties, the risks and F so on. The mere fact that the amount of interest seems high is not sufficient to make the transaction usurious. What, then, is there in a transaction which makes it usurious? If it is not the mere amount of interest, what other circumstances are there? A party claiming rescission of contract on the basis of usury must show extortion or oppression or something G akin to fraud. That approach is consistent with the balance that has to be struck between, on the

one hand, the liberty to regulate one's life by freely engaged contracts and, on the other, the striking down of the unacceptable excesses of freedom of contract. It also accords with the notion that judges should approach with restraint the task of intruding upon the domain of the private powers of citizens. H

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Held, A further, that the situation was somewhat made more complex by the provisions of the Consumer Contracts Act and the Contractual Penalties Act. As a matter of public policy our common law attaches importance to the need to uphold the sanctity of contracts made by equal contracting parties. The freedom to contract encompasses the freedom to make B both a good bargain and a bad one. The Acts urge the courts, despite the freedom of contract exercised by the individuals, nonetheless to intervene and interfere if in their discretion the contract, or some terms in it, are unfair, or if the penalty is out of proportion to the prejudice suffered by the creditor. For a court to make a decision on the matter required evidence on matters such as the cost borne by the plaintiff in C procuring the money for on-lending to the defendants; the risk associated with the creditworthiness of the defendants; the use to which the loan was put by the defendants; the rates of interest charged by comparative institutions in similar circumstances; the unreasonableness of the margin of profit desired by the plaintiff on the loan; the inequalities, if any, in the economic strengths of the parties, and so on. D

Held, further, that the plaintiff's rate needed proper interrogation and that the matter should be referred to trial.

Cases referred to

African Dawn Property Finance 2 (Pty) Ltd v *Dreams Travel & Tours CC*E2011 (3) SA 511 (SCA); [2011] 3 All SA 345 (SCA)

Barkhuizen v *Napier* 2007 (5) SA 323 (CC)

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

CBZ v *MM Builders & Suppliers (Pvt) Ltd* 1996 (2) ZLR 420 (H)

Dyason v *Ruthven* (1860) 3 Searle 282

Ehlers v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H) F

LTA Construction Bpk v *Administrateur, Transvaal* 1992 (1) SA 473 (A)

Linton v *Corser* 1952 (3) SA 685 (A)

Mawere v *Mukuna* 1997 (2) ZLR 361 (H)

Merry v *Natal Soc of Accountants* 1937 AD 331

Pickett v *British Rail Engineering Ltd* [1980] AC 136 G

Reuter v *Yates* 1904 TS 855

Sanlam Life Ins Ltd v *SA Breweries Ltd* 2000 (2) SA 628 (W)

SA Securities v *Greyling* 1911 TPD 352

Standard Bank of SA Ltd v *Oneanate Invstms (Pty) Ltd (in liq)* 1998 (1) SA 811 (A)H

van Diggelen v *Triggs* 1911 SR 154

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Verulam Medicentre (Pty) Ltd v *Ethekwini Municipality*A2005 (2) SA 451 (D)

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

Legislation considered

Consumer Contracts Act [*Chapter 8:03*], ss 2, 4 & 5

Contractual Penalties Act [*Chapter 8:04*], s 4 B

Moneylending and Rates of Interest Act [*Chapter 14:14*], s 8

Prescribed Rate of Interest Act [*Chapter 8:10*], s 4

Case information

O Mutero, for the plaintiff

T K Hove, for the defendants C

Judgment

Mafusire J: By agreement the parties referred this matter to court as a special case in terms of Order 29 of the rules of this court. In my view, this was a mistake. My reasons for saying this are towards the end of this judgment.

The defendants' defence was a frontal attack on the propriety of the penalty D rate of interest levied and claimed by the plaintiff on the monies loaned and advanced to the first defendant. The plaintiff was a registered commercial bank. The first defendant, undoubtedly the *alter ego* of the second and third defendants – themselves husband and wife – obtained from the plaintiff a revolving credit facility in the sum of US$50 000 to boost working capital. Repayments would be made in instalments over twelve months. Interest E would be charged at a flat rate of 30 per cent per annum. In the event of a default the penalty rate of interest was pegged at 50 per cent per annum. It would change from time to time. The second and third defendants bound themselves as sureties and co-principal debtors with the first defendant for the due repayment of the loan.

According to the statement of agreed facts the plaintiff duly disbursed F the loan. The first defendant duly utilised the proceeds. However, it failed to repay as per agreement. From time to time the loan would be "rolled over". The effect of those "roll overs" was such that the total lending to the first defendant was in the sum of US$264 371.25, being the capital sum; US$209 082.49 being the interest accrued, and US$3 475.76 being the bank G charges. Against that the first defendant had paid a total of US$236 272.44. The balance outstanding was said to be in the sum of US$51 657.06 of which US$45 966.07 was the capital; US$5 670.99 the interest; and US$20 the bank charges. Eventually the plaintiff issued summons. The parties were agreed that if the defendants' defence did not succeed then those amounts would be the extent of their liability. H

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Mafusire J

The A defendants' defence was that the plaintiff's penalty rate of interest at 50 per cent per annum was usurious, contrary to public policy and therefore unlawful. They referred to a number of statutes. The first was the Prescribed Rate of Interest Act [*Chapter 8:10*]. This Act empowers the Minister of Justice, with the approval of the Minister of Finance, to prescribe or fix the rate of interest on certain debts. By the Prescribed Rate of Interest Notice 2009 B (SI 164 of 2009), the prescribed rate at the time of this case was 5 per cent.

However, it is not understood why the defendants ever made reference to this Act. It does not apply. By s 4, the prescribed rate of interest only applies to interest-bearing debts the rates of which are not governed by any other law or an agreement or a trade custom or in any other manner*. In casu* the C rate was governed by the loan agreement.

The next statute referred to by the defendants was the Moneylending and Rates of Interest Act [*Chapter 14:14*]. By s 8, no lender can stipulate, demand or receive from the borrower, interest (on money lent and advanced) at a rate greater than the prescribed rate. Again, it is not understood why the D defendants made reference to this Act either. In terms of s 20, the Act does not apply to money lending by banks. The plaintiff was a bank.

The third piece of legislation referred to by the defendants was the Consumer Contracts Act [*Chapter 8:03*]. By its preamble, the purpose of the Act is to provide relief to parties to consumer contracts which are unfair or contain E unfair provisions. In terms of s 2 a "consumer contract" is defined to mean a contract for the sale or supply of goods or services or both. The defendants argued that a loan agreement was a contract for the supply of services, namely banking services.

In terms of s 4 of the Consumer Contracts Act, the court is empowered to grant any of the specified reliefs if it is satisfied that a consumer contract is F unfair. These include:

- cancelling the whole or any part of the contract;

- varying the contract;
- enforcing only part of the contract;
- declaring the contract unenforceable for a particular purpose only; G
- ordering restitution or compensation or reducing the amount payable under the contract.

The court is not confined to the specified remedies. It can make any such other order upon any such conditions as it may fix.

The Act does not exactly define "unfairness". However, in s 5, it lists instances H when a consumer contract may be deemed unfair. These are:

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1. where the contract as a whole results in an unreasonably unequal exchange A of values or benefits;
2. where the contract is unreasonably oppressive in all the circumstances;
3. where the contract imposes obligations or liabilities on a party which are not reasonably necessary to protect the interests of any other party;
4. where the contract is contrary to commonly accepted standards of fair dealing; B
5. where the contract is expressed in language not readily understood by a party.

Subsection (2) of s 5 of the Act says that a court shall not find a consumer contract to be unfair solely because, *inter alia*, it imposes onerous obligations on a party or that a party may have been able to conclude a similar contract C with another person on more favourable terms or conditions.

Subsection (3) of s 5 says that, in determining whether or not a consumer contract is unfair, the court shall have regard to the interests of both parties. In particular, it shall take into account, where appropriate, any prices, charges, costs or other expenses that might reasonably be expected to have D been incurred if the contract had been concluded on terms and conditions other than those on which it was concluded.

Finally, in terms of the Act, the rights conferred by it cannot be waived by agreement unless such waiver is made during the proceedings.

The last piece of legislation referred to by the defendants was the Contractual E Penalties Act [*Chapter 8:04*]. The preamble to this Act says, *inter alia*, it is an Act to provide for the enforcement of penalty clauses in contracts. A "penalty" is defined to include any money which a person is liable to pay, or any money which a person is liable to forfeit under a penalty stipulation. A "penalty stipulation" is defined to include a contractual provision under which a person is liable to pay any money as a result, or in respect of, an F act or omission in conflict with a contractual obligation.

Section 4 of this Act starts by saying that a penalty stipulation is enforceable. However, it goes on to empower the court to reduce a penalty stipulation that may appear to be out of proportion to any prejudice suffered by the creditor as a result of the act or omission under a penalty stipulation. The court may G grant any other relief as it may consider fair and just to the parties.

The Act ends by outlawing any purported waiver of any rights or benefits conferred under it.

As I understood him, and in my own words, I synthesise Mr *Hove's* argument as follows: H

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Mafusire J

(1) The A plaintiff's penalty rate of interest was excessive, burdensome, oppressive and out of proportion to any prejudice that it may have suffered by reason of the defendants' failure to pay the rest of the debt on time.

(2) An interest rate of 50 per cent per annum was usurious, contrary to B public policy and therefore illegal. The empirical evidence necessary to show this was self-evident and the court could take judicial notice of certain economic aspects such as the annual rate of inflation obtaining in the country.

(3) The annual rate of inflation in Zimbabwe was no more than 5 per cent. Even though the Zimbabwean economy had adopted the multi-currency C system, the United States dollar was predominate. It was the currency against which all the other currencies of the world are

bench-marked. In the United States of America, the source country for the currency in use in Zimbabwe, interest rates are no more than 3 per cent per annum.

(4) A penalty rate of interest of 50 per cent per annum betrayed a hang-over D from a by-gone era in Zimbabwe before the advent of the multi-currency in 2009 when exploitive trade practices ran rampant owing to super-hyper-inflation that obtained in the economy.

(5) Other commercial banks such as Stanbic Bank and the Standard Chartered Bank have pegged their interest rates at no more than 15 per cent per annum. The plaintiff's rate at 50 per cent was so way out of range as to E stifle economic growth.

(6) The plaintiff was the defendants' bank for a long time. The defendants could not have been expected to start another relationship with another bank which might have been offering cheaper money.

(7) By the Acts of Parliament referred to above, the legislature had given F the courts the green light to close up the gap in the law as far as fixing appropriate rates of interest under the common law was concerned. It was time for judicial activism. The courts should put a cap on the maximum rates of interest charged on loans and put a stop to the mischief brewed by greedy moneylenders [1] .

(8) The G courts should not shirk from their responsibility to legislate. It is part of their judicial function. The Supreme Court has given the green light. In *Zimnat Insurance Company Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153-4, Gubbay CJ said (McNally and Manyarara JJA concurring):

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> "Law in a developing country cannot afford to remain static. It must undoubtedly A be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by people because it B will cease to serve any useful purpose. Therefore, the law must be constantly on the move, vigilant and flexible to current economic and social conditions …
>
> Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfil the necessary role of effecting such development. C
>
> It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take D part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.
>
> The opportunity to play a meaningful and constructive role in development and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such E a course. If judges hold their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which they stand. In a famous passage Lord Atkin, referring to judicial precedents, said:
>
> > 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred.'" F

In counter, Mr *Mutero*, for the plaintiff, stressed the principle that where parties have entered into a contract freely and voluntarily its validity ought to be preserved. He submitted that, other than the Contractual Penalties Act, none of the other pieces of legislation referred to by the defendants was applicable. With regards the Consumer Contracts Act in particular, Mr *Mutero* said it applies only to contracts for the sale or supply of goods or services. G Banks lend money. To offer loans is not to sell or supply goods or services.

Mr *Mutero* further submitted that while the Contractual Penalties Act did apply, nonetheless the onus had been on the defendants to provide empirical evidence to show that a penalty rate of 50 per cent per annum was disproportionate to the cost incurred by the plaintiff in procuring the money that it had lent H

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to A the defendants. Without that evidence, the court could not possibly grant relief. The plaintiff did not agree with the defendants' statistics.

Finally, Mr *Mutero* submitted that the defendants' call for judicial activism to fix the interest rates was misplaced. Interest rates on loans are influenced by a number of factors, not least, the state of the economy, the risk associated B with the loan, the cost of funds to the lender and the international markets.

That was the case before me. I then wondered what interest is.

(a) Interest in general

It appears that since the beginning of time the question of interest has vexed lenders, borrowers, princes, emperors, rulers and virtually every other society. C Even God seemed apprehensive about the practice of charging interest by Israelites on fellow Israelites. It seems the basic question has been to find the right balance between the competing interests of lenders and borrowers. In my view, since time immemorial, interest ceased to be a private concern of the individual parties to the transaction. It became very much a public policy issue. So what really is interest? What is its purpose? D

(b) What is interest? What is its purpose?

Webster's New Twentieth Dictionary, Unabridged Series, 2 ed and the *Concise Oxford Dictionary* define interest as money paid for the use of money lent or for not exacting repayment of a debt. F A Mann *The Legal Aspect of Money* 4 ed at p 110 (n 146) (quoted with approval by Chinhengo J in *Mawere* v *Mukuna*E 1997 (2) ZLR 361 (H)) says:

> "… interest is awarded to compensate for the deprivation of the use of money due until payment."

In the field of commerce I would say, to the lender, interest is the profit on the loan that the lender receives. To the borrower, it is the cost on the loan F that he pays. Mann *op cit* says it is not the purpose of interest to preserve the real value of the sum due or to provide protection against inflation: see *Pickett* v *British Rail Engineering Ltd* [1980] AC 136.

It seems there are a number of factors that are taken into account in arriving at the rate of interest in any given situation. These include the cost of the G funds to the lender; the risk associated with the borrower, taking into account his creditworthiness, or lack of it; the lenders' overheads and the margin of profit desired; the country risk, and so on. In *African Dawn Property Finance 2 (Pty) Ltd* v *Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA); [2011] 3 All SA 345 (SCA), Ponnan JA said:

> "… The rate of interest levied depends upon various factors, not least the risk to H the lender, which in turn is usually dependent upon whether the creditor is well

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> or ill-secured. And, it can hardly be disputed that inasmuch as profit varies and A fluctuates, so too must interest, which by its very nature is representative of profit."

(c) Interest in Biblical Times

In the Bible, God simply forbade the Jews from charging interest on monies lent to fellow Jews in need. In Exodus 22: 25, God, through Moses, decreed [2] :

> "If you lend money to one of my people among you who is needy, do not be like B a moneylender; charge him no interest."

In Deuteronomy 23:19-20 God said:

> "Do not charge your brother interest, whether on money or food or anything else that may earn interest. You may charge a foreigner interest, but not a brother Israelite, so that the LORD your God may bless you in everything you put your hand to in the land you are entering to possess." C

In Leviticus 25:35-36 God said:

> "If one of your countrymen becomes poor and is unable to support himself among you, help him as you would an alien or a temporary resident, so he can continue to live among you. Do not take interest of any

kind from him, but fear God, so that your countryman may continue to live among you." D

Evidently, God did not ban the charging of interest *per se*. Nonetheless, He seemed concerned that the practice had the potential to cause social problems.

In Jesus' times it seems the charging of interest was permissible. In the parable of the talents in Matthew 25:27, Jesus rapped the lazy servant who had failed to invest the gold coin given him, when He said: E

> "Well then, you should have put my money on deposit with the bankers, so that when I returned I would have received it back with interest."

(d) Interest in Roman and Roman-Dutch times

It seems that in Roman and Roman-Dutch times the question of interest, as in Biblical times, continued to be a cause for concern amongst the F authorities. The charging of interest on monies lent was permissible. But some restrictions were imposed. According to Joubert JA in *LTA Construction Bpk* v *Administrateur, Transvaal* 1992 (1) SA 473 (A), quoted with approval by Blieden J in *Sanlam Life Insurance Ltd* v *South African Breweries Ltd* 2000 (2) SA 628 (W), the concept of interest was conceived and practised G from about 150 BC to AD 250 during the times of the Roman Empire. The economy of the Roman Empire was flourishing. It had a well-developed monetary system. Moneylenders had emerged. They charged interest on the capital amount. The interest was money paid for the capital sum advanced. H

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Then A interest was known as usury. It was the proceeds of the monies lent. The person paying the interest was called the usurarius.

One of the restrictions placed on the charging of interest in Roman times was that it could only be claimed if it had expressly been included in a promise, called *stipulatio*. Furthermore, the ruling authorities, from time to time, B employed various methods to limit the interest which could be claimed. The moneylenders had become greedy. Measures were deemed necessary to provide protection or relief to the borrowers. One such measure was to limit the rate at which interest could be charged. A Watchtower Bible and Tract Society publication that I once came across, titled *Insight on the Scriptures,* Volume one (1988) at p 1212 said that in Babylon, which had a C well-developed loan system, the rate of interest, according to the Code of Hammurabi, was, in the second millennium BC, 20 per cent on money and grain lent. A merchant charging a higher rate would forfeit the amount lent.

Another measure to protect borrowers from money lenders, according to Joubert JA in *LTA Construction Bpk supra*, was to prohibit the levying of interest on interest. Yet another measure was the prohibition against interest D*in duplum*. The learned judge of appeal noted that as early as 529 AD the Emperor Justinian issued the following decree:

> "(i) We by no means permit more than double interest to be collected, not even where pledges have been given to the creditor to secure the debt, under which circumstances certain ancient laws authorised more than double E interest to be collected."
>
> "(ii) We decree that this rule shall be observed in all *bona fide* contracts, and all other cases in which interest can be collected."

Today the *in duplum* rule is part of our law. According to cases such as *van Diggelen* v *Triggs* 1911 SR 154; *Commercial Bank of Zimbabwe Ltd* v F*MM Builders and Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420, *Mawere* v *Mukuna, supra*, and *Conforce (Pvt) Ltd* v *City of Harare* 2000 (1) ZLR 445 (H), interest ceases to accumulate upon any amount of capital owing once it equals the amount of the capital, whether the debt arises out of a financial loan or out of any contract whereby a capital sum is payable together with interest thereon. The *in duplum* rule is conceived in public policy to protect G the borrower from avaricious moneylenders.

(e) Interest in modern times

The question of interest has continued to vex societies even in these modern times. The courts in this jurisdiction and elsewhere have from time to time advocated or taken measures to cushion borrowers from hardships that H may be caused by the charging of excessive interest. They have sometimes

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agitated for the discarding of antiquated Roman-Dutch principles in an effort A to bring the law at par with, or make it relevant to, the society governed by it. In *Linton* v *Corser* 1952 (3) SA 689 (A) at 695G-H Centlivres CJ said:

> "Today interest is the life-blood of finance … The question that now arises is whether we should apply the old Roman-Dutch Law to modern conditions where finance plays an entirely different role. I do not think we should. I think B that we should take a more realistic view than in a matter such as this to have recourse to the old authorities."

However, notwithstanding that there is a general acceptance that in some situations there may be a need to intervene and protect the borrower, eminent judges and jurist have sometimes differed sharply and contradicted one another in the process. I give a few examples: C

(i) In South Africa, in *Standard Bank of South Africa Ltd* v *Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 SA (A) Zulman JA said that legal action interrupted the running of the *in duplum* interest. He blasted the attempt to apply old Roman-Dutch concepts to modern conditions. At p 834F he said:

> "If one accepts that interest and indeed compound interest is the 'life-blood D of finance' in modern times I am of the opinion that one should not apply all the old Roman-Dutch Law to modern conditions where finance plays an entirely different role …"

(ii) In Zimbabwe, two years earlier, i.e. in 1996, Gillepsie J, sitting with two other judges in the *MM Builders and Suppliers'* case s*upra*, had held E that *in duplum* interest would be interrupted by the commencement of litigation.

(iii) Two years after Zulman JA's judgment, Malaba J, as he then was, and sitting as a single judge in *Ehlers* v *Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (H), rejected Gillespie J's approach and restored the position stated by Zulman JA. F

(iv) It became a see-saw. After *Ehlers'* case, Chinhengo J, in *Conforce supra,* rejected the approach by Malaba J and went back to Gillespie J's position. He held that *litis contestatio* did not interrupt the *in duplum* rule. Evidently realizing the futility of this trend and the resultant confusion to the public, Chinhengo J exhorted the parties to appeal to the Supreme Court. G At 458F-G he said:

> "I must respectfully express my dissent from those judgments. I appreciate that the law must be certain and that it is most undesirable for judges to differ on fundamental principles of law. There would appear to be a need for the difference of opinion on this point to be placed before the Supreme Court as soon as possible, either by way of an appeal or on a suitable case, H

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> as A a reference point of law. Consistency in the law is paramount in the administration of justice."

(v) Given that part of the public policy considerations that have led the authorities and/or the courts to conceive of measures such as the *in duplum* rule, to protect borrowers, it sounds logical, on the face of it, that the inquiry should be on the identity of the borrower so as to B determine whether in any given case he is one deserving of protection. That seemed to have been the view of Galgut J in the court of first instance in *Verulam Medicentre (Pty) Ltd* v *Ethekwini Municipality* 2005 (2) SA 451 (D). He said:

> "It appears therefore that the test might simply be whether in the particular case public policy requires the debtor to be protected against exploitation C by the creditor."

In that case the learned judge had concluded that the *in duplum* rule did not apply as the respondent, Verulam Medicentre (Pty) Ltd, did not require the protection that the rule was designed to provide. However, on appeal, the South African Supreme Court rejected that kind of approach. It held D that the enquiry was not on the identity of the debtor, but rather on the nature of the debt. That exactly had been the approach of Chinhengo J, five years earlier, in *Conforce*. He had rejected an enquiry based on the identity of the debtor. At p 458A-B he had said:

> "… I venture to say that the public interest served by the *in duplum* rule is not to be identified with sympathy for the debtor, so as to say that the E rule is designed to protect him. I view the public interest involved as encompassing a wider spectrum of interests, from the protection of the debtor, to securing fiscal discipline on the part of lenders, to considerations of justification for charging interest in the first

place i.e. to compensate the creditor for deprivation of use of the money due until payment (*Mawere* v *Mukuna* 1997 (2) ZLR 361 (H) at 364G) and to the interests of commerce F generally and to perhaps many more interests. Thus the public interest cannot be restricted to one or two considerations i.e. the protection of the debtor and the dictates of modern commerce."

So much about that controversy.

(f) Usury

Disagreements have extended to the question whether under the common G law the courts can fix a rate of interest above which it becomes usurious. Perhaps this is best illustrated by the *African Dawn* case *supra* in 2011.

The facts of that case are remarkably similar to those of the present matter. The first defendant, undoubtedly the *alter ego* of the second defendant, sought bridging finance, or a short term loan of R5 million from the plaintiff, H a money lender. The second defendant stood as guarantor and co-principal

debtor. So did a trust named after the second defendant the beneficiaries of A which were his children with his wife. The wife, the fourth defendant, also stood as guarantor. Collateral security was in the form of two mortgage bonds registered over two properties owned by the trust.

When the draft loan agreement was ready it was forwarded to the second defendant for confirmation. The second defendant managed to talk down B the lender into capping the upper limit of the trust's total liability at a certain amount – marginally lower than that for the rest of the defendants – in the event of default. Eventually the final loan terms were agreed upon. The loan document was signed. Among other things, the rate of interest would be 5 per cent per month. In the event of a default of payment, a penalty rate would apply. It was pegged at 6.5 per cent per month. C

The first defendant required the loan to stock up its business. It failed to re-pay as per agreement. The plaintiff called up the loan. It foreclosed on the trust's two properties. The defendants applied to court for an order declaring, *inter alia*, that both the average and the penalty rates of interest were unlawful. They also sought that all interest on the loan be pegged and D re-calculated at the rate prescribed by the statute regulating, *inter alia*, short term credit transactions.

The second defendant's detailed argument was that the plaintiff's rates of interest were usurious, excessive, unconscionable and against public policy. He said the trust property had been designed for the benefit of his minor child and that it would all but be lost if the plaintiff were to be allowed to enforce E the agreement. Finally, he argued that the plaintiff had taken advantage of the vulnerable position that the defendants had found themselves in given that the loan had been designed to pay staff and to rescue the first defendant's business. It was said the employees stood to lose their employment. Some of them were married and had dependants to look after. F

The defendants' argument found favour with the High Court, the court of first instance. Despite noting that the statutes prescribing the rates of interest in certain circumstances did not apply, the High Court nonetheless held that the plaintiff's rates of interest were usurious given the reality of the defendants' situation and the inequality in the bargaining power of the parties. It found G the rate of interest to be harsh, excessive, gross, unreasonable and contrary to public policy. It adopted the statutory rate of interest which it considered fair, just, equitable and consonant with public policy.

On appeal Ponnan JA, with Tshiqi and Majiedt JJA concurring, reversed the High Court's decision. He criticised it for, among other things, calling in aid an inapposite yardstick, namely the statutory rate of interest. He noted that the H

nature A of the loan sought and obtained by the defendants would necessarily be expensive, and that certain conclusions reached by the High Court had no foundation in facts. The court of appeal upheld the freedom of contract and adopted the definition of usury that had stood the test of time,

namely, that a party claiming rescission of contract on the basis of usury, must show extortion or oppression or something akin to fraud [3] . B

In the course of his judgment Ponnan JA said:

> "[26] At common law there is no fixed customary rate that can be described as a standard rate beyond which it can be said that a transaction becomes usurious. Rates of interest vary with the nature of the financial transaction, the social and economic standing of the parties, the risks and so on. *In the absence of anyCproof or allegation to the contrary, it must be assumed, I would imagine, the loan was worth the rate of interest fixed to the borrower.* One looks in vain for a declaration by the court that at common law any particular rate of interest is the only legal rate. For, the rate of interest levied depends upon various factors, not least the risk to the lender, which in turn is usually dependent upon whether the creditor is well or ill-secured. And, it can hardly be disputed that inasmuch D as profit varies and fluctuates, so too must interest, which by its very nature is representative of profit. *I thus hesitate to say that a court by a mere decision or a series of mere decisions can authoritatively declare what shall be the rate of interest which, without more, upon being exceeded, shall amount to usury. To declare to be usurious a bargained interest beyond a certain rate may well amount to a court legislating by judicial decree*" (my emphasis).

Two paragraphs on the learned judge of appeal also said this: E

> "[28] *It bears restating that our Constitution and its value system does not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perception of fairness or on grounds of impressive notions of good faith*. Nor does the fact that a term is unfair or that it may operate harshly, of itself lead to the conclusion that it offends against constitutional principles. *InFmy view it is essential that the law which makes a transaction usurious should be clear and explicit*. The general rule endorsed by *Merry does precisely that. It, moreover, restrains over-zealous judicial intrusion in the sphere of contractual autonomy – a real and meaningful incident of freedom*. It permits coercive interference by a court *only in circumstances where a party to a contract can show either extortion or oppression or something akin to fraud*. That, I dare say, is consistent with the balance that has to be struck between, on the one hand, G the liberty to regulate one's life by freely engaged contracts and, on the other, the striking down of the unacceptable excesses of freedom of contract. *It also*

> *accords with the notion that judges should approach with restraint the task ofAintruding upon the domain of the private powers of citizens*" (my emphasis).

I respectfully associate myself with the above remarks.

(g) Defendants' case

In casu, Mr *Hove* argued that a rate of interest of 50 per cent per annum is usurious and contrary to public policy. During argument I repeatedly asked B him whether there was a cut-off point at which one could draw the line. If so, what would inform that cut-off point? If I were to declare 50 per cent per annum usurious, would 45 per cent be alright with public policy? What about 46 per cent? 48 per cent? 49.9 per cent? And so on. At that time I was unaware of the remarks of Wessels J in *SA Securities Ltd v Greyling supra,* quoted in *African Dawn*, cases which none of the parties herein made C reference to. At 356 Wessels J said:

> "*From the fact that there is no standard rate it follows that the amount of interest is in itself no criterion*. It may, however, be an element in considering whether a transaction is or is not usurious. The court has allowed as much laxity as sixty per cent, and in his judgment in *Reuter* v *Yates* Mason J saw no reason why an D amount of ninety per cent should not be allowed. It seems difficult to see how or where a limit can be fixed. If ninety per cent can be allowed, why not ninety-one? If ninety-one, why not ninety-two; and so on to 120 per cent. *Therefore, the mere fact that the amount of interest seems high is not sufficient to make the transaction usurious.* What then is there in a transaction which makes it usurious? If it is not the mere amount of interest, what other circumstances are there? A great deal has been said by various judges with regard to 'circumstances'. It is E very difficult for me to find any definite principle upon which a case of usury has been or can be decided. I think the most you can say is that *the transaction must show that there has been either extortion or oppression, or something which is akin to fraud*. I do not think we can put the principle any higher than that. *Therefore in each case we have to decide whether there has been extortion, oppression, or any actions akin to fraud*" (emphasis added). F

Ordinarily usury refers to the practice of lending money to people at unfairly high rates of interest[5]. But in commerce the term has a technical meaning. A usurious transaction is one where there is *either extortion or oppression or something akin to fraud*.

However, despite the fact that to prove that a particular rate of interest is G usurious, one must show *either extortion or oppression or something akin to fraud*, and despite that the mere fact that the amount of interest seems high is not of itself sufficient to make the transaction usurious, the situation is somewhat made more complex by the provisions of the Consumer Contracts Act and H

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the A Contractual Penalties Act. As a matter of public policy our common law attaches importance to the need to uphold the sanctity of contracts made by equal contracting parties. The freedom to contract encompasses the freedom to make both a good bargain and a bad one. In *Barkhuizen* v *Napier* 2007 (5) SA 323 (CC) at para [57] Ngcobo J said: B

> "Self-autonomy, or the ability to regulate one's own affairs, *even to one's own detriment, is the very essence of freedom and a vital part of dignity*. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity" (my emphasis).

That ultimately was the basis of the decision of the appeal court in *African Dawn*. C It cautioned against whimsical declarations by judges to the effect that a bargained rate of interest may be said to be usurious as that might amount to a court legislating by decree.

But I consider that the Consumer Contracts Act and the Contractual Contracts Act do urge the courts, despite the freedom of contract exercised by the D individuals, to nonetheless intervene and interfere if in their discretion the contract, or some terms in it, are unfair, or if the penalty is out of proportion to the prejudice suffered by the creditor. I do not agree with Mr *Mutero* that the Consumer Contracts Act does not apply to lending by banks. I consider that the definition of "consumer contract" is wide enough to encompass a loan contract. Banks do supply banking services. Therefore, a borrower E who can satisfy any of the requirements in s 5 of that Act may be entitled to relief. In particular, if the defendants in this case had shown that a penalty rate of interest of 50 per cent per annum resulted in making the loan contract as a whole an unreasonable exchange of values; or made it unreasonably oppressive; or was such that it made the loan contract impose obligations F or liabilities that were not reasonably necessary to protect the interests of the plaintiff; or that it made the loan contract violate commonly accepted standards of fair dealing, then they would have been entitled to relief under s 4 of the Act. The fact that they might have signed the loan contract freely and voluntarily would not be decisive of the matter. It is a matter of public policy.

Similarly, in terms of the Contractual Penalties Act, if the defendants had G shown that a penalty rate of interest of 50 per cent per annum was out of proportion to any prejudice suffered by the plaintiff as a result of their failure to pay back the loan timeously, then they might have been entitled to relief under s 4 of that Act. In particular, the court could reduce the rate to what it would consider equitable, notwithstanding that the defendants might have H freely and voluntarily signed the loan contract which had stipulated such a rate.

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Unfortunately, there was virtually nothing placed before me in this matter to A help decide whether or not a penalty rate of interest of 50 per cent per annum was usurious; or contrary to public policy; or so excessive as to contaminate the entire loan contract to enable relief to be given under the Consumer Contracts Act, or that such a rate was a penalty that was so disproportionate to any prejudice suffered by the plaintiff by reason of the defendants' default to warrant relief under the Contractual Penalties Act. B

Mr *Hove* argued that the empirical evidence required to make a determination was self-evident. He urged me to take judicial notice of his own bald allegations from the Bar that the rate of annual inflation in this country was 5 per cent and that the average rates of interest in the United States of America, the source country for the functional and dominant currency in this country, C was 3 per cent per annum.

In my view, it was completely inappropriate for this kind of matter to have gone by way of a special case where, among other things, the statement of agreed facts said nothing more than what the pleadings stated. This was a matter that cried out for detailed evidence on a number of aspects, not least D being the cost borne by the plaintiff in procuring the money for on-lending to the defendants;

the risk associated with the creditworthiness of the defendants; the use to which the loan was put by the defendants; the rates of interest charged by comparative institutions in similar circumstances; the unreasonableness of the margin of profit desired by the plaintiff on the loan; E the inequalities, if any, in the economic strengths of the parties, and so on. In other words, it was necessary to show the factors that informed such a rate of interest and that influenced the parties to agree to it. The plaintiff disputed the defendants' statistics on the rates of annual inflation, the rate of interest prevailing in the United States of America or the rates of interest said to be charged by Stanbic Bank and Standard Chartered Bank. F

Under the common law, the onus is on him who alleges usury, to show *either extortion or oppression or something akin to fraud*. Similarly, under the Consumer Contracts Act and the Contractual Penalties Act, the onus is also on him who alleges that a particular consumer contract is unfair, or that a particular penalty is out of proportion to any prejudice suffered. In this G case it was the defendants.

However, given the provisions of the Consumer Contracts Act and the Contractual Penalties Act, it would be remiss of me to leave matters at the classical level that says that where the borrower has failed to show *extortion or oppression or something akin to fraud*, then he is not deserving of relief. H

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The A hallmark of the Consumer Contracts Act and the Contractual Penalties is fairness and justice.

In my view, it is near impossible for the borrower to show conclusively aspects that are manifestly within the knowledge and control of the lender. For example, it is the lender that knows where he sourced and procured the money for on-lending to the borrower. It is the lender that knows the cost B of that money. It is the lender that calculated the risk of the borrower to him and how he translated that risk to a bankable commodity. It is also the lender that knows what mark-up or margin of profit he desired to earn on the loan, taking into account, for example, its overheads and other costs. Under normal circumstances, where, among other things, the central bank acts as C the lender of last resort, there should be, in my view, minimal disparities in the rates of interest charged by the different financial institutions. There has been no evidence what the situation obtaining in this economy is like.

My view of this case is that a rate of interest of 50 per cent per annum, albeit designed as a penalty for default, is, on the face of it, too high, given D that the dominant functional currency in the economy is the United States dollar. On the face of it, such a rate induces a sense of shock. It stifles economic growth. But nothing tangible has been placed before me to use as a yardstick to assess whether such a rate is indeed usurious, or excessive, or unconscionable, or contrary to public policy, or unfair, or disproportionate to any prejudice suffered by the plaintiff by reason of the defendants' default E on the loan agreement.

The plaintiff's rate needs proper interrogation. This is possible only through a trial action. Proper evidence must be led in the normal course. Order 29 r 203 reads:

> "203 Judgment and directions regarding other issues F
>
> When giving its decision upon any question in terms of this Order, the court may give such judgment as may upon such decision be appropriate and may give any directions with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof."

Disposal

The decision of the parties to refer this matter to court by way of a special G case was incompetent. It is hereby set aside. The matter is referred back to trial for evidence to be led on whether or not the plaintiff's penalty rate of interest at 50 per cent per annum on the loan advanced to the first defendant was usurious, or excessive, or unconscionable, or contrary to public policy, or unfair or disproportionate to any prejudice that it may have suffered by H reason of the defendants' default. The overall onus shall rest on the plaintiff.

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The costs shall be in the cause. Either of the parties is free to take steps to A have the matter re-enrolled for the trial.

Sawyer & Mkushi, plaintiff's legal practitioners

T K Hove & Partners, defendants' legal practitioners B

1 Mr *Hove* called them "Shylocks", after a character in the Shakespearian play *Merchant of Venice,* who was a ruthless moneylender.

2 *New International Version* [NIV]

3 See *Dyason* v *Ruthven* (1860) 3 Searle 282; *Reuter* v *Yates* 1904 TS 855 at 858; *South African Securities* v *Greyling* 1911 TPD 352 and *Merry* v *Natal Society of Accountants* 1937 AD 331 at 336

4 *Merry* v *Natal Society of Accountants supra*

5 *Oxford Advanced Learner's Dictionary of Current English*

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BALLANTYNE BUTCHERY (PVT) LTD v CHISVINGA & ORS 2015 (1) ZLR 335 (S)

Citation	2015 (1) ZLR 335 (S)
Case No	Judgment No. S-6-15
Court	Supreme Court, Harare
Judge	Gwaunza JA, Garwe JA & Patel JA
Heard	24 February 2014; CAV
Judgment	26 February 2015
Counsel	*A Mugandiwa,* for the appellant *D Mwonzora,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *Labour Court – decisions by – application of equitable principles – court's duty to secure equity and social justice – arbitration in terms of Labour Act – arbitrator may also apply equitable principles –* D *limits to application of such principles – payment in US dollars of debt already paid in Zimbabwe dollars – latter currency still extant at time of payment – not permissible to invoke equity to award payment in US currency – statutory provisions – equitable considerations may not be used to override or negate such provisions*

Revenue and public finance – *currency – multi-currency system – introduction* E *of – local currency not immediately demonetised – debt paid in local currency after introduction of multi-currency but before demonetisation of local currency – debt lawfully satisfied*

Headnote

Two retrenchment agreements were entered into between the parties on F 23 January 2009. The first agreement stipulated the payment of specified terminal benefits, while the second provided for various payments in kind. The latter package was duly paid out and accepted without controversy. The first retrenchment package was paid, by transfer to the respondents' bank accounts, in Zimbabwe dollars on 13 February 2009. This was G after the introduction of the multi-currency regime on 2 February 2009. Other employees who were not retrenched were paid their wages in US dollars at the end of the month, on 28 February 2009.

The multi-currency system referred to permitted free trade in any convertible currency and, at the same time, retained the local currency (as re-valued). The announcement of the system was accompanied by the promulgation, on H the same date, of the Presidential Powers (Temporary Measures)

(Currency Revaluation and Issue of New Currency) Regulations, 2009 A (SI 6 of 2009).

The respondents did not access or utilise their respective payments at any stage, but some four months later, they applied to a labour officer for the enforcement of their retrenchment benefits. Following the failure to settle the matter, it was referred to arbitration on 9 July 2009. The sole question for determination was "whether or not the [appellant] paid the B mutually agreed retrenchment package in time". The arbitrator found that the appellant had wrongfully paid the package with unusable Zimbabwe dollar currency that had become defunct with effect from 3 February 2009. The appellant was ordered to recalculate the retrenchment package in either South Africa rands or United States dollars and to deposit the recalculated amounts into the respondents' bank accounts. C

An appeal by the appellant to the Labour Court failed, the court finding that the arbitrator had not exceeded his terms of reference and had, in accordance with equity, correctly awarded payment in acceptable, as opposed to valueless, currency. Consequently, the retrenchment package was confirmed for payment in United States dollars at a rate of D conversion to be agreed between the parties or, failing such agreement, to be determined by the court. On appeal to the Supreme Court, the principal issue was whether or not the arbitrator exceeded his terms of reference and thereby arrived at the wrong conclusions. Flowing from this was the correctness or otherwise of the decision of the Labour Court in upholding the arbitrator's award. E

Held, that by making this award, the arbitrator exceeded his terms of reference. He was simply required to determine whether or not the retrenchment package had been timeously paid within the contemplation of the parties as captured in the retrenchment agreement. It was not within his remit, in the event that he answered the question posed in the negative, to F prescribe the remedy to be applied and the specific manner in which the agreement should be implemented. The arbitrator misdirected himself by, in effect, making a new contract for the parties.

Held, further, that the Labour Court misconceived and misapplied its adjudicative function and powers on appeal. What it did was to G fundamentally alter the arbitral award, instead of simply upholding it. Furthermore, unlike the arbitrator, it disregarded the fact that the appellant had already paid the retrenchment package in Zimbabwe dollars. More significantly, it completely failed to address the principal question at the core of the dispute between the parties, *i.e.* whether or not the mutually agreed retrenchment package had been paid on time. H

Tsanga J

In A so doing, it made a new contract for the parties, purportedly as relief for the alleged breach of the retrenchment agreement.

Held, further, that in terms of s 2A(1) of the Labour Act [*Chapter 28:01*], the purpose of the Act is "to advance social justice and democracy in the workplace" by, *inter alia*, "securing the just, effective and expeditious B resolution of disputes and unfair labour practices". Section 2A(2) requires that the Act be construed in such manner as best ensures the attainment of that, while s

2A(3) stipulates that the Act shall prevail over any other enactment inconsistent with it. Section 98(2) of the Act provides that the Arbitration Act [*Chapter 7:15*] shall apply to any dispute referred to compulsory arbitration. Under art 28 of the Model Law, contained in the C Schedule to that Act, an arbitrator is confined to the applicable rules of law and cannot invoke considerations of equity, unless expressly authorised to do so by the parties. However, it has been accepted that the Labour Court has equitable jurisdiction, and it would be arguable that even an arbitrator may dispense equity in labour matters. This is because, as is D declared in s 98(9), in hearing and determining any dispute, an arbitrator has the same powers as the Labour Court. This position would obtain in spite of art 28, because s 2A (3) of the Labour Act accords primacy to the provisions of the Act over any other enactment inconsistent with it.

Held, further, that the principles of equity and social justice, as well as the imperative for the Labour Court to secure the just and effective E resolution of labour disputes, are all called into question when it comes to determining the basis and formula for computing a debt (*e.g.* damages) suffered in Zimbabwe dollars, but claimed in foreign currency, particularly so where such damages, being owed to an employee, can no longer be paid in Zimbabwe currency realistically, or in a way that F gives due value to the employee. 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. However, where the debt in question has already been paid in a currency that is realisable at the time of payment, the situation is different. Another caveat relates to G the application of equity in those instances where it might conflict with rules of law. While the Labour Court, as well as tribunals arbitrating labour disputes, are empowered to promote equity, they clearly cannot, in so doing, disregard existing rules of law. In particular, equity cannot be invoked and applied so as to override or negate the provisions and requirements of any legislation enacted by Parliament, or by an executive H authority duly delegated to frame subsidiary legislation.

Held, further, that, contrary to the findings of the arbitrator and the court A*a quo*, the Zimbabwe dollar had not been demonetised with the introduction of the multi-currency regime. Both the arbitrator and the court clearly misconceived the import and effect of the announcement issued on 2 February 2009. The regulations specifically made the local currency usable up to 30 June 2009. When the matter was first argued before the B arbitrator and at the time that he rendered his award in August 2009, the Zimbabwe dollar had effectively become moribund, but there was no evidence to show that the local currency had completely ceased to be a medium of exchange at the time of payment by the appellant, between 11 and 13 February 2009. That being the case, the appellant was entitled, as it did at that time, to settle and discharge its obligations under the C retrenchment agreement in Zimbabwe dollars, in accordance with s 8(3) of the Regulations. It would then follow that the question referred for determination by the arbitrator and the court *a quo* must be answered in the affirmative: that the appellant effectively paid the mutually agreed retrenchment package in time. Moreover, in the absence of evidence to the contrary, there would have been nothing to prevent the respondents, D at that time, from accessing and utilising their respective packages in Zimbabwe dollars, instead of waiting for four months to raise their complaint before a labour officer.

Cases cited E

Black-Clawson Intl Ltd v *Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 (HL)

Fleximail (Pvt) Ltd v *Samanyau & Ors* S-21-14

Madhatter Mining Co v *Tapfuma* 2014 (2) ZLR 125 (S)

Malimanjani v *CABS* S-47-07

Nzuma & Ors v *Hunyani Paper & Packaging (Pvt) Ltd* Civil Appeal No. F SC 137/11

Ulster-Swift Ltd v *Taunton Meat Haulage Ltd* [1977] 3 All ER 641 (CA)

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, art 28 G

Labour Act [*Chapter 28:01*], ss 2A, 89 & 98

Presidential Powers (Temporary Measures) Act [*Chapter 10:20*], s 212

Case information

A Mugandiwa, for the appellant

D Mwonzora, for the respondents H

Patel J

Judgment

Patel JA: A This appeal arises from the application of two retrenchment agreements that were entered into between the parties on 23 January 2009. The first agreement stipulated the payment of specified terminal benefits, while the second provided for various payments in kind, i.e. fuel coupons and pork bones. The latter package was duly paid out and accepted without controversy. The dispute in casu relates to the first agreement. B

The appellant paid out the first retrenchment package in Zimbabwe dollars on 13 February 2009, following the introduction of the multi-currency regime on 2 February 2009. Some four months later, on 16 June 2009, the respondents applied to a labour officer for the enforcement of their retrenchment benefits. Following the failure to settle the matter, it was referred to arbitration on C 9 July 2009.

The arbitrator found that the appellant had wrongfully paid the package with unusable Zimbabwe dollar currency that had become defunct with effect from 3 February 2009. The appellant was accordingly ordered to recalculate the retrenchment package in the correct multiple currency of South African D rands or United States dollars and to deposit the recalculated amounts into the respondents' bank accounts.

On appeal against this award, the Labour Court found that the delay of several months in enforcing the retrenchment package was not inordinate and that the respondents had not waived their rights. The arbitrator was entitled to hear further evidence to supplement the agreement as to when the E packages were to be paid. There was no need for the respondents to make a specific claim for damages as the appellant had committed an unfair labour practice. The relief sought, *i.e.* payment in currency other than that agreed, was not incompetent and the arbitrator did not thereby rewrite the contract for the parties.

In F effect, the court found that the arbitrator had not exceeded his terms of reference and had, in accordance with equity, correctly awarded payment in acceptable as opposed to valueless currency. Consequently, the retrenchment package was confirmed for payment in United States dollars at a rate of conversion to be agreed between the parties or, failing such agreement, to be determined by the court. The appellant was also ordered to pay the G respondents' costs.

The grounds of appeal herein are manifold, with most of them being tangential to the crux of the matter, and not having been pursued during the course of argument at the hearing of the appeal. In essence, the principal issue to be addressed is whether or not the arbitrator exceeded his terms of reference H and thereby arrived at the wrong conclusions. Flowing from this is the

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Patel J

correctness or otherwise of the decision of the Labour Court in upholding A the arbitrator's award.

The material facts

The retrenchment agreements in question were both concluded on 23 January 2009. The first agreement states that "the works council has come up with its own minimum wage rates for the purposes of calculating the package" and B that "the minimum wage for A1 grade was pegged at ZWD2 quadrillion". The agreement does not provide a specific date for payment. In contrast, the second agreement stipulates the payment of "US$90 worth of fuel coupons flat figure per every employee retrenched, US$200 worth of fuel coupons per every year served, 20 kilograms of pork bones per every year served" to be "settled in two lots with the first payment being by end of January 2009 and C the remainder in February 2009". Having regard to these material distinctions between the two agreements at the time when they were concluded, the parties appear to have

envisaged that the retrenchment package under the first agreement would be discharged in Zimbabwe dollars.

Both agreements were approved by the Ministry of Public Service, Labour D and Social Welfare on 30 January 2009. On 11 February 2009, the appellant effected payment of the first retrenchment package in the new Zimbabwe dollar currency. This was done by RTGS payments into the respondents' bank accounts, which payments were duly reflected in those accounts on 13 February 2009. It appears that the respondents did not access or utilise their respective payments at any stage. However, they did not immediately E lodge any complaint and only applied to the labour officer to enforce their retrenchment benefits four months later.

The arbitral award indicates that other employees who were not retrenched were paid their wages in United States dollars at the end of the month on 28 February 2009. However, no evidence to that effect appears to have been F placed before the arbitrator nor was any evidence led to show what currency these employees received as wages between 11 and 13 February 2009.

After the retrenchment agreements were concluded and approved, but before they were implemented, certain critical developments took place on the monetary plane. On 2 February 2009, the Reserve Bank issued its G Monetary Policy Statement (the MPS), which introduced a multi-currency regime permitting free trade in any convertible currency and, at the same time, retaining the local currency as re-valued. This was accompanied by the promulgation, on the same date, of the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations 2009, SI 6 of 2009 (the Regulations). I will revert to the import of the MPS H

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and A the Regulations and their impact on the facts of this matter later in this judgment.

Terms of reference and grounds of appeal

Where a dispute is referred to compulsory arbitration by a labour officer, s 98(4) of the Labour Act [*Chapter 28:01*] enjoins the officer to determine B the arbitrator's terms of reference after consultation with the parties to the dispute. *In casu*, the sole issue to be determined by the arbitrator, as framed by the labour officer *qua* referring authority, was as follows:

> "whether or not the respondent [appellant herein] paid the mutually agreed retrenchment package in time".

On 16 August 2009, the arbitrator found that the payment of the retrenchment C package in Zimbabwe dollars contravened a Government directive requiring the use of South African rands or United States dollars for all money transactions in Zimbabwe. Consequently, he held that:

> "The employer wrongfully paid the retrenchees bank accounts with unusable Zimdollar currency which had ceased to be used by government directive with D effect from 3 February 2009. Therefore that transaction in Zimdollars is declared null and void as referred to [*sic*] my issued terms of reference."

Although this finding does not directly address the stipulated term of reference, it does arguably indirectly answer the question framed, by the implication that the package should have been paid before 3 February 2009. However, by way of remedy, the arbitrator then proceeded to order the appellant: E

> "To recalculate the retrenchees package in the correct multiple currency of either rand or US dollars as directed by the Government's directive dated 3 February 2009, using the NEC Food Allied Industries Memorandum of Agreement for Salary/wages scale A1 to C4 as basis for recalculations."

By making this award, the arbitrator clearly exceeded his terms of reference. F He was simply required to determine whether or not the retrenchment package had been timeously paid within the contemplation of the parties as captured in the retrenchment agreement. It was not within his remit, in the event that he answered the question posed in the negative, to prescribe the remedy to be applied and the specific manner in which the agreement should be implemented. In effect, the arbitrator misdirected himself by making a G new contract for the parties.

On appeal from the arbitrator, the Labour Court also fell into the same error. What the appellant sought in the appeal was the setting aside of the arbitral award. The respondents did not lodge any cross-appeal and did not move the court to vary the arbitral award. They simply prayed for the dismissal of the H appeal with costs. The court found for the respondents but did not expressly

Patel J

dismiss the appeal. Instead, it confirmed the retrenchment agreement and A ordered as follows:

"1. The retrenchment package between the parties is confirmed.

2. The Zimbabwean dollars payable are to be converted and paid in United States dollars.

3. The rate of conversion is to be agreed between the parties. B

4. Should the parties fail to agree on the conversion rate, either party can approach the court for the determination of the applicable rate.

5. The appellant will pay the respondent's costs."

The court *a quo* clearly misconceived and misapplied its adjudicative function and powers on appeal. What it did was to fundamentally alter the arbitral C award instead of simply upholding it. Furthermore, unlike the arbitrator, it disregarded the fact that the appellant had already paid the retrenchment package in Zimbabwe dollars. More significantly, it completely failed to address the principal question at the core of the dispute between the parties, i.e. whether or not the mutually agreed retrenchment package had been paid on time. And in so doing, it made a new contract for the parties, purportedly D as relief for the alleged breach of the retrenchment agreement. As is appositely cautioned by Christie *The Law of Contract in South Africa* 5 ed at p 366:

> "The fundamental rule that the court may not make a contract for the parties is a salutary one, the principle of which has probably never been seriously questioned. It is unthinkable that the courts should not only tell the parties what they ought E to have done but then make them do it by enforcing the court's idea of what the contract ought to have been."

Considerations of equity

In terms of s 2A(1) of the Labour Act, the purpose of the Act is "to advance social justice and democracy in the workplace" by, *inter alia*, "securing F the just, effective and expeditious resolution of disputes and unfair labour practices" (para (f)). Section 2A(2) requires that the Act be construed in such manner as best ensures the attainment of the purpose referred to s 2A(1), while s 2A(3) stipulates that the Act shall prevail over any other enactment inconsistent with it. G

Relying upon these provisions, Mr *Mwonzora* for the respondents submits that the arbitrator and the Labour Court could not ignore considerations of equity in arriving at their respective decisions. Thus, their respective orders for payment of the retrenchment package in convertible currency were not designed to substitute the retrenchment agreement but to make it more workable. H

Patel J

Mr *Mugandiwa*A for the appellant counters that s 89(2) of the Act, which prescribes the powers of the Labour Court, does not expressly include the power to dispense equity. Additionally, he points to s 98(2) which provides that the Arbitration Act [*Chapter 7:15*] shall apply to any dispute referred to compulsory arbitration. Article 28 of the Model Law scheduled to that Act delineates the rules applicable to the substance of a dispute submitted B to arbitration as follows:

"(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. C

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of any contract and shall take into account any usages of any trade applicable D to the transaction."

It would appear from s 98(2) of the Labour Act, as read with art 28 of the Model Law, that an arbitrator to whom a dispute is referred under the Act is confined to the applicable rules of law and cannot invoke considerations of E equity, unless expressly authorised to do so by the parties. If this is correct, the same limitation would apply to the Labour Court on appeal from an arbitrator because, in terms of s 98(10) of the Act, it may only entertain any such appeal on a question of law.

Conversely, if it is accepted that the Labour Court enjoys equitable jurisdiction by virtue of subss (1) and (2) of s 2A of the Labour Act, then it is arguable that F even an arbitrator may dispense equity in labour matters. This is because, as is declared in s 98(9), in hearing and determining any dispute, an arbitrator shall have the same powers as the Labour Court. This position would obtain notwithstanding Article 28 of the Model Law, by reason of subs (3) of s 2A, which accords primacy to the provisions of the Act over any other enactment G inconsistent with it.

In three previous decisions of this court, *Malimanjani* v *Central Africa Building Society* S-47-07 and *Nzuma & Ors* v *Hunyani Paper and Packaging (Pvt) Ltd* Civil Appeal No. SC 137/11, and *Fleximail (Pvt) Ltd* v *Samanyau & Ors* S-21-14, it was accepted, *obiter* and without elaboration, that the Labour Court is endowed with equitable jurisdiction. This position was H explicitly reaffirmed in *Madhatter Mining Company* v *Tapfuma* 2014 (2)

2015 (1) ZLR p344

Patel J

ZLR 125 (S), in reliance upon the specific wording of s 2A(1)(f). It was A held, *per* Gwaunza JA, at 137, that:

> "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.* damages) suffered in Zimbabwe dollars but claimed in foreign currency. This is particularly so where such damages, being owed to B 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 effect to the employee's entitlement to payment of, and the employer's obligation to pay, the debt in question". C

I respectfully associate myself with these sentiments, but with two significant caveats. The first, obviously enough, concerns the need to distinguish the specific facts of any given case. On the facts in Tapfuma's case, it became necessary to apply equity to compute a debt owed to an employee, which debt had not been satisfied and was still due, in a currency that would be effectively realisable. This scenario must be distinguished from a situation D where the debt in question has already been paid in a currency that is realisable at the time of payment.

The second caveat relates to the application of equity in those instances where it might conflict with rules of law. In this context, the need for predictability must be seen as paramount. See Bennion *Statutory Interpretation* (1984) E at pp 308-310. As was aptly captured by Lord Diplock in *Black-Clawson International Ltd* v *Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 (HL) at 836:

> "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to F know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. That any or all of the individual members of the two Houses of Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in G respect of what it expresses by the words used in the legislation it has passed."

Furthermore, as is lucidly expounded by Megaw LJ in *Ulster-Swift Ltd* v *Taunton Meat Haulage Ltd* [1977] 3 All ER 641 (CA) at 646-647, the danger of allowing judges the latitude of freely interpreting statutes according to their own view of what is just and equitable: H

2015 (1) ZLR p345

Patel J

> "…. A is not, indeed, that the judges become legislators, but that they may become legislators with widely differing, and perhaps unduly legalistic, views of the policy which is, or ought to be, behind the legislation. Hence the law, whatever it may gain in other respects, may in some cases suffer a loss in what has always been regarded as one of the essential features of law – uniformity; or at least predictability. Sometimes, in relation to the judicial view of 'the presumed purpose of the legislation', it may be a case of *quot judices, tot sententiae*: B whereas in relation to what the legislation has actually said, it is unlikely that judicial opinion would vary so widely."

Reverting to the Labour Act, while it might be accepted that the Labour Court, as well as tribunals arbitrating labour disputes, are duly empowered by virtue of s 2A(1) of the Act to dispense equity,

they clearly cannot in so C doing disregard existing rules of law. In particular, equity cannot be invoked and applied so as to override or negate the provisions and requirements of any legislation enacted by Parliament or by an executive authority duly delegated to frame subsidiary legislation. The position might be different if such legislation is shown to be inconsistent with any substantive provision of the Act, in which event that provision would prevail in conformity with D s 2A(3) of the Act. Subject to these qualifications, I have no hesitation in endorsing the application of equitable principles in the adjudication and resolution of labour disputes.

Import and impact of the MPS and the regulations

The arbitrator found that the use of the Zimbabwe dollar had been nullified E by Government directive with immediate effect from 3 February 2009 and that the appellant had therefore paid unusable currency into the respondents' bank accounts. The Labour Court also adopted the position that the local currency had become defunct and valueless in February 2009.

Contrary to the findings of the arbitrator and the court *a quo*, the Zimbabwe F dollar had not been demonetised with the introduction of the multi-currency regime, whether by the MPS or by any other Government directive. Both the arbitrator and the court clearly misconceived the import and effect of the MPS issued on 2 February 2009. As part of the new currency reforms to be applied, paras 5.1 and 5.2 of the MPS explicitly preserved the Zimbabwe Dollar as "the nation's currency". In terms of para 5.3, the local currency G was to be re-valued with immediate effect, accompanied by the introduction of new currency denominations. Thereafter, as prescribed in paras 5.4, 5.5 and 5.6, the old currency was to co-circulate with the new currency until 30 June 2009.

These policy measures were duly codified in ss 3 and 8 of the Regulations, H which were also promulgated on 2 February 2009. The Regulations were made

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under s 2 of the Presidential Powers (Temporary Measures) Act A [*Chapter 10:20*]. In terms of s 5 of that Act, regulations made thereunder are to prevail over any other law to the contrary, to the extent of any inconsistency. In any event, by virtue of s 6(1) of the Act, such regulations, unless they are earlier repealed, expire and cease to have any effect after 180 days following the date of their commencement. Thus, the Regulations *in casu* would have lapsed at or around the end of July 2009. B

Section 3 of the Regulations provided for the issue of new currency, the saving in force of certain coins and banknotes at the re-valued rate and the co-circulation of the old and new currencies. The effect of conversion on debts, contracts, securities, *etc.* was spelt out in s 8, which in its relevant portions stipulated as follows: C

> "(1) The conversion to the new currency system in terms of these regulations shall not prejudice the subsistence or validity of debts, contracts, securities or any other legal act or instrument whatsoever made, done, executed, incurred, entered or created before 2 February, 2009.
>
> (2) Subject to subsection (3), every debt, contract, security or any other legal act or instrument whatsoever involving any obligation to pay or right to receive D money in terms of the old currency system and which continues to subsist or be valid on 28 February, 2009, shall, on and after that date, be construed in accordance with the new currency system.
>
> (3) Debts incurred, contracts entered or securities created or transferred before 2 February 2009, shall be deemed to have been incurred, entered, created or transferred in terms of the old currency system and may be settled, discharged, E sold or liquidated in terms of the old or the new currency system on and between 2 February, 2009, and 30 June, 2009 …"

Whether retrenchment package paid on time

It probably cannot be doubted that when the matter was first argued before the arbitrator and at the time that he rendered his award, *i.e.* in August 2009, the Zimbabwe dollar had effectively become moribund. However, there is no F evidence on record to show that the local currency had completely ceased to be a medium of exchange at the time of payment by the appellant, between 11 and 13 February 2009. That being the case, it seems to me that the appellant was entitled, as it did at that time, to settle and discharge its obligations under the retrenchment agreement in Zimbabwe dollars, in accordance with G s 8(3) of the Regulations. It would then follow that the

question referred for determination by the arbitrator and the court *a quo* must be answered in the affirmative: that the appellant effectively paid the mutually agreed retrenchment package in time. Moreover, in the absence of evidence to the contrary, there would have been nothing to prevent the respondents, at that time, from accessing and utilising their respective packages in Zimbabwe H

Patel J

dollars, A instead of waiting for four months to raise their complaint before a labour officer.

As I have already indicated, considerations of equity, as enunciated and applied in *Tapfuma's* case, *supra*, cannot be brought to bear upon the disposition of the present matter for two reasons. Firstly, the facts herein are distinguishable in that the respondents' retrenchment packages have already been paid in a B currency that was extant and realisable at the time of payment. Secondly, the appellant has duly fulfilled its obligations under the retrenchment agreement, not only as contemplated in the agreement itself but also in compliance and in accordance with the governing law, *viz.* s 8 of the Regulations. I would add, for the sake of completeness, that there is nothing contained in that C section that can be said to be inconsistent with any provision of the Labour Act so as to be overridden by virtue of s 2A(3) of that Act.

The continuing operation and application of the Regulations, after February 2009 and until they expired at the end of July 2009, is obviously questionable. Each case necessitating the payment of employment debts in realisable currency would have to be considered and determined on its own facts and D in light of the changing commercial environment that prevailed during that period.

Disposition

In the result, the appeal must be upheld. As regards costs, however, I am disinclined to follow the general rule that costs should follow the cause. E Although the respondents have only themselves to blame for their tardiness in accessing their retrenchment payments, the fact remains that they will have secured nothing in return for their years of service to the appellant. For that reason and in this particular respect, I take the view that it would be unjust and inequitable to mulct them with costs in the matter.

It is accordingly ordered that: F

1. The appeal be and is hereby allowed.
2. Each party shall bear its own costs.
3. The judgment of the court *a quo* is set aside and substituted as follows:

"(i) The appeal is upheld with no order as to costs. G

(ii) The arbitrator's award of 17 August 2009 is set aside."

GWAUNZA JA and GARWE JA concurred.

Wintertons, appellant's legal practitioners

Mwonzora & Associates, respondent's legal practitioners H

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G BANK ZIMBABWE LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 348 (H)

Citation 2015 (1) ZLR 348 (H)

Case No Judgment No. HH-207-15

Court High Court, Harare

Judge Kudya J

Heard 9 & 10 September 2014; *CAV*

Judgment 27 February 2015

Counsel *A P de Bourbon SC,* for the appellant
T Magwaliba, for the respondent

Case Type Tax appeal

Annotations No case annotations to date

Flynote

Revenue and public finance – *income tax – deduction – tax year in which deduction allowed – allowed in year in which unconditional obligation is incurred – if obligation is conditional, deduction allowed in tax year in which condition fulfilled* D

Revenue and public finance – *income tax – tax avoidance scheme – what constitutes – taxpayer arranging affairs so that income is lower – not a tax evasion scheme – no obligation on taxpayer to ensure that more income is accrued*

Revenue and public finance – *income tax – withholding tax on fees – what* E *payments constitute "fees" – administrative charges paid to external bank constitute fees*

Headnote

The appellant bank carried out a retrenchment exercise due to overstaffing, which itself was a consequence of the economic downturn and the fall in the bank's business activities. The scheme, entitled "Voluntary F Separation Scheme", invited applications for a redundancy package. The applications had to be submitted by the end of December 2009. Most applications were received by that date, but 27 more were submitted and accepted in early 2010. The applications were submitted in batches to the Minister of Labour from early in 2010 and were approved by G the Minister. Applications were submitted to the respondent for a tax deduction directive in respect of each affected employee. The employees were duly paid out. In respect of the tax year ending 31 December 2009, the appellant claimed a deduction equivalent to the total paid out as an expenditure incurred for the purpose of trade and for conducting its business and earning income in that year of assessment. The respondent H

disallowed A the deduction but included it in the amended assessment for the 2010 tax year. It was common cause that the costs of the exercise were deductible in terms of s 15(2)(a) of the Income Tax Act [*Chapter 23:06*] and that the deduction was allowable in the year in which the expenditure was incurred.

The second issue in this appeal was the tax that the respondent assessed B in respect of "Nostro" accounts held by the appellant in the United States. These accounts were current accounts (also known as clearing accounts), which a bank in one jurisdiction opens in another jurisdiction to facilitate customer transactions in the currency of that jurisdiction. It is thus a current account held by a bank in the books of a correspondent C bank in another country. Nostro accounts facilitate trade and transactions between countries of varied currencies. These accounts were not interest bearing accounts, but the respondent regarded them as a tax evasion scheme in terms of s 98 of the Act and assessed tax on imputed notional interest income to these accounts at the average local rates prevailing in Zimbabwe at the time. The appellant argued simply that the respondent D had no legal right to intrude into its operational space in the absence of a local law that required it to move funds from the Nostro accounts into Zimbabwe to lend at the prevailing local interest rates.

The next issue was whether the bank charges that were raised by offshore banks holding the appellant's Nostro accounts amounted to fees under E para 2(1) of the Seventeenth Schedule of the Income Tax Act. Withholding tax is payable on fees due to non-residents. In that provision, "fees" is defined as "any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature." The appellant argued that the payment was not made from a source within Zimbabwe and that the services for which the F charges were levied were not of a technical, managerial, administrative or consultative nature.

Held, that the deduction is allowed in the year of assessment where the taxpayer has incurred an unconditional legal obligation during that year, even if the payment is not made in that year. For a conditional obligation the deduction is allowable in the year in which the condition is fulfilled. G The obligation to pay all of the employees would only have been incurred in 2009 if the exercise had in fact been a voluntary retirement scheme, rather than a retrenchment. The onus of showing this would be on the appellant. The evidence showed that what occurred was a retrenchment exercise, albeit a voluntary one, conducted in terms of the Labour Act H [*Chapter 28:01*]. The commitment to pay the expenses of the proposed

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retrenchment scheme was conditional upon approval by the Minister. A The condition was fulfilled in January and February 2010. The scheme became an unconditional legal obligation for the parties once approval was granted. The expenditure for the retrenchment scheme was accordingly incurred in the tax year ending 31 December 2010.

Held, further, that s 98 of the Income Tax Act cannot be invoked against a taxpayer who abstains from earning income, for example, by closing his B business or resigning from employment or taking a lower paying job or working for nothing. A distinction must be drawn between the case of a person who so orders his affairs that he has no income which would expose him to liability for income tax, and that of a person who so orders his affairs that he escapes from liability for taxation which he ought to C pay upon the income which is in reality his. The reality was that the appellant was not going to earn any income unless it moved the deposits to a call account. The deposit of the funds in the Nostro accounts did not create a tax liability for the appellant. The decision by the appellant to hold the funds in the Nostro accounts rather than investing them could not and did not create any tax liability for the appellant. In the absence D of such a tax liability, the respondent could not properly come to the opinion that holding the funds in the Nostro accounts was designed either solely or mainly to avoid, postpone or reduce a tax liability that did not exist. In deeming notional interest on the Nostro accounts, the respondent lost sight of the fundamental principle behind our income tax legislation. It is designed to tax income that has been created. The E income must have accrued to or been received by the taxpayer. It is not designed to tax income which is not in and has not come into existence. Where the activities of a taxpayer do not, or fail to, create income, it is beyond the remit of the Commissioner to wear the mantle of an investment adviser to the taxpayer and suggest to the taxpayer avenues F for more income creation.

Held, further, that para 1(2) of the Seventeenth Schedule deems the source to be from within Zimbabwe if the payer is ordinarily resident in Zimbabwe, and the appellant was ordinarily resident in Zimbabwe. The four categories of "technical, administrative, managerial or consultative" G are merely adjectives which describe a particular activity and are of wide and general import. The activities that were carried out by the Nostro banks on the various Nostro accounts and by the clearances that were effected were administrative in nature. The clearing or processing of transactions was both administrative and technical. Accordingly, the charges were "fees", as defined. H

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Cases cited A

A v *CoT* 1985 (2) ZLR 223 (H)

Caltex Oil (SA) Ltd v *Sec for Inland Revenue* 1975 (1) SA 665 (A); 37 SATC 1 (A)

CIR v *Delfos* 1933 AD 242

CIR v *I H B and A H King* 1947 (2) SA 196 (A); (1947) 14 SATC 184 (A) B

CIR v *Lever Brothers & Unilever Ltd* (1947) 14 SATC 1

CoT v *A Company* 1979 RLR 29 (A); 1979 (2) SA 409 (RA)

CoT v *F* 1976 (1) RLR 106 (A)

CoT v *Rendle* 1964 RLR 462 (A); 1965 (1) SA 59 (RA)

Edgar Stores Ltd v *CIR* 1988 (3) SA 876 (A); 50 SATC 81 (A)

ITC 1587 (1994) SATC 197 C

Kadir & Sons (Pvt) Ltd v *Panganai & Anor* 1996 (1) ZLR 598 (S)

Port Elizabeth Electric Tramway C Ltd v *CIR* 1936 CPD 241

Sunfresh Entprs (Pvt) Ltd v *ZRA* 2004 (1) ZLR 506 (H)

Legislation referred to

Exchange Control (Cotton) Order 2008 D

Exchange Control (Tobacco Finance) Order 2004 (SI 161 of 2004), ss 4(3) & 4A(3)

Income Tax Act [*Chapter 23:06*], ss 15(2)(a) & 98; Third Schedule para 4(p); Seventeenth Schedule paras 1(1) & 2(1)

Labour Act [*Chapter 28:01*], ss 9, 12C(1), (2), (3) & (4); 12D(1) & (2) E

Case information

A P de Bourbon SC, for the appellant

T Magwaliba, for the respondent

Judgment

Kudya J: This is an appeal filed on 3 September 2013 by a registered F commercial bank in the High Court in terms of s 65 of the Income Tax Act [*Chapter 23:06*]. It arises from taxation in the four areas of staff retrenchment costs, Nostro accounts, Nostro charges (non-resident tax on fees) and offshore loans.

At the appeal hearing, the appellant called the evidence of six witnesses and G produced a compendium of documentary exhibits encompassing some 1207 pages. These documents were contained in two large box files, two lever files and one flat file. In addition 10 loose leaf documentary exhibits that served as a useful summary to the compendium were produced. The respondent did not lead any evidence. It was content to rely on the averments made in the 15-paged Commissioner's case and the 76-paged r 11 of the Income H Tax rules documents.

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On 16 November 2012, the respondent issued to the appellant three amended A assessments in respect of income tax for the tax years ending December 2009, 2010 and 2011, respectively. The respondent objected to the assessments on 12 December 2012. The objections in respect of the subject matter for which the present appeal is concerned were disallowed on 15 August 2013. However, on 21 November 2013 the appellant proceeded to issue further amended assessments for the tax year ending 31 December 2010 and B 31 December 2011, respectively, after allowing deductions for VAT expenses incurred in the two years in question.

The issues for determination were:

1. Whether the appellant correctly brought the provision for retrenchment costs to account in its income tax return in the 2009 tax year; C
2. Whether the respondent was entitled to deem the appellant's offshore Nostro accounts as interest bearing accounts and the appropriate rate of interest;
3. Whether the respondent was entitled to attribute interest earned by non-resident related parties on loans made to businesses in Zimbabwe to the D appellant.

4. Whether bank charges raised by offshore banks holding the appellant's Nostro accounts amounted to fees under para 1 of the 17th Schedule of the Income Tax Act.

I will determine each issue in turn. E

Staff retrenchment costs

The facts

The facts concerning staff retrenchment costs are common cause. They emanate from the comprehensive testimony of the human resources manager for the appellant. He relied on the first 535 pages of the appellant's bundle F of documents, the 9-paged exhibit 1 and 15-paged exhibit 2.

On 26 November 2009 the board of directors for the appellant resolved that:

> "The company undertakes a voluntary retrenchment exercise to reduce its staff head count by up to two hundred and fifty-two (252) staff members." G

The minutes of that meeting are found on pp 1 and 2 of both the bundle of documents and exhibit 1. The minutes reveal that the foreign based parent company of the appellant pledged an amount not exceeding US$7 million to bankroll the costs of the exercise. The exercise was headlined "Voluntary Separation Scheme" in the minutes. The board directed the roll-out of an attractive package that would be of interest to all levels of employees. The H

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rationale, A process and package for the exercise were considered and approved by the board before they were unveiled in country-wide road shows to all members of staff. The rationale behind the decision of the board was the down-turn in economic activity which triggered a drastic fall in business volumes from average monthly transactions of US$1.9 m in 2008 to US$380 000 in 2009 in the face of static staffing levels in excess of capacity. B

The process targeted all levels of staff. All interested staff were required to submit formal applications by 31 December 2009. The appellant reserved the right to approve or decline applications. The separation package consisted of two months' basic salary for every year served, up to a cap of 21 months.

The results and costs of the exercise are set out on p 7 to 9 of both the bundle C and exhibit 1. This is an extract of the information on pages 1 to 535 of the appellant's bundle. The documentation consists of each employee's application letter for consideration in the exercise, the appellant's pro forma letter of acceptance of the exercise and a *pro forma* confirmation signed by each employee and the Zimbabwe Revenue Authority Employee's Tax Deduction Directive. The bundle of documents in respect of the exercise is in two files. D The first file contains information on the 74 employees while the other file contains information on the remaining 27 staff members whose applications were accepted. A total of 74 members of staff submitted applications for the exercise, which were received by the appellant between 3 and 31 December 2009. All these applications were accepted by the appellant on 31 December 2009. E The confirmation certificates in which each staff member affirmed voluntarily and freely terminating employment were all signed by the 74 staff members between 7 January and 14 January 2010. Each applicant was given three months' notice to termination from the date of acceptance. The gross cost of the voluntary retrenchment exercise for the 74 employees was US$1 995 402. A further 27 staff members submitted applications between F 6 January and 2 February 2010. These applications were accepted on the respective dates that they were made. The confirmation certificates were signed by each applicant between 13 January and 4 February 2010. Each applicant served three months' notice from the date of acceptance. The gross outlay to the appellant for these 27 members of staff was in the sum of US$550 059.

The dates on which approval for the exercise was sought from and granted G by the Minister of Labour and Social Services are summarised in exhibit 2. Between 8 January and 4 February 2010 the appellant submitted six batches of the 101 signed applications of the exercise for approval to the Minister. The correspondence in question was referenced "Voluntary Separation Package for Staff". The Minister approved the exercise in respect of 94 staff H members in four letters dated between 12 January and 2 February 2010. In

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ink, the Minister referenced each approval thus: Retrenchment of [the names A of the staff members]. The Minister's approval was typeset in these words:

> "The retrenchment Board acknowledges receipt of correspondence referring to the Works/Employment Council Agreement in Form LRR2. Please proceed as per agreement."

The appellant submitted applications for each employee to the respondent for B a tax deduction directive. The tax directives were issued for each employee for the tax year ending 31 December 2010 between 28 January and 26 February 2010. The tax deductions and the net amounts received by each employee are summarised on pp 7-9 of exhibit 1. US$433 370 was taxed for all the 74 employees leaving them with a total net amount of US$1 562 032. In regards to the 27, the tax deduction amounted to US$ 101 797 and they received an aggregate amount of US$448 262. C

In the return for the tax year ending 31 December 2009, the appellant claimed a deduction of US$2 693 500 for the staff retrenchment costs in terms of s 15(2)(a) of the Income Tax Act as an expenditure incurred for the purpose of trade and for conducting its business and earning income in that year of assessment. The respondent disallowed the deduction but included it in the D amended assessment for the 2010 tax year.

The dispute

Both Mr *de Bourbon,* for the appellant, and Mr *Magwaliba,* for the respondent, agreed that the costs of the exercise were deductible in terms of s 15(2)(a) E of the Income Tax Act. Counsel were also agreed that the deduction is allowable in the year the expenditure was incurred. In *Caltex Oil (SA) Ltd* v *Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 674E; 37 SATC 1 (A) at 11-2 Botha JA stated:

> "It is in the tax year in which the liability for the expenditure is incurred, and not in the tax year in which it is actually paid (if paid in a subsequent year), that the F expenditure is actually incurred for the purposes of s 11(a)."

It is accepted, following the authority of *Port Elizabeth Electric Tramway Co Ltd* v *Commissioner for Inland Revenue* 1936 CPD 241 at 244 and *Commissioner for Inland Revenue* v *Delfos* 1933 AD 242 at 257 that the actual amount of the expenditure incurred can only be ascertained at the end of the year of assessment after the computations have been done. G

In *Edgar Stores Ltd* v *Commissioner for Inland Revenue* 1988 (3) SA 876 (A) at 899A-C; 50 SATC 81 (A) at 90 Corbett CJ noted that deduction is allowed where the taxpayer has incurred an unconditional legal obligation during the year of assessment, in that year. He emphasized that for a conditional obligation the deduction is allowable in the year in which the condition is H

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fulfilled. A To the same effect are the sentiments of van Dijkhorst J in *ITC 1587* (1994) SATC 197 at 103-104.

In para 3 of his written heads, Mr *de Bourbon* submitted in the main that the commitment to the retrenchment exercise as a whole should prevail and in the alternative that the commitment for all the employees whose applications were B made and accepted in 2010 should be disallowed as expenditure incurred in the tax year ending 31 December 2009. The main submission runs contrary to the legal principles laid out in the *Edgars Stores Ltd* case and *ITC 1587*, *supra*, in respect of expenditure arising from unconditional legal obligations. It wrongly assumes, contrary to the evidence adduced during the appeal hearing, that the appellant entered into an unconditional legal obligation to C pay the 27 employees by 31 December 2009. It was common cause that as at that date the 27 had not yet applied for voluntary retirement nor had the appellant accepted their applications. It could not at that stage have incurred an unconditional legal obligation to pay them.

The correctness of the alternative submission by Mr *de Bourbon* hinges on D whether the voluntary separation scheme was a retrenchment exercise or not. A finding that the acceptance of the 74 applications on 31 December 2009 constituted voluntary retirement would inevitably make the expenditure deductible, the basis being that the appellant incurred an unconditional legal obligation to make payment to each of these employees.

Mr *Magwaliba,* however, submitted that the expense in relation to the exercise E was properly disallowed as the commitment made by the board meeting was conditional on approval of the exercise by the Minister of Labour and Social Services. He contended that as such approval was only granted in January and February 2010, the expenditure could not be deducted in the tax year ending 31 December 2009.

F It is correct that the appellant termed the exercise a voluntary separation scheme on page 1 of the extract of its minutes of 26 November 2009 and in correspondence to the Minister of Labour and Social Services and the respondent. It however referred to the exercise in the resolution on p 2 of both the bundle and exhibit 1 replicated on p 75 of the rule 11 documents as a "voluntary retrenchment exercise". In addition, in the letter of objection of G 12 December 2012 it called them "staff retrenchment costs", alternatively "retrenchment expenses". All the three terms were again used by the appellant in its letter of 10 December 2012.

Mr *de Bourbon* submitted that the exercise was in reality a voluntary retirement or resignation scheme, which fell outside the purview of the provisions of H ss 12C and 12D of the Labour Act [*Chapter 28:01*]. The onus to show on a

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balance of probabilities that the scheme was not a retrenchment exercise fell on A the appellant. The discharge of the onus was complicated by the sole witness called by the appellant on this aspect. He conceded under cross-examination that the scheme constituted a retrenchment exercise. His attempts to correct the picture in re-examination failed to paper the cracks. His prevarication on the point did not paint him as a credible witness in that respect only. The documentation emanating from the appellant is replete with reference to B retrenchment exercise, retrenchment costs and retrenchment expenses. The witness intimated that several discussions on the subject, which were not minuted, were undertaken with the Minister of Labour and Social Services. The appellant did not disclose the content of those discussions. The result of those discussions were the approvals in which the Minister treated the C applications as retrenchments. The approvals specified the involvement of the Retrenchment Board and Works/Employment Council Agreement in Form LRR2. The contents of these approvals contradicted the sole witness's evidence that the issue was not handled by the workers committee, works council or employment council as contemplated by s 12C(1).

The procedure set out in s 12C for retrenchment is that the employer who D wishes to retrench more than four people must within six months give written notice of its intention to the works council for the undertaking, and in its absence to an employment council, and in its absence to the retrenchment board. The employer is enjoined to provide the names of the employees and reasons for the proposed retrenchment to the council or board where the notice E is given. The human resources manager of the appellant stated that this was done. The objective facts show at least that all employees were notified. The rationale, process and package were disseminated in road shows. Section 12C(ii), in my view, appears to allow the majority of the employees by agreement to supersede referrals to other councils. The retrenchment board is certainly permitted to perform the functions of these councils. F

Section 12C(2), (3) and (4) provides the reason for referrals to the councils. It is to secure agreement between the employer and employees on the need to retrench and the conditions for such retrenchment. The overall duty of the retrenchment board is to recommend to the Minister whether to approve or reject the retrenchment. The Minister, in terms of s 12(9), then approves or rejects the retrenchment exercise. G

In the present case, the employer and employees reached agreement on their own in accordance with s 12D(2) without the involvement of the workers' committee, works council or employment council. The rationale and process followed by the appellant met the requirements of s 12D(1). The exercise carried out by the appellant was aptly described by the board resolution H

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as A a voluntary retrenchment exercise, in my view, to distinguish it from a compulsory or forced retrenchment. It meets the requirements of s 12C and 12D of the Labour Act. In addition the whole

exercise falls squarely into the definition of retrenchment. Section 2 of the Labour Act defines the word retrench in relation to an employee as follows:

> "'retrench', B in relation to an employee, means terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, reorganising the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed".

The appellant correctly described the process as a retrenchment in its C documentation. That the exercise was a retrenchment is further demonstrated by the provisions of para 4(p) of the 3rd Schedule to the Income Tax Act, which exempts from income tax:

> "an amount accruing by way of the first five thousand United States dollars or one third, whichever is the greater, of the amount of any severance pay, gratuity or similar benefit, other than a pension or cash in lieu of leave, which is paid D to an employee on the cessation of his or her employment, *where his or her employment has ceased due to retrenchment under a scheme approved by the Minister responsible for Labour or the Public Service*:
>
> Provided that the exemption provided in this subparagraph shall apply only in respect of the first forty-five thousand United States dollars of any such pay, E gratuity or benefit payable to him in any one year of assessment. "

Exemption is due to those employees who are retrenched under a scheme approved by the Minister, in this instance, of Labour and Social Services. It cannot lie in the mouth of the appellant to argue that the Minister, at its behest, approved a retrenchment scheme that was in fact a voluntary F resignation scheme. The principle of substance over form satisfies me that the purported voluntary separation scheme in form was in substance and reality a retrenchment scheme.

I agree with Mr *Magwaliba* that the commitment to pay the expenses of, in the words of Gubbay CJ in *Kadir & Sons (Pvt) Ltd* v *Panganai & Anor*G 1996 (1) ZLR 598 (S) at 604C, the "proposed retrenchment" scheme was conditional upon approval by the Minister. The condition was fulfilled in January and February 2010. The scheme became an unconditional legal obligation for the parties once approval was granted. The expenditure for the retrenchment scheme was accordingly incurred in the tax year ending 31 December 2010. The respondent properly disallowed the deduction of H US$2 693 500 in the tax year ending 31 December 2009.

2015 (1) ZLR p358

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Nostro accounts A

The background

The respondent assessed the appellant for income tax over the 2009, 2010 and 2011 tax years. He observed "huge" balances of non-interest-bearing amounts in the Nostro accounts held by the appellant with related parties that were in his view in excess of the monthly transactional requirements of B the appellant. Purportedly acting in terms of s 98 of the Income Tax Act he imputed notional interest income to these accounts at the average local rates prevailing in Zimbabwe at the time. It was common cause that the rates in Zimbabwe were much higher than the prevailing rates in the jurisdictions in which the Nostro accounts were held. The local interest rates applied were 12.4 per cent for 2009, 11.65 per cent for 2010 and 8.04 per cent for 2011. C Notwithstanding some averments in the respondent's correspondence and commissioner's case to the contrary, it is clear that the appellant did not actually earn such interest. The respondent deemed the appellant to have earned the ascribed interest income. He wrote back into the gross income of the appellant a total of US $5 392 369.88 for the 2009 tax year, US$11 429 964.09 for the 2010 tax year and US$8 065 117.68 for the 2011 tax year. The appellant D objected. The objection was disallowed, hence the appeal.

The facts

The appellant relied on the oral evidence of its head of corporate reporting cum deputy chief finance officer, who is also a member of the bank's asset E and liability management committee. In addition it relied on the documents in its bundle running from p 536 to p 579. The bundle consists of the list of all the Nostro accounts held by the appellant (p 536-538). Pages 539-579 consist of the transaction report of the debits from and credits to the Rand Nostro account of the appellant for the period 1 January 2009 to 31 December 2012. F

The witness is responsible for all the reporting processes in the appellant including tax payments and the filing of tax returns. In that capacity he superintends over tracking balances, quantification and reconciliation of all the appellant's Nostro accounts. He defined a Nostro account as a current account (also known as a clearing account), which a bank in one jurisdiction opens in another jurisdiction to facilitate customer transactions in the currency G of that jurisdiction. It is thus a current account held by a bank in the books of a correspondent bank in another country. Nostro accounts facilitate trade and transactions between countries of varied currencies. He produced the list of all the 22 Nostro accounts, exhibit 3 and pp 536-538 of the bundle, held by the appellant throughout the world. The appellant holds Nostro accounts with other banks of the same name worldwide (related parties) and other H

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banks A not related to it (unrelated parties). Ten of the accounts were held with related parties. The Nostro accounts, whether with related or unrelated parties, are all held at arm's length. The witness stated that the most active Nostro accounts for the appellant were the rand account held in Johannesburg, South Africa, with an unrelated party and the United States dollar account held in New York with a related party. He stated that the deposits into the B Nostro accounts are made by customers and not by the appellant. The money is deposited directly into the customer's account and reflected in the Nostro account simply because the appellant is the banker to the customer. The witness testified that Nostro accounts do not earn interest, a fact confirmed by his chief finance officer on p 30 of the rule 11 documents. It was evident C from the evidence of the head of corporate reporting that the appellant did not earn any interest on the deposits in the Nostro accounts. He produced a letter, exhibit 5, from the Director Global Head of USD Clearing Product Management, Americas dated 2 September 2014 in response to a query raised on interest rates on clearing accounts. The letter reads:

> "We are writing to you in response to your recent enquiries with regard to the D non-payment of interest on your clearing account held with us.
>
> As you will be aware, the global economy entered a recession (the Great Recession) in 2009, which had significant implications on the banking sector. The Federal Reserve took extraordinary actions in response to the financial crisis to help stabilize the US economy and financial system.
>
> The actions included reducing the level of short-term interest rates to near zero. E The Federal Fund's average rate since 2009 has been about 13bps (0.13%) whereas the average yields for three month US Treasury Bills since 2009 has been 8bps (0.08 per cent) (refer to appendix to this letter).
>
> As a result of such low yields, interest rates on deposits placed in banks in the United States were significantly impacted, with many banks paying very little or no interest on deposits. We are aware that in some cases some of our competitor banks would in fact charge to hold customer deposits - resulting in F 'negative interest' to their customers. The low interest environment continues to persist to date.
>
> [Related Bank] NY in general pays no interest on the majority of the clearing accounts held for our clients, regardless of whether they are from [related bank group] or from external parties.
>
> We therefore confirm that the non-payment of interest on your clearing accounts G with us has been and remains in line with market practice."

Exhibit 5 confirmed that the appellant did not earn interest income on deposits in its United States dollar Nostro account resident in New York in the United States of America. The witness also produced exhibit 4, the Bloomberg US Generic Government three months' bond yield for any placement funds H for the period 2 January 2009 to 14 October 2011. The average interest

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earned during that period was 0.08 per cent. He confirmed his chief finance A officer's observation that call accounts earn the highest rate in those foreign jurisdictions.

The witness indicated that the appellant could only earn interest on transfer of the deposits from the Nostro account to an investment account such as a call account. The bank also earns interest from buying Treasury Bills or other B interest bearing instruments. Interest was paid on the placement funds and accounted for in the respective tax years. In 2012 a directive from Reserve Bank of Zimbabwe stopped the offshore investment of funds from Nostro accounts. It was common cause that interest rates offered internationally on placement funds were low as exemplified by the declared income earned on those accounts. C

He disputed the averment that the bank did not earn interest on Nostro accounts in order to avoid paying tax and averred that the bank was in the business to earn income. He denied that the bank entered into transactional operation schemes with Nostro banks to deliberately forego interest in order to postpone and avoid paying interest. He stated that the appellant bank D operated Nostro accounts not as a vehicle to avoid, postpone or reduce its tax obligations but as an objective banking necessity; as would any other bank worldwide.

His testimony on the prevailing local position before RTGS was introduced tallied with the response of the appellant's chief finance officer to the respondent of 10 December 2012. The chief finance officer indicated that E in 2009 and 2010, before RTGS was introduced, the only option for local banks was to hold foreign balances either as cash or Nostro balances. All banks including the central bank opened correspondent bank relationships and used Nostro accounts to hold such funds in foreign banks. The entire Zimbabwe National Payment System in this period was conducted through F Nostro accounts and the level of balances was high for all banks reflecting the size of clients for each bank. He set out four reasons for Nostro accounts. These were to ensure bank liquidity to curtail a run on the bank, to maintain minimum liquidity levels set at the time by the Reserve Bank of Zimbabwe at 25 per cent of customer's deposits, to safeguard depositor funds by diligent prudential lending and thorough risk assessments of prospective clients, and G to support prompt settlement of customers' transactions.

When he was cross-examined, he failed to state the balances sitting in the NY Nostro account at the end of 2009, 2010 and 2011 respectively. He did not dispute the averment that the balance in the New York Nostro account at the end of 2009 was US$10.4 million. He also did not dispute that the H

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average A monthly amounts held over the three years in issue in that Nostro account was US$18 million of which US$2 million routinely catered for the transactional requirements of customers, leaving US$16 million idle. He maintained that the primary purpose of maintaining a Nostro account was to conduct customer business transactions. The witness maintained that the bank was not obliged to lend money to earn income. He revealed that the decision B to move money from Nostro to RTGS to cash depended on the risk appetite and assessed needs of the bank. He maintained that at the commencement of the multicurrency regime the bank adopted a low asset-to-deposit ratio as it needed to fully understand the risk factors bedevilling the local economy.

In my view, the witness acquitted himself very well in respect of the Nostro C accounts. He could not term the balances in the Nostro account huge. The respondent averred in the letter of 15 August 2013, disallowing the objection, that the justifications for the balances of liquidity risk management, safeguarding customers deposits and prompt customer transaction settlement support did not eclipse the high balances that remained after these reasons D had been taken into account. The magnitude of the balances, as disclosed in the cross-examination of the head of corporate reporting, of US$16 million was not disputed. Mr *Magwaliba* suggested to the witness that the average monthly transactions were in the sum of US$2 million and US$16 million remained idle in the Nostro accounts and that this pattern characterised the period from 2009 to April 2012. While the witness disputed they were huge, E his immediate supervisor, the Chief Finance Officer conceded they were huge. I am satisfied that in the context of the operational requirements the balances were indeed huge.

The letter disallowing the objection further discloses that the respondent accepted that Nostro accounts did not create an entitlement to interest regardless of whether they were held with related or unrelated parties. F It invoked s 98 because the balances went beyond meeting liquidity and transaction purposes. It was unclear why local rates were preferred to call rates prevailing in the jurisdiction of the correspondent Nostro bank. It was also unclear whether the proposal for the appellant to suggest other interest rates was limited to local interest rates or not. Paragraph 14 of the respondent's G case seems to concede that the computation of applicable interest could be extended to the foreign jurisdiction in which the deposits were made. That attitude is confirmed by the acceptance of the interest income declared on call funds invested in those jurisdictions. The view of the appellant was simply that the respondent had no legal right to intrude into its operational space in the absence of a local law that required it to move funds from the H Nostro accounts into Zimbabwe to lend at the prevailing local interest rates.

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The legal arguments A

The basis for determining this issue lies in the provisions of s 98. It reads:

> "98 Tax avoidance generally
>
> Where any transaction, operation or scheme (including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out, which has the effect of avoiding or postponing liability for any tax or of reducing B the amount of such liability, and which in the opinion of the Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out –
>
> (a) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or C
>
> (b) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question;
>
> and the Commissioner is of the opinion that the avoidance or postponement of such liability or the reduction of the amount of such liability was the sole purpose or one of the main purposes of the transaction, operation or scheme, the D Commissioner shall determine the liability for any tax and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he considers appropriate for the prevention or diminution of such avoidance, postponement or reduction."

Mr *de Bourbon* submitted that there was no legal obligation for the appellant E to have brought those funds onshore, earn interest and avoid the 2009 loss. He further submitted that the respondent had no legal duty to direct how the appellant should run its business affairs. He relied on the sentiments of Watermeyer CJ in dealing with a provision in the South African tax legislation equivalent to our s 98 in *Commissioner for Inland Revenue* v *I H B and A H King* 1947 (2) SA 196 (A) at 207-208; (1947) 14 SATC 184 F (A) at 190-191. The essence of the sentiments being that s 98 cannot be invoked against a taxpayer who abstains from earning income by closing his business or resigning from employment or taking a lower paying job. The learned Chief Justice listed several circumstances in which the equivalent to our section 98 would be inapplicable. He stated at p 208: G

> "These two types of cases may be uncommon but there are many other ordinary and legitimate transactions and operations which, if a taxpayer carries them out, would have the effect of reducing the amount of his income to something less than it was in the past, or of freeing himself from taxation on some part of his future income. For example, a man can sell investments which produce income subject to tax and in their place make no investments at all, or he can spend the proceeds in buying a house to live in, or in buying shares which produce no H

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> income A but may increase in value, or he may invest the proceeds outside of the Union, or make investments which produce income not subject to normal tax in his hands, e.g. Union Loan Certificates, deposits in the Post Office Savings Bank or shares in public companies. He can also sell shares in private companies, the holding of which may subject him to heavy taxation in his hands although he does not receive the income which is taxed, or he can sell shares in companies B which pay high dividends and invest in securities which return him a lower but safer and more certain income. He might even have conceived such a dislike for the taxation under the Act that he sells all his investments and lives on his capital or gives it away to the poor in order not to have to pay such taxation. If he is a professional man he may reduce his fees or work for nothing, if he is a trader he may reduce his rate of profit or sell his goods at a loss in order to earn a smaller income. He can also secure deductions from the amount of his gross C income, for example by insuring his life. He can carry out such operations for the avowed purpose of reducing the amount of tax he has to pay, yet it cannot be imagined that Parliament intended by the provisions of sec. 90 to do such an absurd thing as to levy a tax upon persons who carry out such operations as if they had not carried them out. Moreover, the problem of deciding what the income of such persons for the tax year would have been if they had not carried D out such operations would appear to be insoluble in some cases, if the countless possibilities of what they might otherwise have done with their capital or their labour are borne in mind."

At p 210 he distinguished two meanings to which the term could apply and settled for the latter. He held: E

> "In order to answer these questions it should be realised that there is a real distinction between:

(i) the case of a man who so orders his affairs that he has no income which would expose him to liability for income tax, and

(ii) the case of a man who so orders his affairs that he escapes from liability for taxation which he ought to pay upon the income which is in reality his.

Similarly there is a distinction between: F

(i) reducing the amount of tax from what it would have been if he had not entered into the transaction and

(ii) reducing the amount of tax from what it ought to be in the tax year under consideration."

He held at 210-11 that: G

> "If the words 'avoiding liability' and 'reducing the amount' are given the former meanings [(i) above] in s 90, then absurd results such as those mentioned above will follow, but if the words be given the latter meanings [(ii) above], though some difficulties will still occur, absurd results are on the whole eliminated. The provision contained in s 90, that the taxpayer shall be taxed as if the transaction had not taken place, which suggests that he has escaped from a liability to which H he ought to have been subject, strongly supports the view that the expression

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> 'avoiding liability' and 'reducing the amount' should be given the latter meanings, A and those are the meanings which should be given to them."

In the present matter the appellant did not earn any income from the Nostro accounts. Exhibit 5 demonstrates beyond a shadow of doubt that it was not possible for the appellant to have earned income from those Nostro accounts. The reality was that it was not going to earn any income unless it moved the deposits to a call account. B

Mr *de Bourbon* submitted that s 98 did not apply to the facts of this matter. In Zimbabwe, Smith J set out the four requirements that must co-exist in order to entitle the Commissioner to invoke s 98 in *A* v *Commissioner of Taxes* 1985 (2) ZLR 223 (H) at 232F-233B. The four requisites are: C

a. The presence of a transaction, operation or scheme;

b. Intended to avoid or postpone or reduce liability for any tax

c. Through means or ways not normally employed or which create rights or obligations which would not ordinarily be created by parties dealing at arm's length

d. The Commissioner forms the opinion that the avoidance or postponement D or reduction of such liability was the sole or one of the main purposes of the transaction, operation or scheme

I deal with each of these requisites in turn.

The appellant lawfully opened the Nostro accounts in question. The amounts E in the accounts were deposited by clients in the normal course of business and not by the appellant. The respondent suggested that the holding of funds in excess of the transactional needs for the clients was to the extent of the excess a scheme because this went unabated for three consecutive tax years. I recognise, as Smith J and before him Macdonald JP, as he then was, in *Commissioner of Taxes* v *F* 1976 (1) RLR 106 (A) at 115E, did, that F the words "transaction, operation or scheme" are all-embracing and would apply to any activity carried out by a taxpayer. In the circumstances of this case I would find that holding excess idle funds in the Nostro accounts for three consecutive tax years constituted a scheme.

The second element for determination is whether the scheme had the effect G of avoiding or postponing or reducing tax liability. The appellant stated that it could only earn income by moving the funds from the Nostro accounts to call accounts. It established beyond a shadow of doubt, and the point was accepted by the respondent in the letter disallowing the objection, that Nostro accounts whether held with related parties or not do not earn interest. It was also accepted by counsel for the respondent in argument that the rates of H

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interest A offered on offshore call accounts was negligible. The appellant did not move the funds from the Nostro accounts onshore for two reasons. The first, proffered by the chief finance officer of the appellant and amplified by his deputy in evidence, was that in 2009 and 2010, before the

introduction of the RTGS platform in Zimbabwe, all funds were transacted through Nostro accounts. In my view, that constituted the normal and usual method B of operation for local banks including the central bank. The second was that the prudential risk management policies of the appellant dictated that the money be kept in the Nostro accounts rather than be invested onshore. The bank had a low risk appetite and preferred to safeguard depositors' funds rather than invest the funds in a fragile and uncertain market. It does not appear to me that the scheme was entered into to avoid earning income. It C was carried out to preserve the funds.

The third element was not fulfilled. It was the normal method of operation for any bank with a Nostro account. It was not suggested by the respondent that the Nostro accounts with unrelated parties were operated differently from the ones in issue. The treatment and balances were the same for both D related and unrelated parties. The deputy chief finance officer established that this was a common worldwide practice amongst all banks holding Nostro accounts. No rights or obligations not normally associated with this type of account were created for the related parties.

The opinion of the Commissioner that the scheme was designed solely or E mainly to avoid tax liability was incorrect. It was common cause that the deposit of the funds in the Nostro accounts did not create a tax liability for the appellant. The decision by the appellant to hold the funds in the Nostro accounts rather than investing them could not and did not create any tax liability for the appellant. In the absence of such a tax liability, the Commissioner could not properly come to the opinion that holding the funds in the Nostro F accounts was designed either solely or mainly to avoid, postpone or reduce a tax liability that did not exist.

In deeming notional interest on the basis that the holding of huge amounts of idle funds in Nostro accounts did not make commercial sense for a bank that derived most of its income from interest earnings, the respondent lost G sight of the fundamental principle behind our income tax legislation. It is designed to tax income that has been created. The income must have accrued to or been received by the taxpayer. It is not designed to tax income which is not in and has not come into existence. That the respondent was aware of this fundamental principle is demonstrated by the contradictory averments that characterise para 13 of its pleadings. It first suggested that the appellant H committed tax evasion before imputing interest income that in reality was

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not earned. The bottom line was that either way income had to exist before A it became liable to taxation. The income must either have accrued to or been received or deemed to have accrued or been received by the taxpayer in order to trigger tax liability. In any event, it seems to me that stripped of all the technical points *King's* case, *supra*, amongst other things established that there is no obligation on any taxpayer to earn income. The examples suggested by Mr *de Bourbon* and conceded by Mr *Magwaliba* demonstrate B the point. A registered legal practitioner in private practice who chooses to do *pro bono* work cannot be taxed on the notional income he could have earned. Nor would he be taxed on the income differential if he elects to take a less paying job in the public service. Indeed neither would a bank be assessed to tax on the highest interest rate offered in its or any other C jurisdiction against any lower rate it would have accepted. It is clear to me that where the activities of a taxpayer do not or fail to create income; it is beyond the remit of the Commissioner to wear the mantle of an investment adviser to the taxpayer and suggest to the taxpayer avenues for more income creation. I would add, as an apt reminder to the respondent, the words of Beadle CJ in *Commissioner of Taxes* v *Rendle* 1964 RLR 462 (A); D1965 (1) SA 59 (RA) at 61B that:

> "It is not for the Commissioner to direct how a taxpayer should run its business."

It further seems to me that the Commissioner has no mandate to usurp the role of the onshore regulatory authority in respect of Nostro accounts. It was up to the appellant to deal with the deposits as it pleased, subject of course E to the requirements of both onshore and offshore regulatory authorities. Silke *Income Tax in South Africa* at para 19:14 writes to the same effect. The learned author suggests that:

> "If by this interpretation Internal Revenue considers that it is entitled to impute rights or obligations to a transaction that do not exist in the actual bargain between the parties, for example, to assume a reasonable rate of interest when none was F actually stipulated, it is considered that it misinterprets s 103(1). On the basis of this principle, it is considered that the Commissioner is not entitled to apply s 103(1) in order to subject to tax a lender of an interest-free loan on an amount that he could have earned by way of interest had he charged it, a professional man who renders services to another person

free of charge or a trader who sells trading stock at a price below its current market price. In all these circumstances there is no amount 'received or accrued' on which an assessment may be framed. G The existence of such an amount, it is submitted is an essential requisite for the application of s 103(1)."

I am satisfied that the respondent wrongly invoked s 98 to the Income Tax Act to bring to account notional interest to the gross income of the appellant in the three tax years in issue. H

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Offshore loans A

The respondent wrote back into the appellant's taxable income for the tax years 2009, 2010 and 2011 interest paid by six onshore borrowers on the basis that it was purportedly earned by the appellant. The appellant objected on 12 December 2012. After an exchange of correspondence between the B parties, the respondent disallowed the objection on 15 August 2013. The disallowance was based on the nature and scope of the loan agreement and the original approvals from, the External Loans Coordinating Committee (ELCC) of the Reserve Bank of Zimbabwe. In a bid to establish that the loan agreements executed between the appellant and the onshore payers of interest did not reflect the true position governing the loans in issue, the C appellant called the evidence of four witnesses. The first witness on this aspect of the appeal was the head of corporate banking of the appellant. The second was the managing director of a local tobacco company. The third was an executive director of another local tobacco company. The fourth and last witness was the company secretary of a large local manufacturing and distribution conglomerate. In addition it relied on pp 580 to 1037 of the D bundle, the 170 paged exhibit 6 and exhibits 7, 8, 9 and 10.

The evidence of the head of corporate banking cut across all the six local companies that purportedly executed loan agreements with the appellant. He referred to the Master Risk Participation Agreement (MRPA) concluded E on 12 June 2002 between the appellant and the offshore related party. It was conceived as a vehicle to provide suitable local borrowers with offshore funding at a time Zimbabwe was experiencing endemic foreign currency challenges.

The MRPA laid the general framework for the execution of acceptance F agreements in the form of Schedule 1 to the MRPA between the two banks. In the event of inconsistency between the Acceptance Agreement and the Master Agreement, the provisions of the Acceptance Agreement prevailed. The Acceptance agreements were of two forms. The first was a Funded Risk Participation agreement and the second was an Unfunded Risk Participation agreement. There were three important designations in the MRPA. These G were grantor, participant and obligor. A grantor could be any one of the two banks who offered the other, the participant, a participation in the funding or in the risk associated with the non-payment of the whole or any part of the amounts loaned out. A participant could be any one of the two banks that accepted a participation in the risk that would be assumed or the amount H advanced. The obligor was the borrower of the funds.

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In a funded participation (clause 3 of the MRPA on p 11 of exhibit 6), the A bank providing the funds was the participant. The participant was obliged to deposit the funds representing the extent of the exposure it was willing to assume with the grantor before it was disbursed to the borrower. It was required in terms of clause 3.2 to indemnify the grantor to the extent of the risk per centage on any default by the borrower. The grantor was required B to promptly allocate to the participant its share of the payments made by the borrower inclusive of interest, commission and fees accruing or expenses incurred.

In an unfunded risk participation, in terms of clause 4 of the MRPA, the participant would pay its pro rata share of the risk per centage of the principal, C interest, fees, costs and expenses to the grantor in case of default by the borrower. The participant would pay the participation per centage from any recoveries made from the borrower.

The witness clarified that a funded risk participation was invariably fully funded by the offshore related party while an unfunded risk participation was fully funded by the appellant with the offshore related party sharing in D the risk of default to an agreed per centage. In both instances the appellant was the grantor while the offshore related party was the participant. Clause 5 of the MRPA

dealt with the appropriation of payments made by either party. Clause 6.4 outlined the relationship between the parties. The parties accepted that the MRPA or any acceptance agreement or any other agreement E or understanding did not constitute the grantor an agent, fiduciary or trustee of the participant. The grantor's rights could not be transferred or assigned except for the right in clause 7.5 to sue the borrower for the whole amount owing. The participant had no rights to deal with, make payments to or receive payments from the borrower in the loaned amount. The parties were not in partnership, joint venture or association. The grantor was not required F to indemnify the participant on its participation share.

In the event of default by the borrower, the grantor was obliged to notify the participant in terms of clause 7.3. In terms of clause 11.6 privity of contract and associated benefits to third parties who were not party to the MRPA were expressly excluded. In terms of clause 14, English Law and Courts were G conferred jurisdiction over both the MRPA and any Acceptance Agreement derived from it.

It was the testimony of the head of corporate banking that despite the contents of clause 6.4 the appellant considered itself an agent of the participant. This was also confirmed by the evidence of the other three witnesses who testified H

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on A this aspect. They regarded the appellant (the grantor) as an agent of the offshore related party (the participant).

He established that the Exchange Control (Tobacco Finance) Order 2004 (SI 161of 2004) and the Exchange Control (Cotton) Order 2008 required that offshore funds be utilised for the growth and purchase of auction and B contract tobacco and seed cotton. The loans were approved by the ELCC. Tobacco buyers were precluded by s 4(3) and contract growers by 4A(3) from either drawing on corporate foreign currency account or purchasing, borrowing or raising foreign currency onshore from the interbank market or authorised dealers or any domestic source whatsoever to purchase contract or auction tobacco. A similar bar was placed against seed cotton merchants C by the relevant statutory instrument. In both instruments, onshore funds were defined as:

> "any funds, moneys, deposit, loan, line of credit advance from customer or parent company or other funds or facility whatsoever (in the tobacco order)/wheresoever (in the seed cotton order) located or obtainable within Zimbabwe".

He identified two facility letters for one of the three tobacco merchants. All D the other documentation for the tobacco company in question, being master participation documents, rate fixed advice and correspondence run from p 631 to p 807 in the bundle (pp 627 -726 contains acceptance agreements for the facility letter of 29 June 2011 and the various draw downs and security compliance certificates. The facility letter of 29 June 2011 was not produced E in evidence or in any of the documents). The first, dated 4 June 2009 for US$25 million was for the purchase and processing of tobacco for export for the 2008/2009 season and financing inputs and equipment for contract growing and purchase of tobacco in the 2009/2010 season.

The second facility letter, dated 26 August 2010 for US$35 million was for purchase of tobacco in 2009/2010 and inputs for 2010/2011 season. The F managing director of the tobacco company in question confirmed accessing these offshore loans. The three-paged exhibit 8, dated 17 December 2009 and 31 March 2010, were the bank statements of account produced by the managing director to confirm that his company maintained a current account 0101 2524708 50 with the foreign lender in accordance with the facility G letters. The statements showed that the borrower received US$26 million in 2009 and US$3 million in 2010 from tobacco buyers. It paid out capital and interest on the sum of US$3 031 210 on 9 March 2010. The tobacco company in question repaid the capital and interest into the evidence account 01012 252708 50 of the foreign lender. The acceptance agreement for the first facility letter is at pp 727-730 of the bundle. The grantor was the appellant H while the participant was the offshore related party. The participant funded

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the loan in the sum of US$22 million and assumed risk at a margin and A interest of Libor plus 4 per cent. The facility letter was for US$25 million with a margin and interest rate of Libor plus 6 per cent. It would appear from these two documents that the appellant might have contributed US$3 million and taken the balance of the risk of Libor plus 2 per cent.

The evidence of the head of corporate was that all the money was supplied B from the offshore related party at the margin and interest rate stated in the facility letter to whom all the capital and interest were remitted. It seems to me that he did not fully disclose the nature of the relationship between the appellant and the offshore related party in this regard. I find that he was therefore untruthful in this regard. The acceptance agreement for the facility letter of 26August 2010 was not produced in evidence. It also does not form C part of the documents in the bundle.

The facility letters were generally worded thus:

> "BANKING FACILITIES
>
> The appellant (the Bank) is pleased to confirm (subject to the conditions precedent and upon representations and any warranties as set out herein) its willingness to make available to your company (the Borrower) the uncommitted banking D facilities (the facilities) outlined below on the terms and conditions set out in this letter, as modified by the Bank from time to time and (where applicable) terms and conditions set out in the appendix."

The facilities became available on receipt of original security documents, a certified copy of the board resolution, the RBZ approval for the facilities, the requisite insurance policy and the opening of an evidence account at the E Bank (the evidence account). The interest rate differed in each facility letter. In the first it was set at the aggregate of Libor plus 6 per cent, in the second was risk price of 3.75 and establishment fee of 2.3 per cent.

Other conditions specific to each onshore borrower were stipulated. These were submissions of monthly schedules, management accounts, audited F financials, proof of seasonality, and submission of quarterly crop records to the appellant on set timelines. In addition, Customs Declaration Forms (CD1) of the projected export revenue to be routed and processed through the appellant and insurance cover with a reputable offshore insurer reflecting the appellant as the loss payee were also stipulated. The borrower undertook to the appellant to take comprehensive insurance. G

All sales proceeds from the tobacco sold were to be remitted to the appellant for the credit of the evidence account. The balance of the evidence account would be applied towards the reduction of any outstanding loans due to the appellant and the residue paid to the Borrower. The Bank would only act on instructions received from or verified by the local agent for the operations H

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of A the evidence account. The borrower was required to issue instructions to its overseas buyers to remit funds to the Bank for credit to the evidence account. The evidence account was supplied. The choice of law clause conferred jurisdiction on the local courts. A four-paged appendix consisting of 13 clauses was attached. The appellant was permitted to cede its rights in the facility to third parties. Clause 13 on disclosures identified the appellant B as the Bank. The confidentiality clause regarded the contents as the property of the appellant.

The facility letters of the second tobacco company were dated 30 September 2009 for US$1 million and 6 May 2010 for US$3 million. The full documentation for the second tobacco company runs from p 808 to p 854 of C the bundle. The acceptance agreements filed are for the facility letter for 6 March 2012. The two facility letters made no reference to the opening of an evidence account. There were no acceptance agreements for the two facility letters for this company that are the subject of the appeal.

The facility letters of the third tobacco company were dated 7 May 2009 for D a loan of US$15 million and 21 September 2010 for a loan of US$45 million. There were no documents filed in respect of the third tobacco company in the bundle of documents. The acceptance agreements in respect of the two facility letters for the third tobacco company were not produced in evidence. The accounts director of the third company stated that his company accessed the E offshore component of the loans. His company would instruct the appellant to pay off the loan on maturity through the evidence account. His company did not access local funds as that would have been contrary to law.

The facility letters for the seed cotton company are dated 3 July 2009 for US$2.5 million and 29 June 2010 for US$3 million. The conditions were markedly different to those of the tobacco companies but the framework of F the facility letters was similar to the tobacco ones especially the appendices. There were no other documents filed of record or produced in evidence in respect of the seed cotton company. The booking location stated in the facility letters was the appellant. The interest rate was set at Libor plus cost G of funds plus 6 per cent.

The facility letters in respect of the second and third tobacco companies and the seed cotton company made no reference to an evidence account. They were all formatted differently from the facility letters of the first tobacco company in that respect. They were formatted much like the three onshore funded facility letters for the manufacturing and distribution conglomerate. H Two of the three facility letters for the conglomerate that were admittedly

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funded onshore by the appellant were dated 24 August 2009 for a loan of A US$10 million and 22 September 2010 for a loan of US$20 million.

The witness averred that the appellant acted as the agent of the offshore related party. He further stated that the appellant did not receive any interest from any of the four clients. The interest was paid to the evidence account of the offshore related party on the instruction of the appellant. B

The facility letter for the cement manufacturer was dated 30 August 2010. The loan of US$3 million was required to finance the importation of mobile equipment, compressors, factory consumables and other capital equipment for the quarry and other factory operations. The other documents for the cement company run from p 908 to p 1037. The booking location on the facility letter for 30 August 2010 was the offshore related party. The tenor was a C year and interest was the aggregate of the cost of the funds to the appellant plus 2.5 per cent. Amongst the conditions, condition (c) and (f) on p 104 of exhibit 6 stand out like a sore thumb. Both grant the sole discretion to roll over the loan to the appellant. The appendix to the facility letter is a carbon copy of the appendices in the tobacco and cotton facilities. The choice of law D clause imbues the appellant with the choice of recovering any outstanding amounts in the magistrates court in Zimbabwe. The acceptance agreement in respect of this facility letter was not produced.

The head of corporate banking disclosed that the facility letters dated 24 August 2010 for US$10 million and 22 September 2010 for US$20 E million were in respect of onshore funds availed to the manufacturing and distribution conglomerate. He produced the 28-paged exhibit 7, the facility letter dated 19 October 2011. It differs from all other facility letters thus far analysed in design, content and coverage. The total commitments made in the facility letter were in the sum of US$60 million. It was a revolving loan facility for the general corporate purposes of the borrower. Clauses 11.6 and 25 conferred jurisdiction on the English courts. In schedule 1 para 11 the F guarantor provided security in favour of the appellant.

The head of corporate banking claimed that the appellant did not have the capacity to loan out such an amount. He produced exhibit 9, the loan draw-down advice from the offshore related party dated 17 November 2011, as G evidence of the direct payment of interest into the evidence account of the offshore related party. It stipulated the loan amount of US$60 million, the tenor of 182 days. The rate setting information was provided as were remittance instructions. The all-in-all rate was 7.43 per cent and the interest in the sum of US$2 253 766.67 was payable on 17 May 2012. He produced exhibit 10, the acceptance agreement in the format of schedule 1 to the MRPA. H

It A is in respect of the US$60 million loaned out to the manufacturing and distribution conglomerate. The grantor was the appellant. The participant was the offshore related party. The obligor was the manufacturing and distribution conglomerate. The guarantor was the offshore holding company for the borrower. The participation was fully funded by the participant. The interest rate was Libor plus 6.75 per cent. B

Exhibit 9 further stipulates the remittance instructions. It reads:

> "Please arrange to pay us the Total due of US$12 253 766.67 on 17 May 2012 at maturity to the following Standard Settlement instruction: …"

The nominated account number for payment happens to be the one indicated in Exhibit 3 as the Nostro account of the appellant, account number C 3582 088442 001 Ref: LPU/ [the Conglomerate] (Pvt) Ltd.

The appellant sought authority from the ELCC to borrow offshore funds on behalf of non-tobacco clients. On 6 October 2009 the ELCC approved an ordinary non-tobacco pre and post shipment finance facility in the sum of D US$50 million. The lender was indicated as the offshore related party

and the borrower was the appellant. The approval also covered a further US$50 million for tobacco financing. Again, the borrower was indicated as the appellant and the lender was the offshore related party. Both facilities had an expiry date of 31 August 2010.

Again, on 9 September 2010 the External Loan Coordinating Committee E approved an enhanced ordinary non-tobacco pre and post shipment facility increasing the loan amount from US$50 million granted on 6 October 2009 to US$100 million sought by the appellant from the offshore related party at an interest rate of Libor plus 4 per cent. The tobacco pre and post shipment facility was also increased from US$50 million to US$100 million with F an interest rate of Libor plus 3 per cent expiring on 31 August 2011. The borrower/beneficiary was the appellant while the lender was the offshore related party. The witness characterised the non-tobacco facility as a global arrangement rather than a specific one. He stated that the Reserve Bank of Zimbabwe required approval by the ELCC even for non-tobacco loans from offshore to obviate the need to seek exchange control authority to repay as this G would be embedded in the approval before loans were disbursed to clients.

The US$60 million was included in the US$100 million non-tobacco facility approval. He stated that the ELCC was aware of the legal requirement for tobacco merchants to access funds offshore but approved the appellant as borrower well knowing that the money was for clients rather than for the H appellant's own use.

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He was unable to shed light on the ELCC approval dated 7 December 2011. A It was for US$200 million divided equally between ordinary non-tobacco and tobacco pre and post shipment finance with maturity dates of 31 July 2010 and 31 July 2011 respectively, that predate the date of the authority. Both had a coupon rate of Libor plus 6 per cent. The approval in question was, however, corrected by the ELCC on 14 June 2012. The coupon rate for the B non-tobacco loan was reduced to Libor plus 4 per cent and the expiry date was amended from 31 July 2010 to 31 August 2012 while for the tobacco facility the coupon rate was reduced to Libor plus 3 per cent and the maturity date was amended to 31 August 2012. The other information remained the same.

He portrayed the appellant as an agent of the offshore related party in administering the loan. He maintained funds were disbursed to the six C onshore companies from offshore and that the borrowers also made direct interest payments offshore. In regards to the conglomerate, he averred that the appellant did not have the capacity to loan out more than 25 per cent of its capital to any one entity. He confidently affirmed the absence of the interest payments in the profit and loss interest account as proof that the money was never credited to the appellant. D

The evidence of the head of corporate banking in respect of the manufacturing conglomerate was confirmed by the company secretary of the conglomerate. He took part in the discussions that gave rise to the loan facility. It was clear to him that the appellant fronted the offshore related party. Representatives of the lender sat in the discussions to acquaint themselves with the borrower. E He stated that the money came directly from the foreign bank through the appellant. He stated that the appellant had no capacity to raise such a sum of money. He however acknowledged that his company did not execute any agreement with the foreign lender. The movement of the US$60 million is shown on pp 906 and 907 of the bundle. The money was deposited into the appellant's Nostro account in NY on 17 November 2011 and credited to F the local bank account of the borrower on the following day. He confirmed that payment of interest instructions by his company to the appellant were triggered by the interest rate fix, exhibit 9. The appellant would debit the company's bank account and credit the offshore related party's nominated account. The interest repayments in each six month period was in the region of US$2.2 million. G

The evidence of the head of corporate banking was supported by the three witnesses who testified on behalf of the borrowers. They all maintained that notwithstanding the contents of the facility letters, they sourced offshore loans from the offshore related party. They remitted interest to the offshore related party. The appellant was merely a conduit pipe who facilitated easy H

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access A of the funds and sought approval from the Reserve Bank of Zimbabwe on behalf of both the borrowers and the offshore lender.

There was a plethora of disquieting features in the testimony of the head of corporate banking. He disputed that any money was paid to the appellant by the offshore lender B contrary to the stipulation in clause 3 of the MRPA. He disputed that the appellant borrowed funds from the onshore lender, again contrary to all the approvals he produced that emanated from the central bank. The lender was clearly indicated as the offshore related party and the borrower and in later approvals the beneficiary as the appellant. The unexplained discrepancy between the first facility letter and the acceptance agreement in respect of the first tobacco company did not engender confidence C in his testimony. More importantly, the failure to produce the acceptance agreements of all the other facility letters save for the one in respect of the conglomerate, exhibit 7, and rate fix documents in respect of all the facility letters undermined his credibility. The impression left in my mind was that the appellant was deliberately hiding information in corporate underbrush. The similarity of all the letters save for the first two for the first tobacco D company with the ones the appellant admitted were provided with local funds undermined the appellant's case. There was no reference to any evidence account in these facility letters. The choice of law clause conferred jurisdiction on the local courts. The calculation of the computation of the interest rate in respect of the cement manufacturer demonstrated that it was receiving E onshore finance from the appellant.

In my view, it was simply incredible that the appellant did not have the capacity to fund the requirements of the conglomerate. It admitted to funding the conglomerate in the aggregate sum of US$30 million from onshore funds. In any event it held approvals from the ELCC to on-lend funds borrowed offshore to both tobacco and seed cotton merchants and other non-tobacco F customers. I was satisfied that the head of banking, for reasons best known to himself and the appellant chose to mislead this court about the true nature of the interest payments that were paid by the six onshore companies.

The issue for determination is whether the respondent was entitled to attribute interest earned by non-resident related parties on loans made to businesses in G Zimbabwe to the appellant. It was common cause that the facility letters were all in the name of the appellant. The appellant set the terms and conditions for accessing the loan amounts. The parties were required to provide board of directors' resolutions, various security documents and in some instances proof of an offshore evidence account. The appellant was the link between the borrowers and the External Loan Coordinating Committee of the Reserve H Bank of Zimbabwe. It applied for approval of both tobacco and non-tobacco

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pre and post shipment offshore loans. The approvals identified the appellant A as the borrower and the offshore related party as the lender.

The respondent understandably took the view that the appellant was borrowing offshore funds for onshore lending. This view was in part derived from the letter from the central bank of 12 February 2013 on pp 23 and 24 of the rule 11 documents. The central bank advised that current exchange control B regulations allowed authorised dealers to access offshore lines of credit for on-lending and own use while local companies were permitted to directly access offshore loans from offshore lenders including their holding and sister companies. The letter further indicated in line with the Exchange Control Directive ECD01 dated 31 July 2009 during the period to 5 February 2013, that authorised dealers were allowed to process offshore loans of up to C US$5 million under the advice of the External Loans Coordinating Committee whilst offshore loans in excess of US$5 million required prior approval by the ELCC. The prior approval of the use of the onshore funds borrowed offshore for the purchase and growth of tobacco and seed cotton may have dulled the collective conscience of the parties from the possible breach of the law.

The ELCC approvals granted to the appellant on 6 October 2009, 9 September D 2010 and 7 December 2011 as corrected on 14 June 2012 identified the appellant as the borrower of offshore funds emanating from the offshore related party for both tobacco and non-tobacco pre and post shipment loans. It was on the basis of the contents of the paperwork represented by the facility letters and the ELCC approvals that Mr *Magwaliba* maintained that E the interest purportedly paid by the borrowers to the related offshore party accrued to the appellant. He forcefully contended that the facility document created legal rights and obligations between the appellant and the specified onshore clients. It created the cause for payment of interest to the appellant and did not establish a similar cause for payment to the offshore related party. He relied on *Commissioner of Inland*

Revenue v *Lever Brothers and Unilever Ltd*F (1947) 14 SATC 1 at p 10 where Watermeyer CJ observed that*:*

> "The provision of credit is the originating cause or source of the interest received by the lender."

The onus to show that the interest in issue accrued to the offshore related party, in terms of s 63 of the Income Tax Act as interpreted in such cases as G*Commissioner of Taxes* v *A Company* 1979 RLR 29 (A); 1979 (2) SA 409 (RA) at 416 lies on the appellant. The thrust of the appellant's case and evidence from the four witnesses it called on this aspect appeared to me to be that the interest was in reality received by the offshore related party. The witnesses indisputably established this fact through a variety of documents such as the interest rate fix and bank statements. Interest, like any other income, is also H

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taxed A on the basis of accrual. Accrual denotes legal entitlement. The facility documents seem to appropriate interest to the appellant. They point to the appellant as the provider of the credit to whom interest payments were due. In the parlance of Watermeyer CJ in the *Lever Brothers'* case *supra* the provision of the credit was the originating cause or source of the interest.

The B appellant, however, argued that the interest could not have accrued to it because it was not the actual lender of the money. It merely facilitated the provision of the loan amount to the borrower. The four witnesses confirmed this fact. The appellant also relied on the MRPA and acceptance agreements it executed with the offshore lender. The MRPA mandated the execution of an acceptance agreement between the appellant and the lender to record the C relationship between the parties in a funded or unfunded risk participation.

The appellant did not produce any acceptance agreement in respect of the cotton company, two of the tobacco companies and the cement company. The acceptance agreement for the one tobacco company that was produced left unanswered questions that undermined its probative value. The appellant, D therefore, failed to establish the basis for the remittal of interest to the offshore related party. It produced a relevant acceptance agreement for the loan facility provided to the manufacturing and distribution conglomerate. I would have found for the appellant in regard to the conglomerate were it not for the unexplained remittance details in exhibit 9 which seem to direct payment of capital and interest to the appellant's New York Nostro account E listed in exhibit 3.

I, therefore, hold that the appellant has failed to demonstrate that it did not earn the interest deposited into the offshore evidence account held with the offshore related party.

Withholding tax F

The last issue for determination is whether the bank charges that were raised by offshore banks holding the appellant's Nostro accounts amounted to fees under para 2(1) of the Seventeenth Schedule of the Income Tax Act. The paragraph reads:

> "Every payer of fees to a non-resident person shall withhold non-residents' tax G on fees from those fees and shall pay the amount withheld to the Commissioner within ten days of the date of payment or within such further time as the Commissioner may for good cause allow."

Fees are defined in para 1(1) of the Seventeenth Schedule in the following terms: H

> "1. (1) In this Schedule, subject to subparagraph (2) –

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> 'fees' means any amount from a source within Zimbabwe payable in respect A of any services of a technical, managerial, administrative or consultative nature, but does not include any such amount payable in respect of …
>
> (2) For the purposes of this Schedule –
>
> (a) fees shall be deemed to be from a source within Zimbabwe if the payer is a person who or partnership which is ordinarily resident in Zimbabwe; B
>
> (b) in determining whether or not non-residents' tax on fees should be withheld, the question as to whether or not –
>
> (i) the payer is a person or partnership ordinarily resident in Zimbabwe or

(ii) the payee is a non-resident person; C

shall be decided by reference to the date on which the fees are paid by the payer;

(c) fees shall be deemed to be paid to the payee if they are credited to his account or so dealt with in that the conditions under which he is entitled to them are fulfilled, whichever occurs first;

(d) …" D

The averments made by the appellant in paras 34 to 37 of its case are that:

34. The foreign banks in which the appellant held its Nostro accounts raised transaction-related charges in respect of cash repatriation, cash ordering or Visa card costs.

35. The appellant paid those charges directly to the banks concerned without E deducting therefrom any amount in respect of withholding tax.

36. The respondent contends that the charges raised by the banks holding the Nostro accounts, which were paid by the appellant constitutes fees

37. The appellant contends that the payments made were in respect of bank charges and not in respect of fees, whether of a technical, managerial F or consultative nature and are not subject to the withholding tax.

The head of corporate banking testified how transactions were conducted in the Nostro accounts. A customer/client would instruct the appellant to make payment to a third party. The appellant generated a telegraphic transfer through SWIFT, a safe international payment processing platform used by all banks G to transfer money from one bank to another, to transfer the funds from its relevant Nostro account to the third party's designated bank account. In line with international banking practice, SWIFT automatically charged a fixed rate against the Nostro account based on the number of clearing transactions that operated through the system. SWIFT charged the related account directly from that transaction by debiting the account without raising an invoice. He H

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also A stated that the Nostro bank charged normal bank charges in line with the requirements of the regulatory authorities in which they reside.

When he was cross examined he equated the Nostro bank charges with fees paid by customers of local banks for services rendered and charges levied for maintaining an account with the local bank. He clarified that the appellant B was charged fees for particular transactions that went through the Nostro accounts. He stated that the appellant maintained a mirror account for each Nostro account to track transactions in each account. He conceded that the debit represented money earned by the foreign bank.

Mr *de Bourbon* submitted that the appellant was not liable for withholding tax on two grounds. The first was that the payment was not made from a C source within Zimbabwe and the second was that the services for which the charges were levied were not of a technical, managerial, administrative or consultative nature. He relied on *Sunfresh Enterprises (Pvt) Ltd* v *ZRA* 2004 (1) ZLR 506 (H). In that case, Cheda J held *inter alia* that payment of a commission by a foreign client to a foreign marketing agent of a local D safari operator outside the country did not under para 1(1) of the Seventeenth Schedule of the Income Tax Act constitute payment of fees from within Zimbabwe even though the originating cause was in Zimbabwe.

It seems to me that the facts in *Sunfresh* are distinguishable from the present facts. *In casu*, the appellant conceded in its pleadings that it paid the charges debited by the Nostro banks. Paragraph 1(2) of the Seventeenth Schedule E deems the source to be from within Zimbabwe if the payer is ordinarily resident in Zimbabwe. The appellant is ordinarily resident in Zimbabwe. If the commission in the *Sunfresh* case was deducted from the overall hunting fee remitted to the safari operator as submitted by Mr *de Bourbon*, I would with respect differ from the finding of Cheda J. The payment by the foreign F client to the foreign based agent, in my view, would simply constitute a prepayment on behalf of the safari operator. It would have been subject to withholding tax.

In the present matter, the charges were interchangeably referred to as fees by the head of corporate banking. Mr *de Bourbon* submitted that the Nostro G bank charges were not subject to withholding tax as they did not fall under any one of the four categories of technical, administrative, managerial or consultative. It seems to me that the four categories in question are merely adjectives which describe a particular activity. According to the *Shorter Oxford English Dictionary*, "administer" means *inter alia* "to manage;" "to handle", while "administrative" is defined as

"pertaining to management." H One of the many permutations of "to manage" is "to deal with carefully".

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Like Macdonald JP in *Commissioner of Taxes* v *F, supra,* at 115F where A he was of course referring to "transaction, operation or scheme", I would agree that each of the words "technical, managerial, administrative and consultative" that is used in the paragraph under consideration:

> "is of wide and general import and there are few activities of a taxpayer which will not be appropriately described by one or other of them." B

The activities that were carried out by the Nostro banks on the various Nostro accounts and by SWIFT clearances were administrative in nature. The clearing or processing of transactions by SWIFT were in my view both administrative and technical. They involved the use of software that does not issue invoices but systematically and automatically debits the cost of each transaction on the account. C

I am satisfied that the charges raised by offshore banks holding appellant's Nostro accounts amounted to fees under para 1 of the Seventeenth Schedule of the Income Tax Act.

Conclusion

For the avoidance of doubt, I answer the first issue referred to trial against the D appellant. It did not properly bring to account the retrenchment costs in its tax return for the year ending 31 December 2009. The respondent properly disallowed it in the 2009 tax year.

In regards to the second issue of imputing notional interest to Nostro accounts I hold that the respondent was not entitled to deem the appellant's offshore E Nostro accounts as interest bearing accounts. The respondent erred in adding notional interest back to taxable income.

As for the third issue, on offshore loans, the respondent was entitled to attribute interest earned by non-resident related parties on loans made to businesses in Zimbabwe to the appellant. He correctly added it back to income in the respective tax years that it was earned. F

And in respect of the last issue on withholding tax, I hold that the respondent properly raised withholding tax on the bank charges that were raised by offshore banks holding the appellant's Nostro accounts as they constituted fees under para 1 of the Seventeenth Schedule of the Income Tax Act [*Chapter 23:06*]. G

Costs

The appellant did not achieve anything approximating substantial success. I will order each party to bear its own costs.

Disposition

Accordingly it is ordered that: H

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1. The A appeal in respect of retrenchment costs, interest on offshore loans and non-resident withholding tax be and is hereby dismissed.
2. The appeal in respect of Nostro accounts be and is hereby allowed.
3. The amended assessment issued by the respondent on 16 November 2012 for the tax year ending 31 December 2009, and the amended assessments B issued on 21 November 2013 for the tax years 31 December 2010 and 31 December 2011 respectively, be and are hereby set aside.
4. The respondent is directed to issue further amended assessments in respect of each of the three years in accordance with the contents of this judgment by:
   (i) disallowing the deduction of retrenchment costs in the sum of C US$2 693 500 in the tax return for the tax year ended 31 December 2009;

(ii) exempting payment of imputed notional interest from Nostro accounts in the tax years ended 31 December 2009, 31 December 2010 and 31 December 2011. D

(iii) adding back to income the interest paid by the six companies in each of the three tax years in question.

(iv) adding back to income the withholding tax on the bank charges raised by all the offshore banks holding the appellant's Nostro accounts at the appropriate rate for each of the three tax years in question. E

5. Each party shall bear its own costs.

Gill, Godlonton and Gerrans, appellant's legal practitioners

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MATINDIKE v DUFFY MITCHELL PROPERTY INVESTMENTS (PVT) LTD 2015 (1) ZLR 382 (H)

Citation	2015 (1) ZLR 382 (H)
Case No	Judgment No. HH-215-15
Court	High Court, Harare
Judge	Muremba J
Heard	20 January 2015; *CAV*
Judgment	4 March 2015
Counsel	*M Mavhiringidze*, for the applicant *N Bvekwa*, for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *affidavit – answering affidavit – court's leave* C *required to file such affidavit in all cases, including applications for summary judgment*

Sale – *auction sale – auctioneer's commission – not due until sale complete* D *– sheriff's sale – not complete until confirmed – auctioneer only entitled to commission when sale confirmed*

Headnote

The applicant made the highest bids at two sheriff's sales conducted by the first respondent, an auctioneer. He paid 10 per cent of the bid price to E the auctioneer; however, the sales were not confirmed by the sheriff, who instructed the first respondent to refund the applicant's money. The applicant brought an action for the recovery of the money, and sought summary judgment. The first respondent filed an opposing affidavit; the applicant filed an answering affidavit, without first seeking the leave of the court. F

The first respondent argued that it had a *bona fide* defence, in that it was entitled to its commission, even though the sale was not confirmed.

Held, that although there had been a previous judicial recommendation that, in summary judgment applications, the applicant should always be allowed to file an answering affidavit to show that the respondent's defence was not *bona fide*, this remained just a recommendation. G Rule 67 of the High Court Rules had not been amended and the court's leave was required. The affidavit would be disregarded.

Held, further, that the sale was conducted by the first respondent, on the instructions of the sheriff. The first respondent was the executing arm of the court. The sale was accordingly governed by the rules of court. Rules H

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356 and 359 A make it clear that the sale is not completed or finalised at the time the highest bidder is declared the purchaser, but only after the sheriff has confirmed the sale. If he decides to cancel the sale, he makes an order as he considers appropriate. In an auction sale commission is only payable to the auctioneer upon the property being sold. If he does not sell the property he gets no commission. The first respondent was B unable to produce anything to show that there were conditions attached to this sale which stipulated otherwise. It accordingly failed to show that it had a good *prima facie* defence.

Cases cited

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

Crusader Real Estate Consultancy (Pvt) Ltd v *CABS* 1999 (2) ZLR 257 (S)

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

John Meacock & Co (a firm) v *Abrahams (Loescher Third Party)* [1956] 3 All ER 660

Martin v *Currie* 1921 TPD 50 D

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

Scotfin Ltd v *Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (H)

Stationery Box (Pvt) Ltd v *Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H)

Time Bank of Zimbabwe Ltd v *Culroy Farm (Pvt) Ltd & Ors* HH-181-03

Legislation considered E

High Court Rules 1971 (RGN 1047 of 1971), rr 66, 67c, 356, & 359(7)

Case information

M Mavhiringidze, for the applicant

N Bvekwa, for the first respondent

Judgment

Muremba J: F This is an application for summary judgment. The background of the case is that the applicant who is the plaintiff in the main matter issued summons against the respondents. The first respondent entered an appearance to defend where upon the applicant made the present application for summary judgment stating that the first respondent has no *bona fide* defence to the action.

The facts of this case are as follows. In 2012 the first respondent conducted an G auction sale of immovable properties in execution of this court's judgments at the instructions of the second respondent. Among the properties auctioned were stand numbers 163 Philadelphia Township and 23 Carrick Crescent Hellensvale, Borrowdale, Harare. They were auctioned as Sheriff Sale numbers 1 and 22 respectively. The highest bids for the respective properties were H $192 400 and $12 150 and these bids were made by the applicant. Having

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been declared the highest bidder the applicant was made to pay 10 per A cent of the bid price to the auctioneer before the confirmation of the sales. The applicant duly paid $19 240 and $1 215, but the sales were subject to confirmation by the second respondent.

However, the second respondent did not subsequently confirm the sales. For Sale No. 1 he said that the highest bid was lower than the forced sale B value of the property. By way of a letter dated 17 October 2012, the second respondent directed the first respondent to refund the applicant all his money including commission and sell the property by private treaty. When the first respondent did not take heed the second respondent, on 27 November 2012, wrote yet another letter reiterating that the first respondent was supposed to refund the applicant all the money that he paid. C

The sheriff (second respondent) did not confirm Sale No. 22 because the judgment debtor's legal practitioners had objected to the sale. By way of a letter dated 17 October 2012, the second respondent directed the first respondent to refund the applicant all the money that he had paid including commission. The first respondent did not comply. On 6 December 2012, the D second respondent had to write another letter and in that letter he actually said, "Please refund him his monies since you are entitled to your commission upon confirmation."

The applicant's claim is for a refund of the money that he paid as deposit. The applicant averred that there is no justification for the respondent to refuse to refund the money when the sales did not go through. The applicant also made E a prayer for costs on a legal practitioner and client scale for abusing court process by defending an action which is so clear. It was further averred that the appearance to defend was entered for the purposes of delaying proceedings.

In opposing this application, the first respondent stated that it conducted the auction in its capacity as an agent and as such was entitled to payment of a F commission. It was averred that that money that was paid by the applicant is the commission and not a deposit of the purchase price as the plaintiff was alleging. It was further averred that as an agent, once it introduced the purchaser, its work was done and it was entitled to payment. The first respondent prayed for the dismissal of the applicant's application with costs on a legal practitioner and client scale on the basis that the application was G unwarranted and since the applicant was aware of the legal position he ought not to have made the application.

After the first respondent had filed the notice of opposition and the opposing affidavit the applicant went on to file an answering affidavit without the leave of the court. However, it is apparent that the applicant was aware of H

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the A need to seek the court's leave first before filing the answering affidavit. This is evidenced by the fact that he raised it in his heads of argument, well before the first respondent had raised it in its heads of argument. In his heads of argument the applicant indicated that the answering affidavit ought to be admitted despite him having flouted the procedure.

In the heads of argument the first respondent challenged the filing of the B answering affidavit by the applicant citing r 67(c) of the High Court Rules which states that an answering affidavit in a summary judgment application should be filed with the leave of the court. The rule reads:

> "67 Limitations as to evidence at hearing of application
>
> No evidence may be adduced by the plaintiff otherwise than by the affidavit of C which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit:
>
> Provided that the court may do one or more of the following –
>
> (a) …
>
> (b) …
>
> (c) permit the plaintiff to supplement his affidavit with a further affidavit dealing D with either or both of the following –
>
> (i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or
>
> (ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence." E

The applicant's counsel argued that the answering affidavit should be admitted by the court because it was in the interest of justice to do so for it served to demonstrate that the first respondent has no *bona fide* defence. He went on to cite *Scotfin Ltd* v *Afri Trade Supplies (Pvt) Ltd* 1993 (2) ZLR 170 (H) wherein Robinson J at p 177E said:

> "Let me say, in passing, that I consider that the stage has now been reached where F an applicant for summary judgment should always be allowed to file a replying affidavit to show that a respondent's opposition to his application is not *bona fide* or is ill founded."

The applicant's counsel argued that the *Scotfin* case *supra* marked a departure from the previous position of always requiring the leave of the court to file an answering affidavit. The *Scotfin* case falls on all fours with the present case in that the applicant in that case had also filed G an answering affidavit without the leave of the court. In the heads of argument the respondent raised a point *in limine* for the answering affidavit to be struck out on the grounds that it had been filed without the leave of the court. Robinson J allowed a departure from r 67 in terms of r 4C(a) and admitted the answering affidavit H on the basis that at the time the applicant made its application it had no

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knowledge that the respondent would raise the defence that it raised in the A opposing affidavit.

Robinson J went on to recommend an amendment of r 67. He said:

> "In this regard, I can see no good reason for distinguishing any longer between an applicant for summary judgment and any other applicant insofar as the filing of a replying affidavit is concerned. Accordingly, I would strongly recommend that B our Rules of Court be amended to entitle an applicant for summary judgment to file a replying affidavit if he so elects."

This was just but a recommendation. However, it is apparent that despite the recommendation by Robinson J, r 67 has not been amended to allow an applicant to file an answering affidavit without the leave of the court if he so elects. The rule still says: "provided that the court may permit the plaintiff C to supplement his affidavit with a further affidavit…."

The applicant's counsel's submission that the court's leave is no longer required is not correct. The leave of the court is still required for the applicant to file an answering affidavit. So before filing the answering affidavit the applicant should have sought the leave of the court first. The applicant did D not proffer any explanation why it did not seek the leave of the court to file the answering affidavit as is required by r 67(c). It is clear that the applicant was well aware that he needed the court's leave to do so, but deliberately chose to disregard the rule and mislead the court by saying that in the *Scotfin* case it was said that in summary judgment applications the applicant should E always be allowed to file a replying affidavit to show that the respondent's opposition is not *bona fide*. As I have already explained above, this was just but a recommendation by Robinson J. The rule is very clear that the leave of the court should be sought first. In the absence of a satisfactory explanation for the lack of adherence to the rule I do not see why I should admit the answering affidavit. In any case considering the contents of the F answering affidavit there is nothing new that is being raised by the applicant which was not said in its founding affidavit. I will therefore disregard the answering affidavit.

In an application for summary judgment the applicant should show that he has an unanswerable claim which is based on a clear cause of action. See r 64 G of the High Court Rules and also *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005 (1) ZLR 1 (H). In *CABS* v *Ndahwi* 2010 (1) ZLR 91 (H) Makarau JP (as she then was) stated that a plaintiff resorting to summary judgment must have an unanswerable claim as pleaded in his summons and declaration and as verified in the affidavit that must be filed in terms of the rules. On the other hand, in terms of r 66(1), for the court to dismiss an application for H

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summary A judgment the defendant must satisfy the court that he has a good *prima facie* defence to the action.

In *Hales* v *Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) it was held that –

> "Where a plaintiff applies for summary judgment against the defendant and the B defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He

> must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute a valid defence to the plaintiff's claim. It is not sufficient for the defendant to C make vague generalisations or to provide bald and sketchy facts."

In *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H) Makarau JP stated that in an application for summary judgment the defendant must raise a defence, but he does not have to prove it. In raising the D defence he must merely allege facts which, if he can succeed in establishing them at trial, would entitle him to succeed at the trial. The defence must be plausible and *bona fide*. It must meet the claim squarely and must amount to a defence at law. If it does not, the defendant would not have discharged the onus on him and summary judgment must be granted.

As correctly submitted by the applicant's counsel, the facts of this case are E common cause. Initially in the opposing affidavit and in the heads of argument the first respondent stated that it conducted the auction in its capacity as an estate agent. However, during the hearing the first respondent's counsel wisely abandoned that argument and admitted that the first respondent conducted the auction as an auctioneer. It is a fact that the first respondent was engaged F by the second respondent to sell these immovable properties pursuant to some judgments of this court. The second respondent therefore employed the first respondent in his capacity as the executing arm of this court. It follows therefore that the sale of the properties was governed by the rules of this court, that is, the High Court Rules 1971. By virtue of r 350A, the first respondent was nominated by the second respondent to conduct the sale G as an auctioneer and in terms of r 354 the sale was done by public auction.

Rule 353 states that the conditions of sale are prepared by the Sheriff. In terms of r 356 if the sheriff is satisfied that the highest price offered is reasonable he shall declare the highest bidder to be the purchaser, *subject to confirmation of the sale.* In terms of r 359(1) any interested parties may raise objections against the sale. In terms of r 359(7), upon hearing the H objecting

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parties, the sheriff shall either in terms of r 359(7)(a) confirm the sale or in A terms of r 359(7)(b),

> "cancel the sale and make such order as he considers appropriate in the circumstances and shall without delay notify the parties in writing of his decision."

What is apparent from rr 356 and 359 is that the sale is not completed or finalised at the time the highest bidder is declared the purchaser, but after B the sheriff has confirmed the sale. If he decides to cancel the sale, he makes an order as he considers appropriate.

In resisting the application, Mr *Bvekwa* submitted that the first respondent has a *bona fide* defence, in that it was entitled to its commission because the law relating to auctioneers and estate agents is the same according to Christie C*Business Law in Zimbabwe*. Mr *Bvekwa* argued that the first respondent's basis for refusing to refund the applicant was that it had substantially performed its mandate, that of introducing the purchaser (applicant) to the second respondent. It was argued that the fact that the sale was later not confirmed is neither here nor there. The job that the first respondent had done entitled it to a commission because the contract was created when the D applicant accepted the bid.

Mr *Bvekwa* further submitted that with the sheriff's sale, the sheriff (second respondent) has standard conditions for all auctioneers he appoints to conduct the sales. He said the sheriff has a document which says that the purchaser will be liable to pay the commission. He also said that it is not a condition E of the sale that money paid would be refunded. However, Mr *Bvekwa* did not attach the document in question. It would have been most helpful if Mr *Bvekwa* had attached the sheriff's document which sets out the conditions of sale instead of just making submissions from the bar without any document to back them up. As correctly submitted by Mr *Mavhiringidze*, Mr *Bvekwa* was essentially leading evidence from the bar. However, I would like to F believe that Mr *Bvekwa* was correct in his submission that with the Sheriff's sale it is a condition of the sale that the burden of paying commission to the auctioneer and other selling costs lies with the purchaser or the successful bidder and not with the Sheriff even if the auctioneer is an agent of the Sheriff. My conclusion is based on the letters which were written by the second G respondent (the Sheriff) to the first respondent wherein he was instructing the first respondent to refund the applicant all his money including commission.

However, it is a settled positon of the law that in an auction sale commission is only payable to the auctioneer upon the property being sold. In *Crusader Real Estate Consultancy (Pvt) Ltd* v *CABS* 1999 (2) ZLR 257 (S) Ebrahim JA H

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quoted A with approval the words of Bristow J in *Martin* v *Currie* 1921 TPD 50 at p 53 to the effect that –

> "I think it is clear that the employment of an auctioneer does not give him any authority except to sell by auction. The case of *Muller* v *Kemp* 1 Searle 167 was cited to us, which, on the facts, is not in point, but the court there cited, with approval, a passage from *Storey on Agency* which states that the agency of an B auctioneer ends as soon as the auction is held. An auctioneer is employed to sell property by auction on the conditions arranged; if he sells the property he gets his commission: if he does not sell the property he gets no commission."

Even Denning LJ (as he then was) in *John Meacock & Co (a firm)* v *Abrahams (Loescher Third Party)* [1956] 3 All ER 660 confirmed this position of the law when he said: C

> "I sometimes think it would be a good thing if auctioneers and estate agents, if a sale did not go through, stipulated for a reasonable remuneration for their time and labour; but I suppose that would not be good business. They always claim to be entitled to full commission, and by so doing, take their chance on the sale going through to completion."

In casu, the letters which were written by the second respondent to the first D respondent also confirm this position of the law. After he had cancelled Sale No. 1, in a letter dated 17 October 2012, he wrote to the first respondent to the effect:

> "kindly sell the above immovable property by private treaty and refund all monies paid to yourselves including commission to the auction purchaser."

In respect of Sale No. 22 the sheriff in a letter dated 17 October wrote to E the first respondent:

> "Please be advised that there is an objection to confirmation of the purchase price by the judgment debtor's legal practitioners Messrs I E G Musimbe & Partners. The auction purchaser now wants to pull out of the sale, I therefore request you to refund all monies including the commission paid to the purchaser." F

Despite this order by the sheriff the first respondent still refused to refund the applicant. This prompted the second respondent to write another letter on 6 December 2012 directing the first respondent to refund the applicant all monies paid as commission. The concluding paragraph reads:

> "Please refund him his monies since you are entitled to your commission upon confirmation." G

The position of the law being that the auctioneer is only entitled to his commission upon the property being sold, it was therefore imperative for the first respondent to attach the Sheriff's document which set out the conditions of the sale in order to show that, in setting out the conditions of the sale, the Sheriff allowed a departure from the settled positon of the law by saying H that it was a condition of the sale that the highest bidder was not entitled to

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Muremba J

a refund even if the sale was not confirmed by the second respondent and A that the auctioneer was supposed to get his commission even if the sale did not go through.

In *Stationery Box (Pvt) Ltd* v *Natcon (Pvt) Ltd & Anor supra* Makarau JP stated that the defence that is raised by the respondent must be plausible and *bona fide*. It must amount to a defence at law. If it does not, the defendant B would not have discharged the onus on him and summary judgment must be granted.

In casu, in the absence of the relevant Sheriff's document to support the submissions made by Mr *Bvekwa*, I cannot say that the first respondent raised a *bona fide* defence for its defence does not amount to a defence at law. At the same time it does not make sense that the first respondent would then C contradict himself by instructing the first respondent to refund the applicant in light of its standard document which sets out the conditions for auction sales.

I will seal this case by citing *Time Bank of Zimbabwe Ltd* v *Culroy Farm (Pvt) Ltd & Ors* HH-181-03. In that case it was held that in an application for summary judgment all the defendant has to do to

resist it, is to raise a *prima facie* defence. He has to establish a mere possibility of his success or that he has a plausible case or that he has a triable issue or that there is a reasonable possibility that an injustice might be done if summary judgment is granted.

In suing the defendants for a debt, the plaintiff bank produced a written acknowledgement of debt, written guarantees of the first defendant's debt by the co-defendants and first defendant's bank account transactions. In opposing the application for summary judgment, the defendants said that they were no longer indebted to the plaintiff and even made averments that in fact it was the plaintiff which owed them money. However, the defendants did not produce any documents to support their averments and their figures made no sense at all.

It was held that without any documents to support the defendant's defence, the court was bound to conclude that the alleged defence was not *bona fide*. It was said that bald allegations and figures should be discouraged in such applications.

In casu, as is required by the law, the applicant managed to establish that he has an unanswerable claim and a clear cause of action. On the other hand, the first respondent failed to discharge the onus that it had to show that it has a good *prima facie* defence.

Mr *Mavhiringidze* argued for costs on a legal practitioner and client scale, stating that the first respondent ought to be penalised for disrespecting the court by raising a frivolous defence to the application. Mr *Bvekwa* opposed

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Muremba J

such costs, arguing that the first respondent had put up an arguable case as it genuinely believed that as an agent it had carried out its mandate of introducing the purchaser to the second respondent and as such it was entitled to remuneration. I am inclined to agree with Mr *Mavhiringidze* that the defence raised by the first respondent is frivolous and it even knew it. The instructions by the Sheriff to refund the applicant's money were clear, but the first respondent continued to be stubborn. Costs on a higher scale are warranted under the circumstances.

In the result, the application for summary judgment is granted with costs on the legal practitioner-client scale.

Madanhi Mugadza & Co Attorneys, applicant's legal practitioners

Bvekwa Legal Practice, defendant's legal practitioners

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S v HAMUNAKWADI 2015 (1) ZLR 392 (H)

Citation	2015 (1) ZLR 392 (H)
Case No	Judgment No. HH-323-15
Court	High Court, Mutare
Judge	Hungwe J & Assessors
Heard	23, 24, 26 & 27 February 2015; *CAV*
Judgment	4 March 2015
Counsel	*M Matsikidze*, for the State

N Nhambura, for the accused

Case Type Criminal trial

Annotations No case annotations to date

Flynote

Criminal law – *defences – provocation as a defence to murder – can never* C *exonerate completely but may reduce charge to one of culpable homicide – provocation in circumstances not amounting to partial defence – may be mitigatory – witchcraft – belief in – when may be regarded as sufficient provocation to act as partial defence – principles to follow* D

Headnote

Section 238 of the Criminal Law Code [*Chapter 9:23*] provides that provocation shall not be a defence to crimes other than murder. Section 239 then elaborates when it may be a partial defence to the crime of murder. It is a partial defence, if, after being provoked, and as a result of E provocation, the accused does not have the intention or realisation referred to in s 47; or, although the accused has that intention or realisation, he has completely lost his self-control in circumstances where the provocation was sufficient to make a reasonable person lose his or her self-control. In those circumstances, the charge of murder will be reduced to culpable homicide. However, if the court finds that the accused was provoked F but that he did have the intention or realisation referred to in s 47 or that the provocation was not sufficient to make a reasonable person in the accused's position lose his self-control, the accused shall not be entitled to a partial defence in terms of s 239(1). The court may regard the provocation as mitigatory only.

Many cultures across Africa embrace traditional healers and a persistent G belief in witchcraft. The African concept of a witch does not encompass the potentially benign wiccan or pagan who, in some western countries, enjoys the status of an alternative religion. To the contrary, there is little redeeming about African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all H

manner A of evil on their fellow human beings. The attempts of the common law courts to address witchcraft-inspired violence differed markedly from the suppression tactics of the various legislative initiatives. Whereas legislation recognises the widespread violence and seeks to curtail it, the criminal law has often recognised the belief that gave rise to the violence and carved out a witchcraft-provocation defence that could be offered B as a mitigating factor in cases of witchcraft-related violence. Under this theory, accused persons could reduce their crimes or punishments upon proof that they believed they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self- control. In some ways, this theory provides tacit recognition C that in certain communities killing a "witch" is not merely explainable, or excusable, but praiseworthy.

The basic elements required for a successful defence of witchcraft provocation should be: (a) the act causing death must be proved to have been done in the heat of the passion, that is, in anger; fear alone, even fear of immediate D death, is not enough; (b) the victim must have been performing, in the presence of the accused, some act which the accused genuinely believed, and which an ordinary person of the community to which the accused belongs would genuinely believe, to be an act of witchcraft against him or another person under his immediate care; (c) a belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing E a person believe to be a witch or wizard when there is no immediate act of provocation; (d) the act of provocation must amount to a criminal offence under criminal law; (e) the provocation must be not only grave but sudden and the killing must have been done in the heat of passion.

Cases referred to F

Galikuwa v *Rex* 1951 (1) East African Court of App 175

Rudowiili v *Redubliz* 1991 TLR 102 (CA, Tanzania)

S v *Mokonto* 1971 (2) SA 319 (A)

Legislation considered G

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 47, 238 & 239

Case information

M Matsikidze, for the State

N Nhambura, for the accused H

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Hungwe J

Judgment

Hungwe J: This matter is a matricide matter. A son killed his mother. A The material facts in this matter are not in serious dispute. They may be summarised as follows.

In 2006 the accused consulted his mother, the deceased in the present case, about his settled intention to marry. She denied him this right. This, according to the accused, was the genesis of his troubled relationship with his then B estranged and now deceased mother. She had made it abundantly clear that he was to live in bachelorhood for his entire life. In 2012 the accused decided to marry against his mother's cherished wish. She remonstrated with him and demonstrated her displeasure by absenting herself from the traditional ceremony to welcome a daughter-in-law. The problems persisted in the manner which he outlines both in his confirmed warned and cautioned statement and C in his defence outline, as well as in his evidence-in-chief.

The case against the accused was woven around his own statement to the police recorded two days after the death of his mother. That statement was duly confirmed by the magistrate on 19 May 2014 some five days after he killed his mother. It is important to quote his statement in extensor in order for the defence put forward to be understood in its proper context. He says: D

> "I do admit the charge levelled against me. The reason for this is that the parental bondage between me and my mother had broken down because of problems between the two of us. When I got married in 2012, my mother ran away from her duty of welcoming her daughter-in-law … Three days after my marriage I suffered an erection dysfunction (*sic*) and when I told her she said it was a spiritual issue and I had to go and consult prophets and traditional doctors for solution. E She refused to accompany me to seek remedy saying I had not followed her wish that I should not get married and she was not my mother. I asked her that if she was not my mother could she tell me where my real mother was but she kept quite (*sic*).I then consulted a number of local prophets and traditional doctors who all pointed out that my mother was the source of all my troubles because I should have not married and she was using me as her spiritual husband. That F did not surprise me because most of the time I used to dream of making love to her. I did not confront her for a while as I was gathering the courage. After a while I had the courage and I asked her about what the prophets had said and she denied having anything to do with my problems. I exchanged words with her and she had to report me to Nyanga Police … I was acquitted due to lack of evidence since there was no independent evidence to substantiate my mother's claim that I had verbally assaulted her whilst pointing her a finger. I then left G my mother's homestead and went to lodge at Clive Melinda's homestead ... Even though I had left my mother's homestead, we continued to have squabbles and I had to go to Watsomba sometime in 2013 to inform my uncles about the persistent problems between me and my mother. My uncle baba wa Nyasha and another who I only know as Longchase advised me to retain (*sic*) home and they promised to come and help solve our problems." H

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Hungwe J

He A gives an insight into another possible source of problems between him and his mother on the same page where he states:

> "In January 2014 my niece Tinashe Lapoyo phoned from Banket informing me that my mother was not giving him and his siblings their 50% share of the money which was realized from their father's house rentals. Tinashe Lapoyo is my late sister's son whose father is also late and the house of his parents which is in B Norton was being administered by my mother. Tinashe had been complaining that my mother was abusing the money without giving them their share. I told my mother what Tinashe had said

and she said that she could only discuss this with the bigger Lapoyos. In April 2014 I went to Banket to look for the Lapoyos and I found Sekai Lapoyo who is a sister to my late brother-in-law and I brought him to my mother's homestead to solve the issue of how the rentals of her C brother's house was going to be managed (*sic*). Sekai Lapoyo, my mother held a meeting and we agreed that Tinashe Lapoyo was not supposed to get anything since he had refused to go to school. The money was supposed to be used to support Upenyu Hamunakwadi my late sister's child who she sired from her previous marriage before she was married to Lapoyo and Best Lapoyo who are still going to tertiary school. In April 2014, Upenyu Hamunakwadi was given US$200, 00 meaning that in May 2014 Best Lapoyo was supposed to be given D the same amount. In May 2014 my mother said that she had lost details of Best's bank account and she had sent Best Lapoyo's money through Upenyu's account. When she was later informed by Best that Upenyu had squandered his money she began to cry and in a few days she became sick possibly due to depression ..."

Getting closer to the day of this evil deed he goes on in his own words which E were not translated by anyone into English:

"On 11 May 2014 she was discharged from hospital and she passed through my homestead on her was (*sic*) to fetch some water and I welcomed her. On 14 May 2014 I was passing through my mother's homestead proceeding to my friend Wonder Mudiwa's homestead when I saw my mother's niece Mai Emily Mhlanga whom I had a confrontation with at Nyanga hospital because of her F refusal to let me use my mother's phone to phone a relative had visited (*sic*). I then went to her and asked her to explain to me why she behaved the way she did at the hospital. Before she could say any word, my mother interjected and told me that I should leave her alone and she regrets to have me as a son. I then pushed my mother into a granary hut and closed the door and chased her niece Mai Mhlanga from my mother's homestead. When I came back from chasing G Mai Emily Mhlanga I was just cross and that is when committed this horrific act. I went into the main house and took a nylon cloth belt and told her that today was the end of our wars as I was going to kill her. She then fell to the ground facing down possibly frightened by what I had just said. I then used the belt to strangle her whilst pressing her down with my knees. I then set on top of her still choking her with the belt until she died. I then left her like that, got out of the hut and closed the door. I proceeded to my homestead where I found H my wife at home."

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Hungwe J

He went on to describe how he had attempted to leave the area but failed in A this bid when he could not raise the bus fare for the trip. He went on to give detail of how he kept his wife unaware of his dark deed by pretending to escort his visitor away from home then surreptitiously finding his way back to his mother's homestead in order to put final touches to this horrible act and make it look like his mother had committed suicide. He first went into the B granary and covered his mother's body with a cloth and a tent. He went to pass time with friends but then noticed that the persistent Mai Mhlanga and two others were back at the deceased's homestead looking for the deceased. He asked her why she had not gone to report him to police as she was wont to do. She had no bus fare, she said. The ladies asked him where his mother was. He lied that he had seen her going towards her garden. They then left. C Later, to his wife, he created a false visit to a neighbour as a means to find his way back without arousing his wife's suspicions. He described his final act in trying to stage-manage a suicide in the following terms:

"… and proceeded to my mother's homestead around 1900 hours. I proceeded to the granary hut where I carried the body of my mother and took it into her D bed-room. I carried it on my shoulder and as I was about to enter her bedroom I removed the body from my shoulder put it in my arms and rested whilst supporting its weight with my legs. I rested for a few seconds and thereafter entered the bedroom. I then took the belt I had used to strangle her with and tied it on her neck. I took a trunk and placed her body and tried to lift her body toward the beam but failed because of the low height of the trunk. I then went E to the dining and took a kitchen cupboard and then place her body on top of the cupboard and put the belt around the truss. I lifted the body being supported with the cupboard and tied the belt to the beam. After that I removed the trunk and left the body hanging. I had a hard time in doing all this but this was the only thing I could have done in trying to cover up on what I had done."

In his defence outline, prepared with the assistance of his legal practitioners, F the accused makes no mention of the little fight over the rentals revenue stream between him and his mother. He dwells a lot on his so-called erectile dysfunction whose effects to us remained obscure in light of the fact that within a year of his marriage they were blessed by a child. The witnesses who testified in court were unable to confirm the allegations of witchcraft G against his mother, nor were they aware that he had made such claims against his mother during her lifetime. His defence was that he had killed his own mother as a result of cumulative emotional, psychological and mental pressure

coupled with a high degree of provocation. I will proceed to deal with the last defence; provocation, and revert to the other defences put forward by the accused. H

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Hungwe J

In A our assessment of the evidence placed before us there is no doubt that the accused believed, rightly or wrongly, that his mother was responsible for all his misfortunes, real or imagined.

The witchcraft provocation defence

The Criminal Law (Codification & Reform) Act [*Chapter 9:23*] ("the Criminal B Law Code") has codified the Zimbabwean common law position regarding provocation as a defence.

Section 239 thereof sets out the circumstances under which provocation can successfully be raised as a partial defence to a charge of murder.

Section 238 provides that provocation shall not be a defence to crimes other C than murder. Section 239 then elaborates when it may be a partial defence to the crime of murder. It is a partial defence, if, after being provoked, and as a result of provocation, the accused does not have the intention or realisation referred to in s 47; or if, although the accused has the intention or realisation referred to in s 47 but has completely lost his self-control in circumstances where the provocation was sufficient to make a reasonable person lose his D or her self-control. Then, in those circumstances, the charge of murder will be reduced to culpable homicide.

Put differently, if a court finds that a person charged with murder was provoked but that he did have the intention or realisation referred to in s 47; or the provocation was not sufficient to make a reasonable person in the accused's E position lose his self-control; the accused shall not be entitled to a partial defence in terms of s 239(1) but the court may regard the provocation as mitigatory only.

The question then arises whether, when the accused says he was provoked by his mother's practice of this dark art, the court ought, in the peculiar F circumstances of this case, to accept that as a partial defence in terms of the Criminal Law Code. Witchcraft and the law are different arts, the former residing in the realms of cultural norms and the latter in legal norms. When legal norms and cultural norms conflict, the law must resolve the conflict.

Many cultures across Africa embrace traditional healers and a persistent G belief in witchcraft. The African concept of a witch does not encompass the potentially benign wiccan or pagan which, in some western countries, enjoy the status of an alternative religion. To the contrary, there is little redeeming about African witches who, through sheer malice, either consciously or sub-consciously employ magical means to inflict all manner of evil on their fellow human beings. Someone is either born a witch or can learn witchcraft H from a traditional healer.

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Hungwe J

The attempts of the common law courts to address witchcraft-inspired violence A differed markedly from the suppression tactics of the various legislative initiatives. Whereas legislation recognises the widespread violence and seeks to curtail it, the criminal law has often recognised the belief that gave rise to the violence and carved out a witchcraft-provocation defence that could be offered as a mitigating factor in cases of witchcraft-related violence. B

Under this theory, accused persons could reduce their crimes or punishments upon proof that they believed they, or persons under their immediate care, were being bewitched and that this belief caused them to temporarily lose self- control. In some ways, this theory provides tacit recognition that in certain communities killing a "witch" is not merely explainable, or excusable but praiseworthy. C

In our jurisdiction, the Witchcraft Suppression Act was amended in 2006 to legalise accusations of witchcraft and to allow the State to convict a person and punish her when it deems witchcraft harmful. See Chandra Kumar "*Witches, Witch Doctors and Men of Reason*" *Mail & Guardian Online* September 11 2006 on http://www.mg.co.za. D

There is thread of cases, both in our jurisdiction as well as in South Africa, which show a vacillation between the recognition of witchcraft and a willingness to aid the suppression of the belief in witchcraft. This takes the form of treating the belief as only mitigatory but only as affecting the element constitution a defence to a charge. E

In my respectful view, at least the basic elements required for a successful defence of witchcraft provocation should be:

1. The act causing death must be proved to have been done in the heat of the passion, that is in anger; fear alone, even fear of immediate death is not enough. F
2. The victim must have been performing in the actual presence of the accused some act which the accused genuinely believed and which an ordinary person of the community to which the accused belongs would generally believe, to be an act of witchcraft against him or another person under his immediate care. G
3. A belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believe to be a witch or wizard when there is no immediate provocation act.
4. The provocation act must amount to a criminal offence under criminal law. H

2015 (1) ZLR p399

Hungwe J

5. The A provocation must be not only grave but sudden and the killing must have been done in the heat of passion.

See *Galikuwa* v *Rex* 1951 (1) East African Court of App 175 at 176-178, an appeal case from Uganda.

Where these criteria are met, the court in other jurisdictions have considered B and accepted the witchcraft provocation defence as long as it can be shown that the accused killed in the heat of passion. See *Rudowiili* v *Redubliz* 1991 TLR 102 (CA). In that case the Tanzania Appeal Court reduced the accused's capital murder conviction to manslaughter with a 12 year prison sentence after considering accused's mitigation plea based in defendant's belief in witchcraft. The accused had axed his grandfather to death after the C latter had allegedly threatened to kill the accused through witchcraft. These cases also in a way introduce the concept of anger as being intertwined with provocation. In my respectful view, provocation and anger are different concepts just as cause and effect are.

In criminal law, the term provocation seems to be used to include both concepts D thereby throwing light on the accused's conduct. Thus, when considering the phrase "in the heat of passion", a court is assessing the subjective frame of mind which has triggered the act. The concept of provocation indicates a situation in which the provoker elicits anger or wrath of the provoked by means of a challenging or defiant behaviour, and the latter, in reaction to the provocative behaviour, commits a criminal act. See *S* v *Mokonto* 1971 (2) SA 319 (A). E

Legally, the emotional response of the victim to the assaulting or provocative words or conduct is relevant. When a person has been provoked, anger and rage are the predominant emotions that are experienced.

We have considered the accused's defence throughout this grim and macabre F episode. We have scrutinized his own description of the events leading up to the killing of the deceased. We were unable to find that she had in any way provoked him in the plain and ordinary meaning of this word. He did not act in the "heat of passion" which would have resulted in loss of self-control as would prevent him from formulating the requisite intention or to realise G the risk involved in the act constituting the crime charged. On his word, the accused planned the timing of the execution of his mother. He chose the method of killing her. He knew that there would be relatives who would visit her to check upon her as she had recently been discharged from hospital. He planned on how to deal with that too. He did not want his wife to know what he was determined to achieve and effectively deflected her by various ploys. H He casually announced his decision to kill her causing his victim to pass

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2015 (1) ZLR p400

Hungwe J

out, probably in shock. He then proceeded to strangle her in a most crude A fashion instantly and mercilessly killing her as he had intended. His belief in witchcraft played no part in this chilling

murder. The accused wanted his mother out of the way so that he remains the only person in charge of the two deceased estates of his late father and late sister.

Put in another way, we find that accused did not react to an act of provocation; B plain or witchcraft provocation. He carefully planned this murder and executed it with cold blooded precision, feigning suicide at the end of it all to deflect attention from himself.

There is a small issue of the two estates which his mother was the executor. These revenue streams from his late father and sister, in our view, provided C sufficient motive to wish his mother out of the way so that he is left in physical control of the estates. This, in our view, explain why, despite his belief in witchcraft, he remained physically closely connected to his mother, in spite of the advice from his uncles that he should migrate to a more distant location from his mother.

In the end, we are satisfied by his own admission that when he announced to D his mother that he had decided to end the war between him and his mother on 14 May 2014 by killing her, he was genuinely announcing his true desire and intention to kill.

He was under no emotional stress when he planned to kill her over time. It cannot be argued with any conviction that he was suffering from some E mental disorder which induced in him non-pathological criminal incapacity as a result of emotional stress. The defence of witchcraft provocation appears to be a carefully engineered ploy to raise a red herring to deflect this court from making a finding regarding his true state of mind. We are convinced that the detail reflected in his warned and cautioned statement correctly reflects F a perverted mind rather than an emotionally psychologically stressed mind. This is the reason why, in our view, there is no mention of the two deceased estates in the defence outline as well as in his evidence in chief. So carefully rehearsed in his mind was this defence that counsel for the State failed to pursue this aspect during cross-examination. Even if it were to be assumed in his favour that his belief in witchcraft played a part in prompting him to G kill his mother, the act causing death was not done in the heat of the passion. His victim was not performing an act which the accused genuinely believed and which an ordinary person of the community to which he belongs would generally believe to be an act of witchcraft against him or another person under his immediate care. She was going about her normal domestic chores H

Hungwe J

when A the accused announced to her that her time on earth was up since he had resolved to end their wars by killing her.

We find that when he tied his mother with the nylon belt, he intended to kill her by that means. He was not reacting to anything her mother had done or said. He was not angry but determined to carry out a well-planned plot kill her.

He B is therefore found guilty of murder as defined in s 47(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

National Prosecuting Authority, State's legal practitioners

Mugadza Chinzamba & Partners, accused's legal practitioners C

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GWARADZIMBA NO v GURTA AG 2015 (1) ZLR 402 (S)

Citation 2015 (1) ZLR 402 (S)

Case No Judgment No. S-10-15

Court Supreme Court, Harare

Judge Gwaunza JA, Garwe JA & Patel JA

Heard 25 February 2014; CAV

Judgment 6 March 2015

Counsel *T Mpofu,* for the appellant
F Girach, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Administrative law – *administrative decisions and acts – failure by* C *administrative authority to make decision – remedies available to applicant – entitled to apply to High Court for relief in terms of Administrative Justice Act [Chapter 10:28] – not necessary to bring matter on review – courses open to court – may grant relief sought by applicant* D

Headnote

The appellant was appointed administrator of a mining company which was the subject of a reconstruction order in terms of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*]. In October 2004, the appellant entered into an agreement with the respondent in E terms of which the latter purchased and paid for certain mining claims belonging to the company. Despite registration of the mining claims in the respondent's name, and its assumption of operations on the location in question, it met with fierce resistance from a third party, who claimed ownership of the same location. The third party also made it virtually F impossible for the respondent to enjoy the benefit of the claims that it had purchased. Communication that thereafter opened between the respondent and the appellant to resolve these problems yielded no positive results. This led the respondent, in August 2012, to apply to the appellant for leave to commence legal proceedings against the company for cancellation or confirmation of cancellation of the sale agreement, G as well as a refund of the purchase price paid. The application to the appellant was made in terms of s 6(b) of the Act. Having received no response from the appellant for over a year, the respondent approached the High Court claiming an order that s 6(b) was unconstitutional, alternatively, an order granting leave in terms of s 3(1)(b) and s 4(1) of the Administrative Justice Act [*Chapter 10:28*] ("the AJA") to institute H

Gwaunza J

action A against the mining company. The latter relief was granted; the appellant appealed.

The appellant argued that s 4 of the AJA embodied the common law grounds for review and that the respondent should have brought a review application. Not have complied with the provisions relating to review procedure, the respondent employed the wrong procedure. The appellant also argued B that the court *a quo* erred in holding that the appellant could not consider the merits of the respondent's complaint in relation to the question of the grant of leave to proceed against the company.

Held, that s 4(1) of the AJA provides that the statutory relief sought may be sought by way of an application to the High Court. However, no specific C format for such application is prescribed. While a review in terms of the High Court Rules is a special form of application, there is nothing in s 4(1) to suggest that any other form of application for judicial review would in any way offend against that subsection, as long as it meets the requirements of an ordinary court application. The High Court Act D [*Chapter 7:06*] (ss 26 and 27) allows the High Court to review the decisions of all inferior courts, tribunals and administrative authorities, subject to the Act "and any other

law". The grounds for review are also subject to "any other law". The Act therefore contemplates and permits review proceedings that are brought before it in terms of "any other law." Specifically, judicial review may be done in terms of another statute, E for instance the AJA, as here. Further to this, and as clearly indicated above in subss (1) and (2) of s 27, grounds for review are not limited to those particularised in that section. Other laws can properly dictate the consideration of, or specify, other grounds on the basis of which proceedings of a lower court or tribunal may properly be reviewed. The F failure by the appellant, as an administrative authority, to take action when properly requested to do so, constituted an irregularity which may properly be the subject of judicial review. the appellant's conduct is contemplated by s 3(1)(b) of the Act. His failure to act within a reasonable period after being requested to do so by the respondent, constituted a G ground for review which, albeit not listed in s 27 of the High Court Act, was nevertheless established in terms of "any other law". Common law review would have been difficult because of the problem of ascertaining a date from which the 8 week period provided in the rules would have started. The appellant's conduct was contemplated by s 3(1)(b) of the Act. His failure to act within a reasonable period after being requested H to do so by the respondent constituted a ground for review which, albeit

Gwaunza J

not listed in s 27 of the High Court Act, was nevertheless established A in terms of "any other law".

Held, further, that s 2(2) of the AJA allows a party to apply for "any other form of relief" in respect of administrative actions. Consequently, while s 4(2) of the Act lists the types of relief the High Court could grant, that list is not exhaustive. Rather, it is additional to any other relief that may B be sought in respect of any administrative action relevant to the Act. What is important, at the end of the day, is that justice and fairness prevail, following upon a court ruling that is premised on cogent reasoning and sound principles of law. While the High Court could have sent the matter back to the administrator with specific instructions or conditions on how to address the respondent's request for leave, it was nevertheless C within its competence, in terms of s 2(2) of the Act, to grant the relief sought. The appellant was singularly reluctant to grant the leave sought from him by the respondent. It could be assumed from his attitude that the appellant must have considered the merits of the request and that this had influenced his decision not to act on it. That being the case, the court *a quo,* and indeed the respondent, could not be blamed for safely D assuming that the appellant's decision on the merits of the request for leave would have been negative. Any further delay in resolving the dispute would prejudice the respondent.

Decision of Mathonsi J in *Gurta AG* v *Gwaradzimba NO* 2013 (2) ZLR 399 (H) upheld.

Cases cited

Muchapondwa v *Madake & Ors* 2006 (1) LR 196 (H) F

S v Makawa & Anor 1991 (1) ZLR 142 (S)

S v Mapiye S-214-88

Legislation considered

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

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

High Court Rules 1971 (RGN 1047 of 1971), rr 256, 257 & 259

Reconstruction of State Indebted Insolvent Companies Act G [*Chapter 24:27*], s 6

Case information

T Mpofu, for the appellant

F Girach, for the respondent H

Judgment

Gwaunza JA: A This is an appeal against part of the judgment of the High Court, Harare, handed down on 16 October 2013. The specific part of the judgment appealed against reads as follows;

"(1) …

(2) The alternative relief is hereby granted and accordingly the applicant is B granted leave in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] to institute any action or proceedings in any court or tribunal of competent jurisdiction in Zimbabwe against SMM Holdings (Pvt) Ltf (under reconstruction), to claim payment of US$4 350 000 or part thereof together with interest thereon at the prescribed rate of 5 per cent *per annum* and costs of suit or any other relief available to the applicant at law. C

(3) The respondent shall bear 50 per cent of the applicant's costs of suit."

Although the appellant filed detailed grounds of appeal, it is agreed that two main issues arise in this appeal[1]. These are:

(a) whether there was a proper application before the court *a quo*; and

(b) whether the court *a quo* was correct in holding that the appellant could D not consider the merits of the respondent's complaint in relation to the question of the grant of leave.

In addition to these two issues, the appellant also attacks the decision by the court *a quo* to award fifty per cent of the costs to the respondent.

The background to the dispute may be summarised as follows: E

The appellant was appointed Administrator of SMM Holdings (Pvt) Ltd ("SMM"), an entity under reconstruction, on 6 September 2004. The appellant on 9 October 2009 entered into an agreement with the respondent in terms of which the latter purchased and paid for certain chrome mining claims belonging to SMM (Mashava Area "E") for US$4 350 000. Despite registration of the mining claims in the respondent's name, and its assumption F of operations on the location in question, it met with fierce resistance from a third party who claimed ownership of the same location. The third party also made it virtually impossible for the respondent to enjoy the benefit of the claims that it had purchased. Lines of communication that thereafter opened between the respondent and the appellant to resolve these problems G yielded no positive results. This led the respondent by letter dated 3 August 2012, to apply to the appellant for leave to commence legal proceedings against SMM for cancellation or confirmation of cancellation of the sale agreement as well as a refund of the purchase price paid. The application to the appellant was made in terms of s 6(b) of the Reconstruction of State

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Indebted Insolvent Companies Act [*Chapter 24:27*] ("the Reconstruction A Act"). Having, for over one year, received no response from the appellant the respondent approached the High Court claiming, in the alternative, the relief that it was granted and against which the appellant has filed this appeal. The application was made in terms of ss 3(1)(b) and 4(1) of the Administrative Justice Act [*Chapter 10:28*]. Sections 3 and 4 of the Act read as follows; B

"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 –

(a) act lawfully, reasonably and in a fair manner; and C

(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* (my emphasis)

(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned. D

4 Relief against administrative authorities

4(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 to the High Court for relief*. (my emphasis)

(2) Upon an application being made to it in terms of subsection (1), the High E Court may, as may be appropriate –

(a) confirm or set aside the decision concerned;

(b) refer the matter to the administrative authority concerned for consideration or reconsideration;

(c) direct the administrative authority to take administrative action within the F relevant period specified by law or, if no such period is specified, within a 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 G to achieve compliance by the administrative authority with section three.

(3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the administrative authority with the relevant law or empowering provision." H

2015 (1) ZLR p407

Gwaunza J

The A court *a quo* did not grant any of the forms of relief listed in s 4(2) of the Act but took it upon itself to grant the leave, that is, take the action that the appellant *qua* administrator should have taken, as requested by the respondent.

I will now consider the appellant's grounds of appeal.

1. Whether or not the application was properly before the court B*a quo*

Mr *Mpofu*, for the appellant, argues that s 4 of the Act is an embodiment of the common law grounds for review and the respondent should accordingly have brought a review application before the court *a quo,* in terms of Order 33 of the High Court of Zimbabwe Rules 1971. By essentially bringing C proceedings which "in substance" were for review, without complying with the provisions of the law relating to review proceedings, the respondent, contends Mr *Mpofu,* had employed the wrong procedure. The result was that the application was not properly before the court *a quo*. Mr *Mpofu* further challenges what he refers to as the "contradictory" conclusion of the court *a quo* in that, after concluding that the application was not a review, it went D on to justify its interference on the basis of review principles.

Mr *Girach* for the respondent, on the other hand, contends that the application *a quo* was not one for review and therefore r 257 of the High Court Rules did not apply. The application *a quo* was primarily a constitutional challenge to specific provisions of the Reconstruction Act. In the alternative, the E respondent sought leave to sue the appellant. Further, and in any event, a proper case had been made out by the respondent for leave to be granted. Lastly, he contended that at the time the application for leave was filed in the court *a quo*, the request to the Administrator for the same relief, dated 3 August 2012, had not been adjudicated upon, meaning that there was no decision, nor were there any proceedings, to be reviewed. F

In holding that the application before him was not one for review, Mathonsi J in the court *a quo* stated as follows in his judgment at 410D:

> "Mr *Mpofu*, for the respondent, protested that a wrong procedure was employed as s 4 of the Administrative Justice Act is an embodiment of the common law grounds for review. For that reason the applicant should have brought a review G application in terms of Order 33 of the High Court Rules. I do not agree.
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> Section 4 allows an aggrieved party to seek recourse in this court. It makes no reference to a review application. I agree with Mr *Moyo* for the applicant that if the legislature desired to provide for a remedy of review in terms of Order 33, it would have specifically said so. It however elected to create a statutory remedy in terms of which a party is entitled to approach this court by application where H the administrative authority has come short."

2015 (1) ZLR p408

Gwaunza J

I find little to fault in the reasoning of the court *a quo* on this point. As A correctly stated, s 4 (1) of the Administrative Court Act ("the Act") provides that the statutory relief referred to by Mathonsi J may be sought by way of an application to the High Court. However, no specific format for such application is prescribed. While a review in terms of the High Court Rules is a special form of application, there is nothing in s 4(1) to suggest that any other form of application for judicial review

would in any way offend B against that sub-section as long as it meets the requirements of an ordinary court application.

I find this position to be fortified by s 26 of the High Court Act [*Chapter 7:06*] which reads as follows:

> "PART V C
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> POWERS OF REVIEW
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> 26 Power to review proceedings and decisions
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> 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.
>
> 27 Grounds for review D
>
> (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; E
>
> (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*" (my emphasis).

My understanding of this provision is that the High Court Act contemplates and F permits review proceedings that are brought before it in terms of "any other law." Specifically, judicial review may be done in terms of another statute, for instance, the Administrative Justice Act, as happened *in casu*. Further to this, and as clearly indicated above in subss (1) and (2) of s 27, grounds for review are not limited to those particularised in that section. Other laws can G properly dictate the consideration of, or specify, other grounds on the basis of which proceedings of a lower court or tribunal may properly be reviewed.

Mr *Mpofu* also argues that an allegation to the effect that a public official has failed to give reasons or to make a decision altogether, is a reviewable issue. He has referred the court to a number of decisions to support this contention: *Muchapondwa* v *Madake & Ors* 2006 (1) ZLR 196 (H); and *S* v *Mapiye*H

Gwaunza J

S-214-88. A These authorities in the main relate to judicial officers who, after hearing argument in matters before them, made and communicated their decisions to the parties, but failed to provide reasons for such decisions. In addressing this oversight, Ebrahim JA in *S* v *Makawa & Another* 1991 (1) ZLR 142 (S) at 146D-E stated as follows;

> "Although B 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 gross irregularity in the proceedings … see *R* v *Jokonya* 1964 RLR 236 (G) …"

In casu it is evident that the appellant, who must have had reasons for not C acting on the request made to him by the respondent, chose not to commit them to paper nor communicate them to the latter. The reasons therefore remained "stored" in his mind. Based on the authorities cited, I am satisfied that the failure by the appellant as an administrative authority to take action when properly requested to do so constituted an irregularity which may properly be the subject of judicial review. However, for the reasons stated D above, I am not persuaded that the only form of review proceedings in the circumstances of this case, would be those in terms of Order 33 r 257 of the High Court Rules.

It should be noted that in any case an attempt to satisfy the requirements of Order 33 of the High Court Rules, in particular r 259, given the circumstances E of this case, might present practical difficulties. The rule provides as follows:

> "259 Time within which proceedings to be instituted
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> Any proceedings by way of review *shall* be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred: F

Provided that the court may for good cause shown extend the time" (my emphasis).

The appellant *in casu* took no action at all following the respondent's request for leave to sue SMM. There was effectively no "termination" to speak of since, by its nature, the appellant's inaction was a continuing default. The ascertainment of a date from which to reckon the eight weeks stipulated in G r 259 would thus be problematic.

I find, in any case, that the appellant's conduct is contemplated by s 3(1)(b) of the Act, cited above. His failure to act within a reasonable period after being requested to do so by the respondent constituted a ground for review which, *albeit* not listed in s 27 of the High Court Act, was nevertheless H established in terms of "any other law".

Gwaunza J

Accordingly the respondent was within its rights to approach the High Court A with an application in terms of the Act, for the relief that it had requested from the appellant but did not secure.

In all respects therefore I find there is no merit in the ground of appeal that alleges that the application *a quo* was not properly before that court.

2. Whether the court *a quo* was correct in holding that the B appellant could not consider the merits of the respondent's complaint in relation to the question of the grant of leave

This ground of appeal challenges the competency of the order made by the court *a quo,* whose effect was to effectively rule out any opportunity for the appellant to consider the merits of the respondent's request to it, for leave C to sue an entity under its administration. As already indicated, the court *a quo* did not grant any of the specific forms of relief provided for in s 4 (2) of the Act. Mathonsi J*,* being fully cognisant of the provisions in question, justified his non-observance thereof, in the following terms at 411C-G:

> "The applicant has urged of me the grant of the leave to sue which should have been granted by the respondent mainly because the respondent is not going D to grant the leave, having already nailed his colours onto the mast, and in any event because I have all the facts with which to base such decision. While it is rare that the court would be justified in usurping the decision making function of the administrative authority, McNally JA set out four situations where the court might take such action in *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S). These are:
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> 1. where the end result is a foregone conclusion and it would be a waste of E time to refer the matter back;
> 2. where further delay could prejudice the applicant;
> 3. where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction again; and
> 4. where the court is in as good a position as the administrative body to make F the decision.
>
> In this case, although some of the requirements may be said to be mutually exclusive, I am of the view that all of them exist. To my mind it is a foregone conclusion that the applicant should be granted leave, although the respondent thinks otherwise. The applicant has waited for leave for more than a year and further delay would be unfair to him. I have already expressed my suspicion of G the existence of bias the respondent being an interested party. In any event, I am in as good a position to make the decision as the respondent."

It is pertinent to note that the *Affretair* case that the learned judge premised its decision on was an application for review in terms of Order 33 of the High Court Rules. It is on this basis that Mr *Mpofu* for the appellant argued that the court *a quo* contradicted itself by justifying its interference on the basis H

Gwaunza J

of A review proceedings, when it had found that the proceedings in question were not those for a review.

This argument seems to suggest that review proceedings that are brought in terms of Order 33 of the High Court Rules enjoy a monopoly over the grounds on which interference with an order or proceedings of an inferior B court or tribunal, may be justified. I am not persuaded that is the case.

As indicated above, ss 26 and 27 of the High Court Act [*Chapter 7:06*] and r 256 of the High Court Rules do not rule out review proceedings being brought in terms of" any other law." I take the view that such other review proceedings may properly rely on the same or similar grounds as a basis for some interference or other, by a superior tribunal, with a lower tribunal's C order or proceedings [2] . What is important at the end of the day is that justice and fairness prevail, following upon a court ruling that is premised on cogent reasoning and sound principles of law.

I am satisfied, in any case, that the propriety of the relief granted by the court *a quo* is put beyond doubt when regard is had to s 2(2) of the Act, D which reads as follows:

> "(2) The provision of this Act shall be construed as being in addition to, and not as limiting, any other right to appeal against, bring on review or *apply for any other form of relief in respect of* any administrative actions to which this Act applies" (*my emphasis*).

Related to the circumstances of this case, I find that while s 4(2) of the Act E lists the types of relief the High Court could have granted, that list is not exhaustive. Rather, it is additional to any other relief that may be sought in respect of any administrative action relevant to the Act.

The respondent's application to the appellant for leave to sue SMM, dated 3 August 2012 was, for over a year and in the words of Mathonsi J*,* "met with F deafening silence" from the latter. Not only was there silence, no reasons were proffered for it within a reasonable, or any, period at all. In my view, while the High Court could have sent the matter back to the administrator with specific instructions or conditions on how to address the respondent's request for leave, it was nevertheless, within its competence in terms of G s 2(2) of the Act, to grant the relief sought. I am persuaded that a proper case has been made for the leave in question to be granted by the court *a quo*.

Gwaunza J

Mr *Mpofu* argues *inter alia* in respect of the order granted by the court A*a quo*, that the court took the incorrect position that the merits or demerits of the matter were irrelevant. He contends that s 6(b) of the Reconstruction Act requires the Administrator to consider a matter and deal with it on the merits.

I am not persuaded by this argument.

The facts of this matter show, and the papers before the court confirmed, B that the appellant was singularly reluctant to grant the leave sought from him by the respondent. The appellant made this very clear in his opposing papers. It may in fact be assumed from this attitude that the appellant must have considered the merits of the request and that this had influenced his decision not to act on it. That being the case, the court *a quo* and indeed C the respondent cannot be blamed for, in my view, safely assuming that the appellant's decision on the merits of the request for leave would have been negative.

It is evident from the learned judge's reasoning, cited above, that after considering the papers before him which revealed to an appreciable extent the merits of the case, he took the view that he (a) had all the facts on which D to base the decision that he made and (b) was in as good a position as the administrator to make such decision. The judge was also persuaded that any further delay in resolving the dispute would prejudice the respondent.

I find no reason to fault the learned judge's reasoning. To my mind, there can be little doubt that the respondent did have a grievance. As correctly E submitted by Mr *Girach*, it has paid nearly $4.5 million but, through no fault of the respondent itself, has not enjoyed nor been allowed to enjoy the benefit of its investment. I am persuaded by the further contention that, in any case, the factual position of the dispute as well as its merits or demerits will ultimately be a matter for the trial court. At this stage all that has been granted is leave for the respondent to commence proceedings against SMM, F and possibly the appellant as well, for the redress that it wishes to secure. All parties will therefore have their day in court, as it were.

In the final result, I find that the appellant's second ground of appeal lacks merit and must be dismissed.

3. Costs G

The final ground of appeal challenges the *quantum* of costs awarded against the appellant, which Mathonsi J justified thus in his judgment at 411G:

"Regarding the question of costs, the applicant (respondent) has been partially successful given that its main application for the declaration of s 6 as unconstitutional has not found favour with me, while the alternative claim has. H

Gwaunza J

For A that reason, I consider that it cannot recover all its costs. It has only made a case for 50 per cent of its costs."

The appellant contends that the judge *a quo* exercised his discretion injudiciously in respect of the 50 per cent award of costs, given that the court had considered three main issues and found for the respondent in respect of only one of them. Accordingly, the appellant contends, the costs for each B of the three issues should have been 33 per cent. I am not persuaded by this contention. A look at the draft order of the respondent in the court *a quo* clearly shows that it sought, apart from costs, one main and one alternative form of relief. It was successful in respect of the alternative relief sought. To the extent that costs could be apportioned based on a mathematical calculation of the issues considered by the court, the 50 per cent, even by C the appellant's own formula, would be reasonable. I however entertain some doubt as to the practicality of such an approach.

Mr *Mpofu* argues in the alternative that even if only two issues were determined by the court *a quo,* there should either have been no order as to costs, or each party should have borne its own costs. I hold a different view. D All that the respondent in reality craved was the removal of any obstacle to the prosecuting of its claim against SMM. It sought two orders in the alternative, either one of which would have given the respondent the relief it craved. The court granted the alternative relief, even though it and all the parties had expended time in arguing and considering the merits or demerits of the main relief sought by the respondent. Since the respondent in the end E secured the entirety of the relief that it wanted, my view is that it was entitled to part, if not all, of its costs. However, there having been no cross appeal by the respondent on this aspect, there would be no basis for interference at this stage. Costs being a matter for the court's discretion, I do not in any case find that this discretion was exercised injudiciously by the learned judge F*a quo*, when he ordered the appellant to bear half of the costs.

In all respects, therefore, I find that the appeal lacks merit and should be dismissed.

It is in the result ordered as follows:

"The appeal be and is hereby dismissed with costs." G

GARWE JA and PATEL JA concurred.

Dube, Manikai and Hwacha, appellant's legal practitioners

Kantor and Immerman, respondent's legal practitioners

1 Appellant's heads of argument para 1

2 For instance, in *Johannesburg Consolidated Investment Co & Anor* v *Johannesburg City Counci* 1903 TS 111 the court distinguished three types of reviews, being review by summons, a wider power of review granted by statute and review by motion.

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S v MANYARA 2015 (1) ZLR 414 (CC)

Citation 2015 (1) ZLR 414 (CC)

Case No	Judgment No. CC-3-15
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA & Guvava JA
Heard	19 February 2014; *CAV*
Judgment	9 March 2015
Counsel	*J Mambara*, for the applicant Mrs *S Fero*, for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of* C *Rights – s 24 – application for matter to be referred to Supreme Court – allegation that right to trial within reasonable period has been breached – need for applicant to give evidence in support of application and for State to have opportunity to lead evidence in rebuttal – application not* D *complying with such requirement fatally defective*

Headnote

The applicant sought a permanent stay of the criminal proceedings instituted against him, on the grounds that his constitutional right to a fair trial E within a reasonable time had been violated. An application was made at the magistrates court for referral of the matter to the Supreme Court. No affidavit or evidence was adduced in the lower court, nor was any hearing conducted before it, to enable the magistrate to determine whether or not the application was frivolous or vexatious. Additionally, no documentation was attached to the application to support the applicant's F averments as to what transpired in the six years between the date of his original arrest and the date of the application for referral. The magistrate only considered the written submissions filed on behalf of the applicant before referring the matter to the Supreme Court.

Held, that where an accused person alleges any infringement of his right to G a fair trial within a reasonable time, the factors that are to be ventilated and determined are now well settled. They are: the length of the delay; the reason or explanation and responsibility for the delay; the assertion of his rights by the accused; and prejudice to the accused arising from the delay. In order to enable a proper evaluation of these factors it is essential that evidence be led, primarily by the accused person, as to H

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Patel J

what A transpired from the date of the charge to the date when referral of the alleged violation of rights is sought. Moreover, in respect of all of these factors, the State should have been given the opportunity to test the veracity of the applicant's position through cross-examination, in addition to being given the opportunity to adduce its own evidence to rebut that position. It is on all that evidence that the opinion has to B 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 C further evidence was not presented to the lower court.

Held, further, that an application that does not comply with these requirements is fundamentally and fatally defective and cannot be regularised by remitting the matter to the lower court. If so advised, the applicant could D institute a fresh application, complying with the proper procedures.

Cases cited

In re *Mlambo* 1991 (2) ZLR 339 (S)

S v *Nhando & Ors* 2001 (2) ZLR 84 (S)

S v *Nkomo* S-52-06

S v *Sengeredo* 2014 (2) ZLR 633 (CC) E

Legislation considered

Constitution of Zimbabwe 1980, ss 18(2) & 24(2)

Case information

J Mambara, for the applicant F

Mrs *S Fero*, for the respondent

Judgment

Patel JA: The applicant in this matter seeks a permanent stay of prosecution in respect of a charge that arose more than eight years ago. He claims that his right to a fair trial within a reasonable time, as enshrined in s 18(2) of the former Constitution, has been violated. G

The applicant was arrested in November 2005 on a charge of converting to his own use a sum of ZW$760 000 000 that was given to him by the complainant to purchase 30 000 litres of diesel and 8 000 litres of petrol. According to the submissions filed on his behalf before the magistrates court on 27 June 2011, he was detained but later released and then arrested again H in November 2007. At the end of 2008 he was taken off remand because the

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Tsanga J

State was not ready to proceed. Following his further arrest in May 2011, he A was summoned to appear in court on 20 June 2011, when he gave notice of his intention to apply for the matter to be referred to the Supreme Court in terms of s 24(2) of the former Constitution. The matter was then so referred by the magistrates court sitting at Harare on 8 July 2011.

It is averred on behalf of the applicant that the inordinate delay of six years B in bringing the matter to trial was due to the State's lack of preparedness. It is also averred that he has been prejudiced by the passage of time, the inflation of the Zimbabwe dollar and the subsequent changeover to the United States dollar.

The State opposed the application for referral on the grounds set out in its response filed before the magistrate on 6 July 2011. It further opposed the C request for permanent stay of proceedings in its heads of argument before this court. In essence, it is averred that the matter is not properly before this court because it consists only of the submissions filed in the magistrates court. There was no affidavit or evidence adduced in that court, nor was any hearing conducted before it, to enable the magistrate to determine whether or not the D application was frivolous or vexatious. Additionally, no documentation was attached to the application to support the applicant's averments as to what transpired between 2005 and 2011. Consequently, neither the prosecutor nor the magistrate could test the veracity of the applicant's allegations. It is further argued for the respondent that this court is handicapped by the lack of evidence in making a full inquiry into and determining whether or not E the applicant's right to a fair trial has been violated.

Issues for determination

Having regard to the respondent's position, the preliminary question to be decided is whether or not this matter is properly before this court in light of the procedure adopted by the applicant's counsel in making the request for F referral in the magistrates court. Flowing therefrom is the related question as to whether or not, on the basis of the evidence on record, this court can properly make

a determination on the alleged violation of the applicant's right to a fair and speedy trial as guaranteed by s 18(2) of the former Constitution.

Mr *Mambara* for the applicant accepts that neither party filed affidavits or G gave evidence before the magistrates court in relation to the factual and legal requirements to justify or negative a permanent stay of prosecution. The magistrate only considered the written submissions filed on behalf of the applicant before referring the matter to the Supreme Court. Nevertheless, Mr *Mambara* contends that there are sufficient details in those submissions to enable this court to assess the relevant facts and decide the constitutional H

Patel J

question A referred for determination. If this is not possible, the way forward would be to refer the matter back to the magistrates court to hear evidence from both parties.

Mrs *Fero* for the respondent reiterates the position adopted by the State before the magistrates court, *viz.* that this court, in the absence of the requisite B evidence on record, cannot properly make any finding as to the reasons for the delay in commencing trial, whether or not the applicant asserted his rights, and the nature of the prejudice, if any, occasioned by the delay. She submits, however, contrary to the stance taken in the respondent's heads of argument, that the application should not be dismissed. Instead, the matter should be referred to the magistrates court for a full inquiry to hear evidence C and make proper findings of fact in order to determine whether or not the application for referral is frivolous or vexatious.

Principles governing referral

Where an accused person alleges any infringement of his or her right to a fair trial within a reasonable time, the factors that are to be ventilated and D determined are now well settled. They are: the length of the delay; the reason or explanation and responsibility for the delay; the assertion of his or her rights by the accused; and prejudice to the accused arising from the delay. See In re *Mlambo* 1991 (2) ZLR 339 (S); *S* v *Nhando & Ors* 2001 (2) ZLR 84 (S); *S* v *Nkomo* S-52-06.

In E order to enable a proper evaluation of the above-mentioned factors it is essential that evidence be led, primarily by the accused person, as to what transpired from the date of the charge to the date when referral of the alleged violation of rights is sought. The reasons for this were clearly articulated by Gubbay CJ in *S* v *Banga* 1995 (2) ZLR 297 (S) at 300G-301H as follows:

> "Regrettably, the manner in which the legal practitioner requested the referral F 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 G the delay. Such a fundamental omission on the part of the defence is fatal to the success of the application …
>
> 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 H himself from the charge due to the death, disappearance or forgetfulness of

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Patel J

> potential witnesses. See *In re Mlambo supra* at 352G and 354D-E; A*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 frivolous or vexatious. It is on that record that the Supreme Court hears B 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."

This reasoning has been subsequently adopted and applied by the C Supreme Court on several occasions – see *Sivako* v *A-G* 1999 (2) ZLR 271 (S); *S* v *Njobvu* 2007 (1) ZLR 66 (S) – and, more recently, by this court in *S* v *Sengeredo* 2014 (2) ZLR 633 (CC), *per* Chidyausiku CJ.

Propriety of referral

I advert, firstly, to the notice of application for referral, filed on 27 June 2011, D wherein it is stated that "the applicant's affidavit and annexures will be used in support of the application". It is common cause that no such affidavit was ever filed. All that was attached to the notice were the submissions prepared by his legal practitioners, the request for remand, a bail deposit receipt, the charge sheet and the complainant's statement. E

Following the application *cum* submissions, the State filed its opposing response, dated 6 July 2011, highlighting the procedural and evidential deficiencies besetting the application. Despite this, on 8 July 2011, the trial magistrate proceeded to issue his ruling (comprising a total of four lines) granting the application for referral to the Supreme Court. He did this without hearing argument from the parties or affording them an opportunity to present F evidence on the factual circumstances bearing upon the application.

The only "evidence" from the applicant that was before the magistrates court consisted of the allegations and assertions contained in the written submissions attached to the application. According to those submissions, the applicant was first charged in November 2005 and only summoned to court for trial G in June 2011. The obvious implication is that he was available to attend trial throughout that period. As against this are the averments contained in the complainant's statement, dated 8 May 2011, to the effect that the applicant had run away to South Africa in 2005 and only returned to Zimbabwe in 2011. As pointed out by Mrs *Fero*, this appears to tally with the police docket which shows that the applicant could not be located between 2005 and 2011. H

Patel J

There A can be no doubt that all of the above assertions and counter-assertions should have been ventilated through *viva voce* evidence in order to determine the reasons and responsibility for the delay in bringing the applicant to trial. Equally necessary was the evidence necessary to demonstrate that the applicant did in fact assert his right to a speedy trial, that he has been prejudiced by the B delay and the specific manner in which he has been prejudiced. Moreover, in respect of all of these factors, the State should have been given the opportunity to test the veracity of the applicant's position through cross-examination, in addition to being given the opportunity to adduce its own evidence to rebut that position.

Disposition C

It is abundantly clear from the foregoing that this court would be severely handicapped, on the basis of the evidence on record, in attempting to make any meaningful finding on the relevant issues so as to determine the alleged violation of the applicant's right to a fair and expeditious trial. The evidentiary deficiencies *in casu* are fatal to the propriety of the proceedings before the magistrates court and its ruling referring the matter for determination by D this court.

In short, the application is fundamentally and fatally defective. Moreover, because it was defective as from its inception, I take the view that it is incurably defective and cannot be regularised. That being so, I do not think it appropriate, as proposed by both counsel, to remit the matter to the trial E court for it to conduct the necessary inquiry into the relevant facts. It is of course open to the applicant, should he so deem fit upon proper advice, to institute a fresh application before that court in compliance with the established procedural requirements.

In the result, the application is dismissed. There shall be no order as to costs, none having been sought by the respondent. F

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA and GUVAVA JA concurred

J Mambara & Partners, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners G

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MHARI v MANGOTI NO & ORS 2015 (1) ZLR 420 (H)

Citation	2015 (1) ZLR 420 (H)
Case No	Judgment No. HH-247-15
Court	High Court, Harare
Judge	Chigumba J
Heard	5 March 2015; *CAV*
Judgment	11 March 2015
Counsel	*N Mugiya*, for the applicant *Mr Makoto*, for the respondent
Case Type	Urgent chamber application – criminal
Annotations	No case annotations to date

Flynote

Criminal procedure – *indictment for trial – magistrate obliged to remand* C *accused in custody – previous release on bail irrelevant – accused may apply to High Court for bail – remand – duty of magistrate to refuse further remand after unreasonably long time has elapsed without accused being brought to trial – such refusal not a discharge – charge remains* D *extant and accused may still be charged again*

Headnote

The accused, along with three others, was placed on remand on a charge of murder. With the consent of the State, he was released on bail. Some three months later, on application to the magistrate, he and his co-accused E were removed from remand. Five months after that, he was arrested and detained and then indicted to the High Court on the charge of murder. He was remanded in custody until the trial date. He argued that he should not have been remanded in custody.

Held, that removal from remand is to be distinguished from dismissal of the charge for want of prosecution. A remand will usually be requested F by the State when it is not ready to bring a case to trial because police investigations are still taking place or the police may be experiencing difficulty in locating vital State witnesses. An accused person can be remanded in custody or out of custody. If the accused is remanded in custody he may apply for admission to bail. The remand period G is a maximum of two weeks as provided by s 151 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. A remand period of more that fourteen days requires the consent of the accused. Section 49 of the 2013 Constitution provides for the right to personal liberty, that every person has a right to personal liberty, which includes the right not to be detained without trial, not to be deprived of liberty arbitrarily and H

without A just cause. Section 50 now governs the right of accused persons to be brought to trial within a reasonable period.

Held, further, that magistrates who preside over applications for initial and further remands have a duty to observe the constitutionally guaranteed rights to personal liberty and to be brought to trial within a reasonable period. The court must not go on granting requests for further remand B when an unreasonably long period of time has elapsed since the accused was first charged. The remand court has a duty to the fair and impartial administration of justice, to ensure that the State proceeds to trial within a reasonable period of time. If the court is of the view that further remand of the accused person is not justified or reasonable, it may remove the C accused person from remand, usually on the basis that the State can proceed against the accused person by way of summoning him to court, when the docket is complete and the State is ready for trial. The effect of an order of refusal of further remand is not to discharge the accused person. The charge remains extant until such a time that the accused is discharged, by an acquittal after plea, or by a withdrawal of the charge D before plea.

Held, further, that s 320 of the Criminal Procedure and Evidence Act applies to those accused persons who make a formal application before the trial court, for discharge in default of prosecution, which application, if acceded to, results in a dismissal of the summons, indictment or charge. E On further application, such an accused may be granted a discharge of any recognizances that may have been granted by the court. The result is the acquittal of the accused person of the charges preferred against him, and the rendering of the charge to be unworthy of consideration for any purposes. Discharge does not result when an application for refusal from remand is granted. A refusal of further remand does not result in F the acquittal of an accused person.

Held, further, that once the accused has been indicted, the magistrate is obliged in terms of s 66(2) of the Act to commit the accused for trial before the High Court and to remand him in custody. The accused is not precluded from being released on bail, but an application for bail must G be made before the High Court.

Cases cited

Bull v *Min of Home Affairs* 1986 (1) ZLR 202 (S)

Church of the Province of Central Africa v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 346 (H) H

Denenga v *Ecobank* HH-177-14

Chigumba J

Dexprint Invstms (Pvt) Ltd v *Ace Property & Invstms Co (Pvt) Ltd*A HH-120-02

Fikilini v *A-G* 1990 (1) ZLR 105 (S)

Finwood Invstms (Pvt) Ltd & Anor v *Tetrad Invstm Bank Ltd & Anor* 2014 (2) ZLR 767 (H)

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) B

Madzivanzira & Ors v *Dexprint Invstms (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H)

Mafu & Ors v *Solusi University* HB-53-07

Mukuze & Anor v *A-G* 2005 (1) ZLR 6 (H)

S v *Ruzario* 1990 (1) ZLR 359 (S)

S v *Kundishora* 1990 (2) ZLR 30 (S) C

Williams v *Kroutz Invstms Pvt Ltd & Ors* HB-25-06

Legislation considered

Constitution of Zimbabwe 2013, ss 49 & 50

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 66, 151, 169, 320 & 321 D

Case information

N Mugiya, for the applicant

Mr Makoto, for the respondent

Judgment

Chigumba J: This is an urgent chamber application in which the applicant E seeks an order of release from detention within 48 hours. The applicant seeks a final order declaring that his detention is wrongful and unlawful and a violation of his rights, and an interdict restraining the respondents from denying the applicant his right to liberty in terms of the law. The founding affidavit was deposed to by the applicant's legal practitioner of record who averred that he was authorized to do so by the applicant because of F the urgency of the application. The applicant, being in detention at Harare Remand prison, was unable to depose to the affidavit.

The facts of this matter, as set out in the founding affidavit, are that the applicant was arrested in June 2014 and placed on remand at Mt Darwin magistrates court, on a charge of murder. He was jointly charged with three others. He G was admitted to bail with the consent of the State. On 29 September 2014 the applicant and his co-accused were removed from remand following their application. On 19 February 2015, the applicant was arrested and detained at Mt Darwin police station. On 21 February 2015, he was indicted by the first respondent to the High Court for trial on the murder charge. H

Chigumba J

The A applicant, on indictment, was remanded in custody and transferred from Mt Darwin to Harare Remand prison. The trial is due to commence on 31 March 2015. The issue for determination is whether, in terms of the law, the applicant ought to have been indicted and remanded to the trial date, as opposed to being indicted and remanded in custody until the trial date. Put differently, did the trial court correctly apply the provisions of B s 66 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (CPEA) to the applicant, or was the trial court supposed to deal with the applicant in terms of s 320 of the CPEA? Before dealing with that issue, we will look at whether the requirements of urgency have been met in this matter. The test for urgency is settled. It is so settled as to be cast in stone. One wonders why legal practitioners continue to grapple with the requirements of urgency, C and why they continue to ill-advise their clients, resulting in a waste of the court's time and a corresponding waste of resources.

It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is also urgent if, D 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 188 (H) at 188G .

It has also been held that:

> "For a court to deal with a matter on an urgent basis, it must be satisfied of a E 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 that matter on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does not act immediately and waits for doomsday F to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…"

See *Dexprint Investments (Pvt) Ltd* v *Ace Property & Invstms (Pvt) Ltd* HH-120-02 quoted in *Madzivanzira & Ors* v *Dexprint Invstms (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H) at 318A, *Church of the Province of Central Africa* v GDiocesan Trustees, Diocese of Harare 2010 (1) ZLR 346 (H), *Williams* v *Kroutz Invstms (Pvt) Ltd & Ors* HB-25-06, *Mafu & Ors* v *Solusi University* HB-53-07.

In my view, which I previously expressed in *Finwood Invstms (Pvt) Ltd & Anor* v *Tetrad Invstm Bank Ltd & Anor* 2014 (2) ZLR 767 (H) (and see H also *Denenga* v *Ecobank* HH-177-14), in order for a matter to be deemed

Chigumba J

urgent, the following criteria, which have been established in terms of case A law, must be met:

(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 away without delay.

(c) there is *prima facie* evidence that the applicant treated the matter as B urgent.

(d) the applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) there is no satisfactory alternative remedy.

In the circumstances of this case, I find that the applicant does have a C satisfactory alternative remedy. The applicant must apply for bail pending trial. For that reason this matter is not urgent.

The application is premised on the right of an accused person to liberty, so in my view, an examination of the merits of the matter is warranted. We must determine whether the charge was dismissed in this case by the magistrates court. We were informed that the applicant was removed from remand on D 29 September 2014. Clearly, removal from remand is to be distinguished from dismissal of the charge for want of prosecution. A remand will usually be requested by the State when it is not ready to bring a case to trial because police investigations are still taking place or the police may be experiencing difficulty in locating vital state witnesses. An accused person can be remanded E in custody or out of custody. If the accused is remanded in custody he may apply for admission to bail. The remand period is a maximum of two weeks as provided by s 151 of the CPEA. A remand period of more that 14 days requires the consent of the accused. Section 49 of the Constitution of Zimbabwe 2013 provides for the right to personal liberty, that every person has a right to personal liberty, which includes the right not to be detained F without trial, not to be deprived of liberty arbitrarily and without just cause. Section 50 now governs the right of accused persons to be brought to trial within a reasonable period.

Magistrates who preside over applications for initial and further remands have a duty to observe the constitutionally guaranteed rights to personal G liberty and to be brought to trial within a reasonable period. See G Feltoe *Magistrates Handbook* pp 7-9**.** The remand court must not go on granting requests for further remand when an unreasonably long period of time has elapsed since the accused was first charged. The remand court has a duty to the fair and impartial administration of justice, to ensure that the state proceeds to trial within a reasonable period of time. See *Bull* v *Minister of*H

Chigumba J

Home Affairs 1986 (1) ZLR 202 (S) A , *Fikilini* v *Attorney-General* 1990 (1) ZLR 105 (S). On the factors to be considered in determining whether the accused had been on remand for an unreasonably long time, see *S* v *Ruzario* 1990 (1) ZLR 359 (S) and *S* v *Kundishora* 1990 (2) ZLR 30 (S)

If the court is of the view that further remand of the accused person is not B justified or reasonable, it may remove the accused person from remand, usually on the basis that the State can proceed against the accused person by way of summoning him to court, when the docket is complete and the state is ready for trial. The effect of an order of refusal of further remand is not to discharge the accused person. The charge remains extant until such a time that the accused is discharged, by an acquittal after plea, or by a withdrawal C of the charge before plea.

Section 320 of the CPEA provides:

> "320 Dismissal of charge in default of prosecution
>
> (1) If the prosecutor, whether public or private, does not appear on the court day appointed for the trial, the accused may move the court to discharge him, and the indictment, summons or charge may be dismissed and, when the accused or any D other person on his behalf has been bound by recognizance for the appearance of the accused so to take his trial, may further move the court that such recognizance be discharged, and such recognizance may thereupon be discharged.
>
> (2) Where the indictment is at the instance of a private party, the accused may move the court that the private prosecutor and his sureties shall be called on their recognizance and, in default of his appearance, that the same be estreated E and the accused may also apply for an order directing the private prosecutor to pay the costs incurred by the accused in preparing his defence.

(3) Nothing in this section shall be construed as depriving the Attorney-General, or public prosecutor with his authority or on his behalf, of the right of withdrawing any indictment, summons or charge at any time before the accused has pleaded, and lodging a fresh indictment or charge or issuing and serving a fresh summons F for hearing before the same or any other competent court."

It is my respectful view that s 320 of the CPEA applies to those accused persons who make formal applications before the trial court, for discharge, which application , if acceded to, results in a dismissal of the summons, indictment or charge. On further application, such an accused may be G granted a discharge of any recognizances that may have been granted by the court (s 320(1)). The word "discharge" has been described as a transitive verb which is used to describe the release of a prisoner, or the acquittal of somebody in a court of law. 'The word "dismissal" has been defined as "the rejection of something from consideration". A combination of the two words results in the inescapable conclusion that, an application in terms of s 320 H of the CPEA, if positively accepted by the court, results in the acquittal of

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an accused person of the charges preferred against him, and to the rendering A of the charge to be unworthy of consideration for any purposes.

Section 320 does not apply to the applicant's circumstances. The applicant did not apply for discharge for want of prosecution which would have entitled him to be discharged. Discharge does not result B when an application for refusal from remand is granted. A refusal of further remand does not result in the acquittal of an accused person. The effect of a discharge in terms of s 320 is set out in s 321 as follows:

"321 Liberation of accused persons

Any person who is acquitted on any indictment, summons or charge or whose case has been dismissed for want of prosecution shall forthwith be discharged from custody." C

It has not been submitted that the effect of the removal of the applicant from remand was an acquittal. It was accepted that the State could legitimately bring the same charge against the applicant. That, in my view, is where the applicant's case crumbles, seeing that the applicant's case was premised on the provisions of s 320 of the CPEA. Once an accused is acquitted, it D is impermissible to bring the same charge against him again. Not so with removal from remand. It was submitted by counsel for the State, Mr *Makoto*, which submission I accepted as correct, that the correct section that applies to the applicant's circumstances is s 66 of the CPEA, which provides:

"66 Summary committal for trial of accused person E

(1) If the Attorney-General is of the opinion that any person is under reasonable suspicion of having committed an offence for which the person may be tried in the High Court, the Attorney-General shall cause written notice to be served on –

(a) a magistrate for the province within which the person concerned resides or for the time being is present;

or F

(b) any magistrate before whom the trial of the offence could be held in respect of the offence concerned;

informing the magistrate of his or her decision to indict the person concerned for trial before the High Court and of the offence for which the person is to be tried.

(2) *On receipt of a notice in terms of subsection (1), the magistrate shall cause*G*the person concerned to be brought before him or her and, notwithstanding any other provision of this Act,* shall forthwith commit the person for trial before the High Court *and grant a warrant to commit him or her to prison, there to be detained till brought to trial before the High Court* for the offence specified in the warrant or till admitted to bail or liberated in the course of law" (my emphasis).

See *Mukuze & Anor* v *A-G* 2005 (1) ZLR 6 (H) H

Section 66(2) A is peremptory. On receipt of the notice of indictment the magistrate shall cause the person concerned to be brought before him and, notwithstanding any other provisions of the CPEA, shall commit the person for trial to the High Court till admitted to bail. There is no provision in s

66(1) for the admission to bail of the indictee by the magistrate court. The wording of s 66(2) is clear. Once indicted for trial to the High Court, the B applicant could only have been released on bail by application to the High Court. This is the suitable alternative remedy that the applicant has. I am fortified in this view by the provisions of s 169 of the CPEA:

> "169 Termination of bail on plea to indictment in High Court
>
> If the accused is indicted in the High Court after having been admitted to bail, C his plea to the indictment shall, unless the court otherwise directs, have the effect of terminating his bail, and he shall thereupon be detained in custody until the conclusion of the trial in the same manner in every respect as if he had not been admitted to bail".

The applicant is at liberty to apply for admission to bail pending trial in the normal course of things. He is not precluded from being admitted to D bail pending trial. A judge sitting in chambers may not illicitly release the applicant from the effect of his indictment for trial on a charge of murder. A properly constituted bail court may do so, on the strength of appropriate submissions for consideration of suitability for admission to bail pending trial. This application was not urgent. One of the requirements of urgency, the lack of a suitable alternative remedy, was not met. With regards to the merits E of the matter, s 320 of the CPEA has no application to the circumstances of this case. The applicant is governed by the provisions of s 66 of the CPEA, which permit the course of action that the applicant seeks to impugn. The relief sought is incompetent, and not supported by the averments filed on behalf of the applicant.

For these reasons, the application is dismissed. F

Mugiya and Macharaga Law Chambers, applicant's legal practitioners

Prosecutor-General, respondent's legal practitioners

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MINISTER OF FOREIGN AFFAIRS v JENRICH & ORS 2015 (1) ZLR 428 (H)

Citation	2015 (1) ZLR 428 (H)
Case No	Judgment No. HH-232-15
Court	High Court, Harare
Judge	Uchena J
Heard	14 January, 11, 18 & 20 February 2015; *CAV*
Judgment	11 March 2015
Counsel	*P Machaya*, for the applicant Mrs *J B Wood*, for the first respondent *M C Kamba*, for the second respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

International law – *international agreement signed by President – effect on* C *domestic law – becomes binding when approved by Parliament even if not incorporated into domestic law*

International law – *sovereign immunity – international organisation – restrictive immunity from suits – employment contract – not covered* D *by immunity – international organisation claiming immunity – entitled to approach court to assert immunity – not thereby waiving immunity – action against international organisation – court's duty to inquire mero motu into issue of immunity*

Practice and procedure – *parties – locus standi – Minister acting on behalf* E *of Government – Minister bringing proceedings to protect international organisation – limited circumstances in which may do so*

Practice and procedure – *parties – party claiming sovereign immunity – party entitled to approach court to claim immunity – not waiving immunity by so doing*

Headnote

The first respondent was an employee of the Food and Agriculture F Organisation, an agency of the United Nations. He sued the FAO in the Labour Court, which granted him an order which was registered as an order of the High Court. He sought to execute the order through a writ, but the applicant, the Minister of Foreign Affairs, was granted a G provisional order preventing execution. The first respondent thereupon applied for a garnishee order against the FAO's bank account; the sheriff served the order on the bank but the applicant sought a further order preventing execution of the garnishee order.

It was submitted on behalf of the first respondent that the applicant had no *locus standi* and that the FAO itself should have brought the application. H

All A the FAO had done was write to the Registrar, bringing to his attention its claim to immunity against suits. It was also submitted that the FAO was not entitled to do approach the court in this case because the agreements between Zimbabwe and the FAO were not yet binding on Zimbabwe and did not have the force of law as they have not yet been domesticated. The FAO had not, at the time of the application, been granted immunity B in terms of s 7 of the Privileges and Immunities Act [*Chapter 3:03*].

The applicant argued that customary international law compelled the applicant to act on behalf of the FAO, as Zimbabwe had entered into agreements with the FAO which granted it immunity from the jurisdiction of the Zimbabwean courts.

Held, that the issue as to how foreign nations and international organisations C should raise their immunity before national courts has not been clearly settled in our jurisdiction. The general principle is that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages. The reason is that, if the courts here once entertained the claim, and in consequence D gave judgment against the foreign sovereign, they could be called upon to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee. The duty of the court is to ensure that a sovereign state or international organisation which has been clothed with immunity E is not improperly sued in our courts. The court, if it had received from the registrar the FAO's letter to him, should *mero motu* have inquired into whether the FAO had immunity.

Held, further, that as to whether the Minister could institute proceedings to claim or protect the FAO's immunity, the authorities indicated that the host State had a duty to inform the court. Under customary international F law, the acts of the courts are deemed to be the acts of their State. The Government of Zimbabwe was genuinely worried about the court's failure to act timeously on the information which it and the FAO supplied. That anxiety might, as an extreme possibility, justify its having to come to court as a party to litigate on behalf of FAO. After the court's failure to act appropriately when the FAO wrote to the Registrar, and again G after the applicant's earlier application, the State must have been very anxious that it could be exposed to proceedings. That, however, did not change the nature of the Government's obligation to inform the courts to one of litigating for the FAO, although there may be situations when the State may be left with no option besides having to litigate to ensure H that the courts determine *in limine* the scope of the foreign sovereign's

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Uchena J

immunity. It can be driven to such a possibility by the courts' failure to A play or delay in playing their part. Such a situation occurred here and the State derived its *locus standi* from the danger to which it would be have exposed had nothing been done.

Held, further, that the FAO could itself have come to court to enforce its immunity. This would not have amounted to a waiver of immunity. B

Held, further, that under s 326(1) of the Constitution, customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or a law of Zimbabwe. Under s 327(2), an international treaty which has been concluded or executed by the President does not bind Zimbabwe until it has been approved by Parliament and does not form part of the law of Zimbabwe until it has been incorporated into the C law by an Act of Parliament. The FAO agreements became binding when they were approved by Parliament and the FAO obtained immunity then.

Held, further, that the FAO, like other international organisations, only enjoys restrictive immunity, not absolute immunity. It does not have immunity against labour suits, which meant that the application could not be granted. D

Cases referred to

Barker McCormac (Pvt) Ltd v *Govt of Kenya* 1983 (1) ZLR 137 (H)

Barker McCormac (Pvt) Ltd v *Govt of Kenya* 1983 (2) ZLR 72 (S)

ICRC v *Sibanda & Anor* 2004 (1) ZLR 27 (S) E

Rahimtoola v *Nizam of Hyderabad* [1958] AC 379; [1957] 3 All ER 441 (HL)

Legislation considered

Constitution of Zimbabwe 2013, ss 326 & 327

High Court Rules 1971 (RGN 1047 of 1971), s 227(4)(a) F

Case information

P Machaya, for the applicant

Mrs *J B Wood*, for the first respondent

M C Kamba, for the second respondent G

Judgment

Uchena J: The applicant is the Minister of Foreign Affairs of Zimbabwe. Through this urgent application, he applied for a provisional order intended to protect the Food and Agriculture Organisation of the United Nations, which I will refer to as the FAO, from a garnishee order granted by this court against its bank account with the second respondent in favour of the first respondent. He made the application in his official capacity as the Minster H

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responsible A for foreign affairs, and thus responsible for the FAO with which Zimbabwe has existing agreements for the establishment of the FAO Sub-Regional office for Southern and Eastern Africa. The agreements granted the FAO immunity against legal suits in the national courts of Zimbabwe.

The first respondent was an employee of the FAO who, despite the FAO's B immunity, sued it in the Labour Court which granted him an order which has now been registered as an order of this court. The first respondent sought to execute the order through a writ which was granted by this court. His pursuit for remedy in Zimbabwean courts was interrupted by the applicant's application under HC 5213/14 in which this court granted the applicant a provisional order, on 27 June 2014, on the following terms: C

> "That pending the determination of this matter the applicant is granted the following relief:
>
> 1. The Sheriff for Zimbabwe and any deputy appointed under his hand be and they are hereby interdicted and prohibited from in any way enforcing or executing the writ of execution against

property issued by the Registrar of the High Court on 3 June 2014 in Case HC 3432/14 in favour of one Michael Jenrich and against Food and Agriculture Organisation of the D United Nations."

The first respondent thereafter circumvented the provisional order granted on 27 June 2014. He applied for a garnishee order against the FAO's bank account with the second respondent. The Sheriff, in compliance with the garnishee order, served it on the second respondent who, but for this application, E could have complied. The applicant, being prevailed upon by the FAO, made this urgent application seeking the following order.

"That pending the determination of this matter the applicants are granted the following relief:

That the Sheriff for Zimbabwe and any deputy appointed under his hand be F and they are hereby prohibited and interdicted from any further enforcement or execution of the garnishee order issued by this court on 31December 2014 under case No HC 9895/14"

The second respondent, though participating in these proceedings, did not take an active part, indicating that it will abide by the court's decision

The Sheriff, who is the third respondent, on being served with this application, G in a move which took the sting from the urgency of this case, indicated that he was not proceeding with the enforcement of the garnishee order and would abide by the decision of the court.

Mrs *Wood* for the first respondent strenuously opposed the application, while Mr *Machaya* for the applicant exerted a lot of energy and his knowledge H of international law towards securing an order stopping the execution of

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the garnishee order. They both filed voluminous heads of argument and A attached a lot of authorities on international law on the immunity of foreign governments and international organisations. They both sought sufficient time to enable them to prepare and file heads of arguments, leading to this case being postponed to 11 February 2015. On 11 February 2015 only Mrs *Wood* appeared. Mr *Machaya*, who was then the Deputy Attorney General, was out B of the country on business. Mr *Kamba* for the second respondent was also out of the country, leading to the case being postponed to 18 February 2015.

Mrs *Wood* for the first respondent submitted that the applicant had no *locus standii* to make this application. She submitted that the FAO should have itself have responded to this application and raised the court's alleged lack C of jurisdiction due to its immunity. She criticised its having merely written to the Registrar of this court, bringing to its attention its claim for immunity. Mr *Machaya*, in response, submitted that the applicant has *locus standi* to file this application. He submitted that customary international law compels him to act on behalf of the FAO with which Zimbabwe entered into agreements which granted it immunity from the jurisdiction of Zimbabwean courts. D

Mrs *Wood* also submitted that the deponent of the applicant's founding affidavit does not have personal knowledge of the facts she deposed to in that affidavit. Mr *Machaya* in response submitted that she clearly has personal knowledge of the facts of this case. E

Founding affidavit

Mrs *Wood*'s attack on the founding affidavit is based on the need for the deponent to have personal knowledge of the contents of his or her affidavit. The attack on Mrs Zvedi's founding affidavit must therefore be assessed against the provisions of r 227(4)(a) of the High Court Rules 1971, which provides as follows: F

"An affidavit filed with a written application –

(a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and …"

Mrs Zvedi in her founding affidavit's paras 1 to 3 said:

"1. I am a legal practitioner of this honourable court, duly sworn and admitted, G and am presently employed as a Chief Law Officer in the Civil Division of the Attorney General's Office, the legal practitioners of record of the within named applicant. I have been duly authorised to depose to this affidavit on behalf of the applicant as the substantial content of the affidavit relates to matters of law and procedure which applicant himself has little or no knowledge of. H

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2. The A matters of fact which I depose to herein are, save where otherwise indicated or the context so suggests, within my personal knowledge and belief.
3. I have acquainted myself with the matters which I refer to herein by perusal of all relevant files which the Civil Division has in its possession, and also by personal inquiry with my colleagues who have knowledge of those B matters".

A reading of these three paragraphs reveals that the deponent has three sources of knowledge which entitles her to depose to the affidavit, her legal training and experience, personal knowledge and knowledge acquired from reading files held by the Civil Division and inquiries held with colleagues.

Rule 227(4)(a) of the High Court Rules simply requires the deponent to be the C applicant or respondent "or a person who can swear to the facts or averments set out in therein". All Mrs Zvedi had to do to qualify was to read files held at the Civil Division on the facts relating to the FAO Agreements and the applicable law. She then could fill in that with inquiries with officers who had previously dealt with such cases. Armed with that information she had D every right to depose the founding affidavit. I therefore find no merit in Mrs *Wood*'s challenge to her capacity to depose to the founding affidavit. There is no doubt that, apart from establishing the existence of the agreements, the rest depends on the history of the case which has been handled by the Civil Division and the law which Mrs Zvedi is expected to know or ascertain as she said she did. E

Locus standi

Mrs *Wood* for the respondent submitted that the FAO should have personally come to court to establish its immunity and oust the court's jurisdiction. She further submitted that the applicant does not have *locus standi* to file F this application.

Mr *Machaya* for the applicant, relying on customary international law, submitted that the FAO need not have personally participated to enforce its immunity, as the applicant has *locus standi* to file and prosecute this application.

The issue as to how foreign nations and international organisations should G raise their immunity before national courts has not been clearly settled in our jurisdiction, though one can take guidance from *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1983 (1) ZLR 137 (H). In that case McNally J (as he then was), while considering a chamber application, realised the existence of possible sovereign immunity and had referred the case for H hearing. Waddington J, on hearing the case, did so in the absence of the

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Government of Kenya which was only represented on 24 February but the A hearing continued on 3, 4, and 10 March when the Government of Kenyan was not in attendance nor represented. Commenting on why he proceeded in the absence of representation or a claim of immunity from the Government of Kenya, Waddington J said at 141C-F:

> "In my view, this supine attitude would have been wrong. The courts in at least B two similar and recently decided cases in South Africa adopted anything but a supine attitude. In the *Government of Bolivia* case s*upra*, at 939H, Goldstone AJ (as he then was) is reported in the following terms:
>
> 'Mr *Southwood*, who appeared for the applicant, in a helpful argument, submitted that all the requisites entitling the applicant to the orders sought by it were established. *However, he realised that the difficulty in the way*C*of such relief being granted was the principle of public international law that the courts of a country will not by their process make a foreign State party to legal proceedings against its will . . .*'
>
> It is clear to me that had counsel for the applicant in that case not raised the question, the learned acting judge most certainly would. There is another case brought *ex parte* where a similar course was adopted. In *Kaffraria Property Co (Pty) Ltd* v *Government of the Republic of Zambia* 1980 (2) SA 709 at 711E, D Eksteen J is reported as saying:
>
> 'There was therefore no appearance for the respondent, but Mr *Kroon*, who appeared on behalf of the applicant, very properly dealt with the possible objection that the respondent may enjoy sovereign immunity against any process in our courts. He submitted, however, that the application related E

to a purely commercial transaction and that, by virtue of the restricted view international law took of the doctrine of sovereign immunity today, respondent would not be entitled to claim any such immunity in the circumstances of this case.'

Once again, therefore, it is demonstrated that a proposal to sue a sovereign state in the courts of another state is regarded as a very serious matter justifying action mero motu *by the court.* The reason is explained by Lord Denning MR F in his judgment in *Thai-Europe Tapioca Service Ltd* v *Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies Imports and Shipping Wing* [1975] 3 All ER 961 at 965a-b:

'Counsel for the plaintiffs has taken us through a fascinating study of sovereign immunity and its development. But I do not think we need follow him today through its ramifications. *The general principle is undoubtedly* G *that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages.* The reason is that, if the courts here once entertained the claim, and in consequence gave judgment against the foreign sovereign, they could be called upon to enforce it by execution against its property here. *Such execution might imperil our relations with that country and lead to* H

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repercussions A *impossible to foresee.* We have quite recently had examples in our courts where this general principle has been applied.'

So it seems to me that the general principle must be applied unless it comes within any of the recognised exceptions. But the exceptions are several and they are important.'

It seems to me that it is essential *that in cases of this description where the* B *harmonious relations between Zimbabwe and another State could be adversely affected by the institution of civil action in the Courts of this jurisdiction, it is the clear duty of the Court to ensure that action is brought against the foreign sovereign State only in the most proper of circumstances. The need for caution in this field is no less pressing in Zimbabwe than it is in the United Kingdom. I think that caution should be exercised in this case.* C

It was for the reason given above that on 3 March 1983 when argument was first addressed to the court, I adjourned the proceedings. The purpose of the adjournment was to enable the Registrar to obtain a certificate from the Minister of Foreign Affairs concerning the status of the premises in question in this case. On the papers at that time there was doubt whether the building was in fact the High Commission of the Government and, if so, for how long it had been D recognised by the Government of Zimbabwe as the High Commission. It seemed to me that the recognition of a building as an embassy or high commission is no less an act of State than the recognition of the sovereign power itself. It is an act of a government concerning its foreign relations with another country" (my emphasis throughout).

It is therefore clear that the two judges who first dealt with the E *Barker McCormac* case s*upra* were of the view that in cases of immunity the court should *mero motu* inquire into whether or not the sovereign state has immunity. I am aware that the Supreme Court in *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1983 (2) ZLR 72 (S) did not conclusively deal with whether or not a court should *mero motu* raise the issue of immunity, F but it heard the appeal when there was no appearance for the respondent. This confirms the duty of the court to ensure that a sovereign state or international organisation which has been clothed with immunity is not improperly sued in our courts. Georges JA (as he then was) said at 82F-H:

"In the view which I take of this matter it is unnecessary to rule on that issue. It can be argued that a municipal court has jurisdiction over a claim by reason G of the nature of the claim and that such jurisdiction is barred only when the defendant raises the issue of sovereign immunity. *On the other hand it can be argued that the jurisdiction is barred once it appears on the record that the defendant can raise the issue of sovereign immunity and that the court should not proceed unless satisfied that the defendant consents or that the claim does not fall within the category of claims in regard to which sovereign immunity* H *can be raised*" (emphasis added).

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The fact that the Supreme Court heard an unopposed appeal suggests that A it attached importance to the issue of immunity. It itself confirmed the need for the court to inquire and establish the issue of immunity once it appears on the record. It further did not say the two judges who said that the court should *mero motu* raise the issue of immunity were wrong.

This, in my view, means that if the Registrar had brought the FAO's letter to B him, to the court's attention it should from there on have *mero motu* inquired into whether or not the FAO had

immunity in this case.

Mr *Machaya* for the applicant relied on the advisory opinion given by the International Court of Justice in the case of "*Curamaswamy*", officially cited as "Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion" ICJ C Reports 1999 p 62, for his submission that the applicant has *locus standi*. He submitted that the Government of Zimbabwe has a duty to ensure that the FAO's immunity is observed, as failure to do so can expose it to proceedings in terms of customary international law.

A reading of that case, at pp 86 to 88 paras 59, 60, 61, 62 and 63, which D Mr *Machaya* relied on, merely stresses the need for the host state to inform the national courts of the existence of immunity. The case does not specifically say the state can itself institute proceedings to claim or protect the guest nation or international organisation's immunity.

At p 86, para 59 the International Court of Justice simply said: E

> "The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent Malaysian judicial authority of the Secretary-General's finding that Mr Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was therefore entitled to immunity from legal process …"

This does not in my view authorise the host state to do more than inform the F national courts of the guest nation of the foreign sovereign or international organization's immunity.

At p 87 para 60, the International Court of Justice said:

> "This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and in particular, to request it to bring his findings G to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings."

Again this paragraph places on the host state the duty to inform the local courts and not to itself be part of the litigation.

At p 87 para 61, the International Court of Justice said: H

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> "The A governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Art VIII, s 30, of the General Convention".

Mr *Machaya* heavily relied on the possible proceedings against the B Government of Zimbabwe and the courts' apparent failure to deal with the issue of immunity *in limine litis*, as the basis for the applicant's *locus standi* to make this application on behalf of the FAO. This, though possible, does not change the nature of the state's responsibility, according to this case, which remains that of informing the local courts of the existence of immunity.

At p 87, para 62 the International Court of Justice said; C

> "The Court concludes that the Government of Malaysia had an obligation, under article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State."

There D is no doubt that at customary international law the acts of the courts are deemed to be the acts of their state. I also accept that the Government of Zimbabwe is genuinely worried about the court's failure to timeously act on the information it and the FAO supplied. That anxiety might, as an extreme possibility, justify its having to come to court as a party to litigate on behalf E of the FAO. I appreciate that after the court's failure to act appropriately when the FAO wrote to the Registrar, and again after applicant's earlier application in HC 5213/14, the state must have been very anxious that it could be exposed to proceedings referred to in para 61. That however does not change the nature of its obligation to inform the courts, in terms of para 62 to one of litigating for the FAO. In my view, the applicant could have F informed the courts at an appropriate higher level, to cause them to take over their responsibility of carefully ascertaining *in limine litis*, whether or not the FAO was clothed with immunity.

I must also comment on what the International Court of Justice said on p 88 para 63 about the responsibility of the national courts. It said:

> "*By necessary implication, questions of immunity are therefore preliminary* G *issues which must be expeditiously decided* in limine litis. This is a generally recognised principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur ... As indicated above, the conduct of an organ of a state – even an organ independent of the executive power – must be regarded as an act of the state. Consequently, Malaysia did not act in accordance with its H obligations under international law."

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Mr *Machaya* said that if the State had not applied to stop the execution of A the garnishee order as it did, it would have left itself open to proceedings as the FAO has absolute immunity against execution. It is accepted that the State can in terms of international law be proceeded against for the acts of its organs, including those of the judiciary, even though the judiciary enjoys independence from executive power. This may in exceptional circumstances not mentioned in this case warrant the State's involvement in litigation on B behalf of sovereign nations and international organisations. The courts should therefore *mero motu* act expeditiously to determine immunity issues *in limine litis*. That would take away the state's anxiety for the nation to act appropriately in terms of customary international law.

The possibility of the State making applications on behalf of foreign C governments and international organisations to plead their immunity was commented on by Guido den Dekker at pp 17 to 18 of the *Hague Justice Journal* Volume 31 Number 2/2008, referred to by Mr *Machaya*. Dekker was commenting on the possibility of the state making applications such as the one the applicant made in this case. His comments were based on *Mothers of Srebrenica* et al v *State of the Netherlands and United Nations* D 10 July 2008, where a district court of The Hague heard an application by the State in which it claimed immunity for the United Nations, which had, instead of appearing before the court, send a letter to the UN representative of the Netherlands invoking its immunity. The state forwarded the letter to the district court which, in spite of that letter granted leave to proceed in E default of appearance against the UN. This prompted the state to intervene, which the district court allowed. Dekker commented that the State felt compelled to intervene due to the previous failure by the court to assess as a preliminary matter the (scope of) immunity of an international legal person. He said at pp 17 to 18:

> "The District Court can be followed in its interpretation that 'under the UN F Charter the State has bound itself to warrant as much as possible the immunity laid down in the Charter, irrespective of how far it extends' and that 'pleading the immunity (of the UN) in proceedings before a national court of law at least falls within the bounds of possibility'. It seems to be a matter of policy of the State in each case to decide whether or not it will intervene in court proceedings. To my knowledge there are not yet sufficient examples in Dutch case law to consider G invoking immunity in defence, of anon appearing international legal person before the domestic courts as a common and established practice of the State."

Dekker's article, though not backed by my own reading of the district court's judgment, which was not made available, has a persuasive effect. It points to situations when the State may be left with no option besides having to litigate to ensure that the courts determine *in limine litis* the scope of the H

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foreign A sovereign's immunity. It can be driven to such a possibility by the courts failure or delay in playing their part as clearly spelt out in *Barker McCormac* s*upra* and *Curamaswamy* s*upra*.

In this case, the FAO wrote to the Registrar of this court when an application to register the judgment of the Labour Court was made. It seems this was B not brought to the attention of the court which registered the order. While the Registrar had the letter, an application for a writ of execution was made and granted. The Sheriff was thereafter informed of the immunity to which he responded to the effect, that he would proceed with execution, if he was not stopped by a court order. The applicant, being prevailed upon by the FAO which had send it two notices in which it sought the enforcement of C its immunity, and faced by the extreme urgency to protect its reputation, and guard against its exposure to proceedings against it in terms of customary international law made its first application for a provisional order in HC 5213/14 which was granted.

It is my view that a state may in such circumstances be allowed to litigate, its *locus standi* being rooted in the danger to which it will have been exposed. D

Mrs *Wood* submitted that the FAO should have come to court to enforce its immunity. Mr *Machaya* submitted that would amount to FAO waiving its immunity. I do not agree. A litigant who pleads immunity, or the court's lack of jurisdiction, does not waive his immunity nor clothe the court with the jurisdiction he says it does not have, but enforces his immunity, or stresses E the court's lack of jurisdiction. I am therefore of the view that, subject to international customary law and in appropriate circumstances, a sovereign state or an international organisation can come to court to enforce its immunity. This view draws support from *Rahimtoola* v *Nizam of Hyderabad* [1958] AC 379 at 418; [1957] 3 All ER 441 (HL) at 461 where Lord Denning, commenting on the need for sovereign states to come to court, said: F

> "It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction."

In view of the above I am persuaded that the applicant has *locus standi* to G file this application. Mrs *Wood*, prompted by the applicant's application to amend the order sought submitted that a litigant who is not a holder of the right in issue has no *locus standi*, to apply for a declaratory order. This will, if, necessary be dealt with when I consider the applicant's application for the amendment. Even if a finding that applicant does not have *locus standi*, were to be made, that does not mean that I have to for that reason, dismiss H this application as I have a duty to *mero motu* determine the FAO's immunity,

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in limine litis, as was done in the first *Barker McCormac* case s*upra*. issue A of immunity is already before me. I must determine it on the facts and law which has already been placed and argued before me.

The status of the FAO Agreements

Mrs *Wood* submitted that even if the applicant could come to court to enforce the FAO's immunity it was not entitled to do so in this case because the B agreements between Zimbabwe and the FAO are not yet binding on Zimbabwe as they do not have the force of law as they have not yet been domesticated.

Mr *Machaya* for the applicant submitted that an agreement becomes binding on being approved by Parliament and can be enforced before its domestication by being incorporated into Zimbabwean law. He further submitted that such C agreements are binding in terms of, customary international law which was made part of our law by s 326 of the Constitution, which provides as follows:

> "(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.
>
> (2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary D international law applicable in Zimbabwe, in preference to an alternative interpretation inconsistent with that law."

Section 326(1) clearly states that customary international law is part of the law of Zimbabwe. It can only be excluded if it is not consistent with the Constitution or an Act of Parliament. Subsection (2) is important, as it requires E courts to reasonably, interpret local statutes with an inclination towards making them consistent with customary international law as opposed to in a manner inconsistent with customary international law.

A reading of s 326 of the Constitution, together with the courts' *dicta* in the three *Barker McCormac* cases, confirms that customary international law is part of our law. What remains to be determined is whether or not the FAO's F agreements with Zimbabwe had become binding and enforceable at the time these proceedings were instituted.

Mr *Machaya* relied on the interpretation of s 327(2)(a) of the Constitution to prove that they had become binding at the time these proceedings were instituted. Mrs *Wood* relied on the same section but inseparably including G subs (2)(b) for her submission that the agreements could only become binding on Zimbabwe when they were domesticated. She further submitted that at the time of the applicant's application the FAO had not been granted immunity in terms of s 7 of the Privileges and

Immunities Act [*Chapter 3:03*] which only granted the FAO immunity through the *Government Gazette* of 25 January 2015. On the other hand, Mr *Machaya* submitted that the FAO's H

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agreements A with Zimbabwe became binding on Zimbabwe on 23 July 1996 when the Parliament of Zimbabwe approved them. A literal interpretation of s 327(2)(a) and (b) of the Constitution, as well as an interpretation required by s 326(2), supports Mr *Machaya*'s submission. Section 327(2)(a) and (b) of the Constitution provides as follows:

> "An international treaty which has been concluded or executed by the President B or under the President's authority –
>
> (a) does not bind Zimbabwe until it has been approved by Parliament; and
>
> (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament …"

Section 327(2)(a) of the Constitution can only mean that the agreement C by the President or under his authority becomes binding on its being approved by Parliament. It need not be domesticated for it to be binding on Zimbabwe. The only impediment to its attaining binding status is its approval by Parliament. Mrs *Wood's* attempt to link the agreements' binding effect after their approval by Parliament to the domestication of the law by D incorporation through an Act of Parliament is a result of inseparably linking s 327(2)(a) and (b) which is not consistent with the literal meaning of the words used and has the effect of excluding customary international law contrary to the provisions of s 326(2) of the Constitution. Section 327(2)(a) standing alone gives the agreements a binding effect even if they have not E yet been incorporated into Zimbabwean law. Mrs Wood submitted that the agreements could not be enforced before their being partly domesticated by the *Government Gazette* of 25 January 2015. That cannot be a correct statement of the law as it suggests that courts can only enforce laws. Courts can enforce agreements and laws. Mr *Machaya* was therefore correct when he said the FAO's agreements became enforceable on 23 July 1996 when they F were approved by Parliament. I therefore find that the agreements became binding on Zimbabwe on 23 July 1996.

This case does not therefore only depend on the Privileges and Immunities Act which granted the FAO immunity on 25 January 2015. The issue of immunity was determinable from 23 July 1996 when the Agreements became G binding on Zimbabwe.

The immunity

This case stands or falls on whether or not the FAO has the immunity claimed by the applicant. The issue of immunity is determined by our customary international law. The customary international law referred to in s 326(1) of the H Constitution is the customary international law developed from how nations

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of the world related with each other over the years in terms of conventions A and treaties which have become binding on participating nations.

Mr *Machaya* for the applicant submitted that the FAO enjoys absolute immunity. Mrs *Wood* for the respondent submitted that the FAO, like all nations and international organisations, only enjoys restricted immunity. Absolute immunity protects the claimant from all suits before the national B courts of the host country. Restricted immunity, on the other hand, only protects the claimant against suits based on acts *jure imperii*. This means courts of the host nation have jurisdiction to hear the guest nations' or international organisations' cases based on acts *jure gestionis*. Acts *jure imperii* are, for example, governmental public activities such as the legislative or international transactions of a foreign government, while acts *jure gestionis*C are commercial activities by a foreign sovereign or international organisation of a private law nature.

In *Barker McCormac (Pvt) Ltd* v *Government of Kenya* 1983 (2) ZLR 72 (S) at 79G-H Georges JA (as he then was), after analysing cases from several jurisdictions, said:

> "I am completely satisfied therefore that the doctrine of sovereign immunity D generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no

legislation inconsistent with that doctrine and it should be incorporated as part of our law."

As a result he upheld the appeal allowing the appellant to serve the Government of Kenya by substituted service. The Supreme Court maintained the same E position in *ICRC* v *Sibanda & Anor* 2004 (1) ZLR 27 (S) at 31D-32A, where Sandura JA said:

> "It is therefore, clear that the doctrine of sovereign immunity applicable in this country is that of restrictive immunity as opposed to absolute immunity. In other words, a foreign sovereign would enjoy immunity from suit and legal process where the relevant act which forms the basis of the claim is an act '*jure imperii*' i.e. F a sovereign or public act. On the other hand, he would not enjoy such immunity if the act which forms the basis of the claim is an act '*jure gestionis*', i.e. an act of 'a private law character such as a private citizen might have entered into.'
>
> The position in South Africa is the same. It was stated by Corbett CJ in *Shipping Corporation of India Ltd* v *Evdomon Corporation & Anor* 1994 (1) SA 550 (A) at 565A-B as follows: G
>
> > 'The legal position in this country regarding the doctrine of sovereign immunity was carefully and comprehensively surveyed by the Full Bench of the Transvaal Provincial Division in the case of *Inter-Science Research and Development services (Pty) Ltd* v *Republica Popular de Mocambique* 1980 (2) SA 111 s*upra*. As this survey shows, South African courts initially applied the doctrine of absolute immunity, but H

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> in A the *Inter-Science* case the court … decided to follow the world-wide trend and to apply the restrictive doctrine.'
>
> In my view, an international organisation, such as the ICRC, enjoys immunity from suit and legal process subject to the provisions of international law, and the doctrine of restrictive immunity applies to it. It could hardly have been the intention of the legislature to grant absolute immunity from suit and legal process to such an organisation when a foreign sovereign did not enjoy such immunity." B

The *ICRC* case s*upra* involved a labour dispute between an international organisation and its employees. This case also involves a labour dispute between an international organisation and its employee. It is therefore on all fours with the *ICRC* case s*upra*. The Supreme Court held that an international organisation only enjoys restrictive immunity, and therefore C does not have immunity in cases of a labour nature such as the one before me. The Supreme Court's decision in *ICRC* s*upra*, is therefore binding on this court and must be followed.

A finding that the FAO, like all foreign sovereign states and other international organisations, only enjoys restrictive immunity, which does not include immunity against labour suits, means the applicant's application for a D provisional order cannot be granted.

In the result I order that;

1 The applicant's application for a provisional order, being based on an erroneous assumption that the FAO had absolute immunity should be dismissed. E

2 The applicant shall pay the respondents' costs.

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

Venturas & Samukange, first respondent's legal practitioners F

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NTULIKI v WHITE & ORS 2015 (1) ZLR 444 (H)

Citation 2015 (1) ZLR 444 (H)

Case No Judgment No. HB-46-15

Court High Court, Bulawayo

Judge Moyo J

Heard 17 February 2015; *CAV*

Judgment 12 March 2015

Counsel *D Dube* with *B Dube,* for the applicant
S Collier, for the respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Land – *acquisition – former owner being allowed to remain in occupation* C *– letter written to that effect – Ministry subsequently issuing offer letter to another person – requirement for Ministry to observe the rules of natural justice and notify occupier of proposal to offer land to another person*

Headnote

The applicant claimed to be entitled to occupy a portion of the farm formerly D owned by the first respondent, and that he had an offer letter from the Ministry of Agriculture to that effect. The first respondent, who for years had occupied the portion of the farm and was growing crops there, resisted the application on various grounds, including an averment that E he was already entitled to occupy the land. He had a letter to that effect from the Chief Lands Officer.

Held, that whilst the Lands Ministry, as the acquiring authority, is vested with all rights in relation to State land, such authority should be exercised with due consideration of the rules of natural justice. They had written to the first respondent and made him believe that he could remain F in occupation of the land. The Ministry cannot allow a party to occupy land, then offer the land to another party without following the requirements of the rules of natural justice that demand that the party who understands that he has a right to remain in occupation should be duly notified of the intention to take that right away and to make representations, if any, and a decision be taken subsequently after all concerned have been heard. G

Cases cited

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 188 (H)

ZESA Staff Pension Fund v *Mushambadzi* 2002 (2) ZLR 205 (S) H

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Legislation considered A

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], s 3

Case information

D Dube with *B Dube,* for the applicant

S Collier, for the respondents B

Judgment

Moyo J: This is an application wherein the applicant seeks a provisional order whose interim relief is couched as follows:

"(1) That the applicant shall be allowed unhindered access to the farm known as Lot 2 of Lot 36 Essexvale also known as Avalon Farm, Esigodini and to carryout thereupon all normal farming activities. C

(2) That the respondents, its agents, assignees, associates, or employees be and are hereby interdicted and stopped from interfering with the applicant's operation of the farm known as Lot 2 of Lot 36 Essexvale also known as Avalon farm."

The facts of the matter are that the applicant was allocated Lot 2 of Lot 36 of Essexvale (Avalon) in Umzingwane Matebeleland South Province by the D Ministry of Lands in an offer letter dated 4 December 2014. He then went to the farm and sought to occupy same. He alleges that an agreement had been reached with the first respondent who had agreed to vacate the farm in January 2015 but that on 10 January 2015, the first respondent reneged on his word and stopped applicant's workers from moving into the farm. E The applicant alleges that first respondent then went on to evict the rest of his workers who were at the farm. He alleges that the first respondent has disturbed his peaceful possession of the farm.

The first respondent has raised points *in limine* in opposition to the urgent application. F

He avers that there is no urgency in this matter, as evidenced by the fact that applicant has never been in occupation of the farm in the first place. He avers that he has always been in lawful occupation of the farm and that he never suggested that he would vacate the farm by 10 January 2015. He alleges that the applicant sent his workers to the farm without first respondents' consent G thereto. He avers that his legal practitioners then wrote to applicant advising him that due process had to be followed in taking over the farm and that he could not forcibly dispossess him of the farm. The first respondent also raises another point *in limine* which is to the effect that the relief sought in the provisional order is incompetent as the provisional order seeks interim relief that is the same as the terms of the final order sought and has in fact H the import of a final order as opposed to interim relief.

2015 (1) ZLR p446

Moyo J

Firstly, I will therefore move on to deal with the issue of the relief sought. A It is clear that the terms of the final order sought are similar to the interim relief and they are:

"(1) That the provisional order set out herein be and is hereby confirmed.

(2) That the respondent shall pay the costs of suit at an attorney client scale."

The interim relief itself which I have alluded to earlier herein has the import B of a final order as it is to the effect that applicant be given unhindered access to the farm and that he carries therein normal faming activities as well as that the respondent be interdicted and stopped from interfering with the applicant's operations on the farm. This clearly is a final order couched as interim relief. It is indeed undesirable to have such a state of affairs because the applicant virtually seeks to obtain final relief without having proved its C case. This is because interim relief is obtained merely on establishing a *prima facie* case as opposed to a proven case. See *Kuvarega* v *Registrar General* 1998 (1) ZLR 188 (H). This is an irregularity, applicant, in my view wants to be granted final relief on a platform that requires that only a *prima facie* case be established. This is not proper and the application can not succeed D by reason of this irregularity. Again on the issue of urgency the problem is that applicant seems to have sought to occupy the farm without following due process. The applicant must wait for the law to take its course before creating an urgency for himself. It would seem that the applicant failed in his bid to despoil the first respondent, rather than that he was in peaceful and undisturbed possession as he clearly failed to obtain the possession in E the first place.

Again, even if I were to overlook that irregularity, on the merits of the application the applicant would still need to satisfy the three requirements for an interdict, these being;

"(1) a right which, though *prima facie*, is open to some doubt, F

(2) a well grounded apprehension of irreparable injury

(3) the absence of any other remedy."

This is enunciated in *ZESA Staff Pension Fund* v *Mushambadzi* 2002 (2) ZLR 205 (S).

The applicant in this case has produced an offer letter, so one could hold that G the first requirement has been met, a *prima facie* right has been established, although it is open to some doubt when one looks at the first respondent's papers. The requirement is nonetheless satisfied. The second remedy

of a *well grounded apprehension* of irreparable injury (emphasis mine) is the second in line to be satisfied. I have stressed the words *well grounded* to H

2015 (1) ZLR p447

Moyo J

emphasise A the aspect of the foundation of the fear; it need not be just a fear but a well grounded fear.

In my view, the applicant upon receipt of the offer letter as annexed to his papers should have followed due process in seeking to occupy the farm. By due process, I mean that, rather than confronting the first respondent and advising his imminent take over of the farm, he should have left it to the B land authorities to notify the first respondent to vacate the land and give him a reasonable period within which to leave, this more so in light of the letter from the Ministry of Lands dated 17 May 2007 acknowledging that the first respondent is at farm which is the subject matter of this dispute and he has made an application to the Ministry of Lands for an offer letter. C

Section 3(2)(a) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] provides thus:

> "Every former owner or occupation of Gazetted Land (a) referred to in paragraph (a) of the definition of 'Gazetted Land' in Section 2 (1), shall cease to occupy, hold or use that land forty-five days after the fixed date, unless the owner or occupier is lawfully authorized to occupy, hold or use that land." D

This then takes us to the next question, what is lawful authority? Lawful authority in my view is authority given by the land acquiring authority. The letter that the first respondent understands to authorize him to remain in occupation of the farm is by the Chief Lands Officer from the Ministry of Lands. The offer letter given to the applicant is by the Ministry of Lands. E It is my considered view that the Ministry of Lands cannot allow a party to occupy land, then offer the land to another without following the requirements of the rules of natural justice that demand that the one who understands has a right to remain in occupation, should be duly notified of the intention to take that right away, make representations if any, and a decision be taken subsequently after all concerned have been heard. F

It is not disputed that the first respondent has remained in occupation of the farm for years by virtue of the written assurance given to him by the same Ministry which has now given the applicant on offer letter, without first duly notifying the first respondent of the current position.

In my view, administrative decisions should be taken within the ambit of the G law. Whilst the Lands Ministry as the acquiring authority is vested with all rights in relation to State land, such authority should be exercised with due consideration of the rules of natural justice. They wrote to the first respondent and made him believe that he could remain in occupation of the land, they should have, at the time they took the decision to offer the land to someone H else advised the first respondent as such.

2015 (1) ZLR p448

Moyo J

The first respondent also challenges the purported offer letter to the applicant A as being fake, for the simple reason that it now offers applicant what first respondent believes he is rightfully occupying by virtue of authority from the Lands Ministry. Unfortunately the Ministry of Lands, as well as the Chief Lands Officer who purportedly authored the letter dated 17 May 2007, were not cited as parties to these proceedings. When I pointed this out to the applicant's counsel, he submitted that he chose to have the application proceed without the citation of and service of the application B on the Ministry. This creates difficulty in that we are now faced with two conflicting scenarios created by the same Ministry but they are not here to enlighten the court on which is which. The court finds itself hamstrung in this situation as only the lands office could vouch for the authenticity of the offer letter that is C being challenged.

The applicant should follow due process in the eviction of the first respondent. The applicant cannot on this platform seek to evict the first respondent by means of a provisional order. The requirement for a well grounded fear is not satisfied in my view for the aforestated reasons, for the applicant had not D taken effective control of the farm, neither had the Ministry of Lands taken effective steps to give him possession and control of the farm in light of the conflicting correspondence by the same office. For the applicant to have a well grounded fear, that the first respondent, wants to dispossess

him of the farm or to disturb his effective control, the applicant must have occupied the farm after following due process. This is not the situation in this case. E

There is also the requirement of the lack of an alternative remedy that the applicant had to satisfy in addition to the other two. This requirement has not been fulfilled for the simple reason that in para 5.7 of the founding affidavit applicant states thus:

> "I have lodged the (*sic*) complaint with the Zimbabwe Republic Police who are F still handling the matter …".

This in essence shows that the applicant has initiated proceedings in terms of s 3 of the Gazetted Land (Consequential Provisions) Act *supra*. In terms of subsection (5), provision is made for the eviction of a former owner who has been convicted in terms of that section. This therefore clearly means G that the applicant has initiated criminal proceedings which will if, the first respondent is convicted, lead to the eviction of the first respondent from the farm. This in my view amounts to an alternative remedy as the relief sought would be achieved through the prosecution of the first respondent in terms of that Act.

It is for the aforestated reasons that I find that this application should fail. H

Moyo J

I A accordingly dismiss the application with costs.

Cheda and Partners, applicant's legal practitioners

Webb, Low and Barry, first respondent's legal practitioners

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CHIMINYA v EST CHIMINYA & ORS 2015 (1) ZLR 450 (H)

Citation	2015 (1) ZLR 450 (H)
Case No	Judgment No. HH-272-15
Court	High Court, Harare
Judge	Mwayera J
Heard	18 February 2015; *CAV*
Judgment	12 March 2015
Counsel	Applicant in person Miss *B R Munyere*, for the first & second respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Will – *validity – disposition affecting property rights of surviving spouse* C *– testator leaving nothing to surviving spouse – right of surviving spouse to inherit matrimonial home – marriage contracted under customary law – spouse's rights not affected*

Headnote

The applicant was the widow of the testator, to whom she had been married D under a registered customary law union for 42 years. The only property of substance in the estate was the matrimonial home, where the applicant lived. In his will, executed some eight years before he died, the testator left the house to a grandson and the remaining items to other relations. E Nothing was left to the applicant, who challenged the validity of the will on the grounds that the testator bequeathed the matrimonial home to her exclusion and that as the surviving spouse she ought to be awarded the house. The first and second respondents opposed the application on the basis that there was a valid will whose provisions were capable of being carried out as long as they were not contrary to law and or public F policy. They also argued that a wife married customarily cannot inherit from the husband's estate if the husband dies testate.

Held, that in terms of s 56(3) of the Constitution, every person has a right not to be treated in an unfairly discriminatory manner on such grounds as custom, culture, sex, gender and marital status. It was *ultra vires* G the Constitution to discriminate against the applicant because she was married under customary law.

Held, further, that under s 5 of the Wills Act [*Chapter 6:06*], no provision, disposition or direction made by a testator shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate. Women, regardless of marital status, H

Mwayera J

have A a right to equal protection by the law and also have a right to own property. Even an unregistered customary law union is recognised for inheritance and proprietary right purposes. Under the Administration of Estates Act [*Chapter 6:01*], a marriage contracted under customary law is a valid marriage for the purposes of the Act. While it is important to B uphold wills in the interest of fulfilling of a testator's wishes, the mischief of disinheriting the legal and rightful beneficiary is what s 5(3)(a) of the Wills Act is about and seeks to prevent. The section outlaws any disposition in a will which prejudices the rights of a person to whom the deceased was married. The section does not define marriage. A customary law marriage is a recognised marriage for proprietary, inheritance and C maintenance rights. The section further talks of a share "in the deceased's estate". A surviving spouse, by virtue of being a surviving spouse, is entitled to a share of the deceased's estate.

Held, further, that the house was the only matrimonial home, which the surviving spouse was at law entitled to. Any disposition against that would be an illegality and also contrary to public policy. The will was D accordingly invalid and the house should be awarded to the applicant.

Case cited

Wakapila's Est v *Matongo & Ors* 2008 (2) ZLR 43 (H) E

Legislation referred to

Administration of Estates Act [*Chapter 6:01*], s 68(3)

Constitution of Zimbabwe 2013, ss 2, 56(1) & (3)

Deceased Estates Succession Act [*Chapter 6:02*], s 3A

Wills Act [*Chapter 6:06*], ss 5(3)(a) & 8(6)

International instruments F

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, arts 20 & 21(1)

Case information

Applicant in person

Miss *B R Munyere*, for the first & second respondents G

Judgment

Mwayera J: In this application the applicant, a widow and surviving spouse to the late Dennis Chiminya, approached the court seeking an order that the will by the late Dennis Chiminya, her husband, be disregarded and set aside and that the only property of the estate, house number 2421 Egypt, Highfield H be and is hereby awarded to the applicant who is the surviving spouse.

2015 (1) ZLR p452

Mwayera J

The brief background to the case is that the applicant was customarily married A to the late Dennis Mhirimo Chiminya on 24 August 1971 as per the marriage certificate attached as annexure A on p 5. Before his death, Dennis Chiminya executed a will on 5 November 2005. Upon Dennis Mhirimo's death on 11 June 2013 the will was subsequently registered and accepted by Master of the High Court who directed that the estate be wound up in terms of the accepted will. The will bequeathed the matrimonial home house number 2421 Egypt B line Highfield to the grandson of the deceased, one Tapiwanashe Dennis. It also bequeathed other property like a shop in Chivhu to the step-son of the applicant, that is the son of the deceased, and further bequeathed two bicycles to the other son, Hupenyu Chiminya. Further there was distribution of cattle. The shop was not an issue for it was disposed of by sale before C the death of the testator.

The applicant sought to challenge the validity of the will on the basis that

(1) assets acquired in 2006 appeared on the will which was executed in 2005, namely the bicycles;

(2) that the deceased bequeathed the only matrimonial home to her exclusion D

(3) that as she was the surviving spouse in terms of s 3A of Deceased Estate Succession Act [*Chapter 6:02*] she ought to be awarded the matrimonial home as the surviving spouse.

The first and second respondents opposed the application on the basis that there is a valid will whose provisions thereof are capable of being carried out E as long as they are not contrary to law and or public policy. The respondents also sought to rely on an argument that a wife married customarily cannot inherit from the husband's estate if the husband dies testate. This argument from the legal practitioner, in my view found no support in law and precedent as will be demonstrated. F

First and foremost, the supreme law of this country outlaws any legal provisions that are discriminatory. Section 56(1) and (3) of the Constitution of Zimbabwe 2013 is instructive. It reads:

> "56 Equality and non-discrimination
>
> (1) All persons are equal before the law and have the right to equal protection G 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, ethnic or social origin, language, class, religious belief, political affiliation, opinion, *custom, culture, sex, gender, marital status,* age, pregnancy, disability H

2015 (1) ZLR p453

Mwayera J

> or A economic or social status, or whether they were born in or out of wedlock" (my emphasis).

The supremacy of the Constitution is clearly confirmed in s 2, which reads:

> "This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct in consistent with it is invalid to the extent of the inconsistency"

The respondent sought to rely on the fact that the applicant was customarily B married and that the husband in his will did not bequeath the matrimonial home to her, hence she had no right or entitlement to the home.

This position in my view is inconsistent with and *ultra vires* the Constitution.

It is important in determination of this matter for one to look at the C circumstances of the case and *juxtapose* them to the constitutional provisions and relevant legislative provisions.

The Deceased Estates Succession Act [*Chapter 6:02*] buttresses entitlement of surviving spouses and outlines inheritance principles on matrimonial home and household effects. Section 3A is apposite. It reads:

> "The surviving spouse of every person who on or after the 1st November 1997, D dies wholly or partly intestate shall be entitled to receive from the free residue of the estate:
>
> (a) the house or other domestic premises in which the spouses or surviving spouses, as the case may be, lived immediately before the person's death and
>
> (b) the household goods and effects which immediately before the person's E 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's estate."

I am alive to the fact that the Deceased Estates Succession Act [*Chapter 6:02*] deals with intestate succession. Suffice it to mention at this stage that F I have alluded to it in so far as it is in conformity with the Constitution and in so far as it recognises the surviving spouse's right to inheritance. In the same manner, the Wills Act [*Chapter 6:06*] recognises the surviving spouse's rights by having provisions such as s 5(3)(a) which recognises rights of a surviving spouse and seeks to protect inheritance rights of a surviving spouse even where the other spouse dies testate. G

Section 5 of the Wills Act [*Chapter 6:06*] deals with the power to make dispositions by will. Section 5(3)(a) reads

> "No provision, disposition or direction made by a testator shall operate so as to vary or prejudice the rights of any person to whom the deceased was married to a share in the deceased's estate or in the spouse's joint estate in terms of any H law governing the property rights of married persons."

2015 (1) ZLR p454

Mwayera J

Women, regardless of marital status, have a right to equal protection by A the law and also have a right to own property. The legislature has made commendable in-roads on deceased estates such that one fails to understand how the respondent's legal practitioners sought to justify disinheritance of a surviving spouse on the basis of having a registered customary law marriage. Even an unregistered customary law union is recognised for inheritance and proprietary right purposes. The Administration of Deceased Estates Act B [*Chapter 6:01*] Part 2A deals with estates of persons subject to customary law.

Section 68(3) reads

> "A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this Act notwithstanding that it has not been solemnized in terms of the customary marriage Act [*Chapter 5:07*] and any reference to spouse shall be construed accordingly." C

A beneficiary in the same Act in s 68 includes surviving spouses. It defies logic therefore for one to distinguish the applicant's spousal status on the basis that she contracted a registered customary marriage. The fact that it is even registered makes it certain she is a surviving spouse. The applicant certainly does not derive her rights from the survival of the deceased but D has rights by virtue of being a surviving spouse.

Interestingly, the respondents accept that the applicant is a beneficiary but argued she cannot inherit because the testator disposed of his property in the manner he liked. The argument was presented that the applicant's right as a beneficiary was prefixed on survival of her spouse and that the moment he E died she was not clothed with any right as regards the matrimonial home. I found these submissions as not only unpalatable but not in sync with the progressive 21st century legislation. *Estate Wakapila* v *Matongo & Ors* 2008 (2) ZLR 43 (H) sought to illustrate that a spouse customarily married would not inherit where the deceased spouse had died testate and made dispositions by way of a will. While it is important to uphold wills in the F interest of fulfilling of a testator's wishes, the mischief of disinheriting the legal and rightful beneficiary is what s 5(3)(a) of the Wills Act [*Chapter 6:06*] is about and seeks to cure.

I respectfully do not agree with the reasoning in *Est Wakapila* v *Matongo* where it sought to emphasize that only rights existing at the time a will is G executed may not be eroded. It is my considered view that a spouse, though not an owner, has personal rights against the owner of the house. The provisions of a will can only be struck out at the time of implementation and not at the time of execution. The legislative intention in enactment of s 5(3) of the Wills Act cannot be ignored, for clearly the section gives warning bells and pre-warns a testator not to touch or interfere with the right of a spouse or H

Mwayera J

legally A recognised beneficiary. In *Est Wakupila* v *Matongo* there seems to be an assumption that contingent rights are not included because the only time which matters is the execution of the will. On the contrary, all rights personal, real and contingent are covered in the manner s 5(3) of the Wills Act is couched. The use of the words *deceased's estate* instead of testator's estate suggests that contingent rights were considered by the legislature. It is B apparent that the mention of *any person to whom the deceased was married* denotes it happens at the time the deceased is dead. Equally, mention of share in the deceased's estate happens only when the spouse is deceased.

It is appreciated that marriage regimes in Zimbabwe in the absence of ante-nuptial contracts are out of community of property. The wording of s 5(3) C of the Wills Act falls for scrutiny here. The relevant section outlaws any disposition in a will which prejudices the rights of a person to whom the deceased was married. The section does not seek to define marriage. It is trite a customary law marriage is a recognised marriage for proprietary, inheritance and maintenance rights. The section further talks of a share *in the deceased's estate.* A surviving spouse is entitled to a share of the deceased's estate. D

Finally the section talks of right in terms *of any law governing the property rights of married persons*. The relevant section does not seek to distinguish the law, and as such it is inclusive of customary law. To this extent therefore the circumstances of the applicant are distinguishable from *Est Wakapila* v *Matongo supra*. *In casu* the applicant was customarily married to the E deceased under the Customary Marriages Act [*Chapter 5:07*]; she in her capacity as a surviving spouse has rights to the deceased's estate or in the spouses' joint estate.

It is clear from s 5(3)(a) of the Wills Act that any provision made by a testator to the extent that it prejudices the rights of a legally recognised beneficiary F is invalid. Section 5(3)(a) states:

> "No provision, disposition or direction made by a testator in his will *shall* operate so as to vary or prejudice the right of *any* person to who the deceased was married to share in the *deceased's estate*or in the spouses' joint estate in *terms of any law* governing the property rights of married persons ..." (my emphasis).

It is clear from a reading of this section that a testator cannot make a disposition G that affects the other spouse's rights. The will as it stands is not in sync with public policy and the legal position as far as marriages and deceased estates are concerned. There is no legal basis for holding a will which seeks to disinherit a legally recognised beneficiary as valid.

Our Constitution and legislation on deceased estates and inheritance, in so H far as it recognises the rights of a surviving spouse in the deceased estate,

Mwayera J

tallies to a great extent with the Convention on the Elimination of all forms A of Discrimination against Women, and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, arts 20 and 21. Article 21(1) on rights to inheritance reads:

> "A widow shall have the right to an equitable share inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house" B

To this end the right and freedom of testation cannot be viewed as absolute to the extent of eroding the proprietary and inheritance rights of a legally recognised surviving spouse. Section 5(3)(a) of the Wills Act in my view protects a surviving spouse from being disinherited under the realm of a testator disposing of his property the way he deems fit regardless of the C surviving spouse's personal and contingent rights.

The respondent also argued that the complaint was lodged out of time. For this proposition they sought to rely on s 8(6) of the Wills Act, which states:

> "Any person who is aggrieved by the decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master." D

The argument was that the will was accepted by the Master on 10 March 2014 and the application was lodged on 23 May 2014, about two and a half months later. Assuming the respondent was right in the observation, the reading of the relevant section clearly shows by the use of the word *may* that the court can exercise its discretion depending on the circumstances of the case. The applicant

argued that she only came to know of the acceptance E after she came to make enquiries with the Master's Office. I find no reason why I should not believe the applicant's version that she did not wilfully defy the 30 day period. In any event s 8(b) of the Wills Act does not talk of 30 days from the day of the acceptance of the will by the Master but from the day the aggrieved party is notified of the Master's decision. F

To this end therefore the applicant is within her rights to make the present application. The applicant has revealed that the acceptance of the will disinherited her as a surviving spouse. Such a scenario has no legal basis on which to stand and as such the will cannot be held as valid. *In casu* it is not in dispute that house number 2421 Egypt is the only matrimonial home which the surviving spouse is at law entitled to. Any disposition against that G would be an illegality and also contrary to public policy.

Accordingly it is ordered that:

1. The provision of the will of Dennis Mhirimo Chiminya which disposes of house number 2421 Egypt, Highfield Harare be and is hereby declared invalid. H

2015 (1) ZLR p457

Mwayera J

2. The A only property of the estate, the matrimonial home 2421 Egypt, Highfield, Harare be and is hereby awarded to Venencia Chiminya the surviving spouse.
3. The second respondent pays the costs of the suit. B

Hungwe & Partners, respondents' legal practitioners

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CHIROTO v HUNDA 2015 (1) ZLR 458 (H)

2015 (1) ZLR p458

Citation	2015 (1) ZLR 458 (H)
Case No	Judgment No. HH-276-15
Court	High Court, Harare
Judge	Uchena J
Heard	26 & 30 January & 13 February 2015; *CAV*
Judgment	12 March 2015
Counsel	*F Gijima*, for the plaintiff *T Zhuwarara* and *S M Hashiti*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family law – *husband and wife – marriage – requirements for valid marriage* C – *recording of marriage in register not essential to validity of marriage*

Headnote

The plaintiff brought an action to declare his marriage to the defendant to be a nullity. The parties had planned a wedding. Before the date of the D ceremony, their pastor, an authorised marriage officer, invited them to a meeting to discuss the arrangements. He observed that the plaintiff was not a young man and asked if this was his first marriage. The plaintiff said he was a widower. The pastor asked for a copy of a certificate from the Master to prove the death of his first wife. Initially the pastor E suggested that in the absence of the certificate he could only conduct a church blessing, but on the day of the ceremony the parties said they wanted a document to prove to their friends and relations that they were married. The pastor then conducted a normal marriage service, asking the parties to take their marriage vows. He then declared them to be husband and wife. The pastor filled in the details on the first of F the three originals of the marriage register, then he, the parties and the parties' witnesses signed that document. The remaining copies were not completed or signed, the pastor saying that he would not complete those documents until the plaintiff brought the certificate from the Master. The plaintiff never brought the certificate and then brought the action for nullification of the marriage. The defendant opposed the claim, arguing G that the marriage was valid.

Held, that the requirements for a valid marriage, as set out in the Marriage Act [*Chapter 5:11*] are: (a) the marriage must be solemnised by a marriage officer; (b) a marriage solemnised without the publication of banns, notice of intention to marry or the issuance of a marriage licence will be H

Uchena J

a A nullity; (c) if the relevant document has lapsed, a marriage solemnised on the strength of such a document is invalid; (d) a marriage entered into by a minor without consent is voidable but not void; (e) marriages of persons within specified relationships and outside the exceptions are void and in some circumstances voidable; (f) a marriage must be solemnised in the presence of the parties and at least two witnesses, B who should be above the age of 18 years; (g) no person may marry by proxy; (h) the marriage officer must cause each party to the marriage to make specified vows of marriage (if he is not a minister of religion), or vows prescribed by his denomination (if he is a minister of religion). According to s 26 as read with s 31 of the Act, that marks the end of the prerecording stage of a marriage ceremony. The parties will at that stage C be married, only the marriage will not have been recorded.

Held, further, that the evidence led by the plaintiff did not establish the existence of grounds of nullity referred to in the Marriage Act, the Matrimonial Causes Act [*Chapter 5:13*] or the Criminal Law Code [*Chapter 9:23*]. Banns were published; the marriage was witnessed; the D marriage was consummated; the marriage officer was properly qualified; the parties took marriage vows; and the marriage officer made an entry in the marriage register book. There were no grounds for holding the marriage to be a nullity.

Legislation considered E

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 103 & 104

Marriage Act [*Chapter 5:11*], ss 8(1) & (2), 9(1) & (2), 17(1), 20(2), (3) & (4), 21(1) & (2), 22, 24(1), (2) & (3), 25(2) & (3), 26, 31, 32 & 33

Matrimonial Causes Act [*Chapter 5:13*], s 13(1) & (2)

Case information

F Gijima, for the plaintiff F

T Zhuwarara and *S M Hashiti*, for the defendant

Judgment

Uchena J: The plaintiff and the defendant were customarily married in late 2009. On 10 April of that year they appeared before a marriage officer who initially conducted a church blessing, marriage

ceremony. The parties G had published banns for a marriage in terms of the Marriages Act [*Chapter 5:11*]. They were to marry before a marriage officer who unfortunately had to attend to his pastoral duties elsewhere on the date of the marriage. They had invited friends and relatives to their wedding

The original marriage officer requested Pastor Viniel Takavada Zhou to H conduct the ceremonies for the parties. Pastor Zhou invited the parties to a

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meeting with him so that he could prepare them for the wedding. On seeing A the plaintiff's age he wondered if he was marrying for the first time. He asked him and was told that the plaintiff was a widower. He asked if he had a Master's certificate to confirm the death of his former wife. The plaintiff told him that he did not currently have such a document, but could obtain it later, leading to the marriage officer suggesting that he could in those circumstances only conduct a church blessing for them. The parties agreed B with the marriage officer.

On the day of the ceremony Pastor Zhou conducted the church blessing. Thereafter the parties asked him to give them something which they could present to their guests and relatives as proof that they had married. Pastor Zhou, then conducted a marriage ceremony, observing the procedure followed C when conducting a real and valid marriage. He asked the parties to take marriage vows, which they did. He then declared them husband and wife. He filled in the parties' details on the first copy of the marriage register which provides for the completion of three copies for each marriage. He asked them to append their signatures on the first copy referred to earlier, which they did. He asked the parties' witnesses to sign on the first copy, which D they did. The marriage officer, who the Deputy Registrar of Marriages said was a qualified marriage officer, also signed the first copy which he then gave to the parties to exhibit to their guests and relatives as proof that they were now married.

Pastor Zhou told the court that he told the parties that he would not complete E the other two copies until the plaintiff brought the Master's certificate. He at their request gave them the first copy which they wanted to use to apply for visas to enable them to travel out of the country for their honeymoon. He instructed them to bring it back on the understanding that he could not give them a marriage certificate until after the plaintiff had given him the master's certificate. The parties complied and brought back the first copy. F

Thereafter it seems the plaintiff's love for the defendant grew cold. He did not bring the master's certificate to the marriage officer who had asked him to bring it to him before the expiry of 30 days from the date of the marriage, as he was required by law to send documents of a solemnised marriage to the Registrar of Marriages within 30 days of the date of its solemnisation. G The marriage officer, not being favoured with the document he required, did not send the records of the parties' marriage to the Registrar. The defendant visited him several times enquiring as to whether the record of their marriage had been forwarded to the Registrar of Marriages. He on each occasion told her that he could not do anything further without the master's certificate. The plaintiff who must by then have lost interest in the marriage did not H

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bring A the required document. He has now sued for the nullification of the marriage, alleging that they did not enter into a valid marriage as they were issued with the first copy for purposes of merely showing off to their guests and families when in actual fact they had merely gone through a church blessing. The defendant opposed the plaintiff's claim for a declaration that their marriage was a nullity. It was submitted on her behalf that they entered B into a valid marriage.

The Deputy Registrar of Marriages, Mrs Spiwe Mutesva, who also testified for the plaintiff, told the court that the defendant approached their offices inquiring about the submission of the record of their marriage. She checked their records and found that no records of a marriage involving the defendant C and the plaintiff had been submitted. She also checked as to whether there was evidence of the plaintiff's former wife Abigail Nyamuteya's death. She established that the plaintiff's former wife's death had been recorded in their register against her marriage to the plaintiff. She told the court that it was therefore not an impediment to the plaintiff and defendant's marriage. Mutesva told the court that she took the issue to the Registrar General who D said the marriage was not valid because its record had not been submitted to their office for registration.

Mutesva told the court that they instructed Pastor Zhou to bring the records of the defendant and plaintiff's marriage to their offices. She confirmed that the first copy which was completed is a record of the marriage by Pastor Zhou E who she said was a qualified marriage officer. She confirmed that all the details of the parties which the marriage officer was required to record were recorded except that the plaintiff was recorded to be a bachelor when he is a widower, and the space on the left side of the certificate on which the date of the marriage was to be recorded was not completed. Exhibit 1 however clearly shows at the bottom that the marriage was solemnised on F 10 April 2010.

The plaintiff closed his case after which Mr Zhuwarara for the defendant applied for absolution from the instance, submitting that the plaintiff had not presented a *prima facie* case on which the court acting carefully might find for the plaintiff. G

The issue which falls for consideration is whether or not the evidence led proves or might prove that what the parties did justifies a declaration that the marriage the parties entered into was a nullity. Mr Zhuwarara relied on *South African Family Law* 2 ed by D S P Cronje and J Heaton for his submission that the plaintiff failed to prove that the marriage recorded on exh 1 is a H nullity. He relied on p 41 para 4.1.2 which reads as follows:

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> "The court can declare a marriage null and void on the ground of non-compliance A with the formal or material requirements for a civil marriage. The following are examples of situations in which the formal requirements are not met:
>
> 1. The marriage is solemnised by someone who is not a competent marriage officer,
> 2. A girl below 15 years of age or a boy below 18 years of age marries without having obtained the written consent of the Minister of Home Affairs.
> 3. No witnesses are present at the marriage. B
>
> The following are examples of situations in which the material requirements are not met:
>
> 1. The parties are of the same sex.
> 2. One of the parties is already married to someone else.
> 3. The parties are related to each other within the prohibited degrees of relationship. C
> 4. One of the parties is below the age of puberty.
> 5. One of the parties is mentally ill."

I agree that some of these circumstances, which are coincidentally also mentioned in the Marriage Act [*Chapter 5:11*] and in s 13 of the Matrimonial Causes Act [*Chapter 5:13*], are the circumstances which in our law, justifies a declaration of a marriage as a nullity. D

Mr *Gijima* for the plaintiff, relied in his response on P M Bromly *Family Law* 8 ed for his submission that the plaintiff has made out a *prima facie* case on which a court, acting carefully, might find for the plaintiff. He relied on p74 where the learned author said:

> "Essentially a marriage will be void if either party lacks capacity to contract it E or if the ceremony is formally defective. Until the Nullity of Marriages Act it was doubtful whether lack of consent made a marriage voidable in the case of marriages contracted after 31st July 1971, the act specifically provides that this will make them voidable.
>
> With the doubtful exception of lack of consent, the only ground on which a marriage could be voidable after 1929 was that one of the parties was impotent. F The Matrimonial Causes Act of 1937 added four new grounds: the respondent's wilful refusal to consummate the marriage, either party's mental disorder, the respondent's venereal disease, and the respondent wife's pregnancy per alium. Impotence, the four statutory grounds (with some modifications) and lack of consent are the grounds on which a marriage will be voidable today."

It is unfortunate that the parties' counsel on both sides decided to rely G entirely on South African and English law, when our own statute law, which coincidentally provides for similar but not identical requirements for a valid marriage, does not justify total reliance on laws based on foreign statutes. Section 13 of the Matrimonial Causes Act reads as follows:

> "13 (1) In addition to any other ground on which a marriage is by law voidable, a marriage shall be voidable on the ground – H

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(a) that A the marriage has not been consummated owing to the wilful refusal of the defendant to consummate the marriage; or

(b) that either party to the marriage was at the time of the marriage mentally disordered or defective within the meaning of the Mental Health Act: [*Chapter 15:06*]:

Provided that, in the case specified in paragraph (b), an appropriate B court shall not grant a decree of nullity unless it is satisfied that –

(i) the plaintiff was at the time of the marriage ignorant of the facts alleged; and

(ii) the proceedings were instituted within a year from the date of marriage; and

(iii) marital intercourse with the consent of the plaintiff has not taken place C since the discovery by the plaintiff of the existence of the ground for a decree.

(2) Nothing in subsection (1) shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted."

As already said, counsel for both parties relied on text books written on the basis of the South African and English Marriages Acts. It should have D occurred to them that we have our own Marriage Act [*Chapter 5:11*], which authoritatively deals with the issue at hand.

A reading of the Marriage Act [*Chapter 5:11*] reveals that –

1. Section 8(1) of the Act provides that:

"(1) A marriage may be solemnized by a marriage officer only." E

This means that a marriage solemnised by a person who is not a designated marriage officer is a nullity. Section 8(2) makes it clear that a criminal offence will be committed if a person who is not a marriage officer purports to solemnise a marriage. It reads:

"Any person, not being a marriage officer, who purports to solemnize a marriage F shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

2. Section 9(1) of the Act provides that –

"Subject to subsection (2), no marriage officer shall solemnize any marriage unless in respect thereof and in terms of this Act or a prior law – G

(a) each of the parties has caused banns of marriage to be published; or

(b) each of the parties has caused a notice of intention to marry to be published; or

(c) one of the parties has caused banns of marriage to be published and other has caused a notice of intention to marry to be published; or H

(d) a marriage licence has been issued."

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This means a married solemnised without the publication of banns, notice A of intention to marry or the issuance of a marriage licence, will be a nullity. Subsection (2) provides exceptions for parties who are subject to foreign marriage laws.

3. Section 17(1) provides that "no marriage shall be solemnised in pursuance" of lapsed banns, notice of intention to marry or marriage licence. This again means a marriage solemnised on the strength of such lapsed documents B cannot be valid.

4. Section 20(2), as read with subss (3) to (4), prohibits the marriage of minors except under the prescribed circumstances. Section 22 of the Marriage Act also prohibits marriages of boys below 18 and girls below 16 without the consent of the Minister, but gives exceptions. This means marriages of such C persons outside the stated exceptions are a nullity. In terms of s 21(1) and (2), marriages entered into by minors without consent are voidable but not void' Section 21 provides as follows:

"(1) Where a marriage of a minor which requires the consent of his legal guardian or legal guardians or the consent of a judge under section *twenty* is contracted D without such consent, the marriage shall not by reason of that fact be void, but may be set aside and declared to be void by the High Court in its discretion if his legal guardian or legal guardians, whose consent was required but not obtained, makes application therefor within a period of six weeks, calculated from the date on which he or they first had notice of such marriage, or within such further period as the court may allow:

Provided that no such application shall be made against the wishes of the minor E if, since the date of the marriage, he has attained the age of eighteen years.

(2) Where the marriage of a minor which requires the consent of his legal guardian or legal guardians or the consent of a judge under section *twenty* is contracted without such consent and is not set aside in terms of subsection (1), the marriage shall have effect in all respects as if it were a marriage contracted between persons both of whom were of full age." F

5. Section 24 of the Marriage Act prohibits marriages of persons related within specified degrees of relationships and the exceptions thereto. This means marriages of persons within specified relationships and outside the exceptions are void and in some circumstances voidable. Section 24 provides as follows: G

"(1) For the avoidance of doubt it is declared that, on and after the date of commencement of the Criminal Law Code –

(a) no persons who are related to each other in any degree of relationship specified in subsection (2) of section 75 of the Criminal Law Code shall be capable of contracting a valid marriage, unless, in the case of persons who are related to each other as first or second cousins, they satisfy the H

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marriage A officer that they belong to a community referred to in subsection (3) of section 75 of the Criminal Law Code;

(b) persons who are related to each other by affinity shall be capable of contracting a valid marriage if the affinity relationship between them is not one described in paragraph (*b*) or (*j*) of subsection (2) of section 75 of the Criminal Law Code. B

(2) If, on or after the date of commencement of the Criminal Law Code, a marriage is contracted or purports to be contracted between parties who are related to each other as first or second cousins without belonging to a community referred to in subsection (3) of section 75 of the Criminal Law Code, and at the time of the solemnisation of the marriage –

(a) the parties knew or realised that there was a real risk or possibility that they C were related to each other as first or second cousins, such marriage shall be void;

(b) one of the parties knew or realised that there was a real risk or possibility that they were related to each other as first or second cousins, such marriage shall be voidable at the instance of the party who was not so aware within twelve months from the time when he or she became so aware; D

(c) the parties did not know or realise that there was a real risk or possibility that they were related to each other as first or second cousins, such marriage shall not be void or voidable.

(3) For the avoidance of doubt it is declared that a marriage between persons who are related to each other as first or second cousins shall not be void or voidable if such marriage was contracted before the date of commencement of the Criminal Law Code." E

6. Section 25(2) requires that a marriage be solemnised in the presence of the parties and at least two witnesses, who should be above the age of 18 years.

7. Section 25(3) prohibits a party from marrying through a proxy that is through the representation of a third party. If a party marries through such F representation the marriage will be void. Section 25(3) reads as follows;

"(3) No person shall, under this Act, be capable of contracting a valid marriage through any other person acting as his representative."

8. Section 26 requires the marriage officer to cause each party to the marriage to make specified vows of marriage if he is not a minister of religion, or vows prescribed by his denomination if he is a minister of religion. According G to s 26 as read with s 31, that marks the end of the prerecording stage of a marriage ceremony. Parties will at that stage be married, but for the recording of their marriage. The vows of marriage other than those conducted by a minister of region will be worded as follows;

"I do solemnly declare that I know not of any lawful impediment why, I, A.B., H may not be joined in matrimony to C.D., here present." and each of the parties

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shall say to the other – "I call upon these persons here present to witness that I, A A.B., do take C.D. to be my lawful wedded wife (or husband)."

The calling of those "here present to witness" the taking of the bride or groom as a lawfully wedded wife or husband indicates that a marriage comes into existence at that stage but for the recording thereof.

9. A reading of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] reveals that s 103 defines a monogamous marriage as follows: B

> "'Monogamous marriage' means
>
> (a) *a marriage celebrated in terms of the Marriage Act* [*Chapter 5:11*] or any enactment repealed by that Act; or
>
> (b) any other marriage celebrated inside or outside Zimbabwe *under a law*C*which prohibits the parties from marrying anyone else whilst they remain married to each other***"** (emphasis added).

Section 104 of the Code makes it a criminal offence for a party married in terms of the Marriage Act to contract any other marriage during the subsistence of his or her marriage in terms of the Marriage Act [*Chapter 5:11*]. This means a marriage in terms of the Marriage Act cannot be validly contracted D by a person who is already married to someone else.

The evidence led by the plaintiff does not establish the existence of grounds of nullity referred to in the Marriage Act, the Matrimonial Causes Act or the Code. All it establishes is that the marriage officer first conducted a church marriage blessing with the parties' agreement. The parties later asked for E proof of marriage which they were to show to their guests and families. That changed the original plan. The marriage officer then took steps to publicly solemnise a civil marriage in the presence of all present and witnesses. He caused the parties to take vows of marriage. He recorded in exhibit 1 that he had solemnised the parties' marriage. He is a qualified marriage officer. According to his own testimony all he required was for the Master's certificate F to be brought so that he could complete with the parties and their witnesses the remaining copies of the marriage register. He would then give them exhibit one and send the second copy to the Registrar of Marriages, for the marriage to be registered at the Registrar's office. It is clear the marriage officer knew he had conducted a valid marriage which he was to complete by G completing the copies he had left blank. He wanted the Master's certificate in time so that he could forward the records of the marriage to the Registrar within 30 days of its solemnisation.

The defects noted were the referring to the plaintiff as a bachelor and the omission to complete the left hand space for the date of marriage which was in fact endorsed at the bottom of the certificate. These are immaterial defects H

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which A do not affect the validity of a marriage. They can be corrected in terms of s 33 of the Marriages Act which provides as follows:

> "(1) The Registrar *may correct any clerical error or error of fact or substance in any duplicate original register filed in his office or in possession of the parties to the marriage if there is produced to him such evidence as he may require, stating the nature of the error and the true facts of the matter, and he is satisfied*B*that an error has been made*.
>
> (2) If the Registrar makes any correction in terms of subsection (1), *he shall direct the marriage officer having the custody of the marriage register book in which the marriage in question is entered to make a like correction to the entry in that book"* (emphasis added).

Mr *Gijima* submitted that the parties knew they were pretending to get married C as demonstrated by their leaving the marriage certificate exhibit 1 with the marriage officer. That is rendered immaterial by the marriage officer basing his submission of the parties' marriage to the Registrar of Marriages on what he had done and recorded in exhibit 1. According to his evidence, he was not going to ask them to take further vows or complete another first copy. He was merely going to complete what he had started. What he had already D done is all that is necessary to solemnise a valid marriage. The recording of the marriage in the marriage register by the marriage officer, in terms of s 31 and the registration of the marriage by the Registrar of Marriages in terms of s 32 of the Marriage Act, though legally required and necessary, are after-effects of a marriage which if not correctly done can be corrected, E but do not render a marriage a nullity.

In my view the important stages towards the solemnisation of a valid marriage are:

1 The correct publication of banns or intention to marry or availability of a valid marriage licence. No issue arises from the parties' compliance F with s 9.

2 The marriage was witnessed by competent witnesses.

3 They consummated their marriage. That is why they went on a honeymoon.

4 The marriage is not afflicted by the grounds of nullity in ss 8(1), 17(1), 20(2) to (4), 21(1) and (2), 22, 24(1) to (3) and 25(2) and (3), mental G illness, or a prior marriage by one of the parties,

5 The marriage officer was properly qualified.

6 The taking of marriage vows by the parties is not in dispute. They took vows with a serious intent to marry as they were already customarily married. The taking of marriage vows is in my view the most important H part of a marriage ceremony because any recording of a marriage depends

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on it. A marriage officer cannot record a marriage if the parties have not A taken vows of marriage. It is in fact the last stage of the marriage ceremony, which justifies its being recorded in the marriage register. Section 31(1) of the Marriage Act confirms this by stating that the recording takes place immediately after the solemnisation of the marriage. It reads:

"(1) *Immediately after the solemnization of a marriage, the marriage officer*B*shall make an entry thereof in the marriage register book to be kept for that purpose* and shall complete two duplicate original registers of that entry, inserting therein the same particulars as appear in the entry" (emphasis added).

I am satisfied that the plaintiff did not establish a case on which a finding of nullity can or might be made. The defendant's application for absolution from the instance is therefore justified. I therefore order as follows: C

1. The defendant is absolved from the instance.
2. The plaintiff shall pay the defendant's costs.

Gijima & Associates, plaintiff's legal practitioners

Coghlan Welsh & Guest, defendant's legal practitioners D

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P MINES (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 469 (H)

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Citation	2015 (1) ZLR 469 (H)
Case No	Judgment No. HH-244-15
Court	Special Court for Income Tax Appeals, Harare
Judge	Kudya J
Heard	15 September 2014; *CAV*
Judgment	13 March 2015
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 – C *income tax – deduction – assessed loss – special mining lease – assessed loss may only be deducted once and not carried forward*

Headnote

The D appellant mined and processed platinum group metals in Zimbabwe under a special mining lease issued in terms of the Mines and Minerals Act [*Chapter 21:05*]. In terms of the Income Tax Act [*Chapter 23:06*], holders of a special mining lease are subject to a corporate income tax rate of 15 per cent against a general mining corporate tax rate of 25 per cent. E In addition, such holders are levied additional profits tax. The taxable income for a holder of a special mining lease is charged under s 22 of the Act, as read with the Twenty-Second Schedule, while additional profits tax is charged in terms of s 33 of the Act and determined in accordance with the provisions of the Twenty-Third Schedule.

The respondent assessed the appellant in July 2009 for additional profits tax F for the period 2004 to 2009. The appellant included, as an allowable deduction, the aggregate of the allowable deductions attributable to the special mining lease area. It took the position that assessed losses were allowable deductions against both the income tax liability and the additional profits tax of a holder of a special mining lease. G The respondent questioned the appellant on the double deduction of the cumulative assessed losses to June 2005 in both the income tax liability and additional profits tax liability, but passed the double deduction and assessed the appellant for additional profits tax in the amount of some US$23 million for the years 2004 to 2007. The appellant accepted liability and settled the amount in full in 2010. The respondent reassessed the H appellant for additional profits tax, and revisited the deduction of the

assessed tax losses incurred up to June 2005 in the computation of the A 2006 additional profits tax. It issued amended assessments, disallowing the deduction of assessed losses from the additional profits tax that had already been deducted from the gross income of the appellant. The effect was to increase the additional profits tax for the appellant by a further US$27 million from the amount previously accepted and paid. After an objection had been disallowed, the issue on appeal was whether or B not the assessed loss incurred in the previous year was an "allowable deduction" for purposes of computing net cash receipts in terms of para 2(3)(a)(i) of the Twenty-Third Schedule.

An assessed loss is the negative balance that accrues to the holder of a special mining lease after making all permissible deductions from the income C attributed to the holder for the particular year of assessment. For income tax liability under s 22 of the Act, the holder is, by virtue of para 4(5) of the Twenty-Second Schedule, allowed to deduct from the income of the current year any assessed loss incurred by him for the preceding year.

The appellant argued that all the deductions allowed under the Twenty-Second Schedule, except for the three that are expressly excluded under para 1(2) D of the Twenty-Third Schedule, are also deductible in the computation of net cash receipts under the Twenty-Third Schedule. The respondent contended that the "allowable deductions" contemplated in para 2(3) and "a deduction allowable" envisaged by para 1(1) of the Twenty-Third Schedule are both circumscribed by the deliberate use of the phrase "expenditure incurred". E

Held, that the definition of "assessed loss" clearly demonstrates that it does not constitute expenditure incurred in the year of assessment concerned by the holder of the special mining lease. Rather, it represents a debit balance in the accounts of the holder of the previous year of assessment. The wording of para 2(3) of the Twenty-Third Schedule was clear and F unambiguous and did not require the application of the *contra fiscum* rule.

Held, further, that s 15(4) of the Act prohibits double deduction of an assessed loss in the same year of assessment. In terms of para 4(5) of the Twenty-Second Schedule, the section applies to such

the holder of a special mining lease in calculating his income tax liability. The section G is all encompassing and applies to all the provisions of the Act, whether they specifically incorporate it or not. It prohibits the double deduction of any allowable amount under more than one provision of the Act. Accordingly, the deduction of an assessed loss carried forward from the previous year of assessment is not an allowable deduction sanctioned by the provisions of para 2(3)(a)(i) of the Twenty-Third Schedule. H

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Cases referred to A

Coltness Iron Co v *Black (*1881) 6 App Cas 315

Commr of Her Majesty's Revenue & Customs v *DCC (UK) Ltd* [2010] UKSC 58

Fundstrust (Pty) Ltd (in liquidation) v *van Deventer* 1997 (1) SA 710 (A)

ITC No. 628 (1946) 15 SATC 90 B

Joffe & Co (Pty) Ltd v *CIR* 1946 AD 157; 13 SATC 354

NST Ferrochrome (Pty) Ltd v *CIR* [2000] ZASCA 171; 2000 (3) SA 1040 (SCA)

Pinkey v *Race Classification Bd & Anor* 1966 (2) SA 73 (E)

Port Elizabeth Electric Tramway v *CIR* (1936) 8 SATC 13; 1936 CPD 241 C

R v *Norfolk County Council* (1891) 60 LJ QB 379

Scottish Widows plc v *Commr of Her Majesty's Revenue & Customs* [2011] UKSC 32

Willis Faber Enthoven (Pty) Ltd v *Receiver of Revenue & Anor* 1992 (4) SA 202 (A) D

Legislation considered

Income Tax Act [*Chapter 23:06*], ss 15(4), 22 & 33; Twenty-Third Schedule, paras 1(1) & (2), 2(3), 4 & 5

Case information

A P de Bourbon SC, for the appellant E

T Magwaliba, for the respondent

Judgment

Kudya J: The issue for determination in the present appeal is whether in the computation of additional profits tax an assessed loss carried forward is an allowable deduction in the calculation of net cash receipts in para 1(2) of F the Twenty-Third Schedule of the Income Tax Act [*Chapter 23:06*].

The background

The appellant is a company registered in Zimbabwe, wholly owned by a company incorporated in Guernsey, Channel Islands, and listed on the Australian Stock Exchange. It mines and processes platinum group metals G in Zimbabwe under a special mining lease issued in terms of the Mines and Minerals Act [*Chapter 21:05*].

In terms of the Income Tax Act, holders of a special mining lease were subject to a corporate income tax rate of 15 per cent against a general mining corporate tax rate of 25 per cent. In addition, such holders are levied H additional profits tax.

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The taxable income for a holder of a special mining lease is charged under A s 22 of the Income Tax Act, which reads:

"22 Special provisions relating to special mining lease operations

(1) In the case of the holder of a special mining lease, that part of the holder's taxable income or assessed loss, as the case may be, which is attributable to special mining lease operations for a year of assessment shall be determined in accordance with the Twenty-Second Schedule. B

(2) If the holder of a special mining lease derives income from any trade other than special mining lease operations, that part of his taxable income or assessed loss, as the case may be, which is attributable to that other trade shall be determined in accordance with the general provisions of this Act".

It is computed under the provisions of the Twenty-Second Schedule of the Income Tax Act, headed "Determination of Gross Income and Taxable Income C or Assessed Loss from Special Mining Lease Operations".

Additional profits tax is charged in terms of s 33 of the Income Tax Act and is determined in accordance with the provisions of the Twenty-Third Schedule, headed "Determination of Additional Profits Tax in respect of Special Mining Lease Area". Notwithstanding some contrary undertakings D made by the Government of Zimbabwe in 2001, the appellant conceded that it was liable to additional profits tax.

The facts

The respondent assessed the appellant in July 2009 for additional profits tax for the period 2004 to 2009. The appellant included, as an allowable E deduction, the aggregate of the allowable deductions attributable to the special mining lease area for the purpose of calculating its tax liability for income tax the assessed losses incurred up to June 2005 in the sum of US$ 26 668 264. It purportedly acted in terms of the Twenty-Third Schedule. It took the position that assessed losses were allowable deductions against both the income tax liability and the additional profits tax of a holder of F a special mining lease. The respondent verbally questioned the appellant on the double deduction of the cumulative assessed losses to June 2005 in both the income tax liability and additional profits tax liability. It, however, passed the double deduction and on 27 July 2009 assessed the appellant for additional profits tax in the amount US$23 485 026.62 for the years 2004 to 2007. The appellant accepted liability and settled the amount in full in 2010. G

The respondent reassessed the appellant for additional profits tax for the period 2001 to 2007. The computed liability remained unchanged at the figure previously assessed and paid for in full. The respondent, however, revisited the deduction of the assessed tax losses incurred up to June 2005 in the computation of the 2006 additional profits tax. On 13 December 2010, H

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it A issued amended assessments for the years ending 31 December 2005, 31 December 2006 and 31 December 2007, disallowing the deduction of assessed losses from the additional profits tax that had already been deducted from the gross income of the appellant. The effect was to increase the additional profits tax for the appellant by a further US$26 895 889.26 from the amount previously accepted and paid for in full. B

The appellant objected to the amended assessments on 15 December 2010. The respondent disallowed the objection on 18 February 2011 but in terms of s 69(1) of the Income Tax Act suspended payment of the additional profits tax pending the determination of the present appeal. The appellant filed the notice of appeal on 11 March 2011 and the Commissioner replied to the C notice on 3 May 2011. The appellant, however, filed its case on 9 May which prompted the reply from the respondent of 18 July 2011.

The issue

At the pre-trial hearing of 10 July 2014 the issue referred to trial was whether or not the assessed loss incurred in the previous year is an allowable deduction D for purposes of computing net cash receipts in terms of para 2(3)(a)(i) of the Twenty-Third Schedule of the Income Tax Act.

The statutory provisions

Additional profits tax in respect of a special mining lease area is charged in terms of s 33(1) and (2) of the Income Tax Act. The two sub-sections read: E

"33 Additional profits tax in respect of special mining lease areas

(1) There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund an additional profits tax, determined in accordance with the Twenty-Third Schedule, in respect of the first accumulated net cash position and the second accumulated net cash position, as so determined, in respect of any special mining lease area for any year of assessment. F

(2) The additional profits tax referred to in subsection (1) shall be determined, charged and levied in respect of each special mining lease area separately".

The formula for calculating additional profits tax is set out in para 4 of the Twenty-Third Schedule. The way to the additional profits tax passes through net cash receipts. Net cash receipts in turn determine the calculation of tax G for the first and second accumulated net cash position on which the formula for computing additional profits tax rests. Net cash receipts are defined in para 2 of the Twenty-Third Schedule. The relevant part reads:

"2. (1) For the purpose of this Schedule, the net cash receipts from a special mining lease area in a year of assessment shall be the result, which may be a positive or negative figure, of deducting from the income referred to in subparagraph (2) H the deductions referred to in subparagraph (3)".

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The computation of income, set out in para 2(3) of the Twenty-Third A Schedule, is not in issue before me. The dispute between the parties is in respect of the deductions that are allowed under para 2(3) of the Twenty-Third Schedule. It states:

"(3) The deductions to which subparagraph (1) relates are the aggregate of –

(a) allowable deductions in respect of expenditure which – B

(i) has been incurred or is deemed to have been incurred in the year of assessment concerned by the holder of the special mining lease or, in the case of joint holders, by each of the holders; and

(ii) the Commissioner determines is attributable to the special mining lease area for the purpose of calculating the holder's liability for income tax; C

and

(b) income tax paid for the year of assessment concerned in respect of the taxable income of the holder of the special mining lease or, in the case of joint holders, of each of the holders, which the Commissioner determines is attributable to the special mining lease area; and D

(c) capital expenditure incurred solely in relation to a special mining lease area which is allowable as a deduction under paragraph 5 of the Twenty-Second Schedule:

Provided that –

(i) any capital expenditure in respect of exploration operations which is so allowable and which is incurred prior to the first year of assessment E shall be deemed to have been incurred in the first year of assessment for special mining lease operations;

(ii) such capital expenditure shall be deducted in full in the year in which it is incurred or deemed to have been incurred."

The first two categories of deductions in para 2(3) are in respect of allowable F deductions of expenditure incurred and income tax paid by the holder in the requisite year of assessment, adjudged by the respondent to have been for the special mining lease area. The third and last category is in respect of capital expenditure incurred solely on the special mining lease area that is deductible under para 5 of the Twenty-Second Schedule. The proviso to the third category is a deeming provision that relates to time rather than to G exploration expenditure. It was common ground that only the first category calls for determination in the present matter. The decision turns on the meaning and application of "allowable deductions" envisaged in para 2(3)(a)(i).

The term "allowable deductions" is defined in para 1(1) of the Twenty-Third Schedule as follows: H

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"In A this Schedule 'allowable deductions' means, subject to subparagraph (2), a deduction allowable under the Twenty-Second Schedule in respect of expenditure incurred."

Subparagraph (2) in turn states:

"(2) For the purposes of this Schedule, a deduction made in respect of –

(a) expenditure of the kind referred to in subparagraph (b) subparagraph (1) B of paragraph 4 of the Twenty-Second Schedule; or

(b) a training investment allowance referred to in subparagraph (f) of subparagraph (1) of paragraph 4 of the Twenty-Second Schedule; or

(c) any capital redemption allowance referred to in paragraph 5 of the Twenty-Second Schedule;

shall not be treated as an allowable deduction." C

Subparagraph (2) specifically excludes three deductions. The first is on expenditure of the kind referred to in para 4(1)(b) of the Twenty-Second Schedule, being "(b) expenditure incurred in that year in respect of interest on, or in borrowing or obtaining, a loan or other form of credit or financial D accommodation". The second concerns a training investment allowance in para 4(1)(f) of the Twenty-Second Schedule equivalent to fifty per cent of the cost to the holder of any training building, any addition or alteration to any training building or any training equipment brought into use in the year of assessment. The third and last exclusion relates to any capital redemption allowance in para 5 of the Twenty-Second Schedule. E

The definition of an assessed loss for a holder of a special mining lease as set out in para 2 the Twenty-Second Schedule as an antonym of taxable income. Taxable income under both the Twenty-Second Schedule and Twenty-Third Schedule is defined by reference to para 2 of the Twenty-Second Schedule. Paragraph 2 states:

"The taxable income or, as the case may be, the assessed loss accruing to the holder F of a special mining lease in a year of assessment shall be the difference, if any, between the income attributable to special mining lease operations accruing to him in that year and the sum of his allowable deductions for that year; and that difference, if any, is a taxable income if the income so attributable is greater than the sum of those allowable deductions, and is otherwise an assessed loss."

It is apparent from the definition that an assessed loss is the negative balance G that accrues to the holder of a special mining lease after making all permissible deductions from the income attributed to the holder for the particular year of assessment. For income tax liability under s 22 of the Income Tax Act, the holder is, by virtue of para 4(5) of the Twenty-Second Schedule, allowed to deduct any assessed loss incurred by him for the preceding year from H the income of the current year. What this entails is that in the current year

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the assessed loss carried forward would have been deducted to arrive at the A final figure constituting taxable income deductible under para 2(3)(b) of the Twenty-Third Schedule.

The legal submissions

Mr *de Bourbon* for the appellant submitted that all the deductions allowed under the Twenty-Second Schedule except for the three that are expressly B excluded under para 1(2) of the Twenty-Third Schedule are also deductible in the computation of net cash receipts under the Twenty-Third Schedule. Mr *Magwaliba* for the respondent contended that the "allowable deductions" contemplated in para 2(3) and "a deduction allowable" envisaged by para 1(1) of the Twenty-Third Schedule are both circumscribed by the deliberate use of the phrase "expenditure incurred". Mr *Magwaliba* submitted on the C authority of *Port Elizabeth Electric Tramway* v *CIR* (1936) 8 SATC 13; 1936 CPD 241 at 243-244, cited with approval in *Income Tax Case No. 628* (1946) 15 SATC 90 at 91 that expenditure incurred is distinct and separate from losses incurred. Watermeyer AJP reasoned that:

"Income is produced by a series of operations and transactions entered into for D the purpose of manufacturing or acquiring a saleable product and thereafter selling it or by rendering services for which payment is received. In the course of such operations and transactions expenditure and losses may be incurred, and these are the expenditure and losses referred to in the section. For the purposes of the present case 'losses' can be ignored. It was not contended that the expenditure in this case was a loss and rightly so because the word 'losses' in this section appears to mean 'losses' of floating capital employed in the trade E which produces income."

Again, in *Joffe & Co (Pty) Ltd* v *CIR* 1946 AD 157; 13 SATC 354 at 359 Watermeyer CJ stated:

"The word 'loss' has several meanings and its meaning in s 11(2)(a) is somewhat obscure. In relation to trading operations, the word is sometimes used to signify F a deprivation suffered by the loser, usually an involuntary deprivation, whereas expenditure usually means a voluntary payment of money … The word 'loss' is also sometimes used as the antonym of 'profit', but then it denotes the final result of a trading operation after expenditure has been deducted and it seems inappropriate to speak of a loss, in that sense, in conjunction with expenditure, as something which is incurred in the production of income." G

In my view, the definition of assessed loss clearly demonstrates that it does not constitute expenditure incurred in the year of assessment concerned by the holder of the special mining lease. Rather, it represents a debit balance in the accounts of the holder of the previous year of assessment. It simply is not expenditure incurred in the year of assessment. This point was conceded by Mr *de Bourbon* in his oral submissions. He confessed that: H

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> "Although A we accept that in normal tax parlance an assessed loss is not expenditure, because of the way Parliament has crafted para 2(3) of the Twenty-Third Schedule, it deems by reference back to the Twenty-Second Schedule assessed losses to be expenditure. It does not have to be expenditure; it has to be an allowable deduction which is deemed in terms of the Twenty-Second Schedule to be treated as expenditure." B

He sought to avoid the confession by submitting that reference in the definition of allowable deduction in para 1(1) of the Twenty-Third Schedule to "a deduction allowable under the Twenty-Second Schedule" imported all the deductions found in the Twenty-Second Schedule. The confession ignores the controlling words "in respect of expenditure incurred" that complete the C definition. It seems to me that Mr *Magwaliba* was correct in his submission that the words "in respect of expenditure incurred" limit the deductions in the Twenty-Second Schedule that apply to the Twenty-Third Schedule. The admission that in normal tax parlance an assessed loss is not expenditure demonstrates, in my view, its exclusion from deduction under the Twenty-Third Schedule. D

It is not clear to me how reference to "a deduction allowable under the Twenty-Second Schedule in respect of the expenditure incurred" is deemed in para 2(3) to be expenditure incurred in the year of assessment. I agree with Mr *Magwaliba* by reference to *Pinkey* v *Race Classification Board & Another* 1966 (2) SA 73 (E) at 77 that the two essential features of a deeming section are firstly, "a thing deemed to be something" and secondly "that which it is E deemed to be". The meaning of "deemed" and its application as restated in the cases cited by the appellant such as *R* v *Norfolk County Council* (1891) 60 LJ QB 379 at 380, *Commissioner of Her Majesty's Revenue and Customs* v *DCC (UK) Ltd* [2010] UKSC 58 at para 38 and academic writers such as E A Kellaway *Principles of Legal Interpretation, Statutes, Contracts and* F *Wills* at p 82 and Cross *Statutory Interpretation* at p 120 is unquestionably correct. In the present case the appellant has simply failed to demonstrate on a balance of probabilities how and where an assessed loss carried forward is in the Twenty-Third Schedule deemed to be "expenditure incurred".

The appellant's fall-back position was the *contra fiscum* rule. It entails G construing an ambiguous and unclear statute, especially a taxing one, which imposes a burden in a way that is more favourable to a subject. See *Fundstrust (Pty) Ltd (in liquidation)* v *van Deventer* 1997 (1) SA 710 (A) at 735G-H, *Willis Faber Enthoven (Pty) Ltd* v *Receiver of Revenue & Anor* 1992 (4) SA 202 (A) at 216C, *Coltness Iron Co* v *Black (*1881) 6 App Cas 315 and *Scottish Widows plc* v *Commissioner of Her Majesty's Revenue* H *and Customs* [2011] UKSC 32 at para 94. The timely warning of Scott JA

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in *NST Ferrochrome (Pty) Ltd* v *Commissioner for Inland Revenue* [2000] A ZASCA 171 para [17]; 2000 (3) SA 1040 (SCA) at 1048D-G applies with equal force in the present case. He said:

> "An alternative argument advanced on behalf of the appellant was that subpara (d)(iv) was at least reasonably capable of the construction which the appellant sought to place upon it. Accordingly, so it was contended, the *contra fiscum* rule required that the subparagraph be so construed. Where there is doubt as B to the meaning of a statutory provision which imposes a burden, it is well established that the doubt is to be resolved by construing the provision in a way which is more favourable to the subject, provided of course the provision is reasonably capable of that construction. (See, for example, *Fundstrust (Pty) Ltd (in liquidation)* v *van Deventer* 1997 (1) SA 710 (A) at 735G-H; *Willis Faber Enthoven (Pty) Ltd* v *Receiver of Revenue & Another* 1992 (4) SA 202 (A) at C 216C.) But, where any uncertainty in a statutory provision can be resolved by an examination of the language used in its context, there is no rule of interpretation which requires that effect be given to a construction which is found not to be the correct one merely because that construction would be less onerous on the subject. (See, for example, *Glen Anil Development Corporation Ltd* v *Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 726 *in fine*-727H.) For the reasons already given, I am satisfied that the construction of subpara (d)(iv)

advanced D on behalf of the appellant is not correct. It follows that the alternative argument must likewise fail".

In my view, the wording of para 2(3) of the Twenty-Third Schedule is clear and unambiguous and does not require the application of the *contra fiscum* rule.

Counsel were in disagreement on whether s 15(4) of the Income Tax Act E applied to the computation of additional profits tax against a holder of a special mining lease. It states that:

> "(4) Where in respect of any amount, a deduction would but for this subsection be allowable under more than one provision of this Act and whether it would be so allowable in respect of the same or different years of assessment, the taxpayer shall not be entitled to claim that such amount shall be deducted more than once F and, where the deduction would but for this subsection be allowable under more than one provision of this Act in respect of the same year of assessment, the taxpayer shall elect under which one of those provisions he wishes to claim such amount as a deduction."

It prohibits double deduction of an assessed loss in the same year of assessment. It was apparent that in terms of para 4(5) of the Twenty-Second Schedule, the G section applies to such a holder in calculating his income tax liability. The section under consideration, in my view, is all-encompassing and applies to all the provisions of the Income Tax Act, whether they specifically incorporate it or not. It prohibits the double deduction of any allowable amount under more than one provision of the Income Tax Act. The taxpayer is given the option to choose the provision under which he wishes to claim the amount of the H

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deduction. A The submission by the appellant that the word amount is limited in application to Part III of the Income Tax Act and does not therefore extend to the Twenty-Third Schedule overlooks the effect of the cross references found between para 2(3)(a) of the Twenty-Third Schedule and para 3(1) of the Twenty-Second Schedule with s 8(1)(s) of the Income Tax Act.

The resolution B

I am satisfied that the deduction of an assessed loss carried forward from the previous year of assessment is not an allowable deduction sanctioned by the provisions of para 2(3)(a)(i) of the Twenty-Third Schedule to the Income Tax Act. The issue for determination is answered in favour of the respondent. He correctly disallowed the deductions for the assessed losses carried forward C and correctly issued amended assessments dated 13 December 2010 for the year of assessment ending 31 December 2009, 31 December 2010 and 31 December 2011. The amended assessments in question are confirmed.

The parties were agreed that in the event the appeal failed, each party would bear its own costs. D

The disposition

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. Each party shall bear its own costs. E

Dube, Manikai & Hwacha, appellant's legal practitioners

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ZUCULA v OIC HARARE REMAND PRISON & ORS 2015 (1) ZLR 480 (H)

Citation 2015 (1) ZLR 480 (H)

Case No	Judgment No. HH-266-15
Court	High Court, Harare
Judge	Muremba J
Heard	13 March 2015; *CAV*
Judgment	16 March 2015
Counsel	*N Mugiya,* for the applicant *T Tabana,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights* C *– s 49 – right to personal liberty – right not to be detained without just cause – alien unlawfully within Zimbabwe – prohibited person in terms of Immigration Act – right of immigration authorities to detain such person pending deportation, even if no criminal charges preferred*

Immigration – *prohibited person – right of immigration authorities to detain* D *such person pending deportation, even if no criminal charges preferred – such detention not a contravention of person's right to personal liberty under s 49 of Constitution*

Headnote

The applicant, a foreign national, was detained by immigration authorities E and lodged in the Harare remand prison. Although he was married to a Zimbabwean citizen, he had no permit of any kind regularising his stay in Zimbabwe. He produced documents (though not a passport) showing a connection with Mozambique but there were questions about the validity of these. It was only after his arrest that the applicant claimed F that his passport had been lost. The immigration authorities stated that they had decided not to charge the applicant with any offence, but to have him detained in order that he could be deported.

It was argued that the applicant's detention contravened his right to personal liberty under s 49 of the Constitution and that he should have been brought to court within 48 hours, as required by s 50(2) of the Constitution. G

Held, that at the time of his arrest the applicant was a prohibited person in terms of the Immigration Act [*Chapter 4:02*] by virtue of the fact that he was in the country in contravention of the Act. Being a prohibited person he had no right to ask to be released from detention and be allowed to remain on Zimbabwean soil. He should be held in detention pending H

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deportation A to his home country. His detention was not in contravention of s 49 of the Constitution: upon his arrest he was not charged with an offence, not even for contravening the Immigration Act. His detention was in terms of s 49(1)(b) of the Constitution. In terms of s 49(1)(b) (which should be read disjunctively from s 49(1)(a)), a person can be B deprived of his personal liberty without having been charged with an offence. However, under such circumstances the deprivation of liberty should not be done arbitrarily or it should be done for a just cause. In other words, the deprivation of liberty should be authorised by the law or be in compliance with the law or it should be for reasons that are just in their substance. When a person is detained in terms of s 49(1)(b), C it is not a requirement that he be taken to court

because he would not have been detained for the purpose of being taken to court. Under the Immigration Act, a person who is suspected, on reasonable grounds, to have entered or remained in Zimbabwe in contravention of the Act may be detained for up to 14 days for the purpose of making inquiries as to D the person's identity, antecedents and national status and any other fact relevant to the question of whether the person is a prohibited person. Similarly, if a person is to be deported, he may be detained until such time as he is deported. Even if he were charged and convicted, he could not be released on conclusion of the criminal proceedings: he must remain in detention until he is deported. E

Case cited

Okey v *Chief Immigration Officer & Ors* 2014 (2) ZLR 211 (H)

Legislation considered

Constitution of Zimbabwe 2013, ss 49 & 50 F

Immigration Act [*Chapter 4:02*], ss 8, 9, 14, 17, 29, 31 & 32

Immigration Regulations 1979 (SI 373 of 1979), ss 16, 22, 31, 34, 37 & 48

Case information

N Mugiya, for the applicant

T Tabana, for the respondents G

Judgment

Muremba J: The applicant who claims to be a Mozambican national was arrested on 28 February 2015 in Harare on allegations that he was in this country illegally.

He was arrested by the second and third respondents and placed in the custody H of the first respondent at Harare remand prison.

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From 28 February 2015 to 13 March 2015 when this application was heard the A applicant was still in detention. He had not been charged with any offence. For the two weeks that he had been at Harare remand prison he had not appeared in a court of law. This history of the matter is what prompted the making of the present application. The following is the prayer that is being sought.

"A. TERMS OF THE FINAL ORDER SOUGHT B

IT IS ORDERED THAT:

1. The respondents are interdicted from interfering with the applicant's right to liberty unless in terms of the law.
2. The respondents are ordered to pay costs of suit on a client-attorney scale.

B. PROVISIONAL ORDER GRANTED

Pending the confirmation of the provisional order – C

IT IS ORDERED THAT:

1. The respondents are ordered to release the applicant from their detention forthwith or at least not later than 24 hours from the date of this order."

The deponent to the applicant's founding affidavit is the wife of the applicant, one Cynthia Ndlovu a Zimbabwean citizen. Attached to the application is the marriage certificate which shows that the applicant and Cynthia Ndlovu D contracted the marriage on 29 May 2009. They got married in terms of the Marriage Act [*Chapter 5:11*].

In the affidavit Cynthia Ndlovu made averments that on the day the applicant was arrested she was present. He was severely assaulted and he sustained injuries. He was taken to Harare remand prison. Since then she has been denied access to see him. E

Cynthia Ndlovu stated that from the time they got married the applicant has been staying in this country on the basis of permit renewal while he is applying for citizenship.

In opposing the application the second and third respondents argued that the applicant has no permit to justify his presence in Zimbabwe. He holds F no permit to renew nor is he seeking any permit renewal. It was stated that upon being arrested the applicant was asked to produce his passport and permit which authorised his stay but he had none of the two documents. It was only after a few days that the wife brought the applicant's Mozambican birth certificate and driver's licence to the second respondent's offices. G

The second respondent stated that its offices sent the two documents to the Mozambican embassy for verification through the Ministry of Foreign Affairs. They got a response that although the documents are true and original documents of the Republic of Mozambique the interview that had been carried out with the applicant had established that the applicant is not a citizen of Mozambique. H

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With A Mozambique having disowned the applicant, the applicant's claim that he is a Mozambican national was put in serious doubt. The second and third respondents argued that once a country disowns a person who claims to be its national, they cannot enjoin or force that country to receive such a person lest it risks sparking a diplomatic row.

The second and third respondents stated that they had exercised their discretion B in choosing not to charge the applicant with a criminal offence for staying in Zimbabwe illegally. It was submitted that they had had the applicant arrested and detained only for the purpose of having him deported to his country.

The law and its application

What grants a foreigner the right to stay or remain in Zimbabwe is either a C visitor's entry certificate or a permit. The visitor's entry certificate is granted at the port of entry when a foreigner enters Zimbabwe. This certificate is granted in terms s 31 of the Immigration Act [*Chapter* 4:02]. This certificate is valid for the period stated on it which according to section 31 shall not exceed six months in the first instance. Upon its expiration it can be extended. D

A permit can be a residence permit, an employment permit, a student permit, a scholar's permit or an alien's permit. These permits are issued in terms of ss 16, 22, 31, 34 and 37 of the Immigration Regulations 1998 (SI 195 of 1998) respectively. With a residence permit it can be a permanent residence permit or a permit which is issued to a foreigner who is married to a Zimbabwean citizen or to a foreigner who is a dependant to a Zimbabwean citizen. E

In terms of s 32 of the Immigration Act [*Chapter 4:02*] police officers and immigration officers are empowered to demand from any person whom they suspect to be a foreigner the production of either a visitor's entry certificate or a permit which authorises their stay in Zimbabwe. If the person fails to show that he is not a foreigner and also fails to produce any of the two F documents he or she may be arrested and be charged for being here illegally. The section reads as follows.

> "32 Production of documents
>
> (1) A police officer or immigration officer may demand from any person whom he suspects on reasonable grounds of being an alien the production of his visitors entry certificate or any permit, as the case may be. G
>
> (2) If a person referred to in subsection (1) fails –
>
> (a) to produce any certificate or permit referred to in that subsection; or
>
> (b) to satisfy the police officer or immigration officer that he is not an alien or that he is not required in terms of this Part to be in possession of any certificate or permit referred to in that subsection; H
>
> the police officer or immigration officer may arrest such person.

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> (3) Sections *eight*, *nine* and *ten* shall apply, *mutatis mutandis*, in respect of a A person arrested in terms of subsection (2).
>
> (4) If an alien to whom a visitors entry certificate or permit has been issued fails or neglects to produce it within seventy-two hours of any officer or immigration officer demanding its production, he shall be guilty

of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment." B

In the present case the second and third respondents were well within their rights when they arrested the applicant on 28 February 2015 and asked him to produce documents which authorised his stay in Zimbabwe.

As it is, the applicant is in Zimbabwe illegally for he has no document whatsoever to justify his stay in Zimbabwe. He failed to produce a permit, C even though averments were made in Cynthia Ndlovu's founding affidavit that the applicant had a permit which entitled his stay. The second and third respondents made it clear that for the applicant to remain in Zimbabwe he needed to produce his passport which shows that he was granted a visitor's entry certificate at the port of entry when he entered Zimbabwe. It was also submitted by the second and third respondents that instead of producing D the visitor's entry certificate, the applicant being married to a Zimbabwean citizen could produce a residence permit which is issued to a foreigner who is married to a Zimbabwean.

I asked Mr *Mugiya* for the permit which entitles the applicant to stay in Zimbabwe, but he availed no such documents. Instead he made submissions E that the applicant had never been issued with a permit of any sort to stay in Zimbabwe for the almost six years that he has been married to Cynthia Ndlovu. It was submitted that the applicant had always used his passport and the visitor's entry certificate which he would have extended when it expired whenever he intended to extend his stay otherwise he would return to Mozambique upon its expiration. So the averments that were made by F Cynthia Ndlovu in her affidavit that the applicant was staying in this country on the basis of permit renewal were incorrect.

When I asked for the applicant's passport Mr *Mugiya* produced a ZRP form 162 which is a stolen property list form. Submissions were made to the effect that the applicant had lost his passport before his arrest and had G made a police report to that effect. The form 162 looks authentic on the face of it, but the only problem that I have is that this document was shown for the first time to the second and third respondents on 12 March 2015, after this application had been filed on 10 March 2015. It was submitted by these two respondents that at the time of his arrest the applicant not only failed to produce his passport, but he also never said that his passport was lost. H

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He A did not even produce the ZRP form 162 and neither did he allude to its existence. If the applicant had indeed lost his passport he surely would have told the police officers who arrested him and the immigration officers who interviewed him after his arrest that he had lost his passport and that he had made a police report.

However, an analysis of the ZRP Form 162 shows that the police report was B only made on 3 March 2015, well after the applicant's arrest on 28 February 2015. So although it is claimed that the applicant had lost his passport before his arrest, the fact is that he did not make a police report to that effect. A police report was only made after he had been arrested and was already in detention at Harare Remand Prison. It cannot therefore be true that it is the C applicant himself who made the police report. It can reasonably be inferred under the circumstances that it is Cynthia Ndlovu who made that report, but she did not want to be truthful about it. This explains why the form 162 was not signed despite it having space for the signature of the owner or the custodian of the stolen or missing property. The omission of the signature was deliberate. It was meant to mislead people into believing that it was the D applicant himself who had made that report if they did not notice the anomaly on the date of the applicant's arrest and the date the police report was made.

It is obvious that what prompted Cythia Ndlovu to make the police report was the arrest of the applicant. Had it not been for that, this report would not have been made. Most probably the applicant never lost his passport. The E natural thing to do for a person who has lost his or her travel documents is to report the loss to the local police, the Department of Immigration and to one's embassy in order to get a replacement travel document, for instance, an emergency travel document. Surprisingly the applicant did not make a report to any of these.

Be that as it may, it was submitted that upon being interviewed after his arrest F the applicant indicted that he came to Zimbabwe via Forbes Border Post. It was submitted on behalf of the second respondent that ports of entry keep all records of visitors or foreigners who enter Zimbabwe on what is called an Immigration Form 1. Verifications were made with Forbes Border Post but the border post did not have any record about the applicant's entry into G Zimbabwe in January 2015 as he had

averred. Further verifications were also made with Nyamapanda and Machipanda border posts, but they also did not have any records of entry pertaining to the applicant.

In the absence of a passport and a record from the port of entry, there is no visitor's entry certificate that the applicant can talk about. In any case even H if the visitor's entry certificate was there by now it would have expired

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because it was submitted that the applicant was given between 15 and 30 A days when he entered Zimbabwe in January 2015. It was said that when he was arrested he had not yet extended his visitor's entry certificate. By now the 30 days have long expired. In fact, by 10 March 2015 when this application was made 30 days had already lapsed. When this application was filed the applicant was already in contravention of s 29(1)(a) of the Immigration B Act which states that an alien shall not remain in Zimbabwe unless he is in possession of a permit to remain in Zimbabwe. It is without question that at the time of his arrest the applicant was a prohibited person. In terms of s 17(1)(a) of the same Act he is not entitled to remain in Zimbabwe because he is a prohibited person.

By virtue of being a prohibited person the applicant has no right to ask to be C released from detention and be allowed to remain on Zimbabwean soil. As correctly argued for the respondents, the applicant should be held in detention pending deportation to his home country. His detention is not in contravention of s 49 of the Constitution of Zimbabwe 2013 which protects the right to liberty. Mr *Mugiya* argued that the applicant's continued incarceration without D being taken to court infringed this right. Section 49 (1) reads:

> "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."

What s 49(1)(a) simply means is that if a person is charged with an offence E he should not be detained without trial. In other words, he or she should be taken to a court of law for trial. The provisions of s 50 of the Constitution which relate to the rights of persons who are arrested and detained for the purposes of being brought before a court of law or for an alleged offence become applicable. As correctly put by Mr *Mugiya*, a person who has been charged with an offence should be made to appear in a court of law within F 48 hours of his arrest or detention. See s 50(2) of the Constitution.

Mr *Mugiya* argued that since the applicant's detention had far exceeded the 48 hour period he must be entitled to his immediate release in terms of s 50(3) which states that,

> "Any person who is not brought to court within the forty-eight hour period referred G to in subsection (2) must be released immediately unless their detention has earlier been extended by a competent court."

While I agree with Mr *Mugiya's* submissions with regards to the law, I find his submissions on the reasons why the applicant should be released wrong. They are wrong for the reason that upon his arrest the applicant was not charged with an offence, not even for contravening the Immigration Act. As H

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earlier A on stated, the second respondent chose not to charge the applicant. So the applicant's detention is in terms of s 49(1)(b) of the Constitution and not in terms of s 49(1)(a). In terms of s 49(1)(b), which should be read disjunctively from s 49(1)(a), a person can be deprived of his personal liberty without having been charged with an offence. However, under such circumstances the deprivation of liberty should not be done arbitrarily or it B should be done for a just cause. In other words, the deprivation of liberty should be authorised by the law or be in compliance with the law or it should be for reasons that are just in their substance. See *Okey* v *Chief Immigration Officer & Ors* 2014 (2) ZLR 211 (H).

I hold the view that when a person is detained in terms of s 49(1)(b) it is C not a requirement that they be taken to court because they would not have been detained for the purpose of being taken to court. So s 50(2) of the Constitution, which requires that a person who has been arrested and detained for the purpose of being brought to court or for an alleged offence should be taken to court within 48 hours, would not be applicable. D

In casu, what is apparent is that the applicant was detained for two reasons. Firstly, for the production and verification of the documents which authorised him to remain in Zimbabwe and for the verification of his identity and nationality. Secondly, it was for his deportation to his home country.

In terms of s 8(1) of the Immigration Act: E

> "Subject to section *nine,* an immigration officer may arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of this Act and may detain such person for such *reasonable period, not exceeding fourteen days*, as may be required for the purpose of making inquiries as to such person's identity, antecedents and national status and any other fact relevant to the question of whether such person is a prohibited person." F

So this provision of the Immigration Act allows that a person be detained for a period of up to 14 days pending inquiries about his or her identity, background and nationality. *In casu* at the time this application for the applicant's release was made he had not exceeded 14 days in detention. So his detention was still lawful. G

In terms of s 8(2)(a) and (b) of the Immigration Act [*Chapter 4:02*], immigration officers are empowered to remove or cause to be removed from Zimbabwe any prohibited 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 H any prohibited person; and

> (b) pending the completion of arrangements for the removal of a person in A terms of paragraph (a) and such removal, subject to section *nine*, detain that person."

Section 8(2)(b) makes it clear that, pending the completion of deportation arrangements, the prohibited person may be detained. In terms of s 9(1) the prohibited person may be detained in a prison, police cell or some other B convenient place. For the prohibited person to be detained, it is not a must that he or she should have been charged with an offence for remaining in Zimbabwe illegally. The decision to charge or not to charge lies with the second respondent. I say this because in terms of s 14(1)(i) of the Immigration Act any person who has entered or remained in Zimbabwe illegally, whether or not he has been prosecuted for being in Zimbabwe illegally, is a prohibited person. He or she is a prohibited C person by operation of the law. Such a person has no right to remain in Zimbabwe but to be deported. Besides qualifying for deportation, the prohibited person may also be prosecuted. So in some instances a prohibited person may be prosecuted and then deported, while in other instances the prohibited person may be deported only without having been prosecuted. D

It is therefore clear that, in terms of s 8(1) and 8 (2) of the Immigration Act, a foreign national can be arrested and detained without being charged with any offence. In view of s 49(1)(b) of the Constitution, I would not say that this infringes the right to personal liberty. As already stated above, all that needs to be shown under s 49(1)(b) of the Constitution is that the detention E or deprivation of liberty was not done arbitrarily or it was done for a just cause. *In casu,* it has been demonstrated that the arrest and detention were done in compliance with the law, that is, s 8(1) and (2) of the Immigration Act. Besides complying with the law the detention is also for a just cause and the just cause is the deportation arrangements that are being made. F

Even s 48 of the Immigration Regulations 1998 states that in a case where a prohibited person is arrested on a criminal charge and the criminal proceedings are concluded or he finishes serving the sentence imposed upon him, he shall be handed over to an immigration officer for detention. So even after criminal proceedings have been concluded, the prohibited person should remain in detention pending deportation. It is permissible and it is the most G appropriate thing to do. For a person who is in this country illegally that cannot be said to be an infringement of the right to personal liberty. The person has no right to be in this country in the first place. Therefore there is no way he can be released from detention. To release such a person would not only be unreasonable and inappropriate, but also illogical. It is illogical because it is tantamount to authorising the prohibited person to remain in H

Muremba J

Zimbabwe A in the absence of valid documents authorising their stay. The point that I am simply illustrating is that not every detained person should appear in a court of law. Of course, if they are challenging the lawfulness of their detention, they have the right to appear before a court of law. See s 50(5)(e) of the Constitution. However, in instances where a prohibited person is being detained for the sole purpose of being deported to his or her country, I do not B see the need for him or her to be taken to court, let alone insisting that he or she should be taken there within 48 hours. As long as that person has not been charged with an offence, taking him to court serves no purpose at all.

Section 48 of the Immigration Regulations reads as follows.

> "If a prohibited person who has arrived in Zimbabwe or a person who is being C detained in terms of subsection (1) of section 8 of the Act is arrested upon a criminal charge, he shall be handed over to the custody of an Immigration Officer at the conclusion of the criminal proceedings or at the expiration of any sentence of imprisonment imposed upon him, as the case may be, and shall thereafter be detained under and subject in all respects to this Act and these regulations."

Submissions were made at the hearing by the second and third respondents D that at the time the applicant was arrested he was arrested together with six other foreign nationals who did not have documents which authorised their stay in Zimbabwe. By the time this application was made, out of the seven, four had already been deported to their home countries because they had the necessary travel documents. The second and third respondents submitted that, in the applicant's case, what is delaying his deportation is his lack of E travel documents such as a passport or an emergency travel document. It was submitted that a person cannot be deported on the strength of a birth certificate or a driver's licence. The second and third respondents submitted that when they forwarded the applicant's birth certificate and driver's licence to the Mozambican embassy they expected to get confirmation that F the applicant was a Mozambican national and the Mozambican embassy to furnish them with an emergency travel document to enable his deportation. They were surprised when on 11 March 2015 they received a letter from the Mozambican embassy to the effect that the interview that was carried out with the applicant had revealed that he was not a Mozambican national. It was argued for the respondents that, in the premises, the applicant has no G country to be deported to. Mozambique cannot be forced to accept a person whom it has said is not its national. The second and third respondents argued that once the applicant brings valid information about his nationality he will be deported to his country.
It is my finding therefore that the applicant's detention is not illegal as it is H sanctioned by s 8(2)(a) and (b) of the Immigration Act and s 49(1)(b) of the

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Muremba J

Constitution of Zimbabwe. Accordingly, the application for the applicant's A release is dismissed with costs.

Mugiya & Macharaga, applicant's legal practitioners

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

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PERUKE INVESTMENTS (PVT) LTD v WILLOUGHBY'S INVESTMENTS (PVT) LTD & ANOR 2015 (1) ZLR 491 (S)

Citation 2015 (1) ZLR 491 (S)

Case No Judgment No. S-11-15

Court	Supreme Court, Harare
Judge	Gowora JA, Hlatshwayo JA & Patel JA
Heard	10 October 2014; *CAV*
Judgment	19 March 2015
Counsel	*E W W Morris*, for the appellant *L Uriri*, for the first respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Arbitration – *award – challenge to – time limits for mounting challenge – three months from date award received – failure to secure copy within reasonable time may result in party being out of time* D

Arbitration – *award – setting aside of – grounds – public policy – limited grounds on which public policy defence may be relied on*

Landlord and tenant – *lease – lease by co-owners of adjacent properties being leased as a single unit – unequal contributions to cost of acquisition – appropriate to apportion rental incomes in proportion to contributions* E *made*

Headnote

The appellant and the first respondent purchased two adjoining stands, with a building straddling both stands. The two properties were held under separate deeds of transfer and were the same size. The greater portion of the building, however, rested on the appellant's stand. The appellant F paid 70 per cent of the total purchase price while the first respondent paid 30 per cent of that price. The building was let to a third party as a single unit. The outgoings and expenses for the building were shared equally by the parties. The appellant received the rentals and apportioned the net rentals in the ratio of 70 per cent to 30 per cent. There was no G agreement between the parties that the net rentals would be shared in that proportion. The first respondent's claim that the rentals be shared equally was referred to arbitration. The arbitrator held that the income derived from the two stands as one indivisible unit should be in proportion to the specific contributions made by the parties towards the total purchase price.

The first respondent challenged the award. The appellant argued that the H challenge was mounted out of time, being filed precisely three months

after the award was received. However, the parties had been advised A three weeks earlier that the award was ready for collection. The High Court ruled that the award was filed in time. On the merits, it found that both stands and the building thereon were leased out as a single unit. The parties had contributed equal pieces of land to their partnership and it was immaterial that a larger portion of the building was located on the B appellant's stand. The parties' contribution to the partnership was equal as both had contributed a stand and both paid for the expenses equally. The arbitrator's award of only 30 per cent of the net rental income to the first respondent was palpably inequitable and therefore contrary to public policy.

Held, that under art 34(3) of the Model Law contained in the First Schedule to C the Arbitration Act [*Chapter 7:15*], an application to set aside an arbitral award must be made within three months from the date when the applicant has *received* the award. There was nothing specific in the Model Law that elaborates the manner and circumstances in which the applicant is deemed to have received the award. There was no reason to depart from the literal and grammatical meaning of art 34(3). *In casu*, although the D parties were notified that the award was available for

collection, it was only released to the first respondent after the question of payment of the arbitrator's fees had been satisfactorily resolved. The delay was not lengthy and was not solely attributable to the first respondent. However, it might be necessary and appropriate to adopt a different approach on E a different set of facts, where the delay in securing a copy of the award is significantly inordinate and is entirely due to the supine or calculated dilatoriness of the party concerned.

Held, further, that the core element of the arbitrator's findings was that, although each stand purchased and contributed by the parties was equal in size, the appellant's stand contained a greater proportion of the F permanent structures and more of the usable floor space. This disparity in value accounted for the significant disparity in the parties' respective contributions to the purchase price of the property. The relationship between the parties in acquiring the stands as a single entity was one of co-ownership in proportion to the purchase price that each had paid. G Thus, in leasing the stands as a single unit, the parties became co-lessors with each party being due its *pro rata* share of the income derived from the payment of rentals. In the arbitrator's assessment, law and good reason dictated that the share of the income derived from the leasing of the stands as one indivisible unit should be in proportion to the specific contribution made by each party to the purchase price of the single H

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entity. A There was nothing iniquitous in the apportionment of rental income in the same proportion as the parties' respective contributions to the purchase price of the property. There was nothing outrageous in a co-lessor who owns a larger portion of a building receiving a greater return on the rentals received from that building. On the contrary, an B equal 50 per cent apportionment of income between the parties would itself render a palpable inequity by unjustly enriching one of the parties to the grave detriment of the other.

Held, further, that with the concurrence of the parties, the issue of the sharing of expenses was referred by the arbitrator to a firm of accountants to make the necessary calculations. The judge *a quo* had erred in disregarding C this point.

Held, further, that the courts are generally loath to invoke the public policy defence except in the most glaring instances of illogicality, injustice or moral turpitude. There was no suggestion here that the arbitrator failed to understand or apply his mind to the question before him. Moreover, as D already intimated, there was nothing outrageously illogical or immoral in his reasoning or conclusions, whether as regards the apportionment of rental income between the parties or in relation to the sharing of leasehold costs and expenses between them. His decision could not be said to be faulty or incorrect in any material respect so as to warrant a different conclusion. E

Judgment of Zhou J in *Willoughby's Invstms (Pvt) Ltd* v *Peruke Invstms (Pvt) Ltd & Anor* 2014 (1) ZLR 501 (H) reversed.

Cases cited

Colonial Govt v *Wassermann* (1887) 5 SC 185

de Pass v *Colonial Govt & Ors* (1886) 4 SC 383 F

Glenn v *Bickel* 1928 TPD 186

Groenewald v *van der Merwe* 1917 AD 233

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

Legislation referred to G

Arbitration Act [*Chapter 7:15*], First Schedule, arts 3(1) & (2), 31(4), 34(1), (2)(b)(ii), (3) & (5)

Case information

E W W Morris, for the appellant

L Uriri, for the first respondent H

Judgment

Patel JA: This is an appeal against the decision of the High Court setting aside A an arbitral award rendered by the second respondent on 25 February 2011. The grounds of appeal relate to the period allowed for contesting an arbitral award and the substantive correctness of the decision of the court *a quo*.

Factual background

The appellant and the first respondent purchased two adjoining stands (nos. B 894 and 895) respectively, with a building (Lonrho House) straddling both stands. The two properties are held under separate deeds of transfer. The greater portion of the building rests on stand no. 894. It is common cause that the appellant paid 70 per cent of the total purchase price while the first respondent paid 30 per cent of that price.

Lonrho House was let to a third party as a single unit. The expenses for C the building were shared equally by the parties. The appellant received the rentals and apportioned the net rentals in the ratio of 70 per cent and 30 per cent. There was no agreement between the parties that the net rentals would be shared in that proportion.

The first respondent's claim that the rentals be shared equally was referred D for arbitration to the second respondent (the arbitrator). The latter held that the income derived from the two stands as one indivisible unit should be in proportion to the specific contributions made by the parties towards the total purchase price. The first respondent's claim for 50 per cent share of the rentals was dismissed. Aggrieved by the arbitral award, the first respondent challenged the award as being contrary to public policy. E

The High Court held that the first respondent's challenge was not filed out of time but was filed within the prescribed three months of receiving the award, even though the first respondent had been advised three weeks earlier that the award was ready for collection.

On the merits, the court found that both stands and the building thereon F were leased out as a single unit. There was no evidence that 70 per cent of the usable rentable area of the building was on the stand belonging to the appellant and 30 per cent on the first respondent's stand. The parties had contributed equal pieces of land to their partnership and it was immaterial that a larger portion of the building was located on the appellant's stand. The G parties' contribution to the partnership was equal as both had contributed a stand and both paid for the expenses equally. The arbitrator's award of only 30 per cent of the net rental income to the first respondent was palpably inequitable and therefore contrary to public policy. In the result, the court held that the arbitrator had erred in rejecting the first respondent's claim and ordered that his award be set aside with costs to be borne by the appellant. H

Patel JA

Grounds of appeal A

The procedural point raised in the grounds of appeal pertains to the period within which an arbitral award may be challenged. The appellant contends that the court *a quo* misdirected itself in holding that the stipulated period of three months commenced when the first respondent took receipt of the arbitral award as opposed to the day after it was advised that the award was B available.

As for the merits, the appellant's position is that the court *a quo* misdirected itself in making the following findings:

- that it was common cause that the outgoings/expenses on the leased premises were shared equally between the parties; C
- that the building was indivisible and that each party's share of the rentals therefrom should not be based on the usable area on their respective stands;
- that the payment of 70 per cent of the joint purchase price by one party and the payment of 30 per cent of that price by the other party was not based upon the rentable value of the improvements upon their respective D stands;
- that it was immaterial that the larger portion of the building was located on the appellant's stand, even though that was the only reasonable explanation for the disparity in purchase prices paid by the parties;

- that the arbitrator's ruling should be overturned without any finding that E he had misconducted himself;
- that the arbitrator made a ruling that was in conflict with the public policy of Zimbabwe.

Relevant provisions of the Model Law

Article 34 of the Model Law (First Schedule to the Arbitration Act F [*Chapter 7:15*]) prescribes the procedure for setting aside an arbitral award and the substantive grounds upon which it may be set aside. It provides, in its relevant portions, as follows:

> "(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. G
>
> (2) An arbitral award may be set aside by the High Court only if –
>
> (a) the party making the application furnishes proof that …; or
>
> (b) the High Court finds that –
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or H
>
> (ii) the award is in conflict with the public policy of Zimbabwe.

Patel JA

> (3) An application for setting aside may not be made after three months have A elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
>
> (4) …
>
> (5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public B policy of Zimbabwe if –
>
> (a) the making of the award was induced or effected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award." C

As appears from para (3) of art 34, an application to set aside an arbitral award must be made within three months from the date when the applicant has received the award. I am unable to find anything specific in the Model Law that elaborates the manner and circumstances in which the applicant is deemed to have received the award. The only other provisions that are relevant to this question are arts 3 and 31. D

Article 3, which deals with the receipt of written communications, provides as follows:

> "(1) Unless otherwise agreed by the parties –
>
> (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of E business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last know place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it; F
>
> (b) the communication is deemed to have been received on the day it is so delivered.
>
> (2) The provisions of this article do not apply to communications in court proceedings."

Article 31 governs the form and contents of arbitral awards. Paragraph (4) of this article stipulates that: G

> "After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party."

Prescription period for challenging arbitral awards

In the instant case, both parties were advised by the Harare Arbitration Centre on 25 February 2011 that the arbitrator's award was ready for collection. The H

Patel JA

first A respondent uplifted the award on 14 March 2011 and filed its application to the High Court challenging the award on 14 June 2011. On these facts, the court *a quo* held that the actual date of receipt was when the prescriptive period began to run and that, therefore, the first respondent had timeously filed its application.

Mr *Morris* for the appellant submits that the period for filing an application B under Article 34 of the Model Law cannot be allowed to run in perpetuity. He further submits that the receipt of an award does not necessarily involve physical prehension but can be effected *traditio longa manu* (by long hand delivery). He relies for this proposition on the headnote to *Groenewald* v *van der Merwe* 1917 AD 233 where the following passage appears: C

> "To constitute delivery physical prehension is not essential if the subject-matter is placed in the presence of the would-be possessor in such circumstances that he and he alone can deal with it at pleasure."

Mr *Uriri* for the first respondent argues that art 34(3) must be read in its literal and grammatical sense, *i.e.* the award in question must be delivered to the parties in order to be received. He further argues that the first respondent's D delay in uplifting the award, as is explained in its answering affidavit, was occasioned by the arbitrator's insistence on the payment of his fees before the award could be released and the subsequent confusion as to whether or not the first respondent's payment was duly reflected in the arbitrator's bank account.

I E have no doubt that the purpose of arbitration proceedings is to enable the expeditious resolution of disputes. Moreover, there are two maxims of the law that are apposite to the circumstances of this matter, *viz. leges vigilantibus non dormientibus subveniunt* (laws serve the vigilant and not the sluggish) and *interest reipublicae ut sit finis litium* (there must be finality to litigation). However, in the absence of any absurdity and on the particular facts of this F case, I am disinclined to depart from the literal and grammatical meaning of art 34(3).

I take this view for two compelling reasons. Firstly, a literal reading of art 34(3), as requiring actual as opposed to putative receipt of the arbitral award, is amply supported by art 3(1) which enjoins physical delivery of written communications in arbitral proceedings, either in person to the intended G recipient or to his place of business or habitual residence or by registered mail. This interpretation is further fortified by art 31(4) which explicitly mandates the delivery of a signed copy of the award to each party. The burden to do so is implicitly placed on the arbitrator himself or on the administrator of the place of arbitration. There is no obligation imposed upon either party to H take steps to actively obtain a copy of the award.

Secondly, as I have already noted, although the award *in casu* was said to A have been ready for collection on 25 February 2011, it was only released and availed to the first respondent on 14 March 2011, after the question of payment of the arbitrator's fees had been satisfactorily resolved. Thus, the intervening delay of two and a half weeks was not solely attributable to the first respondent; nor can this delay be regarded as having been unduly B lengthy. On these particular facts, it seems to me churlish to penalise the first respondent for having disregarded that short period in computing the prescribed three month period for challenging the award. I would, however, add that it might be necessary and appropriate to adopt a different approach on a different set of facts, where the delay in securing a copy of the award C is significantly inordinate and is entirely due to the supine or calculated dilatoriness of the party concerned.

Apportionment of income and expenditure

The main thrust of the decision *a quo* is that the parties had contributed equal pieces of land in the form of their respective stands to their partnership and, D therefore, it was immaterial that a larger portion of the building was located on the appellant's stand. The court also found that both had paid equally for the expenses incurred on the leased property. Consequently, the arbitrator's award, dismissing the first respondent's claim for an equal share of the rental income derived from the property, constituted a palpable inequity contrary to public policy. E

The core element of the arbitrator's findings was that, although each stand purchased and contributed by the parties was equal in size, the appellant's stand contained a greater proportion of the permanent structures and more of the usable floor space. This disparity in value accounted for the significant disparity in the parties' respective contributions to the purchase price of the property. F

In making his award, the arbitrator relied on the principle enunciated by *Voet* 21.2.21to the effect that each co-lessor is entitled to found his claim in proportion to his share of the leased property:

> "The action on letting is a personal *bona fidei* action. It is granted to a lessor, and G also to a lessee who has in turn sublet to another the thing which he had hired. If a number of persons have let, it is granted to each in proportion to his share. It lies against a lessee and, if there are more than one, against each in proportion."

This passage is quoted with approval in *de Pass* v *Colonial Government & Ors* (1886) 4 SC 383 at 391 and *Colonial Government* v *Wassermann* (1887) 5 SC 185 at 187, and applied in *Glenn* v *Bickel* 1928 TPD 186 at 191-192. H

2015 (1) ZLR p499

Patel JA

The A arbitrator accordingly found that the relationship between the parties in acquiring the stands as a single entity was one of co-ownership in proportion to the purchase price that each had paid. Thus, in leasing the stands as a single unit, the parties became co-lessors with each party being due its *pro rata* share of the income derived from the payment of rentals. In the arbitrator's assessment, law and good reason dictated that the share of the income B derived from the leasing of the stands as one indivisible unit should be in proportion to the specific contribution made by each party to the purchase price of the single entity.

In my view, the arbitrator was perfectly correct in ascribing legal significance to the fact that the appellant and the first respondent had respectively paid 70 per cent C and 30 per cent of the purchase price for the property. The reason for this arrangement was quite obvious. The appellant's stand contained a greater proportion of the permanent structures than those on the first respondent's stand and was therefore considerably more valuable in terms of usable and rentable space. In these circumstances, I am unable to find anything iniquitous D in the apportionment of rental income in the same proportion as the parties' respective contributions to the purchase price of the property. There can be nothing outrageous in a co-lessor who owns a larger portion of a building receiving a greater return on the rentals received from that building. On the contrary, an equal 50 per cent apportionment of income between the parties would itself render a palpable inequity by unjustly enriching one of the E parties to the grave detriment of the other.

As for the sharing of expenses, the arbitrator correctly dealt with this aspect with the concurrence of counsel for both parties. He made the specific point that the remaining financial issues relating to the deductions made by the appellant and the rates of interest to be paid by it on any monies found to be F owing to the first respondent were to be referred to a mutually acceptable firm of accountants to make the necessary calculations. Thereafter, any dispute that might arise as to what figures should be factored in for the calculation exercise should be remitted to the arbitrator for determination. This aspect of the arbitrator's award appears to have been totally disregarded by the G judge *a quo*. He clearly misdirected himself in this respect.

Whether award conflicts with public policy

In terms of art 34(2)(b)(ii) of the Model Law, an arbitral award is challengeable and may be set aside on the ground that it is in conflict with the public policy of Zimbabwe. As a rule, the courts are generally loath to invoke this H ground except in the most glaring instances of illogicality, injustice or moral

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2015 (1) ZLR p500

Patel JA

turpitude. In the words of Gubbay CJ in the *locus classicus* on the subject, A*ZESA* v *Maposa* 1999 (2) ZLR 452 (S) at 465D-E:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated." B

This cautionary approach is further underscored by the learned Chief Justice in elucidating the proper test to be applied, at 466E-H:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.
>
> Under article 34 or 36, the court does not exercise an appeal power and either C uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe D would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

In the instant case, there is no suggestion that the arbitrator failed to understand E or apply his mind to the question before him. Moreover, as already intimated above, I am unable to find anything outrageously illogical or immoral in his reasoning or conclusions, whether as regards the apportionment of rental income between the parties or in relation to the sharing of leasehold costs and expenses between them. Indeed, I do not even think that his decision F can be said to be faulty or incorrect in any material respect so as to warrant a different conclusion. Consequently, I take the view that the learned judge *a quo* misdirected himself in holding that the impugned award constituted a palpable inequity contrary to the public policy of Zimbabwe.

In the result, the appeal must succeed on the substantive merits of the matter. It is accordingly ordered that: G

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:
   "The application is dismissed with costs." H

GOWORA JA A and HLATSHWAYO JA concurred

Atherstone & Cook, appellant's legal practitioners

Mutumbwa, Mugabe & Partners, respondent's legal practitioners

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AUGAR INVESTMENTS OU v MINISTER OF ENVIRONMENT & ANOR 2015 (1) ZLR 502 (H)

Citation	2015 (1) ZLR 502 (H)
Case No	Judgment No. HH-278-15
Court	High Court, Harare
Judge	Chigumba J
Heard	4 March 2015; *CAV*
Judgment	25 March 2015
Counsel	*F Girach*, for the applicant *J Mumbengegwi*, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Administrative law – *audi alteram partem rule – application – Minister issuing notice declaring area to be "wetland" in terms of Environmental Management Act [Chapter 20:27] – requirement of Act and of Administrative Justice Act [Chapter 10:28] that Minister give notice* D *to parties affected by such declaration and allow time to make representations – Minister failing to take such steps – notice invalid*

Environment – *wetlands – what are – declaration by Minister of land as "wetland" – not permissible to make such declaration – land must be "wetland" as defined in Act – Minister may declare specific wetland* E *to be "ecologically sensitive" – such declaration must be based on scientific evidence*

Headnote

Under s 113(1) of the Environmental Management Act [*Chapter 20:27*], the Minister of Environment may declare any wetland to be an ecologically F sensitive area and may impose limitations on development in or around such area. "Wetland" is defined in s 2 of the Act. In terms of s 136 of the Act, in the exercise of any function in terms of the Act, the Minister, the Secretary, the Agency, the Director-General and any other person or authority "shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable G steps to ensure that every person whose interests are likely to be affected by the exercise of the function is given an adequate opportunity to make representations in the matter". Without giving notice of his intention to do so, the Minister issued a general notice, stating that, in terms of s 113(1) of the Act, he had declared the land described in the schedule to be wetlands. The applicant sought to have the notice set aside (a) H

2015 (1) ZLR p503

Chigumba J

because A the rules of natural justice were not observed, the applicant being a party affected by the notice; and (b) because "wetland" being expressly defined by the Act, the question of whether or not a piece of land was a wetland was a question of fact, of whether the piece of land fitted into the description prescribed in the Act. No amount of declaration by the Minister that a piece of land was a "wetland" would turn that B piece of land into a "wetland" unless the piece of land fitted squarely within the definition of the word.

Held, that the declaration in the notice that the Minister had declared the land described in the schedule to be "wetlands" could not be construed as an invitation to make representations. The rules of natural justice C were flagrantly flouted. Further, the Minister being an "administrative authority" in terms of the Administrative Justice Act [*Chapter 10:28*], he was obliged by s 3 of that Act to act as fairly as possible, by giving adequate notice of his intention, by allowing a reasonable time period within which affected parties can make representations, and by providing reasons for his decision within a reasonable period of adverse D representations being made. The Minister took none of these steps. The notice was invalid on these grounds alone.

Held, further, that the general notice was indeed *ultra vires* the Environmental Management Act, which in s 113(1) only provided for a declaration that a wetland was an "ecologically sensitive" area. Section 113(1) E presupposed the existence of a wetland. The definition of "wetland" was clear. It is a question of fact, not law, whether a piece of land is a wetland. Not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must surely be based on scientific study and determination of such ecological sensitivity. A wetland will not become ecologically sensitive just because it has been declared to be so. F

Cases referred to

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

Marufu v *Min of Tpt & Anor* 2009 (2) ZLR 458 (H)

Legislation considered G

Administrative Justice Act [*Chapter 10:28*], s 3

Environmental Management Act [*Chapter 20:27*], ss 2, 4, 113, 130 & 136

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

Case information

F Girach, for the applicant H

J Mumbengegwi, for the respondent

Judgment

Chigumba J: This is an application to have General Notices 313 of 2012 A and 380 of 2013 declared a nullity as being *ultra vires* the powers granted to the first respondent in terms of the Environmental Management Act [*Chapter 20:27*] (hereinafter referred to as EMA). The purpose of EMA is to define environmental rights and to set out the principles of environmental management, as well as to provide an enforcement mechanism against B recalcitrant offenders. This is a relatively new piece of legislation in this country, and its ability to nurture and protect the environment may be dependent upon the interpretation given to its provisions. Section 4 of EMA declares that

> "every person in Zimbabwe shall have a right to a clean environment that is not C harmful to health, access to environmental information, protect the environment for the benefit of present and future generations and to participate in the implementation of reasonable legislative policy and other measures that prevent pollution and environmental degradation, and secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development".

The issue that falls for determination is whether the first respondent is D empowered to declare that a piece of land is a "wetland", or whether his powers are confined to declaring an existing wetland to be "an ecologically sensitive area".

At the hearing of the matter, the court pointed out that the first respondent was barred in terms of r 238(2b) of the Rules of the High Court 1971 for E failing to file its heads of argument on time. Counsel for the applicant, Mr *Girach*, advised the court that he had instructions from his client to consent to condonation of the late filing of the heads of argument, and to the upliftment of the bar. In return, the first respondent acceded to the application, by the applicant, for an amendment of the papers for the proper citation of the F respondents, in terms of r 87 of the Rules of the High Court 1971**.** The court's view was that neither party would be prejudiced by these concessions, so they were allowed. The first respondent was then correctly cited as Minister of Environment, Water and Climate, and the second respondent was correctly cited as the Environmental Management Agency.

General Notice 313 of 2012 provided that: G

> "Notice is hereby given, in terms of section 113(1) of the Environmental Management Act … that the Minister has declared the land described in the schedule as wetlands, (hereinafter in this notice referred to as 'Harare scheduled wetlands')".

Section 113 of EMA reads as follows: H

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> "113 A Protection of wetlands
>
> (1) The Minister may declare any wetland to be an ecologically sensitive area and may impose limitations on development in or around such area.
>
> (2) No person shall, except in accordance with the express written authorisation of the Agency, given in consultation with the Board and the Minister responsible for water resources –
>
> (a) reclaim or drain any wetland; B
>
> (b) disturb any wetland by drilling or tunnelling in a manner that has or is likely to have an adverse impact on any wetland or adversely affect any animal or plant life therein;
>
> (c) introduce any exotic animal or plant species into the wetland.
>
> (3) Any person who contravenes subsection (2) shall incur a fine not exceeding level eight or imprisonment not exceeding two years or to both such fine and such C imprisonment."

"Wetland" is defined in s 2 of EMA to mean:

> "any area of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, and includes riparian land adjacent to the wetland". D

It was submitted on behalf of the applicant that, "wetlands" being expressly defined by EMA, the question of whether or not a piece of land was a wetland was a question of fact, of whether the piece of land fit into the description prescribed in the EMA. It was submitted further that no amount of declaration by the Minister that a piece of land was a "wetland" would turn that piece of land into a "wetland" unless the piece of land fitted squarely within the E description provided in the EMA. It was submitted, further, that s 113(1) had to read in conjunction with s 136 of EMA which provides that:

> "136 Observation of rules of natural justice
>
> In the exercise of any function in terms of this Act, the Minister, the Secretary, the Agency, the Director-General and any other person or authority shall ensure F that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the exercise of the function is given an adequate opportunity to make representations in the matter.

It is common cause that the Minister did not observe the rules of natural G justice when he issued GN 313 of 2012. No reasonable steps were taken to ensure that every person whose interests were likely to be affected, was given adequate opportunity to make representations in the matter. It was submitted that GN 380 of 2013 seeks to rely upon GN 313 of 2012 for its validity, and that, for this reason, both general notices are null and void *ab initio.* The court was referred to the celebrated case of *Jensen* v *Acavalos*H 1993 (1) ZLR 216 (S) where the court said at 220C that:

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> "In *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) at 183*,* Klopper JP held that a fatally A defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. With this view I most respectfully agree; for if the notice of appeal is incurably bad, then, to borrow the words of Lord Denning in *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I, 'every proceeding which is founded on it is also bad B and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'"

If the court makes a finding that GN 313 of 2012 was null and void for contravening s 113, as read with s 136 of the EMA, then it should follow that GN 380 of 2013 be null and void, being founded on GN 313 of 2012. General Notice 380 of 2013 would collapse, because it is based on something C incurably bad. It was submitted on behalf of the respondents that GN 313 of 2012 amounted to a notice of invitation to the public to object and that the letter of complaint written by the applicant amounted to an opportunity to make representations. I respectfully disagree with that view. In terms of GN 313 of 2012, notice was given, in terms of s 113(1) of the EMA that the Minister had declared the land "described" in the schedule as wetlands. D That cannot, in any language, be interpreted as an invitation to make representations. Section 136 of the EMA enjoins the Minister to observe the rules of natural justice for every action that he takes, or decision that he makes. It is my view that the rules of natural justice were flagrantly flouted by the gazetting of GN 313 of 2012.

The court is fortified in this view by the persuasive submission made on behalf E of the applicant, that the promulgation of GN 313 of 2012 was in breach of s 3 of the Administrative Justice Act [*Chapter 10:28*], which provides that:

> "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 F expectations of any person shall –
>
> (a) act lawfully, reasonably and in a fair manner; and
>
> (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
>
> (c) where it has taken the action, supply written reasons therefor within the G 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) –

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

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

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

It is settled in our law that the Minister is an "administrative authority' for purposes of the Administrative Justice Act (see *Marufu* v *Minister of Transport & Anor* 2009 (2) ZLR 458 (H)) and that he is enjoined to act as fairly as B possible, by giving adequate notice of his intention, by allowing a reasonable time period within which affected parties can make representations, and by providing reasons for his decision within a reasonable period of adverse representations being made. The Minister did not do so before or after he caused GN 313 of 2012 to be promulgated.

Section 130 of EMA provides for appeals against any decision of any authority C in terms of the EMA as follows:

"130 Appeal against decision of authority

(1) Subject to this section, any person who is aggrieved by any decision of any authority in terms of this Act, may within twenty-eight days after being notified of the decision or action of the authority concerned, appeal in writing to the Minister, submitting with his appeal such fee as may be prescribed: … D

(2) For the purpose of determining an appeal noted in terms of subsection (1), the Minister (if he is not the authority concerned in the appeal) may require the authority to furnish him with the reasons for the decision or action that is the subject of the appeal and a copy of any evidence upon which the reasons are based.

(3) The Minister, after due and expeditious inquiry, may make such order on any appeal noted in terms of subsection (1) as he considers just.

(4) An appeal shall lie to the Administrative Court against any order of the E Minister in terms of subsection (3).

(5) An appeal in terms of subsection (4), shall be made in the form and manner and within the period prescribed in the rules of court.

(6) On appeal in terms of subsection (4), the Administrative Court may confirm, vary or set aside the decision or action appealed against and may make such order, whether as to costs or otherwise, as the court thinks just." F

It is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting by future generations, for failing to play our part in preserving and protecting the environment. However, it is my considered view that even if the High Court were to issue the declaratur G that is sought by the applicant, no consequential relief will flow from such a course of action. It is only pursuant to the noting of an appeal against the action of the Minister, in terms of s 130 of EMA, to the Administrative Court, that the decision of the Minister may be confirmed, varied, or set aside. The land that was declared to be "wetland" remains so declared until the Administrative Court makes a finding in regards to the propriety of the H action of the Minister in making the declaration. Section 136(6) empowers

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the Administrative Court to confirm, vary or set aside the decision or action A appealed against. This court, in terms of s 14 of the High Court Act [*Chapter 7:06*] is empowered to:

"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, B notwithstanding that such person cannot claim any relief consequential upon such determination."

This court therefore declares that it was not open to the second respondent to make decisions based on the apparent validity of General Notices 313 of 2012 and 380 of 2013, which were null and void for contravening the provisions of s 113, as read with s 136, of the EMA. The Minister was required to give C all parties likely to be affected by his decision, a reasonable opportunity within which to make representations, and observe each person's right to be heard in deference to the time honoured rule of *audi alterem partem.* It is this court's view that the general notices were indeed

ultra vires the EMA, which in s 113 only provided for a declaration that a wetland was D an ecologically sensitive area. Section 113(1) presupposes the existence of a wetland. The definition of wetland is clear. It is a question of fact, not law, whether a piece of land is a wetland. Not all wetlands are ecologically sensitive, and declaring a wetland to be ecologically sensitive must surely be based on scientific study and determination of such ecological sensitivity. E A wetland will not become ecologically sensitive just because it has been declared to be so. The court was constrained, despite its findings, and unable to accede to the second part of the order sought by the applicant. This is so because no evidence was placed before the court which it could rely on that the applicant's denial of permission to develop its land, was based on the provisions or implementation of the General Notices in question. For these F reasons, the relief sought by the applicants is granted, as follows:

IT IS HEREBY ORDERED THAT:

1. General Notices 313 of 2012 and 380 of 2013 be and are hereby declared a nullity and are of no force or effect. G
2. The first and second respondents pay the costs of this application, jointly and severally, the one paying and the other to be absolved.

Coghlan Welsh & Guest, applicant's legal practitioners

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

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VODAGE INVESTMENTS (PVT) LTD v TORO & ORS 2015 (1) ZLR 509 (H)

Citation	2015 (1) ZLR 509 (H)
Case No	Judgment No. HH-279-15
Court	High Court, Harare
Judge	Chigumba J
Heard	4 March 2015; *CAV*
Judgment	25 March 2015
Counsel	*T Tandi,* for the applicant *J Koto,* for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Land – C *occupation – agricultural land allocated in terms of offer letter from Ministry of Lands – land subsequently being designated as urban land under control of rural district council – occupier in terms of offer letter no longer having authority to occupy land – purchaser of land being* D *entitled to seek eviction of occupier*

Headnote

The first respondent had occupied a farm which had been allocated to him following the farm's seizure by the State. The piece of land had subsequently been handed, in terms of a proclamation by the President E in terms of s 139 of the Rural District Councils Act [*Chapter 29:13*], to the second respondent, a rural district council, which had designated the piece of land as urban land. The applicant entered into an arrangement with the council to lease the piece of land, with an option to buy, and paid a deposit. It sought the eviction of the first respondent, who resisted on the grounds that he had had an offer letter from the responsible Ministry. F The issue for determination was what was the effect of a proclamation, that agricultural land be subsequently designated to be urban land, on the rights of the holder of an offer letter to the agricultural land? The applicant argued that the proclamation effectively bestowed ownership of the piece of land on the applicant. The offer letter was invalidated by operation of law. It fell away, and ceased to be valid. It ceased to G operate when the land was designated as urban land, because offer letters are issued in terms of the provisions of the Agricultural Settlement Act [*Chapter 20:01*], which do not apply to urban land.

Held, that the proclamation had the effect of incorporating those areas it identified within the council area and of vesting in the council the H administration, control or management of the piece of land in question.

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The effect of the proclamation was to vest in the council, without formal A conveyance, the piece of land in question. Once the proclamation was gazetted, the first respondent no longer had lawful authority to remain on the piece of land. Only agricultural land can be held via the auspices of an offer letter. Once the piece of land ceased to be agricultural land, on the date of the Proclamation, the offer letter fell away by operation of the law. There was no need for the offer letter to be cancelled. It B became invalid at law, on the day of the gazetting of the proclamation. The need of the Minister of Lands to find suitable replacement land for the first respondent did not constitute a valid legal shield for the first respondent to resist eviction by the applicant, which had validly been allocated the piece of land, by the second respondent, in whom the piece of land vested as at the date on which the Proclamation was gazetted. C

Cases referred to

Chimpondah & Anor v *Muvami* 2007 (2) ZLR 326 (H)

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

McGregor v *Saburi & Ors* 2011 (1) ZLR 262 (H) D

P E Bosman Tpt Works Cttee & Ors v *Piet Bosman Tpt (Pty) Ltd* 1980 (4) SA 801 (T)

Pedzisa v *Chikonyora* 1992 (2) ZLR 445 (S)

Zimbabwe Teachers Assn & Ors v *Min of Education* 1990 (2) ZLR 48 (H)

Legislation considered E

Rural District Councils Act [*Chapter 29:13*] , ss 10(2) & (4)(c); 139

Case information

T Tandi, for the applicant

J Koto, for the first respondent F

Judgment

Chigumba J: Section 72(2) of the 2013 Constitution enshrines the right to compulsory acquisition of agricultural land by the State, where the land is required for public purposes, such as settlement for agricultural or other purposes, land reorganization or relocation of dispossessed persons, through a notice published in the *Government Gazette* identifying the land. With G effect from the date of publication, the land becomes fully vested in the State. "Agricultural land" means land used or suitable for agriculture, but does not include communal land or land within the boundaries of an

urban local authority or within a township. The applicant has approached this court seeking an order for the eviction of the first respondent and all those claiming occupation through him from Subdivision C and D of Beatrice, Central H

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Beatrice, A as well as costs of suit. The basis of the application is Proclamation No 3 of 2012 (SI 157 of 2012), handed down by the President for the benefit of the second respondent, a rural district council, which designated the land in question to be urban land, whereas the land had previously been gazetted as agricultural land. The issue that falls for determination is whether this proclamation trumps an offer letter issued to the first respondent in respect B of the same piece of land. Put differently, what is the effect of a proclamation that agricultural land be subsequently designated to be urban land on the rights of the holder of an offer letter to the agricultural land?

The applicant is a company which is duly registered in accordance with the law of Zimbabwe. The first respondent is the current occupier of the piece of C land known as Subdivision C and D Beatrice Central, Beatrice. The second respondent is a rural district council. The third respondent is the Minister who is mandated to administer all agricultural land in Zimbabwe, and who was cited in his official capacity. Mr Leornard Matiza, who deposed to the founding affidavit, averred that the basis of the application for eviction is that on 30 July 2013, the applicant entered into an agreement of sale/lease D with the second respondent as the seller/lessor. It was a lease agreement with an option to purchase. The lease number is A639/2013. The full purchase price of the property is listed as US$176 000. It was acknowledged that the applicant had paid a deposit to the second respondent of ZW$150 000 in 2003. The applicant exercised its option in terms of clause 18 of the lease agreement and purchased the property from the second respondent. E

It was averred, on behalf of the applicant, that the presence of the first respondent on the property had hindered it and prevented it from taking occupation despite having bought the property from the second respondent. The applicant averred that the first respondent had an offer letter which was withdrawn on 11 January 2012. The offer letter was cancelled in terms of F the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. It was submitted that the first respondent no longer had any lawful authority to hold or use the land, and lost his rights over the piece of land, on the date that the offer letter was cancelled. It was submitted that if the first respondent has another valid offer letter, it is invalidated because the third respondent's authority over the property was ousted by the Proclamation, which handed G over the property to the second respondent.

The first respondent filed a notice of opposition on 30 September 2014. He raised a preliminary point that the matter was *res judicata.* On the merits, he averred that he was in occupation when the parties entered into their lease agreement solely to defeat his rights in the piece of land. The authenticity H of the lease agreement was challenged, and the applicant was challenged to

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substantiate the claim that it had bought the piece of land from the second A respondent. The applicant was challenged to produce proof of payment, and to provide an explanation as to why he paid a deposit for the piece of land in 2003 before he signed the agreement in 2013. The first respondent attached an offer letter dated 16 July 2012 as proof that he was allocated the piece of land under the A2 model. He averred that he has a current offer letter. The B third respondent filed an opposing affidavit on the first of October 2014. The Director of Resettlement in the Ministry of Lands and Rural Resettlement, Mr Elias Ziro, deposed to the affidavit on behalf of the third respondent. It was averred that the land in question is now designated as urban land by the Proclamation. It was averred further, that, as from the date of the Proclamation the offer letter holder, the first respondent, no longer had title, because the C land ceased to be agricultural land, and title to urban land does not fall under the same regime as title to agricultural land.

The applicant's answering affidavit was filed on 10 November 2014. It was denied that these proceedings are *res judicata*. The applicant averred that the proceedings before the magistrates court dismissed an application for summary judgment, which is an interlocutory order, and did not dispose of D the matter on the merits. In any event, the proceedings before the magistrate's court were withdrawn in terms of a notice of withdrawal dated 10 October 2014. The applicant reiterated that the proclamation, as read with s 139 of the Rural District Councils Act [*Chapter 29: 13*],

effectively bestows ownership of the piece of land to the applicant. It was submitted that the offer letter was invalidated by operation of law. It fell away, and ceased to be valid. The offer letter E ceased to operate when the land was designated as urban land, because offer letters are issued in terms of the provisions of the Agricultural Land Settlement Act [*Chapter 20:01*], which do not apply to urban land.

At the hearing of the matter, the first respondent insisted on being heard on the merits of the preliminary point that these proceedings are *res judicata.* F The court was referred to *Chimpondah & Anor* v *Muvami* 2007 (2) ZLR 326 (H), where Makarau JP (as she then was) stated that:

> "… our law recognizes that once a dispute between the same parties has been exhausted by a competent court, it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same G ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute … for the plea to be upheld, the matter must have been finally and definitively dealt with in prior proceedings … in other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties by making a finding in law and or in fact against one of the parties on the substantive issues before the court or on the competence of the parties H

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> to A bring or defend the proceedings … *a judgment founded purely on adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter, does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved*" (my emphasis). B

The applicant submitted that the issue of *res judicata* does not arise in these circumstances, and set out the constituent elements of the defence as follows:

(a) an earlier judicial decision

(b) which is final and definitive on the merits of the matter

(c) involving the same parties C

(d) where the cause of action in both cases is the same

(e) seeking the same relief.

I agree with the applicant's contention that dismissal of an application for summary judgment is not a decision which is final and definitive of the merits of the matter. It is a judgment "founded purely on adjectival law, regulating D the manner in which the court is to be approached for the determination of the merits of the matter": *Chimpondah & Anor* v *Muvhamu supra.* A dismissal of an application for summary judgment is merely an indication that the requirements of summary judgment were not established to the satisfaction of the court. The court will have made a finding that the applicant is not E entitled to use the procedure of summary judgment to obtain relief. Such an applicant is at liberty to proceed in terms of the normal court rules to obtain relief. Summary judgment is a procedure whose purpose is to curtail proceedings and provide quick relief to a litigant who has a clear-cut case, who is faced with a defendant who enters appearance to defend merely to delay the inevitable. Summary judgment is "merely a simple interlocutory F judgment directing the parties on how to approach the court if they wish to have their dispute resolved". The preliminary point raised is entirely devoid of merit. The proceedings before the magistrate's court have been withdrawn. This matter is not *res judicata.*

The first respondent took a second point *in limine*, that the applicant had no G*locus standi* to bring these proceedings, and relied on *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S) as authority for this proposition. The facts of this case are that the respondent had entered into an agreement to "purchase" on a lease-to-buy basis from the owner-lessor a plot of land with an incomplete dwelling house. Under the agreement, title to this property would only pass to the respondent after certain conditions had been met. These conditions H had not yet been fulfilled. One of the terms of the agreement was that the

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lessee-to-buy was prohibited from sub-leasing or assigning the property A to a third party without the written consent of the owner-lessor. After the agreement had been entered into, the respondent

did not move into the house, as he had somewhere else to live. Thereafter he either sub-let this property to the appellant or assigned the property to him by selling to him his right of occupation together with the eventual right to take title. The respondent did this without first obtaining the consent of the owner-lessor to this sub-letting B or assignment.

Sometime later, the respondent brought an action for the eviction of the appellant from the premises. The main issue on appeal was whether the lessee-to-buy had locus standi to sue to evict the appellant without having C obtained a cession of action from the owner-lessor. It was held that the terms of the lease-to-buy agreement were such that the lessee initially acquired only a personal right exercisable against the owner-lessor and not against third parties without recourse to the owner-lessor. This personal right entitled him to delivery of vacant possession of the property from the owner-lessor. But D once the lessee had been given vacant possession of the property and had assumed physical control over it, he then acquired a real right entitling him to evict anyone who wrongfully occupied the property such as a trespasser. Although the respondent had not actually moved into the house, he had acquired control over the unoccupied property. He had thus acquired a real E right over the property. It was held therefore, that the respondent had *locus standi* to sue for the eviction of the appellant, even though he had not obtained a cession of action from the registered owner-lessor. It is my view that this case does not assist the first respondent to make a good case that the applicant does not have the requisite *locus standi* in the circumstances of this case. The applicant is a lease holder and purchaser of the piece of land, in terms F of the Proclamation, which vested the land in the second respondent which subsequently sold it to him. The *Pedzisa* case regrettably has no application to the circumstances of this case. This case does not turn on the distinction between real rights and personal rights. It turns on the issue of the effect of the Proclamation on the offer letter issued to the first respondent by the G third respondent. It turns on the legal implications of title to urban land versus agricultural land, and whether the classification of land as urban or agricultural is interchangeable, and if so what the implications are.

I find myself in agreement with the submissions made on behalf of the applicant, that the legal position with regards to locus standi was summarized H

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in A*P E Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 803E-804E [1] , where Eloff J said:

> "It is well settled that, in order to justify its participation in a suit such as the present, a party such as second applicant has to show that it has a *direct and substantial interest* in the subject-matter and outcome of the application. In regard to the concept of such a 'direct and substantial interest', Corbett J in B*United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Another* 1972 (4) SA 409 (C) quoted with approval the view expressed in *Henri Viljoen (Pty) Ltd* v *Awerbuch Brothers* 1953 (2) SA 151(O) that it connoted –
>
> '… an interest in the right which is the subject-matter of the litigation and … not thereby a financial interest which is only an indirect interest in such litigation' C
>
> and then went on to say:
>
> 'This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division … and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court.' D
>
> This requirement of a legal interest as opposed to a financial or commercial interest also received judicial endorsement in *Anderson* v *Gordik Organisation* 1962 (2) SA 68 (D) at 72B-E."

From these authorities it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal E interest in the subject matter of the action. I proceed now to consider the application of these principles to the facts of the matter before me. Clearly the applicant has a direct and substantial interest in this matter; whether it be derived from a lease agreement or from an agreement of sale will be determined when the merits of the matter are determined. The preliminary F point taken is entirely devoid of merits and is dismissed. I will now turn to the merits of the matter. It was submitted, on behalf of the applicant, that the issue that falls for determination by this court is whether the first respondent can continue to rely on an offer letter that has been terminated by operation of law. It is common cause that the piece of land is no longer agricultural land, or gazetted land. The third respondent has refused to revoke the offer G letter, despite no

longer having any interest or title in the piece of land. It was alleged that the first respondent has remained in occupation without the lawful authority of the second respondent, who now hold the land as urban land, in terms of Proclamation 3 of 2012 (SI 157 of 2012) which declared:

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> "…AND WHEREAS I consider it desirable to alter the boundary of the Manyame A Rural District Council by excising Subdivision C [Beatrice Showground] and Subdivision D of Beatrice Central from Ward 14 and incorporate them in ward 13 of Manyame Rural District council therefrom…"

The word "excise" means "to delete part of something … to remove something by cutting …" So the effect of the proclamation was to alter the boundaries. B

It was further submitted that the effect of the Proclamation, when read with s 139 and s 10(4)(c) of the Rural District Councils Act [*Chapter 29:13*], is to immediately vest the land in the second respondent. Section 10 provides:

> "(2) Notwithstanding anything contained in the Urban Councils Act [*Chapter 29:15*], the establishment of a council for a district in which there are one or more areas under the jurisdiction of a local authority *shall have the effect of*C*incorporating those areas within the council area and of vesting in the council the administration, control or management of any local government area within that district, unless the proclamation establishing the council expressly provides the contrary.*
>
> (3) …
>
> (4) …Where the whole or part of a council area is a former local authority area, the following provisions shall apply in addition to any apportionment, direction, D authority, declaration or requirement made or given in terms of subsection (3) –
>
> (a) …
>
> (b) …
>
> (c) *all property, movable or immovable, and all moneys of or vested in the former local authority shall be vested in and belong to the council, without formal conveyance or assignment* of the estate and interest of the former local authority, and, in the case of immovable property so vested, a Registrar E of Deeds shall, without payment of any fee or duty, at the request of the council and on being satisfied with the title of the council to such property, register the council as owner of such property in lieu of the former local authority and shall make the appropriate amendments in his registers and on the title deeds relating to such property" (my emphasis).

Section 139 provides as follows: F

> "139 Alteration of councils and wards and abolition of councils
>
> (1) Subject to this Part, whenever the President considers it desirable he may, by proclamation in the *Gazette*, exercise all or any of the following powers –
>
> (a) alter the name of a council;
>
> (b) alter a council area by adding any area thereto and additionally, or alternatively, subtracting any area therefrom, and redefine the council area; G
>
> (c) alter the wards of a council area by adding any area thereto and additionally, or alternatively, subtracting any area therefrom;
>
> (d) re-divide the council area into any number of wards;
>
> (e) abolish a council;
>
> (f) determine any question arising from any exercise of powers in terms of this subsection, and give directions relating to such determination." H

Chigumba J

Regrettably A the court did not find any of the first respondent's submissions on the merits instructive. In terms of the Gazetted Land (Consequential Provisions) Act, no person may hold use or occupy gazette land without lawful authority. Section 1 of this Act provides:

> "'lawful authority' means –
>
> (a) an offer letter; or B
>
> (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 offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter'". C

It is common cause that the first respondent had an offer letter which lawfully authorized him to occupy and utilize the piece of land for agricultural purposes. The Supreme Court has given guidance in respect of the holding of title to agricultural land in the leading case of *Commercial Farmers Union & Ors* v *Minister of Lands & Ors* 2010 (2) ZLR 576 (S) at 591, where the court made the following observation: D

> "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 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 E of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to choose … 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. An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should F 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."

See also *McGregor* v *Saburi & Ors* 2011 (1) ZLR 262 (H).

My reading of s 139, as read with ss 10(2) and 10(4)(c) of the Rural District G Council Act, is that the proclamation had the effect of incorporating those areas it identified within the council area and of vesting in the council the administration, control or management of the piece of land in question. The effect of the proclamation was to vest in the council, without formal conveyance, the piece of land in question. In terms of the Gazetted Land H (Consequential Provisions) Act, no person may hold use or occupy gazetted

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Chigumba J

land without lawful authority. Once the Proclamation was gazetted, the first A respondent no longer had lawful authority to remain on the piece of land. I am fortified in this view by the opposing affidavit filed on behalf of the third respondent which contains an admission that the land is now urban by virtue of Proclamation 2 of 2012. The sentiments expressed in that affidavit, that the offer letter holder needs to be relocated before anything can take place on the property in question, have no basis at law. There is no offer letter holder B to speak of. Urban land does not fall under the Minister of Lands and Rural Resettlement. Title to urban land cannot be the same as title to agricultural land. Once the piece of land ceased to be agricultural land, on the date of the Proclamation, the offer letter fell away by operation of the law. There is no need for the offer letter to be cancelled. It became invalid at law, on the day of the gazetting of the proclamation. C

It is this court's considered view that officials of the third respondent, who have shown a frequent tendency to confuse issues with regards to the allocation of agricultural land and the issue, revocation and alteration of offer letters and other title to agricultural land, should desist from this dishonourable practice forthwith. Clearly after admitting that the piece of land in question D was now urban, the legal position is that only agricultural land can be held via the auspices of an offer letter, so there was no longer any offer letter to speak of. The need of the third respondent to find suitable land for the first respondent is one of the issues that ought to have been brought to the attention of the President, before the Proclamation was gazetted. It does not constitute a valid legal shield, to the first respondent, that he can use to E resist eviction, by the applicant, which has validly been allocated the piece of land, by the second respondent, in whom the piece of land vested as at the date on which the Proclamation was gazetted.

It follows that the applicant is a genuine and legitimate title holder to the piece of urban land, and entitled to the relief that it seeks. Accordingly it is F hereby ordered that:

1. The first respondent and all those claiming occupation through him be and are evicted from Subdivision C & D Beatrice Central, Beatrice.
2. The first respondent to pay costs of suit on a party and party scale. G

Kantor & Immerman, applicant's legal practitioners

Koto & Company, first respondent's legal practitioners

1 Cited in *Zimbabwe Teachers Association & Ors v Minister of Education* 1990 (2) ZLR 48 (H) at 52

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JAMES v CITY OF MUTARE & ORS 2015 (1) ZLR 519 (H)

Citation	2015 (1) ZLR 519 (H)
Case No	Judgment No. HH-280-15
Court	High Court, Harare
Judge	Chigumba J
Heard	4 March 2015; *CAV*
Judgment	25 March 2015
Counsel	Ms *E Mpanduki,* for the applicant Ms *F Mahere,* for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Local governmentC – *rates – increase – requirement for advertising and allowing ratepayers to object – single ratepayer objecting – not following procedure for objection provided by legislation – instead bringing application to set aside increase in rates – not properly before the court* D

Headnote

The applicant, a former mayor of Mutare, saw an advertisement in the local newspaper, inserted by the respondent council, in which it was announced, without giving specific details, that the council proposed to review the tariffs for rates, fees and other charges levied by the council. E The advertisement stated that a copy of the proposals would lie open for inspection at the council's various offices and that anyone who wanted to object could do so within 30 days. The proposed tariffs were subsequently approved at a special meeting of the council and then implemented. The applicant sought orders directing the council to cease levying the new F charges and to revert to the old ones; to refund the increases; and not to implement the new charges until advertisements had been placed in the manner specified by s 219(2) of the Urban Councils Act [*Chapter 29:15*].

The applicant argued that s 219 of the Act requires that the advertisement shows both the existing and the proposed tariffs, and that consequently, the advertisement that was flighted failed to

comply with this requirement. G The purpose of this requirement is to enable an easy comparison to be done between the old tariffs and the proposed new tariffs in the advertisement, without having to go through the trouble of travelling to the Council's offices to inspect the actual new charges. He also alleged that the advertisement had been placed before the council had passed a H resolution to fix the new charges.

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Chigumba J

The respondents averred that the Administrative Court was the proper A court to determine a challenge to an administrative authority; and that the method of advertising was chosen because of the substantial cost savings that would be made.

The applicant denied that only the Administrative Court had the requisite jurisdiction to determine the issues raised, and contended that the B High Court could determine the matter in terms of s 3 of the Administrative Justice Act [*Chapter 10:28*]. He maintained that, no matter how prohibitive the cost of inserting the advertisement was, the council was duty bound to comply with s 219 of the Act, and did not have any discretion to proceed in the manner that it did. Section 219, he said, is peremptory.

Held, that under s 219(3), where an advertisement has been placed and, within C 30 days, 30 or more voters object to the proposed tariffs, the council is obliged to reconsider the tariffs. The council is at liberty, by a resolution passed by a majority of councillors present, to pass or approve whatever rates or deposit charges it pleases, after a consideration of the objections properly lodged. An objection which is properly lodged will trigger reconsideration of the proposed rates by council, but reconsideration D may or may not result in a downward variation of the charges.

Held, further, that before deciding whether or not the respondents contravened the provisions of s 219 of the Act, it had to be determined whether the applicant was properly before the court, and whether the relief he sought flowed from what Parliament intended to happen when the Act is breached. E

Held, further, that there was no proper objection filed before the council and the respondents were at liberty to pass any resolution that they so wished with regard to the proposed new tariffs. The applicant wrote two letters on his own behalf, and attached three supporting affidavits to his application. What he was required to do in order to qualify for consideration of his objection was to mobilize 30 ratepayers. The F respondents may or may not have contravened the provisions of the Act and may have failed to act lawfully by contravening the provisions of the Act which provide for the manner of advertising, but the applicant, being aggrieved by such administrative decision, could not approach the court on the basis that the respondents contravened the Act and failed G to correct their decision through a reconsideration of the proposed new tariffs when he himself failed to comply with the relevant provisions of the Act that would have brought about the relief that he now sought. It would only be after following that provision that the applicant could have approached the court for a determination of whether the right to administrative justice of 30 ratepayers had been contravened. H

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Chigumba J

Cases cited A

Affretair (Pvt) Ltd v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

Silver's Trucks (Pvt) Ltd & Anor v *Director of Customs & Excise*1999 (2) ZLR 88 (H)

Tengwe Estates (Pvt) Ltd v *Min of Lands & Anor* 1992 (1) ZLR 77 (H) B

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 2 & 3

Constitution of Zimbabwe 2013, s 68

High Court Rules 1971 (RGN 1047 of 1977), r 64

Urban Councils Act [*Chapter 29:15*], s 219 C

Case information

Ms *E Mpanduki,* for the applicant

Ms *F Mahere,* for the first respondent

Judgment

Chigumba J: This is an application for an interdict and other consequential relief, brought by a resident of the city of Mutare, who operates a business D which trades as Manicaland Meat Products. The applicant owns immovable property in Mutare, is a rate payer, and a former mayor of Mutare. The applicant is aggrieved because the city of Mutare, a local authority, placed an advertisement in the Manica Post, on 29 November 2013. The advertisement was for the purpose of changing the city's old tariffs for payment of rates E and licence fees, and replacing them with new ones. The issue that falls for determination is whether the advertisement complied with the provisions of s 219(2) of the Urban Council's Act [*Chapter 29:15*] (hereinafter referred to as "the Act"). The relief that the applicant is seeking, in the event that the court finds that the Act was contravened, is that: F

1. The first respondent shall with immediate effect, cease levying or charging the new tariffs, charges, deposits and service charges as contained in the new budget for 2014 as approved by council on 9 January 2014 and shall revert to the charges applicable for the year 2013.
2. In respect of any increased tariffs, charges and deposits and service charges, actually charged since 1 January 2014, the first respondent shall G refund the amount of the increase implemented forthwith, and in any event by no later than 30 days from the date of this order by refunding cash to the payer or with the consent of the payer by crediting the account of the payer.
3. The first respondent shall not implement the new tariff charges, deposits H and service charges for 2014 until such time as it has placed the necessary

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Chigumba J

advertisements in a newspaper in accordance with s 219(2) of the Act, A in the manner specified and setting out the proposed tariffs charges and deposits and any existing tariffs charges or deposits and thereafter fully complied with subs (3), (4) and (5) of s 219 aforesaid.

4. A copy of this order be served on the respondents as soon as possible after issue and failure by the respondents to comply with it forthwith shall constitute contempt of court. B
5. The respondents shall jointly and severally pay the applicant's costs on the legal practitioner client scale.

I have taken the trouble to set out in full the terms of the draft order sought by the applicant, for reasons that will become clear when the court determines the various preliminary points that were raised on behalf of the respondents, C at the hearing of the matter.

First, let us examine the facts. On 31 March 2014, a "court application in terms of r 64" was filed against the City of Mutare, the local authority responsible for the management administration of the City of Mutare in terms of the Act, the town clerk of the City of Mutare, and the non-executive mayor of D Mutare, who is responsible for for the day to day implementation of council policy through management. The basis of the application was to seek an order impugning the increases in rates and other charges, by the first respondent, on the basis that the advertisement placed in the *Manica Post* and flighted on 6 of December 2013, did not comply with the relevant provisions of the Act. The advertisement read as follows: E

> "CITY OF MUTARE
>
> PROPOSED TARIFFS FOR 2013
>
> NOTICE is hereby given in terms of section 219 of the Urban Councils Act [*Chapter 29:15*] that the Mutare City council proposes to review tariffs for the categories mentioned below with effect from *1 January 2014*.F
>
> Owner's rates and supplementary charges, Water and sewage charges, Shop Licence Fees, Cremation Charges, Refuse Disposal, Rents High Density, Rents low density, Burial Charges,

Licence and health registration Certificates, public health fees, Housing administration Charges, parking Charges, Traffic Enforcement fees, Ambulance Fees, Vehicle Licence Fees, Hire of Stadium and halls, swimming pool Charges, G other related Charges.

A copy of the proposals will lie open for inspection at Civic Centre and all District offices during normal working hours between 0800 hrs and 1630 hrs on any working day… Any ratepayer who has any objections to the proposed tariffs can lodge his/her objections in writing to the town clerk within 30 days from the first date of publication. H

2015 (1) ZLR p523

Chigumba J

O L Muzawazi A

Town Clerk."

The applicant's first bone of contention with the manner of publication was that s 219 of the Act requires that the advertisement show both the existing and proposed tariffs, and that consequently, the advertisement that was flighted failed to comply with this requirement. The applicant averred that B the purpose of this requirement was to enable easy comparison to be done, between the old tariffs and the proposed new tariffs in the advertisement, without having to go through the trouble of travelling to the Council's offices to inspect the actual new charges. The applicant's second bone of contention was that he "discovered" that the council had not passed a resolution by a C majority of its members to fix the new charges in terms of s 219 of the Act, which meant that the advertisement was flighted prematurely. Lastly, the applicant was aggrieved because when he went to inspect the new charges on 29 November 2013, he was advised that the new charges were not yet ready for inspection. He was finally able to inspect the new charges on 4 December 2014. D

On 29 November 2013, the applicant's legal practitioners addressed a letter to the respondents in which the alleged invalidity of the advertisement was pointed out. On 9 January 2014, at a special council meeting, the second respondent presented for approval, the proposed new tariffs which were approved via a resolution. No advertisements were published as requested E by the applicant, and the new tariffs were subsequently implemented. It is common cause that ratepayers are now paying increased rates. The applicant attached affidavits by three such affected ratepayers. On 25 February 2014, another letter was dispatched to the first respondent on behalf of the applicant, protesting the implementation of the new tariffs, and applicant did not get the courtesy of a reply, or an explanation. The applicants aver that the F ratepayers were shortchanged by being denied their statutory right to object, and by the unlawfulness of the advertisement which was defective and which contravened the Act. The applicant averred that the first respondent sought to mislead its ratepayers, in an article on the front page of the *Manica Post,* dated 14 February 204, by stating that there would be no increase in rates and commercial licences, which is contrary to the 2014 budget approved by G council on 9 January 2014.

The respondents filed their opposing papers to the application on 17 April 2014. The opposing affidavit filed on behalf of the first respondent was deposed to by Mr. Tawanda Martin Kanengoni, its legal officer. A point *in limine* was raised that the application purported to have been filed in H terms of r 64 of the High Court Rules 1971, which rule specifically makes

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provision for applications for summary judgment. It was contended that this A error rendered the application fatally defective, when it was coupled with the fact that the relief being sought demonstrated clearly that applicant was seeking to challenge the validity or propriety of administrative action taken by the first respondent. It was submitted that the Administrative Court was the proper court to determine a challenge to administrative authority. The first respondent averred that a single advertisement in the Manica Post cost B US$2 798.64, and that it was this prohibitive cost that led it to leave the proposed new tariffs to lie open for inspection at its offices, rather than to burden the ratepayers further by passing onto them the cost of flighting six pages (+/-$16 791.84) which the first respondent would have been required to pay, a total US$33 583.68 for the two advertisements, whereas each time C the notice was published in its abridged form, it cost US$478.

The first respondent averred that it did not deliberately flout the law; it made a calculated decision to save the ratepayers further more onerous charges to their accounts. The first respondent contended that it complied substantially with the provisions of the Act, more so because the notice

called upon those D with objections to come forward. The first respondent averred that a resolution regarding the tariffs was passed at a council meeting on 12 November 2013 by a majority vote of the councilors present. The first respondent denied that the applicant was unable to inspect the schedule of proposed new tariffs as alleged, and contended that applicant's written objections were considered and rejected by it, during the statutorily provided 30 day period from the date E of publication. It was averred by the first respondent that the council meeting which was held on 9 January 2014 was convened to consider objection to the proposed new tariffs in terms of s 219(3) of the Act. Council concluded, at that meeting, that applicant's objection did not warrant a revision of the tariffs.

Mr. Orbert Linos Muzawazi, the second responded, deposed to a supporting F affidavit and confirmed that the contents of the first respondent's founding affidavit were true and correct. Mr. Tawanda Nhamarare, the third respondent, deposed to a similar supporting affidavit. On 6 May 2014, the applicant filed an answering affidavit in which he acknowledged that an error had been made in labelling the application as being one brought in terms of r 64. He denied G that such an error rendered the application fatally defective. The applicant denied that only the Administrative Court had the requisite jurisdiction to determine the issues raised, and contended that this court could determine the matter in terms of s 3 of the Administrative Justice Act [*Chapter 10:28*]. The applicant maintained that, no matter how prohibitive the cost of flighting the advertisement was, the first respondent was duty bound to comply with H

Chigumba J

s 219 A of the Act, and did not have any discretion to proceed in the manner that it did. He contended that s 219 of the Act was peremptory.

The applicant filed a notice of application to amend on 6 May 2014, in which it was proposed to delete r 64, and substitute it with Order 32, as the heading of its application. The applicant's legal practitioner of record, B Mr George Lock, deposed to an affidavit in support of the application for amendment, in which he stated that he used a precedent from another matter and failed to realize that the application was erroneously referred to as being brought in terms of r 64. He urged the court to have regard to the draft order in order to satisfy itself that the application was clearly not one for summary judgment. The applicant's heads of argument were filed on C 25 June 2014. In the heads of argument, it was submitted that the tariffs which were approved and implemented by the first respondent are null and void for non compliance with the Act, more particularly, the advertisements which were published in the *Manica Post* on 29 November 2013, and 6 December 2013, directly contravened the provisions of s 219 of the Act. Section 219 D of the Act provides as follows:

> "219 Charges by resolution
>
> (1) A council may, by resolution passed by a majority of the total membership of the council –
>
> (a) fix tariffs or charges for –
>
> (i) the supply of electricity or water or of refuse removal services; or
>
> (ii) the conveyance of sewage or trade effluent in public sewers and its E treatment at a sewage treatment works; or
>
> (iii) any other services which a council may provide in terms of this Act;
>
> (b) …
>
> (c) …
>
> (2) Before any tariffs, charges or deposits fixed in terms of subsection (1) come into operation a statement setting out the proposed tariffs, charges or deposits F and any existing tariffs, charges or deposits for the same matters shall—
>
> (a) be advertised in two issues of a newspaper; and
>
> (b) *be posted at the office of the council for a period of not less than thirty days from the date of the first advertisement* in the newspaper.
>
> (3) If a statement has been advertised in terms of paragraph (*a*) of subsection (2) and within the period of thirty days referred to in that paragraph *objections*G*to the proposed tariffs, charges or deposits are lodged* –
>
> (a) by thirty or more persons who are voters or who are users of the service to which the tariff, charge or deposit relates; or

(b) where there are less than thirty such users of the service concerned, by not less than fifty per centum of the number of such users;

such tariffs, charges of deposits *shall be reconsidered by the council, together with the objections so lodged,* and they shall not come into operation unless the H resolution is again passed by a majority of the total membership of the council:

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Provided that the council may in these circumstances, by such resolution, fix lower A tariffs, charges or deposits than those objected to without further advertising.

(4)…" (the emphasis is mine).

It is my considered view that before going off on all sorts of tangents pertaining to the peremptory provisions of s 219 of the Act, it is necessary to consider firstly, whether the objection filed by the applicant was done so properly, B and secondly, based on the relief being sought, whether the applicant has the *locus standi* to purport to bring this application on behalf of every ratepayer in Mutare. Section 2913)(a) is clear. Objections may be lodged by 30 people or more. Section 291(3)(b) is equally clear. Where the users of the services are less than 30 people, at least half of their number, whatever it may be, must lodge the objection. Once objections are lodged as provided by s 219 (3), C the tariffs and charges of deposits *shall be reconsidered by council.* Council is at liberty, by a resolution passed by a majority of councillors present, to pass or approve whatever rates or deposit charges it pleases, after a consideration of the objections properly lodged. My reading of the Act is that an objection which is properly lodged will trigger reconsideration of the proposed rates by council. Reconsideration may or may not result in a D downward variation of the charges.

The court was referred to *Tengwe Estates (Pvt) Ltd* v *Minister of Lands & Anor*2002 (2) ZLR 137 (H) on behalf of the applicants where it was held that:

"…in many cases, the legislation expressly stipulates that certain formalities must be complied with and certain procedures followed when the power is exercised. E As a general principle if these are not observed, the action taken will be invalid … where a statutory provision has the effect of depriving an individual of his rights and liberties, the courts render a strict interpretation of the provisions in favor of safeguarding the individual rights and freedoms as enshrined in the Constitution."

It was submitted, further, that s 219 of the Act, which permits the first F respondent to fix and amend charges, tariffs and deposits, affects citizen's rights to administrative justice as enshrined in s 68 of the Constitution. Section 68 of the Constitution of Zimbabwe which provides that –

"Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

Section 3 of the Administrative Justice Act provides as follows: G

"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 ... act lawfully, reasonably, and in a fair manner."

Section 2, which provides for interpretation and application, has the following definitions, among others: H

2015 (1) ZLR p527

Chigumba J

"'administrative A action' means any action taken or decision made by an administrative authority;

'administrative authority' means any person who is an officer, employee, member, committee, council, or board of state or a local authority or parastatal".

It is common cause that the first respondent is an administrative authority.

My reading of the interpretation section of the Administrative Justice Act B is that any action taken by the respondent or any of its employees, is administrative action, and that in exercising discretion in any administrative action, the conduct must be reasonable, and substantively and procedurally fair. Francis Bennion *Statutory Interpretation* at pp 21-22 writes as follows:

"Where a duty arises under a statute, the court, charged with the task of enforcing C the statute, needs to decide what consequences Parliament intended should follow from breach of the duty. This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of

command. They say that a thing 'shall' be done. Too often they fail to consider the consequences when it is not done…"

See *Chiroodza* v *Chitungwiza Town Council & Anor*1996 (2) ZLR 15 (S). D

In *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), at 21, McNally JA said:

"It seems to me, to put it in simple terms, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency. 'Fair' was Lord Denning's favorite word in his decisions on E administrative matters. 'Transparency' is a more modern but equally valuable word which, I venture to suggest, could usefully be used in such decisions to connote openness, frankness, honesty and the absence of bias, collusion, favoritism, bribery and corruption, and underhand dealings and considerations of any sort.

The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just F because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say 'the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency'." G

See also *Silver's Trucks (Pvt) Ltd & Anor* v *Director of Customs & Excise*1999 (2) ZLR 88 (H).

I accept the correctness of the submission, however, that, before delving into the merits of the matter, before deciding whether or not the respondents contravened the provisions of s 219 of the Act, we must determine if the H applicant is properly before the court, and whether the relief that he seeks

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Chigumba J

flows from what Parliament intended to happen when the Act was breached. A Was it the intention of Parliament that the ratepayers be refunded to a man, or that council be ordered to go back to the old rates, more than a year after implementing the new charges? Why did the Act provide that objections must be lodged within thirty days of the date of the advertisement? And finally, what is the effect of a council resolution by a vote of the majority of B councilors present? If my interpretation of s 219(3)(a) and (b) is accepted as being correct, it follows that there was no proper objection filed before the first respondent and the respondents were at liberty to pass any resolution that they so wished with regards to the proposed new tariffs. The applicant wrote two letters on his own behalf. He attached three supporting affidavits to this application before us. What he was required to do in order to qualify C for consideration of his objection was to mobilize thirty ratepayers of the first respondent. Clearly s 219(3)(b) does not apply because it is common cause that the first respondent has more than thirty ratepayers. There was no valid objection before the first respondent.

The applicant is a former mayor of the first respondent. He ought to have been sufficiently appraised of the provisions of the Act to realize that an objection D by one person would be of no force or effect. The respondents may or may not have contravened the provisions of the Act as alleged by the applicant. It may well be that the respondents failed to act lawfully by contravening the provisions of the Act which provide for the manner of advertising. But the applicant, being aggrieved by such administrative decision, may not E approach this court on the basis that respondents contravened the Act and failed to correct their decision through a reconsideration of the proposed new tariffs when he himself failed to comply with the relevant provisions of the Act that would have brought about the relief that he now seeks. It is for that reason that the relief that the applicant is seeking is incompetent. The applicant does not have the requisite *locus standi in judicio* to seek F relief on behalf of all the ratepayers of Mutare. Although he himself has a direct and substantial interest in the matter, he ought to have followed the provisions of s 219(3)(a). It is only after following that provision that applicant could have approached this court for a determination of whether the right to administrative justice of thirty proven ratepayers of Mutare had been contravened. G

It is my view that the various preliminary points raised by the parties were not dispositive of the issue that fell for consideration. It is not necessary to catalogue them, or to pronounce on their correctness or otherwise. This matter cannot be determined on the merits because the applicant is not properly before us. He should have mobilized 30 ratepayers in Mutare who H

Chigumba J

could A support their assertion of rate-paying status. All 30 should have lodged their objections in writing to the council. The objections ought to have been lodged within 30 days of 29 of November 2013, and of 6 December 2013. The Council would have been obliged to circulate each objections then hold a meeting and reconsider whatever issue would have been raised in the objections. One objection by one ratepayer need not detain council B business. The objection will not be properly before council. In order to trigger reconsideration of proposed tariffs by council, thirty ratepayers needed to object within the prescribed time period. That not being done, the council did not contravene the provisions of s 219 by failing to consider applicant's objection. There was nothing to stop the council from passing a resolution C to bring into effect the proposed new tariffs.

Counsel for the respondents made a very sound argument for costs to be levied against the applicant on a punitive scale. Not only were the papers filed of record discordant with the rules of this court, the relief sought was incompetent, and not premised on the papers filed of record. There was no class action before us, yet the relief sought had the effect of reversing D financial transaction with regards to each and every ratepayer in Mutare. The applicant, being a former mayor of Mutare, ought to have been more conversant with the provisions of the Act which he sought to enforce. The basis of his application fell away because he himself had not complied with the relevant provisions of the Act. For these reasons, the application is dismissed with costs on a legal practitioner and client scale. E

Henning Lock, applicant's legal practitioners

Matsika & Associates, first respondent's legal practitioners

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T (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 530 (H)

Citation	2015 (1) ZLR 530 (H)
Case No	Judgment No. HH-285-15
Court	High Court, Harare
Judge	Kudya J
Heard	16 & 17 September 2014; *CAV*
Judgment	25 March 2015
Counsel	*D Ochieng*, for the appellant *S P Msithu*, for the respondent
Case Type	Value added tax appeal
Annotations	No case annotations to date

Flynote

Revenue and public finance – *value added tax – service supplied in course* C *of business for which supplier receives a commission – VAT payable on commission received – commission – distinction from discount*

Headnote

The appellant was a travel agent. In carrying out its tasks, it assisted the D passenger in the selection of a suitable airline that was compatible with his needs on cost, class and convenience. It booked the seat, received payment for the airfare and issued the ticket to the passenger. It also handled the complaints raised by the passenger against the chosen airline. It charged the passenger a fee for these services. This fee was liable for value added tax, which was paid to the respondent. E

The appellant interfaced with the airline on two fronts. It actively dealt with the airline in trouble-shooting passenger complaints. The main interaction was carried out indirectly through the central reservation system run by the International Air Transport Association (IATA). The appellant, like other travel agents, received payments from IATA in F respect of bookings made through it. These payments were referred to by IATA as "commissions"; in respect of commissions for domestic flights, the appellant paid VAT on the commissions for those flights. In respect of other flights, the appellant argued that the payments were not commissions, but "discounts" and thus not liable to VAT. It explained G that the practice used to be that airlines used to pay travel agents a nine per cent commission across the board on the tickets sold for the airlines. At that time, the commission constituted the sole source of income for the travel agent. The travel agent did not charge any service fee to the passenger. In time, the airlines unilaterally stopped paying commission to travel agents. In its place, they introduced discounts ranging between H

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zero A per cent and one per cent. The travel agents resorted to charging service fees to augment their income.

In argument, the submissions by counsel were confined to whether the amounts assessed for VAT by the respondent constituted discounts or commissions in the hands of the appellant. Counsel were agreed that a discount was distinct from a commission. The latter would attract VAT, B while the former would not.

Held, that a discount represents a reduction in the normal price of goods or services provided by a supplier to a customer while a commission is a fee based on a per centage of the sale made that is mutually agreed upon or fixed by custom or law that accrues to an agent or a broker. C

Held, further, that in terms of s 6(1)(a) as read with s 6(2)(a) of the Value Added Tax Act [*Chapter 23:12*], VAT is paid by a registered operator for the supply of goods or services made by him on or after 1 January 2004 in the course or in furtherance of his trade. In terms of s 10(2)(a)(ii) of the Act, the airfare paid by a passenger for a flight from Zimbabwe to a foreign destination was zero rated for VAT, while any payment by the D airline to the appellant was subject to value added tax as it was neither exempted nor zero rated.

Held, further, that the positive acts of the appellant in purchasing the ticket on behalf of the passenger from the chosen airline through the central reservation system constituted "anything done" for the airline and thus E constituted a "service", for which the appellant was paid a commission. The only conceivable reason why the appellant earned commission consistently from the airlines over the years in question was because it was an agent of those airlines. The commission was subject to VAT. It was paid in US dollars and the VAT would, in terms of s 38(4) of the F Act, also have to be paid in US dollars.

Cases cited to

CIR v *SA Mutual Unit Trust Mgmt Co Ltd* 1990 (4) SA 529 (A)

Commr, SARS v *Cape Consumers (Pty)* Ltd 1999 (4) SA 1213 (C)

Liquidator, Pretoria Hotels Ltd v *CIR* 1929 TPD 946 G

R v *Lethaby* 1925 SR 61

Commr, SARS v *Pretoria East Motors (Pty) Ltd* [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA)

Legislation referred to: H

Fiscal Appeal Court Act [*Chapter 23:05*], s 10

2015 (1) ZLR p532

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Value Added Tax Act [*Chapter 23:12*], ss 6(1)(a) & (2)(a), 10(2)(a)(ii), A 37, 38(4) & 69(1)

Case information

D Ochieng, for the appellant

S P Msithu, for the respondent

Judgment

Kudya J: The appeal seeks to answer the question whether the income B that accrued to the appellant and reflected in the International Air Transport Association Bank Settlement Plan schedules was liable to value added tax, VAT, or not. The appellant submitted that these amounts, being in nature discounts, were not liable to VAT. The contrary submission of the respondent was based on the contention that the amounts in issue were commissions. C

Introduction

The appellant called the evidence of its managing director while the respondent relied on the testimony of one of its revenue specialists. Both witnesses relied on the annexures attached to the respondent's reply.

The background D

The appellant is a company duly incorporated in Zimbabwe, carrying on the business of a travel agent in Harare. The respondent is the statutory taxation authority in Zimbabwe.

The revenue specialist of the respondent and a colleague conducted a tax audit on the appellant between 5 September 2007 and 8 October 2008. He E interacted with the managing director and her accountant. The appellant provided him with all the annexures attached to the respondent's case. He presented the report of his findings to the appellant on 8 October 2008. His investigations revealed that while the appellant was paying VAT in local currency on commissions earned on the sale of tickets on domestic flights F it was not paying any VAT for commissions earned on international flights. The VAT on commissions earned on international flights was due in foreign currency, in terms of s 38(4) of the VAT Act [C*hapter 23:12*].

On 10 October 2008 the respondent issued an assessment for the calendar years 2006, 2007 and 2008 on the appellant, claiming US$28 917 in unpaid value added tax. The amount consisted of the principal sum of US$14 458.65 and G an equivalent amount in penalties. The appellant objected to the assessment on 5 December 2008. On 27 February 2009 the objection on the principal amount was disallowed while the penalty was reduced to 40 per cent of the principal amount. The appellant appealed to this court against both the disallowance and the penalty. H

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A A total of 11 issues were referred for determination. The bulk of the issues depend on the resolution of the main issue, *viz.*, whether the amounts constituted discounts or commissions and thus vatable, and if they were so vatable, whether any penalty was due on the appellant.

The facts B

The agreed facts

The bulk of the facts in this appeal emerged from the evidence of the managing director of the appellant and the annexures attached to the respondent's case. The appellant interacted on a daily basis with three major players in the international flight business. These were the passengers, the airlines and the C International Air Transport Association, IATA. The latter is an international trade association of the world's airlines, which *inter alia* facilitates the issue of tickets by airlines and their payment. The appellant was a member of this international organisation.

The passenger interacted with the airline and IATA through the appellant. The appellant assisted the passenger in the selection of a suitable airline that D was compatible with his needs on cost, class and convenience. It booked the seat, received payment for the airfare and issued the ticket to the passenger. The appellant also handled the complaints raised by the passenger against the chosen airline. The appellant charged the passenger a fee for these services that was based on the rates stipulated in the Esther guidelines on domestic, E regional and international routes. The service fee was liable for value added tax. It was common ground that value added tax was paid to the respondent on the service fee.

The appellant interfaced with the airline on two fronts. The appellant actively dealt with the airline in trouble-shooting passenger complaints. The main interaction was carried out indirectly through the IATA-run Amadeus F Central Reservation System. This is a real time computer based information system on which airlines sign up, post their services and quote their fares. The system provides information on the class of flights, fares, promotions, flight routes and flight times.

IATA operated the central reservation system. The system captured the price G of the airfare. The airfare was the aggregate of the amount charged by the airline for the flight, airport taxes, fuel surcharges and departure taxes charged by governments and civil aviation authorities. The airfare was fixed by the airline. IATA, through the Billing and Settlement Plan also known as the Bank Settlement Plan, every two weeks, running from 1-15 and 16 to the end of the month, generated gross billing schedules that it dispatched to the H appellant. A sample of the schedules entitled "breakdown of the agent sales

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per carrier" were attached as annexures A1-A14 to the respondent's case. A They cover the months of January, June and the last two weeks of December 2006, the first two weeks of January and June and the whole of December 2007, the whole of January 2008, the first two weeks of June and September 2008 and last week of August 2008. The amounts are denominated in United States dollars. They bear the appellant's name and address and amongst other things, the gross ticket sales, taxes charged and the "commission" due B to the appellant. The reconciliation on each breakdown indicates the "total commission" amount due to the appellant.

The appellant deposited the airfare paid by the passenger into a transitory bank account housed in a local bank for the benefit of the airlines. The account was in the name of the appellant. The appellant could not withdraw C any funds from the account. The account was also beyond the reach of the Reserve Bank of Zimbabwe.

The financial statements of the appellant for the years ending on 31 July 2004, 31 July 2005 and 31 July 2006, compiled by a firm of chartered accountants, consistently reported "sales commission" under the headline of "Commission Income". In letters written by the accounts supervisor and managing director D of the appellant dated 2 September, 10 October and 27 October 2008, the amounts in contention were referred to as "foreign commissions". The appellant's tax consultants who objected to the assessment on its behalf used the appellation "commission" to refer to this income.

The appellant did not dispute paying VAT on commission earned from E the sale of domestic tickets. The appellant did not lead evidence on the ZW$5 555 015.26 that it paid, under protest, on the advice of the Association of Zimbabwe Travel Agents on 13 October 2008, purportedly in discharge of its liability for the value added tax and penalties in question. It was the uncontroverted testimony of the revenue specialist that the respondent presented to the appellant a foreign currency denominated bill for payment, F which was never paid.

The disputed facts

In evidence, the managing director referred to the "commissions" in the "breakdown of the agent sales per carrier" that were generated by the G International Air Travel Association Bank Settlement Plan as discounts received. It was only in rare lapses of concentration that she called them commissions.

She stated that these discounts were fixed by the airlines at between zero per cent and one per cent of the real fare charged by the airline, exclusive of charges and taxes levied by civil aviation authorities and governments. H

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The A discount received by the appellant represented the difference between the full purchase price paid by the passenger and the amount charged to the appellant by the airline inclusive of government and civil authority charges, levies and taxes.

The revenue specialist stated that the documents attached to the respondent's B case established that the income that accrued to the appellant in the "breakdown of the agent sales per carrier" was commission. He further revealed that in all his dealings with the appellant's officials, the income was referred to as commission. Even on 27 October 2008, after the assessment had been issued, the managing director referred to the income as commission. Her major concern at that time was the refusal by the exchange control authorities to C authorise payment of VAT in foreign currency. It was only in the objection of 8 December 2008, that the term discount was raised for the first time. He disputed that the commission could be transmuted to discounts.

The managing director provided a historical backdrop to the commission going back the 25 years that she has been in the travel agency trade. The D airlines used to pay travel agents nine per cent commission across the board on the tickets sold for the airlines. At that time, the commission constituted the sole source of income for the travel agent. The travel agent did not charge any service fee to the passenger. In time, the airlines unilaterally stopped paying commission to travel agents. In its place, they introduced discounts ranging between zero per cent and one per cent. The travel agents resorted to E charging service fees to augment their income. She attributed her constant use of the word commission for discount as a throwback to those halcyon days.

Assessment of the credibility of the witnesses

The managing director generally gave truthful evidence on the operations of the appellant. Her version was heavily tilted towards the relationship F between the appellant and the passenger. It was thin on the nature and scope of the relationship between the appellant and IATA on the one hand and between the appellant and the airlines on the other. I formed the distinct impression that she deliberately did not make full and complete disclosure on these relationships for fear of undermining the appellant's position that the amount was a discount. I therefore found her to be a calculating witness G who deliberately proffered a half-baked story. In any event, her evidence on how the discount was received was unclear. She stated that the full amount paid by the passenger was deposited into the transitory account for the benefit of the airline. This appears to contradict para 13 of the appellant's case that averred that only the discounted total was remitted to the airline H while the discount was retained by the appellant. It would also contradict the

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reasonable inference drawn from the reconciliation on the IATA schedule of A the "total net to be paid" presumably to the airline that excludes the agent's commission and taxes levied.

The revenue specialist on the other hand gave his evidence well. He only testified on how he carried out his investigations. His version was mostly supported by the documents that were furnished to him by the appellant. B His assertion, first raised in his summary of evidence filed and served on the appellant on 16 September 2014 after the managing director had testified that the appellant received commission on domestic ticket sales for which VAT was paid was not canvassed with the managing director when she was cross-examined. For that reason, it lacks probative value. I did not find C the relevance of the juxtaposition of the old nomenclature of a geographic location in Harare to commission by appellant's counsel. It did not dent the credibility of the revenue specialist on his

understanding of what constituted commission nor did it justify the appellant's purported predilection for "commission" in place of "discount".

The issues D

A total of 11 issues were referred to trial. These were:

1. Whether the payment by the appellant of the sum of ZW$5 555 015.26 on 13 October 2008, which amount was admittedly received, retained and not returned, did not discharge any liability that the appellant might have to the respondent; E
2. Whether the amount due in respect of VAT was due in Zimbabwe currency and not in foreign currency;
3. Whether the amount sought to be taxed by the respondent as VAT was received by the appellant for the supply of goods and services; F
4. Whether the appellant received any commission or simply a discount in respect of the purchase price payable by the appellant's principal;
5. Whether such amount was received for a service rendered by the appellant;
6. Whether the principles laid down in *CSARS* v *Cape Consumers* applied and thus confirmed that there was no VAT payable in respect of the G discount;
7. Whether in terms of a direction from the Reserve Bank VAT was payable on the full amount of the discount or a lesser amount;
8. Whether the amount received by the appellant was from a source within Zimbabwe; H

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9. A Whether the appellant acted as an agent of the airlines concerned or on behalf of its own customers;
10. Whether the appellant received any amount in respect of services, in furtherance of a trade;
11. Whether the penalty imposed was fair and reasonable in all the applicable B circumstances.

It seems to me that issues 3 to 10 will all be resolved by the determination of whether the income earned was a commission or a discount. No evidence was led nor argument made in this appeal on issue 1, 2, 7 and 10. I concluded that the appellant abandoned these issues.

The onus C

In his submissions Mr *Ochieng,* for the appellant, suggested that the onus was on the respondent to show that the appellant provided a service to the airlines. Section 37 of the VAT Act casts the onus on the taxpayer to show on a preponderance of probability that the decision of the respondent against which it appealed was wrong. See *Commr, SARS* v *Pretoria East Motors (Pty) Ltd*D [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA) at para [6] and *CIR* v *SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A) at 538D. The onus lay on the appellant to show on a balance of probabilities that it received a discount rather than a commission from the airlines. E

The determination

The submissions by counsel were confined to whether the amounts assessed for VAT by the respondent constituted discounts or commissions in the hands of the appellant. Counsel were agreed that a discount was distinct from a commission. Indeed Russell J in *R* v *Lethaby* 1925 SR 61 at 63 F recognised that the word "discount" may suggest a different idea from the word "commission". By reference to *R* v *Lethaby*, Mr *Ochieng* suggested that a discount was a reduction of the normal retail price availed to a trader by the supplier of goods or services" while Mr *Msithu,* for the respondent, defined discount as "an allowance or a concession or a reduction of the price by the seller to the buyer." G

Counsel were agreed that a commission would attract VAT, while a discount would not do so. The other issues referred to trial appear to have been abandoned by the appellant's counsel who took the view that the definition of commission suggested by the revenue specialist narrowed the issues for determination. Simply put, it was that commission was a payment for a H taxable supply rendered by a registered operator.

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The word "discount" is defined in the *Shorter Oxford English Dictionary* A as follows:

> "1. An abatement or deduction from the amount or from the gross reckoning of anything; 2. Commerce: a. a deduction made for payment before it is due or for prompt payment of a bill or account; any deduction or abatement from the nominal value or price; to reckon as an abatement or reduction from a sum due; to deduct from". B

And in the online *Free Dictionary.com* by Farlax 2015 it is defined as

> "a deduction from the usual cost of something; synonyms: reduction, deduction, markdown, price cut, lower price, cut price, concessionary price, rebate, and take off".

On the other hand "commission" is defined In the *Shorter Oxford English Dictionary* as: C

> "10. A *pro rata* remuneration for work done as an agent."

And the on line *Free Dictionary.com* by Farlax 2015 defines it thus:

> "4. A fee or per centage allowed to a sales representative or an agent for services rendered; noun: 1. a fee paid based on a per centage of the sale made; mutually agreed upon or fixed by custom or law, fee accruing to an agent broker" D

It seems to me that a discount represents a reduction in the normal price of goods or services provided by a supplier to a customer, while a commission is a fee based on a per centage of the sale made that is mutually agreed upon or fixed by custom or law that accrues to an agent or a broker.

The starting point in resolving the dispute is to ascertain what constitutes E value added tax in our law. Value added tax is levied under s 6 of the Value Added Tax Act, *supra*. In terms of s 6(1)(a) as read with s 6(2)(a) the tax is paid by the registered operator for the supply of goods or services made by him on or after 1 January 2004 in the course or in furtherance of his trade.

It was common ground that the appellant was a registered operator. It was F further common cause that the transactions that attracted VAT took place after 1 January 2004. It was further agreed that the payments were undertaken in the course or in furtherance of the appellant's business of travel agency. Mr *Ochieng* submitted that the appellant did not supply any service to the airlines but merely acted as an agent for the passengers. The appellant therefore placed the supply of a taxable supply in dispute. G

Mr *Msithu* correctly submitted that in terms of s 10(2)(a)(ii) of the Value Added Tax Act, the airfare paid by a passenger for a flight from Zimbabwe to a foreign destination was zero rated for VAT while any payment by the airline to the appellant was subject to value added tax as it was neither exempted nor zero rated. H

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The A basic issue for determination is therefore whether or not the appellant supplied a service to the airlines. Mr *Ochieng* contended that three conjunctive elements must be fulfilled before the appellant could be found liable for value added tax. These are firstly, whether the appellant provided a service to the foreign airlines, secondly, whether the appellant charged the airlines for the service and lastly whether the airlines paid for the service. B

In regards to the first element, he contended that the appellant provided a service to the passengers and not to the airlines. It is correct that the appellant provided a service to the passenger for which it charged a fee, which fee was liable for VAT. Mr *Msithu*, for the respondent, contended that the appellant also supplied a service to the airlines that were chosen by the passengers. C Both "services" and "supply" are defined in the Act thus:

> "'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';
>
> 'supply' includes all forms of supply, irrespective of where the supply is effected, D 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 two words are of wide import. The positive acts of the appellant in purchasing the ticket on behalf of the passenger from the chosen airline E through the central reservation system in my view constitutes "anything done" for the airline. The appellant availed a monetary advantage to the airline. The positive deeds of the appellant thus constitute a service. The *Shorter Oxford English Dictionary* defines the word "supply" *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 F provide". Supply thus carries a variety of meanings. *In casu*, the appellant rendered service to the airline by sourcing passengers and securing the fare-paying passengers, receiving payment, selling, processing and issuing tickets to the passengers. In addition, it remitted the fares to the airline. In short, it carried out the duties that should have been performed by the airlines. I am G satisfied that the appellant provided a service to the airlines.

The second question for consideration that arises from Mr *Ochieng's* submission is whether or not the appellant charged the airlines for the service rendered. In my view, it did. Paragraph 13 of the appellant's notice of appeal revealed the existence of a contractual arrangement between the appellant and the airlines which incorporated a payment formula. The payment formula, H according to the testimony of the managing director, was initially unilaterally

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set by the airlines and then accepted by the travel agents before becoming a A fixed custom. The charges of the appellant were embedded in that contractual arrangement. The payment formula can easily be computed from the gross billing schedules appropriately termed "breakdown of the agent sales per carrier". The managing director equated the charge to between zero per cent and one per cent. A calculation of the amount due to the appellant from the B gross billing schedule of 1-15 January 2006 reveals a cost to gross charge of just in excess of six per cent. The title of the IATA gross billing schedules discloses the nature of the relationship between the appellant and the airline. The appellant was an agent of the airline. It must therefore have charged the airline in terms of the agreed formula fixed by custom.

The money paid by the passenger, according to the managing director, C belonged to the airline. The outflow of funds from the transitory account for the credit of the appellant would thus constitute a payment from the airline. In my view, it would be irrelevant whether the appellant accessed the funds before they were transferred to the airline as suggested in para 13 of its founding papers. Indeed, all the experts in the know ranging from D the appellant's senior management, through its auditors and tax advisers to IATA's Bank Settlement Plan all treated the amounts in issue as commissions. I am satisfied that payment was made by the airline to the appellant for the services rendered. The basis set out for receipt of the money by the appellant in paras 14, 15 and 16 of its case was the collection and remission of the airfare to the airlines. The amounts credited to the appellant were analogous E to collection commission earned by legal practitioners and estate agents for collecting debts. It would be a misnomer to call them collection discounts.

The payment of commission could only have been on the basis laid out by Tindall J in *Liquidator, Pretoria Hotels Ltd* v *Commissioner for Inland Revenue* 1929 TPD 946 at 951 where he stated that: F

> "The words 'selling commission' can only mean a commission earned for selling, and that implies a relationship of principal and agent between the seller and the agent."

The only conceivable reason why the appellant earned commission consistently from the airlines over the years in question was because it was G an agent of those airlines. The facts and principles set out by Davis J in *Commissioner, South African Revenue Services* v *Cape Consumers (Pty)* Ltd 1999 (4) SA 1213 (C) are distinguishable from the present case. In regards to the VAT issue it was stated at 1226J that:

> "The dispute is whether the discounts granted by suppliers are received as a result of a supply of services or goods by respondent." H

It A was common cause in the *Cape Consumers'* case that the taxpayer, a mutual buying organisation, received discounts for the benefit of buyers and not for its own benefit. In the present case, the appellant received commissions for its own benefit. There was a clearly defined contractual arrangement between the taxpayer and the buyers that defined the nature and scope of their B

relationship. The buyers were aware that they could only access the discount through the taxpayer. There was an absence of a similar arrangement between the appellant and the passengers. The claim for VAT in the *Cape Consumers* case, unlike in the present case, was not based on commission but on the contention that the taxpayer rendered services to suppliers and buyers and that its operations constituted an enterprise which received consideration for C such services. Davis J held that no income had accrued to the taxpayer. In the present case the IATA Bank Settlement Plan schedules demonstrate that income accrued to the appellant. Davis J held further that the arrangement did not constitute a service as defined in the South African Value Added Act. In the present case not only did the appellant interpose as the buyer's agent; it also supplied a taxable service to the airlines by performing their D obligations towards passengers.

In the present case the seller was the airline. The buyer was the passenger. There was no evidence adduced to show that the appellant ever bought tickets from the airlines, which it in turn sold to the passengers. Rather, the evidence demonstrated that the appellant stood in the shoes of the seller of E the tickets. A discount, by definition, cannot arise in the absence of a sale of tickets by the airlines to the appellant. The three contentions advanced by Mr *Ochieng* are all determined against the appellant. I am satisfied that the income disbursed to the appellant by the airlines constituted commissions rather than discounts. F

The cases of *R* v *Lethaby* and *Commissioner for the South African Revenue Services* v *Cape Consumers (Pty) Ltd* are unable to salvage the appeal. In *R* v *Lethaby* Russell J did not accept the accused's version that he had purchased the goods dispatched to him for "on sale or return". The accused had been convicted of theft for failing to return the goods that he could not sell. The learned judge did not find that the goods had been sold on discount to the G accused as contended by Mr *Ochieng*. He upheld the accused's appeal on the ground that he might have misunderstood the terms of the contract wherein "the best commission to allow you on these goods is a discount of 10 per cent of the retail prices" because of the use of both the words "commission" and "discount" in that contract. He also gave the accused the benefit of the H doubt following upon the English Law concept of "on sale or return" that

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deemed all the goods that were not sold and not returned to the supplier to A have been purchased by the holder.

In the present case, I hold that the appellant earned commission income from the airlines for the services rendered. The amount was subject to VAT. The resolution dispenses of the second, third, fourth, fifth, sixth and tenth issues. Those issues are all resolved in favour of the respondent. B

The seventh issue refers to a direction of the Reserve Bank of Zimbabwe and seeks determination of whether VAT was payable on the full amount of the Commission or a lesser amount. The directive was not produced. The appellant did not lead any evidence on it. Counsel for the appellant did not make any submissions on the issue. It is fair to hold that it was abandoned. The same applies to the eighth issue which sought determination of whether C the amount was received by the appellant from a source within Zimbabwe. It was not argued before me. I, therefore, consider it abandoned. The effect is that it is determined against the appellant.

The same fate would befall the first and second issues. The appellant did not pursue them in the appeal through evidence or argument. The provisions of D s 38(4) as read with s 69(1) of the VAT Act may have persuaded the appellant to abandon the point. Section 38(4) reads:

> "(4) Notwithstanding section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and the Exchange Control Act [*Chapter 22:05*], where a registered operator –
>
> (a) receives payment of any amount of tax in foreign currency in respect of E the supply of goods or services, that operator shall pay that amount to the Commissioner in foreign currency …
>
> In this subsection 'foreign currency' means the euro, British pound, United States dollar, South African rand, Botswana pula or any other currency denominated under the Exchange Control (General) Order, 1996, published in Statutory Instrument 110 of 1996, or any other enactment that may be substituted for F the same".

And s 69(1) reads:

> "Any price charged by any registered operator in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of paragraph (a) of subsection

(1) of section *six* in respect of such G supply, whether or not the registered operator has included tax in such price."

Section 38(4) prescribes how the VAT for income denominated in foreign currency is to be paid. It does not grant the respondent or the Reserve Bank of Zimbabwe or the Association of Zimbabwe Travel Agents or the court, or anyone else for that matter the power to order payment for value added tax in any currency other than foreign currency. The appellant conceded H

Kudya J

in A the papers that it earned the commissions in United States dollars. The value added tax was due in that currency. Had the appellant not abandoned the point, I would have found against it. The answer to the first issue would have been that the appellant did not discharge the VAT liability by defying the law and paying VAT in a currency of its choice. The answer to the second issue would have been that the currency of the account was United States B dollars and not local currency.

The last point related to the penalty of 40 per cent that was imposed by the respondent. The appellant did not lead any evidence on it. It did not argue on it. It did not lay any basis for me to exercise my discretion on the point. It simply abandoned the issue without explanation. I must dismiss the appeal C on the last issue.

Costs

The respondent sought dismissal of the appeal in its entirety with costs. I am empowered by s 10 of the Fiscal Appeals Court Act [*Chapter 23:05*] to impose costs against the respondent where I form the opinion that the decision D appealed against was grossly unreasonable or against the appellant if I find that the grounds of appeal were frivolous. The question raised on discounts in view of the documentation of the appellant satisfies me that the grounds raised were all frivolous. I will grant the respondent's prayer for costs.

Disposition

It is ordered that:

The appeal be and is hereby dismissed with costs. E

Atherstone and Cook, appellant's legal practitioners

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AUCTION CITY (PVT) LTD v EL ELION INVESTMENTS (PVT) LTD 2015 (1) ZLR 544 (H)

Citation	2015 (1) ZLR 544 (H)
Case No	Judgment No. HH-315-15
Court	High Court, Harare
Judge	Chitakunye J and Tsanga J
Heard	1 April 2015
Judgment	1 April 2015
Counsel	Ms *F Mahere*, for the appellant

N Sai, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Sale – *auction sale – auctioneer's commission – auctioneer entitled to* C *commission when contract complete – contract completed on auctioneer's acceptance of bid by buyer*

Headnote

The appellant was an auctioneer and conducted the sale of certain equipment D belonging to a company which was being liquidated. It was a term of the sale that any deposit paid by a tenderer would be refunded less the agent's commission (including VAT) and any expenses incurred by the liquidator or her agents in the process of conducting the sale and its aftermath. The respondent was the successful bidder and the appellant E called on it to pay a deposit of 10 per cent of the price that had been bid. This the respondent did; the sale conditions were that the balance of the purchase price was to be paid within seven days. The respondent defaulted and despite being given a two week extension did not pay the balance. The appellant then cancelled the sale agreement. The respondent sought a refund of the deposit and was told that the agent's F commission and the expenses incurred in the process of conducting the sale and its aftermath exceeded the deposit that the respondent had paid and so the appellant would not be refunding the respondent any amount. The respondent sued the appellant in the magistrates court and was awarded a sum equating to 82 per cent of the deposit. On appeal, the appellant argued that the commission was due upon the acceptance G of the respondent's offer, as in any other contract.

Held, that in an auction sale, the auctioneer calling for bids is inviting offers, and each bid is an offer which, so far as the bidders are concerned, he may accept or reject at his discretion. Once accepted by the seller or the auctioneer, a contract for the sale of the auctioned property comes H

Chitakunye J

into A being. In other words, the bidder makes the offer and the seller or auctioneer has the option to accept the offer or reject it. The terms and conditions of such a sale will usually be as per the terms and conditions the seller or auctioneer will have put up in inviting offers. Anyone making an offer will be expected to be familiar with the terms and conditions for the intended contract once his offer is accepted. Once it is shown that an B auctioneer has sold the property he becomes entitled to his commission. Here, the contract of sale was concluded once the auctioneer accepted the respondent's offer. The challenge that befell the contract was that the respondent could not pay the balance of the purchase price. The failure by the respondent to pay the purchase price in terms of the contract C should not be a bar to the auctioneer getting its commission. To hold that because a party to a contract has defaulted and so the auctioneer is not entitled to its dues would work unduly harshly against auctioneers, as they would have to wait till the parties to a contract fulfilled all their obligations before getting paid. It is surely not the auctioneers' obligation to ensure that the parties fulfil their contractual obligations. The auctioneer D had fulfilled its mandate and earned its commission. The fact that the property was later sold to another party was irrelevant.

Case cited

Crusader Real Estate Consultancy (Pvt) Ltd v *CABS* 1999 (2) ZLR 257 (S) E

Legislation considered

Value Added Tax Act [*Chapter 23:12*], s 6(1)(a) and (d)

Case information

Ms *F Mahere*, for the appellant

N Sai, for the respondent F

Judgment

Chitakunye J: This is an appeal against the judgment of the magistrates court sitting at Harare in terms of which the appellant was ordered to pay to the respondent a sum of US$8 277 plus interest.

The appellant is an auctioneer. The appellant acting on behalf of Conte G Shoes (Pvt) Ltd in liquidation (represented by Theresa Grimmel) auctioned industrial shoe making equipment in June 2012. The respondent successfully bid for the equipment at a price of US$100 000. Upon the successful bid being accepted, the appellant proceeded to call upon the respondent to pay a deposit of US$10 000, being 10 per cent of the tendered amount. The respondent paid the said deposit and in terms of the conditions of the sale was H to pay the balance of the purchase price within seven days. The respondent

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defaulted in the payment of the balance of the purchase price despite being A granted, at its request, an extended time of 14 days within which to pay. The appellant subsequently cancelled the agreement of sale upon realising that applicant was not forthcoming with the balance of the purchase price.

A term of the sale by auction was that any deposit paid by a tenderer would be refunded less the agent's commission (including VAT) and any expenses B incurred by the liquidator or her agents in the process of conducting the sale and its aftermath (clause 9 of the Notes and Conditions of Sale).

After the agreement of sale had been cancelled the respondent sought the refund of its deposit. By letter dated 5 March 2013, the appellant advised the respondent that the agent's commission and the expenses incurred in the process of conducting the sale and its aftermath exceeded the $10 000 deposit C that the respondent had paid and so the appellant would not be refunding the respondent any amount.

The respondent, being dissatisfied, sued the appellant for the refund in the magistrates court. After a contested trial the trial magistrate ordered the appellant to pay to the plaintiff the sum of $8 277. D

The appellant has thus appealed against the trial magistrate's order. The grounds of appeal were that:

(1) The court *a quo* grossly erred and misdirected itself in finding that Clause 9 of the Notes and Conditions of Sale agreed to by the parties is invalid and unenforceable at law. E

(2) The court *a quo* erred and misdirected itself in finding that the Appellant could only charge Value Added Tax (VAT) and Commission after the conclusion of a sale.

(3) The court *a quo* grossly erred and misdirected itself, which misdirection amounts to an error of law in finding that the Appellant could not deduct F costs for security because the receipt was not in the appellant's name.

From the arguments presented by counsel for both parties the following issues emerge –

(a) when is a contract formed in a sale by auction?

(b) what terms and conditions govern such a contract? G

(c) when does an auctioneer's commission become payable?

It is pertinent to firstly ascertain when a sale by auction is said to be formed in an auction. Ordinary principles of contract law apply to transactions arising pursuant to a public auction. These maybe stated as the principles of offer and acceptance. H

When A is a contract formed in a sale by auction?

In *Business law in Zimbabwe* (Juta, 1998) at p 35, R H Christie states that:

> "Calling for tenders and conducting auctions are methods of endeavouring to obtain the best contractual terms by inviting members, or selected members of the public, to bid in competition with each other. It is characteristic of tenders that they are not revealed to rival tenderers, and of auctions that bids are made B publicly. What concerns us here is who makes the offer, thereby putting the conclusion of the negotiations out of his further power … the auctioneer calling for bids is inviting offers, and each bid is an offer which, so far as the bidders are concerned, he may accept or reject at his discretion."

It is thus clear that what constitutes an offer to purchase the property is the bid at the bidded price. Once accepted by the seller or the auctioneer, a contract C for the sale of the auctioned property comes into being. In other words, the bidder makes the offer and the seller or auctioneer has the option to accept the offer or reject it. The terms and conditions of such a sale will usually be as per the terms and conditions the seller or auctioneer will have put up in inviting offers. Anyone making an offer will be expected to be familiar with D the terms and conditions for the intended contract once his offer is accepted.

In Christie *The Law of Contract in South Africa* 6 ed 2011 (LexisNexis) at p 47, the learned author states that:

> "More frequently, the terms on which the auction is to be held are drawn up by the seller or auctioneer in the form of 'conditions of sale'. To be effective, these E must be read out at the beginning of the sale, or other reasonable steps must be taken to bring them to the notice of buyers. If this is done, the conditions will be binding even on bidders who arrive late and have not read them or heard them read out, since they could have asked for information on them. These conditions may create rights and duties not only between the seller and the bidders but between the auctioneers and the successful bidder on such matters as the payment of the auctioneer's commission." F

It is invariably the trend that the terms and conditions are put up for the bidders to know in advance the terms and conditions of the sale. Such conditions include the deposit required, the fate of the deposit in the event of a successful or failed bid, the auctioneer's commission and other attendant details for the auction. G

When does an auctioneer become entitled to its commission?

The next issue is when does an auctioneer's commission become due? The appellant's argument was that the commission was due upon the acceptance of the respondent's offer as in any other contract. The respondent on the other hand contended that commission was not yet due. Both parties referred to H*Crusader Real Estate Consultancy (Pvt) Ltd* v *CABS* 1999 (2) ZLR 257 (S).

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In that case Ebrahim JA, quoting from *Martin* v *Currie* 1921 TPD 50, A held at 260B that:

> "An auctioneer is employed to sell the property by auction on the conditions arranged: if he sells the property he gets his commission; if he does not sell the property he gets no commission."

It is thus clear that once it is shown that an auctioneer has sold the property B he becomes entitled to his commission. In the *Crusader* case *supra* the acceptance of the price bid was subject to confirmation by the sheriff, hence when the sheriff declined to confirm the sale as the price was too low, the court accepted that the sale had not been concluded and so the commission was not due.

In casu, it is common cause that the respondent's offer was accepted, after C which the respondent was asked to pay the deposit, which it duly did. Clearly, in my view, a contract of sale was concluded. The challenge that befell the contract was that the respondent could not pay the balance of the purchase price. The respondent's contention that the contract was not concluded does not hold water. The auctioneer's duty was to ensure a contract of sale was D entered into and that each party to that contract was aware of their obligations. This the auctioneer did. The failure by the respondent to pay the purchase price in terms of the contract should not be a bar to the auctioneer getting its commission.

Clause 9 of the Notes and Conditions of Sale provided that: E

> "The balance of the total amount of the invoice must be paid to Auction City within 7 days of the notification of the outcome of the tender. Should this condition not be met in its entirety, the sale may be cancelled at the sole discretion of the liquidator. In such case, any deposit will be refunded less agent's

commission (including VAT) and ANY expenses incurred by the liquidator or her agents in the process of conducting the sale and its aftermath." F

As aptly submitted by the appellant's counsel, the appellant discharged its duties as an auctioneer because the sale, the subsequent breach notwithstanding, came about by the auction conducted by the appellant. The fact of the respondent's breach does not detract from the fact that the appellant rendered its services in conducting the auction which led to the sale. G The appellant's commission was pegged at 10 per cent of the tendered price, which in this case is US$10 000. The respondent's contention that the sale was not concluded and so the appellant was not entitled to its commission is in my view misplaced. To hold that because a party to a contract has defaulted the auctioneer or agent is not entitled to its dues would work unduly harshly against auctioneers as they would have to wait till parties to a contract fulfilled H

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all A their obligations before getting paid; but surely it is not the auctioneers' obligation to ensure that parties fulfil their contractual obligations.

I am thus of the view that the trial magistrate erred in holding that there was no sale and that as such the appellant was not entitled to its commission.

The respondent's counsel also argued that as the appellant subsequently B sold the property after the respondent had failed to raise the balance of the purchase price, the sale was not complete and the appellant is not entitled to its commission. Unfortunately, as already alluded to above, the respondent's failure and the appellant's cancellation of the contract serve to confirm that the two parties had entered into a valid agreement of sale hence its cancellation. The resale was a natural consequence of the cancellation. The auctioneer C had fulfilled its mandate and earned its commission.

The trial magistrate's finding that clause 9 of the Notes and Conditions of Sale is illegal and cannot be enforced is, in the light of the above, not sustainable. Such a finding was based on the conclusion that there was no sale. This clause, in my view, is a key component of the terms and conditions of the D agreement the respondent agreed to in bidding. This included that the total amount must be paid within seven days of the notification of the outcome of the tender, and the consequence of failure to meet that condition.

The trial magistrate alluded to the fact that the VAT referred to in the clause pertained to when the goods have been sold. In that regard she referred to E s 6(1)(d) of the Value Added Tax Act [*Chapter 23:12*] and concluded that such VAT was not yet due. The appellant's argument was to the effect that the VAT in issue pertains to the service provided by the auctioneer for which a commission is due. In that regard, the relevant section is 6(1)(a) and not 6(1)(d). Section 6(1)(a) states that:

"6 Value Added Tax F

(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 by the Charging Act on the value of –

(a) the supply by any registered operator of goods and services supplied by him on or after 1 January, 2004, in the course or furtherance of any trade carried on by him; …" G

The VAT in question is on the value of the auctioneer's services which in this case is $10 000 and not on the purchase price. Counsel for the appellant thus argued that the trial magistrate erred in referring to s 6(1)(d) as the applicable section for the VAT being claimed by the appellant. Section 6(1)(d) relates to value added tax on goods sold and would be calculated on the purchase H price. Section 6(1)(d) which the trial magistrate alluded to states that:

"Subject to this Act, there shall be charged, levied and collected, for the benefit A of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of goods and services sold through an auctioneer(as defined in section 56(6)) by persons who are not registered operators."

An analysis of the two subsections confirms that they relate to two deferent scenarios. Subsection (a) relates to supply of services whilst (d) relates to B goods and services sold through an auction.

The term "service" is defined in s 2 as –

> "... anything done or to be done, involving the granting, assignment, cession or surrender of any right or the making 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'". C

From the above, I am of the view that the appellant provided a service as per s 6(1)(a). I am inclined to agree with the appellant's counsel that the appellant did provide a service for which a commission was due and so was the VAT in relation to that commission. That service comprised conducting a successful auction sale in which a buyer was secured and an agreement of sale entered into. D

Whether or not security costs were due?

The appellant's counsel argued that the trial magistrate erred in not accepting the evidence pertaining to the provision of security services in the sum of $8 000. The relevant part of the magistrate's judgment on this issue reads as follows: E

> "The defendant relied on a receipt written under Groovemark Security in the name of one Mrs Grimmel. During the leading of the evidence the witnesses for the plaintiff confirmed that the premises were manned not by a uniformed security guard. Such piece of evidence [*sic*] was not rebutted by the defendant and the witness for the defendant refused to shed more light on that issue. The receipt is not in the defendant's name Auction City and this court cannot use it F as a piece of evidence."

The above reasoning was attacked on the basis that it seeks to ignore the clear provision of clause 9. Clause 9 of the conditions of sale allowed for the deduction of "any expenses incurred by the liquidator or her agents in the process of conducting the sale and its aftermath". It is common cause G that the receipt was in the name of Mrs Grimmel, who from the record of proceedings, was the liquidator. The fact that the receipt was not in the appellant's name should not have been the deciding factor as the condition clearly provided for costs incurred by the liquidator as well. The issue the trial magistrate ought to have exercised his mind on is whether the security costs were incurred in the process of the sale and its aftermath. I am of the H

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view A that whether the receipt for security services was in the name of either the auctioneer or the liquidator did not make a difference as long as the costs were incurred in the process of the sale and its aftermath.

The trial magistrate seemed to take issue with the fact that the security guard was not in uniform. That in my view is of no consequence as it was not part of the condition that those providing security services must be in uniform. B All that was required of the appellant is to show that the security services were provided, leading to costs being incurred.

In conclusion therefore, it is apparent that the trial magistrate misdirected himself when he held that the appellant had not earned its commission as the sale was not completed but had been cancelled. He also erred in concluding that C clause 9 of the Notes and Conditions of Sale was illegal and not enforceable.

In the circumstances the appeal is hereby allowed with costs. The judgment of the court *a quo* be and is hereby set aside and is substituted by the following-

The plaintiff's claim be and is hereby dismissed with costs. D

Coghlan, Welsh & Guest, appellant's legal practitioners

Mundia and Mudhara, respondent's legal practitioners

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PG INDUSTRIES (ZIMBABWE) LTD v JONES HOLDINGS (PVT) LTD 2015 (1) ZLR 552 (H)

Citation	2015 (1) ZLR 552 (H)
Case No	Judgment No. HH-336-15
Court	High Court, Harare
Judge	Tsanga J
Heard	10 March 2015; *CAV*
Judgment	1 April 2015
Counsel	*T Mpofu,* for the applicant *D Ochieng,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *scheme of arrangement with creditors – requisite majority of creditors in favour of scheme – sanctioning of scheme by court – limited circumstances in which court could refuse to sanction scheme and override wishes of majority* D

Headnote

The rationale behind the Companies Act [*Chapter 24:03*], providing in the manner that it does in s 191(2), gives some indicator of what the court should look out for to be sufficiently satisfied to sanction a scheme of compromise or arrangement between a company and its creditors. The E difficulty of obtaining the consent of each individual is core to allowing the sanctioning of the scheme on the basis of majority approval. While a court generally cannot refuse to sanction a scheme where the requisite majority have approved it, where cogent reasons are placed before the court as to why it should not sanction the scheme, it obviously has a duty to consider the objections placed before it in arriving at its final F conclusion, since, once a court sanctions a scheme, the scheme is binding on dissenters and apathetic members.

In reality, a scheme of arrangement necessarily requires some give and take on the part of all those involved, which is why the statutory position should ultimately be central in assessing whether or not to sanction a G scheme. The requisite guideline, namely the approval of a scheme by three quarters of creditors or class or creditors, or members or class of members, is there as a beacon to assist the court in its assessment of the general acceptance of the scheme. It is a yardstick that is crucial for the court to arrive at a conclusion whether or not it can or should dispense with the need of unanimous consent by way of a court order. H

Tsanga J

While A the provision which permits the court to sanction a scheme does indeed leave room for possible refusal, it would be in very exceptional circumstances that the court would disallow a scheme and override the interests of the majority on account of a single creditor whose debt is comparatively minimal when assessed in light of the overall debt owed to the consenting majority. In any case, it would open the flood gates for B litigation were the court to start playing business rather than legal umpire in such matters. Courts are indeed ill-equipped to set aside a scheme of arrangement that will have been thoroughly considered by those with the requisite

business interest. Whilst dissentient voices have a right to be heard, a case of unfairness would need to be truly manifest to justify C a deviation from the norm, which is ordinarily that of granting to those who voted in favour of the scheme a chance to see it come to fruition. After all, often at the core of a scheme of arrangement necessitated by economic hardship is the desire to the return a company's operations to a sound footing, which will result in a win-win situation for all involved, creditors and shareholders alike. D

Cases referred to

Ex p *Macey's Stores Ltd* 1983 (2) SA 657 (ZH)

Parker v *W B G Kinsey & Co (Pvt) Ltd* 1987 (1) ZLR 188 (S)

Legislation considered E

Companies Act [*Chapter 24:03*], s 191(2), 193(1)(e)

Insolvency Act [*Chapter 6:04*], s 2

Case information

T Mpofu, for the applicant

D Ochieng, for the respondent F

Judgment

Tsanga J: On 18 December 2013, the applicant, PG Industries (Zimbabwe) Ltd, sought and was granted an order in terms of s 191 of the Companies Act [*Chapter 24:03*] that scheme meetings be convened with members, secured lenders, secured supplier and debenture holders and concurrent creditors. This was for the purpose of considering the scheme of arrangement as part G of an overall composite scheme proposed by the applicant to essentially regain economic viability.

On 26 March 2014, following the holding of the various meetings, the applicant re-approached the court *ex parte*, seeking this time the court's sanctioning of the combined scheme. However, it was not to be, as one of its creditors, H Jones Holdings (the respondent herein), appeared in court and objected to the

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confirmation of the scheme. This was on the basis that it should have been A regarded as a secured creditor. It made an oral application for leave to file its opposing papers. On 21 May 2014 Ndewere J granted Jones Holdings leave to file its opposing papers on the basis that the court does not act as a mere rubber stamp to scheme arrangements. She also stated that the court has a duty to hear any objections in order to arrive at a proper conclusion regarding B any provisions to be made for any party dissenting from the compromise arrangement. She placed reliance on s 193(1)(e) for this position and also drew strength from the local case of Ex p *Macey's Stores Ltd* 1983 (2) SA 657 (ZH) where objections were considered, albeit ultimately the objections did not prevent the confirmation of a scheme.

Jones Holdings having filed its papers, this was the hearing of the opposed C matter to the application for confirmation. The applicant's standpoint is that the scheme should be sanctioned by the court on the basis that it has been approved by the by the requisite majority among its various classes of shareholders and creditors as required by the law.

Section 191(2), on which it relies is couched, as follows: D

> "If the majority in number representing three fourths in value of the creditors or class of creditors or members or class of members,as the case may be present and voting either in person or by duly authorised agent or proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court,be binding on all the creditors" (my emphasis). E

Mr *Mpofu* on behalf of the applicant emphasised what he termed the crucial factual and legal reality of the applicant having observed all the requisite legal steps needed for a scheme to be approved by the court. He also stated that the court cannot refuse to sanction the scheme on account of the objection of a single creditor. Such interference, he opined, would interfere with the whole body of creditors. He relied on *Parker* v *W B G Kinsey & Co (Pvt) Ltd*F 1987 (1) ZLR 188 (S), wherein the

court stated that in an application to set aside a scheme, it would want to know the attitude of the creditors generally and would not be prepared to make a decision until the body of creditors had in some competent manner elected whether or not to annul the compromise or arrangement. Furthermore, he pointed out that to annul the scheme on account of one creditor owed roughly $600 000 when the sum total G of those owed $21 million have approved the scheme would be manifestly unreasonable. His additional argument was that the applicant's claim will not change the numbers in terms of voting for the scheme. The applicant's position is, therefore, that the special treatment that the respondent seeks is not provided for in the applicable sections. H

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The A respondent's major objection to the scheme is that the chairman of the scheme meetings erred in arriving at the conclusion that it is not a secured creditor. It bases its claim of being a secured creditor on the following facts. On 2 August 2011 it concluded a written agreement with PG Merchandising Ltd (PGM), a subsidiary of the applicant, whereby it sold its 30 per cent interest in Zimtile to PGM and the applicant stood as guarantor. The price B was US$1 500 000, payable as deposit of $750 000 and the balance in 12 equal monthly instalments of US$62 500 with effect from 31 January 2012. The deposit was paid, but it is the respondent's position that since its payment PG has only made sporadic payments as regards the balance. In terms of transfer, under the agreement of sale ownership of the sale shares, as well C as the risk and profit in the sale shares and Jones loan account, passed to PGM on the effective date. Share transfer, and a certified resolution of the directors of Jones Holdings recording their approval of the transfer, was to be made on payment in full of the purchase price. The effective date of the sale was 1 July 2011. Interest was payable at the rate of 13 per cent per annum. Penalty interest on any outstanding balance was also payable at the D rate of 20 per cent, in addition to the normal interest. It was to be calculated on from the date on which the unpaid amount was due.

The respondent thus asserts that it is impossible for Zimtile to enter into the restructuring scheme without its approval. It insists that to date it has not resolved to approve the restructuring. It is argued that the chairperson of E the scheme meetings behaved contrary to the rules of natural justice in the manner he handled its claims. Its argument is also that since the title of the shares was to be only transferred upon full payment, it has a lien over the sale of the shares pending payment of the purchase price in full. Its position is that it would be manifestly unfair to disregard its interests when it took F steps to protect its position as creditor.

On the basis of the above, the respondent's standpoint is that it is owed $1 164 422.30 as at 30 April 2014. The respondent insists that it is not a concurrent creditor, noting that the other creditors consist largely of trade creditors and utility organisations. The major difference is that it has a right of retention over 30 per cent of the shares in Zimtile until it has been paid G in full and is therefore secured by a debtor credit lien.

Mr *Ochieng*, who argued on its behalf, insisted that the court's concern should also be whether the scheme is a fair one and reasonable one. He pointed out that the secured creditors are owed $4 million whereas the respondent is owed $1 million – a reality which, he says, would have had a domino H effect on other creditors. In favour of the non-sanctioning of the scheme, he

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argued that the secured creditors have been made to believe that the debt is A a lot less than it actually is.

What the respondent demands, as articulated in its papers, that the applicant either seeks or obtains its consent, or that the scheme be not sanctioned. It says that, if necessary, further meetings will need to be convened with the creditors. In the final analysis, the respondent asserts that the application be B dismissed with costs or alternatively that the court gives directions as to how the matter may be fairly resolved to the respondent's aforementioned scale.

The actual clause in the agreement of sale of the shares in question, of the agreement regarding transfer of title that the respondent says makes it a preferential creditor through retention of possession, reads as follows:

> "9.1 Within seven days of payment in full of the purchase price and of all interest C and other amounts due in terms of this agreement Jones Holdings shall deliver to PG Merchandising the following

documentation:

9.1.1 Share transfer forms duly signed on behalf of Jones Holdings and/or its nominee/s for transfer of the sale shares, together with the share certificates in respect of the sale of shares;

9.1.2 A certified copy of a resolution of the directors of Jones Holdings D recording their approval of the transfer of the sale shares to PG Merchandising;

9.1.3 A cession in writing, of Jones Holdings loan account, if any, duly signed on behalf of Jones Holdings ceding all right, title and interest in and to Jones Holdings loan account to PG merchandising; E

9.1.4 Letters addressed to Zimtile by two directors nominated as directors by Jones Holdings, tendering their resignations as officers of the company."

Moreover in terms of clause 12, PGM was bound by stipulated undertakings regarding Zimtile until the purchase price had been paid. It is on the basis of the above clause that the respondent argues it was a secured creditor as it F retained possession of title until the shares were fully paid for.

The respondent's grievance was considered by the chairman of the scheme meetings who arrived at the conclusion that the respondent was not a secured creditor premised on the absence of a pledge agreement and a perfection of that security. The chairman's report filed 29 January 2014 captured the G resolution of the claim and status of Jones Holdings as follows in arriving at the conclusion that it was an unsecured creditor:

"26.1 That the retention of the shares sold without a bilateral cession and pledge agreement in respect of the shares, perfected by delivery of the shares in negotiable order would not be sufficient to make Jones Holdings a secured creditor. H

Tsanga J

26.2 A No such documents above having been made available to the company before the meeting or handed over to me at the meeting, my decision for purposes of the meeting was that the creditor was not secured and was therefore a concurrent creditor.

26.3 As regards quantum the record date for the purposes of the meeting was 30 September 2013 and claims would be treated as they appeared in record B books of the company as at that date. I further made the point that in general, I would consider values as referring to capital rather than interest. However nothing turned on this aspect."

Given the fact that Jones Holdings' claim for preferential consideration had been considered by the scheme chairman, Mr *Mpofu* argued that that there is no statutory procedure which allows the court to interfere with a C determination made by the chairman of the statutory meetings. He maintained that the only remedy would have been by way of review of the chairman's decision. He also argued that, in any event, the respondent had been engaged in negotiations with the applicant to collaterise the debt proving that it was not a secured creditor. He was emphatic that the chairman's position was D unassailable that what was needed to make the agreement a security was a cession of the shares and a pledge of shares to the respondent and that this had not taken place.

Since the court is not merely there to rubber stamp, it follows that the essence of a grievance if presented to the court must at least be engaged with regardless of the position that will have been taken by the chairman of the E scheme meetings. After all the aim of the court in its scrutiny is to ensure that a scheme is not manifestly unfair.

The respondent argues that s 2 of the Insolvency Act [*Chapter 6:04*] defines a secured creditor as one who "has a preferment right by virtue of any special mortgage, landlord's hypothec or right of retention". It argues that one form F of retention is a debtor-creditor lien and that it has the right to retain the buyer's shares until the buyer has paid all that is due under the contract.

A party who wants to secure protection against claims by third parties to the collateral must secure their interest. For a creditor to have maximum legal rights, the security agreement must not only be created but that it must also G be perfected. The parties must intend that security of interest be created by the agreement in question. But a security agreement alone will not create a security of interest unless it is perfected. Perfection can generally be through possession depending on the nature of the collateral or execution of specific documents. Once such security of interest is created and perfected then it is enforceable against third parties. If there is an agreement and it is unperfected, H then the creditor remains subordinate to other secured creditors.

Tsanga J

In casu the issue is whether the clause in the agreement of sale outrightly A created a security of interest which was perfected. In other words, the issue is whether adequate steps were taken that would be sufficient to put third parties on notice that respondent is a preferential creditor.

Clearly conscious of the risks of selling the shares on a credit basis, the respondent took the added precaution of inserting a clause on retention of title B until the payment of the full purchase price. In my view, the security clause that was inserted, though material in many respects regarding its intention, as a creditor cannot be said to have sufficiently constituted a security of interest that was perfected. For instance, there was no specific share pledge agreement that was subsequently executed accompanied for instance by a resolution from the board of directors of PGM approving the pledge of shares C pending full payment of the purchase price to Jones Holdings. The debtor must authenticate the security agreement. If, as Mr *Ochieng* described, this is a debtor/creditor lien, then the debtor should have subsequently signed a specific agreement giving it rights to the purchased property and agreeing to use it as collateral.

Since it cannot be said that the totality of the writing in the sale agreement D was sufficient to constitute a perfected security of interest, the absence of a more specifically dedicated security agreement makes the chairman's position unassailable. Building onto the understanding captured in the sale agreement, to make Jones Holdings a secured creditor, what was subsequently necessary was, as he put it, "a bilateral cession and pledge agreement in respect of the E shares, perfected by delivery of the shares in negotiable order". Stocks and shares are incorporeal and their transfer is through an instrument in writing. As observed by R H Christie *Business Law in Zimbabwe* p 450*,* to create a pledge of incorporeal things, cession takes the place of delivery. Thus even if there was an agreement to create a security of interest, the agreement alone did not perfect the interest. F

The respondent's grievance in seeking to have the scheme set aside does bring to the fore the rationale behind the Companies Act providing in the manner that it does in s 191(2), some indicator of what the court should look out for to be sufficiently satisfied to sanction a scheme. Evidently the difficulty of obtaining the consent of each individual is core to allowing the G sanctioning of the scheme on the basis of majority approval. While a court generally cannot refuse to sanction a scheme where the requisite majority have approved it, where cogent reasons are placed before it as to why it should not, it obviously has a duty to consider the objections placed before it in arriving at its final conclusion since once a court sanctions a scheme, it is binding on dissenters and apathetic members. H

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Tsanga J

It A cannot be down played that in reality a scheme of arrangement necessarily requires some give and take on the part of all those involved. It is for this reason that the statutory position should ultimately be central in assessing whether or not to sanction a scheme. The requisite guideline, namely the approval of a scheme by three quarters of creditors or class or creditors, or members or class of members, is there as a beacon to assist the court in its B assessment of the general acceptance of the scheme. It is a yardstick that is crucial for the court to arrive at a conclusion whether or not it can or should dispense with the need of unanimous consent by way of a court order.

While the provision which permits the court to sanction a scheme does in indeed leave room for possible refusal, in my view that it would be in very C exceptional circumstances that the court would allow a scheme to override the interests of the majority on account of a single creditor whose debt is comparatively minimal when assessed in light of the overall debt owed to the consenting majority. In any case, it would open the flood gates for litigation were the court to start playing business rather than legal umpire in such matters. Courts are indeed ill equipped to set aside a scheme of D arrangement that will have been thoroughly considered by those with the requisite business interest. Whilst dissentient voices have a right to be heard, a case of unfairness would need to be truly manifest to justify a deviation from the norm which is ordinarily that of according those who would have voted in favour of the scheme, a chance to see it to fruition. After all, often at the core of a scheme of arrangement necessitated by economic hardship, E is the desire to the return a company's operations to a sound footing which will result in a win-win situation for all involved. This includes creditors and shareholders alike.

The papers reveal that the parties have been engaged in some dialogue, albeit without closure, ever since the issue of the respondent's standing as F a creditor was surfaced. There is nonetheless some discernible common ground among the two parties, if, as the applicant's counsel pointed out in arguing that the respondent's debt was indeed unsecured, the respondent has been engaged in discussions to secure its debt. Opening the door to negotiations would suggest some appreciation on the applicant's part that the respondent's position is not entirely without merit and that there is some G grasp that the respondent cannot be at par with creditors for utility bills. It is apparent from the agreement that the intention behind the insertion of the retention clause was seemingly to create a security of interest, though admittedly it was not perfected. It was also the respondent's averment in its papers that on 13 March 2014 the applicant's finance director advised by H email that he had engaged Interest Research Bureau (IRB) to do a calculation

Tsanga J

of the respondent's claim and that the final order to shareholders for the A EGM excluded Zimtile from divisionalisation; allegedly in recognition of the amount due to respondent. It was however not made privy to the final decision. It is for the parties therefore to pursue to their logical conclusion the initiatives that have been set motion. There will be no order as to costs.

Since the primary purpose of this application is for this court to assess whether B the law's requirements to enable it to sanction the scheme of arrangement have been met, this court finds no reason that is sufficiently compelling to deny applicant the sanctioning of its scheme.

Accordingly it is ordered that:

1. The scheme document of PG Industries (Zimbabwe) Ltd attached as annexure B thereto, be and is hereby modified as follows: C
   1.1 by the deletion of the first paragraph in clause 2.1.1 and its replacement with the following:
   "The company owes $5.3 million to secured lenders (see appendix (3). The secured lenders Scheme comprises:
   (a) A swop of the debt owed by PGIZ to their lenders with immovable D properties on mutually agreed valuations and other terms and conditions; or
   (b) A deferred payment plan to settle amounts owed on the following terms:
   Facility type Amortised Loan E
   Tenure: 36 months from date of the Court sanction of the scheme
   Standstill period: 3 months
   Settled period: All amounts owed including accrued interests will be amortised on monthly basis over 33 months following the standstill period. F
   Interest rate: An all in interest rate of 12% per annum.
   Security: Immovable properties".
   1.2 By the deletion of paragraph (b) from clause 2.1.3 and any reference in clause 2.1.3 to an option.
2. The scheme of arrangement proposed by PG Industries (Zimbabwe) Ltd G as modified in terms of this court order be and is hereby sanctioned in terms of section 191(2) of the Companies Act [*Chapter 24:03*].

Dube, Manikai & Hwacha, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners H

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MUGUTI & ANOR v TIAN ZE TOBACCO CO (PVT) LTD & ANOR 2015 (1) ZLR 561 (H)

Citation 2015 (1) ZLR 561 (H)

Case No Judgment No. HH-364-15

Court High Court, Harare

Judge Mathonsi J

Heard 8 April 2015

Judgment 8 April 2015

Counsel *E Gijima,* for the applicants
Ms *T Chiguvare,* for the first respondent
Second respondent in default

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Court – C *High Court – jurisdiction – sale in execution of dwelling house – High Court's power to stay sale when debtor makes reasonable offer to pay debt – no comparable provision in rules of magistrates court – writ of execution granted by magistrates court in pursuance of judgment granted there – application to High Court to prevent sale – High Court* D *not able to entertain such application*

Practice and procedure – *execution – sale – dwelling house – High Court's power to stay sale when debtor makes reasonable offer to pay debt – no comparable provision in rules of magistrates court – writ of execution granted by magistrates court in pursuance of judgment granted there –* E *application to High Court to prevent sale – such application incompetent*

Headnote

The first applicant was sued by the first respondent in the magistrates court for a sum of money which ordinarily would exceed the civil jurisdiction of the magistrates court. In spite of this, the court gave judgment in F favour of the first respondent. A writ of execution was issued against the applicants' immoveable property and the second respondent, the messenger of court, attached the property. The resident magistrate was notified, as required by the Magistrates Court (Civil) Rules 1980. The magistrate then notified the Secretary to the Ministry of Local Government, who did not reply, so the magistrate authorised the sale G in execution of the property. The messenger of court advertised the sale of the property. This led to an application to the High Court by the applicants, seeking to halt the sale on condition that the debt was repaid in three monthly instalments.

Held, the application had been made in the wrong court. Rule 348A of the H High Court Rules provides for the stopping of the sale in execution of a

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Mathonsi J

dwelling house if the court is satisfied that there is a reasonable probability A that the execution creditor's claim will be satisfied or settled from the National Housing Fund. The execution debtor himself is entitled to make the application where the dwelling is occupied by him or members of his family. Similar provisions are to be found in Order 26 r 8 of the Magistrates Court (Civil) Rules. They were meant to provide sanctuary to debtors when attachment of dwelling houses became a serious national problem B which was rendering a lot of people homeless. The legislature intervened and a fund to cater for such problem was set up. The High Court Rules went further in r 348A(5a) to provide a remedy to a judgment debtor who has made a reasonable

offer to pay, other than placing reliance on the Housing Fund, to approach the court to secure a stay of the sale on C condition of the offer. No such provision exists in the Magistrates Court (Civil) Rules, but even if there were such a provision, it would have to be enforced in that court. What the present applicants had done was to seek an order in the High Court to stay proceedings being pursued by another court, which has complete enforcement mechanisms for its orders and rules that provide for the procedure to be followed; and in so D doing to employ rules of the High Court which applied to orders issued by the High Court. That was incompetent. No amount of benevolence or indulgence could save the applicants. The court could simply not entertain an application which had been made in the wrong court and which sought to apply rules not applicable to the case. E

Cases cited

Kuvarega v *Registrar General & Anor* 1998 (1) ZLR 188 (H)

Masendeke v *CABS & Anor* 2003 (1) ZLR 65(H)

Legislation considered F

High Court Rules 1971 (RGN 1047 of 1979), rr 356 & 348A

Magistrates Court (Civil) Rules 1980 (SI 290 of 1980), Order 26 r 8

Case information

E Gijima, for the applicants

Ms *T Chiguvare,* for the first respondent

Second respondent in default G

Judgment

Mathonsi J: For reasons which are not apparent from the papers placed before me, the first respondent sued the first applicant in the magistrates court of Harare in case number 19780/13 for payment of the sum of $73 577.93 together with interest of 5 per cent per annum and costs of suit on the scale H

Mathonsi J

of A legal practitioner and client and obtained judgement on 7 November 2013. I say the reasons are not apparent because a claim of that magnitude would ordinarily be made in this court, the magistrates court's civil jurisdiction being currently limited to only $10 000.

Subsequently, a writ of execution against immovable property, being Stand 8 B Good Hope Township of Lot 7 of Good Hope, Westgate Harare, was issued on 14 November 2014 after the first respondent had failed to locate sufficient movable assets to satisfy the debt. That property was then attached in execution by the second respondent in terms of Order 26 r 8 of the Magistrates Court (Civil) Rules 1980. I say that because the second respondent, sought authority from the resident magistrate for the area to sell the property, presumably C acting in terms of Order 26 r 8(2) of that court's rules which provides that whenever a dwelling is attached, the messenger shall forthwith send written notification to the magistrate and then take no further steps.

The magistrate sent written notification of the attachment to the secretary in the Ministry of Local Government, Public Works and National Housing D who did not bother to respond. On 19 February 2015 the magistrate wrote to the second respondent in the following:

> "Reference is made to my letter to the Secretary dated 2 January 2015. The Secretary has not respondent(*sic*) to the letter. In terms of O 26 r 8, you are hereby directed to proceed with the sale of four attached properties. Be guided accordingly. E
>
> B Pabwe
>
> Resident Magistrate
>
> Harare Civil Court"

After receiving those instructions from the magistrate, the second respondent, who I must stress is an officer of that court charged with the execution of writs coming out of that court, proceeded to

advertise the property for sale F by public auction on 10 April 2015. It is that advertisement which has jolted the applicants into action and triggered the filing of this urgent application wherein they seek the following relief:

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be G made in the following terms:

(a) The sale of Stand No 8 Goodhope Township of Lot 7 of Goodhope be and is hereby suspended on condition that the applicant pays the judgement in three equal monthly instalments of USD 22 054 beginning on the 1st of July 2015 until the debt is settled and if applicant defaults on any one payment execution will proceed. H

(b) The applicants pay the costs.

2015 (1) ZLR p564

Mathonsi J

INTERIM RELIEF A

It is hereby ordered that pending the confirmation of this matter, the applicant is granted the following relief:

1. The sale of stand No. 8 Goodhope Township of Lot 7 of Goodhope be and is hereby suspended on condition that the applicant pays an amount of USD 22 054 on or before the first day of each month provided that the first such payment shall commence on or before 1 July 2015. In the event that B the applicants defaults in respect of any one payment the sale in execution shall proceed.
2. The second respondent shall suspend any action towards the sale in execution of the property referred to in paragraph 1 hereof.
3. A copy of this order or shall be served on the first and second respondent's legal practitioners." C

Never mind that the interim relief is the same as the substantive relief; (*Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H)), but clearly this is an application made in terms of r 348A of the High Court of Zimbabwe Rules 1971 for the stopping of a sale in execution to facilitate settlement of a claim. Ordinarily there would be nothing wrong with it except that it has been made in the wrong court. D

Rule 348A deals with stopping sales in execution conducted by the Sheriff of the High Court in pursuance of a writ issued in terms of r 346. In terms of r 348A(1), where a dwelling has been attached, the Sheriff is required to forthwith send the Secretary of the Ministry responsible for the administration of the Housing and Building Act [*Chapter 22:07*] notification E of the attachment. Subrule (4) allows the Secretary to approach this court by chamber application for an order staying the sale. A judge will issue a provisional order staying the sale if satisfied that there is a reasonable probability that the execution creditor's claim will be satisfied or settled from the National Housing Fund. F

In terms of subrule (5a), the execution debtor himself is entitled to make the application where the dwelling is occupied by the execution debtor or members of his family. This court ruled in *Masendeke* v *CABS & Anor* 2003 (1) ZLR 65 (H) at 70E that in terms of r 348A(6) any such application shall be treated as urgent as no valid argument can be advanced against the urgent treatment of an application in terms of r 348A. G

A writ issued in terms of r 346 is in Form No. 36 of the High Court Rules and is issued following the grant of an order by this court and cannot possibly relate to a writ issued following the grant of an order by a magistrate. The procedure relating to attachment of immovable property in the magistrates court is governed by Order 26 r 8 of the rules of that court. It provides: H

2015 (1) ZLR p565

Mathonsi J

"8 Attachment of dwelling A

(1) In this rule –

'dwelling' means a building or part of a building, including a flat, designed as a dwelling for a single family and includes the usual appurtenances and out buildings associated with such a building;

'Secretary' means the Secretary of the Ministry responsible for the B administration of the Housing and Building Act [*Chapter 22:07*].

(2) Whenever a dwelling is attached under rule 7, the messenger shall forthwith send the provincial magistrate or magistrate of the court from which the warrant of execution was issued, as the case may be, written notification that the dwelling has been attached and is to be sold in execution, and the messenger shall take no further steps in regard to the sale of the dwelling for a period of forty days, C pending notification by the magistrate concerned in terms of subrule (4).

(3) Upon receiving notification of the attachment of a dwelling in terms of subrule (2) the magistrate shall forthwith send the Secretary –

(a) written notification that the dwelling has been attached under this order and is to be sold in execution; and

(b) copies of all documents and particulars relating to its attachment. D

(4) If, within 30 days after being sent notification under subrule (3), the secretary notifies the magistrate in writing that he proposes to satisfy or settle the judgment creditor's claim from the National Housing Fund established by section 14 of the Housing and Building Act [*Chapter 22:07*], the magistrate shall, without undue delay, notify the messenger in writing. E

(5) On receiving notification under subrule (4), the messenger shall –

(a) inform the judgment creditor of the Secretary's proposal; and

(b) take no further steps in regard to the sale of the dwelling concerned until a period of sixty days has elapsed from the date on which he received such notification.

(6) For the purpose of calculating any time- limit under this order, any period F during which the messenger is required by subule (2) or (5) to take steps in regard to the sale of any dwelling shall be disregarded".

The provisions of Order 26 r 8 are similar to those of r 348 of the High Court Rules.

They were meant to provide sanctuary to debtors when attachment of dwelling G houses became a serious national problem which was rendering a lot of people homeless. The legislature intervened and a fund to cater for such problem was set up. The High Court Rules went further in r 348A(5a) to provide a remedy to a judgment debtor who has made a reasonable offer to pay, other than placing reliance on the Housing Fund administered by the Secretary, H to approach the court to secure a stay of the sale on condition of the offer.

2015 (1) ZLR p566

Mathonsi J

Unfortunately there is no similar remedy in the Magistrates Court Rules. A Even if it were there, it would be available for enforcement in that court. What the present applicants have done is to seek to stay proceedings being pursued by another court, which has complete enforcement mechanisms for its orders and rules that provide for the procedure to be followed, in this court employing rules of this court applying to orders issued by this court. In my view that is incompetent. You cannot mix oil with water. B

Mr *Gijima*, who appeared for the applicants, conceded that the application seeks to stay execution which has been levied in terms of the Magistrates Court Rules. He further conceded that it seeks to apply High Court Rules on a matter governed by the Magistrates Court Rules and that it is therefore out of order. He however submitted that I must indulge the applicants because C there is no provision in the Magistrate Court Act [*Chapter 7:10*] and the Magistrates Court Rules allowing for such an application to be made. For that reason, the applicants had no option but to come to this court.

This is a matter in which no amount of benevolence or indulgence can save the applicants. I simply cannot entertain an application which has been made in the wrong court and seeks to apply rules not applicable to the case. D

The first respondent opposed the application on grounds other than the issue of an approach made to the wrong court. It stated in the opposing affidavit of Loveness Ngwanga, its legal counsel, that the property attached is not a family dwelling E as the applicants and their family live at Dunine Farm in Beatrice and that they had in fact consented to the sale of the dwelling by private treaty as far back as January 2014. It produced evidence in the form of the messenger of court's returns showing the attachment of their household furniture at Dunine Farm Beatrice.

In addition to that, the first respondent attached proof that the applicants F also own a house in Waterfalls Harare. It further asserted that the applicants have previously made endless undertakings

and proposals to settle the debt which have not been honoured and there is nothing to show that the present offer will be different.

I do not consider it necessary to decide the merits of the application, having taken the view that the applicants are in the wrong court. I must say, however, that in light of the evidence produced in opposition, the applicants would G have had serious difficulties sustaining a case even on the merits.

In the result, the application is hereby dismissed with costs.

Mapaya & Partners, applicants' legal practitioners

Muvirimi Law Chambers, first respondent's legal practitioners H

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CARE INTERNATIONAL IN ZIMBABWE v ZIMBABWE REVENUE AUTHORITY & ORS 2015 (1) ZLR 567 (H)

Citation	2015 (1) ZLR 567 (H)
Case No	Judgment No. HH-373-15
Court	High Court, Harare
Judge	Mtshiya J
Heard	24 March 2015; *CAV*
Judgment	15 April 2015
Counsel	*D Ochieng*, for the applicant *A Moyo*, for the first respondent *A Makoni*, for the third respondent
Case Type	Opposed matter
Annotations	No case annotations to date

Flynote

Practice and procedureC – *parties – Commissioner-General of Zimbabwe Revenue Authority – proceedings against – notice required in terms of State Liabilities Act [Chapter 8:14] before proceedings may be instituted*

Revenue and public financeD – *Zimbabwe Revenue Authority – Commissioner-General of – has taken over functions of Director of, and Commissioner of, Customs and Excise – legal proceedings against – subject to same requirement for sixty days' notice to be given before proceedings may be instituted – failure to give such notice – proceedings invalid*

Headnote

The E applicant was a non-profit making organisation engaged in humanitarian work that was, in law, entitled to a rebate or refund of duty on such goods as the Commissioner-General of the first respondent might approve. The first respondent seized a large amount of wire from the premises

of the third respondent, one of the applicant's approved suppliers. The F goods were seized on suspicion that, although a rebate of duty had been applied for and granted, the goods were not destined for consumption or use in an aid or technical co-operation project in which the applicant was involved. That led to investigations by both the applicant and the first respondent, which found that fraudulent purchase orders had been G placed by the second respondent, an employee of the applicant. The purchase orders raised had been neither processed nor approved by the applicant in terms of its procurement procedures. The first respondent demanded duty and a penalty of the same amount in respect of the seized goods. Nearly six months after the demand, the applicant filed an application for an order setting aside the first respondent's decision. H The first respondent raised a number of issues, the first of which (and

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the deciding issue) was that the applicant had failed to give 60 days' A notice of the proceedings, as required by s 196(1) of the Customs and Excise Act [*Chapter 23:02*], which provides that "No civil proceedings shall be instituted against the State, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to customs and excise until B sixty days after notice has been given in terms of the State Liabilities Act [*Chapter 8:14*]." Section 6(1) of the State Liabilities Act provides that no legal proceedings in respect of any claim for money or for the delivery or release of any goods shall be instituted against any officer or employee of the State in his official capacity unless notice in writing C has of the intention to bring the claim has been served at least 60 days before the institution of the proceedings.

In the Customs and Excise Act, "Commissioner" is defined as (a) the Commissioner in charge of the department of the Zimbabwe Revenue Authority which is declared in terms of the Revenue Authority Act [*Chapter 23:11*] to be responsible for assessing, collecting and enforcing D the payment of duties in terms of the Act; or (b) the Commissioner-General of the Zimbabwe Revenue Authority, in relation to any function which he has been authorised to undertake under the Revenue Authority Act.

Held, that there could be no doubt that the "Commissioner" referred to in s 196(1) of the Customs and Excise Act was the Commissioner-General E responsible for the supervision and management of the first respondent, which was an authority established in terms of s 3 of the Revenue Authority Act. Its functions were set out in s 4 of the Act, and its operations were overseen by the Commissioner-General. There was no dispute regarding the position or authority of the Commissioner-General in relation to the transition from the former office of Director or Controller of Customs F and Excise under the Act. The Authority, as agent of the State and under the supervision and management of the Commissioner-General, was charged with carrying out the functions spelt out in the Act and also in s 19(4) of the Revenue Authority Act. This explained the continued protection granted under s 196 of the Customs and Excise Act and s 6 of G the State Liabilities Act respectively. The Authority was an agent of the State, and continued to carry out the functions of the former department of Customs officers and the former department of Customs and Excise was still in our statutes. The protection has been retained for the benefit of the first respondent and its officers. H

Mtshiya J

Editor's note: A see *Zimbabwe Platinum Mines (Pvt) Ltd* v *ZRA & Ors* HH-169-15 (reported above in this volume, at p 124) where Makoni J held that the Revenue Authority did not fall under the purview of the State Liabilities Act.

Cases cited

Chiutsi v *Commr of Police & Ors* HH-65-05

Dube v *ZRA* HB-2-14 B

Machacha v *ZRA* HB-186-11

Tasmine Entprs (Pvt) Ltd v *ZRA* HB-115-09

Legislation referred to

Customs and Excise Act [*Chapter 23:02*], ss 2 & 196

Revenue Authority Act [*Chapter 23:11*], ss 3, 4, 19(4), 38 & 39 C

State Liabilities Act [*Chapter 8:14*], ss 6 & 7

Case information

D Ochieng, for the applicant

A Moyo, for the first respondent

A Makoni, for the third respondent D

Judgment

Mtshiya J: On 10 April 2013 the applicant filed this application for the following relief:

> "1. The decision of the first respondent of 20 December 2012 directing the applicant to pay duty in the sum of US$219 437.62 and a penalty of the same amount be and is hereby set aside. E
>
> 2. The costs of this application shall be borne by the respondents jointly and severally one paying the other to be absolved".

The first, second and third respondents all filed their notices of opposition to the application on 25 April 2013.

The background to the relief sought is that following investigations, which F are common cause to the other parties, the first respondent directed the applicant to pay duty totalling US$219 437.62 together with a penalty in the same amount in respect of goods it alleged the applicant had fraudulently imported into the country. The applicant, a non-profit organisation engaged in humanitarian work, is, in law, "entitled to a rebate or refund of duty on such goods as the Commissioner General of the first respondent may approve". G

On 27 September 2012, the first respondent, the Zimbabwe Revenue Authority (ZIMRA), seized 27 wire rolls weighing about 14.096 tonnes and 387 rolls of barbed wire weighing about 20 tonnes from the premises of the third respondent. The third respondent was one of the applicant's approved suppliers. The goods were seized "on suspicion that although a H rebate of duty had been applied for and granted, the goods were not destined

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for consumption or use in an aid or technical co-operation project" in which A the applicant was involved. That led to investigations by both the applicant and the first respondent. In the main the findings were that:

> "19.1 During the period extending from March 2011 – September 2012 fraudulent purchase orders in the name of Care International had been raised by the second respondent, who was employed as a Procurement Supervisor by B Care International. The purchase orders raised were neither processed nor approved by Care International in terms of its procurement procedures".

On 20 December 2012, following the conclusion of the investigations, the first respondent then wrote to the applicant in the following terms:

> "RE: POST CLEARANCE AUDIT 2009-2012: CARE ZIMBABWE
>
> I refer to the Post Clearance Audit exercise which our office was conducting C on your organisation.
>
> Please be advised that CARE Zimbabwe is being held responsible for the payment of duty totalling to USD219 437.62 plus a penalty of USD219 437.62. These amounts are arising from all the importations done by your organization and were not properly sanctioned in terms of sec 122 of the Customs and Excise (General) Regulations 2001, REBATE OF DUTY ON GOODS IMPORTED D BY A FOREIGN ORGANISATION UNDER AN AID OR TEHNICAL COOPERATION AGREEMENT. As per our meeting in the morning, please note that we will be waiting for your feedback by the 4th of January 2013.
>
> I wish to thank you so much for your cooperation during the exercise.
>
> Let me take this opportunity to remind you that goods cleared under the said E rebate shall not be disposed of other than for the purpose for which the rebate was granted without authority from the Commissioner General.
>
> Please feel free to contact the ZIMRA office for further information and clarification on the above case.
>
> Yours faithfully

L. Chibika (Ms) F

For Regional Manager Customs and Excise Region 1"

It is the decision contained in the above letter that the applicant seeks to have set aside.

A number of points *in limine* were raised by all the respondents.

In the main, in its opposing affidavit, the first respondent raised three main G points *in limine.* These were that:

(a) the applicant had not complied with s 196(1) of the Customs and Excise Act [*Chapter 23:02*] ("the Act")

(b) the applicant had not exhausted domestic remedies; and

(c) the applicant was approaching the court with dirty hands. H

2015 (1) ZLR p571

Mtshiya J

The A first point *in limine* raised by the first respondent, is of crucial importance, because all the other points can only be dealt with if the applicant is properly before the court. That includes points raised by other respondents. To that end, the first respondent averred:

"6.1 The application before this Honourable Court is premature and irregular. I B aver so because applicant has not complied with the mandatory provisions of section 196(1) of the Customs Act. The said section makes it mandatory that before instituting proceedings against the first respondent one shall first give sixty days' notice of its intention to institute civil proceedings against the first respondent before the proceedings are instituted.

6.2 In the present case, the applicant has not given any notice to the first respondent as required by the said section as read with the State Liabilities C Act [*Chapter 8:14*]

6.3 Over the years it has been the approach of this Honourable Court that the failure to give the required notice renders the application fatally defective, and I aver that the present case is no exception and it should be dismissed.

6.4 I am further advised that no court of law has the discretion to dispense with strict compliance with the provisions of a statute. Again it follows that the D present application is invalid for want of compliance with section 196 (1) of the Act.

6.5 On the above basis this application ought to be dismissed with costs".

Notwithstanding the fact that the other points *in limine* raised by the other respondents depend on the determination of the first point *in limine* raised E by the first respondent, I shall briefly state them herein.

The second respondent, who did not attend the hearing, also raised a number of points *in limine.* However, being in default at the hearing he was therefore barred, and detailing his points *in limine* will not serve any purpose.

The third respondent's points *in limine* were given as follows:

"4. The deponent to the applicant's affidavit has no authority to act on behalf F of the applicant. He has not given this honourable court proof of such authority nor has he made the necessary averment that could clothe him with authority. Accordingly the application is improperly before [the] court.

5. Secondly, the third respondent has wrongfully been made a party to these proceedings as no specific and substantive relief is being sought from it. The third respondent has been inconvenienced and made to suffer unnecessary G costs.

6. Accordingly, this application is an abuse of court process and should be dismissed with costs on a legal practitioner and client scale".

As the first point *in limine* raised by the first respondent is to the effect that there is no valid application before the court, it is therefore imperative to start H by examining that point. That is important because if that point is upheld,

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2015 (1) ZLR p572

Mtshiya J

everything else *in casu* will, in my view, indeed fall away. Upholding the A point *in limine* will mean that the application is fatally irregular and cannot be entertained.

It is important to proceed by indicating the exact provisions of the law that the first respondent is relying on in raising its first point *in limine*. Sections 6 and 7 of the State Liabilities Act [*Chapter 8:14*] provide as follows: B

"6 Notice to be given of intention to institute proceedings against State and officials in respect of certain claims

(1) Subject to this Act, no legal proceedings in respect of any claim for –

(a) money, whether arising out of contract, delict or otherwise; or

(b) the delivery or release of any goods; C

and whether or not joined with or made as an alternative to any other claim, shall be instituted against –

(i) the State; or

(ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity or;

(iii) any officer or employee of the State in his official capacity; D

unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings.

(2) A notice referred to in subsection (1) –

(a) shall be given to each person upon whom the process relating to the claim E is required to be served; and

(b) shall set out the grounds of the claim; and

(c) where the claim arises out of goods sold and delivered or services rendered, shall specify the date and place of the sale or rendering of the services and shall have attached copies of any relevant invoice and requisition, where available; and F

(d) where the claim is against or in respect of an act or omission of any officer or employee of the State, shall specify the name and official post, rank or number and place of employment or station of the officer or employee, if known.

(3) The court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the G court is satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant.

(4) For the purposes of this section, legal proceedings shall be deemed to be instituted by the service of any process, including a notice of application to court and any other document by which legal proceedings are commenced, in which the claim concerned is made. H

Mtshiya J

7 A Exemptions

Section *six* shall not apply to –

(a) a claim in which the debt concerned has been admitted to the claimant, expressly and in writing; or

(b) a counter-claim; or

(c) a B claim which the court or a judge or magistrate, on application, has determined to be urgent; or

(d) a claim in respect of which the defendant has waived, expressly and in writing, the notice required by section six".

The above exemptions are not relevant *in casu.*

Section 196 of the Customs and Excise Act ("the Act") as amended by C Act No. 17 of 1999 provides as follows:

"196 Notice of action to be given to officer

(1) No civil proceedings shall be instituted against the State, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to customs and excise until sixty D days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*].

(2) Subject to subsection (12) of section *one hundred and ninety-three,* any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity E for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law".

Section 2 of the Act defines the Commissioner referred to in s 196(1) above as follows:

"'Commissioner' means –

(a) the Commissioner in charge of the department of the Zimbabwe Revenue Authority which is declared in terms of the Revenue Authority Act [*Chapter 23:11*] to be responsible for assessing, collecting and enforcing the payment of duties in terms of this Act; or

(b) the Commissioner-General of the Zimbabwe Revenue Authority, in relation to any function which he has been authorised under the Revenue Authority Act [*Chapter 23:11*] to exercise".

The above definition creates a link between the Act and the Revenue Authority Act [*Chapter 23:11*], particularly when read together with ss 38 and 39 of the Revenue Authority Act. Sections 38 and 39 of the Revenue and Authority Act provide as follows:

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Mtshiya J

"38 Savings

Where, before the fixed date –

(a) the Commissioner of Taxes; or

(b) the Director of Customs and Excise; or

(c) an officer, proper officer or revenue officer;

made any assessment or decision, or issued any notice or directive, or did any other thing whatsoever in terms of an Act specified in the First Schedule, and that assessment, decision, notice, directive or other thing had or was capable of acquiring effect immediately before the fixed date, it shall be deemed to have been made, issued or done, as the case may be, by the appropriate Commissioner or officer in terms of the Act concerned as amended by this Act, and shall continue to have effect or to be capable of acquiring effect, as the case may be, accordingly.

39 Construction of certain references

Any reference in any enactment, other than a provision of an Act amended by the Third Schedule, or in any document to –

(a) the Director or Controller of Customs and Excise, shall be construed as a reference to the Commissioner in charge of the department which is declared in terms of subsection (2) of section *twenty-one* to be responsible for assessing, collecting and enforcing the payment of duties under the Customs and Excise Act [*Chapter 23:02*];

(b) the Department of Customs and Excise, shall be construed as a reference to the department referred to in paragraph (a);

(c) the Commissioner of Taxes –

(i) in relation to value added tax, shall be construed as a reference to the Commissioner in charge of the department which is declared in terms of subsection (3) of section *twenty-one* to be responsible for assessing, collecting and enforcing the payment of the value-added tax leviable under the Value Added Tax Act [*Chapter 23:12*];

(ii) in relation to any other tax or impost, shall be construed as a reference to the Commissioner in charge of the department which is declared shall be construed as a reference to the Commissioner in charge of the department which is declared in terms of subsection (2) of section *twenty-one* to be responsible for assessing, collecting and enforcing and enforcing the payment of the taxes leviable under the Income Tax Act [*Chapter 23:06*];

(d) the Department of Taxes, shall be construed as a reference to the department referred to in paragraph (c)".

In view of the foregoing clear provisions of the law, there can be no doubt that the Commissioner referred to in s 196(1) of the Act is the Commissioner-General responsible for the supervision and management of the first respondent.

2015 (1) ZLR p575

Mtshiya J

It is common cause that the notice referred to in s 196(1) of the Act was not given to the Commissioner General or first respondent before the filing of this application. The first respondent is an authority established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*] and its functions are given under s 4 of that Act as follows:

"4 Functions and powers of Authority

(1) The functions of the Authority shall be –

(a) to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues; and

(b) to advise the Minister on matters relating to the raising and collection of revenue; and

(c) to C perform any other function that may be conferred or imposed on the Authority in terms of this Act or any other enactment.

(2) For the better exercise of its functions, the Authority shall have the power, subject to this Act, to do or cause to be done, either by itself or through its agents, all or any of the things specified in the Second Schedule, either absolutely or conditionally and either solely or jointly with others". D

The operations of the authority are supervised and managed by a Commissioner-General, whose functions are stipulated under s 19(4) of the Revenue Authority Act as follows:

"(4) The Commissioner-General shall be responsible, subject to the Board's control, for –

(a) supervising and managing the Authority's staff, activities, funds and E property; and

(b) performing such other functions as the Board may assign to him or as may be conferred or imposed on him by or under this Act or any other enactment".

There is no dispute regarding the position or authority of the Commissioner-General F in relation to the transition from the former office of Director or Controller of Customs and Excise under the Act. The authority, as agent of the State and under the supervision and management of the Commissioner-General, is charged with carrying out the functions spelt out in the Act and also in s 19(4) of the Revenue Authority Act as quoted above. That explains the continued protection granted under ss 196 and 6 of the Act and the State G Liabilities Act respectively.

It was argued that in enacting the Revenue Authority Act, Parliament was already aware of the provisions of s 196 of the Act as amended by Act No. 17 of 1999, but it did not deem it necessary to expressly extend the protection to the new entity called the Zimbabwe Revenue Authority (i.e. H first respondent). That argument, however, does not go far to explain why

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the legislature did not expressly remove the protection from the agent of A the State, now seized with exactly the same functions that were formerly executed by the department of Customs and Excise. It cannot be denied that the authority (first respondent) is an agent of the State, and continues to carry out the functions of the former department of Customs and Excise. The law protecting the former officers and the former department of Customs and Excise is still in our statutes. The protection has been retained for the benefit B of the first respondent and its officers.

It is important at this stage to also take note of the endorsement on the official notice of seizure issued to the applicant on 27 September 2012. The relevant endorsement reads as follows:

"If you wish, you may, within three months from the date of this notice, make C your own written representations to the Port Manager of the Port shown on this notice, for the release of the goods.

Additionally or alternatively you may, within three months from the date of this notice and subject to the submission of written notification 60 days beforehand in terms of the provisions of section 196 of the Act, institute proceedings for the recovery of the goods from the Commissioner or for the payment of compensation D in respect of any dangerous or perishable goods which have been disposed of by the Commissioner.

If the Commissioner does not release the goods following representations made by you or if you do not institute proceedings within the period specified, any goods declared to be forfeited will become the property of the State without compensation". E

The endorsement on the seizure notice cannot be taken lightly. It explains the law and those affected, like the applicant, should obey the mandatory provisions of the law. There was therefore a clear need on the part of the applicant to give the requisite notice to the first respondent before making this application. Failure to give the notice was, in my view, fatal. There is therefore F no proper application before the court and as already stated, upholding this point *in limine* means that the court cannot proceed to do anything else. I liken this position to a situation, where, in an urgent application, the court, upon making a finding that there is no urgency, cannot proceed to the merits.

I am also unable to ignore the authorities relied on by the first respondent, namely *Tasmine Enterprises (Pvt) Ltd* v *ZRA* HB-115-09, *Machacha* v *ZRA*G HB-186-11, *Chiutsi* v *Commissioner of Police & Ors* HH-65-05 and *Dube* v *ZRA* HB-2-14, where the need to comply with s 196(1) of the Act was emphasized. In *Chiutsi*, *supra,* Bhunu J said:

"Apart from the need to exhaust domestic remedies before approaching the courts s 196 precludes the applicant from approaching the courts before observing laid down procedures … As the laid down 60 days period has not yet expired this H

Mtshiya J

application A is ill-conceived and premature. The section is mandatory and admits of no exception because it constitutes a prohibition without making provision for any exception".

In addition to the mandatory need for notice, I fully associate myself with the above. I agree with the first respondent that there is no valid application before the court and accordingly the rest of the other issues raised by the B respondents cannot be delved into. This finding estops me from going any further.

I therefore order as follows:

1. The first point *in limine* raised by the first respondent be and is hereby upheld. C
2. The application is not properly before the court and is therefore dismissed with costs.

Wintertons, applicant's legal practitioners

Kantor & Immerman, first respondent's legal practitioners D

Mbizo Muchadehama & Makoni, third respondent's legal practitioners

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S v MUTETWA 2015 (1) ZLR 578 (H)

Citation	2015 (1) ZLR 578 (H)
Case No	Judgment No. HH-374-15
Court	High Court, Harare
Judge	Mafusire J
Heard	16 April 2015
Judgment	16 April 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *compensation and restitution – how may be granted –* C *two methods – suspension of portion of sentence on condition of payment of compensation or grant of compensation order at request of injured party – distinction between two methods*

Headnote

There are two ways in which compensation or restitution may be ordered D following a criminal conviction. The first is where, acting in terms of s 358(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the court suspends the whole or a portion of the sentence on condition that the accused pays compensation for the damage or pecuniary loss caused by the offence. An application by the prosecutor or the complainant is not a pre-requisite. Such compensation is part of the sentence. The E suspended portion of the sentence falls away if the accused complies with the condition; if he complies only partially, the court may reduce the period of imprisonment to such extent as it considers appropriate in order to take account of the accused's partial compliance. The court may not order suspension on condition of compensation or restitution if a compensation order has been made in terms of Part XIX of the Act. F

The second is the grant of a compensation order in terms of Part XIX. The amount of such an order is not fettered by the usual limits of the court's civil jurisdiction, even though the court is exercising a special civil jurisdiction. The order for compensation may be in any amount and an order for restitution may be awarded whatever the value of the G property. Such an order is not part of the sentence. It may only be made on application by the injured party or by the prosecutor acting on the injured party's instructions (s 358). The award may be registered as an order of the court which made the award. The order is not suspended if an appeal is noted or even if it is successful. H

2015 (1) ZLR p579

Mafusire J

Legislation considered A

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 258(2)(b), (3)(b), (4) & (9), 367, 368(1), 372(1), (2) & (3), & 374

Judgment

Mafusire J: The accused was convicted of theft of trust property as B defined in s 113(2) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]. He was sentenced to 12 months' imprisonment of which five months' imprisonment was suspended for five years on condition of good behaviour. A further two months' imprisonment was suspended on condition of restitution. The remaining five months' imprisonment was commuted to C community service.

On scrutiny the regional magistrate raised two queries. The first was that the trial court sentenced the accused as a first offender yet the record makes no indication that the prosecution had so advised the court.

The second query was that the order of restitution was imposed by the trial court *mero motu,* i.e. without any application by the prosecutor or the D complainant as contemplated by s 368(1) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*] ("the CP & E Act")

To the first query, the trial magistrate conceded that she had omitted to record that the prosecution had indicated that the accused was indeed a first offender. To the second query the trial magistrate stated that she had acted in terms of s 358(3)(b) of the CP & E Act and that s 368(1), which the regional E magistrate had cited, applied to s 366.

In response to the response by the trial magistrate the regional magistrate argued that s 358(3)(b) did not refer to *restitution* but to *compensation*, and that at any rate, whether the section referred to compensation or restitution, the trial court ought not to have made such an order without an application F having been made by either the prosecutor or the complainant as required by s 368(1).

I have considered the record of proceedings and the queries by the regional magistrate. With regard to the first query, the trial magistrate ought to have recorded the fact that the prosecutor had informed the court that the accused G was a first offender. It is hoped that such a mistake will not recur. However, since the omission caused no prejudice, and since, according to the trial magistrate, the prosecutor had indicated that the accused was indeed a first offender, the proceedings shall not be upset for that omission.

With regard to the second query, the correct position, with all due respect to the regional magistrate, is that adopted by the trial magistrate. The following H should be noted:

Mafusire J

1 In terms of s 358(2)(b), as read with subs (3)(b), of the CP & E Act, A a court which has convicted a person of an offence which is not one specified in the Eighth Schedule, may suspend the operation of the whole or a portion of the sentence for a period not exceeding five years on condition that the accused pays compensation for the damage or pecuniary loss caused by the offence. An application by the prosecutor or the complainant is not a pre-requisite. B

2 The power of a court to suspend the whole or a portion of the sentence on condition of compensation in terms of s 358 aforesaid should not be confused with the power of the court to order compensation or restitution under Part XIX of the Act. The compensation under s 358 *is part* of the sentence. The award of compensation under Part XIX is not. C

3 That the compensation under s 358 is part of the sentence is clear from subss (4) and (9). In terms of subs (4), the suspended portion of the sentence falls away where the accused complies with the condition of suspension. Under subs (9), where the accused complies with only a part of the condition, then the suspended portion falls away to the extent of the part compliance, as the court may consider appropriate. D

4 That the compensation under s 358 is part of the sentence is also clear from the proviso to para (b) of subs (3) of s 358. It reads:

> "Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX." E

5 In other words, where the damage or loss caused by the offence is one in respect of which an award of compensation may be made by the court under Part XIX, then it is not competent for the court to impose it in lieu of a portion of the sentence as can be done under s 358(2)(b) as read with subs (3)(b). F

6 That the award of compensation under Part XIX is not part of the sentence is manifest from a reading of that whole part. It is clear that under this part the criminal court is enjoined to exercise a special civil jurisdiction which, among other things, is unfettered by the usual limits of civil jurisdiction, for example, such as those imposed on the court of a magistrate under the Magistrates Court Act,[*Chapter 7:10*], or any G other enactment. Section 367 of the CP & E Act expressly empowers the court to award compensation in *any* amount or restitution of property of *whatever* value.

7 That in making an award under Part XIX the court will be exercising a civil function is also evident from the following provisions: H

Mafusire J

- the A provision that requires that such an award be made only upon an application being made by the injured party or the prosecutor [s 368], which is not a requirement under s 358;
- the provision that the award of compensation be registered by the Registrar of the High Court or the clerk of the magistrate's court B for enforcement (s 372(1) and (2)), which is not necessary with a s 358 award; C
- the provision that says any appeal by the accused person against conviction or sentence or both does not affect or suspend the award, even if the execution of the sentence may have been suspended, or even if such an appeal is successful (s 372(3));
- the provision that the injured party in respect of whom the award is made is debarred from instituting separate civil proceedings in respect of the loss or injury which has been the subject of the award (s 374).

In conclusion, the award of compensation by the court under s 358 of the D CP & E Act, and the nature and purpose of such an award are manifestly different from those under Part XIX. The observation by the regional magistrate that s 358(3)(b) refers to "*compensation*" and not "*restitution*" is, with due respect, a distinction without a difference. In para (b) of subs (3) the compensation is for "damage or pecuniary loss caused by the offence."

In law "compensation" is money or something that one gives to another in E lieu of the hurt or harm or damage or loss caused. "Restitution" is the same. It is the giving back of something that was lost or stolen. It is also the payment, usually of money, for some harm or wrong done. Notwithstanding

that Part XIX of the CP & E Act is titled "COMPENSATION AND RESTITUTION", it is noted that, except for ss 366(2) and 367 where the term "restitution" is F used in reference to the restoration of property obtained unlawfully, in all other instances only the term "compensation" is used, the same as in s 358.

Therefore, the proceedings of the trial court are hereby certified as having been conducted in accordance with real and substantial justice.

Chigumba J agrees. G

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WHITEHEAD v REGISTRAR-GENERAL OF CITIZENSHIP & ORS 2015 (1) ZLR 582 (S)

Citation	2015 (1) ZLR 582 (S)
Case No	Judgment No. S-21-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Guvava JA
Heard	13 September 2013
Judgment	16 April 2015
Counsel	*L Uriri*, for the appellant *C Mudenda*, for the first respondent No appearance for the second to fourth respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – citizenship – by birth – cannot be revoked – revocation of citizenship or declaration as prohibited immigrant made before new Constitution came into effect – no longer relevant* D

Headnote

The appellant was born in Zimbabwe (then Southern Rhodesia) in 1944; his mother was born here in 1917. His father was South African by birth and came here in 1939. The first respondent (the Registrar-General) confiscated the appellant's Zimbabwe passport in 2005 on the grounds E that the appellant had not renounced his South African citizenship (by descent). The appellant then obtained a South African passport. The Minister of Home Affairs shortly afterwards declared the appellant to be an undesirable inhabitant or visitor to Zimbabwe. In 2011 the appellant sought a declaratur in the High Court that (a) he was a citizen by birth, (b) the order issued by the Minister was unlawful and consequently null F and void, and (c) as a citizen by birth he was entitled to all the rights and privileges that are enjoyed by a citizen, including the right to a Zimbabwean

passport. The court concluded that, once a Zimbabwean citizen acquires foreign citizenship, he immediately ceases to hold Zimbabwean citizenship and dismissed the application. G

Section 36(1) of the 2013 Constitution, which came into effect on 22 May 2013, provides that "Persons are Zimbabwean citizens by birth if they were born in Zimbabwe and, when they were born … either their mother or their father was a Zimbabwean citizen". The appellant had argued that the fact that he also held South African citizenship did not disentitle him, under the new Constitutional dispensation, to his Zimbabwean citizenship by birth and that citizenship by birth cannot be revoked by the State. The first respondent argued that the appellant lost his Zimbabwean H

2015 (1) ZLR p583

Garwe JA

citizenship A by operation of law. He was also declared a prohibited immigrant. His status as a prohibited immigrant remained extant and consequently it would not be competent for him to be declared a citizen of Zimbabwe by birth. B

Held, that the first respondent's argument overlooked the fact that there was a new Constitution in force and that new rights had been created by the Constitution. The argument was also oblivious of the fact that any existing law that is inconsistent with the new Constitution is invalid to the extent of such inconsistency. Thus, any provision in the Citizenship of Zimbabwe Act C [*Chapter 4:01*] or the Immigration Act [*Chapter 4:02*] that is inconsistent with the provisions of s 36 of the current Constitution would be invalid to the extent of such inconsistency.

Held, further, that the appellant was born in Zimbabwe and, at the time he was born, both his parents were Zimbabwean citizens. The appellant was, by operation of law, a citizen of Zimbabwe by birth. Such citizenship cannot D be revoked by the State except in the circumstances provided for under s 39(2) of the Constitution, that is, in cases of fraud, misrepresentation or concealment of a material fact or, in the case of a child found in Zimbabwe and presumed to be a Zimbabwean citizen by birth, it is established that in fact the child was a citizen of another country. None E of these applied, so a decision to revoke his citizenship or to declare him a prohibited immigrant s clearly unlawful. The fact that the appellant also enjoyed South African citizenship or that at some stage he was branded a prohibited immigrant was now no longer relevant. He was a citizen by birth in terms of s 36(1) of the Constitution and entitled to all the benefits of citizenship. That was the end of the matter. F

Decision of Zimba-Dube J in *Whitehead* v *Registrar-General of Citizenship & Ors* HH-349-12 (judgment delivered 13 September 2012) reversed. G

Case referred to

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

Legislation considered

Citizenship of Zimbabwe Act [*Chapter 4:01*], ss 2 & 9

Constitution of Zimbabwe 2013, ss 36(1) & 39(2)

Case information

L Uriri, for the appellant H

C Mudenda, for the first respondent

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Garwe JA

No appearance for the second to fourth respondents A

Judgment

Garwe JA:

[1] After hearing counsel and perusing the papers filed of record, the court made the following order:

"1. The appeal is allowed with no order as to costs. B

2. It is hereby declared that the appellant is a citizen of Zimbabwean by birth in terms of section 36 of the current Constitution.

3. Reasons for this order are to follow in due course".

[2] What follows are the reasons for the order.

Background C

[3] The appellant was born in this country, then known as Southern Rhodesia, on 15 April 1944. His mother, Enid Marjorie Whitehead, was also born in this country on 11 April 1917. His father, born in South Africa, migrated to the then Southern Rhodesia in 1939 and later married the appellant's mother. At the time when the appellant was born, both his parents were citizens of this country, his mother by birth and his father by naturalization. D

[4] In October 2005 the first respondent confiscated the appellant's Zimbabwean passport on the basis that he had not renounced his entitlement to South African citizenship. The appellant then applied for South African citizenship and was subsequently issued with a South African passport. On E 16 December 2005, he was declared an undesirable inhabitant or visitor to Zimbabwe by the Minister.

Proceedings in High Court

[5] On 25 March 2011, the appellant, as applicant, filed a court application with the High Court at Harare seeking a declaratur that (a) he was a citizen G by birth, (b) the order issued by the Minister was unlawful and consequently null and void, and (c) as a citizen by birth he was entitled to all the rights and privileges that are enjoyed by a citizen, including the right to a Zimbabwean passport.

[6] The first respondent opposed the relief sought. It was his contention that, although the applicant was a citizen by birth, he had lost such citizenship as a result of his failure to comply with certain renunciation requirements. The Constitution of Zimbabwe Amendment (No. 3) of 1983 made provision for an Act of Parliament to be passed prohibiting dual citizenship. Consequent thereto, s 9 of the Citizenship of Zimbabwe Act [*Chapter 4:01*] prohibited all forms of dual citizenship. H

Garwe JA

[7] A The court *a quo*, after hearing argument, concluded that, once a Zimbabwean citizen acquires foreign citizenship, he immediately ceases to hold Zimbabwean citizenship. In the result, in a judgment dated 13 September 2012, the court *a quo* dismissed the application with no order as to costs.

[8] It is that order that the appellant has challenged before this court. B

New Constitution enacted

[9] On 22 May 2013, almost four months before the hearing of the appeal, the new Constitution i.e. Constitution of Zimbabwe Amendment (No. 20) Act 1 of 2013 came into operation. In s 36(1) thereof the Constitution provides:

"(1) Persons are Zimbabwean citizens by birth if they were born in Zimbabwe C and, when they were born –

(a) either their mother or their father was a Zimbabwean citizen; or

(b) … (not relevant)."

Appellant's submissions on appeal

[10] On the authority of the judgment of this court in *Mawere* v *Registrar-General*D& *Ors* 2013 (1) ZLR 578 (CC), the appellant has argued that the fact that he also holds the citizenship of South Africa does not disentitle him, under the new constitutional dispensation, to his Zimbabwean citizenship by birth. He further argued that citizenship by birth cannot be revoked by the State.

First respondent's submissions on appeal E

[11] The first respondent does not agree. He has submitted that the appellant lost his Zimbabwean citizenship by operation of law. He was also declared a prohibited immigrant. His status as a prohibited immigrant remains extant and consequently it would not be competent for him to be declared a citizen of Zimbabwe by birth.

Whether appellant is a citizen under the Constitution F

[12] It is clear that the argument by the first respondent overlooks the fact that there is a new Constitution in force and that new rights have been created by the Constitution. The argument also seems oblivious of the fact that any existing law that is inconsistent with the new Constitution is invalid to the extent of such inconsistency – s 2 of the Constitution. G

[13] Put differently, any provision in the Citizenship of Zimbabwe Act [*Chapter 4:01*] or the Immigration Act [*Chapter 4:02*] that is inconsistent with the provisions of s 36 of the current Constitution would be invalid to the extent of such inconsistency.

[14] It being common cause that the appellant was born in Zimbabwe and H that, at the time he was born, both his parents were Zimbabwean citizens,

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Garwe JA

the appellant is, by operation of law, a citizen of Zimbabwe by birth. Such A citizenship cannot be revoked by the State except in the circumstances provided for under s 39(2) of the Constitution.

[15] In *Mawere* v *Registrar General & Ors supra*, this court stated in clear terms that, in a case where it is common cause that a person was born in Zimbabwe and at the time of birth at least one of his parents was a Zimbabwean B citizen, the person enjoys citizenship by birth in terms of s 36(1) and such citizenship cannot be revoked or lost under any circumstances. Citizenship may only be revoked by the State in cases of fraud, misrepresentation or concealment of a material fact or, in the case of a child found in Zimbabwe and presumed to be a Zimbabwean citizen by birth, it is established that in fact the child was a citizen of another country. In a case, such as the present, C where it is not suggested that the citizenship was acquired through fraud, misrepresentation or concealment of a material fact, a decision to revoke his citizenship or to declare him a prohibited immigrant is clearly unlawful.

[16] In the *Mawere* case s*upra*, this court stated at 586D-E:

> "[27] What is significant about s 39 is that it does not provide for the revocation D of the citizenship of a person who is born in Zimbabwe to a Zimbabwean parent as provided in s 36 (1) of the Constitution.
>
> Read against s 39, the necessary corollary is that citizenship acquired in terms of s 36(1) cannot be revoked by the State under any circumstances."

At 587G, the court further remarked:

> "[35] Consequently, on a proper reading of all the provisions of Chapter 3, the E inference is irresistible that dual citizenship in respect of citizens by birth is not proscribed. Such citizenship exists by operation of law."

[17] The above remarks apply with equal force to this case. The fact that the appellant also enjoys South African citizenship or that at some stage he was branded a prohibited immigrant is now no longer relevant. He is a citizen by birth in terms of s 36(1) of the Constitution and is entitled to all the benefits F of citizenship. That is the end of the matter.

[18] On the issue of costs, both parties were agreed that a no costs order would meet the justice of the case.

[19] It was for the above reasons that we made the order cited in paragraph 1 of this judgment. G

ZIYAMBI JA and GUVAVA JA concurred.

Zimbabwe Lawyers for Human Rights, appellant's legal practitioners

Mudenda Attorneys, first respondent's legal practitioners H

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MPANSI & ORS v DUBE & ORS 2015 (1) ZLR 587 (S)

Citation	2015 (1) ZLR 587 (S)
Case No	Judgment No. S-19-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Hlatshwayo JA
Heard	16 July 2013; *CAV*
Judgment	21 April 2015
Counsel	*C F Dube,* for the applicants *N Chikono,* for the first respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Costs – C deceased estate – when estate should bear costs of litigation – executor – when should bear costs personally – only where executor's conduct is such that court should mark its disapproval – need for special order to that effect to be specifically pleaded D

Headnote

The applicants had been the successful appellants in a matter relating to a deceased estate and the validity of a will. The order of the Supreme Court had stated that the judgment of the court *a quo* should be altered to read "Judgment is granted for the plaintiffs with costs …" They argued that E the court's earlier order was ambiguous, and should be interpreted to mean that the first respondent (the executor) was liable for costs in his personal capacity or, alternatively, since he participated in the litigation in a representative capacity as a duly appointed executor, he should pay such costs *de bonis propriis* as he had allegedly conducted himself F grossly negligently and maliciously in defending the validity of the will. They applied for the order to be altered accordingly.

The application was brought in terms of r 449 of the High Court Rules 1971, on the basis that, under r 58 of the Supreme Court Rules 1964, the practice and procedure of the Supreme Court shall follow that of the High Court where the rules of the Supreme Court are silent on any G matter. Under r 449, a court or judge may, in addition to any power it or he may have, *mero motu* or upon application by any party affected, correct, rescind or vary any judgment or order, *inter alia*, in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission. The applicants submitted that the H order of the Supreme Court lacked clarity and certainty as to whether

Hlatshwayo JA

the first respondent was liable to pay costs personally or whether such A costs should be paid out of the estate.

Held, that costs may be awarded against a deceased estate, but a special order requiring that the executor should bear the costs personally must be specifically pleaded. If it is not, the ordinary rule that costs follow the event applies. This rule requires parties to pay costs in the capacities in B which they participate in litigation, based on the outcome of the matter. It applies even in legal proceedings involving deceased estates unless special circumstances are invoked, which had not been done here. In the court *a quo*, the matter was brought against the first respondent in his representative capacity, as executor. As a general rule executors are only visited with personal costs in exceptional circumstances. Generally, C where an executor litigates in the interest of the estate and not in his own interests, he will not personally be mulcted in costs in the absence of circumstances making it desirable for the court to mark its disapproval of his conduct. On appeal, the applicants prayed for ordinary costs consequent upon a favourable outcome to them. That is precisely what the Supreme Court granted in the impugned order. To introduce a higher D scale of costs and to insist on costs *de bonis propriis* at this stage was completely impermissible.

Cases cited

Bonsma v *Meaker NO & Ors* 1973 (2) RLR 16 (G); 1973 (4) SA 526 (R)E

Legislation referred to

High Court Rules 1971 (RGN 1047 of 1971), r 449

Supreme Court Rules 1964 (RGN 380 of 1964), r 58 F

Case information

C F Dube, for the applicants

N Chikono, for the first respondent

Judgment

Hlatshwayo JA: This is an application for the correction or variation of the order issued by the Supreme Court under SC 161/09 on 16 July 2011 allowing the appeal by the applicants (then appellants), on the basis that the G order is ambiguous. The application was filed under the same case number as the original appeal. The impugned order (*per* Sandura JA, with Garwe JA and Cheda AJA concurring) reads as follows:

> "1. The appeal is allowed with costs.
>
> 2. The order of the court *a quo* is set aside and the following is substituted: H

Hlatshwayo JA

> 'Judgment A is granted for the plaintiffs with costs to the extent that the will attested to by the late Richard Mpansi and registered with the second defendant under LW 47/2005 be and is hereby declared null and void.'"

The applicants contended that the above order must be interpreted to mean that the first respondent is liable for costs in his personal capacity or, alternatively, since he participated in the litigation in a representative capacity as a duly B appointed executor, he should pay such costs out of his own pocket (*de bonis propriis)* as he had allegedly conducted himself grossly negligently and maliciously in defending the validity of the will. Accordingly, the applicants pray that the above order be "corrected" to read as follows:

> "1. The appeal be and is hereby allowed *with costs (to be) borne by the first*C*respondent on a party/party scale*.
>
> 2. The order of the court *a quo* is set aside and the following substituted:
>
> 'Judgment is granted for the plaintiffs *with costs being borne by the first defendant on a party/party scale* to the extent that the will attested by the late Richard Mpansi and registered with the second defendant under LW 47/2005, be and is hereby declared null and void'" (emphasis added).

The key issue is whether this matter is properly before this court. D

The applicants have approached this court in terms of r 449 of the High Court Rules 1971. The Rules apply pursuant to r 58 of the Supreme Court Rules 1964, which provides that the practice and procedure of this court shall follow that of the High Court where the rules of this court are silent on any matter.

Rule 449 of the High Court Rules provides that a court or judge may, in E addition to any power it or he may have, *mero motu* or upon application by any party affected, correct, rescind or vary any judgment or order, *inter alia*, in which there is an ambiguity or patent error or omission, but only to the extent of such ambiguity, error or omission.

The applicants submitted that the order of the Supreme Court lacks clarity and F certainty as to whether the first respondent is liable to pay costs personally or whether such costs should be paid out of the estate.

That costs may be ordered against the estate is without doubt. However, such a special order of costs must be specifically pleaded, otherwise the ordinary rule that costs follow the event applies. The standard rule requires parties to G pay costs in the capacities they participate in litigation based on the outcome of the matter. This rule applies even in legal proceedings involving deceased estates unless special circumstances are invoked. In *Bonsma* v *Meaker* 1973 (2) RLR 16 (G); 1973 (4) SA 526 (R) at 531C-E the court observed as follows:

> "While normally in legal proceedings instituted by or against a deceased estate the ordinary rule that costs follow the event applies, there are circumstances under H which a person who is instituting proceedings against a deceased estate will,

> whether he is successful or not, be entitled to have costs made payable out of the A estate. This can be the position not only where the validity or construction of a will is in dispute but also in matters arising from or concerning the administration of an estate."

In my view, the Supreme Court order in question was crafted in line with the ordinary rule pertaining to costs. No special circumstances were alleged in B earlier proceedings, both in the High Court and Supreme Court, necessitating a departure from the ordinary rule. No claim was made for the executor to pay costs *de bonis propriis* at any stage until now. There is no suggestion that this court omitted to deal with any issue that had been raised. In the circumstances, it is difficult, nay impossible, to conclude that the order in issue is vague or ambiguous in any way. C

I am further fortified in this conclusion by an examination of how this case proceeded. This matter commenced by way of court application at the High Court but because it was found that there were irreconcilable disputes of fact, the matter was referred to trial and subsequently ended up before the Supreme Court on appeal. D

Of significance is the fact that at court application stage, the first respondent objected to his being cited in his personal capacity instead of his official capacity as the appointed executor. The applicants conceded the point and duly withdrew the matter against the first respondent in his personal capacity, tendering wasted costs. The matter then proceeded against the first respondent in his representative capacity of executor. E

As a general rule executors are only visited with personal costs in exceptional circumstances. The remarks of Corbett, Hahlo, Hofmeyr and Kahn *The Law of Succession in South Africa* (Juta & Co Ltd, 1980) are apposite. At p 601, they state:

> "Having regard to the executor's duty to defend the will, if such defence is F unsuccessful but was reasonable, the executor's costs will be ordered to be paid out of the estate as well as costs of the successful party. Generally, where an executor litigates in the interest of the estate and not in his own interests, he will not personally be mulcted in costs in the absence of circumstances making it desirable for the court to mark its disapproval of his conduct." G

No special order of costs against the first respondent was prayed for either at the High Court or Supreme Court. In fact, in the draft order of the High Court application, the applicants did not ask for costs at all. Nonetheless, after a full trial the High Court issued a standard order of costs, thus:

> "Accordingly it is ordered that:
>
> 1. The plaintiffs' claim is dismissed. H

Hlatshwayo JA

2. The A plaintiffs shall pay the first defendant's costs for both the application and trial jointly and severally the one paying the others to be absolved."

In their notice of appeal to the Supreme Court the present applicants (then appellants) sought the following relief:

"Appellants pray that the judgment of the court *a quo* be set aside with costs and be substituted by a judgment granting the relief sought by the appellants setting B aside the contested will with costs."

Once more, the applicants prayed for ordinary costs consequent upon a favorable outcome to them. That is precisely what the Supreme Court granted in the impugned order. There is nothing ambiguous about that order. Therefore, r 449 is not applicable. C

The attempt by the applicants to introduce a higher scale of costs and to insist on costs *de bonis propriis* at this stage is completely impermissible, matters having been definitively concluded by this court. These matters, not having been raised then, certainly cannot be raised now on the basis that r 449 applies.

As far as the costs of this application are concerned, there is no need to depart D from the ordinary rule that costs follow the outcome since no special order of costs to be paid out of the estate has been made. However, Mr *Dube,* for the applicants, indicated to this court that the value of the estate was so small that he has had to waive his fees and appear *pro bono.* It was not clear whether his commendable gesture applied only to this application or to the E whole litigation. However, according to correspondence on the record it appears that he had initially charged a fee of over $40 000 against the estate.

Certainly if Mr *Dube* is waiving the fees for all the proceedings, this would be a most welcome relief for the small estate already much diminished by the heavy litigation costs.

Although Mr *Chikono* in his heads of argument had sought costs on the legal F practitioner-client scale, in oral argument both parties agreed that an order directing each party to pay its own costs would be appropriate.

Accordingly, the application is dismissed. Each party shall bear its own costs.

ZIYAMBI JA andGARWE JA concurred. G

Dube, Manikai & Hwacha, applicant's legal practitioners

Ngarava Moyo & Chikono, respondents' legal practitioners

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BP ZIMBABWE (PVT) LTD v CEDAR PETROLEUM (PVT) LTD 2015 (1) ZLR 592 (H)

Citation	2015 (1) ZLR 592 (H)
Case No	Judgment No. HH-389-15
Court	High Court, Harare
Judge	Muremba J
Heard	23 February 2015; *CAV*
Judgment	22 April 2015
Counsel	*D Ochieng*, for the plaintiff

T Kanengoni, for the defendant

Case Type Special case

Annotations No case annotations to date

Flynote

Landlord and tenant – *lease – long term lease – whether tenant entitled to lease property back to owner – long term lease a form of alienation and lessee entitled to sublet premises to owner – clause in sub-lease agreement that sub-tenant not entitled to further sub-lease with lessee's approval* D *– lessee, as landlord, entitled to seek ejectment of further sub-tenant*

Headnote

The plaintiff sued for the ejectment of the defendant from premises which were used as a service station. The plaintiff had leased the premises from its owner, a company called Solta Trading, on a long term lease of over E 25 years, and built the service station. This long lease agreement was Solta's way of repaying the loan that was advanced to it by the plaintiff for the purposes of purchasing the premises. The lease gave the plaintiff the right to sub-let the premises. After some years, the plaintiff sub-leased the premises to Solta for a period of one year. One of the terms of the sub-lease was that Solta was not allowed to sub-let the premises without F the prior written consent of the plaintiff. Solta remained in occupation of the premises after the sub-lease expired and some two years later sub-let the premises to the defendant without the plaintiff's written permission.

The plaintiff contended that it was entitled to protect its rights of use and occupation by seeking the ejectment of the defendant who was a G wrongful occupier, as the sub-lease agreement was concluded without the plaintiff's prior written consent. The defendant contended that it was neither party nor privy to the lease agreements which were entered into by and between the plaintiff and Solta. It was party to a subsisting lease agreement between itself and Solta and had no contractual or other legally binding relationship with the plaintiff. Accordingly, it argued: H

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Muremba J

(a) A the plaintiff had no cause of action; (b) Solta could not be tenant at its own property, so the sub-lease agreement between the plaintiff and Solta was invalid, thus rendering the requirement for Solta to obtain the plaintiff's consent to the sub-lease invalid; and (c) even if the sub-lease to Solta was valid, that sub-lease had expired and Solta was no longer bound by it. B

Held, that it is not an absolute rule that a person is not entitled to hire his own property. A lease in *longum tempus* is in the nature of an alienation. The plaintiff became entitled to use of the property, subject to the terms of the lease. It was then perfectly entitled to sub-let the property to the defendant. The plaintiff having obtained a real right in the property C of the defendant, the hiring of that property to the defendant was not ineffective. The long lease agreement was Solta's way of repaying the loan that was advanced to it by the plaintiff for the purposes of purchasing these premises. This was not an ordinary lease agreement. Solta, the owner and the principal lessor, was indebted to the plaintiff and had an obligation to extinguish its debt. It chose to do so by entering into D a lease agreement whereby the plaintiff would for 26 years lease the premises without paying rent, as the loan it advanced to Solta constituted payment in full in advance of the entire rental for the entire lease period. Solta established in the plaintiff a real right and alienated its property. The hiring was of the property of the plaintiff, not as Solta's property. E When Solta took occupation of the premises it was doing so as a sub-tenant and not as the owner of the premises. It was therefore bound by the terms and conditions of the sub-lease agreement.

Held, further, that where a contract of lease contains prohibitions against sub-letting without the lessor's consent, a sub-lease entered into by the F lessee, without title to do so, is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the

lessee has. Thus, if the third party enters into occupation of the leased property, the lessor is entitled to an ejectment order against him.

Held, further, that with a sublease there is no privity of contract between the landlord and the sub-tenant. For this reason, a landlord who sues G to eject a sub-tenant sues in delict, not contract. It matters not that the tenant has not been sued as a co-defendant, as long as the lessor can show that he has a real right in the property and that he did not give the sub-tenant the right of occupation. While it is wiser to join the tenant as a co-defendant, it is not fatal for the lessor to omit to join the tenant H as a co-defendant.

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Muremba J

Held, further, that when Solta remained in occupation after the expiry of its A lease, it became a statutory tenant. A statutory tenant is only entitled to remain in occupation if it continues to pay the rent and observes all terms and conditions of the expired lease to the extent that those terms and conditions are not inconsistent with the regulations. Despite the non-renewal of the sub-lease agreement, Solta had a duty to observe all the duties imposed upon it by that agreement, including the clause B that barred it from subletting without the approval of the plaintiff. By subletting the premises, Solta breached the contract and the plaintiff was entitled to sue the defendant for eviction.

Cases cited

Akoon v *Jhavary* 1934 NPD 282 C

Greenhalgh v *Rowley* 1925 SR 30

Grootchwaing Salt Works v *van Tonder* 1920 AD 492

Hamza v *Bailen* 1949 (1) SA 993 (C)

Hissaias v *Lehman & Anor* 1958 (4) SA 715 (T)

MacDonald, Patterson's Tutor Dative v *Hume* (1875) 5 Buch 8 D

Pedzisa v *Chikonyora* 1992 (2) ZLR 445 (S)

Potgieter & Anor v *van der Merwe* 1949 (1) SA 361 (A)

Total Oil Products (Pty) Ltd v *Perfect & Anor* 1964 (2) SA 297 (D)

Total Zimbabwe (Pvt) Ltd v *Appreciative Invstms (Pvt) Ltd* 2010 (1) ZLR 598 (H)

Legislation considered E

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 22(2)(a) & (b), & 23

Case information

D Ochieng, for the plaintiff F

T Kanengoni, for the defendant

Judgment

Muremba J: The plaintiff issued summons for the ejectment of the defendant from stand number 10232 Highfield Township, also known as Machipisa Service Station Corner 112th and Main Street, Machipisa, Harare (hereinafter referred to as the stand or premises). G

This stand belongs to a company called Solta Trading (Pvt) Ltd (hereinafter referred to as Solta). In September 1998 the plaintiff and Solta entered into a written lease agreement in respect of the stand. In terms of the lease agreement the plaintiff would lease the premises from Solta until 31 July 2024. In or about October 1998 the plaintiff took occupation of the stand H

2015 (1) ZLR p595

Muremba J

and A built a filling station and related facilities. The premises were thereafter commonly called "BP Machipisa Service Station".

The lease agreement gave the plaintiff the right, at its sole discretion, to sub-lease the premises. In 2006 the plaintiff exercised that right by subletting the premises to Solta under a written sub-lease agreement. The B sub-lease period would run from 1 January 2006 to 31 December 2006. At the commencement of the sub-lease agreement Solta took occupation of the premises. Notwithstanding the termination of the sub-lease agreement by effluxion of time, Solta remained in occupation after 31 December 2006.

In terms of the sub-lease agreement of 2006 Solta was not allowed to sub-let the premises without the prior written consent of the plaintiff. The relevant C clause read that Solta "shall not be permitted to cede, assign or make over its rights and/or obligations under this agreement nor to sublet or part with the possession of the leased premises without the prior written consent of the Lessor". Despite the sub-lease agreement of 2006 Solta went on to sub-let the premises to the defendant in February 2009 without the prior written consent of the plaintiff. The defendant assumed occupation of the premises D and is still in occupation.

The plaintiff contends that it is entitled to protect its rights of use and occupation by seeking the ejectment of the defendant who is a wrongful occupier as the sub-lease agreement was concluded without the plaintiff's prior written consent. E

In resisting the claim for ejectment the defendant contends that it is neither party nor privy to the lease agreements which were entered into by and between the plaintiff and Solta. The defendant said that it is party to a subsisting lease agreement between itself and Solta. The defendant states that it has no contractual or other legally binding relationship with the plaintiff. F The defendant contends that:

(i) The plaintiff has no cause of action against it.

(ii) Solta cannot be a tenant at its own property so the alleged sub-lease agreement between the plaintiff and Solta is invalid. Consequently the requirement for Solta to obtain the plaintiff's prior written consent for G sub-leasing to the defendant is invalid.

(iii) Alternatively, even if the sub-lease to Solta was valid, it had expired by the time of the sub-lease to the defendant. Solta was no longer bound by the alleged stipulation against sub-leasing.

On the day of the trial the parties' legal practitioners agreed to proceed by H way of a special case in terms of Order 29 of the rules of this court. They

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submitted that by reason of neither of them being party nor privy to the A agreements alleged in their respective cases, as summarised above, they cannot lead evidence to counter factual allegations they are not aware of. They submitted, however, that certain legal issues arise which if determined, have the effect of disposing of the matter without the need for any evidence to be led before the court.

The issues for determination, as agreed upon by the parties, are as follows. B

1 Does the plaintiff have a valid cause of action against the defendant on the pleadings before the court?

2 Consequently does the plaintiff have a right to seek the defendant's ejectment from the premises? C

3 Is a person legally capable of leasing his or her own property from his/her own tenant?

4 Consequently, was the alleged sublease of the premises by the plaintiff to Solta legally valid?

5 Was Solta bound by the covenant against sub-leasing at the time of its agreement with the defendant, such that this sub-lease was legally D invalid?

The parties stated that if the above questions are all answered in the affirmative, the plaintiff will be entitled to an order for the ejectment of the defendant and costs of suit. Conversely, if any one of the questions is answered in the negative the plaintiff's case must fail and costs of suit must be awarded to E the defendant.

In my view, issues 1 and 2 are one issue. It follows that if the plaintiff has a valid cause of action against the defendant then it has the right to seek the defendant's ejectment from the premises. Issues 3 and 4 are one issue as well. If a person is legally capable of leasing his own property from his F or her tenant then it follows that the sub-lease of the premises to Solta by the plaintiff is legally valid. Issues 2 and 4 are therefore superfluous. So in essence I have three issues to deal with, the third issue being issue number 5.

I propose to deal with issue number 3 first, then 1 and lastly issue number 5.

(a) Whether or not a person can lease his or her own property G

The defendant argued that a person cannot lease his or her own property from his or her own tenant. He made reference to *Grootchwaing Salt Works* v *van Tonder* 1920 AD 492 at 497 wherein Innes CJ remarked that no man can hire his own property. Innes CJ further stated that the capacities of both lessor and lessee cannot competently reside in the same individual. *In casu* the defendant argued that when the plaintiff sub-leased the premises H

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to A Solta it reverted full rights in the property to Solta as the owner such that it was at liberty to lease the property to any willing tenant without recourse to the plaintiff.

I had occasion to read the case of *Grootchwaing Salt Works* and upon reading it I realised that its facts are distinguishable from the facts of the present case. B In that case the lessee, Grootchwaing Salt Works, was hiring a certain piece of land from the lessor. The terms of the lease agreement conferred certain rights over the adjoining unleased land of the lessor which included free use of stone, clay and earth so far as these materials were required in connection with the lessee's salt business. However, the lessee subsequently bought the property that it was leasing from the lessor and became the owner thereof. C Despite this development, Grootchwaing Salt Works sought to enforce the rights which it used to enjoy as a lessee over van Tonder's unleased property. Innes CJ said that clearly the relationship of lessor and lessee had come to an end between the parties when the former acquired the property and as such Grootchwaing Salt Works could not continue to enjoy rights it used to enjoy as a lessee. Those rights could only be enjoyed by a lessee. D So for Grootchwaing Salt Works Ltd to enjoy those rights it meant that it had to be paying rent. This is what prompted Innes CJ to make the remark that no man can hire his property. If Grootchwaing Salt Works Ltd was to pay rent, it would be paying it to itself because it had become the owner. Innes CJ said that a person can neither be his own creditor nor his own debtor. If E there is no other debtor then the debt is extinguished.

The *Grootchwaing Salt Works Ltd* scenario is not the scenario that we have in the present case. I am persuaded by *Total Oil Products (Pty) Ltd* v *Perfect & Anor* 1964 (2) SA 297 (D) which the plaintiff referred to. It is a case which almost falls on all fours with the present case. In that case the owner of certain premises (first respondent) leased them to a petroleum company (the F applicant), which had lent it R10 000. The applicant then sublet the premises back to the owner (first respondent). The terms of the lease and the terms of the sub-lease differed considerably. According to the terms of the sub-lease, the applicant was entitled to cancel the lease agreement and re-enter the premises if the first respondent failed to pay rent when it became due. The G first respondent then failed to pay rent when it became due. Apparently it had sub-let a portion of the premises to the second respondent (at least the sub-lease agreement allowed the first respondent to sub-let). When the applicant gave notice to the first respondent terminating the sub-lease agreement for failure to pay rent on time, the first respondent handed over possession of the premises to the applicant minus the portion that was now being leased H by the second respondent. The applicant instituted proceedings against the

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second respondent for its ejectment. The respondents' legal practitioner Mr A*Pretorius*, relying on *Voet* 19.2.4, argued that the owner (first respondent) cannot hire its own property from its tenant (the applicant) and as such when it contracted with the second respondent it did so in its capacity as the owner not as a tenant. So it had the right to lease the whole or a portion of the premises as the owner.

However, the passage from *Voet* which Mr *Pretorius* sought to rely on has B the following paragraph:

> "The hiring of one's own property is only so ineffective when no other person has obtained any right over our property. Certainly to the extent that a right has been established in another over our property it is understood to have been alienated by us; and thus there is a hiring of it not as being ours but as belonging to another." C

Friedman AJ had this to say at 300H to 301F about Mr *Pretorius*' submissions in view of the above passage,

> "It is quite clear that it is not an absolute rule, as Mr *Pretorius* suggests, that a person is not entitled to hire his own property. When the lease which was entered into between the applicant and the first respondent was registered against the title deeds of the property, the applicant acquired a real right in the property. A D lease *in longum tempus* is in the nature of an alienation. *Johannesburg Municipal Council* v *Rand Townships Registrar* 1910 TS 1314 at 1320; *Breytenbach* v *Frankel & Another* 1913 AD 390 at 402. The applicant became entitled to the use and occupation of the property subject to the terms of the lease. It was then, in my view, perfectly entitled to sub-let the property to the first respondent which it did on terms and conditions substantially different from those contained in the E lease with the first respondent. The applicant having obtained a real right in the property of the first respondent, the hiring of that property to the first respondent was, according to *Voet,* not ineffective. As the rights and obligations created by the lease and the sub-lease, differed so materially this is not a case where there was a 'concurrence of the debtor and creditor in the same person and in respect of the same obligation.' *Grootschwaing Salt Works* v *van Tonder* 1920 AD 492 at 497. Generally speaking, the obligations which are imposed upon the applicant by the F lease have to be performed by the applicant under the lease and the obligations which are imposed upon the first respondent by the lease have to be performed by the first respondent under the sub- lease. Moreover if this contention of Mr *Pretorius* were upheld, a most inequitable and anomalous position would be created. It seems clear – and this was not disputed by Mr *Pretorius* – that the agreements of lease and of sub-lease, viewed as one transaction, were entered G into for the purpose of giving the applicant security for the grant of R10 000 made by the applicant to the first respondent. It was obviously the intention of the parties that the two agreements of lease should operate as one transaction and that there should be no merger. It is common cause that this sum of R10 000 was paid by the applicant to the first respondent, and was to be paid during the period of the sub-lease in the manner set out therein. If Mr *Pretorius's* contention were to be upheld it would mean that the first respondent, having obtained the H

> benefit A of the sum of R10 000, would be entitled to deny to the applicant the rights conferred upon the applicant by the lease."

In casu the head lease between the plaintiff and Solta should run up to 2024 from 1998 and it allows the plaintiff to sublet the premises. It does not say the plaintiff cannot and should not sublet to Solta being the owner and principal lessor. What is of significance is that this long lease agreement was B Solta's way of repaying the loan that was advanced to it by the plaintiff for the purposes of purchasing these premises. The relevant portion of the lease agreement which is marked annexure A reads:

> "AND WHEREAS BP has agreed to assist the Owner (Solta) in the purchase of the property C
>
> AND WHEREAS in recognition of such assistance, the Owner is willing to grant to BP a lease on the property upon the terms and conditions set out hereunder
>
> NOW THEREFORE the parties agree as follows:
>
> 1. PERIOD
>
> The Owner hereby leases to BP who hereby hires from the Owner the property D for a period commencing on 1 September 1998 and terminating on 31 July 2024 unless previously terminated..
>
> 2. …
>
> 3. …
>
> 4. RENTAL
>
> It is recorded by the parties that BP has, by way of a loan, made available to E the Owner certain funding of purchase of the property by the Owner from the Municipality. Accordingly, rental for the period set out in clause 1 above shall be determined as follows:
>
> 4.1 the full value of the loan made by BP to the Owner and the subject of the Loan Agreement to which this agreement constitutes Annexure F A (hereinafter referred to as 'the Loan Agreement') together with the cost to BP of construction and development as set out in clause 3 above, shall be deemed to be the rental paid by BP to the Owner for the period set out in clause 1 above. Accordingly BP

hereby waives its right to repayment of the said loan and to payment of compensation for any construction or development undertaken in accordance with clause 3 and such waiver shall constitute payment in full in advance G of the entire rental for the lease period ...

8 SUB-LEASE

BP will, during the subsistence of this agreement, be entitled, in its sole discretion, to sublet the property upon such terms and conditions that it sees fit provided that any such sub-lease shall not contain any term or condition materially in H conflict with any term or condition of this agreement."

2015 (1) ZLR p600

Muremba J

So instead of Solta repaying the loan in cash, Solta would lease the premises A to the plaintiff to the value of the loan. So this is not an ordinary lease agreement. The owner which is the principal lessor is indebted to the lessee and it has an obligation to extinguish its debt. It chose to extinguish the debt by entering into a lease agreement whereby the plaintiff would for 26 years lease the premises without paying a rent as the loan it advanced to Solta B in 1998 constituted payment in full in advance of the entire rental for the entire lease period. A lease of 26 years is a lease *in longum tempus* simply meaning that it is in long time and long use, beyond the memory of man, and suffices for a real right. Friedman AJ in the *Total Oil Products* case s*upra* said it is in the nature of an alienation. In that regard, Solta established in C the plaintiff a real right and alienated its property and thus there is hiring of it as the property of the plaintiff and not as its own property. It is therefore incorrect to say that the sub-lease to Solta reverted full rights on the property and entitled it to lease the premises to any willing tenant. To uphold this contention would be to sanction Solta to run away from its obligation to repay the loan that was advanced to it by the plaintiff. That will obviously D create an inequitable and anomalous situation.

As correctly stated by the plaintiff the head lease and the sub-lease are two separate and unidentical agreements. No merger occurred. In terms of the sub-lease agreement which was produced as Annexure B, Solta was supposed to pay rent in the sum of US$4 500 per month, reviewable quarterly. In terms E of clause 7 (m) thereof the lessee was not entitled,

"to cede, assign ... nor to sub-let or part with the possession of the leased premises without the prior written consent of the lessor."

As was stated in the *Total Oil Products* case s*upra* this is not a case where there was "concurrence of debtor and creditor in the same person and in F respect of the same obligation". It was therefore permissible and valid for Solta to lease its own premises from the plaintiff. The lease agreement granted the plaintiff a real right over the property.

The plaintiff is correct in saying that when Solta took occupation of the G premises in 2006 it was doing so as a sub-tenant and not as the owner of the premises. It was therefore bound by the terms and conditions of the sub-lease agreement. One of the conditions was that it was not supposed to sublet the premises without the prior written consent of the plaintiff. Under the circumstances the plaintiff had stepped into the position of the owner or the landlord or the lessor while Solta had stepped into the position of the lessee. H

2015 (1) ZLR p601

Muremba J

(b) Whether A or not the plaintiff has a valid cause of action against the defendant

The defendant's argument is that the plaintiff is suing the defendant basing its cause of action upon a breach of contract by Solta. The defendant avers that it being neither party nor privy to that contract the plaintiff cannot B succeed in its claim without having sued Solta as the first defendant in this matter. The defendant argues that the plaintiff must first prove that Solta breached the sub-lease agreement. It averred that in the absence of Solta the plaintiff's allegation that there was breach of contract by Solta will remain an unproven allegation.

In *Pedzisa* v *Chikonyora* 1992 (2) ZLR 445 (S) at 453 Gubbay CJ said: C

"It is trite law that where a contract of lease contains prohibitions against sub-letting, cession or assignment, either absolutely or without the lessor's consent, a sub-lease, cession or assignment, entered into by the lessee, without title to do so, is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the lessee has. Thus, if the third party enters into occupation of the leased property, the lessor is entitled to an ejectment D order against him. See *Stalson*

> v *Brook* 1922 WLD 143; *Akoon* v *Jhavary* 1934 NPD 282 at 285; *Hissaias* v *Lehman & Anor* 1958 (4) SA 715 (T) at 719B-C; Wille *Landlord and Tenant in South Africa* at pp 123 and 124. A further obvious consequence of the prohibition is that the court will refuse to enforce the sub-lease, cession or assignment, at the instance of the lessee. To do otherwise would be to confer a right upon the lessee not given him by the lessor." E

R H Christie *Business Law in Zimbabwe* 2 ed 1998 at p 286 states that with a sublease there is no privity of contract between the landlord and the sub-tenant. He further states that because there is no privity of contract between the two a landlord who sues to eject a subtenant sues in delict not contract. See also *Greenhalgh* v *Rowley* 1925 SR 30 at 33. At p 287, Christie *op cit*, citing *Potgieter & Anor* v *van Der Merwe* 1949 (1) SA 361 (A), says: F

> "When the landlord's consent is required but the tenant has sublet without it the landlord is entitled to the ejectment of the subtenant and, if the lease contains a forfeiture clause, also of the tenant."

In *MacDonald, Patterson's Tutor Dative* v *Hume* (1875) 5 Buch 8, the owner of the property instituted an action for the ejectment of a sub-lessee who had G been put in occupation of property by the tenant without his consent. The tenant was not joined as a co-defendant, but the court made an order for the ejectment of the sub-lessee. In *Akoon* v *Jhavary* 1934 NPD 282 a lessee put in occupation a sub-lessee without obtaining the necessary consent of the owner. The owner sued for the ejectment of the sub-lessee without joining the lessee and an order was made for ejectment against him. Hathorn J remarked H that the owner of the property had proved that he was the owner and that

he had not given the sub-lessee the right of occupation. Consequently the A lessee was said to be a trespasser. The learned judge went on to say that it might have been wiser to join the lessee, but the omission to join him was not fatal. See also *Hamza* v *Bailen* 1949 (1) SA 993 (C)

In *Hissaias* v *Lehman & Anor* 1958 (4) SA 715 (T) at 719C Roper AJ stated that the correct position of the law is that the owner of a property can directly B sue for the ejectment of a sub-tenant who has been allowed occupation by the tenant without obtaining his (owner's) consent. He said that if this was not the position it might be impossible for the owner to get an unlawful occupant out where the tenant has disappeared. At p 718B-C he said that a person with a real right in the property is *dominus*. As *dominus* he has the right of possession and occupation of it against all the world save and so far C as he has parted with his right to such possession and occupation.

In casu the defendant's argument that the plaintiff has no valid cause of action against it has no merit. In para 11 of the special case the parties said that they wanted the matter to proceed on the basis of a special case because there were no disputes of facts. They said neither party could lead evidence to counter factual allegations made by the other party since neither of them D was party to or privy to the agreements each party entered into with Solta. Moreover, the plaintiff attached the sub-lease agreement it entered into with Solta as annexure B. The defendant cannot therefore at this stage turn around and say that the averment that there was a sub-lease agreement with Solta and a breach thereof remain as mere allegations as long as Solta is not E party to the proceedings as a co-defendant. If these averments were disputed then the defendant should not have agreed to have the matter dealt with as a special case. Instead it should have proceeded as a full trial. It is clear from the plaintiff's supplementary summary of evidence that it was going to call Solta's director to testify at trial that the plaintiff had a long lease which will expire in 2024. That director was further going to say that in subletting the F premises Solta had not obtained approval from the plaintiff in accordance with the sub-lease agreement between Solta and the plaintiff.

In view of the foregoing, I therefore consider it as a fact that Solta entered into a sub-lease agreement with the plaintiff and in breach of that contract it in turn sublet the premises to the defendant without the plaintiff's approval. G The above cited authorities make it clear that if a tenant sublets without the consent of the lessor when in terms of the lease agreement he is required to seek the lessor's consent, the lessor is entitled to eject the sub-tenant and the lessor sues in delict not contract. It matters not that the tenant has not been sued as a co-defendant as long as the lessor can show that he has a real right in the property and that he did not give the sub-tenant the right H

Muremba J

A of occupation. While it is wiser to join the tenant as a co-defendant, as has been demonstrated by the above cited cases, it is not fatal for the lessor to omit to join the tenant as a co-defendant. It is therefore not mandatory that the tenant be sued as a co-defendant. In fact Christie *op cit* p 287 says the tenant may also be sued if there is a forfeiture clause in the agreement and the landlord wants the tenant evicted as well. So suing the tenant as a B co-defendant will depend on the circumstances of each case and the remedy that the lessor wants to obtain from the court. So under the circumstances the plaintiff has a valid cause of action against the defendant and the cause of action is delictual not contractual.

(c) Whether or not Solta was still bound by the sublease agreement C of 2006 at the time of its agreement with the defendant

It is a fact that when the sub-lease agreement between Solta and the plaintiff expired on 31 December 2006 it was not renewed. At the same time Solta remained in occupation and in terms of s 22(2)(a) and (b) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) it became a statutory tenant. D A statutory tenant is entitled to remain in occupation indefinitely unless he or she fails to pay rent due within seven days of the due date under the lease and he fails to perform any other conditions of the lease. The section reads,

> "(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given E by the lessor, shall be made by a court, so long as the lessee –
>
> (a) continues to pay the rent due, within seven days of due date; and
>
> (b) performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that – F
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person."

Section 23 thereof sets out the rights and obligations of a statutory tenant. It says:

> "23 Rights and duties of statutory tenant G
>
> A lessee who, by virtue of section 22, retains possession of any commercial premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of lease, so far as the same are consistent with the provisions of these regulations, and shall be entitled to give up possession of the premises only on giving such notice as would have been required under the contract of lease or, if no notice would H have been so required, on giving reasonable notice:"

Muremba J

As correctly contended by the plaintiff, a statutory tenant must observe all A terms and conditions of the expired lease to the extent that those terms and conditions are not inconsistent with the regulations. In *Total Zimbabwe (Pvt) Ltd* v *Appreciative Investments (Pvt) Ltd* 2010 (1) ZLR 598 (H) Kudya J said that the effect of s 22(2) as read with s 23 is that on acquiring statutory tenancy status the original lease is renewed to the extent that it is consistent with the regulations. B

In casu, therefore, despite the non-renewal of the sub-lease agreement of 1996, Solta has a duty to observe all the obligations imposed upon it by that agreement, including the clause that bars it from subletting without the approval of the plaintiff. By subletting the premises to the defendant, Solta breached the contract. Consequently, the plaintiff is entitled to sue the C defendant for eviction.

Conclusion

There are instances when a person is legally capable of leasing his or her own property from their own tenant. As such the sub-lease agreement of 2006 between Solta and the plaintiff is legally valid. When that sub-lease D agreement expired on 31 December 2006 Solta became a statutory tenant, but it remained bound by the clause in the expired lease agreement which prohibited it from subletting the premises without the consent of the plaintiff. By subletting the premises to the defendant without prior consent of the plaintiff, Solta breached the sub-lease agreement. As a result, the sub-lease is valueless and confers no rights on the defendant. The plaintiff is entitled to E

sue the defendant for its ejectment from the premises. There being no contract between the parties, the plaintiff's cause of action against the defendant is delictual. It is not fatal that the plaintiff has not sued Solta as a co-defendant.

Accordingly it be and is hereby ordered that:

1. The defendant and all those claiming occupation through it are F hereby evicted from stand number 10232 Highfield Township, Harare (also known as Machipisa Service Station, Corner 112th and Main Streets, Machipisa, Harare).
2. The defendant pays cost of suit. G

Scanlen & Holderness, plaintiff's legal practitioners

Nyika, Kanengoni & Partners, defendant's legal practitioners

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CHIKODZI & ANOR v MUSUMHI & ANOR 2015 (1) ZLR 605 (H)

Citation	2015 (1) ZLR 605 (H)
Case No	Judgment No. HH-392-15
Court	High Court, Harare
Judge	Tsanga J
Heard	12 March 2015; *CAV*
Judgment	22 April 2015
Counsel	*P Mabundu,* for the applicants *T Muleya,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Property and real rights – *spoliation – order for – right to – alleged fraudsters having confessed to buying motor cars with proceeds of fraud – person defrauded having no right to take possession of vehicles – constitutional principle of adherence to rule of law – self-help not consistent with* D *such principles*

Headnote

The applicants sought the return of motor cars which had been taken from them by the respondent company at the company's premises. The wife of the first applicant and the second applicant worked for the company. E Both she and the second applicant were accused by the company of fraud and of using the proceeds to purchase the cars in question. Both of them signed statements admitting to fraud and to using the proceeds to buy the cars. The company also claimed, though

the applicants denied it, that the applicants agreed to the company taking the cars. The applicants brought a vindicatory action. F

Held, that while there may be circumstances justifying instant self-help, such as where a thief is caught *in flagrante delicto*, the respondent's possession was not within this ambit. The respondent's quest to justify possession of the car on the basis of its purchase using illicit proceeds did not further its case. Self-help runs against the grain of rule of law G as articulated in s 3(1)(a) & (b) of the Constitution of Zimbabwe 2013. The first applicant's wife and the second applicant were accused of an offence and thus had a right in terms of s 69(1) to be brought for trial for a hearing. No one is entitled to take the law into their own hands. Besides a strong constitutional grounding discouraging self-help in favour of measures that are grounded in the rule of law, public policy clearly H dictates that such matters involving fraud be dealt with in a court of

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Tsanga J

criminal law. In such matters, criminal courts often order restitution as A a condition for a suspended jail sentence where a party has been found guilty. As such, no matter how justifiable the respondent might deem its actions to be in the face of the alleged confessions to fraud, it is the concepts of law and order as constitutionally articulated that should guide its case against the alleged fraudsters. Restitution would be ordered. B

Cases referred to

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

Chief Lesapo v *Northwest Agricultural Bank* 2000 (1) SA 409 (CC)

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

Supline Invstms (Pvt) Ltd v *Forestry Co of Zimbabwe* 2007 (2) ZLR 280 (H) C

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

Legislation considered

Constitution of Zimbabwe 2013, ss 3(1) & 69(1) D

Case information

P Mabundu, for the applicants

T Muleya, for the respondents

Judgment

Tsanga J: This is an application for a spoliation order in which the applicants seek that two motor vehicles, a Toyota Vitz registration no. E ACN 2357 and a BMW registration no. ACN 8630 be surrendered to them by the first respondent Mashonaland Tobacco (Pvt) Ltd and the second respondent its security manager. For ease of reference I shall refer hereinafter to the respondent as indicating both the company and its security manager unless otherwise necessary.

The circumstances under which the cars came to be in the possession of F the respondent were as follows: the wife of the first applicant, one Thelma Kusangaya, and the second applicant worked for the respondent company. They were facing charges of fraud. According to the respondent, Thelma Kusangaya worked as a debtor capturing clerk whilst the second applicant, Enos Tapiwa Musumhi, worked for it as a data capturing clerk. Both are said by the respondent to have admitted to fraud and to using the proceeds G to purchase the cars. The cars were taken from them at the work place.

The first applicant, Machel Chikodzi, says he is married to Thelma Kusangaya under customary law and that the car belongs to him. He says it was unlawfully and forcibly taken by the first respondent's security manager acting in the scope of his employment after he had given it to his wife to take to work. H

Tsanga J

The A first applicant states that at the time that his vehicle was taken he was in peaceful possession, which possession he was exercising through his wife whom he had authorised to drive it. He produced a registration as proof of ownership of the vehicle. Thelma Kusangaya also deposed to an affidavit averring that that the keys of the motor vehicle had been taken away from her by force. In her supporting affidavit, she said that the allegations of fraud were B never established and were mere allegations meant to get rid of them both.

The second applicant's position is that the statements should not have been taken as the respondents are not police officers. The second applicant also averred that the security manager forcibly took the keys from him after the mechanic who had been servicing his car had brought the car to his work C place and given him the keys. It is argued by the applicants that the first and second respondents had no lawful right to impound the said vehicles without a court order and without consent of the owner or permission of the person who was in possession of the motor vehicle. The applicants state that their lack of consent is bolstered by the fact that they launched this application as D soon they realised that the respondents were refusing to return the vehicles in question.

In the applicants' heads of argument they stress that an application for a spoliation order must prove peaceful and undisturbed possession of a thing and unlawful deprivation of such possession. They further point out that the E only valid defences against spoliation are that applicant was not in peaceful possession; that dispossession was not unlawful; that restoration is impossible and that the respondent acted within limits of counter spoliation regarding possession of article. The first applicant also makes the point that Thelma Kusangaya could not have surrendered a vehicle she did not own.

In limine the respondent submits that there are material disputes of facts F and that the court is being asked to choose between two sets of facts. These disputes are said to relate to the differing version of events relating to the writing of the statements which the applicants say they were forced to do and the surrender of the vehicles which the applicants claim was involuntary. It G is the respondent's position that the vehicles were surrendered voluntarily. Both former employees are said to have written statements confirming their fraud. The respondent says that Thelma Kusangaya confessed to having deposited some of the money into an NBM account which belonged to the first applicant, her customary law husband. They insist that the surrender was voluntary and that there was no duress. It is said that both are bent on H perpetuating their fraud.

Tsanga J

In the face of the applicants' claim for the return of the cars, the respondent A alleges a material dispute of fact which they say cannot be decided on the papers alone and that *viva voce* evidence will need to be led with witnesses being cross examined to determine the veracity of their evidence. The respondent also raises the issue of the *locus standi* of the first applicant. The respondent argues that it is Thelma Kusangaya who should have claimed spoliation and that the first applicant should have claimed vindication B (*rei vindicatio)* since he says he is the owner of the motor vehicle. It is said that that the applicant has dismally failed to prove spoliation since the vehicle was in the possession of Thelma, who is said to have voluntarily surrendered the vehicle. It is said that there is no question of the respondent having acted wrongfully or unlawfully under the circumstances. The respondent maintains C that failure to call for *viva voce* evidence would be a miscarriage of justice and relies on cases such as *Supline Investments (Pvt) Ltd* v *Forestry Co of Zimbabwe* 2007 (2) ZLR 280 (H) and *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H).

The respondent urges that the application should be dismissed, alternatively that the matter should be referred to trial. D

The first applicant admits in his affidavit that his wife and the second applicant were facing fraud charges. There is no dispute therein. What he disputes is whether that fact entitled the respondents to take the law into their own hands. As the first applicant put it in para 13 of his founding affidavit:

> "Even though my wife and second applicant were facing charges of fraud that E does not mean that the first and second respondents were entitled to take the law into their own hands. There is no place for the law of the jungle in the Republic of Zimbabwe and as such the court need to register a serious dismay at such conduct".

That the first applicant's wife and the second applicant were facing allegations of fraud is therefore common cause. That they signed certain statements F is also common cause, albeit the variation in

positions is that the former employees say these were dictated to and made under duress, whereas the respondent says these were voluntarily made. The argument by the second applicant and the wife of the first applicant that they signed the statements under duress appears to lack merit, as the details provided in both statements are those that could clearly only have been in their knowledge as opposed G to being dictated to them. This court obviously has a duty to assess these statements in reaching a conclusion as to whether they from a basis for a real dispute of fact.

In any event, there is no indication that the two made any report to the police regarding the duress and what they deemed to be false accusations against H

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them. A In my view, there is no dispute of fact that warrants the referral of the matter to trial. I do not think that this is a dispute which leaves this court with "no ready answer as to the dispute between the parties". In fact the statements are not the real issue, but rather the self-help which the respondent resorted to which it says was by agreement. What is clearly captured in the affidavits B produced by the respondent is that the applicants both revealed that they had used the proceeds stolen from the company to purchase vehicles. In light of the statements made by Thelma Kusangaya and the second applicant, Enos Musumhi, to the respondent, the latter was evidently after a quick solution to recouping at least some of its money in view of the financial loss suffered at the hands of the two former employees. The issue is really the legality C of the action.

In *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S), it was stated that agreements in which the parties authorise one another to take the law into their own hands must be regarded as invalid. It was, however, also emphasised that this does not mean that an agreement in terms of which a party undertakes to hand over property in settlement cannot always be relied on as evidence D of consent where the creditor goes on to secure the property agreed that he should take.

While there may be circumstances justifying instant self-help, such as where a thief is caught *in flagrante delicto* as stated in *Yeko* v *Qana* 1973 (4) SA 735 (A) at 739, the respondent's possession is not within this ambit. The E respondent's quest to justify possession of the car on the basis of its purchase using illicit proceeds does not further its case since, as pointed out in the *Qana* case at p 739, drawing on Voet:

> "For as Voet 41.2.16 says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that on one is allowed to take the law F into his own hands. All that the *spoliatus* has to prove is possession of the kind which warrants protection of the remedy and that he was unlawfully ousted."

What is important to consider is whether the admissions in the statements relied upon by the respondent entitled them to take the law into their own hands by resorting to self-help, even if they say it was by agreement, a fact which is now disputed. Self-help runs against the grain of rule of law as G articulated in s 3(1)(a) & (b) of the Constitution of Zimbabwe 2013, which deals with founding values and principles. It states as follows:

> "3 Founding values and principles
>
> (1) Zimbabwe is founded on respect of the following values and principles –
>
> (a) supremacy of the Constitution;
>
> (b) H the rule of law."

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Tsanga J

Section 69(1), on the right to a fair hearing, provides as follows: A

> "(1) Every person *accused of an offence* has the *right to a fair hearing and a public trial* within a reasonable time before an independent and impartial court" (my emphasis).

Thelma Kusangaya and the second applicant were accused of an offence and thus had a right to be brought for trial for a hearing. In terms of case law, I find persuasion for the interpretation of self-help as being decidedly B anti the rule of law, in the above constitutional sense, from the interpretation of a similarly phrased provision in the South African case of *Chief Lesapo* v *Northwest Agricultural Bank* 2000 (1) SA 409 (CC) at p 415A-B where Mokgoro J made the following remarks regarding the right to a trial:

"A trial or hearing before a court or tribunal is not an end in itself. It is a means of C determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes and preventing remedies being sought through self-help. No one is entitled to take the law into their own hands. Self-help in this sense is inimical to a society in which the rule of law prevails as envisioned by s 1(c) of our Constitution which provides D

'The Republic of South Africa is one sovereign democratic state founded on the following values:

…

(c) supremacy of the Constitution and the rule of law.'

Taking the law into one's own hands is thus inconsistent with fundamental principles of our law." E

At p 418F-G she goes further to elucidate that:

"The right of access to court is indeed fundamental to the stability of an orderly society. It ensures peaceful, regulated and institutionalised mechanism to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism and the chaos and anarchy which it causes. Construed in this F context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable".

Besides a strong constitutional grounding discouraging self-help in favour of measures that are grounded in the rule of law, public policy clearly dictates that such matters involving fraud be dealt with in a court of criminal law. G In such matters, criminal courts often order restitution as a condition for a suspended jail sentence where a party has been found guilty. As such, no matter how justifiable the respondent deems its actions to be in the face of the so called confessions to fraud, it is the concepts of law and order as constitutionally articulated that should guide its case against Thelma Kusangaya and the second applicant. However, I am not of the view that H

Tsanga J

the A application warrants the award of costs on a higher scale, particularly in light of the fact that the statements on which the matter has been opposed do appear to have voluntarily come from the makers. The fact that the respondent may not have proceeded in accordance with constitutional dictates does not in my view mean higher costs are justified.

Accordingly, B

1. The first and second respondents be and are hereby ordered surrender a Toyota Vitz registration number ACN 2357 and a BMW 318i registration number ACN 8630 to the first and second applicants respectively upon service of this order.
2. The first and second respondents are ordered to pay costs of this C application on an ordinary scale.

Mabundu Law Chambers, applicants' legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners D

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S v M & ORS 2015 (1) ZLR 612 (H)

Citation 2015 (1) ZLR 612 (H)

Case No Judgment No. HH-409-15

Court High Court, Harare

Judge Mafusire J

Heard 27 April 2015

Judgment 27 April 2015

Counsel No counsel details supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of* C *Rights – s 53 – freedom from torture or cruel, inhuman or degrading punishment or treatment – corporal punishment of juvenile criminal offenders – a contravention of s 53*

Constitutional law – *Constitution of Zimbabwe 2015 – Declaration of Rights – right of High Court to declare law to be in breach of Declaration of* D *Rights – right of High Court to refer matter to Constitutional Court for final decision on matter*

Criminal procedure (sentence) – *general principles – juvenile offenders – corporal punishment of – unconstitutionality of* E

Headnote

There can be no question that corporal punishment of juveniles has become unlawful in this country. The old Constitution made this country an outpost of tyranny and cruelty against children. Our stance on corporal punishment stuck out like a sore thumb. All around us, and in virtually all over the progressive world, corporal punishment, whether of adults or of juveniles, has been abolished. That s 353 of the Criminal Procedure and F Evidence Act [*Chapter 9:07*] refers to "moderate corporal punishment" and s 101 of the Prisons Act [*Chapter 7:17*] refers to corporal punishment as a "moderate correction of whipping" or that the Prison Regulations go to some length to mollify or mitigate the manner of its execution cannot make it any less brutal. It is like applying lipstick on a bullfrog, or blowing incense on a skunk. G

By amending the 1980 Constitution in 1990 to make corporal punishment of juveniles lawful, the Legislature was being reactive and retrogressive. In June 1989 the Supreme Court, sitting as a Constitutional Court, held that corporal punishment inflicted upon male juvenile offenders was *ultra vires* s 15(1) of the 1980 Constitution. Given the weight of authority, both H

in A this jurisdiction and elsewhere in the progressive world, except South Africa at that time, and given the provisions of the various international conventions on children's rights, such a conclusion was inevitable.

Therefore, if the new Constitution has dropped the amendment to the old Constitution that permitted the meting out of corporal punishment upon B male juveniles, and if the Constitution has gone on to strengthen certain provisions of the Declaration of Rights, for instance, by promulgating s 86(3)(c) that says that no law may permit a person to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; s 52(a), that guarantees the freedom from all forms of violence from public or private sources; and s 56, that guarantees fair treatment of all persons C and outlaws discrimination on the grounds of, *inter alia*, sex, gender or age, there can be no doubt that s 353 of the Criminal Procedure and Evidence Act has become anachronistic.

In terms of s 175(4) of the Constitution, the High Court may directly cause the reference of a matter concerning constitutional validity to the Constitutional Court, which in terms of s 167(3) makes the final decision D whether, among other things, an Act of Parliament is unconstitutional. It is

that court that must confirm an order of constitutional invalidity made by another court before that order has any force.

Editor's note: the original judgment referred to the Prisons Regulations 1956 (FGN 42 of 1956), and various provisions thereof relating to corporal punishment of juveniles. E Those Regulations were repealed by the Prisons (General) Regulations 1996 (SI 1 of 1996), which provides in s 103 that corporal punishment of a male juvenile offender shall be administered in accordance with the Criminal Procedure and Evidence (Corporal Punishment) Regulations 1993 (SI 308 of 1993). The judgment in the relevant parts has accordingly been edited to refer to the current legislation.

Cases cited F

S v *C (a juvenile)* 2014 (2) ZLR 876 (H)

S v *A Juvenile* 1989 (2) ZLR 61 (S)

S v Ncube & Ors 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS)

Legislation considered

Constitution of Zimbabwe 1980, s 15 G

Constitution of Zimbabwe 2013, ss 53, 56, 86, 167 & 175

Criminal Law (Codification and Reform) Act *[Chapter 9:23*], ss 65, 66, 70 & 353

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 353

Criminal Procedure and Evidence (Corporal Punishment) Regulations 1993 (SI 308 of 1993), H ss 4, 5 & 6

2015 (1) ZLR p614

Mafusire J

Magistrates Court Act [*Chapter 7:10*], s 57 A

Prisons Act [*Chapter 7:17*], s 101

Judgment

Mafusire J: The above four cases came up separately on automatic review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*]. Except for Case 3, all of them were cases of rape by juvenile male offenders upon female minors or infants. Case 3 was one of aggravated indecent assault. I decided B to deal with all of them in one judgment. The essential element is the same. It is about the constitutionality of corporal punishment.

All accused persons were first offenders. In Case 1 the accused was 16 years old. His victim was four years old. The accused pleaded guilty. He was sentenced to three strokes with a rattan cane. C

In Case 2 the accused was 16 years old. The complainant was 13. He was charged with rape, in contravention of s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code"). He denied the charge. A full trial ensued. The court found no evidence of rape. Sexual intercourse had been consensual. So the accused was found guilty of contravention of s 70 of the Code, i.e. having sexual intercourse with a young person. He was D sentenced to four strokes.

In Case 3 the accused was 14 years old. His victim was three. He indecently assaulted the complainant by inserting a stick into her vagina. She was injured. He denied the charge. Nonetheless he was convicted of aggravated indecent assault as defined in s 66(1)(a) of the Code. The sentence was four strokes. E

In Case 4 the accused was 15 years old. The complainant was four. The accused pleaded guilty. He was sentenced to three strokes.

In Case 1 the sentence was passed in January 2014. In all others, sentencing was in December 2014. There is no telling from the record whether or not the sentences have already been carried into execution. But in all likelihood they F have. Section 7 of the Criminal Procedure (Corporal Punishment) Regulations 1993 (SI 308 of 1993) requires that a sentence of corporal punishment be carried out as soon as possible after it has been imposed. This, of course, is after all the formalities, like confirmation or appeals, have been exhausted.

In this country corporal punishment of male juveniles is sanctioned by s 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the CP&E Act"). G It reads:

"353 Corporal punishment of male juveniles

(1) Where a male person under the age of eighteen years is convicted of any offence the court which imposes sentence upon him may-

(a) in lieu of any other punishment; or H

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Mafusire J

(b) in A 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*;

sentence him to receive moderate corporal punishment, not exceeding six strokes."

Section 101 of the Prisons Act [*Chapter 7:17*] defines corporal punishment B as a "… moderate correction of whipping referred to in section 353 of the Criminal Procedure and Evidence Act ..."

Subsections (2) to (6) of s 353 of the CP & E Act regulate the manner in which the corporal punishment is to be administered. In brief, it is to be administered in private. The parent or guardian of the juvenile offender may be present. It can only be administered after a medical doctor has certified C that the juvenile offender is fit to receive it.

The CP&E Act, the Prisons Act and the Regulations aforesaid prescribe, among other things, the manner how, the place where, and the persons by whom, corporal punishment is to be administered. Firstly, in addition to the parents or guardian of the juvenile offender that may be present in terms D of the CP&E Act, the Prisons Act adds two more persons. Section 103 provides that no corporal punishment shall be carried out in the absence of the medical officer who certified the juvenile offender to be fit to receive it, and of the officer in charge of the prison. With regards the officer in charge of the prison, the Regulations, in s 8, empower him to delegate this function to any other officer. E

The Regulations, in s 4, prescribe the type of instrument by which corporal punishment shall be administered. It is a rattan cane, one metre long and not more than 10 millimetres in diameter.

Then ss 5 and 6 of the Regulations read:

"Protection of juvenile F

5. A sentence of corporal punishment shall not be carried out unless –

(a) a pair of calico shorts; and

(b) a vest; and

(c) kidney protector;

are worn by the juvenile offender during the administration of strokes. G

Method of administration

6. Strokes shall be administered on the buttocks of the juvenile offender and on no account shall the strokes –

(a) be administered on the back of the offender; or

(b) be administered on the same spot; or

(c) H exceed the number imposed by the court."

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Mafusire J

Elaborating on the manner of execution of corporal punishment, the A Supreme Court painted the following graphic description in *S* v *Ncube*1987 (2) ZLR 246 (S) at 263B-D, 1988 (2) SA 702 (ZS) at 714B- C, a case that held that corporal punishment on adults was unconstitutional:

"Once the prisoner is certified fit to receive the whipping, he is stripped naked. He is blindfolded with a hood and placed face down upon a bench in a prone B position. His hands and legs are strapped to the bench, which is then raised to an angle of 45 degrees. (A) calico square is tied over his buttocks and the kidney protector secured above his buttocks at waist level. The prisoner's body is then strapped to the bench. The cane is immersed in water to prevent splitting. The strokes are administered to one side across the whole of the buttocks."

On 31 December 2014, Muremba J, in *S* v *C (a juvenile)* 2014 (2) ZLR 876 (H), C with which Mawadze J concurred, declared, among other things, that s 353 of the CP & E Act was misaligned with the new Constitution of Zimbabwe. She came to this conclusion by comparing the wording on corporal punishment in the old Constitution with that of the new Constitution. Section 15 of the old Constitution of 1979 provided as follows:

> "15 Protection from inhuman and degrading treatment D
>
> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.
>
> (2) …
>
> (3) *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 E 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*" (emphasis added). F

On the other hand, the new Zimbabwe Constitution that came into effect in 2013 and which replaced the old one, made no specific mention of corporal punishment. But on inhuman or degrading treatment or punishment it provides as follows in s 53:

> "53 Freedom from torture or cruel, inhuman or degrading treatment or punishment G
>
> No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

In the review judgment aforesaid Muremba J noted that s 86 of the new Constitution outlaws any law that purports to limit any fundamental rights and freedoms enshrined in that Constitution. Expressly mentioned in subsection H

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Mafusire J

(3), A paragraphs (a) and (b), are the right to human dignity and the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

The learned judge also noted the provisions of s 52 and s 56 of the new Constitution. Section 52(a) guarantees the right of every person to bodily and psychological integrity. This includes the right to freedom from all forms of B violence from public or private sources. Section 56 guarantees equality and equal treatment of all persons before the law. Discrimination on the grounds of, *inter alia*, sex, gender or age is outlawed.

On the basis of the change in the wording in the new Constitution, and having regard to several regional and international conventions that have C regarded corporal punishment of juveniles as violence against children and a violation of their human dignity, physical integrity and self-esteem, Muremba J concluded at 884C-F as as follows:

> "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 … the imposition of corporal punishment anymore. D Clearly s 353(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is now a law which is inconsistent or *ultra vires* the Constitution. … What it means under the circumstances is that whilst the Criminal Procedure and Evidence Act [*Chapter 9:07*] remains in force its section 353(1) is now an invalid law. … [T]he courts have a duty to uphold the Constitution and to promote, respect and protect the rights and freedoms enshrined therein. I thus declare s 353(1) of the Criminal E Procedure and Evidence Act [*Chapter 9:07*] to be constitutionally invalid."

In my view, and with due respect, my learned sister judge hit the bull's eye. I agree entirely with those findings and those conclusions. There can be no question that corporal punishment of juveniles has become unlawful in this country. The old Constitution made this country an outpost of tyranny and cruelty against children. Our stance on corporal punishment stuck up like a F sore thumb. All around us, and in virtually all over the progressive world, corporal punishment, whether of adults or of juveniles, had been abolished. That the Prisons Act defines corporal punishment as "… *moderate correction of whipping …*", or that the Regulations seem to go to some length to mollify or

mitigate the manner of its execution cannot, in my view, make it any less brutal. It is like applying lipstick on a bullfrog, or blowing incense on a skunk. G

In fact, our old Constitution, in expressly sanctioning corporal punishment as it did, was not always like that before. Subsection (3) of s 15 that expressly said, *inter alia*, corporal punishment inflicted upon a male person in execution of a judgment or order of a court was not inhuman or degrading treatment was a 1990 amendment. The subsection was inserted by Act No. 30 of 1990 H as the eleventh amendment to the Lancaster House Constitution.

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Mafusire J

In my view, by amending the Constitution in 1990 to make corporal punishment A lawful, the legislature was being reactive and retrogressive. In June 1989 the then Supreme Court, sitting as a Constitutional Court in *S* v *A Juvenile* 1989 (2) ZLR 61 (S), by a majority of three judges to two, had held that corporal punishment inflicted upon male juvenile offenders in terms of the CP & E Act was *ultra vires* s 15(1) of the Constitution. Given the weight of B authority, both in this jurisdiction and elsewhere in the progressive world, except South Africa at that time, and given the provisions of the various international conventions on children's rights, such a conclusion by the then constitutional court was inevitable. The *Ncube* case, *supra*, had been decided two years earlier. The Supreme Court had, by a unanimous decision, adjudged corporal punishment on adults as being unconstitutional, barbaric, C inherently brutal and cruel. The court said it stripped the victim of all dignity and self-respect, treating humans as non-humans.

In the *Juvenile* case, noting that the only significant difference between the whipping of an adult and that of a juvenile in the execution of the sentence of corporal punishment was in the size of the rattan cane to be used, the D constitutional court said that the strictures applied to corporal punishment of adults would apply *a fortiori* to such punishment when meted out on juveniles. The court registered its abhorrence of this type punishment in the most powerful diction and colourful nomenclature. For example, Gubbay JA, who had delivered the court's judgment in the *Ncube* case saidat 90G-91C:

> "… [J]udicial whipping in any form must inevitably tend to brutalise and debase E both the punished and the punisher alike. It causes the latter, and through him society, to stoop to the level of the offender. It marks a total lack of respect for a fellow human, be he adult or juvenile. It treats members of the human race as non-humans. By its very nature it is extremely humiliating to the recipient.
>
> … [J]udicial whipping, no matter the nature of the instrument used and the manner F of execution, is a punishment inherently brutal and cruel; for its infliction is attended by acute physical pain … Irrespective of any precautionary conditions which may be imposed, it is a procedure subject to ready abuse in the hands of a sadistic or overzealous official appointed to administer it. It is within his power to determine the force of the beating.
>
> In short, whipping, which invades the integrity of the human body, is an antiquated G and inhuman punishment which blocks the way to understanding the pathology of crime. It has been abolished in very many countries of the world as being incompatible with contemporary concepts of humanity, decency and fundamental fairness. The main categories of exception appear to be some former British colonies and some States where *shari'a* (Islamic law) is practised."

In the same judgment, Korsah JA, on the side of the majority, said at 101E-G: H

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Mafusire J

> "Speaking A for myself, I think any law which compels a person, against his will, to expose his posterior to the gaze of total strangers while blindfolded and strapped to a wooden bench degrades and debases that person, and if this is done for the sole purpose of subjecting him to whipping, then it also dehumanises him.
>
> Even if corporal punishment were to be administered without the victim taking his clothes off, the mere idea of inflicting physical pain as a form of punishment B corresponds, in my view with torture and the *lex talionis* – an eye for an eye, a tooth for a tooth, a life for a life – all of which have been condemned because they represent an inhuman approach to punishment; …"

Not only is this court bound by the decisions of the Supreme Court and the Constitutional Court, but also the manner those courts have expressed themselves on the subject is, in my view, and with due respect, the mark of C leadership in the development of jurisprudence.

Therefore, if the new Constitution has dropped the amendment to the old Constitution that permitted the meting out of corporal punishment upon male juveniles, and if the Constitution has gone on to strengthen certain provisions of the Bill of Rights, for instance, by promulgating s 86(3)(c) that D says that no law may permit the right to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; s 52(a) that guarantees the freedom from all forms of violence from public or private sources; and s 56 that guarantees fair treatment of all persons and outlaws discrimination on the grounds of, *inter alia*, sex, gender or age, there can be no doubt that s 353 of the CP & E Act, has become anachronistic.

E In the circumstances, in the four cases above, like Muremba J did before me, I cannot certify the sentences of caning to be in accordance with real and substantive justice. Given the average ages of the accused persons and those of their victims, and given that community service is wholly inappropriate in rape cases and, in my view, cases of aggravated indecent assault such as F was the situation in Case 3 above, I consider that sentences of imprisonment of three to five years wholly suspended would have been appropriate.

Section 167(3) of the new Constitution provides that it is the Constitutional Court that makes the final decision whether, among other things, an Act of Parliament is unconstitutional. It is that court that must confirm any order of constitutional invalidity made by another court before that order has any force. G

That an order concerning the constitutional invalidity of any law made by any other court has no force unless confirmed by the Constitutional Court is repeated in s 175(1) of the Constitution. Subsection (4) says that if a constitutional matter arises in any proceedings before any court, the person presiding over that court may refer the matter to the Constitutional Court. H I consider that this provision also applies to criminal reviews by this court

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Mafusire J

in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*]. In terms of A subsection (5) of s 175 of the Constitution, an Act of Parliament or rules of court must provide for the reference to the Constitutional Court of an order concerning the constitutional invalidity made by any court other than the Constitutional Court.

There is not yet any Act of Parliament or rules of court providing for the B reference of matters to the Constitutional Court. In her review judgment aforesaid Muremba J employed the provisions of subsection (3) of s 175 of the Constitution. They say that 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. The learned judge held the view that it is the Prosecutor-General who should apply to the Constitutional C Court to have the declaration of constitutional invalidity of s 353(1) of the CP&E Act confirmed. Thus, she directed that her review judgment be brought to the attention of the Prosecutor-General.

I believe that the course adopted by the learned judge was correct. But I also believe that in terms of subsection (4) of s 175 this court may directly cause the reference of the matter to the Constitutional Court without imploring the D Prosecutor-General to appeal or apply.

In the premises, this declaration of constitutional invalidity of s 353(1) of the Criminal Procedure and Evidence Act, [*Chapter 9:07*) is hereby referred to the Constitutional Court in terms of s 175 of the Constitution. The registrar of this court is hereby requested to prepare the necessary referral papers and E ensure that this judgment is placed before the Constitutional Court.

Tsanga J agrees.

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KAMBARAMI v KAMBARAMI & ANOR 2015 (1) ZLR 621 (H)

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Citation	2015 (1) ZLR 621 (H)
Case No	Judgment No. HH-419-15
Court	High Court, Harare
Judge	Tsanga J
Heard	27, 28 April 2015; *CAV*
Judgment	29 April 2015
Counsel	*O D Mawadze,* for the applicant *J Samukange & E Samkange,* for the first respondent No appearance by the second respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Practice and procedure – *application – urgent – certificate of urgency – contents – close similarity to wording of founding affidavit – not in itself an indication of failure by legal practitioner to apply his mind properly to issue of urgency – test is whether facts justify hearing case* D *as a matter of urgency*

Words and phrases – *immediately – usual meaning of "within a reasonable time" – need for prompt action, with delay, but not requiring the impossible*

Headnote

The parties were granted a divorce order by consent. There were three options E in the consent paper regarding the house: (1) that it be sold "immediately" for a minimum agreed price and the proceeds shared equally; (2) that if a buyer could not be found "immediately", either party could buy the other out at the same minimum agreed price within a year; and (3) that if neither bought out the other in that time, the house would be sold by auction. About five months after the divorce, a buyer was found who was F willing to pay more than the agreed minimum. On being told that a buyer had been found, the first respondent (the husband) wrote to the agent, stating that the property was no longer for sale as he wished to exercise his option to buy his wife out. He took the line that a sale not having taken place "immediately", he wanted to exercise the second option. The G wife brought an urgent application to require the husband to withdraw his notification and to ratify the proposed sale. The husband took the point *in limine* that the matter was not urgent, and that the certificate of urgency by the legal practitioner was not valid. The objection to the certificate was that the legal practitioner appears to have merely copied and pasted information that was in the founding affidavit. This was said H be indicative of failure to apply his mind to the nature of the application

before him. The husband's other argument was that the buyer had not A been found "immediately". There had been buyers "in the wings" at the time the divorce was granted.

Held, that the legal practitioner's certificate must contain the reasons for the urgency to justify the Registrar placing the matter before the judge in the initial instance. The judge may then call upon the other party to make representations on urgency before making any decision. Central to the B assessment of urgency is that a matter is urgent, if at the time the need arises, the matter cannot wait. That is the crucial test; it is a fact-based assessment. Inevitably there will be some fundamental factual overlap between what is stated in the legal practitioner's certificate of

urgency and what is averred in the applicant's founding affidavit. After all, they C are drinking from the same fountain. That, however, does not mean that a practitioner is there to merely repeat what has been said. Indeed, his role is to apply his analytical skills to those facts, with the primary aim of distilling the urgency and the core message that needs to be communicated to the court as the receiver of the nature of that urgency. In other words, he distils the factual within the context of the legal, to D communicate the exigencies of urgency. A matter cannot be dismissed simply because there are close similarities in the wording between what has been captured as the core of the urgency by the practitioner and what the applicant has said. Ultimately, the true test is whether the facts, as stated, make out a case of urgency that justifies hearing the matter on that basis. Here, a case for dealing with the matter as urgent E had been made out.

Held, further, that the meaning to be attributed to "immediately" depends on the circumstances, and the word usually has been held to mean "within a reasonable time". The word cannot be construed as requiring the impossible, but usually implies prompt, vigorous action without delay. F Although there may have been buyers "in the wings", the reality was that the court was confined to interpreting the word as embodied in the document in light of the circumstances that have developed since its signing. The facts of this matter were a salutary reminder to practitioners to avoid vagueness in the drafting of consent papers. G

Held, further, that the property was being sold within a specific economic environment, which was largely stagnant in nature. Quick sales were certainly not the order of the day. Few people were currently able to come up front with the considerably high deposit that is required even if they get a loan. A five month period in the current circumstances could not, given the sluggish reality of house sales, be said to be indicative H

Tsanga J

of A failure to effect a sale "immediately". The husband claimed that he had applied for a mortgage bond, but it took him some time, and the prompting of the court, to produce a document to show that he had applied for a mortgage and that his application was under consideration by the building society. Only when the mortgage had been approved could it be said that the house was no longer for sale. Accordingly, the B letter to the estate agent should be withdrawn.

Cases cited

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

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) C

R v *Sikumbuzo* 1967 RLR 348 (A); 1967 (4) SA 602 (RA)

Rowland Electro Eng (Pvt) Ltd v *Zimbank* 2003 (1) ZLR 226 (H)

Legislation referred to

High Court Rules 1971 (RGN 1047 of 1971), r 244 D

Case information

O D Mawadze, for the applicant

J Samukange & E Samkange, for the first respondent

No appearance by the second respondent

Judgment

Tsanga J: This urgent application is at the instance of the applicant Dawn E F Kambarami, a former spouse seeking to put into effect a clause of a consent paper regarding the sale of the matrimonial home, having found a buyer. The first respondent is her former husband Edgar Kambarami. He opposes the application on the grounds that the consent paper has not been properly interpreted. He says it is still within his rights to buy her out since either F party was given up to a year to buy the other out in the event of a purchaser not being found "immediately" after the granting of the court order.

On 19November 2014 the parties were granted a divorce order by consent in terms of which the consent paper which regulated the distribution of the matrimonial property between them, among other things, was made a part of the divorce order. Regarding the house the first option captured in G the consent paper was for it to be sold immediately for a minimum agreed price of $150 000. Sharing of the sale price would be split equally once all requisite taxes had been paid. The second option in the event of failure to find a purchaser "immediately", was for either party in light of that eventuality to exercise the option to buy the other out at the agreed price within that H one year period. The third option if they failed to buy each other out within

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the requisite time frame was that the house would then be sold by auction A to the highest bidder.

It is some five months now after the divorce order was granted and a buyer has been found for $180 000 which is $30 000 more than the minimum agreed price of $150 000. The applicant seeks an order to compel the respondent to sign the necessary papers to effect the sale. On being notified that a buyer B had been found the first respondent wrote a letter to the agent stating that the property was no longer for sale as he wished to exercise his option to buy his wife out.

In his resistance to the sale at this point, the first respondent premises his argument on the basis that this purchaser has not come "immediately" after C the granting of the divorce order as had been anticipated in the crafting of the consent paper. The essence of his argument is that within the ordinary meaning of the word "immediately" that time frame has passed and that the consent paper is currently operating within its second optional tier – that of buying each other out.

Points *in limine* D

The first respondent raises two points *in limine* regarding why the application before me should not be heard on the merits. The first is that part of the interim order sought, in particular para 2, is couched exactly the same as the final order. It reads as follows:

> "1. Respondent be and is hereby directed to retract in writing to the purchaser E and or the concerned Estate Agent, his communication dated 14 April 2015 which communication stated that the immovable property namely stand number 16 Lower Hampden Place, Stand Number 903, Marlborough, Harare is no longer on sale.
>
> 2. Respondent be and is hereby directed to cooperate with the applicant in having signed the Agreement of Sale (Annexure G) of stand number 16 F Lower Hampden Place, Stand Number 903, Marlborough, Harare, within 48 hours of this order being granted, failing which the sheriff of the High Court of Zimbabwe - Harare or his lawful deputy be and is hereby directed and authorised to sign all the necessary papers on the Respondent's behalf to effect transfer to the purchase."

Clause 2 as captured above is reproduced in *toto* as the operative paragraph G of the final order. The first respondent objects that in essence what the applicant is seeking in the interim order is in fact a final order and as such there would be no need for the applicant to move for the confirmation of the final order since the interim relief would be final. The first respondent relies on cases such *Kuvarega* v *Registrar General & Another* 1998 (1) ZLR 188 (H); *Rowland Electro Engineering (Pvt) Ltd* v *Zimbank* 2003 (1) ZLR 226 (H) H

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at 227; A and *Chikafu* v *Dodhill (Pvt) Ltd* 2009 (1) ZLR 293 (S) at 298 for its objection.

There is no need to belabour this point as case law is very clear. As subsequently re-echoed in many other cases, Chatikobo J put it thus when he addressed this undesirable overlap between the interim and the final order in the *Kuvarega* B case above at p 193 A-C:

> "The practice of seeking interim relief, which is exactly the same as substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical C to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on the proof merely of a *prima facie* case. This to my mind is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return date."

However, where an urgent matter appears to have merit and the order can be rectified, that should be done so as to do justice between the parties. Indeed, D as Chatikobo J himself observed, despite his displeasure with the above procedural irregularity, ultimately his dismissal of the matter that was before him was not because of the anomalies he had detected but more importantly because the matter lacked merit. Indeed there is no rule which forbids a judge in chambers, where a case truly merits, from having changes effected to a faulty provisional order. Understandably, such action should be limited E to meritorious instances because it is indeed ordinarily the requirement that a provisional order should truly be provisional when sought, and not final.

In the case before me, Mr *Mawadze* for the applicant indicated that para 2 of the interim order could be struck off altogether, such that the application proceeds with only para 1 as the interim relief sought, particularly since the F first respondent was opposed to an application for amendment. The interim relief does indeed contain not just the disputed overlay but also para 1 upon which it can stand should this matter be found to have merit. As such, para 2 of the interim relief which is the same as the final relief, is accordingly struck off without substitution.

The second point raised *in limine* by Mr *E Samkange* is that the certificate G of urgency by the legal practitioner is not valid because, in terms of r 244 of the High Court Rules 1971, he or she ought to objectively assess the urgency of the matter. The objection to the certificate attached is that the legal practitioner appears to have merely copied and pasted information that is in the founding affidavit. This is said to be indicative of failure to apply H his mind to the nature of the application before him.

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Mr *Mawadze* argued in response to the objection that there is no hard and fast A rule as to how the reasons should be crafted since what matters is whether or not they reveal urgency.

Rule 244 which deals with urgent applications reads as follows:

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that B the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith:
>
> Provided that before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent."

What emerges from the above is that the bottom line is that the certificate C must contain the reasons for the urgency to justify the Registrar placing the matter before the judge in the initial instance. The judge may then call upon the other party to make representations on urgency before making any decision. As stated in the *Kuvarega* case above, central to the assessment of urgency is that "a matter is urgent, if at the time the need arises, the matter D cannot wait". That is the crucial test; that is a fact-based assessment.

The facts of each particular case are what a practitioner uses to determine urgency. Inevitably there will of necessity be some fundamental factual overlap between what is stated in the certificate of urgency by the legal practitioner, and what is averred in the founding affidavit by the applicant. After all they E are drinking from the same fountain. That however does not mean that a practitioner is there to merely repeat what has been said. Indeed his role is to apply his analytical skills to those facts with the primary aim of distilling the urgency and the core message that needs to be communicated to the court as his as the receiver of the nature of that urgency. In other words, he distils the factual within the context of the legal to communicate the exigencies of F urgency. Being that as it may, I do not think that a matter can be dismissed simply because there are close similarities in the wording between what has been captured as the core of the urgency by the practitioner and what the applicant himself or herself has said. Ultimately, the true test is whether the facts as stated make out a case of urgency that justifies hearing the matter on that basis. My reading of the certificate of urgency and the application was G that indeed a case had been made out. Accordingly, this point *in limine* is equally dismissed and I proceed to deal with the merits of the matter below.

The merits of the matter

The operative part of the consent paper dealing with the matrimonial home reads in clause 4 as follows: H

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"4 A The plaintiff and defendant's matrimonial immovable property known as number 16 Lower Hampden Place, Stand Number 903, Marlborough Township, Harare, registered in the defendant's name under Deed of Transfer Number 0088972/2000:

4.1 Shall be sold at an agreed price of US$150 000 and shared equally between the parties after paying costs for capital gains tax to Zimbabwe Revenue Authority and costs of rates clearance certificate to City of Harare and; B

4.2 Either party can buy 50% of the other within a period of one year of the granting of this order.

4.3 In the event that purchaser is found*immediately after the granting of this order,*the house shall be sold and the proceeds shared equally (my emphasis).

4.4 If there is no purchaser, either party can buy the other out within a period C of one (1) year from the granting of this order for the same value.

4.5 If the house is not sold to a third party immediately after the granting of this order, the house shall be auctioned after one (1) year from the date of this order to the highest bidder"

The central issue is what interpretation is to be placed on the use of the word "immediately" as captured in clause 4.3 of the consent paper. It would D appear much ultimately depends on the circumstances of each case. In *R* v *Sikumbuzo* 1967 RLR 348 (A); 1967 (4) SA 602 (RA) Beadle CJ said the word means "within a reasonable time in the circumstances of each case". A reasonable time is generally accorded to doing something "immediately" as opposed to requiring instantaneous action. Even in historical context, case E law suggests strongly that the meaning given to the word has generally been contextual rather than pedantic.

In *Words and Phrases Legally Defined*John B Saunders (ed) Volume 3 I-N (London: Butterworths, 1969) the following case extracts indicate a fact and contextual based interpretation of the word "immediately":

> "The great question is, whether the condition in this contract, that the goods shall be F taken from the vessel immediately she was ready to discharge, has been satisfied or not … The first point is what is the effect of the words 'immediately' here? Under ordinary circumstances when a man is called upon to do an act, and no time is specified, he is allowed a reasonable time for doing it; what is reasonable may depend on all the circumstances of the particular case. But here the word used being 'immediately', it implies that there is a more stringent requisition G than what is ordinarily implied in the word 'reasonable'. Still, it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is impossible. (*Alexiadi* v *Robinson* (1861) 2 F & F 679 *per* Cockburn CJ at pp.683, 684)"

Yet another example:

> "It is impossible to lay down any hard and fast rule as to what is the meaning of H the word 'immediately' in all cases. The words 'forthwith' and 'immediately'

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> have the same meaning. They are stronger than the expression within a reasonable A time, and imply prompt, vigorous action without delay" (*R* v *Berkshire* (1878) 4 QB 469 *per* Cockburn CJ at 471)

Mr *J Samukange* who argued on the merits sought to apply a more doctrinaire meaning to the word highlighting that three to seven days would be no more than was envisaged in its usage. Having represented the respondent B in the divorce proceedings and crafted the consent paper with the input of Mr *Mawadze* for the applicant, he argued that there had been buyers in the wings at the time the consent paper was crafted. But the reality is that I am now confined to interpreting the word as embodied in the document in light of the circumstances that have developed since its signing. Needless to state, the facts of this matter are a salutary reminder to practitioners to C avoid vagueness in the drafting of consent papers – after all they are paid to solve, rather than create, their client's problems.

The property is being sold within a specific current economic environment- largely stagnant in nature where quick sales are certainly not the order of the day. Few people are currently able to come up front with the considerably high deposit that is required even if they get a loan. A five month period in D the current circumstances for getting a buyer cannot in my view, given the

sluggish reality of house sales, be said to be indicative of failure to effect a sale "immediately". This is more so where the applicant seems to have put in motion following the divorce the active quest for a purchaser.

Nonetheless it is equally important to balance this against the first respondent's E position that he has in fact applied for a mortgage bond. His averments need to be fully contextualised. When he was advised of the existence of the purchaser on 30 March and again reminded on 7 April imploring him to sign the documents, his response on 14 April was to the estate agent whom he advised that the property was no longer for sale and that he was buying out his ex-wife. No proof was attached to this effect. F

When this urgent application was brought on 27 April he made the same averments but again attached no proof that he had actually applied for a mortgage bond. It was in this light that I asked the first respondent, through his counsel who was Mr *E R Samkange,* on that day, to obtain the proof of his application from CABS to allow me to make an informed decision. G The applicant's counsel consented to the postponement of the matter to the following day albeit rightly pointing out that this was information that the first respondent should have provided without the need for prompting. Given that a purchaser has been found, and that a 'bird in hand is worth two in the bush', I emphasised that the information sought should address when the application was made and how long it is likely to take before a decision is H

Tsanga J

made A by CABS on the mortgage issue. The matter was accordingly postponed to 28 April for the obtaining of this information.

At the hearing on 28 April the letter was reported to have been done by CABS in Chinhoyi but had yet to be sent electronically due to challenges with power cuts. On the morning of 29 April the letter was placed before B me. It is dated Tuesday 28 April and reads as follows:

> "To whom it may concern
>
> We write to inform that Edgar Tafadzwa Kambarami I.D Number 63-273381 N47 holds a transactional account 1004474687 with CABS and has applied for a mortgage loan facility which is currently under consideration. For further information pertaining to this matter do not hesitate to contact the undersigned." C

It is signed by one Daniel Gunhi, the Area Manager for Chinhoyi. The respondent currently works in Chinhoyi. The information provided is unfortunately pedestrian in nature and does not really take the matter much further. More importantly it was not placed before me as a result of the respondent's own efforts to prove that he had applied for a mortgage bond. Instead he had to be requested to provide such proof. The information is D decidedly non-committal. Indeed Mr *J Samukange*, in arguing the merits and speaking to the loan application, stated that it was in fact the bank in Chinhoyi, through its manager, who in discussion with the respondent, indicated the possibility of him applying for a bond because his business account is with the bank. Thus whereas the applicant has clearly been taking measures to E bring finality to property distribution following divorce, it would appear that the first respondent has not done anything without prompting. Even the letter proving his application has had to be coaxed from CABS on his behalf.

In the circumstances of the letter being essentially factual and non-committal, and there being no indications whatsoever as to whether or not he is likely F to get the mortgage bond, I see no harm or prejudice that will be suffered by the first respondent from withdrawing his letter to the estate agent as per the provisional order. I say this for the stronger reason that the property can only truly be described as being no longer for sale once a mortgage is approved and granted. It cannot be described as not being for sale simply on the strength of an application whose positive outcome or otherwise cannot G be determined at this point. Should indeed the mortgage be processed and approved by the time of the hearing of the final order and concrete proof is produced, that is indeed the point in time when it can be said that the property is no longer for sale.

Accordingly the provisional order is granted with costs on the following terms. H

Pending the return date, it is hereby ordered that:

Tsanga J

1. The respondent be and is hereby directed to retract in writing to the A purchaser and/or the estate agent concerned, his communication dated 14 April 2015 which communication stated that the immovable property, namely stand number 16 Lower Hampden Place, Stand Number 903, Marlborough, Harare is no longer on sale. B

Manase & Manase, applicant's legal practitioners

Venturas and Samukange, first respondent's legal practitioners

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S v KINNAIRD & ANOR 2015 (1) ZLR 631 (H)

Citation	2015 (1) ZLR 631 (H)
Case No	Judgment No. HB-87-15
Court	High Court, Bulawayo
Judge	Mutema J
Heard	30 April 2015
Judgment	30 April 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – C *general principles – theories of purpose of punishment – extent to which rehabilitation should be regarded as primary purpose of punishment – retribution – nature of crime and harmful effects caused may sometimes dictate that only retribution will meet justice of the case* D

Headnote

Punishment is the authoritative imposition of a sanction upon an individual, in response to a particular errant behaviour that is deemed criminal and has been defined and promulgated as such. Justification for punishment in the realm of the criminal law resides in theories of punishment which include retribution, deterrence, rehabilitation and prevention or incapacitation. E It is often said that punishment must fit the triad of the offender, the offence and the interests of justice which latter notion is represented by societal interests/expectations/the legal values or convictions of society. Punishments differ in their degree of severity, depending primarily on the gravity of the crime. F

While current trends in sentencing place emphasis on the rehabilitative theory of punishment, this can be categorised as the general rule. Sight must not be lost of the fact that to every general rule there are exceptions. There exists a school of thought whose argument is that, in so far as the different theories of punishment are answers to questions about the meaning of punishment,

only the retributive theory is a possible one, G for there is no conceptual connection between punishment and notions like those of deterrence, prevention and reform, for the latter theories look to the future in deciding what to do with the present, their shared goal being crime prevention.

Whilst there is nothing wrong with crime prevention, it sometimes necessarily H happens that the nature of a given crime, the *modus operandi* of its

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perpetration, and the motive as well as the resultant harmful effect(s) A the crime causes to both the victim and the society, no other theory of punishment except retribution will meet the justice of the case.

Judgment

Mutema J: The two accused persons were correctly convicted of attempted murder in contravention of s 47(1) as read with s 189(1) of the Criminal Law B (Codification and Reform) Act [*Chapter 9:23*] following a contested trial in the regional court of the Western Division at Bulawayo.

The two accused persons aged 37 years and 27 years respectively brutally assaulted the complainant, one Clint Harness, following a misunderstanding whose nature all concerned could not clearly ventilate save to aver that C insults were uttered. Despite the brutality of the assault and the severity of the resultant injuries inflicted upon the complainant, issues which I shall advert to in due course, the regional magistrate sentenced the two accused persons as follows:

> "Accused 1:
>
> 5 years' imprisonment of which 3 years' imprisonment is suspended for 5 years D on condition the accused person does not during this period commit any offence involving assault or assault with intent to kill for which if convicted accused person is sentenced to a term of imprisonment without the option of a fine. The remaining 2 years' imprisonment is suspended on condition the accused person completes 840 hours of community service at Ingutsheni Hospital.
>
> Accused 2:
>
> 3 years' imprisonment of which 1½ years' imprisonment is suspended for 5 E years on condition the accused person does not during this period commit any offence involving assault or assault with intent to kill for which if convicted accused person is sentenced to a term of imprisonment without the option of a fine. The remaining 1½ years' imprisonment is suspended on condition the accused person completes 600 hours of community service at ZRP Donnington Police Bulawayo."

When the record of proceedings landed on my desk on automatic review, F on account of the fact that accused 2, unlike accused 1, was not legally represented, I considered the sentence, particularly the aspect of community service, disturbingly inappropriate. Despite the learned trial regional magistrate's attempt to justify her sentence, this case clearly cried out for an effective custodial sentence after weighing the mitigating factors against G the aggravating ones.

Punishment is the authoritative imposition of a sanction upon an individual, in response to a particular errant behaviour that is deemed criminal and has been defined and promulgated as such. Justification for punishment in the realm of the criminal law resides in theories of punishment which include H

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retribution, A deterrence, rehabilitation and prevention or incapacitation. It is often said that punishment must fit the triad of the offender, the offence and the interests of justice, which latter notion is represented by societal interests/expectations/the legal values or convictions of society. Punishments differ in their degree of severity depending primarily on the gravity of the crime.

While current trends in sentencing place emphasis on the rehabilitative theory B of punishment this can be categorised as the general rule and sight must not be lost of the fact that to every general rule there are exceptions. There exists a school of thought whose argument is that in so far as the different theories of punishment are answers to questions about the meaning of punishment, only the retributive theory is a possible one for there is no conceptual connection C between punishment

and notions like those of deterrence, prevention and reform, for the latter theories look to the future in deciding what to do with the present, their shared goal being crime prevention.

Whilst there is nothing wrong with crime prevention it sometimes so necessarily happens that given the nature of a specific crime, the *modus*D*operandi* of its perpetration, the motive as well as the resultant harmful effect(s) the crime causes to both the victim and the society, no other theory of punishment except retribution will meet the justice of the case.

Now applying the above observations to the case at hand, attempted murder is a grave crime. It poses a serious threat to the sanctity of human life. No E wonder the legislature deemed it fit to provide in s 47(3) of the Criminal Law (Codification and Reform) Act to provide for a punishment of death or imprisonment for life or any shorter period.

Both accused persons were not married at the time of sentence. They were first offenders and were voluntarily moderately drunk when they committed F the offence. While the crime was committed in July 2009, the trial only commenced in March 2012 and was concluded in February, 2015. The learned trial regional magistrate stated that the delay in finalising the matter was occasioned by her transfer from Bulawayo to Masvingo as well as the fact of accused 2 being medically examined and referred for psychiatric examination. She went on to consider in accused 2's favour that his G pre-trial incarceration was about five years while accused 1 was out of custody, hence the disparity in the sentences. The record does not reveal when she was transferred to Masvingo. However, it was a misdirection on her part to give credit of pre-trial incarceration to accused 2 for what was self-inflicted by his feigned mental illness – the psychiatrist's report (exhibit 2) clearly H shows that this accused was feigning mental illness. The delay and pre-trial

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incarceration were therefore self-inflicted and no credit should have been A accorded him in the premises.

Although the accused persons used booted feet and fists in attacking the complainant, the attack was brutal and seemingly a motiveless one. Once the complainant collapsed in the trench and lay unconscious the accused continued to pulverise him. They went on to cover the prostrate complainant B with grass which they set fire to. Had it not been for Antony Malony who put out the fire, the complainant would have been burnt to death. As if that was not enough, the accused stripped the complainant of his clothes in an attempt to stage a robbery and those clothes were never recovered.

The brutality and heinousness of the attack upon the complainant is C corroborated by exhibit 1 – the medical report – as well as the complainant's physical state when he testified some two years later. Doctor Magara medically examined the complainant on the very day he was brutalised. He observed the following: facial bruises, decreased level of consciousness, GCS (a form of scale used to determine the level of alertness of a patient with head injuries) was 11/15 (highest level is 15 and lowest is 3), the CT scan that D was done revealed that the complainant had bruises on the brain and that the brain had shrunken in size. He opined that a blunt instrument wielded with severe force was used to inflict the very serious injuries noted. The injuries posed potential danger to life with permanent disability likely to occur to the complainant in the form of permanent neurological disability, hence the E complainant's limping months afterwards when he came for review and also two years later at the trial. The complainant himself came to testify walking with the aid of a stick and had episodes of memory loss.

The foregoing injuries and their effect upon the complainant are a clear testimony of a brutal attack upon him. The attempted murder left him on the verge of being a cabbage while the perpetrators remained intact with no F loss of any life amenities. It is not likely that even if he sued the complainant would recover anything, since their mitigation reveals the accused persons to be paupers.

This was a brutal, mindless, heinous and sustained attack on a defenceless complainant by determined gangsters who exhibited zero remorse during the G attack as well during the trial. They had the effrontery to plead not guilty to the charge, alleging that they never touched the complainant or were never at the scene when they well knew that they were guilty.

Clearly the two accused did not deserve the lenient sentence that was meted out to them. This was a clear case where a retributive punishment in the H

Mutema J

form A of an effective custodial sentence should have been inescapable in the circumstances.

In the event, in view of the leniency of the sentence imposed I am unable to certify the proceedings as being in accordance with real and substantial justice and accordingly I withhold my certificate. B

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S v GOTO; S v SIBANDA 2015 (1) ZLR 636 (H)

Citation	2015 (1) ZLR 636 (H)
Case No	Judgment No. HB-88-15
Court	High Court, Bulawayo
Judge	Mutema J
Heard	30 April
Judgment	30 April 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *offences under Criminal Law Code – culpable* C *homicide – homicide arising out of motor vehicle accident – need for magistrate to determine degree of negligence in order to decide whether suspension or cancellation of accused's driving licence should also be ordered in addition to other punishment* D

Headnote

Culpable homicide is a common law crime which has been codified and is now governed by s 49 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Culpable homicide which is occasioned through the driving of a motor vehicle is interwoven with certain provisions of the Road Traffic Act [*Chapter 13:11*] when it comes to sentencing. E Culpable homicide involves the negligent killing of a human being. This is precisely why, in respect of culpable homicide cases arising out of traffic accidents, the particulars of negligence are always cited in the State outline or statement of agreed facts. These particulars of negligence will guide the trial magistrate in the determination, when it F comes to sentence, which offence under the Road Traffic Act the accused would have been charged with (such as negligent driving or reckless driving) had he not been charged with culpable homicide. Depending on the court's findings in that respect, and on whether the accused was driving a commuter omnibus, the suspension or cancellation of the accused's driving licence might be obligatory in the absence of special G circumstances. This punishment will be in addition to the punishment for the culpable homicide itself.

Trial magistrates are strongly urged to acquaint themselves with, understand and invoke this link when it comes to sentence. H

2015 (1) ZLR p637

Mutema J

Cases referred to A

S v *Duri* 1989 (3) ZLR 111 (S)

S v *Ferreira* 1992 (1) ZLR 93 (S)

S v *Kwedza* HB-128-13

S v *Ndebele* HB-160-13 B

Legislation considered

Road Traffic Act [*Chapter 13:11*], ss 52(2)(a) & (4)(a) & 64

Judgment

Mutema J: These two cases were dealt with by the same senior magistrate sitting at Western Commonage magistrates court on 27 March 2015 and C 8 April 2015 respectively. Both involved culpable homicide in contravention of s 49(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] emanating from road traffic accidents. I have decided to deal with them *pari passu* because they both involve the same legal issue(s).

In *S* v *Goto*, the 27-year-old accused hit the five-year-old deceased Theodore D Ncube with the headlight of his Nissan Primera opposite White City Stadium. The deceased was crossing the road with his siblings when he was hit and he fell down and sustained serious head injuries. He was rushed to Mpilo Hospital where he died two hours later. The post mortem report gives the cause of death as brain haemorrhages, head injury and road traffic accident. The accident occurred during the day, visibility was good and the road E surface was good.

The accused is a holder of class 4 and 5 driver's licence. The following were the alleged particulars of negligence:

1. Failing to stop or act reasonably when an accident or collision seemed imminent; F
2. Failing to keep a proper lookout in the circumstances;
3. Failing to exercise the high degree of care called from a driver who sees children in the road in front of him.

The accused is a first offender, He pleaded guilty to the charge, is single, has no children and is self employed as a trader realizing about $300 per month. G

The sentence was $400 or in default of payment three months' imprisonment.

In *S* v *Sibanda* the 20-year-old accused was driving a public service vehicle – a Toyota Hiace – carrying nine passengers when he hit the 21-year-old deceased Mbongeni Sibanda who was crossing the road. The deceased was conveyed to Mpilo Hospital where he was admitted but died one week later H due to the injuries sustained from the accident.

2015 (1) ZLR p638

Mutema J

The pathologist observed the following injuries on the deceased: A

1. bruised scalp bilaterally on parietal region;
2. patchy subarachnoid haemorrhages to the brain;
3. massive right haemothorax of about 1000 ml; small left haemothorax; bruised right lung and right posterior rib fractures T3 to T7; bruised left lung and rib fracture T4 and T5 posteriorly; B
4. retroperitoneal blood in the abdomen.

The cause of death was given as chest injury, road traffic accident.

The accused holds a driver's licence in classes 4 and 5, obtained on 10 September 2014 – some six months prior to the fatal traffic accident. He is a first offender, single, not employed and with no

children. He pleaded guilty C to the charge. The following were the alleged particulars of negligence.

1. Fail to stop or act reasonably when an accident seemed imminent;
2. Fail to keep a proper lookout in the circumstances.

The accident occurred during day time and visibility was good. The commuter omnibus sustained damage on the front windscreen, front grill, left headlight D and indicator and bonnet.

Following a finding of no special circumstances the trial magistrate imposed this sentence:

> "$400 or in default of payment three months' imprisonment. In addition accused is prohibited from driving for a period of 24 months." E

In both matters it is a mystery why the police and prosecution overlooked the inclusion of the particulars of negligence of driving at a speed that was excessive in the circumstances, especially in the latter case if account is taken of the injuries sustained by the deceased as well as the damage occasioned to the vehicle.

In light of the fact that these two cases are not the first in which this same F trial magistrate blundered when it came to following the proper procedure in sentencing, I did not deem it necessary to continue seeking his views regarding his failure to invoke the proper statutory provisions in the assessment of the correct sentence.

On 29 September, 2014 in HCAR 1349/14 I wrote a review minute to the G same magistrate in *S* v *Moyo*: CRB W/C TFC 48/14 as follows:

> "The accused was correctly convicted of culpable homicide in contravention of s 49(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] arising from driving a motor vehicle negligently. He was sentenced to $500 or in default of payment nine months' imprisonment. I queried with the trial magistrate why, in view of the carnage and loss of life, property and limb on our H

Mutema J

> roads, A there was no prohibition from driving and cancellation of the accused's driver's licence. He has since conceded to the query.
>
> The matter is hereby remitted to the trial magistrate to proceed in terms of s 64 (3) as read with s 65(6) of the Road Traffic Act [*Chapter 13:11*] regarding the two issues raised *supra*. In so doing, the trial magistrate's attention is drawn to the provisions of s 65(8) of that Act." B

Again on 13 October 2014 in HCAR 1728/14 in *S* v *Siziba* CRB W/C TFC 57/14 I wrote this query to the same magistrate:

> "Why did the trial magistrate in regard to sentence, specifically in connection with prohibition from driving and accused's licence, not proceed to cancel his driver's licence pursuant to s 65(5)(a) [of the Road Traffic Act] whose provisions are mandatory, clear and straight forward?" C

Numerous review minutes and review judgments have been written pertaining to the correct approach to sentencing in respect of the offence of culpable homicide arising from traffic accidents. See for instance *S* v *Kwedza* HB-128-13 and *S* v *Ndebele* HB-160-13. Culpable homicide is a common law crime which has been codified and is now governed by s 49 of the Criminal Law D (Codification and Reform) Act. Culpable homicide which is occasioned through the driving of a motor vehicle is interwoven with certain provisions of the Road Traffic Act when it comes to sentencing. Trial magistrates are strongly urged to acquaint themselves with, understand and invoke this link when it comes to sentence.

Section 64 of the Road Traffic Act, in relevant parts provides that: E

> "Prohibition from driving on conviction of certain offences
>
> (1) Subject to this part, a court convicting a person of an offence in terms of *any law other than this Act by or in connection with the driving of a motor vehicle on a road* may, in addition to any other penalty which it may lawfully impose, prohibit the person from driving for such period as it thinks fit.
>
> (2) … F
>
> (3) If, on convicting a person of murder, attempted murder, *culpable homicide*, assault or any similar offence by or in connection with the driving of a motor vehicle, the court considers –
>
> (a) that the convicted person would have been convicted of an offence in terms of this Act involving the driving or attempted driving of a motor vehicle if G he had been charged with such an offence instead of the offence at common law; and

(b) that, if the convicted person had been convicted of the offence in terms of this Act referred to in paragraph (a), the court would have been required to prohibit him from driving and additionally, or alternatively, would have been required to cancel his licence; H

the court shall, when sentencing him for the offence *at common law* –

2015 (1) ZLR p640

Mutema J

(i) prohibit him from driving for a period that is no shorter than the period A of prohibition that would have been ordered had he been convicted of the offence in terms of this Act referred to in paragraph (a); and

(ii) cancel his licence, if the court would have cancelled his licence on convicting him of the offence in terms of this Act referred to in paragraph (a)" (my emphasis).

Now, culpable homicide involves the negligent killing of a human being. B This is precisely why, in respect of traffic culpable homicides, the particulars of negligence are always cited in the state outline or statement of agreed facts. These particulars of negligence will guide the trial magistrate in the determination, when it comes to sentence, which appropriate section of the Road Traffic Act the particular accused would have been charged with (depending on the degree of the negligence), had he not been charged with C common law culpable homicide.

On the facts of the *Goto* case, had the accused been charged under the Road Traffic Act instead of under the common law, the proper section under the Act would have been contravening s 52(2)(a), which is negligent or dangerous driving. The main punishment for contravening s 49(1) of the Criminal Law D (Codification and Reform) Act is the one provided for in that section. However, regarding the additional punishment of prohibition from driving and or cancellation of the licence, that has to be extracted from the relevant provisions pertaining thereto from s 52 of the Road Traffic Act. *In casu*, the relevant subsection is subs (4)(a) of s 52. That provision is not mandatory E but permissive, for it says the court "may prohibit" the person from driving for a period it deems fit. That is when the question of judicious reasoning comes into play, premised upon the material facts of the case including the degree of the negligence.

In the instant case, the accident occurred during the day when visibility was good and the road surface was good. This was in a built up area opposite F a stadium on a Sunday when many people, including children, are wont to cross the road to and from the stadium. In *S* v *Duri* 1989 (3) ZLR 111 (S) it was held that a motorist has a duty to reduce speed and exercise caution when he observes people, especially children, within the vicinity of the road ahead of him. Children have a propensity for impulsive and sometimes G irrational action and so greater care is demanded towards them than is otherwise necessary. See also *S* v *Ferreira* 1992 (1) ZLR 93 (S). It is difficult to comprehend why the accused, given the facts of the case, failed to avoid the five-year-old deceased whom he hit with his car headlight. The only reasonable explanation for accused's conduct must be the three particulars of negligence alluded to *supra* which he admitted. He must also have been H

2015 (1) ZLR p641

Mutema J

travelling A at an excessive speed in the circumstances. In view of the carnage on our roads, stiff and deterrent sentences are called for. While I have no quarrel with the sentence imposed by the trial magistrate I have misgivings about the failure to prohibit the accused from driving for a commensurate period in the absence of special circumstances and cancellation of his licence.

Regarding *Sibanda supra*, had he been charged under the Road Traffic Act B instead of under the common law, the proper section would also have been s 52(2)(a) of the Act. In that regard, s 52(4)(c) as read with s 64(3) would strictly be apposite regarding prohibition from driving and cancellation of his driver's licence, since he was driving a commuter omnibus.

Section 52(4)(c) provides: C

"(4) Subject to part IX, a court convicting a person of an offence in terms of subsection (1) [(*sic*) – it should be (2) – draftsman's error] involving the driving of a motor vehicle –

(a) …

(b) …

(c) in D the case of an offence involving the driving of a commuter omnibus or a heavy vehicle *shall* prohibit the person from driving for a period of not less than two years:

Provided that the court may decline to prohibit the person from driving in terms of paragraph (b) or (c) if it –

(a) considers that there are special circumstances in the case which justify the court in so declining; and E

(b) endorses the special circumstances referred to in paragraph (a) on the record of the case when passing sentence."

In casu the trial magistrate found no special circumstances and correctly prohibited the accused from driving for two years. The trial magistrate however misdirected himself by failing to go a step further and invoke the F provisions of s 64(3)(b)(ii) of the Road Traffic Act quoted *supra* and cancel the accused's driver's licence.

In terms of s 29(2)(iii) of the High Court Act [*Chapter 7:06*] it behoves me to remit the case to the trial magistrate directing him to recall both accused persons pursuant to s 65(6) of the Road Traffic Act. In so doing, the trial magistrate's attention is drawn to the provisions of subs (8) of s 65. In G respect of accused Goto, the trial magistrate is directed to enquire into the existence or otherwise of special circumstances and if no such are found, to prohibit him from driving for a period he deems fit and is so doing the trial magistrate's attention is drawn to subs (5)(a) of s 65. In respect of accused Sibanda, the trial magistrate is directed to cancel the accused's driver's H licence. Also the Prosecutor General is directed to consider whether or not

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Mutema J

the owner of the commuter omnibus registration number ACL 6607 Toyota A Hiace which the 20-year-old accused Sibanda whose driver's licence was just six months old should not be prosecuted for allowing such an accused to drive a public service vehicle if he/she has not already been prosecuted.

Makonese J agrees. B

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REDSTONE MINING CORP (PVT) LTD & ORS v DIAOIL GROUP ZIM LTD & ORS 2015 (1) ZLR 643 (H)

Citation	2015 (1) ZLR 643 (H)
Case No	Judgment No. HH-438-15
Court	High Court, Harare
Judge	Mathonsi J
Heard	6 May 2015
Judgment	6 May 2015
Counsel	Ms *R Zvimba,* for the applicant *T K Hove,* for the respondents
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Costs – C *security for – purpose of – to protect interests of incola – purpose not to prevent access to court by peregrinus – court's discretion – need for application to be made and figure proposed – security for costs in urgent application by peregrinus – may defeat object of urgent application* D

Headnote

The respondents in this urgent application took the preliminary point that the third applicant was a South African national and therefore a *peregrinus* and should furnish security for costs. The first and second applicants were companies incorporated in Zimbabwe and thus were *incolae* and not required to furnish security. E

Held, that there are no rules governing the grant of an order for security for costs, which issue arises out of judicial practice. The court has an exclusive discretion to make such order or not to. The court has a discretion to dispense with security in exceptional cases, but should exercise that discretion sparingly. It is always difficult, where an urgent F application has been lodged, for the court to first deal with an application for an order for security for costs. By the time such an application has been dealt with, irreparable injury would have been sustained by the applicant. Because, in an urgent application, the court usually is required to grant interim relief, it would be a judicious exercise of discretion to entertain the urgent application first and let the party seeking an order G for security to make its application for an order pending the return date of the provisional order, should such be granted.

Held, further, that what appears to be lost to the litigants is that the requirement of security for costs to be given by a *peregrinus* is not only not there for the asking, it is not there as a weapon of defence by an *incola* bent on H preventing an approach to the court by a *peregrinus*. The object of the

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2015 (1) ZLR p644

Mathonsi J

rule relating to the provision of security is to ensure that an *incola* will A not suffer loss if he is awarded costs of the proceedings. It protects the interests of the *incola*. A party requiring security for costs should make an application to the court for an order to be made. Such party is not the court and therefore cannot prevent the *peregrinus* from accessing the court until it has been paid ridiculous sums of money as security. It is the court which, in its discretion, should prescribe the amount to be B paid, usually to the registrar.

Held, further, that there had been no application made by the respondents, no figure had been proposed and indeed the issue of security for costs was being used by the respondents to ward off an application. The respondents appeared determined not to get to the merits of the matter. Security for C costs in respect of the third applicant would be dispensed with.

Cases cited

African Banking Corp of Zimbabwe Ltd v *PWC Motors (Pvt) Ltd* 2013 (1) ZLR 376 (H) D

Bowes & Ors v Manolakakis 2011 (2) ZLR 59 (H)

Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njainjai & Ors 2000 (1) ZLR 85 (S)

Ericksen Motors (Welkom) Ltd v Protea Motors, Warrenton & Anor 1973 (3) SA 685 (A)E

Joint Project Mgmt Cttee for Belvedere West/Warren Park v Mutingwende & Anor HH-541-14

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

Wong & Ors v Liu & Anor 2013 (2) ZLR 576 (H)

Zendera v McDade & Anor 1985 (2) ZLR 18 (H) F

Case information

Ms *R Zvimba,* for the applicant

T K Hove, for the respondents

Judgment

Mathonsi J: The applicants are in the mining business and have a G substantial number of mining claims for tantalite, wolframite, gold, diamond and copper in Bakwa, Karoi, Buhera and Marange which they hold by certain certificates of registration. Duly represented by the third applicant, they, in December 2012, signed a memorandum of understanding with the first respondent ably represented by the second respondent the import of which was to identify the roles and responsibilities of the parties in respect H

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of A those mining concessions. In effect the parties were going into a kind of joint venture to operate together subject to certain terms and conditions.

The applicants now complain that although the respondents were required to inject some capital into the joint venture in order to be admitted as partners in the mining concerns they failed to do so even after their contribution had B been reduced to $700 000 down from the original $3 million. When the second respondent purported to make a contribution in the form of 2 motor vehicles, a DAF truck registration number ACO 0841 and a Land Cruiser pick up, registration number ACO 0843 as well as a compressor, having failed to pay the money, it turned out that he was not the owner of those items. They belong to a third party Pitch Mining (Pvt) Ltd in which the second C respondent is merely one of 5 directors of that company.

The respondent having failed completely to fund the project, the third applicant states that he was constrained to do so himself with the assistance of his son who is based in South Africa. He developed the first and second applicants that way at a time when the respondents kept a very safe distance away from the mining activities. Displaying a lamentable trait of wanting D to reap where they completely did not sow, the respondents are said to have only surfaced on 25 April 2015.

They started interfering with mining operations, harassed the workers at the mine and labelled the third applicant a thief. They threatened the third applicant and vowed to disrupt operations at both the business premises of E the first and second applicants and to cause the arrest of the third applicant on trumped up charges to enable them to remain taking over operations while he is in custody. The actions of the respondents have not only disrupted operations, they have unsettled the applicants who now seek in this application the following relief:

> "A. TERMS OF THE FINAL ORDER SOUGHT F
>
> That you show cause to this Honourable Court why a final order should not be made on the following terms:
>
> (1) The respondents be and are hereby ordered not to interfere and/or disrupt operations at the first and second applicants unless in terms of the law.
>
> (2) The respondents be and are hereby barred from taking any equipment or machinery at the first and second applicants. G
>
> (3) The respondents be and are hereby ordered not to visit the first and second applicants.
>
> (4) The respondents to pay costs of suit on a higher scale.
>
> B. INTERIM RELIEF GRANTED
>
> Pending the return date of this matter, the applicant(s) be and are hereby granted H the following interim relief:

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> (1) The respondents be and are hereby ordered not to harass and threaten the A third applicant and the mine workers.
>
> (2) The respondents be and are hereby ordered not to visit the first and second applicants unless in terms of the law.

(3) The respondents be and are hereby barred from removing any machinery or equipment from first and second applicants and not to interrupt or interfere with operations thereof.

(4) The respondents be and are hereby ordered to pay costs of suit on the attorney-client scale."

Mr *Hove* for the respondents has raised an array of points *in limine* in his quest to defeat the application. In the first place he complains that the third applicant is a fugitive from justice who is wanted by the police in Karoi and Avondale Harare in connection with charges preferred against him by *inter alia*, the second respondent himself. The third applicant is a fraudster and are crook who has been defrauding a number of people of their money and also has a judgment against him in the sum of $85 000 issued by this court. He should therefore be denied audience.

In my view, there is a distinction between the criminal court and this court and where the police desire to prefer criminal charges against a person, as it is their constitutional mandate to do so, they should not hesitate to do so and the law should be allowed to take its course. Critically, it is a celebrated principle of our criminal jurisprudence that an accused person is innocent until proven guilty. It would be extremely unwise to judge a litigant in a civil matter by accusations that have been levelled against him by his business acquaintance in the criminal courts even before he has been convicted. Those accusations remain irrelevant to the present inquiry.

More importantly, the third applicant is not the only one seeking redress in this application. There are 3 other applicants. In any event he has given his residential and business addresses and if indeed the police would like to interview him they know where to find him. Significantly, in his founding affidavit the third applicant states that he has been threatened by the respondents starting with their visit to the mine on 25 April 2015. He must therefore be available for arrest if indeed such is desired.

I also find it interesting that the charge preferred by the respondents against the third applicant relates to a compressor which, according to the report made at Avondale Police Station on 18 April 2015 by the second respondent, occurred between February 2014 and April 2015 a stretch of 14 months. One wonders how a single item could be stolen over such a long time. It has also not escaped me that this is the same compressor which Russia Muzanenhamo one of the directors of Pitch Mining (Pvt) Ltd which owns the compressor says the second respondent confirmed to him having authorised the third

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applicant to collect. I note that the second respondent, who had an opportunity to refute that, did not grab the chance.

Ms *Zvimba* for the applicants produced a court order issued by this court in favour of the third applicant on 24 October 2013 directing that he be issued with a residence permit. I conclude therefore that the third applicant's tribulations in the criminal justice system cannot be used as a weapon to ward off this application.

Mr *Hove* also took the preliminary point that the third applicant is a South African national and therefore a *peregrinus*, who should be made to pay security for costs. As he has not made a payment of security for costs he should be denied audience. I have to repeat that the third applicant is not only the applicant, there are three others. In particular, the first and second applicants are incorporated in Zimbabwe and are therefore *incolae*. There is no requirement for them to provide security for costs where they are suing in this jurisdiction.

There are no rules governing the grant of an order for security for costs which issue arises out of judicial practice. The court has an exclusive discretion to make such order or not to: *Bowes & Ors* v *Manolakakis* 2011 (2) ZLR 59 (H) at 63D; *Wong & Ors* v *Liu & Anor* 2013 (2) ZLR 576 (H).

The court has a discretion to dispense with security in exceptional cases but should exercise that discretion sparingly: *Zendera* v *McDade & Anor* 1985 (2) ZLR 18 (H) at 20A-D. In my view, it is always difficult, where an urgent application has been lodged, an application which demands the court's urgent attention because of its exigencies, for the court to first attend an application for an order for security for costs. By the time such an application has been dispensed with, irreparable injury would have been sustained by the applicant. It occurs to me that as in an urgent application the court usually is required to grant interim relief, it would be a judicious exercise of discretion to entertain the urgent application first and let the party seeking an order for security to make its application for an order pending the return date of the provisional order should such be granted.

What appears to be lost to litigants is that the requirement of security for G costs to be given by a *peregrinus* is not only there for the asking, neither is it there as a weapon of defence by an *incola* bent on preventing an approach to the court by a *peregrinus*. The object of the rule relating to provision of security is to ensure that an *incola* will not suffer loss if he is awarded costs of the proceedings. It protects the interests of the *incola*. See Herbstein and van Winsen *The Civil Practice of the Superior Courts of South Africa* 3 ed H at p 251, *Zendera* v *McDade & Anor* s*upra*.

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In that regard a party requiring security for costs should make an application A to the court for an order to be made. Such party is not the court and therefore cannot prevent the *peregrinus* from accessing the court until it has been paid ridiculous sums of money as security. It is the court which, in its discretion, should prescribe the amount to be paid, usually to the registrar.

In *casu,* there has been no application made by the respondents, no figure B has been proposed and indeed security for costs is being used to ward off an application by respondents who appear determined not to get to the merits of the matter. In the exercise of my discretion, I will therefore dispense with security for costs in respect of the third applicant. Thankfully Mr *Hove*, saw the light, albeit late, and abandoned that point *in limine.*

The final point taken in limine relates to urgency. The respondents are of the C view that the matter is not urgent and that the applicants have an alternative remedy to claim damages. The matter is not urgent because the dispute started on 11 April 2015 when the respondents discovered that the "third applicant had stolen mining equipment at their farm". Mr *Hove* did not explain why the matter would not be urgent where allegations are made that the respondents rocked up at the mine on 25 April 2015 and disrupted operations, threatening D to take over. There is no merit in that point *in limine* which is dismissed. There is no merit in the submission that the application should fail as there is no resolution of the companies authorising the third applicant to depose to the founding affidavit: *African Banking Corporation of Zimbabwe Ltd* v *PWV Motors (Pvt) Ltd* 2013 (1) ZLR 376 (H). E

What the applicants yearn for is a temporary interdict against what they regard as unlawful self help by the respondents who, by force and power, would like to take over mining operations they have not paid for. According to the applicants it was a condition of the agreement between the parties that before the respondents could secure shares in the group of companies F , the first respondent, represented by the second respondent had to fund the group of mines until they became productive. That suspensive condition not having been met, the respondents have no right whatsoever over the mining concerns and should stay where they were when the third respondent funded the projects with his son.

Holmes JA set out the requirements for the grant of a temporary interdict in G*Ericksen Motors (Welkom) Ltd* v *Protea Morors, Warrenton & Anor* 1973 (3) SA 685 (A) at 691C-G in the following words:

> "The granting of an interim interdict pending an action is an extra ordinary remedy within the discretion of the court. Where the right it is sought to protect is not clear, the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo* v *Setlogelo* 1914 AD 221 at p 227. In general the requisites are: H

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(a) a A right which, 'though *prima facie* established, is open to some doubt';

(b) a well-grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy;

In exercising its discretion, the court weighs *inter alia,* the prejudice to the applicant, if the interdict is withheld against the prejudice to the respondent if it B is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of 'some doubt' the greater the need for the other factors to favour him".

See also *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai & Ors*C 2000 (1) ZLR 85 (S) at 89E-H; *Joint Project Management Committee for Belvedere West/Warren*

Park v *Mutingwende & Anor* HH-541-14; *Universal Merchant Bank Zimbabwe Ltd* v *The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H).

Before denying disrupting operations, the second respondent accused the applicants of failing to substantiate the claim of interference. He also D challenged the applicants to prove that they funded the project. While claiming to have funded it, he also failed to produce proof in that regard. What I however find disturbing is contained in para 8(b) of the opposing affidavit of the second respondent where he says:

> "the third applicant should go to the police and defendant his case. It is therefore E incorrect that the alleged interference started on 25 April 2015. The third applicant has been on the run since 11 April 2015. The respondents have always been running the business through the first respondent with second respondent as the chairman".

If this is no proof of interference, nothing is. A person does not wake up one day "running the business" or "as chairman" of an enterprise. A lot has been F held back from the court's gaze.

There can be no doubt that the first three requirements have been established. The applicants have funded a mining operation which they are running lawfully holding as they do mining certificates. They have a right to do so. The respondents appear to be threatening that investment unlawfully which G action will certainly result in irreparable injury to the applicants, giving rise to what they have called "commercial urgency". I can conceive of no other remedy available to them other than an interdict.

It remains for me to weigh the prejudice to be suffered by either side as a result of the grant or otherwise of the interdict. Clearly the balance favours H the applicants because they are currently running the project without any

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input from the respondents who are "johnnies come lately" but wanting to A take over without expending anything.

I am therefore inclined to grant the interdict. Accordingly the provisional order is granted in terms of the amended draft order.

Zvimba Legal Practitioners, applicants' legal practitioners B

T K Hove & Partners, respondents' legal practitioners

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TELECEL ZIMBABWE (PVT) LTD v POSTAL & TELECOMMUNICATIONS REGULATORY AUTHORITY OF ZIMBABWE & ORS 2015 (1) ZLR 651 (H)

Citation	2015 (1) ZLR 651 (H)
Case No	Judgment No. HH-446-15
Court	High Court, Harare
Judge	Mathonsi J
Heard	7 May 2015; *CAV*
Judgment	13 May 2015

Counsel *F Girach*, for the applicant
J C Muzangaza, for the first respondent
Ms *C M Dube*, for the second respondent
G N Mlotshwa, for the fourth respondent

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Administrative law – *administrative decisions and acts – lawfulness of – general requirements – administrative decision rendering nugatory the* D *right of affected party to appeal – such decision irrational, unfair and probably unlawful*

Legal practitioner – *conduct and ethics – special pleas and other points in limine – abuse of right to raise such points – should only be made where point has merit and is likely to dispose of matter* E

Practice and procedure – *application – urgent – when urgency exists – when urgency can be said to be self-created – need to act within a reasonable time*

Practice and procedure – *special pleas and other points in limine – abuse of right to raise such points – should only be made where point has merit* F *and is likely to dispose of matter*

Headnote

Urgent applications are those where, if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have G become irreversible and irreversibly so, to the prejudice of the applicant. Too often, the issue of whether urgency is self-created is blown out of proportion. A delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent times the courts have been subjected to endless points *in limine* centred on urgency which should not be made at all. The courts appreciate that litigants H do not eat, move and have their being in filing court process. There are

other issues they attend to and where they have managed to bring their A matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust.

Raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one B opens a notice of opposition these days, one is confronted by a point *in limine* challenging the urgency of the application, a point which should not be made at all. The courts are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply C as a matter of fashion. A preliminary point should only be taken where, firstly, it has merit and, secondly, it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence D*vis-à-vis* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit, it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse E the court in that way, by ordering them to pay costs *de bonis propriis.*

The concept of administrative justice is now embedded in our Constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised. The elements are: (1) lawfulness, in that official decisions must be authorised by statute, prerogative or F the Constitution; (2) rationality, in that official decisions must comply with the logical framework created by the grant of power under which they are made; (3) consistency in that

official decisions must apply legal rules consistently to all those to whom the rules apply; (4) fairness, in that official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected persons an opportunity to be G heard; (5) good faith in the making of decisions in that the official must make the decision honestly and with conscientious attention to the task at hand having regard to how the decision affects those involved.

Where an administrative authority makes a decision which renders nugatory the right of the affected party to appeal, that decision cannot be said to H

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accord A with these dictates of administrative justice. It cannot be rational, neither can it be fair; in fact it borders on unlawfulness.

Cases cited

Bozimo Trade & Development Co (Pvt) Ltd v *First Merchant Bank Ltd & Ors* 2000 (1) ZLR 1(H) B

Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v *Njainjai and Ors* 2000 (1) ZLR 85 (S)

Document Support Centre (Pvt) Ltd v *Mapuvire* 2006 (1) ZLR 240 (H)

Ericksen Motors (Welkon) Ltd v *Protea Motors, Warrenton and Anor* 1973 (3) SA 685 (A)C

Prosecutor-General v *Busangabanye & Anor* HH-427-15

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

Legislation referred to

Constitution of Zimbabwe 2013, ss 68, 69 & 71

High Court Rules 1971 (RGN 1047 of 1971), r 241 D

Indigenization and Economic Empowerment Act [*Chapter 14:33*]

Postal and Telecommunications Act [*Chapter 12:05*], ss 43(2) & 96(1) & (3)

Case information

F Girach, for the applicant E

J C Muzangaza, for the first respondent

Ms *C M Dube*, for the second respondent

G N Mlotshwa, for the fourth respondent

Judgment

Mathonsi J: After hearing arguments from counsel on 7 May 2015, I granted F the provisional order and said the reasons would follow. These are they:

This matter has got a chequered history indeed. The applicant is a corporation which provides national cellular telecommunications service in Zimbabwe, among other services, by virtue of a licence issued in terms of the Postal and Telecommunications Act [*Chapter 12:05*] (the Act) by the first respondent, which is the statutory authority established in terms of the Act to superintend G the licencing and regulation of telecommunication service in this country under the watchful eye of the second respondent, the minister charged with the administration of the Act.

The applicant was initially issued with a national cellular telecommunications licence in May 1998. It was issued with a revised licence on 26 June 2002, H a licence which in terms of its clause 4 was valid for 15 years from the date

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of its signing. That licence contains the terms and conditions under which A the applicant is required to provide the service.

I have said that the relationship between the parties has had its fair share of problems. At some point, because of the squabbles relating to the applicant's shareholding which the regulatory authority insisted did not comply with the country's indigenisation laws and, more importantly, with the terms of the B licence, the authority cancelled the licence on 9 August 2007. The applicant appealed that cancellation to the responsible minister in terms of s 96 of the Act on 10 August 2007 and approached this court by urgent application in HC 4301/07 for interim relief. This court, *per* Musakwa J, issued a consent order on 15 August 2007, to wit:

> "It is hereby ordered that: C
>
> 1. Pending the determination of the appeal by the second respondent the order cancelling the licence and directing the applicant to switch off its telecommunications issued by the first respondent be and is hereby suspended.
> 2. There is no order as to costs."

Fortunately the applicant had the presence of mind to seek the suspension D of the cancellation order, because it was not until 29 April 2010 that the Minister finalised the appeal, almost three years later. The Minister's decision communicated by the Secretary for Transport, Communications and Infrastructural Development on that date is helpful:

> "RE: TELECEL ZIMBABWE LICENCE
>
> Your minute AM/mn/342/10 dated 28 April 2010 refers. The Ministry holds E the view that cancelling Telecel Zimbabwe's licence is not tenable *vis-a-vis* the thousands of subscribers the mobile operator now has and the many negative messages such action would convey to potential investors both in the sector and across the whole economy.
>
> Thus, at a meeting between Honourable Minister N T Goche (MP) and Telecel's chief Mr Kia Uebech on 1 April 2010, Government's requirement that Telecel F Zimbabwe reverts back to its original 60:40 position in respect of its local:foreign shareholding was stated/indicated. Telecel undertook to address this challenge. Clearly, it will be difficult for the Government to support the renewal of the licence come 2013 should Telecel fail to comply with Government's pre-condition. In our view, the ball is now in Telecel Zimbabwe's court."

That way the licence was reinstated on the understanding that the shareholding G would be regularised to meet government requirements. Since 2010 the parties have been engaged in dialogue over the shareholding which went on and on with no end in sight. A lot has happened including an agreement signed by the parties on 6 August 2013. However, not happy with what the applicant had done, the first respondent again cancelled the applicant's licence on 28 April 2015 on the basis that the applicant had failed to comply with H

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the A Act. It then set about issuing a raft of provisions in its final regulatory order which reads:

> "11. REGULATORY ORDER
>
> HAVING REGARD to the provisions of the Act, Telecel licence conditions, persistent compliance default, all relevant evidence and the submissions made by Telecel Zimbabwe Limited, POTRAZ hereby makes the following order in B the exercise of its power under the Act.
>
> 11.1 Telecel's licence to provide National Cellular Telecommunications Service is hereby cancelled with effect from the date of this order.
>
> 11.2 Telecel immediately notifies its subscribers and relevant stakeholders of the termination of its licence upon receipt of this order
>
> 11.3 Telecel ceases to operate its cellular telecommunications network and ceases C to offer any communication service upon receipt of this order.
>
> *The effect of the cancellation is as follows:*
>
> (a) Radio frequency spectrum allocated to Telecel for the provision of cellular telecommunication services are hereby withdrawn with effect from the date of receipt of this order (see Annex 01 for the detailed spectrum information). D
>
> (b) Radio frequency spectrum allocated to Telecel for the establishment of Microwave Fixed Links in 7, 8, 13, 18, 22 and 23 GHz bands are hereby withdrawn with effect from the date of receipt of this order.
>
> (c) Radio frequency spectrum allocated to Telecel for the establishment of a C-band VSAT Earth Station are hereby withdrawn with effect from the date of receipt of this order. E

(d) The number resources used by Telecel Zimbabwe Limited to offer telecommunication services are hereby withdrawn with effect from the date of this order.

12. SPECIAL DISPENSATION TO TELECEL

NOTWITHSTANDING the provisions of subparagraphs 11.2 and 11.3 above, however, and being mindful of the disruptive effect of an immediate cessation F of operations upon the subscribers and other stakeholders of Telecel, POTRAZ hereby grants a special dispensation to Telecel for it to continue with its operations for a period of thirty (30) days from the date of receipt of this order. The purpose of the dispensation will be to afford Telecel an opportunity, among other things to:

12.1 Facilitate the migration of subscribers from Telecel to other licenced telecommunications operators. G

12.2 Notify its employees and agents of the cancellation of its operating licence.

12.3 Notify its stakeholders in the mobile financial services sector of the cancellation of its licence.

12.4 Notify the general public of the cancellation of its licence.

12.5 Begin the process of decommissioning its telecommunications equipment which process has to be completed within ninety (90) days calculated from H the date of receipt of this order."

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Hence on the stroke of the pen and by regulatory decree, scores of employees A had lost employment and a number of subscribers had lost a service, never mind other stakeholders and never mind the labour laws of this country dealing with notice of termination of employment.

The applicant has now come to court on an urgent basis seeking the following relief: B

"TERMS OF FINAL ORDER SOUGHT

That you shall show cause to this Honourable Court why a final order should not be made in the following terms:

1. That pending determination of the finalisation of the appeal by the applicant pursuant to the provisions of s 96 of the Posts and Telecommunications Act [*Chapter 12:05*] that Regulatory Order No 1 of 2015 and special licence and C concomitant dispensations imposed by the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) be and are hereby suspended
2. That pending finality to the appeal process as provided by the Posts and Telecommunications Act [*Chapter 12:05*] applicant shall not dispose of any movable assets or infrastructure without notice to the first, second and third respondents. D
3. That there be no order as to costs.

INTERIM RELIEF (GRANTED)

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

(a) That first to third respondents be and are hereby interdicted from in any way of (*sic*) interfering with the normal business activities of the applicant pursuant to the provision of its telecommunication services and related business activities to the public and its subscribers in Zimbabwe. E

(b) The dispensation time periods mentioned in Regulatory Order No 1 of 2015 and the cancellation of applicant's licence be and are hereby suspended until such time as there has been a final determination of (*sic*) a final order sought in terms of this application."

In its founding affidavit deposed to by Angeline Vere, its general manager, the F applicant states that after all its attempts to reduce its foreign shareholding to a level acceptable to the first respondent were rejected by the latter, which retains the exclusive right of approval in terms of clause 12 of the licence, the first respondent resorted to the drastic action of cancelling the licence on terms set out in the regulatory order aforesaid.

Clause 12 of the licence provides: G

"12.1 Ownership

12.1.1 Foreign Investment and Shareholding Structure

1. The holder of this licence must be incorporated in Zimbabwe. The licencee shall ensure that the foreign ownership shall be limited to forty nine per cent. H

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2. A*Changes in the shareholding structure at any stage must be approved by the Authority before it is effected.*

3. In the event that the licensee's initial shareholding structure does not conform to the provisions of clause 12.1.1.1 the licensee shall within five years from date of signing of the licence ensures (*sic*) that the foreign ownership is reduced to forty nine per cent (49%)" (the emphasis is B mine).

Over the years the applicant has tried to comply by introducing a new partner to assume ownership of the 11 per cent balance of the 60 per cent shareholding held by the foreign partner Telecel International Ltd (TIL), but the first respondent either rejected the proposed partner or insisted it had to C be approved by the Minister. At one stage the applicant was told the 11 per cent shareholding could only be sold to the fourth respondent which holds the other 40 per cent stake.

The applicant introduced an employees' share ownership scheme (ESOP) in terms of which its employees would own the 11 per cent shares currently in the hands of TIL in order to move the shareholding to indigenous people. D This was rejected. It proposed listing on the Zimbabwe Stock Exchange as another option which was also rebuffed. Instead the first respondent cancelled the licence. The reason given for the cancellation appears in paragraph 1 of the first respondent's "judgment" of 28 April 2015 which reads: E

> "1. INTRODUCTION
>
> This case concerns Telecel Zimbabwe Limited (hereinafter referred to as 'Telecel') non-compliance with licence conditions, provisions of the Postal Telecommunications Act [*Chapter 12:05*] (hereinafter referred to as 'the Act') as read with Indigenisation and Economic Empowerment laws. The Postal Telecommunications Regulatory Authority of Zimbabwe (hereinafter referred to as 'POTRAZ') has to determine whether the licence issued to Telecel to F provide National Cellular Telecommunication Services should be cancelled or not, and issue an appropriate order."

The applicant stated that following the cancellation and the "appropriate order" it has appealed to the second respondent, the responsible Minister, but meanwhile the regulatory order remains extant as the appeal does not have the effect of suspending the order appealed against. Whichever way, it G is unlikely that the Minister will dispose of the appeal before the expiration of the period of 30 days it has been given to close shop, a period which is unreasonable in the circumstances given that it employs more than 700 direct employees (at the hearing counsel for the employees corrected that figure, there are 820 direct employees) whose employment contracts would H have to be terminated. In addition, in terms of the Act, they are entitled to

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28 days during which to lodge an appeal. The applicant therefore craves the A interim relief aforesaid.

While the other respondents did not oppose the application – in fact Mr *Mlotshwa* for the fourth respondent supported it and Ms *Dube* for the second and third respondents had no submissions to make except that the Minister would await the appeal – the first respondent surprisingly opposed the application vehemently, as if everything depended on the cancellation B of the licence and the closure of the applicant.

Mr *Muzangaza* for the first respondent contested the validity and urgency of the application. He submitted that the application does not comply with r 241(1) of the High Court Rules 1971, in that the purported Form 29B does not contain a summary of the grounds on which the application is brought. C For that reason there is no application at all before me. Mr *Girach* who appeared for the applicant conceded the omission of the grounds which he however said are contained in the founding affidavit. He submitted that I should condone what he called "a minor omission."

I take the view that the rules of court are there to assist the court in the D discharge of its day to day function of dispensing justice to litigants. They certainly are not designated to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in E abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission.

Mr *Muzangaza* was not done. He submitted that the applicant should not be entertained on an urgent basis because the matter is simply not urgent, F in fact this is self-created urgency. The applicant was aware of the intention to cancel its licence as at 5 March 2015 when the first respondent advised it of that intention by letter of that date. It should have taken remedial action then instead of waiting until 30 April 2015 to file this application. For that reason, the matter is not urgent and the applicant should be turned away for that reason alone. G

In my view, there is no merit whatsoever in that point *in limine*. I find myself having to repeat what I stated in *Prosecutor-General* v *Busangabanye & Anor* HH-427-15 at p 3:

> "In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self- H

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> created A urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust." B

I agree with Mr *Girach* that raising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining C points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute.

Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose D of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *vis-à-vis* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, E they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis.*

A matter is urgent if, when the need to act arises, the matter cannot wait. That is the simple test for urgency. While there is a catena of authorities pronouncing on urgency, it all boils down to the remarks of Makarau JP F (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (1) ZLR 232 (H) at 243G and 244A-C where the learned Judge President pronounced:

> "Some actions, by their very nature, demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of G individuals, or where the interests of minor children are at risk, demand that the courts drop everything else and, in appropriate cases, grant interim relief protecting the affected rights. The rationale of the courts acting swiftly where such interests are concerned is, in my view, clear … It is now accepted that in some cases, even purely commercial interests can be protected urgently in appropriate cases. In *Silvers Trucks (Pvt) Ltd & Anor* v *Director of Customs & Excise* 1999 (1) ZLR 490 (H), Smith J considered the matter of the release of H certain attached imports on the basis that the applicant would face bankruptcy

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> and its 67 employees would lose their jobs as a result. In my view, the reasoning A adopted by Smith J in this regard is still in line with the objective test that had the courts waited, there would have been no need for the court to act subsequently. The applicant would have been liquidated and the return to it of the attached imports would not have reversed the effect of non-timeous action by the court. It would be of no further benefit to the applicant to pursue the legal interest. *In my view, urgent applications are those where if the courts fail to act, the applicants*B*may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant"* (the emphasis is mine).

See also *Triple C Pigs & Anor* v *Commissioner General, Zimbabwe Revenue Authority* 2007 (1) ZLR 27(H) at 30G-31B.

It is not factually correct for Mr *Muzangaza* to suggest that the applicant did C not do anything from 5 March 2015. On that date the first respondent gave notice of an intent to cancel the licence and invited the applicant to make representations as to why such cancellation should not be effected. This was as it should have been in terms of the procedure set out in s 43(2) of the Act. The applicant made those representations which did not find favour with the first respondent and it duly cancelled the licence on 28 April 2015 issuing an D order which ignored completely the applicant's right of appeal to the Minister.

In my view, the need to act arose when the applicant received the notice of cancellation dated 28 April 2015. It obliged by filing this application on 30 April 2015, two days later. There can be no possibility of self-created urgency. For that reason I dismissed the point *in limine* as being fanciful and without E merit. This is a matter which cannot wait at all because the operation of the regulatory order started immediately and in 30 days the applicants would have to close with all the attendant consequences.

What the applicant seeks is a temporary, interim or interlocutory interdict. Holmes JA set out the requirements for the grant of such an interdict in F*Ericksen Motors (Welkom) Ltd* v *Protea Motors, Warrenton and Anor* 1973 (3) SA 685 (A) at 619C-G (quoted with approval by Sandura JA in *Charuma Blasting and Earthmoving Services (Pvt) Ltd* v *Njainjai and Ors* 2000 (1) ZLR 85 (S) at 89E-H) as:

> "The granting of an interim interdict pending an action is an extra ordinary G remedy within the discretion of the court. Where the right it is sought to protect is not clear, the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo* v *Setlogelo* 1914 AD 221 at p 227. In general the requisites are:
>
> (a) a right which, 'though *prima facie* established, is open to some doubt'.
>
> (b) a well-grounded apprehension of irreparable injury,
>
> (c) the absence of ordinary remedy; H

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> In A exercising its discretion, the court weighs *inter alia* the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called, the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated, for example, the stronger the applicant's prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of 'some doubt' the greater, the B need for the other factors to favour him … Viewed in that light, the reference to a right which, 'though *prima facie* established is open to some doubt'; is apt, flexible and practical, and needs no further elaboration."

See also *Bozimo Trade and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR 1 (H) at 9F-G.

In respect of the establishment of a *prima facie* right Mr *Girach* alluded C to s 96 of the Act which gives the applicant a right to appeal the decision of the first respondent to the Minister and to s 71 of the Constitution of Zimbabwe relating to the right to protection of property. On the other hand, Mr *Muzangaza* submitted that the applicant would not possibly have any right, *prima facie* or otherwise, when it has been operating outside the law, D that is without compliance with the indigenization laws of this country, which Mr *Girach* countered by submitting that the Indigenization and Economic Empowerment Act [*Chapter 14:33*] only came into effect in April 2008, long after the licence had been issued on 26 June 2002.

Mr *Mlotshwa* for the fourth respondent brought a new dimension to the issue. He submitted that to the extent that the cancellation is premised E on indigenization laws as stated in the first respondent's "judgment", the cancellation is invalid because the first respondent is not the enforcement authority of that Act, the Minister of Youth, Empowerment & Indigenization is in terms of s 5 thereof. It is he who initiates the process of cancellation for want of compliance with that Act.

It F is not necessary for me to determine all those issues because that is the province of the second respondent when dealing with the appeal. I am sitting only to decide whether a case had been made for an interim interdict. I think it has been. Section 96(1) of the Act provides:

> "Subject to this section, any person who is aggrieved by

(a) a decision of the Authority not to issue a licence or certificate; or G

(b) any term or condition of a licence issued to him, or a refusal by the Authority to specify a term or condition in a licence, or

(c) a refusal by the Authority to review a licence or certificate; or

(d) any amendment of a licence or a refusal by the Authority to amend a licence; or H

(e) the suspension or cancellation of a licence; or

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(f) the grant or refusal to grant any approval or authority in terms of this Act; A or

(g) the outcome of any mediation by the Authority of a dispute between licensees; or

(h) such decision of the Authority as may be prescribed;

may, within twenty eight days after being notified of the decision or action of the Authority concerned, appeal in writing to the Minister, submitting with his B appeal such fee as may be prescribed:

Provided that such appeal shall not suspend the operation of any licence or certificate issued by the Authority."

After cancelling the applicant's licence, the first respondent issued a special licence effective from 28 April 2015 to 26 May 2015 to facilitate only C the winding up of the applicant's operations, presumably including the termination of the employment contracts of 820 employees. Such termination would ordinarily require three months' notice where there are good grounds in terms of the labour laws of this country. The applicant cannot lawfully employ those employees after 26 May 2015. All that against the backdrop D of the applicant's right of appeal to the Minister which right subsists until the expiration of 28 days on 28 May 2015, if one includes weekends and public holidays. By the time the applicant's right of appeal expires, the applicant would have closed down in terms of the regulatory order. What that means therefore is that the regulatory order effectively obliterates the applicant's right of appeal reposed to it by s 96 of the Act. Clearly therefore E that regulatory order is not only unreasonable in the extreme in its effect, it also infringes upon the right of appeal given to the applicant by the Act. That right has been taken away.

More importantly, there is the possibility that the Minister may take a while to determine the appeal. There is no time limit given by the Act for him to F determine an appeal. Subsection (3) of s 96 only requires him to make an order on appeal "after due and expeditious inquiry". A precedent has already been set in that regard. When the applicant appealed another cancellation by the first respondent in August 2007, the Minister took almost three years to determine the appeal.

In terms of s 68 of the Constitution the applicant has a right to administrative G conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. In terms of s 69 it has a right to a fair hearing in the determination of its civil rights. Those rights cannot be derogated from at the whim of an impatient and overzealous regulatory authority. H

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The A concept of administrative justice is now embedded in our Constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised. The elements are:

1. Lawfulness, in that official decisions must be authorised by statute, prerogative or the Constitution. B
2. Rationality, in that official decisions must comply with the logical framework created by the grant of power under which they are made.
3. Consistency, in that official decisions must apply legal rules consistently to all those to whom the rules apply.
4. Fairness, in that official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected persons an C opportunity to be heard.
5. Good faith in the making of decisions, in that the official must make the decision honestly and with conscientious attention to the task at hand, having regard to how the decision affects those involved.

Where an administrative authority makes a decision which renders nugatory D the right of the affected party to appeal, that decision cannot be said to accord with the dictates of administrative justice which I have set out above. It cannot be rational neither can it be fair and in fact borders on unlawfulness.

I therefore entertain no doubt that the requirements of an interdict have been met. The applicant does have a *prima facie* right to appeal which has E been curtailed, if not negated. There has been an infringement of that right which, if allowed to perpetuate would adversely prejudice the applicant and its employees. It would have to close before it has exhausted remedies available to it.

In weighing the balance of convenience as I am required to do, I can conceive F of no prejudice that may be sustained by the first respondent except for a wounded ego which perhaps is the only reason why it chose to oppose the application. It is a truism that the first respondent has acted in an overzealous and precipitate manner without regard to the rights of stakeholders in this matter. It has in fact proceeded rough-shod over the rights of those that it is sworn to superintend and in so doing it has created a train smash of gigantic G proportions.

It is for these reasons that I granted the provisional order as amended, the interim relief of which is in the following:

"INTERIM RELIEF GRANTED

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

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(a) That first to third respondents be and are hereby interdicted from A in any way interfering with the normal business activities of the applicant pursuant to the provision of its telecommunication services and related business activities to the public and its subscribers in Zimbabwe.

(b) The dispensation time periods mentioned in Regulatory Order No. 1 of 2015 B and the cancellation of applicant's licence be and are hereby suspended until such time as there has been a final determination or a final order sought in terms of this application."

Honey & Blackenburg, applicant's legal practitioners

Muzanagaza, Mandaza & Tomana, first respondent's legal practitioners C

Attorney-General's Office, second and third respondent's legal practitioners

G N Mlotshwa & Co, fourth respondent's legal practitioners D

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S v MACHONA 2015 (1) ZLR 665 (H)

Citation	2015 (1) ZLR 665 (H)
Case No	Judgment No. HH-450-15
Court	High Court, Harare
Judge	Hungwe J & Bere J
Heard	14 September 2014; *CAV*
Judgment	13 May 2015
Counsel	*B Ndhlovu*, for the appellant

E Makoto, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal law – C *offences under Criminal Law Code – rape – sexual relations with mentally incompetent person – onus on accused to prove that complainant was able to consent and that she did consent*

Evidence – *witness – competence – mentally retarded person – whether* D *capable of giving evidence – court entitled to make assessment while witness testifies*

Headnote

In this appeal against a conviction for rape, there had been a medical affidavit stating that the complainant was not capable of giving evidence in court E and that she could not consent. Nonetheless, she gave evidence through victim-friendly close circuit television and was found to be a competent and credible witness.

There are always difficulties encountered in dealing with mentally retarded persons, whether as witnesses or accused persons. Different pieces of F legislation do not always appear to be synchronous in the terms used to refer to mental illness or retardation. As such, the legislation is consequently not in harmony with the scientific terms used by medical professionals or clinicians who are required to provide expert evidence in such cases. The Mental Health Act [*Chapter 15:12*], which governs mental health, makes no mention of the term "mental retardation". G The closest reference to the term is the term "arrested or incomplete development of mind", which is found in the definition of "mentally disordered or intellectually handicapped". Section 64 of the Criminal Law Code [*Chapter 9:23*] uses the term "mentally incompetent" in reference to a victim of sex-related offences. The term "incompetent" is H not defined, so the assumption must be that it relates to "legal competency

to give informed consent". The use of such broad and undefined terms A is unhelpful, as it removes certainty from the statute.

The question regarding a rape victim's ability to consent to sexual intercourse is a fairly complex matter. Recent research has found that people with mental retardation are not able to consent to sexual interaction, regardless of the degree of impairment. The level of their intellectual functioning is considered to be equivalent to that of minors. Evaluation of the B complainant's ability to consent should focus on the event in question, and include information on the individual's understanding of sexual behaviour and the context of normal sexual relationships; knowledge of the consequences of sexual intercourse, for example, pregnancy and infections; ability to make an informed decision to engage in sexual C intercourse, based on the above awareness and understanding of the right to say "no"; and the ability to resist or say "no" in context.

The function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training D or experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance. The medical affidavit, in pointing out that the complainant was "slow" and going to a special school and was incapable E of attending to her personal hygiene, was not expert evidence in the sense set out in s 278(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], nor could it be said that the doctor's opinion that the complainant was not capable of giving evidence in court and that she could not consent covered matter about which the court could not, on its own, make a determination upon. F

Every person not excluded from giving evidence in terms of the Criminal Procedure and Evidence Act shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe (s 245). Incompetence due to mental defects or illness is relative and only lasts as long as the mental illness lasts. Since 1851 the English law has been G that a person who suffers delusions may give evidence on matters about which he is rational. In light of the present knowledge about mental conditions, there is no reason why a person who may be an imbecile should not be able to testify as long as he or she has demonstrable ability to do so. Similarly, the fact that the witness is deaf and dumb does not make him incompetent so long as communication can be made through H

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an A interpreter. The cost of expert witness evidence regarding intellectual and psychological disabilities of a relatively normal kind far outweighs the marginal benefit which may be gained in the administration of justice by the admission of such evidence. Such disabilities can be assessed reasonably adequately while the witness gives evidence. It is not necessary to hold a trial within a trial to determine whether a person B is a competent witness.

Under s 64 of the Criminal Law Code, a person accused of having sexual intercourse with a mentally "incompetent" person will be charged with rape. There is a legal assumption that such a person cannot give consent due to her condition. Where the defence is that she consented to the act, C the section, by its wording, requires that the accused discharges what amounts to a reverse onus and proves that she was able to consent and that she consented.

Cases cited

Genticuro AG v *Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)D

R v *Davis* 1925 AD 30

R v *Hill* (1851) 2 Den CC 254; 169 ER 495

R v *K* 1951 (4) SA 49 (O)

R v *Ranikolo* 1954 (3) SA 225 (O)

R v *Turner* [1975] 1 All ER 70

S v *Naidoo* 1962 (2) SA 625 (A)E

S v *Nel* 1990 (2) SACR 136 (C)

S v *Thurston en 'n Ander* 1968 (3) SA 284 (A)

S v *Zenzile* 1992 (1) SACR 444 (C).

Legislation considered F

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 64(3)

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 245, 246 & 278(1)(a)

Mental Health Act [*Chapter 15:12*], s 2

Case information

B Ndhlovu, for the appellant G

E Makoto, for the respondent

Judgment

Hungwe J: The appellant was convicted of rape as defined in s 65(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 15 years' imprisonment of which three years was suspended for H five years on condition of good behaviour. He appeals against both conviction

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and sentence. Several "grounds of appeal" were advanced on behalf of the A appellant. They however amounted to an attack on the decision by the trial court to allow the complainant to testify when there was a medical report which expressed the view that the complainant was not capable of giving evidence in court. This is the only ground around which the heads of argument were formulated, confirming that this was the only basis of challenging the B conviction. An ancillary point was made in the heads of argument, which is that the magistrate fell into error by dismissing the defence claim that the complainant was capable of giving consent to the act of sexual intercourse. In short, the conviction was attacked on the basis that the court *a quo* erred in believing the evidence tendered by the complainant and the other state witnesses at the expense of the appellant. C

The following facts are largely common cause. The complainant and the appellant were, at the time these allegations arose, neighbours at Zipam Institute, Norton. The complainant's family kept part of their food which required refrigeration inside a house shared by the appellant and another. One day the complainant went to fetch some meat from the fridge inside this house. When she knocked, the appellant asked her to come in. What D transpired from there on is a matter of some dispute. The complainant says the appellant proposed love to her and she turned him down. The appellant, on the other hand, says that they were lovers, having fallen in love a month earlier. The complainant says that when she opened the fridge to take out the meat, he grabbed her and pulled her onto a sofa where he forcibly sexually E penetrated her against her will. He claimed that sexual intercourse with her occurred with her consent. His description of the incident was that when she came on that particular day, she found him having just taken a bath. She locked the door and asked if he had protection. He confirmed that he had. She rolled the condom onto his manhood, removed her jean trousers and they had sexual intercourse. He also claimed that they had sexual intercourse F on another occasion at her instance and request.

The complainant gave her evidence through the victim friendly closed circuit television system to avoid any further intimidation the appellant's presence might present to her. Despite the fact that she had shown obvious signs of distress causing the postponement of the trial, the court *a quo* found that she G was a credible as well as a competent witness. The court *a quo* was alive to the fact that the complainant was mentally retarded. That court attributed the initial difficulty the complainant experienced in composing herself before she could give her evidence properly to her condition. In analysing her evidence, the court came to the conclusion that although there had been initial problems to get her to relate the events of the rape, the court was satisfied that she H

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was A logical and competent to testify. The question that arises is whether the court *a quo* was correct in permitting the complainant to testify in light of the medical affidavit which specifically stated that "she is not capable to give evidence in court" and "she cannot consent." This appears to be the major thrust of the appellant's argument on appeal.

I must preface this judgment with the difficulty encountered in dealing B with mentally retarded persons whether as witnesses or accused persons. Different pieces of legislation do not always appear to be synchronised in the terms used to refer to mental illness or retardation. As such, legislation is consequently not in harmony with the scientific terms used by medical professionals or clinicians who are required to provide expert evidence in C such cases. The Mental Health Act, [*Chapter 15:12*] which governs mental health in Zimbabwe makes no mention of the term mental retardation. The closest reference to mental retardation is the use of the term "arrested or incomplete development of mind" which is found in the definition of mentally disordered or intellectually handicapped. The definition (in s 2 of that Act) provides thus: D

> "'mentally disordered or intellectually handicapped', in relation to any person, means that the person is suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind".

Whilst there is no specific mention of mental retardation in the South African Mental Health Act 17 of 2002, that Act defines mental illness as a positive E diagnosis of a mental health-related illness in terms of accepted diagnostic criteria by a mental healthcare practitioner authorised to make such diagnosis. The Criminal Law Code uses the term "mentally incompetent" in reference to a victim of sex-related offences (s 64). The term "incompetent" is not defined; the assumption therefore must be that it relates to "legal competency F to give informed consent". In my view, the use of such

broad and undefined terms is unhelpful. It removes certainty from the statute. I proceed on the basis that the assumptions I make regarding the words used by the legislature accord with the standard interpretation of the statute in question.

The question regarding the rape survivor's ability to consent to sexual G intercourse is a fairly complex matter. A recent research found that people with mental retardation are not able to consent to sexual interaction, regardless of the degree of impairment. The level of their intellectual functioning is considered to be equivalent to that of minors. Evaluation of the complainant's ability to consent should focus on the event in question, and include information on the individual's understanding of sexual behaviour and the H context of normal sexual relationships; knowledge of the consequences of

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sexual intercourse, for example, pregnancy and infections; ability to make A an informed decision to engage in sexual intercourse, based on the above awareness and understanding of the right to say "no"; and the ability to resist or say "no" in context.

The first point to make in this regard is that the medical affidavit by Dr S Nhiwatiwa was admitted into evidence as part of an expert opinion in terms of s 278 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. B However, the matters to which she deposes are not matters which, strictly speaking, required any special skill. She noted that:

> "She is slow, going to special schools. She is not capable of keeping her hygiene. She can barely read or write."

Under a section which required an expression of her expert opinion, the C doctor states:

> "She is not capable of giving evidence in court. She cannot give consent."

With respect, the doctor's observations expressed in her first paragraph are not matters which amount to

> "any fact ascertained by an examination or process requiring knowledge of or D skill in bacteriology, chemistry, physics, microscopy, astronomy, mineralogy, anatomy, biology, haematology, histology, toxicology, physiology, ballistics, geography or the identification of finger-prints, palm-prints or footprints or any other knowledge or skill whatsoever;"

as required in terms of s 278(1)(a) of the Criminal Procedure and Evidence Act, nor can it be said that her opinion in the subsequent paragraph covers matter for which the court could not, on its own, make a determination upon. E In fact, the doctor ventured an opinion which was irrelevant.

In essence, the function of an expert is to assist the court to reach a conclusion on a matter on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or F experience, the reasons for the opinions he expresses are acceptable. Any expert opinion which is expressed on an issue which the court can decide without receiving expert opinion is in principle inadmissible because of its irrelevance. The rule was crisply stated in *Genticuro AG* v *Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 616H:

> "[T]he true and practical test of the admissibility of the opinion of a skilled witness G is whether or not the court can receive 'appreciable help' from that witness on the particular issue".

Expert witness testimony on an issue will more readily tend to be relevant when the subject is one upon which the court is usually quite incapable of forming an unassisted conclusion. On the other hand the opinion of the witness H

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is A excluded not because of a need to preserve or protect the fact-finding duty of the court, but because the evidence makes no probative contribution.

In any event, every person not excluded from giving evidence in terms of the Criminal Procedure and Evidence Act [*Chapter 9:07*] shall be competent and compellable to give evidence in a criminal case in any court in Zimbabwe B (s 245). However issues of competence of witnesses is specifically left to the discretion of the court before which a case is being tried. The Act then goes on to exclude certain classes of witnesses from enjoying competence to testify in the following terms:

"246 Incompetency from mental disorder or defect and intoxication

No person appearing or proved to be afflicted with idiocy or mental disorder or C defect or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability."

The issue that arises is whether a complainant victim of rape, by virtue of this provision, is excluded from testifying.

Incompetence is relative and only lasts as long as the mental illness lasts. D Since 1851 the English law has been that a person who suffers delusions may give evidence on matters about which he is rational (*R* v *Hill* (1851) 2 Den 254, 169 ER 495; *R* v *Davis* 1925 AD 30 at 32). The question whether a mentally disordered person was adjudged automatically incompetent was left open in *S* v *Thurston en 'n Ander* 1968 (3) SA 284 (A). However, Hoffmann & E Zeffertt *S A Law of Evidence* 3 ed p 287 argue forcefully that in light of the present knowledge about mental conditions, there is no reason why a person who may be an imbecile should not be able to testify as long as he or she has demonstrable ability to do so. Thus the learned writers commend the decision in *R* v *K* 1951 (4) SA 49 (O) where the evidence of an imbecile was admitted after the court found that the complainant showed surprising F intelligence. For the reason that it would be impossible to prove a sexual offence charge without the evidence from the woman, I respectfully associate myself with the reasoning in that particular case.

Similarly, the fact that the witness is deaf and dumb does not make him incompetent so long as communication can be made through an interpreter: G*R* v *Ranikolo* 1954 (3) SA 225 (O); *S* v *Naidoo* 1962 (2) SA 625 (A). It has been said that the cost of expert witness evidence regarding intellectual and psychological disabilities of a relatively normal kind far outweighs the marginal benefit which may be gained in the administration of justice by the admission of such evidence: du Toit, de Jager *et al: Commentary on the Criminal Procedure Act, 1993*. Such disabilities can be assessed reasonably H adequately while the witness gives evidence: *S* v *Nel* 1990 (2) SACR 136

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(C). See also *R* v *Turner* [1975] 1 All ER 70. It is not necessary to hold a A trial within a trial to determine whether a person is a competent witness: *S* v *Zenzile* 1992 (1) SACR 444 (C).

In the present case, the Criminal Law Code specifically requires that a person accused of having sexual intercourse with a mentally "incompetent" person be charged with rape. There is a legal assumption that such a person cannot B give consent due to her condition. Where the defence is that she consented to the act, it seems to me that the relevant section by its wording, requires that the accused discharges what amounts to a reverse onus and prove that she was able to consent and that she consented.

The relevant section provides: C

"64 Competent charges in cases of unlawful sexual conduct involving young or mentally incompetent persons

(1) (not relevant)

(2) (not relevant)

(3) A person who engages in sexual intercourse, anal sexual intercourse or other sexual conduct with a mentally incompetent adult person shall be charged with D rape, aggravated indecent assault or indecent assault, as the case may be, unless there is evidence that the mentally incompetent person –

(a) was capable of giving consent to the sexual intercourse, anal sexual intercourse or other sexual conduct, and

(b) gave his or her consent thereto."

It therefore appears that once the fact that the complainant was mentally E incompetent is established, the appellant had to establish that she had consented to the act of sexual intercourse. The appellant did not deny sexual intercourse. He claimed that it took place with the complainant's consent. The court *a quo* did not believe the appellant's defence. In my view that finding was entirely justified. These two were neighbours. It is high unlikely that the F complainant's condition was not known to the appellant. The complainant's aunt who works together with the appellant specifically told him about the condition. The court observed the condition. It must have been pretty obvious to anyone that the complainant was mentally retarded.

In the event I find that the appellant's appeal against conviction ought to fail for the reasons given above. G

As for the appeal against sentence, I must confess that the appellant dismally failed to put up a strong argument against the sentence imposed. The reasons must be that because the Act provides for up to life imprisonment upon conviction for rape, the appellant was hard put to argue against the severity of the effective 12-year jail term. The appellant, by his own admission, H

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sexually A abused a mentally retarded young adult who was also his neighbour. In her reasons for sentence, the magistrate pointed out what she deemed particularly aggravating features of this case. The physical trauma as well as the emotional trauma are specific aggravating features that the court pointed out. Although the Criminal Law Code does not expressly state this purpose, it is clear to me that the fundamental purpose of sentencing is to B contribute, along with crime prevention initiatives, to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences; C

(c) to separate offenders from society where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment D of the harm done to victims and to the community.

Above all, one must also have regard to the principle that a sentence must be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In reconciling the different goals of sentencing, the fundamental principle of sentencing is that a sentence must E be proportionate to the gravity of the offence and the degree of responsibility of the offender. What then must be put in the balance is the gravity of the offence, the moral blameworthiness of the offender and the harm caused by the crime. Proportionality is the *sine qua non* of a just sanction. In my respectful view, these aspects were properly weighed into the assessment of the sentence by the court *a quo*. I am therefore unable to agree with the F appellant's contention that the sentence imposed on him induces a sense of shock. Where a convicted person gets away with an effective 12-year jail term in these circumstances, he cannot push his luck too hard by contending, as he does, that such a sentence induces a sense of shock. There is no basis for attacking such a sentence as too harsh.

In the result, the appeal is dismissed in its entirety. G

BERE J concurred.

Kanoti & Partners, appellant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners

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S v BIDDLECOMBE 2015 (1) ZLR 674 (H)

Citation 2015 (1) ZLR 674 (H)

Case No Judgment No. HB-62-15

Court	High Court, Bulawayo
Judge	Takuva J & Moyo J
Heard	6 October 2014; *CAV*
Judgment	14 May 2015
Counsel	*P Dube*, for the appellant *T Hove*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law (defences) – *ignorance of the law – accused person led into* C *breach by advice of government agents – entitled to acquittal*

Land – *acquisition – agricultural land – occupation of – need to have lawful authority – such can include permit issued by State – land handed by acquiring Ministry to another Ministry – latter Ministry giving* D *undertaking to sign a long lease with occupier – occupier having lawful authority to occupy and use land*

Headnote

The appellant's farm had been expropriated for re-settlement, but he did not vacate the farm. He was charged with contravening s 3 of the Gazetted E Land (Consequential Provisions) Act [*Chapter 20:28*], the charge alleging that he had continued to occupy the farm without lawful authority, "lawful authority" being defined as (a) an offer letter; or (b) a permit; or (c) a land settlement lease. "Permit" is defined as "a permit issued by the State which entitles any person to occupy and use resettlement land". F

The appellant produced documentary evidence to show that the farm was removed from the control of the Ministry of Lands, Agriculture and Rural Resettlement (the acquiring authority) to the control of the Ministry of Environment and Tourism because of the business operations carried out on the farm by the appellant and his company. An undertaking was then made to the appellant and the company that, upon such transfer, the G Ministry of Environment and Tourism would sign a 25 year lease with the appellant and his company. The appellant argued that he therefore had a "permit" to remain on the farm. He also argued the defence of mistake of law. It was conceded by the State in argument that a proper interpretation of the definition of a "permit" in the Act is that it can be issued by "any state organ" unlike an offer letter that can only be issued H

by A the "acquiring authority". It was conceded that the definition of a "permit" was wide.

Held, that the land reform policy is multifaceted, in that it focuses on different uses of acquired land. What happens in practice is that once land is gazetted and acquired by the State through the "acquiring authority", B that authority can transfer the land to another ministry for occupation and use in accordance with that ministry's requirements and needs. Gazetted land, for example, can be transferred from the Ministry of Lands to the Ministry of Local Government for urban expansion. It can also be transferred to the Ministry of Environment and Tourism in order to boost or promote proper management of government's wild life C policy. The argument that, notwithstanding such transfers, the Ministry of Lands retains the mandate to authorize the use and occupation of such transferred land becomes untenable, not only because it defies logic and common sense, but because it contradicts the clear meaning of the definition of the word "permit" in the Act. The letters the appellant had received constituted a permit as defined. Consequently, he had lawful D authority to occupy and use the farm.

Held, further, that while ignorance of the law is generally not an excuse, a person may be excused from criminal liability where such a person has been misled into breaching the law by government agents. Where the State has misled a man into a contravention of the law, as a matter of E public policy he should be entitled to an acquittal. It was clear from the correspondence that the appellant was indeed misled by government officials into breaching the provisions of the Act. It was unfortunate that the Ministry of Environment and Tourism had taken a long time to finalise the 25 year lease with the appellant, but this bureaucratic delay was not F of his making and should therefore not place him at any disadvantage.

Cases cited

DPP & Anor v *Phillips* [2012] ZASCA 140; [2014] 4 All SA 513 (SCA)

S v *Davy* 1988 (1) ZLR 386 (S) G

Legislation referred to

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

Case information

P Dube, for the appellant

T Hove, for the respondent H

2015 (1) ZLR p676

Judgment

Takuva J: This is an appeal against the decision of the magistrates court A sitting at Gwanda, in which the appellant was ordered to stand trial on allegations of contravening the provisions of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] (hereinafter referred to as "the Act").

The factual allegations were that on 19 May 2006, the State acquired Famona B Farm in terms of s 16B(2)(a)(iii) of the Constitution of Zimbabwe 1980 by publishing GN 128 of 2005 in the Government *Gazette* (Extraordinary) of 19 May 2006. The appellant then failed to comply with the provisions of s 3 of the Act. Specifically, it was alleged that the appellant failed to vacate the acquired land within 45 days from the fixed date, which was 20December 2006. Essentially, the charge was that appellant had continued to occupy the C farm without lawful authority.

After the ruling, the appellant appealed to this court. On 9 September 2013, both parties filed what they termed "stated case on a point of law arising on appeal." The document states:

> "Background and Accepted Facts D
>
> 1. On 29 November 2010, the above cited appeal was called before this Honourable Court.
> 2. Upon hearing the parties briefly the court directed that counsel for the respondent must investigate the authenticity of the letters filed of record by the appellant.
> 3. Such letters related to Famona Farm, the farm in respect of occupation E of which the criminal charges against the appellant were levelled, which charges the appellant moved unsuccessfully to quash, leading to the present appeal.
> 4. The letters purported that Famona Farm had been transferred from the control of the Ministry of Environment and Tourism.
> 5. Further, the letters reported that the Ministry of Environment and Tourism desired to leave the farm for stated reasons, in the control and administration F of the appellant and his company, Gamestone Safaris.
> 6. Counsel for the respondent had investigated the letters and can confirm before this Honourable Court that the letters have been written with the authority of the Ministry of Environment and Tourism and that this Ministry has consented that the appellant and Gamestone Safaris remain in occupation and control of the farm. G
>
> *7. The parties, therefore agree that:*
>
> 7.1 Famona Farm has been acquired by the State:
>
> 7.2 The State is now the owner of the farm;
>
> 7.3 The administration of Famona Farm, however, has been removed from the Ministry of Lands, Agriculture and Rural Resettlement, to the Ministry of Environment and Tourism; H

Takuva J

7.4 A The Ministry of Environment and Tourism administers the farm on behalf of the State.

POINTS OF LAW

8. At the present time, with the leave of this Honourable Court, the parties agree that they will, when the appeal is called, argue only the following points of law:

8.1 whether the letters produced of record by the appellant, emanating B from the Ministry of Environment and Tourism, amount to a 'permit' or other legal authority for the appellant to remain on the farm;

8.2 whether, therefore, the charges against the appellant were incompetent, standing to be quashed by the trial court, by reason that the appellant had lawful authority to remain on Famona Farm."

The appellant's argument is two pronged. Firstly, he argues that he had C lawful authority in the form of letters from certain government departments to remain on the farm. Secondly, he relies on the defence of mistake of law. I will deal with these grounds *seriatim* but before I do that let me examine the essentials of the offence the appellant was charge with.

Section 3(1) and (3) of the Act read as follows: D

"(1) Subject to this section, no person may hold, use or occupy gazetted land without lawful authority.

(2) …

(3) If a former owner or occupier of gazetted land who is not lawfully authorized to occupy, hold or use that land does not cease to occupy, hold or use that land after the expiry of the appropriate period referred to in subsection (2) (a) or (b), E or, in the case of a former owner or occupier referred to in section 2(b), does not cease to occupy his or her living quarters in contravention of proviso (iii) to section 2 (b), he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

Section 2, in which the definitions are contained, is also relevant in the F following parts:

(1) in its definition of lawful authority, as follows:

"'lawful authority' means

(a) an offer letter; or

(b) a permit; or

(c) a land settlement lease; G

and 'lawfully authorized' shall be construed accordingly";

(2) in its definition of offer letter:

"'offer letter' means a letter issued by the acquiring authority to any person that offers to allocate to that person any gazetted land, or a portion of gazetted land, described in that letter;" H

and

Takuva J

(3) in its definition of permit: A

"'permit', when used as a noun, means a permit issued by the state which entitles any person to occupy and use resettlement land."

From the above, it is clear that the following are the essential elements of the charge:

(a) the accused must be a former owner or occupier; B

(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, and

(e) has no lawful authority to occupy or use that land.

In casu, the only issue is whether or not appellant has lawful authority to C occupy or use that land. It was contended on appellant's behalf that he had permission to remain on the farm. This permission arose from the various negotiations, representations and undertakings by government officials. The essence of the representations was that the farm would be removed from the control of the Ministry of Lands, Agriculture and Rural Resettlement the acquiring authority to the control of

the Ministry of Environment and D Tourism because of the business operations carried out on the farm. Further, an undertaking was then made to the appellant and the company that upon such transfer, the Ministry of Environment and Tourism would sign a 25 year lease with the appellant.

The appellant attached the following correspondence by consent of the respondent: E

1. Appendix 1 a letter dated 1 November 2007 advising appellant of the initiative to transfer the farm from the Ministry of Lands, Agriculture and Rural Resettlement, to the Ministry of Environment and Tourism;
2. Appendix 2, a letter from the Director General of the Zimbabwe Parks and Wildlife Management Authority, confirming the strategic location F of and business at the farm on 18 February 2008.
3. Appendix 3, a letter dated 9 November 2010, served as apparent from the stamp and signature acknowledging receipt of a copy on the Minister of Lands and Rural Resettlement on 9 November 2010, which advised that a 25 year lease was being prepared in favour of the company. G
4. Appendix 4, letter from appellant dated 16 November 2010, accepting the offer of a 25 year lease.
5. Appendix 5, letter dated 20 February 2012 advising that deliberations were being held between the Ministries of Lands & Rural Resettlement and Environment and Tourism, concerning the farm in issue. H

Takuva J

6. A Appendix 6, letter dated 12 July 2012, advising that the farm had been formally transferred from the control of the Ministry of Environment and Tourism.

The respondent, while acknowledging the authenticity and sources of the above letters, insisted that the appellant did not have lawful authority because B he does not possess an offer letter issued by "the acquiring authority" i.e. the Ministry of Lands. However, the respondent conceded that a proper interpretation of the definition of a permit in the Act is that it can be issued by "any State organ", unlike an offer letter that can only be issued by the "acquiring authority". Put differently, it was conceded that the definition of a "permit" is wide. C

In my view, the land reform policy is multifaceted in that it focuses on different uses of acquired land. What happens in practice is that, once land is gazetted and acquired by the State through the "acquiring authority", that authority can transfer the land to another ministry for occupation and use in accordance with that ministry's requirements and needs. Gazetted land, for example, can be transferred from the Ministry of Lands to the Ministry D of Local Government for urban expansion. It can also be transferred to the Ministry of Environment and Tourism in order to boost or promote proper management of government's wild life policy.

For these reasons, the argument that notwithstanding such transfers the Ministry of Lands retains the mandate to authorize the use and occupation of E such transferred land becomes untenable, not only because it defies logic and common sense, but because it contradicts the clear meaning of the definition of the word permit in the Act.

In casu, the inter-ministerial process has since been finalised in July 2012, as seen from appendix 6. As matters stand, the farm in issue is now under F the control of the Ministry of Environment and Tourism, which, based on their business operations and record, is willing to permit appellant and the company to occupy and run the farm on the basis of a twenty-five year lease.

In view of the wide definition of the word "permit", I find that the letters of 16 November 2010 and 12 July 2012 in particular constitute a "permit" as defined in s 2 of the Act. Consequently, the appellant had lawful authority G to occupy and use the farm in issue.

As regards the second ground of appeal, the contention is that the appellant was misled into breaching the provisions of the Act by Government officials. The argument is that, subjectively the appellant believed, based on what was stated and undertaken to him, that he had the right to remain on the farm. H He believed that all steps requisite to the regularization, or formalization of

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Takuva J

his stay were being taken. Indeed a firm decision to transfer control of the A farm from one Ministry of another was taken in July 2012.

It is trite that while ignorance of the law is generally not an excuse, a person may be excused from criminal liability where such a person has been misled into breaching the law by government agents: *S* v *Davy* 1988 (1) ZLR 386 (S) where Gubbay JA (as he then was) stated as follows: B

> "It necessarily follows that in my opinion the rule that ignorance or mistake of law is no excuse which judicial officers have applied for so long in this country in conformity with both English law and the decision of the South African courts prior to the advent of *de Blom's* case *supra* remains valid. Its strength has hardly been shaken. It is, however, subject to the exception that where the accused acted upon incorrect advice as to the law given by a Government official who is primarily responsible for the administration of the particular statute to C which the matter relates, his ensuing mistake of law is a good defence. See *S* v *Zemura, supra* at 377E-G. As expressed by Lewis AJP in *S* v *Bledig & Anor* 1974 (1) RLR 100 (A) at 109A.
>
> > 'There is something in the nature of an estoppel present when the State prosecutes a person for certain conduct when he has been induced by advice received from a responsible representative of the State to embark on such conduct.' D
>
> Clearly the exception is grounded in reasons of public policy. Where the State has misled a man into a contravention of the law as a matter of public policy he should be entitled to an acquittal. But care must be taken not to extend the exception beyond the strict limits of *Zemura's* case, for to do so would be 'extremely dangerous and would tend to frustrate the enforcement of statutory provisions.' See *Bledig's* case *supra* at 108 in fine." E

In casu, it is clear from the numerous correspondence referred to that the appellant was indeed misled by Government officials into breaching the provisions of the Act. It is unfortunate that the Ministry of Environment and Tourism has taken a long time to finalise the 25 year lease with the appellant. However, this bureaucratic delay is not of the making of appellant and should F therefore not place him at any disadvantage. See *DPP & Anor* v *Phillips* [2012] ZASCA 140; [2012] 4 All SA 513 (SCA) (judgment delivered 28 September 2012).

I find therefore that appellant's occupation of the farm was not illegal on the grounds that he had lawful authority to remain on the farm. G

Accordingly, the appeal is allowed.

MOYO J concurred.

Webb, Low & Barry, appellant's legal practitioners

Prosecutor General's office respondent's legal practitioners H

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S v SIBANDA 2015 (1) ZLR 681 (H)

Citation	2015 (1) ZLR 681 (H)
Case No	Judgment No. HB-89-15
Court	High Court, Bulawayo
Judge	Mutema J & Moyo J
Heard	16 March 2015; *CAV*
Judgment	14 May 2015

Counsel No counsel details supplied

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal procedure (sentence)C – *statutory offence – domestic violence – mother burning child with hot coals because of minor infraction – prison sentence merited*

Headnote

The D appellant was convicted of contravening the Domestic Violence Act [*Chapter 5:16*]. She had burnt her then 10-year-old son on both hands with hot charcoal and filled a tablespoon with hot ashes and put it on the child's lips. This was as a punishment for him having, without her permission, taken a small amount of a sweet powder which he added to E water to make a cool drink. He and his sister had been left at home by the appellant for several hours without any food. The powder was of a very low value. When the child was taken by the appellant to a clinic, she said that he had fallen into a fire.

The appellant was sentenced to 24 months' imprisonment, of which eight months were suspended on suitable conditions. The maximum sentence F provided by the statute for the offence is a fine not exceeding level 14 or imprisonment for a period not exceeding 10 years or both. On appeal against the sentence:

Held, that the appellant's conduct was devoid of any maternal instinct, in spite of the fact that she was the one to blame by leaving the complainant G with no food for the day. Hunger, not being a good teacher of morals, got the better of the complainant and understandably so. How could a mother worth her motherhood cast away the cloak of maternity and brutally punish her own ten-year-old son in such a primitive fashion for such a minuscule infraction, worth not even a teaspoon? As if that were not enough, the appellant felt no remorse and had the effrontery H to tell lies to the clinic staff. What the appellant did contravened s 53

2015 (1) ZLR p682

Mutema J

of the Constitution. She subjected her son to torture, cruel, inhuman A and degrading treatment or punishment. This was not a case of sparing the rod and spoiling the child. Section 81 of the Constitution confers on every child the right to parental care, protection from maltreatment, neglect or any form of abuse and the right to nutrition. By her conduct the appellant sorely breached the complainant's constitutional rights. If this had occurred in other societies the appellant, for this domestic child B abuse, would surely have been stripped of custody of her children, for she certainly did not deserve custody after exhibiting such cruelty to the complainant. A fine or community service would trivialize the offence. The sentence was properly deserved. C

Cases cited

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

Legislation considered

Constitution of Zimbabwe 2013, ss 53 & 81

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

Judgment

Mutema J: This is an appeal against a sentence of 24 months' imprisonment of which eight months' imprisonment were suspended for five years on the usual conditions of future good conduct.

The appellant who then was aged 32 years was arraigned before a senior E magistrate sitting at Kezi on 24 November, 2009 facing a charge of contravening s 4(1) as read with s 3(1) (a) of the Domestic Violence Act [Chapter 5:16].

The allegations were that on 1 November 2009 at her homestead in Natisa area of Matobo the appellant, by means of an unlawful act which resulted F in direct infliction of physical injury, severely and intentionally burnt Prince Nkosi, her son aged ten years on both palms with hot charcoal and on the mouth with hot ashes.

The agreed facts are that the complainant was doing grade 4 at Whitewater Primary School. On the day at around 0800 hours the appellant went to church leaving the complainant and his sister Adelite Nkosi at home. Around 1300 G hours the complainant became hungry and took the appellant's jollie juice/sweet aid valued at R1 which he diluted with water and drank. On returning from church and discovering the consumption of the sweet aid the appellant accused the complainant of being a thief who should be taught a lesson. She took the complainant into the kitchen hut where she took two pieces H

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of A hot charcoal and put each in the complainant's palm. She proceeded to fill a tablespoon with hot ashes and put it on the complainant's lips. Due to the pain he felt the complainant started screaming but the appellant ordered him to keep quiet. As a result the complainant suffered severe burns on the palms and lips. The appellant took the complainant to Natisa Clinic where she lied to the clinic staff that the complainant fell into the fire on his own. It B was only after teachers at his school had observed the burns and interviewed him that the complainant disclosed the offence leading to the school head reporting the matter to the police. The complainant was medically examined on 5 November, 2009 and a medical report was then compiled. The doctor observed burns on both palms and on the lips and opined that although there was no potential danger to life or permanent disability likely to occur to the C complainant, the degree of force used to inflict those injuries was very serious.

The appellant pleaded guilty to the charge. She is a first offender who is married with four children. She vends vegetables realizing around R150 per month. She went to school up to form 4. She had US$150 and P360 in savings and three goats and a donkey as assets. She said she was very angry D at what complainant had done, hence the punishment.

Following the imposition of the sentence alluded to above on 24 November 2009, the appellant's current legal practitioner noted the appeal against the sentence on 4 December, 2009. The gravamen of the appeal is simply that the appellant should not have been visited with an effective custodial sentence, E instead, the trial court should have imposed a non-custodial sentence such as community service.

The appeal having been noted on 4 December, 2009 we raised eyebrows as to why it took so long – up to 16 March, 2015 – to have the appeal heard. A perusal of the record and Mr M*ahachi's* explanations revealed the following sad slipshod and slapdash way by Mr *Mahachi*, of prosecuting the appeal. The F notice of appeal was served only on the criminal registrar and office of the then Attorney General on 4 December, 2009. Contrary to appeal rules it was not served upon the clerk of Kezi magistrates court. On 18 December, 2009 the criminal registrar's office issued a warrant of liberation for the appellant. Although *ex facie* appeal record cover it is endorsed that appellant was on bail there is nothing in the record showing who granted the bail, when and G where or how much it was.

The next document is a piece of paper with this court's letterhead written

> "EDNA SIBANDA
>
> -VS-
>
> THE STATE H
>
> HCA 185/09"

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with the criminal registrar's date stamp on 21 May 2010. It is not known A who in that office gave the matter the appeal number – even the stamping of 4 December, 2009 on the notice of appeal by

the two offices alluded to above are not signed for.

The matter lay in abeyance, shrouded with its secrecy, until13 February, 2013 when the now resident magistrate of Kezi wrote to the provincial magistrate in Gwanda querying the circumstances leading to the issuance of the warrant B of appellant's liberation alluded to above. On 10 March 2013 the provincial magistrate directed that a warrant of arrest be issued for the appellant. That prompted the appellant's legal practitioners to serve the more than three-year-old notice of appeal upon the clerk of Kezi magistrates court on 18 March 2013. Promptly on 19 March 2013 the clerk of court at Kezi forwarded the C notice of appeal and the record of proceedings to the trial magistrate who was then based at Plumtree for processing of the appeal record which was done and the processed record was sent back to Kezi from Plumtree on 11 April 2013 and received at Kezi on 23 April, 2013. Meanwhile, as far back as 21 December, 2009 Cheda J had confirmed the proceedings on review. D

On 27 May, 2013 appellant's legal practitioners were called upon by the registrar's office to file their heads of argument by 21 June, 2013. They did not do so. On 16 July, 2013 the appeal was deemed abandoned and dismissed. On 5 August, 2013 a warrant for appellant's arrest was issued by the magistrate at Kezi. This jogged Mr *Mahachi* to apply for reinstatement of the appeal which Makonese J granted on 10 September 2013. On 13 September 2013 E Mr *Mahachi* wrote to the Kezi magistrates court's clerk of court attaching the order for reinstatement of the appeal and requesting the clerk to issue a warrant of liberation for the appellant. Thereafter the appeal again lay in abeyance for more than a year. I presume this was because appellant's heads of argument filed on 15 October 2013 were not served upon the respondent until this year. F

At the hearing of the appeal Mr *Mahachi*, on being quizzed by the court about the delay in prosecuting the appeal, conceded that the delay was occasioned by himself. Indeed from the chronology of events postulated above he could not have had any other plausible explanation except to concede and apportion the blame squarely on his sole shoulders. G

We are not privy to the reasons why, in view of the brazen and suspect non-observance of the appeal rules *in casu* as expounded *in extenso supra*, this appeal was reinstated but clearly this is one case in which the salutary words of Dumbutshena CJ in *S* v *McNab* 1986 (2) ZLR 280 (S) at 284 should have been, with respect, heeded. Therein the learned Chief Justice said: H

Mutema J

> "It A is in the discretion of the court to refuse condonation even in cases which the respondents do not object to the relief being granted to the applicants. In cases in which defective notices of appeal are filed it is in most cases the applicant's legal practitioners who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioners. In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by Steyn CJ in *Saloojee & Anor NO* v B*Minister of Community Development supra* at 141C-E when he said:
>
> > 'There is a limit beyond which a litigant cannot escape the result of this attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not C be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to the neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such D a relationship, no matter what the circumstances of the failure are … '"

I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the rules will encourage some legal practitioners to disregard the rules of court to the detriment of the good administration of justice." E

Regarding the merits or otherwise of the appeal, it is trite that sentencing is the prerogative of the sentencing court and the appellate court is generally loathe to interfere unless there exists a clear injustice or misdirection. In the instant case while Mr *Mahachi* conceded in his oral submissions that appellant's conduct was abhorrent for a mother cannot abuse her child in that manner he still contended that the sentence was harsh. The pith of his argument was F that appellant pleaded guilty, is a first offender and if incarcerated no one will remain taking care of the children. He

suggested that a sentence of 12 months' imprisonment with half suspended on condition of good behaviour and the balance on condition of performance of community service will meet the justice of the case. G

Mr *Makoni* maintained that the appeal be dismissed for lack of merit.

Section 4(1) of Domestic Violence Act provides:

> "… any person who commits an act of domestic violence … shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding 10 years or both such fine and such imprisonment." H

In his reasons for sentence the trial magistrate said:

2015 (1) ZLR p686

Mutema J

> "The accused although a first offender, perpetrated a gothic and barbaric crime A that is viewed with indignation, contempt and abhorrence by the public. As a mother, she severely and undeservingly punished a 10-year-old son by burning him on the palms and mouth for drinking a R1 worth sweet aid. Mothers are synonymous with love and care. Although a first offender, her behaviour is distinguishable. A fine will trivialize the offence. An option of community service too, will be inadequate. A prison sentence, appropriately suspended on B condition of good behaviour will meet the justice of this case. This is a serious offence … The fact that she is a mother to the victim aggravates this offence. A gaol sentence will be appropriate."

It is pertinent to point out that the appellant was in fact taken through the community service enquiry. The trial magistrate cannot be faulted in his reasoning *supra* that a fine or community service will trivialize the offence. C There is no jot of misdirection on his part.

Those of a rustic background would remember with shivers how rural women used to punish hens that would have "eaten their own eggs." The women would take a piece of burning wood and burn the hen's beak until only a stump remained so that thereafter the hen's beak would not be able to peck and break the egg shell in order to drink the contents again. D

The above scenario can be equated to the appellant's conduct *in casu*. Her conduct was devoid of any maternal instinct, in spite of the fact that she was the one to blame by leaving the complainant with no food for the day. Hunger being not a good teacher of morals got the better of the complainant and understandably so. How could a mother worth her motherhood cast E away the cloak of maternity and brutally punish her own ten-year-old son in such a primitive fashion for such a miniscule infraction worth not even a teaspoon? As if that was not enough, the appellant felt no remorse and had to effrontery to tell lies to clinic staff in an endeavour to sweep her dastardly act under the carpet. F

What appellant did contravenes s 53 of the Constitution. She subjected the son to torture, cruel, inhuman and degrading treatment or punishment. This case is not one of sparing the rod and spoiling the child. Section 81 of the Constitution confers on every child the right to parental care, protection from maltreatment, neglect or any form of abuse and the right to nutrition. By G her conduct the appellant sorely breached the complainant's constitutional rights enshrined in the Bill of Rights.

It does not matter that the appeal took this long to be heard. As already stated the delay lies squarely on appellant's legal practitioner's shoulders and this one is a proper case where appellant must bear the consequences of her agent's negligence. H

2015 (1) ZLR p687

Mutema J

Also, A it matters not that if incarcerated appellant's children will remain with no mother. They will remain with their father. After all, the complainant himself is now 16 years old. He is now a teenager and not a child. If it were in other societies the appellant, for this domestic child abuse, would surely have been stripped of custody of her children, for she certainly does not deserve custody after exhibiting such cruelty to the complainant. B

There was no misdirection by the trial magistrate in the manner in which he assessed the sentence that he imposed upon the appellant. The sentence is properly deserved.

In the result the appeal against sentence is without merit and is accordingly dismissed in its entirety. C

MOYO J concurred.

T Hara & Partners, appellant's legal practitioners

Prosecutors General's Office respondent's legal practitioners

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S v CHIKWATA 2015 (1) ZLR 688 (H)

Citation	2015 (1) ZLR 688 (H)
Case No	Judgment No. HH-455-15
Court	High Court, Harare
Judge	Mafusire J
Heard	18 May 2015
Judgment	18 May 2015
Counsel	No counsel details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Family law – *husband and wife – divorce – maintenance following divorce* C *– maintenance order specifying manner of payment of maintenance – maintenance paid indirectly in a different manner – what offence should be charged*

Headnote

The accused was charged with contravening s 23(1) of the Maintenance Act [*Chapter 5:09*], the charge alleging that he had failed to pay maintenance D in terms of an order of the maintenance court for some three years. The order was to pay the monthly amounts into his ex-wife's bank account. He claimed, and the magistrate accepted, that he had been paying maintenance in the form of school fees directly to the child's school. There was a divergence of views among magistrates about how to deal E with such a situation, one being that the accused ought to have been ordered to pay all the arrear maintenance and that it should have been up to the accused to institute civil proceedings against the complainant to claim reimbursement of any excess payments. The other was that the true object of the Act was to enforce payment of a civil debt, in much the same way as civil imprisonment proceedings are. This view was F supported by s 25 of the Act, which entitles an accused person sentenced to prison for failure to pay maintenance, to seek his release upon proof that he has paid all the arrear maintenance, or proof that he has

made adequate arrangements for such, and that he *bona fide* intends to make future payments in accordance with the order of maintenance. G

Held, that despite its penal character, the principal object of the Act is to enforce the orders of the maintenance court, not simply to jail defaulters. That would be somewhat self-defeating. A maintenance order is for the benefit of a dependent who is in need of support. A maintenance defaulter in jail is no good to the dependant. The dependant would sooner have him out of jail and providing for his or her wants and needs. That this H

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is A the object and purpose of the Act is made plain by the preamble. It says that the Act is one, *inter alia,* to provide for the *enforcement* of maintenance orders. Section 23(2) empowers the court convicting the defaulter to order payment of all the maintenance arrears. And then, s 25 entitles the jailed defaulter to seek his freedom immediately upon payment of the arrears, or upon making adequate arrangements for their B payment, and future payments.

Held, further, that on the other hand, a person, whom a court tells to do something in a particular way, does it, but in some other way, has disobeyed the court. Disobedience of court orders lies at the root of threats to the rule of law. Such conduct is a serious infraction and a threat C to orderly conduct. In the case of an order of the maintenance court, a direction that the maintenance be paid in a particular way is, or should be, made only after a full enquiry in terms of s 5 and s 6 of the Act. So, any directions given in such orders should not be ignored. A failure to follow such directions, without just cause, should result in a conviction D under any statute that penalises such failure, or under the common law. So if a person who was ordered to pay maintenance in a particular way showed that he has been paying, not in the way ordered, but in some other way, may be guilty of contravention of s 24, makes it an offence for any person to fail to comply with any direction made against him.

Held, further, that on the facts, the magistrate's findings that the accused had E paid the school fees was not supported by the evidence. The accused should have been convicted as charged.

Editor's note: section 24 of the Act makes it an offence for a person not to comply with a "direction" made against him in terms of s 6(5). Such a direction may be made against the *employer* of a person against whom a maintenance order is made, F requiring such employer to pay the whole or part of any maintenance payments out of the person's earnings. Section 23, on the other hand, makes it an offence to fail to make any particular payment "in terms of" the maintenance order.

Legislation considered

Maintenance Act [*Chapter 5:09*], ss 23(1) & 24 G

Judgment

Mafusire J: This matter was referred straight to this court by the trial magistrate for advice on a certain point. Thus, it did not come up by way of an automatic review in the ordinary way. From the referral letter advice on the point in question is sought, not for the trial magistrate alone, but for the H generality of the magistracy. It appears that the referral has been prompted

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by a meeting of the magistrates, following a discussion of this case, and at A which there were divergent views.

The point of concern was this: where an accused person has been convicted of contravention of s 23(1) of the Maintenance Act [*Chapter 5: 09*], for failure to pay maintenance in terms of an order of the maintenance court, should the court, upon conviction, order that he pays all the arrear maintenance B in circumstances where it is shown that even though he did not pay in the particular manner as ordered, he was in fact paying in some other way?

In the current case, it appears the order of maintenance directed the accused to pay the monthly amounts into the complainant's bank account. However, the trial magistrate accepted the accused's

claim that he had paid the C maintenance in the form of school fees directly to the child's school, and groceries directly to the child.

I shall shortly deal with the question posed. In the meantime, my attention has been drawn to something else that I have picked from the record. It is this. The trial magistrate's acceptance of the accused's assertion that he was paying maintenance for the child in the form of school fees directly to the D child's school was a manifest misdirection. The evidence adduced did not support such a finding. Furthermore, the charge was patently defective. I shall deal with these aspects in greater detail later on. For now I turn back to the magistrates' point of concern.

The accused was charged with contravention of s 23(1) of the Maintenance E Act, in that for 36 months he had failed to pay the maintenance (at the rate of US$60 per month), resulting in an accumulation of arrears in the sum of US$1 920. He pleaded not guilty. After a full trial he was convicted. The trial court ruled that the accused had wilfully disobeyed a court order that directed him to pay the maintenance into the complainant's bank account. F It rejected the State evidence that, contrary to his assertion, the accused had not been paying school fees for the child directly to the school, or at all, but that it was in fact the complainant who had been paying the school fees. But the court said it would give the accused the benefit of the doubt. Therefore, of the sum of US$1 920 said to be in arrears, US$1 780 was subtracted; that G amount being partly the total of the school fees said to have been paid by the accused directly to the child's school, and partly being the total of three deposits made by the accused directly into the complainant's bank account soon after the order of maintenance had been granted. The result was that the trial magistrate found that only US$140 had been outstanding. So the quantum of the arrear maintenance was ordered in that amount. H

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The A accused was sentenced to three months' imprisonment which was suspended on condition that he paid the complainant before a certain date, and through the clerk of court, arrear maintenance in the sum of US$140 aforesaid.

From the referral letter, it is said that two schools of thought emerged from B the meeting of the magistrates. The one school of thought was that the accused ought to have been ordered to pay all the arrear maintenance in the sum of US$1 920. The reason for that was that the maintenance court had not ordered him to pay the maintenance in the form of school fees. It had ordered him to pay into the complainant's bank account. It should have been up to the accused to institute civil proceedings against the complainant to C claim reimbursement of any excess payments.

The other school of thought, to which the trial magistrate subscribed, was that the true object of the Maintenance Act is really to enforce payment of a civil debt, in much the same way as civil imprisonment proceedings are. It argued that such a view is supported by s 25 of the Act. That section entitles D an accused person sentenced to prison for failure to pay maintenance to seek his release upon proof that he has paid all the arrear maintenance, or proof that he has made adequate arrangements for such, and that he *bona fide* intends to make future payments in accordance with the order of maintenance.

It seems both schools of thought were agreed that an accused person against whom there is an order of maintenance, but who claims to have paid, or to E have been paying in ways other than as directed by the maintenance court, would be guilty of contravention of s 23(1) aforesaid. However, it seems to me that in such a situation, the more appropriate charge would be contravention of s 24. It is this section that makes it an offence for any person to fail to comply with any direction made against him. What s 23(1) criminalises is the F wholesale failure by a person against whom there is an order of maintenance to make any particular payment in terms of that order. So if a person who was ordered to pay maintenance in a particular way shows that he has been paying, not in the way ordered, but in some other way, may be guilty of contravention of s 24, rather than s 23(1).

It is probably understandable why a seemingly straightforward provision G such as s 23(1), or s 24, of the Maintenance Act would produce divergent views. On the one hand, despite its penal character, the principal object and purpose of the Act, demonstrably, is to enforce the orders of the maintenance court. The object is not simply to jail defaulters. That would be somewhat self-defeating. A maintenance order is for the benefit of a dependent that H is in need of support. A maintenance defaulter in jail is no good to the

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dependant. The dependant would sooner have him out of jail and providing A for its wants and needs. That this is the object and purpose of the Act is made plain by the preamble. It says that the Act is one, *inter alia,* to provide for the *enforcement* of maintenance orders. Subsection (2) of s 23 empowers the court convicting the defaulter to order payment of all the maintenance arrears. And then, of course, there is s 25. It entitles the jailed defaulter to seek his freedom immediately upon payment of the arrears, or upon making B adequate arrangements for their payment, and future payments.

Yet, on the other hand, one who a court tells to do something in a particular way, does it but in some other way, has disobeyed the court. Disobedience of court orders lies at the root of threats to the rule of law. Such conduct is a C serious infraction and a threat to orderly conduct. In the case of an order of the maintenance court, a direction that the maintenance be paid in a particular way is, or should be, made only after a full enquiry in terms of s 5 and s 6 of the Act. Ideally courts should not be in the business of telling men or women to be responsible for the upkeep of their offspring or dependants. But because sometimes some people are irresponsible, the courts will make it D their business. And, anxious to make their orders more effective, the courts will sometimes go to some lengths to specify the manner in which their orders may be obeyed or enforced. So, any directions given in such orders should not be ignored. A failure to follow such directions, without just cause, should result in a conviction under any statute that penalises such failure, or under the common law. That is why in this case both schools of thought E were agreed that the conviction had been proper despite the trial magistrate's finding that the accused had paid a substantial portion of the maintenance in the form of school fees. Such would be a matter for mitigation and the quantum of the arrear maintenance to be paid.

Therefore, if anyone against whom there is an order of maintenance that F directs him to pay it in a particular way, shows that he did pay, but in some other way, should be found guilty. However, in the order to pay the arrear maintenance, the trial court convicting him should not ignore the payment made in kind, or in some other way, if such payments are ascertainable. If they are not, then the trial court would rather leave the matter for determination by the civil court, should the accused decide to claim reimbursement. G

However, in the present case there were a number of anomalies that drew my attention. The charge read out to the accused said that the accused was being charged with the crime of "… *defaulting*…" to pay maintenance "*… as defined in …*" s 23 (1) of the Maintenance Act, "… *in that … between October 2010 and August 2013 the accused … failed to pay US60 per month*H

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resulting A *in the accumulation of the money to US$1 920 thereby contravening the said Act*."

The State outline was no better. It simply gave the name and address of the complainant. The accused was described as a male adult and his residential address and place of employment were stated. It then went on to repeat B the period of the accused's alleged default and the amount of the arrear maintenance. It concluded by saying that the accused had acted unlawfully.

In drafting charges the wording of the statutory provision creating the offence should be followed as nearly as possible. The offence in s 23(1) is "… *failure* …" to make payments for the maintenance of a dependant by someone *against whom an order of maintenance was made.* In this case, the C order of the maintenance court was not produced. There was no reference to it at all. So from the charge, nobody would have known when, where, by whom, against whom, in whose favour and for which dependant the order of maintenance was made. The manner and frequency for the payment of such maintenance was not disclosed. D

Apart from the defects in the charge sheet, the evidence militated against the trial magistrate's finding that the accused had paid the maintenance in the form of school fees. Despite the absence of the order of maintenance, it seemed common cause between the State and the accused that the accused had been ordered to pay US$60 per month as maintenance for the unnamed child and that following that order the accused had made only three deposits E into the complainant's bank account. He produced the deposit vouchers for those three payments. This was not in dispute.

What influenced the magistrate to accept the accused's claim that he had been paying school fees for the child directly to the school was the fact that, except for the last receipt bearing the complainant's initial and surname, the F rest of them bore the accused's initial and surname. As a matter of fact, the child and the accused shared the same initial "T". The trial court said that the State had failed to prove its case beyond a reasonable doubt. Yet it was the State, through the complainant, that produced the school fees receipts. The accused claimed he would hand them over to the complainant after each payment. He implied in his cross-examination of the complainant that her G long period of silence showed that she had been content that the accused had been paying.

But both the complainant and the school bursar testified that it was the complainant that used to pay the school fees and that the receipts were being issued to the complainant. They both said that, until instructed by the auditors H to change it, the policy of the school had been to issue the receipts in the

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surname of the child. The trial court rejected this because it said nothing in A writing had been produced to back up such a claim. That was a misdirection. It may have been daft or contrary to sound accounting principles to have such a policy. But that did not explain why the hard copies of the receipts would be physically issued to the complainant if it had been the accused paying. The complainant and the accused were not staying together. B

The accused's claim was manifestly implausible. Among other things, he would not have willingly paid the school fees because he seemed irked by the conduct of the complainant in transferring the child from the one school to the other that she considered was offering much better education. Furthermore, the accused's testimony was contradictory on that crucial point. In one breath, during the cross-examination of himself by the State, he claimed that he C had stopped paying the maintenance into the complainant's bank account because the complainant had changed her account and had told him to pay school fees instead. Yet in another breath, he claimed that he had changed from paying into the complainant's account because he feared she would not pay the school fees if he gave her the money directly.

For the above reasons the trial court ought to have ordered restitution in the D full amount of the arrears.

In the result, despite the anomalies in the charge, the evidence seemed to have adequately cured them. The conviction and sentence were proper. But there was a misdirection in the amount of the arrear maintenance to be paid. In the premises, the order directing the payment of the arrear maintenance E is altered from US$140 to US$1 920. The period within which the accused may pay the amount shall be determined by the trial magistrate to whom the record is returned for an enquiry to be conducted in that regard. Thus the sentence shall read as follows:

> "The accused is hereby sentenced to three months' imprisonment which is suspended on condition that he shall pay the arrear maintenance due to the F complainant in the sum of US$1 920, less any amounts as he may have paid, such amount to be paid through the Clerk of Court, Karoi Magistrates Court."

The date or dates for the payment of the amount of the arrear maintenance shall be fixed by the trial court.

Musakwa J agrees. G

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TIMBA v SARUCHERA NO & ORS 2015 (1) ZLR 695 (H)

Citation 2015 (1) ZLR 695 (H)

Case No	Judgment No. HH-461-15
Court	High Court, Harare
Judge	Makoni J
Heard	27 March 2013; *CAV*
Judgment	20 May 2015
Counsel	*T Mpofu*, for the applicant *A Mugandiwa*, for the first and fifth respondents *L Uriri*, for the second respondent
Case Type	Court application
Annotations	No case annotations to date

Flynote

Costs – C *liability for – party withdrawing action or application – such party liable to pay opposing party's costs in absence of very sound reasons*

Headnote

The general principle regarding costs where a party withdraws his action or D application are: (a) the party *ipso jure* invites upon himself the obligation to pay costs for the opposing side; (b) the withdrawing party is in no better position than a losing party, his litigation being futile; (c) the withdrawing party cannot call to his aid the merits of the matter in trying to avoid costs; (d) costs have to be paid up to the date of withdrawal of the matter; (e) the sole question to be asked is whether or not the matter E has been withdrawn. If the answer is in the affirmative, then liability for payment of costs will attach; (f) a withdrawing party seeking to avoid a payment of costs has to advance very sound reasons why he should not pay the costs.

If the opposing party has incurred costs, then generally speaking he will be entitled to them. F

Cases cited

Abramacos v *Abramacos* 1953 SR 118; 1953 (4) SA 474 (SR)

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

Germishuys v *Douglas Besproeiinsraad* 1973 (3) SA 299 (NC)

Geldenhuys & Neethling v *Beuthin* 1918 AD 426G

Mahembe v *Matambo* 2003 (1) ZLR 14 (H)

Case information

T Mpofu, for the applicant

A Mugandiwa, for the first and fifth respondents

L Uriri, for the second respondent H

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Makoni J

Judgment

Makoni J: The applicant mounted a court application against all the A respondents seeking certain declarations and consequential relief. At the time of the launch of the application the fifth respondent was under the management of a curator, the first respondent. The curatorship took effect on 2 June 2011. The applicant was well aware of this position and that the curatorship was for a limited period. The application was opposed by all the respondents. The first and the fifth respondents retained the services B of Wintertons, legal practitioners. On 11 November 2011, the first and the fifth respondents sought to have the application determined on a certificate of urgency before the expiry of the curatorship. This was opposed by the applicant and the curatorship expired before the matter was heard. The curatorship was lifted on 2 March 2012.

On 5 June 2012 the applicant advised the respondents that the matter had been C set down for hearing on 21 June 2012. On the day of hearing the applicant at 08:45 a.m. served the first and the fifth respondent's legal practitioners with a notice of withdrawal. The notice was not accompanied by a tender of wasted costs.

The issue for determination is whether the applicant should be ordered to D pay the first and the fifth respondents' costs of the application and if so the scale of such costs. The second respondent indicated that it will abide by the decision of the court.

Mr *Mpofu* submitted that the first respondent was cited in his official capacity. The post was removed, therefore he ceases to be before the court. There E in no one to insist on costs. He referred the court to *Gariya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H). A party claims for costs because he or she is put out of pocket. Into whose pockets will the costs go if they are awarded?

As regards the fifth respondent, Mr *Mpofu* submitted that the application was not seeking any relief against it. It was not called upon to defend. It was joined as a matter of convenience. F

It did not put its position before the court. It did not incur any costs.

Mr *Mpofu* further submitted that the first respondent not having been sued in his personal capacity, did not meet the costs of litigation. They were met by the financial institution then under curatorship. The first respondent intends to recover money to put in his own pocket and that conduct borders on the G improper and is *prima facie* criminal.

He further submitted that courts of law exist for purposes of settling concrete controversies. He referred to *Geldenhuys and Neethling* v *Beuthin* 1918 AD 426. *In casu*, once the curatorship was uplifted there was no longer a concrete controversy for the court to settle. The applicant then withdrew H

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the A proceedings. The applicant cannot be penalized for a matter which was overtaken by events. He prayed that the first respondent in his personal capacity be ordered to pay costs on a higher scale.

Mr *Mugandiw*a contended that the relief that the applicant sought could still have been granted after the curatorship had ceased. What the applicant B sought were declarations. The court could still make a decision on whether the curator had discharged his obligations in terms of the Banking Act. The applicant also sought consequential relief regarding re-imbursement of fees drawn by the first respondent. This could still have been determined post-curatorship.

He further submitted that the applicant applied for a set-down date three C months after the curatorship had ceased. The applicant only filed the notice of withdrawal on the day of hearing at 8:45hours.

He further contended that serious allegations of impropriety were made against the first respondent and he had to respond. As a result he was put out of pocket. He also contended that the first respondent requested for D an urgent set-down of the matter before the expiry of the curatorship. The applicant opposed the request. In examining the fundamental rules relating to awards of costs, Herbstein and van Winsen *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa* 5 ed vol 2 p 954 state the following:

> "The award of costs is a matter wholly within the discretion of the court, but E this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. In leaving the magistrate (or judge) a discretion,

> The law contemplated that [a judicial officer] should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstance which may have a bearing F upon the question of costs and then make such order as to costs as would be fair and just between the parties …
>
> Even the general rule, *viz* that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs."

What comes out clearly from the above text is that the award of those G costs is at the discretion of the court and that the court is guided by certain fundamental principles in exercising this discretion. In dealing with the issue of costs on withdrawal of proceedings specifically, A C Cilliers *Law of Costs* 2 ed p 121 had this to say:

> "Where a litigant withdraws an action or in effect withdraws it, *very sound reasons* must exist why a defendant or respondent should not be entitled to his costs. H A plaintiff or applicant who withdraws his action or application is in the same

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Makoni J

> position as an unsuccessful litigant because after all, his claim or application A is futile and *the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. In such a case it is not necessary to go into the merits of the case*: there is a crucial difference between the position of an applicant settling his case on the merits and then asking the court's ruling on costs, and the position of an applicant withdrawing his claim and thereafter attempting to avoid an order of costs against him" (emphasis added). B

The above position was adopted in *Germishuys* v *Douglas Besproeiinsraad* 1973 (3) SA 299 (NC). See also *Abramacos* v *Abramacos* 1953 SR 118; 1953 (4) SA 474 SR). As was correctly pointed out by Mr *Mugandiwa,* the legal position emerging from the above is that;

(i) a plaintiff/applicant withdrawing an action/application *ipso jure* invites upon himself the obligation to pay costs for the opposing side. C

(ii) the withdrawing party is in no better position than a losing party, his litigation being futile.

(iii) the withdrawing party cannot call to his aid the merits of the matter in trying to avoid costs. D

(iv) costs have to be paid up to the date of withdrawal of the matter.

(v) the sole question to be asked is whether or not the matter has been withdrawn. if the answer is in the affirmative, then liability for payment of costs will attach.

(vi) a withdrawing party seeking to avoid a payment of costs has to advance "very sound reasons therefor". E

It is common cause that the applicant withdrew its application 15 minutes before the hearing. In terms of the above propositions of the law, the applicant invited upon himself the obligation to pay costs of the application up to the time of withdrawal unless he can show "very sound reasons" for avoiding the costs. The issue to be determined is whether the applicant has advanced F very strong reasons for avoiding liability of costs.

In summary, the applicant's reasons for avoiding costs are that the curatorship ceased and there is no longer a respondent answering to the name and position of the first respondent. The first respondent not having been sued in his personal capacity did not meet the costs of litigation and finally there G was no longer a concrete controversy for the court to settle.

The question to ask is whether the reasons advanced by the applicant amount to "very sound reasons" for avoiding liability for costs. My view is that the reasons advanced by the applicant are far from meeting the criteria of "very sound reasons". H

Makoni J

Lapse A of curatorship

When the applicant instituted the proceedings in issue, it was aware that the curatorship had a lifespan. Being fully cognisant of the fact, the applicant opposed the first and the second respondents' attempt to have the matter decided on an urgent basis and during the subsistence of the curatorship. B He therefore took the risks of the matter having to outlive the curatorship, and

cannot turn around and seek to rely on the lapse of the curatorship. In any event, no evidence has been placed before the court to show that the withdrawal is attributable to the lapse of the curatorship. If that was the case, the applicant would have withdrawn the matter immediately upon the lapse of the curatorship. He did not do so but waited for a period of almost four C months, after the lapse of the curatorship to file the notice of withdrawal. The applicant has not established a link between the lapse of the curatorship and the withdrawal four months down the line and a few minutes before the hearing.

Concrete dispute between the parties D

The lapse of the curatorship did not render the matter incapable of being resolved. The court could still make pronouncements on the legality or otherwise of the first respondent's conduct. The court could still determine the issue relating to the board of the fifth respondent. It could also still determine the issue of the consequential relief being sought by the applicant regarding re-imbursement of the fees drawn by the first respondent. E

No respondent answering by the name of the first respondent

The curatorship in this matter lapsed on 2 March 2012. The applicant proceeded to set the matter down when he knew very well that it had lapsed. On 5 June 2012, three months after the lapse of curatorship, the applicant clearly exhibited an intention to proceed with the matter by serving the notice of F set-down on the first respondent's legal practitioners. The question that begs an answer is if there was no longer a respondent answering to description of the first respondent, why did the applicant serve notice of set-down for the first respondent to appear in court, on his legal practitioners. There is no doubt that, as a result of the service of the notice of set down, the first respondent incurred costs post the curatorship. His lawyers prepared for the G hearing only to be served with a notice of withdrawal 15 minutes before the hearing. The applicant could have elected to abandon the case against the first respondent if the lapse of the curatorship rendered his case again the first respondent futile. He did not do so but instead chose to withdraw the case at the eleventh hour. H

The first respondent was not sued in his personal capacity.

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Makoni J

I agree with the submission made by Mr *Mugandiwa* that the source of money A that was used to meet the costs of the proceedings by the first respondent is not material to the determination of the issue at hand. The question is very simple: did the first respondent incur costs in defending this matter during and after the subsistence of the curatorship? If the answer is in the positive that is the end of the matter. The question of into whose pockets the money will go is not for this court to determine. B

As regards the fifth respondent, no meaningful submissions were made against it. It is still in existence. It incurred costs in defending this matter. I agree with Mr *Mugandiwa* that the fact that the other respondents have abandoned their claim for costs does not disentitle the first and the fifth respondents to claim their costs. From the above analysis, it is clear that the first and the C fifth respondents have managed to establish their entitlement to costs. The next issue to determine is at what scale.

This is one of the cases where I will not hesitate to exercise my discretion and award costs on a punitive scale. It is clear from the facts, that the applicant was not genuine in the pursuance of a stand in the litigation process. See *Mahembe* v *Matambo* 2003 (1) ZLR 14 (H) at 15C. The application by the D applicant was vexatious, and meant to disturb the smooth operations of the curator. It was not meant to vindicate any rights. If it was, the applicant would not have opposed the request by the first respondent to have the case set down urgently. The applicant would also have taken steps to withdraw or abandon the matter immediately upon the expiry of the curatorship. Having failed to do so and instead setting the matter down, it should not have opposed the E claim for costs by the first and fifth respondents.

The first and the fifth respondent have made out a case for costs on a higher scale.

In the result I will make the following order: F

The applicant is to pay the first and the fifth respondents' costs on the attorney and client scale.

Muza and Nyapadi, applicant's legal practitioners

Wintertons, first and fifth respondents' legal practitioners

Dube, Manikai and Hwacha, second respondent's legal practitioners G

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GAMBAKWE & ORS v CHIMENE & ORS 2015 (1) ZLR 701 (H)

Citation	2015 (1) ZLR 701 (H)
Case No	Judgment No. HH-465-15
Court	High Court, Harare
Judge	Uchena J
Heard	13 May 2015; *CAV*
Judgment	20 May 2015
Counsel	Miss *P Makurumure*, for the applicants *J Dondo*, for the first respondent Miss *R Hove*, for the second, third and fourth respondents
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Customary law – C *chieftainship – disputes concerning appointment of chiefs and acting chiefs – must be resolved by President on recommendation of provincial assembly of chiefs – courts having no jurisdiction to resolve such disputes* D

Headnote

Section 283(c)(i) of the 2013 Constitution provides for the appointment of a chief by the President "in accordance with the traditional practices and traditions of the communities concerned". While ss 3 and 4 of the Traditional Leaders Act [*Chapter 29:17*] distinguish between E the procedures for the appointment of a chief and acting chief, the Constitution only mentions the appointment of a chief. However, in terms of s 340(1)(c) of the Constitution, the power to appoint a substantive office holder includes the power to appoint a person to act in that office; therefore, according to the 2013 Constitution, the procedure provided F for the appointment of a chief applies to the appointment of an acting chief. In terms of s 283(c)(ii), disputes concerning the appointment of chiefs "must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders". This imposes a duty on the

President, and is indicative G of the legislature's intention that only the President should resolve such disputes. The use of the word "concerning", which means something about or involving the appointment of chiefs, includes disputes which arise before a chief is appointed, as long as they have something to do with a chief's appointment. The duty to resolve such disputes having H been cast on the President, the courts have no jurisdiction to resolve them.

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Uchena J

Editor's note: on this topic, see also *Munodawafa* v *District Administrator, Masvingo,*A& *Ors* HH-571-15 (*infra*, at p 957 of this volume).

Legislation considered

Constitution of Zimbabwe 2013, ss 2(1), 283, 286(1), 340(1)(c) & 342

Traditional Leaders Act [*Chapter 29:17*], ss 3 & 4 B

Case information

Miss *P Makurumure*, for the applicants

J Dondo, for the first respondent

Miss *R Hove*, for the second, third and fourth respondents

Judgment

Uchena J: The first applicant claims to be the guardian (*zibambo*) of the C Budzi chieftainship. The second to the fifth applicants are the eldest surviving male children from the four houses among which the Budzi chieftainship rotates. The applicants claim that the guardian and the eldest male children of each house have the responsibility of nominating a person to be appointed chief of the Budzi clan. They say the second respondent nominated and imposed the first respondent for appointment as Chief Budzi against their customs. D

The first respondent is the eldest son of the late Gwinyai Dzivakwe, who was appointed Chief Budzi but had not been installed when he died. He has been nominated for appointment as acting chief Budzi and it is believed the second to the fourth respondents are in the process of preparing papers for his appointment by the President. The applicants seek an interdict to E stop them from processing papers for the first respondent's appointment. The second respondent is the District Administrator of Bikita district under which the Budzi chieftainship falls. The third respondent is the Provincial Administrator of Masvingo Province under which Bikita district falls. The fourth respondent is the Minister of Local Government, Rural and Urban Development through whom the recommendations for a chief or acting F chief's appointment is forwarded to the President.

The applicants filed this urgent application seeking the following interim order;

> "That pending determination of this matter the Applicants are granted the following relief:
>
> (a) the second, third and fourth respondents be and are hereby interdicted from G processing and forwarding to His Excellency the President of Zimbabwe the documents pertaining to the nomination and appointment of the first respondent as Acting Chief Budzi."

Miss *Makurumure* for the applicants relied on s 3 of the Traditional Leaders Act [*Chapter 29:17*] to establish the applicants' right to nominate a person to be appointed Acting Chief Budzi. She submitted that because the provisions H

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of A s 3 and the customs of the Budzi clan were not followed, the nomination of the first respondent is most likely going to be declared null and void in an application for a declaratory order the applicants filed under HC 4111/15. She submitted that the process of appointing a chief takes about a month, hence the applicant's apprehension that if the second to fourth respondents are not interdicted from processing the appointment the appointment might B have gone through by the time their application will be heard.

The respondents opposed the application. Mr *Dondo* for the first respondent submitted that the first applicant is not the guardian of the Budzi chieftainship, and therefore has no right to have been consulted in respect of the first respondent's nomination. He submitted that the first applicant's elder brother C is the guardian of the Budzi chieftainship. He submitted that the second to the fifth applicants while heads of houses among which the chieftainship rotates do not have an interest in the current appointment as their houses have already had their chances as the current chief should come from the Chimene house. He submitted that the fifth respondent has a right to contest the chieftainship as a member of the Chimene house but he is not the son of D the last appointed chief Budzi and is therefore not entitled to be appointed the acting chief Budzi.

Mr *Dondo* for the first respondent further submitted that the resolution of disputes should be done by the President, in terms of s 283 of the Constitution on the recommendation of the provincial assembly of Chiefs through the E Minister responsible for traditional leaders. He submitted that the Constitution gave the responsibility to resolve disputes concerning the appointment of chiefs to the President. He submitted that the courts can only intervene on review after the President has resolved the dispute.

Miss *Hove* for the second to fourth respondents agreed with Mr *Dondo*'s F submissions and further submitted that the applicants are erroneously relying on s 3 of the Traditional Leaders Act [*Chapter 29:17*], which provides for the nomination of persons for appointment as substantive chiefs. She submitted that s 4 of the Traditional Leaders Act which provides for the appointment of acting chiefs does not provide for a nomination procedure. She therefore submitted that the applicants had no right to nominate an acting chief and G are therefore not entitled to the interdict sought.

Sections 3 and 4 of the Traditional Leaders Act provide as follows:

> "3. (1) Subject to subsection (2), the President shall appoint chiefs to preside over communities inhabiting Communal Land and resettlement areas.
>
> (2) In appointing a chief in terms of subsection (1), the President – H
>
> (a) shall give due consideration to –

> (i) the prevailing customary principles of succession, if any, applicable to A the community over which the chief is to preside; and
>
> (ii) the administrative needs of the communities in the area concerned in the interests of good governance; and
>
> (b) wherever practicable, shall appoint a person nominated by the appropriate persons in the community concerned in accordance with the principles referred to in subparagraph (i) of paragraph (a): B
>
> Provided that, if the appropriate persons concerned fail to nominate a candidate for appointment as chief within two years after the office of chief became vacant, the Minister, in consultation with the appropriate persons, shall nominate a person for appointment as chief.
>
> 4. (1) Subject to subsection (2), in the event of the office of a chief becoming vacant through the death of the chief, or his removal or suspension from office C in terms of this Act, the President may appoint an acting chief to preside in his stead for such period or periods as the President may fix.
>
> (2) An appointment in terms of subsection (1) shall cease to have effect –
>
> (a) on the date the President, in terms of subsection (1) of section *three,* appoints a chief for the community concerned; or
>
> (b) on the cancellation of the suspension of the chief of the community concerned D in terms of subsection (3) of section *seven*; or
>
> (c) when the President cancels the appointment."

Miss *Makurumure* for the applicants in her response conceded that s 3 does not apply to the appointment of an acting chief. She further conceded that acting chiefs are appointed in terms of s 4(1). That concession is fatal to the E applicants' application which depended on the provisions of s 3(2) which gives the applicants a role in the nomination of a person for appointment as Chief Budzi. Section 4(1) which applies to the appointment of acting chiefs does not provide for their participation; it merely provides that if the office of a chief is vacant "the President may appoint an acting chief to preside in G his stead for such period or periods as the President may fix." That should have been the end of the inquiry if the Constitution had not changed the law, because an

interdict can only be granted to a party who has an actual or *prima facie* right. The applicants in terms of s 4(1) do not have any such rights. H

Section 4(1) of the Traditional Leaders Act is not consistent with the provisions of s 283 of the Constitution. In terms of s 2(1) as read with s 10 of the Sixth Schedule of the Constitution "any law, practice, custom or conduct inconsistent" with the Constitution "is invalid to the extend, of the inconsistency". Section 4(1) of the Traditional Leaders Act cannot, because of its inconsistency with s 283(c)(i) of the Constitution, be the determining factor in this case.

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Section 283 A of the Constitution which provides for the appointment of chiefs provides as follows:

> "An Act of Parliament must provide for the following, in accordance with the prevailing culture, customs, traditions and practices of the communities concerned –
>
> (a) the appointment, suspension, succession and removal of traditional leaders; B
>
> (b) the creation and resuscitation of chieftainships; and
>
> (c) the resolution of disputes concerning the appointment, suspension, succession and removal of traditional leaders; but –
>
> (i) the appointment, removal and suspension of Chiefs must be done by the President on the recommendation of the provincial assembly of Chiefs through the National Council C of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned;
>
> (ii) disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders; D
>
> (iii) the Act must provide measures to ensure that all these matters are dealt with fairly and without regard to political considerations;
>
> (iv) the Act must provide measures to safeguard the integrity of traditional institutions and their independence from political interference."

Section 283(c)(i) provides for the appointment of a chief by the President "in E accordance with the traditional practices and traditions of the communities concerned"; While ss 3 and 4 of the Traditional Leaders Act distinguishes the procedure for the appointment of a chief and acting chief, the Constitution only mentions the appointment of a chief. In terms of s 340(1)(c) of the Constitution, the power to appoint a substantive office holder includes the power to appoint a person to act in that office; therefore, according to the new F Constitution the procedure provided for the appointment of a chief applies to the appointment of an acting chief. Section 340(1) reads:

> "340 (1) Except as otherwise provided in this Constitution, a power under this Constitution to appoint a person to an office includes a similar power –
>
> (a) …
>
> (b) … G
>
> (c) *to appoint a person to act in that office*" (emphasis added).

Mr *Dondo* submitted that the provisions of s 283(c)(ii) of the Constitution has the effect of ousting the court's jurisdiction to determine issues concerning disputes over the appointment of chiefs, except the review of the President's determination of such disputes. Miss *Makurumure* submitted that the court's H jurisdiction was not ousted by s 283(c)(ii) of the Constitution. While the courts

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guard jealously against the ousting of their jurisdiction, it is important for A the courts to identify the intention of the legislature and act accordingly. In this case, from the use of the word "must" in s 283(c)(ii) of the Constitution I am persuaded that the legislature in drafting the Constitution intended to give that responsibility to the President. My view is strengthened by the provisions of s 342(1) of the Constitution, which provides as follows: B

> "A power, jurisdiction or right conferred by this Constitution may be exercised, and *a duty imposed by this Constitution must be performed*, whenever it is appropriate to do so" (emphasis added).

As already said, the requirement in s 283(c)(ii) of the Constitution that disputes concerning the appointment of chiefs "must be resolved by the President on the recommendation of the provincial

assembly of Chiefs through the Minister C responsible for traditional leaders" imposes a duty on the President, and is indicative of the legislature's intention that only the President should resolve such disputes. Otherwise, how must the President resolve such disputes if the courts can also resolve them? The use of the word "must" means he is obliged to resolve every such dispute. Miss *Makurumure* for the applicants further submitted that the provisions of s 283(c)(ii) of the Constitution D do not apply to disputes which arise before the appointment of a chief or acting chief, but only applies to disputes which arise after a chief has been appointed. Miss *Hove* for the second to fourth respondents submitted that the word "concerning" which precedes the disputes to be resolved which includes appointment of chiefs, means "about" and "involving". This, she argued, means the disputes to be resolved include those which arise before E the appointment of a chief or acting chief. I agree. The use of the word "concerning", which means something about or involving the appointment of chiefs, includes disputes which arise before a chief is appointed as long as they have something to do with a chief's appointment. The *Cambridge Advanced Learners' Dictionary* supports the meaning given by Miss *Hove*. F I therefore agree with Mr *Dondo* and Miss *Hove* that the applicants have come to the wrong forum.

Section 283(c)(i) of the Constitution introduced the involvement of the provincial assembly of chiefs on whose recommendation the President appoints chiefs. This means what the applicants wanted to do in terms of their G customs as regards the nomination of the acting chief may be included in the provincial assembly's recommendations to the President. Section 286(1)(a) and (f) of the Constitution provides that the functions of a provincial assembly of chiefs includes the protection, promotion and development of Zimbabwe's culture and traditions and the facilitation of settlement of disputes between and concerning traditional leaders. It is therefore within H

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a A provincial assembly's mandate to make recommendations about how an acting chief should be nominated under the Budzi clan. This also means the applicants have alternative remedies through which they can stop the first respondent's appointment. They can, in addition to presenting their grievances to the President for resolution, present them to the provincial assembly of chiefs which can in turn include them in its recommendations B to the President.

The applicants' application must therefore be dismissed with costs.

It is therefore ordered that;

1. The applicants' application is dismissed.
2. The applicants shall pay the respondents' costs. C

Mukuku Law Firm, applicants' legal practitioners

Dondo & Partners, first respondent's legal practitioners

Attorney-General's Office, Civil Division, second to fourth respondents' legal practitioners D

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PL MINES (PVT) LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 708 (H)

Citation	2015 (1) ZLR 708 (H)
Case No	Judgment No. HH-466-15
Court	High Court, Harare
Judge	Kudya J

Heard 24 September 2014; *CAV*

Judgment 21 May 2015

Counsel *A P de Bourbon SC*, for the appellant
T Magwaliba, for the respondent

Case Type Tax appeal

Annotations No case annotations to date

Flynote

Revenue and public finance – *income tax – additional tax or penalty for* C *failure to render complete return etc – assessment of penalty – same principles applicable as in criminal law*

Revenue and public finance – *income tax – appeals – Special Court for Income Tax appeals – nature of appeal in such court – court to make* D *its own assessment of facts and exercise its own discretion – not bound by exercise of discretion by revenue authority*

Revenue and public finance – *income tax – tax evasion – what is – when person may be said to have intended to evade tax* E

Headnote

The appellant mined and processed platinum group metals in two districts in Zimbabwe in terms of a special mining lease number issued under the Mines and Minerals Act [*Chapter 21:05*] on August 1994. A joint venture company had been formed for the purpose, the appellant being the minority shareholder. The joint venture failed and the majority shareholder withdrew from the project in 1999. The appellant acquired F the interests of the majority shareholder and invited two South African companies, a major mining house and a financial institution, to take equity in the joint venture. One of the two new shareholders agreed to finance the project. The two new shareholders and the appellant were enticed, by written undertakings from the Government of Zimbabwe, G represented by the Ministry of Mines and Energy, to participate and remain in the project. Part of the enticement was an undertaking to enact a more favourable tax regime than that normally accorded to holders of special mining leases. The agreement provided that in the event that, such legislation was not promulgated within the agreed period, the parties, in good faith would review the relevant clause and the provisions of H

the A agreement affected by non-promulgation of the amendments, and seek to agree on a mechanism, within the scope of existing legislation, to achieve substantially the same economic and fiscal effect. Pending agreement on such mechanism, the provisions of the Income Tax Act [*Chapter 23:06*] would apply.

It was pointed out in a letter to the appellant in 2005 that the undertaking B was subject to legislation being passed, but that it had not been possible to pass such legislation. Accordingly, the appellant was subject to the existing tax laws. It was common cause that since 2001, in computing its taxable income, assessed losses, capital redemption allowances and deductions, the appellant applied the provisions of the Income Tax Act applicable to general mining operations where these were more favourable C than those applicable to special mining leases.

The appellant was subjected to tax audits for the period between 2004 and 2010. These resulted in some tax adjustments. The respondent accepted that the appellant's failure to comply with the prevailing tax laws emanated from the undertakings made by the Ministry of Mines to D grant tax exemptions, which did not materialise. However, it had been pointed out by the respondent that the undertakings did not constitute the law. The respondent accepted that the appellant had not intended to evade tax, and in terms of s 46(6) of the Act remitted the bulk of the additional tax

that would normally be provided in terms of s 46(1). The E figure was initially assessed at 8 per cent and then reduced to per cent.

Held, that notwithstanding the respondent's admissions, the duty of the court on appeal was to enquire and make a finding on whether the appellant intended to evade tax. The court was not bound in any way by the exercise by the respondent of its discretion. In cases involving the exercise of a discretion by the respondent the Special Court on appeal is called upon F to exercise its own, original, discretion. A decision is given on facts which may not have been considered by the respondent. An appeal to the Special Court is a full re-hearing in which the court exercises the same wide discretion as that vested in the authority. The court does not exercise a restricted interference only where there is a significant G discrepancy between its own decision and that of the authority.

Held, further, that a taxpayer intends to evade tax if (a) it is his aim to so act and thereby bring about tax evasion ("direct intent"); or (b) he acts in circumstances where evasion is not his closest aim but when achieving that aim evasion is necessary or certain or unavoidable ("awareness of certainty"); or (c) he acts when evasion is a possible result of achieving H his aim and in spite of that possibility pursues his objective, that is, he

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reconciles himself to the risk of evasion possibly occurring ("awareness A of possibility").

Held, further, that while s 46 of the Income Tax Act does not use the word penalty but refers to additional tax, it is settled law that this additional tax is in essence, an administrative non-compliance penalty. It is imposed for deliberate evasion, careless and inadvertent omissions and misstatements on the part of the taxpayer. No particular form of B*mens rea* is required. All that the court has to decide is whether, objectively, an amount which ought to have been included was omitted or whether an incorrect statement was rendered.

Held, further, that the letter in 2005 put the appellant on notice that the Government had failed to promulgate the contemplated legal instruments C that would usher in the most favoured tax status for the appellant. The letter directed the appellant to comply with the provisions of the mining agreement. The appellant partially did so by paying the non-resident shareholder withholding tax. The appellant did not pursue negotiations to review the existing legislation to achieve substantially the same economic and fiscal effect, nor did it deduct the capital redemption allowances in D terms of the Twenty-Second Schedule to the Act. While the appellant may have lacked direct intent to evade tax, it could not escape the "awareness of certainty" test. Its closest aim may have been to reduce the tax burden and stampede the Government to honour its promises, but it must have been aware that it was in the process unavoidably evading existing taxation under the Twenty-Second Schedule. If the E awareness of certainty did not apply, the appellant could not escape the "awareness of possibility" test. In pursuing its objective, the appellant must have realised that its actions constituted tax evasion but it acted in reckless disregard of that awareness. However, the court was bound by the admission and concession made by and on behalf of the respondent, F that the appellant did not intend to evade tax.

Held, further, that the same principles applicable to assessment of penalties in criminal law applied to such cases as the present. The triad of the crime, the offender and the interests of society must be enunciated and envisaged to holistically embrace all considerations necessary in the G imposition of any penalty. The appellant made massive and substantial foreign direct investments in this country. It was generally a law abiding and responsible corporate citizen. The success it achieved, and the downstream effect of its activities to the general economy and economic and social well-being of Zimbabwe, could not be gainsaid. The appellant at all times fully cooperated with the tax audit. H

Held, A further, that the purpose of the penalty is to punish errant taxpayers and deter prospective wrongdoers and encourage the rendering of honest and accurate returns and thereby avoid loss of revenue to the *fiscus*. The appellant failed to discharge the onus on it to show it made full disclosure. While it did not intend to evade tax, it certainly omitted the requisite information and, in addition rendered an inaccurate statement. B An objective assessment of its actions shows that it was grossly negligent. The appellant did not avail itself of the avenues set out in the mining agreement of resolving the failure to legislate the undertakings. It simply decided to break the law. It was grossly negligent. Its moral blameworthiness for that reason was high. A penalty of 5

percent was at the lower end of the punishment spectrum that could legitimately be C imposed on the appellant.

Cases cited

CIR v *da Costa* 1985 (3) SA 768 (A)

CIR v *di Ciccio* 1985 (3) SA 989 (T) D

CIR v *McNeil* 1959 (1) SA 481 (A)

Commr, SARS v *Brummeria Renaissance (Pty) Ltd & Ors* 2007 (6) SA 601 (SCA)

Israelsohn v *CIR* 1952 (3) SA 529 (A)

ITC 1331 (1981) 43 SATC 76

ITC 1334 (1981) 43 SATC 98 E

ITC 1351 (1982) 44 SATC 48

ITC 1430 (1988) 51 SATC 50

ITC 1489 (1990) 53 SATC 99

ITC 1508 (1991) 53 SATC 442

ITC 1540 (1992) 54 SATC 400 F

ITC 1576 (1993) 56 SATC 225

ITC 1577 (1993) 56 SATC 236

ITC 1608 (1996) 59 SATC 72

ITC 1725 (2000) 64 SATC 223

Mining Industry Pension Fund v *DAB Marketing (Pvt) Ltd* 2012 (2) ZLR 132 (S) G

P Mines (Pvt) Ltd v *ZRA* HH-244-15

S v *Gondo* 1990 (2) ZLR 171 (S)

S v *M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC)

S v *Mudzamiri & Anor* 1993 (2) ZLR 43 (S)

S v *Mugwanda* 2002 (1) ZLR 574 (S)

S v *Zinn* 1969 (2) SA 537 (A) H

Kudya J

Legislation considered A

Civil Evidence Act [*Chapter 8:01*], *s 36*

Income Tax Act [Chapter 23:06], ss 22, 25, 46, 47, 65, 71, 72, 76, 83 & 86A; Fifth Schedule; Twenty-Second Schedule

Case information

A P de Bourbon SC, for the appellant B

T Magwaliba, for the respondent

Judgment

Kudya J: This is an appeal against the decision of the respondent declining to remit in full the penalty imposed against the appellant for erroneously claiming capital redemption allowances in its tax returns between 2007 and 2012. C

Background

The appellant was subjected to tax audits for the period between 2004 and 2010 that resulted in some tax adjustments. Apparently, the failure to comply with the prevailing tax laws emanated from certain undertakings made by the Ministry of Mines to exempt the appellant from paying certain D taxes that it would otherwise have paid. A number of interactions between the parties before me took place. The appellant conceded that it was proper for the respondent to impose normal taxes on the putative exemptions as such undertakings were not strengthened by legal instruments in the form of statutory instruments or legislative provisions. E

On 28 September 2012, the appellant objected to the imposition of additional tax and interest charged on principal taxes on the delayed payments. The Commissioner General of the respondent partially allowed the objection on the additional tax after he "found no justification in waiving the full F penalty considering that appellant was well aware of the correct position as advised by the Authority but based on the circumstances surrounding this case, (he) further reduced the penalty to 5%". The objection on interest was disallowed in full and was appealed to the High Court and is therefore not before me for consideration.

In terms of s 65 of the Income Tax Act [*Chapter 23:06]* the appellant filed G the notice of appeal on 4 January 2013, as supplemented by the amended notice of appeal filed by consent on 1 July 2014 and duly granted on 10 July 2014. The appeal is against the partial reduction of the additional tax imposed by the appellant from 8 per cent to 5 per cent. The appellant seeks full remission of the additional tax. H

Kudya J

The A **grounds of appeal**

The appellant raised 13 grounds of appeal. It accepted calculating its income tax liability between 2001 and 2011 under the aegis of the Fifth Schedule rather than the Twenty Second Schedule of the Income Tax Act. It averred the absence of any intention to defraud the revenue, postpone liability B and evade tax and claimed to have acted in good faith by believing the undertakings made in 1994 that were reinforced in 2001 by the Government of Zimbabwe of a favourable tax dispensation that was to be promulgated into law. It further averred several other factors that allegedly justified full remission of the penalty. These were that it had a legitimate expectation that the Government of Zimbabwe would keep its word; that it had fully C co-operated and timeously re-computed its income tax liability and additional profits tax in response to the issues raised during audit and that it had made open and full disclosure of the Capital Redemption Allowances, CRA, in its returns over the 12 years. It further pleaded that the penalty was heavy and burdensome in view of the severe deterioration in the economic environment since 14 January 2013 and that the imposition of interest in a substantial D amount fully compensated the fiscus for the time value of the additional tax chargeable. Lastly, it averred that in the absence of any misstatement, fraud or misrepresentation personal deterrence was inapplicable as it was a law abiding corporate citizen.

The facts E

The facts in this matter are common ground. They are gleaned from both the appellant and respondent's cases and the rule 11 documents. The rule 11 documents must be filed with the respondent's case. This was not done. At the hearing of this matter on 24 September 2014, Mr *Magwaliba*, for the F respondent applied to file these documents by end of business on 3 October 2014. Mr *de Bourbon*, for the appellant, consented to the application. I duly granted the application. The documents were only filed by the Commissioner on 8 April 2015. The attitude of the respondent in regards to the filing of rule 11 is unacceptable. The respondent must comply with the rules. These documents constitute the basic record of proceedings of the Commissioner on G which his decision to fully or partially allow or disallow an objection raised by a taxpayer is based. They represent the record of the interaction between the taxman and the taxpayer culminating in the response to the objection appealed against. Rule 11`documents assist the appeal court to appreciate the factual and legal contentions made by each party that give rise to the appeal in this Court. It is imperative, in all cases, for the Commissioner to H comply with the rules.

Kudya J

The facts are therefore these. A

1. The appellant mines and processes platinum group metals consisting of platinum, palladium, rhodium, gold, nickel, copper and cobalt in two districts in Zimbabwe in terms of a special mining lease number 1, SML1, covering the geographic area of approximately 6 373 hectares issued under the Mines and Minerals Act [*Chapter 21:05*] on 24 August 1994 B (Annexure 1 and its attached schedule A to the appellant's case)and supplemented by a mining agreement, MA, executed on the same date, annexure 2).
2. The two documents sought to accord certain stated special and preferential privileges and concessions to the joint venture company between the C majority shareholder ABC Minerals Zimbabwe (Pty) Ltd and the minority shareholder, the appellant. In regards to taxation the parties agreed that the appellant would be subject to the fiscal regime applicable to the mining sector in general where this regime was more favourable than that applicable to special mining leases.
3. The joint venture failed and the majority shareholder withdrew from D the project in 1999. The appellant acquired the interest of the majority shareholder and invited two South African companies; a major mining house and a financial institution, to take equity in the joint venture. One of the two new shareholders agreed to finance the project. The two new shareholders and the appellant were enticed by written undertakings from the Government of Zimbabwe, represented by the Ministry of Mines E and Energy to participate and remain in the project. The sweetheart deal was memorialised on 20 December 1994 in the Framework for an Agreement between the holding company of the appellant and the Government of Zimbabwe, annexure 3 to the appellant's case. It was further reaffirmed in letters from the Ministers of Mines and Energy of F 9 March 2001, annexures 4 and 5 addressed to the boards of directors of the two South African companies and of 7 September 2001, annexure 6, addressed to the board of the appellant. In terms of the definitions of companies and lessee in Clause 1.1and Clause 23.1, 23.4, 23.7 and 29.5 of the Mining Agreement the successors and permitted assigns and assignees of the initial parties to the agreement automatically became G parties to the agreements.
4. Clause 7.1 of the Mining Agreement provided for the conditions that had to be fulfilled before the appellant could invoke the most favoured status. The first was that these were to be legislated. The second was that pending such legislation, the parties were to agree on utilising existing H

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legislation A to implement the envisaged most favoured status set out in Clause 7.2 and 7.3 of the Mining Agreement. The third was that pending the interim agreement and legislation the prevailing taxation provisions in the Income Tax Act applied to the appellant.

5. The sweetheart undertakings in the three letters, annexures 4, 5 and 6 B promised to accord the appellant a fiscal dispensation applicable to the general mining sector in those instances where it was more favourable than in the special mining lease. Paragraph 1.4 of the Framework Agreement stated that:

> "The Government of Zimbabwe shall provide a legal and fiscal regime acceptable to the appellant and its financiers, either by way of the proposed new fiscal legislation for the mining industry or by way of existing legislation C pertaining to the joint venture, but extended to include the operations of the NOM."

The letters of 9 March 2001 invoked the immediate application of "the new fiscal framework already enacted in relation to 25 per cent income tax rate and any future lower rates for both income tax and additional D profits tax, capital allowances, indefinite carry forward of assessed income tax losses, debt to equity ratio of 3:1, arm's length interest rates and Minerals Marketing Corporation of Zimbabwe exemptions. In annexure 6 to appellant's case the Minister indicated that the most favoured status had not yet been enacted in the new fiscal regime and E concluded the letter by stating that the "mining operations of the appellant will be accorded more favourable fiscal benefits applicable to the entire mining sector as and when such benefits are granted".

6. On 23 August 2005, the Secretary for the Ministry of Mines and Mining Development (Annexure A to the Commissioner's case) in response to the appellant's correspondence of 17 June 2005 on the issue of non-resident F shareholders withholding tax in respect of dividend distribution from mining operations of the appellant clarified the effect of the undertakings in

the agreements of 24 August 1994, the Framework Agreement of 20 December 1994 and the three letters of 9 March and 7 September 2001. He stated that the undertakings were subject to legislation. He further G indicated that the best endeavours of the Executive arm of Government (both Ministries of Finance and Mines) failed to move parliament to pass such legislation as envisaged in Appendix A to the Agreement. The effect of such failure being that the appellant was not granted the most favoured status envisaged in the undertakings. It remained subject to the prevailing fiscal provisions in the Income Tax Act. He indicated that H he had written to the respondent to collect the relevant tax due from the

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appellant and recommended to the Ministry of Finance to amend A GN 451 of 1996 to substitute the appellant for the original owners as the approved holder of the special mining lease. He called upon appellant to initiate review of clause 7 and the agreement and thus invoke the interim arrangements envisaged in those provisions in order to utilise existing legislation to achieve the most favoured taxation status. B

7. The letter to the respondent, annexure B to the Commissioner's case, copied to the Secretary for Finance, essentially indicated that the appellant was in regards to the withholding tax subject to existing legislation pending promulgation of legislation incorporating the provisions in the 1994 agreements and 2001 letters. It pointed out that existing legislation GN 451 of 1996 did not cover non-resident shareholders tax envisaged C in Appendix A to the agreement. In conclusion, the letter indicated that the appellant was liable for taxation under the provisions of the Income Tax Act applicable to special mining leases.
8. The appellant duly paid the withholding tax it had hitherto disputed on the basis of the undertakings in accordance with prevailing legislation. D
9. It was common cause that since 2001, in computing its taxable income, assessed losses, capital redemption allowances and deductions, the appellant applied the provisions of the Income Tax Act applicable to general mining operations where these were more favourable than those applicable to special mining leases. Since commencing operations in E 2001 it was claiming capital redemption allowances under the Fifth Schedule to the Income Tax Act and deducting capital expenditure in full in the year the expenditure was incurred. This was contrary to s 15(ff) and s 22 of the Income Tax Act under which capital redemption allowances deductions are claimed in quarterly instalments over four years. This was exposed by the 2012 investigative audit conducted by the respondent. F
10. On 14 January 2013 the respondent reduced the penalty from 8 per cent to 5 per cent but declined to waive interest payment.
11. In para 20 of its case the appellant averred that "the use, and not the abuse, of the tax provisions applicable to general mining operations G was undertaken by the appellant with full disclosure to the respondent and was applied consistently over the period 2001 to 2011, with the full knowledge of the Government of Zimbabwe and the respondent." The averment was disputed by the respondent. The appellant did not submit proof of such disclosure. The onus was on the appellant to establish on a balance of probabilities that it made full disclosure as alleged. It failed H

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to A discharge the evidential onus in this respect. I find that it did not make such disclosure to the respondent in its returns over the period in issue.

12. The original agreement of 24 August 1994 came into effect on the understanding that clause 7.1 would be fulfilled. The lease (Clause 1) was to operate for the lesser period between 25 years and the estimated life B of the mine. It was (Clause 2) subject to renewal if the life of the mine exceeded 25 years for the lesser of 10 years or the remaining period of the estimated life of the mine on one year notice provided that the lessee remained in good standing (compliant with the agreement and other laws of the country) with a further 10 year renewal on the same conditions as the first renewal. The Mining Affairs Board was obliged to notify the C lessee of its reasons for declining renewal to enable representations to be made before final refusal could be made.

13. The resolution of any dispute arising from the agreement was governed by Clause 28. The parties envisaged that all disputes would in the first instance be determined by negotiation failing which some would be referred to conciliation and others to arbitration. An arbitration tribunal D constituted in terms of the mining agreement was mandated to determine disputes between the appellant and the Government of Zimbabwe. The agreement also provided that disagreements on financial plans and loans (Clause 9.20) and on commercial competitive prices for sale of minerals between the appellant and the Minerals Marketing Corporation E of Zimbabwe (Clause 10.1.7) and on fair market prices and fair market values for metals and corollary services such as processing, transportation, marketing and disposals (Clause 11.3) would be referred to a Sole Expert as defined in Clause 1.1 at the instance of any party 60 days after negotiation had failed. The appointment method and qualifications of arbitrators and the seat of arbitration which included the involvement F of The London Court of International Arbitration were spelt out.

14. The clauses that governed taxation issues were mainly clause 6.1.d of the mining agreement that defined the appellant's total tax liability as the "tax liability of the companies for Income Tax and APT based exclusively on income derived from mining operations under the SML to which this G agreement relates"; clause 7 that I will shortly reproduce in full; and clause 17.5 that provided that "taxation statutes take precedence over accounting and auditing procedures agreed". Clause 7 states:

"Clause 7: Taxation

7.1 The companies understand and accept that Government shall take appropriate steps, within a period of six (6) months after the date H of this agreement, or such longer period as the parties may agree, to

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amend the Income Tax Act [*Chapter 181*] as necessary with effect A from the effective date, to provide for a special income tax and APT regime to be applicable to all companies carrying out mining operations under or pursuant to special mining leases, including the lessee and the two companies which are signatory to the agreement. The legislation will reflect the main principles set out in a document entitled 'MAIN PRINCIPLES OF PROPOSALS FOR TAXATION B ARRANGEENTS FOR HOLDERS OF SPECIAL MINING LEASES TO BE REFLECTED IN LEGISLATION' attached as annexure A to the letter of even date with this agreement to the lessee and the companies from the Ministry of Mines and accepted by them. The following sub-clauses 7.2 and 7.3 are therefore agreed subject to the promulgation of the relevant amendments as anticipated. *In the eventcthat such legislation is not promulgated within the agreed period, the parties, in good faith shall review this clause 7 and the provisions of the agreement affected by non-promulgation of the amendments, and seek to agree on a mechanism, within the scope of existing legislation, to achieve substantially the same economic and fiscal effect. Pending agreement on such mechanism the provisions of the Income Tax Act* [Chapter 181] *shall apply.*D

7.2. During the initial term of this agreement, if in respect of any tax year for which APT is not payable, the applicable rate of income tax with respect to special mining leases exceeds the rate of income tax applicable to special mining leases on the effective date the parties agree to make the necessary adjustments to the relevant provisions of E this agreement to ensure that the combined liability for royalty and income tax of the companies is restored to the level of liability which would have been incurred if the rate of income tax applicable on the effective date of this agreement had applied.

7.3. For the purpose of assessment of liability for APT under the Income Tax Act [*Chapter 181*], the first accumulation rate shall be twenty F (20) per cent and the second accumulation rate shall be twenty-five (25) per cent.

7.4. Except as provided hereinabove and clause 6, the lessee and the companies shall be subject to taxes and charges in effect in Zimbabwe from time to time that are of general application and that are applicable, on a non-discriminatory basis, to holders of special mining leases and companies carrying out mining operations" (my own emphasis). G

The law

Legislative provisions

The imposition of additional tax is found in s 46 of the Income Tax Act. It reads: H

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"46 A Additional tax in event of default or omission

(1) A taxpayer shall be required to pay, in addition to the tax chargeable in respect of his taxable income –

(a) [not applicable]

(b) if he *omits* from his return any amount which ought to have been included B therein, an amount of tax equal to the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as finally determined after including the amount omitted;

(c) if he makes any incorrect statement in any return rendered by him which results or would, if accepted, result in the calculation of the tax at an amount which is less than the tax properly chargeable, an amount of tax equal to C the difference between the tax as calculated in accordance with the return made by him and the tax properly chargeable if the incorrect statement had not been made;

(d) if he fails to *disclose* in any return made by him any facts which should be disclosed and the failure to disclose such facts results in the calculation of the tax at an amount which is less than the tax properly chargeable, D an amount of tax equal to the difference between the tax as calculated in accordance with the return made by him and the tax properly chargeable if the disclosure had been made;

(e) …

(f) …

(1a) Where a taxpayer, having previously been required to pay any additional E tax in terms of subsection (a), (b), (c), (d) or (e) of subsection (1), makes any default or omission or does any act or thing that would again render him or her liable for payment of additional tax in terms of the same or a different paragraph of that subsection, he or she shall be required, in addition to the tax chargeable in respect of his or her taxable income, to pay an amount of tax equal to twice the amount payable in terms of subsection (1)(*a*), (*b*), (*c*), (*d*), (*e*) or (*f*) as the F case may be.

(2) ...

(3) The powers conferred upon the Commissioner by this section shall be in addition to any right conferred upon him by this Act to take proceedings for the recovery of any penalties for evading or avoiding assessment or the payment G of tax or attempting to do so.

(4) Any taxpayer who, in determining his taxable income as disclosed by his return, deducts any amount the deduction of which is not permissible under the provisions of this Act, or shows as an expenditure or loss any amount which he has not in fact expended or lost, shall be deemed for the purposes of this section to have omitted such amount from his return. H

(5) ...

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(6) If the Commissioner considers that the default in rendering the return was A not due to any intent either to defraud the revenue or to postpone the payment by the taxpayer of the tax as chargeable, or that any such omission incorrect statement or failure to disclose facts was not due to any intent to evade tax on the part of the taxpayer, he may remit such part or all of the said additional amount for which provision is made under this section as he may think fit."

In my view, the provisions of s 46(1)(a) to (f) are disjunctive. This view is B further reinforced by the wording of subs (1a). Section 46(1)(b) and (c) as read with subs (4) apply to the present matter. The appellant omitted from his return the amount deducted as capital redemption allowances in the year it was incurred instead of spreading it over a four year period (omission). As a result, it also submitted an incorrect statement ((1)(c)). In addition, it would also be liable if it failed to disclose information or facts (non-disclosure) C which would result in a lesser charge ((1)(d)).

Notwithstanding contrary averments in paras 30, 31 and 37 of the Commissioner's case that the appellant intended to evade tax by relying on the undertakings after the letter of 23 August 2005 from the Secretary of Mines in respect of the payment of non-resident shareholders withholding D tax, which it then paid thereafter and in subsequent years, Mr *Magwaliba* conceded on the facts and in argument that the appellant did not intend to defraud the revenue, or to postpone the payment of the tax or evade tax. The concession was in line with the attitude of the respondent in the meeting

held with the appellant on 25 September 2012 E (see letter of 28 September 2012 pp 6 and 7) where the Commissioner first agreed to impose an 8 per cent penalty before reducing it to 5 per cent. In response to the letter of objection of 28 September 2012, the respondent determined in regards to penalties that:

> "According to the information submitted to me, the appellant was subjected to tax audits between 2004 and 2010 resulting in some tax adjustments. The F main reason advanced by the appellant for non-compliance was that it relied on undertakings made by the Ministry of Mines to grant tax exemptions of which this did not materialise. During these audits, there were a number of interactions between the appellant and the Zimbabwe Revenue Authority. In this case, it was highlighted to the appellant that the tax exemption undertakings made by the Ministry of Mines did not constitute Statutory Instruments and are therefore of no effect at law. G
>
> In the light of the above I am of the view that the appellant should have caused some tax adjustments in all affected areas after that awareness, in order to regularise the position and to comply with the Income of the Income Tax provisions.
>
> I have therefore found no justification in waiving the full penalty considering that the appellant was well aware of the correct position as advised by the Authority. However, based on the circumstances of this case, I have further H

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> reduced A the penalty to 5%. The ground of objection is hereby partly allowed to the extent of this reduction."

The import of s 46(6) is that the Commissioner cannot reduce the penalty where the taxpayer defaulted in rendering a tax return with intent to defraud the revenue or postpone the payment of tax chargeable or omitted to render B a return or submitted an incorrect return or failed to disclose facts with intent to evade tax. The import of imposing an 8 per cent penalty that was subsequently reduced to 5 per cent was an admission by the Commissioner of the absence of any intention by the appellant to evade tax as contemplated in s 46 (1) (b) and (c). The above sentiments find resonance in the local case of *ITC No 1334* (1981) 43 SATC 98 at 106 where Squires J observed that: C

> "The statement that the vehicle was part of appellant's assets for the 1976 financial year therefore being incorrect, the next issue is whether it has been shown that this was not done with intend to evade the payment of tax. Counsel were agreed, rightly in my view that if this was the intent, then the commissioner, and therefore the court, has no discretion to remit any part of the penalties: but that if there were no special intent, then a discretion to leave the penalties in force either in D full or in part, would nevertheless remain."

In *Commr, SA Revenue Svc* v *Brummeria Renaissance (Pty) Ltd & Ors* 2007 (6) SA 601 (SCA) at paras 26 and 27 Cloete JA held that:

> "[26] It seems to me that these competing contentions must be resolved by having regard to the purpose underlying ss 79(1) and 81(5), which is obviously to achieve E finality. To uphold either of the Commissioner's contentions would undermine that purpose. It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – *interest rei publicae ut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; F documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.
>
> [27] In my view, once the Commissioner changed the entire basis of the G assessment in the further revised assessments, he allowed Brummeria's objection to the revised assessments in full as contemplated in s 81(5) and, as no fraud, misrepresentation or non-disclosure is relied upon, that is the end of the matter. I therefore consider that the Commissioner was precluded by the provisions of s 79(1) read with s 81(5) of the Act from raising the assessments against Brummeria for the tax years 1996, 1997, 1998 and 1999 which he did in the H further revised assessments."

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The attempt in the respondent's case to breach the limits of his findings by A suggesting that the appellant did so with intent to evade tax or attempted to evade tax, from the sentiments expressed in *Brummeria's* case, appears impermissible. The dilemma I face in this matter is based on the other submission made by the appellant based on the sentiments of Davis J in *ITC 1725* (2000) 64 SATC 223 at 235 that:

> "On appeal this court is obliged to determine the matter according to its own B discretion. *Commissioner for Inland Revenue* v *Da Costa* 1985 (3) SA 768 (A), 55 SATC 198 at 206.The section envisages two enquiries:
>
> (1) Was there an intention to evade?
>
> (2) If so, there can be no remission unless extenuating circumstances have been found." C

See Melamet J in *ITC 1331* (1981) 43 SATC 76 at 83. Davis J did not decide whether the taxpayer intended to evade tax but assumed that the Commissioner correctly found that the taxpayer lacked such an intention. He, however, dismissed the submission that illiteracy justified the reduction of the penalty imposed of 67.3 per cent of the additional tax chargeable. To the same effect was Conradie J in *ITC 1489* (1990) 53 SATC 99 at 103. D

While in South Africa the Commissioner or, on appeal, the Special Court is required to investigate the existence of extenuating circumstances, in Zimbabwe once the intention to evade tax is found, in the words of Squires J in *ITC 1334* above, there would be no remission. My reading of *ITC 1725* is that I am in an appeal of this nature, which is a full and unrestricted rehearing, not bound by the findings of the Commissioner. Rather, I am obliged to E enquire and make a finding on whether the appellant intended to evade tax.

The only useful discussion I have found that assists me determine this question is found in the head note of the South African case *ITC 1577* (1993) 56 SATC 236. The full judgment is in Afrikaans, a language I am not conversant with. In that case, the Commissioner found extenuating circumstances and F imposed the penalty of 100 per cent of the additional tax chargeable in the sum of R135 757 and interest in the sum of R85 744. On appeal Howie J confirmed both the penalty and the interest. He held that a taxpayer intends to evade tax if:

(a) it is his aim to so act and thereby bring about tax evasion ("direct intent"); or G

(b) he acts in circumstances which that intention where evasion is not his closest aim but when achieving his aim it is necessary or certain or unavoidable ("awareness of certainty"); or

(c) he acts with that intention when evasion is a possible result of achieving his aim and in spite of that possibility pursues his objective, that is he H

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reconciles A himself to the risk of evasion possibly occurring ("awareness of possibility").

The approach of Howie J reminds me of the modern test for actual and legal intention in murder cases set out by Chidyausiku CJ in *S* v *Mugwanda* 2002 (1) ZLR 574 (S) at 581A-F. All one has to do is to substitute tax evasion for B murder and lower the onus from beyond a reasonable doubt to a balance of probabilities. The direct intent would equate with the actual desire of the taxpayer while awareness of certainty would be the same as substantial certainty and awareness of certainty would be much like subjective foresight exercised with reckless abandon.

It seems to me that my duty on appeal is not to review the decision of C the Commissioner but to exercise my own discretion. In doing so I will seek to evaluate whether on the facts the appellant intended to evade tax notwithstanding the contrary admission of the Commissioner and concession of Mr *Magwaliba*.

I agree with the appellant's submission that while s 46 of the Income Tax Act D does not use the word penalty but refers to additional tax, it is now settled law that this additional tax is in essence, an administrative non-compliance penalty. It is imposed for deliberate evasion, careless and inadvertent omissions and misstatements on the part of the taxpayer. In *CIR* v *di Ciccio* 1985 (3) SA 989 (T) at 993E-G Nestadt J held that no particular form of *mens rea* was required. All that the court has to decide is whether objectively, E an amount which ought to have been included was omitted or whether an incorrect statement was rendered. See also *CIR* v *McNeil* 1959 SA (1) 481 (A) at 487E-G and *Israelsohn* v *CIR* 1952 (3) SA 529 (A) at 539-40.

The issue

The issue referred to trial on 10 July 2014 was whether or not the penalty F imposed was justified in the circumstances.

The onus

Mr *Magwaliba* both in his written heads of argument and oral submissions submitted that the onus was on the taxpayer to establish that the respondent either misdirected himself or made an error of law or acted *mala fides* in G arriving at the penalty he did. He contended that since these factors were not alleged and proved, the decision of the respondent should remain intact. He relied firstly on s 63 of the Income Tax Act which reads:

> "63 Burden of proof as to exemptions, deductions or abatements
>
> In any objection or appeal under this Act, the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms H of this Act or credit, shall be upon the person claiming such exemption, non-

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> liability, deduction or credit and upon the hearing of any appeal the court shall A not reverse or alter any decision of the Commissioner unless it is shown by the appellant that the decision is wrong."

In dealing with a similar provision in the South African Act, Mullins J stated in *ITC 1430* (1988) SATC 50 at 56 that:

> "Admittedly we are not simply restricted to deciding whether the Commissioner B was right or wrong. This is a rehearing of the matter during which evidence can be led and other admissible evidence placed before us. In my view, in an appeal in terms of s 76(2)(b), it is the duty of the Special Court itself to decide whether or not there was an intention to evade taxation as envisaged by s 76(2), and, if so, whether extenuating circumstances are present … In the present case, however, we have to decide not whether the Commissioner's decision was correct or not, but how we should exercise our discretion. There seems therefore to be C no logical reason why we should not consider the facts existing as at the date of the appeal in exercising our powers on appeal, under s 83 (13) (b), whether 'to reduce, confirm or increase the amount of the additional charge imposed."

This approach was in this jurisdiction confirmed by Smith J who stated in *ITC 1508* (1991) 53 SATC 442 at 452 that:

> "Her failure to include the income from the sale of the car in her income tax return D was not because she wanted to evade the payment of income tax but because she was unaware that it would, or could, be regarded as part of her gross income. … It was not necessary for the court to find that the respondent's decision was unreasonable before setting it aside. In hearing the appeal, the court was required to make the decision which it felt was appropriate in the circumstances. In *CIR* v *da Costa* 1985 (3) SA 768 (A) at 774I van Heerden JA said: E
>
> > "It seems clear, therefore, that in cases involving the exercise of discretion by the Commissioner the Special Court on appeal to it is called upon to exercise its own, original discretion and the views expressed by Friedman J are not well-founded.'
>
> That view has been accepted as correctly reflecting the position in Zimbabwe. In my view, the applicant has established that she genuinely was not aware that F the purchase price she received on the sale of her car was an amount which she was obliged to reflect in her income tax return. On this aspect the probabilities support her *ipse dixit*."

Mr *Magwaliba* sought further reliance on the purported approval in *Commissioner for Inland Revenue* v *da Costa* 1985 (3) SA 768 (A) of the sentiments of Friedman J in *ITC 1295* at 30 that: G

> "The Secretary deals with a large number of cases of this kind. He has yardsticks by which to go and is in a far better position to decide upon appropriate remissions than this court. Where, of course, the Secretary exercises his discretion on an incorrect basis or taking into account matters which he is not entitled to take into account, this court will disregard the Secretary's decision and be at large to itself decide upon an appropriate remission. Where however, the Secretary H

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> has A properly exercised his discretion in a *bona fide* manner, then it seems to me that this court will interfere only where there has been an unreasonable exercise by the Secretary of his discretion."

I agree with Mr *de Bourbon* that Mr *Magwaliba* misconstrued the import of *da Costa's* case in regards to the sentiments of Friedman J both in the case he referred to and in *ITC 1351* at 63. Van Heerden

JA who gave judgment B for the court stated at 773I-775A that:

> "Section 76(1)(b) provides that if a taxpayer omits from his return any amount which ought to have been included therein, he shall be required to pay in addition to the tax C chargeable in respect of his taxable income,
>
> 'an amount equal to twice the difference between the tax as calculated in respect of the taxable income returned by him and the tax properly chargeable in respect of his taxable income as determined after including the amount omitted.'
>
> Subsections 2(a) and (b) read as follows:
>
> '(a) The Commissioner may remit the additional charge imposed under subsection (1) or any part thereof as he may think fit:
>
> Provided that, unless he is of the opinion that there were extenuating D circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in para (a), (b) or (c) of subsection (1) was done with intent to evade taxation.
>
> (b) In the event of the Commissioner deciding not to remit the whole of the additional charge imposed under subsection (1), his decision shall be subject to objection and appeal.' E

Section 83 (13) (b) provides that, subject to the provisions of the Act, in the case of any appeal against the amount of the additional charge (the penalty) imposed under s 76 (1) the Special Court may reduce, confirm or increase the amount of the penalty.

With regard to the discretion conferred upon the Commissioner (previously the Secretary) by s 76 (2) (a), Friedman J said in *Income Tax Case No 1295* at 30: F

> 'The Secretary deals with a large number of cases of this kind. He has yardsticks by which to go and is in a far better position to decide upon appropriate remissions than this court. Where, of course, the Secretary exercises his discretion on an incorrect basis or by taking into account matters which he is not entitled to take into account, this court will disregard the Secretary's decision and be at large to itself decide upon an G appropriate remission. Where, however, the Secretary has properly exercised his discretion in a *bona fide* manner, then it seems to me that this court will interfere only where there has been an unreasonable exercise by the Secretary of his discretion. In order, however, to decide what is or is not an unreasonable exercise of discretion, it is, as I have already indicated, necessary for this court itself to decide what it regards as an appropriate remission and if there is a significant difference between that which this H court regards as appropriate and that which the Secretary has decided is

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> appropriate, this court is entitled to infer that there has been an unreasonable A exercise by the Secretary of his discretion and will interfere.
>
> In this regard it seems to me that the position is not entirely different from that of, for example, a court of appeal hearing an appeal in a criminal case against a sentence imposed by a lower court,..."

In *Income Tax Case No 1351* at 63 Friedman J reiterated his view and added:

> 'It seems to me... that where one is concerned with a permitted appeal B against the exercise by the Commissioner of a discretionary power, then the approach of this court should be similar to that adopted by appeal courts in general when considering appeals against decisions involving the exercise by the court *a quo* of a discretion.'

In my view the above passages cannot be reconciled with the approach of this court in *Rand Ropes (Pty) Ltd* v *Commissioner for Inland Revenue* 1944 AD 142. With reference to the provisions of the Income Tax Act 40 of 1925 Centlivres JA C said (at 150):

> 'That the Legislature apparently thought that it was necessary to give a special right of appeal in cases where a matter is left to the discretion of the Commissioner appears from a number of instances where that special right is conferred .... In all these cases it seems to me that the Legislature intended that there should be a re-hearing of the whole matter by the D Special Court and that that court could substitute its own decision for that of the Commissioner. For, as Curlewis JA pointed out in *Bailey* v *Commissioner for Inland Revenue* 1933 AD at 220, the Special Court is not a court of appeal in the ordinary sense: it is a court of revision.'

It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to it is called upon to exercise E *its own, original, discretion and that the views expressed by Friedman J are not well-founded.* That much was indeed common cause at the hearing of this appeal. And since the appeal is directed against the penalty determined by the Court a quo, it is immaterial whether the Commissioner was entitled to delegate his function to the aforesaid committee.

It was also common cause that this court will interfere with the determination F of the extent of a penalty (or the exercise of any discretion) by a Special Court only on the limited grounds on which a value judgment of a court of first instance may be set aside or varied on appeal. Prior to the enactment of s 86A of the Act in 1976 (by virtue of Act 103 of 1976) such a determination would have been final unless it was erroneous in law: the *Rand Ropes* case at 150. Section 86A now provides for a full right of appeal against any decision of a Special Court on issues of fact or law. As was pointed out by Trollip JA in *Hicklin* v *Secretary*G*for Inland Revenue* 1980 (1) SA 481 (A) at 485, such an appeal

> '... is therefore a re-hearing of the case in the ordinary well-known way in which this court, while paying due regard to the findings of the Special Court on the facts and credibility of witnesses, is not necessarily bound by them.'

Having pointed out that the section is silent about the powers of this Court in such an appeal, Trollip JA went on to say that it was manifestly the intention H

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of A the Legislature that this court was to have those general powers that are conferred upon it by s 22 of the Supreme Court Act 59 of 1959. In my view, it is implicit in these *dicta* that in an appeal from a Special Court those powers should be exercised according to the principles and subject to the restrictions applicable to appeals in general. And there is indeed no reason to differentiate between an appeal from a Special Court and an appeal from a Local or Provincial Division. *Unlike the position obtaining in a Special Court where a decision is*B*given on facts which may not have been considered by the Commissioner, this court hears an appeal from a Special Court on the record of the proceedings in that Court.* It follows that, if a decision of a Special Court is based on the exercise of a discretion, this court will interfere only if the Special Court did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle: Ex parte *Neethling and Others* 1951 (4) SA 331 (A) at 335" (my own emphasis). C

It is clear to me that the approach of Friedman J was given short shrift. The fact that the Appellate Division dismissed the appeal did not vindicate the sentiments of Friedman J on the powers of the Special Court in appeals from the decision of the Commissioner. It approved the penalty reduction from 100 per cent imposed by the Commissioner to 30 per cent by Berman J D in the Special Court as a proper and reasonable exercise of his discretion.

An appeal to this court is a full re-hearing in which this Court exercises the same wide discretion vested in the Commissioner. This court does not exercise a restricted interference only where there is a significant discrepancy between its own decision and that of the Commissioner. See also *ITC 11 038*E para 45 where it was held that:

> "it has long been accepted that, in an appeal against the additional charge imposed under s 76 (1), the legislature intended that there should be a rehearing of the whole matter by the tax court and that the tax court can substitute its own decision for that that of the commissioner: i.e. the Tax Court on appeal to it is called upon to exercise its own original discretion- see *Rand Ropes (Pty) Ltd* v *CIR*F1944 AD 142 at 150; *CIR* v *da Costa* 1985 (3) SA 768 (A) at 774G-J, *Meyerowitz on Income Tax* 2002.2003 para 32.40."

The discretion is as wide "as he may think fit" with the surrounding belt of restriction being precedent and particular facts of the matter. All relevant considerations include even those at the time of hearing the appeal. In *ITC 1430* (1988) 50 SATC 51 at 56 Mullins J said: G

> "Nor does it seem to me that the Special Court is restricted to evidence of facts existing as at the date of assessment or of imposition of the additional charges. This would be the situation in an ordinary civil or criminal appeal, where the court on appeal is confined solely to the record … There therefore seems to be no logical reason why we should not consider the facts existing as at the date of the appeal in exercising our powers on appeal … It would, for example, H require us to sit with blinkers if we were obliged to close our minds to the fact

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> of the supervening death of the taxpayer, as well as to certain other facts to A which I shall refer."

In the present case, the meaning of clause 7 is clear to me. It precluded the appellant from claiming capital redemption allowances using the favourable tax regime in the Fifth Schedule. Until the law

was put in place by legislation or failing legislation, by negotiation it was obligated to apply the provisions of the Twenty-Second Schedule in respect of claims for capital redemption B allowances. The Special Mining Lease, the Mining Agreement, the Framework and the three letters of March and September 2001 did not permit the appellant to breach the Mining Agreement. Any lingering doubts the appellant may have had were dispelled by the letter from the Government of Zimbabwe of 23 August 2005. It reiterated the correct legal position. C

I am satisfied that before 23 August 2005, the appellant lacked the intention to evade tax in any of the permutations discussed by Howie J in *ITC 1577*. The first two sentences in clause 7.1 of the Mining Agreement would have influenced the corporate mind of the appellant in thinking that the most favoured status though it would tarry would appear in the future backdated to the to the effective date of the agreement. The ministerial letters of 2001, D the year in which operations actually commenced served to reassure the corporate mind of the appellant that the Government of Zimbabwe was pursuing the contemplated most favoured status legislation.

The letter of 23 August 2005 brought the appellant on notice that the Government of Zimbabwe had failed to promulgate the contemplated legal E instruments that would usher in the most favoured tax status for the appellant. The letter directed the appellant to comply with the provisions set out in the last sentence of clause 7.1 of the Mining Agreement. The appellant partially did so by paying the non-resident shareholder withholding tax. The appellant did not pursue negotiation to review existing legislation to achieve substantially the same economic and fiscal effect nor did it deduct F the capital redemption allowances in terms of the Twenty-Second Schedule. The promise of new legislation was effectively dispelled by that letter of 23 August 2005. While the appellant may have lacked direct intent to evade tax, it cannot escape the awareness of certainty test. Its closest aim may have been to reduce the tax burden and stampede the Government of Zimbabwe G to honour its promises but it must have been aware that it was in the process unavoidably evading existing taxation under the Twenty-Second Schedule. If I am wrong in that the awareness of certainty possibility applies, it seems to me that the appellant cannot escape the awareness of possibility test. In pursuing its objective, the corporate mind of the appellant must have realised that its actions constituted tax evasion but acted in reckless disregard of that H

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awareness. A In my view, the appellant fell foul of the last two tax evasion tests propounded by Howie J in *ITC 1577, supra.* In my view, when it claimed deductions and omitted to make the proper amounts in its tax returns it must have known that it was acting unlawfully but nonetheless continued to do so with reckless abandon.

I B would have found the appellant liable for payment of the double tax penalty and directed the respondent to re-assess it on that basis but for two reasons that I proceed to set out. The first is that even though Howie J found that the taxpayer in *ITC 1577* had failed to discharge the onus to establish his lack of intention to evade tax he did not upset the finding of the taxman. Rather, he used his finding as an aggravating feature for upholding the penalty and C interest imposed by the taxman. The second is based on my understanding of the practice in the superior courts in regards to admissions made in pleadings by litigants and concessions seriously and deliberately made by counsel against the interest of their clients.

In regard to admissions made in pleadings by litigants, the position was set D out with her customary clarity by Makarau JA in *Mining Industry Pension Fund* v *DAB Marketing (Pvt) Ltd* 2012 (2) ZLR 132 (S) at 138G-139C thus:

> "A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted … The importance of the admission is that it is thus seen E as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted.(See *Rance* v *Union Mercantile Co Ltd* 1922 AD 312 *, Gordon* v *Tarnow* 1947 (3) SA 525 (A), *van Deventer* v *de Villiers* 1953 (4) SA 72 (C), *Moresby-White* v *Moresby-White* 1972 (1) RLR 199 (A) at 203E-H; 1972 (3) SA 222 (RA) at 224, F*DD Transport (Pvt) Ltd* v *Abbot* 1988 (2) ZLR 98 (S) and *Liquidator, M & C Holdings (Pvt) Ltd* v *Guard Alert (Pvt) Ltd* 1993 (2) ZLR 299 (H)."

Section 36 of the Civil Evidence Act [*Chapter 8:01*] is to the same effect.

The admission in this case was apparent from the initial penalty imposed by the Commissioner of 8 per cent that he later reduced to 5 per cent. It would be prejudicial and cause an injustice to the appellant were I to ignore the G admission. Aligned to the concessions deliberately and seriously made by counsel, is the practice that a court is precluded from determining an issue before it based on case authority that was not referred to by any of the parties in submissions without first affording them an opportunity to make argument on it. I chanced upon *ITC 1577* while researching for this judgment. It was H not referred to by any of the parties or their counsel. I accept that it would

be prejudicial to the appellant were I to use it to circumvent the admission A made by the respondent and the concession of his counsel.

Thus even though I would have been inclined to find the appellant liable for evading tax, I accept that I am bound by the admission and concession made by and on behalf of the respondent. Accordingly, I proceed to determine the penalty based on the admission and concession that the appellant did not intend to evade tax. B

The principles governing the imposition of a penalty are well developed in our criminal law. In *S* v *Zinn* 1969 (2) SA 537 (A) at 540G (approved by the Constitutional Court of South Africa in *S* v *M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC) para [10] and [109]) the triad of the crime, the offender and the interests of society were enunciated and envisaged C to holistically embrace all considerations necessary in the imposition of any penalty. The principle has been applied in Zimbabwe in such cases as *S* v *Gondo* 1990 (2) ZLR 171 (S) at 173A and *S* v *Mudzamiri & Anor* 1993 (2) ZLR 43 (S) at 48A. Since this appeal constitutes a rehearing, I am not restricted by the considerations of the Commissioner. I will take into account the all the factors raised by both counsel in their respective oral and written D submissions.

The offender

The appellant after extensive negotiations with the Government of Zimbabwe made massive and substantial foreign direct investments in this country in E two geographic areas in Zimbabwe from 2001 when it commenced mining operations. The figures indicated on p 13 of the rule 11 documents from 2001 to 2012 of US$58 525 499 exploration expenditure and US$897 402 585 development expenditure, aggregating US$955 929 084, constitute one-quarter of the actual financial investments. In addition the second phase of one of its project envisaged expenditure of US$500 million that would increase F annual production of their product from "the current 180 00 ounces to 270 000 ounces from 2014 and increase employment by 1000 to approximately 5 000 people". It remained loyal to Zimbabwe despite the withdrawal of its former majority joint partner. Instead of following suit it courted other foreign investors and financiers. It imported expensive machinery and equipment G necessary for the mining operations. It brought in various experts into the country who imparted their knowledge and skills to locals. It employed many locals in its various operations and developed local human capital. It constructed mining and social infrastructure that altered the Zimbabwean landscape. In a nutshell, it fulfilled its part of the bargain spelt out in the Mining Agreement. It was generally a law abiding and responsible corporate H

citizen. A The success it achieved and the downstream effect of its activities to the general economy and economic and social well-being of Zimbabwe cannot be gainsaid. These phenomenal successes, in all fairness also demonstrate that the Government of Zimbabwe fulfilled almost all the conditions set out in the Special Mining Lease, Mining Agreement, and Framework for an Agreement and later the Tribute Agreement between the appellant and the B Government of Zimbabwe.

The appellant fully cooperated with the respondent from the commencement of the audit. The rule 11 documents indicate the respondent notified the appellant of its failure to comply with s 22 and 25(2) as read with the Twenty-Second Schedule to the Income Tax Act on 17 August 2012. On 24 August 2012 C the appellant took the view that it was entitled to apply the provisions of the Fifth Schedule in respect of capital redemption allowances on the basis of the undertakings made by the Government of Zimbabwe and averred that it had acted in good faith in breaking the law. The parties held a meeting on 29 August 2012. On 31 August 2012 the respondent requested six

documents from the appellant which were duly supplied on 5September 2012. In that D letter the appellant complied with the respondent's request to recompute its income tax for the years 2001 to 2012 based on the provisions of the Twenty-Second Schedule on a without prejudice basis. On 12 September 2012 the respondent remained adamant that the appellant was liable under the law and that the undertakings did not constitute such a law. The respondent E agreed with the computations of the appellant that the principal income tax amount due was in accordance with the schedule on page 13 of the rule 11 documents in the sum of US$36 685 956. The taxes due over the period were US$64 808 370 of which US$28 122 414 had been paid. The respondent also notified the appellant that he was computing the penalty and interest amounts due for presentation in due course. F

On 17 September 2012 the appellant filed its objection in response to the letter of 12 September 2012. It objected to the period of re-computation and levying of penalties and interest. For the first time it accepted that the undertakings were not law and conceded owing additional tax but disputed liability for the payment of penalties and interest "as the historical calculations G were made in good faith and with full knowledge of Zimra". The appellant further agreed with the amounts computed for the 11 year period but pleaded prescription for the six years from 2001 to 2006. It engaged an independent firm of tax experts to audit compliance and shared the results with the respondent. The parties met on 19 September 2012. On the following day the appellant wrote to the respondent. The respondent conceded in that H meeting that the claim for the first six years from 2001 had under s 47(1)(ii)

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of the Income Tax Act, prescribed. The appellant redid the computations of A liability from 2007 to 2012 (p 43 of the rule 11 documents). The less 25 per cent development expenditure for the latter six years was the aggregate of exploration expenditure of US$56 366 074 and development expenditure of US$792 122 470 resulting in total capital redemption allowances of US848 488 544. The total tax liability for the period was US$56 961 973 of which US$ 23 209 382 was paid. The outstanding additional tax due was in the sum of B US$ 33 752 591.The appellant agreed to recompute additional profits tax due. It fought that battle in *P Mines (Pvt) Ltd* v *Zimra* HH-244-15 [*Ante*, at p 469 of this volume – *Editor*] and lost. It proposed a 12 month plan to settle the additional tax due by forfeiting its monthly VAT refunds of US$3 million per month plus a cash payment of US500 000 per month until the C full debt was liquidated. The plan was based on falling cash flows, driven by the effect of the Greek debt crisis in international prices of its products from US$1 800 per ounce in August 2001 to US$1 450 per ounce as at date of the letter and difficulties at the principal South African PGM producer. It proposed to pay US$3.5 million per month to liquidate the income tax and additional profits tax due commencing at the end of October 2012. D

Pages 14 to 33 of rule 11 documents constitutes various assessments raised by the respondent against the appellant on 9 October 2014, 24 December 2014 and 23 February 2015. The penalties raised on 9 October 2014 of US$415 824.18 were prescribed and apparently discharged together with the additional tax chargeable of US$8 732 307.74 on 24 December 2014 but E were all reinstated on 23 February 2015. On 9 October 2014 the respondent issued amended assessment showing penalties aggregating US$2 828 473. The penalties were revised upwards in the amended assessment of 24 December 2014 to an aggregate of US$ 3 018 498.95 on the purported completion of investigations.

On 25 September 2012 the parties met. The issue of prescription was agreed F to and the appellant duly withdrew objection to liability for the period 2001 to 2006. The respondent accepted the payment plan in the letter of 20 September 2012. The respondent charged a penalty of 8 per cent of the principal tax payable over 12 months. On 28 September 2012 the appellant filed an amended objection. It had a US$6.1 million APT liability for the years 2007 to 2012. It withdrew the objection for the first six tax years and G objected to the imposition of penalty at 8 per cent.

In regards to interest it sought the respondent's indulgence under s 71(2) of the Income Tax Act to extend the time for payment of additional tax without charging interest from the date of the original returns to the dates set out in the payment plan. In the alternative, it sought complete waiver of interest H

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under A s 72(11). The final objection was dealt with on 14 January 2013. The objection on penalties was partially allowed by the reduction from 8 per cent to 5per cent while the objection on interest was disallowed in full.

I have summarised the 45 paged r 11 documents to demonstrate that the appellant at all times fully cooperated with the tax audit. The co-operation B constitutes mitigation that will be weighed in the balance in assessing the appropriate penalty. See Melamet J in *ITC 1540* (1992) 54 SATC 400. A penalty is not meant to crush the taxpayer. Mr *de Bourbon* submitted the additional tax penalty that was in the region of US$1.3 million. My calculations indicate that as at 24 December 2014 the aggregate penalties were in the sum of US$3 018 498.95. The appellant did not plead inability to pay but C suggested that any such payment would cripple its operations. It agreed to settle the additional penalties and made a payment plan, in itself a sign of remorse; which again is mitigatory. In addition I recognize that the cash flow of the appellant is constrained by the deteriorating economic environment in Zimbabwe and the falling international platinum prices which at the time of writing this judgment were at US$1 157 per ounce. D

The offence

It was common cause that the purpose for the penalty is to punish errant taxpayers and deter prospective wrongdoers and encourage the rendering of honest and accurate returns and thereby avoid loss of revenue to the E fiscus. This was clearly stated by Mullins J in *ITC 1430* (1988) SATC 51 at 54 and by Friedman J in *ITC 1351* (1982) 44 SATC 58 at 63. Mullins J further held at p 57 that unless a taxpayer is unversed and unintelligent in the preparation of simple statements of income and expenditure the fact that the Commissioner allowed years (from 1978 to 1983) to pass before he queried such obviously inaccurate figures in order to nip them in the bud and assist F the taxpayer mend his way did not constitute strong mitigatory factors. The 12 years that passed or, for this case 6 years that passed, do not constitute mitigation, especially after 23 August 2005 when the appellant became aware that the attitude of the Government of Zimbabwe through the Ministry of Mines was that it should pay taxes in accordance with the Income Tax Act.

In *ITC 1351* Friedman J correctly noted that the blameworthiness of each G taxpayer depends on the particular facts of each case. The case before him was for non-disclosure where the undisclosed amount was in excess of the disclosed amount and discovery was due to investigation and not voluntary. He dismissed the appeal and confirmed the assessments on the ground that a high standard of diligence was required of the taxpayer in rendering H his returns as the Commissioner entirely depends on them. In the present

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case the appellant failed to discharge the onus on it to show it made full A disclosure. While it did not intend to evade tax, it certainly omitted the requisite information and in addition rendered an inaccurate statement. An objective assessment of its actions show that it was grossly negligent. In *ITC 1508* (1999) 53 SATC 442 Smith J set aside the penalty in full on the diplomat who did not include the proceeds of the car she imported into the B country because he was satisfied from her *ipse dixit* that she genuinely was unaware that she was required to do so, and in *ITC 1608* (1996) 59 SATC 72 at 78 he accepted that the taxpayer was genuinely mistaken as to when the commissions it received accrued. He did not find any intention to avoid and delay the payment of tax or any negligence on these two taxpayers, respectively. In the present case the appellant did not avail itself of the C avenues set out in the Mining Agreement of resolving the failure to legislate the undertakings. It simply decided to break the law. It was grossly negligent. Its moral blameworthiness for that reason was high. As Davis J, in my view, correctly observed in *ITC 1725* (2000) 64 SATC 223 (C) at 236 "there is a difference between an intention to evade and reasonable grounds". The finding of gross negligence on the part of the appellant constitutes a serious D infraction of the law that deserves punishment.

Interests of society

The broad interest of societal confidence in the justice delivery system requires that laws are obeyed and offenders appropriately prosecuted, denounced and E penalised. The general objectives of penalties are retribution, deterrence, prevention and rehabilitation.

In my view, the reliance on the undertaking was not so reasonable as to compel the Commissioner to forego the penalty entirely as sought by the appellant. While the appellant lacked intention to evade payment of tax, it was clear to me that its motive was to pay less tax purportedly in terms of F the undertakings. The Mining Agreement, the Framework for the Agreement, the letter of Minister of September 2001 and of 23 August 2005 indicate that further reliance on the undertakings was grossly negligent. The appellant in continuing to claim capital redemption allowances under the wrong schedule was no longer acting in good faith. Its moral blameworthiness was high. It is on that score that the present case is distinguishable from *ITC 1508*, G*ITC 1306* and *ITC 1609* where the taxpayers neither intended to evade tax nor exhibited negligence. The effect of this finding militates against full remission of the penalty.

The appellant contended that it should be precluded from paying the penalty as it was obliged to pay interest on the additional tax from the date of the H

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original A assessment. Mr *de Bourbon* "let the cat out of the bag" that the appellant was contesting payment of interest in the High Court. Clearly, the appellant is unwilling to pay the interest in question. It cannot therefore be rewarded for making such payment under duress. The appellant correctly submitted in paras 69 and 70 of its written heads of arguments that the payment of interest compensates the fiscus for the time value of the lost revenue. It is B also correct that the South African cases such as *ITC 1489* (1990) 53 SATC 99, *ITC 1576,* 56 SATC 225 and *ITC 1725* (2000) 64 SATC 223 have been loath to impose both interest and penalty where the facts warrant it and where very little blame is attached to the tax payer. The finding of gross negligence against the appellant distinguishes these cases from the present matter. In any event our legislature deliberately imposed both to underscore C the seriousness of omitting to submit or in rendering inaccurate tax returns. It does not appear to me that payment of interest in the circumstances pertaining to the appellant warrants full remission of the penalty.

The Tax Amnesty

At D the time of writing this judgment, there was a tax amnesty in existence. I express no opinion on whether that amnesty justifies full remission of the penalty in the absence of argument on the point. Accordingly, I leave that question open to proper argument by affected parties in future cases.

Conclusion

After E weighing the mitigatory features against the aggravating features, it seems to me that that the penalty of 5 per cent is most appropriate. In my view, such a penalty is at the lower end of the punishment spectrum that could legitimately be imposed on the appellant. I do not accept the argument proffered by the appellant that imposing such a punishment, in the circumstances pertaining to this case, would deter foreign direct investment. F I am unable to envisage a foreign direct investor who would be discouraged from investing in this country by such a low penalty. I believe that all foreign investors, just like local investors, appreciate and accept that they are subject to the laws of this country. In my view, the penalty of 5 per cent strikes a balance between the need to punish the appellant for breaking the law and G its viability concerns.

In the result, the appeal is dismissed and the 5 per cent penalties imposed by the respondent for the tax years from 2007 to 2012 are confirmed. In line with the legal provisions in regards to costs, each party will bear its own costs.

Dube, Manikai and Hwacha, appellant's legal practitioners H

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TEL•ONE (PVT) LTD v SENGENDE 2015 (1) ZLR 736 (S)

Citation	2015 (1) ZLR 736 (S)
Case No	Judgment No. S-64-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Gowora JA
Heard	21 May 2015
Judgment	21 May 2015
Counsel	*J Dondo,* for the appellant *J Bamu,* for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment – *wrongful dismissal – contract of fixed term duration – claim* C *that employee had legitimate expectation of being re-engaged and that another person was employed in his stead – must show both elements – specific provision on renewal that employee should have no expectation of further renewal – wrongful dismissal not established*

Headnote

The respondent was employed by the appellant on a fixed term contract for D a period of two years. Before the expiry of the contract, it was renewed for a further year. The renewal contract provided "The renewal of this contract is entered into with no guarantee of long term employment or any expectation of any further renewals." During that last year, the E respondent worked with a student on attachment who, after one year, was given a one year contract which came into effect before the expiry of the respondent's renewed contract. At the end of his renewed contract period, the respondent was told that his contract would not be renewed further. He claimed that he had been unfairly dismissed in terms of s 12B(3)(b) of the Labour Act [*Chapter 28:01*]. An arbitrator upheld F his claim, as did the Labour Court.

Held, that the employee who alleges that his dismissal should be deemed unfair must show that (a) he had a contract of fixed duration; (b) he had a legitimate expectation to be re-engaged; *and* (c) another employee was engaged in his stead. Contracts of fixed duration are part of our G labour law (s 12 of the Act) and the adoption of that type of contract is a prerogative of the employer. Such a contract is the basis of the legitimate expectation sought to be enforced by the respondent. If there is no contract of fixed duration, the issue of legitimate expectation does not arise. It is therefore a contradiction to state that the respondent had a legitimate expectation to be re-engaged and at the same time find that H

Ziyambi JA

the A contract of fixed duration is an abuse of authority or casualisation of labour, as it was put by the arbitrator and the Labour Court. For in terms of subs (3)(b) there can be no legitimate expectation without a contract of fixed duration.

Held, further, that the respondent was offered, and accepted, a renewal of the contract on the understanding that the renewal would not create an B expectation of further renewals. Prior to the

renewal for one year, his contract had been renewed once and for a period of two years. This was therefore a second renewal for a shorter period. It was difficult to see how, in these circumstances, he could have a legitimate expectation to be re-engaged. No legitimate expectation was shown by the respondent C to exist.

Cases referred to

Magodora & Ors v *Care International Zimbabwe* 2014 (1) ZLR 397 (S)

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

Legislation considered

Labour Act [*Chapter 28:01*], ss 12, 12B(3)

Case information

J Dondo, for the appellant

J Bamu, for the respondent E

Judgment

Ziyambi JA:

[1] The question which fell to be determined in this appeal is whether, on a correct interpretation of s 12B(3)(b) of the Labour Act [*Chapter 28:01*] ("the Act"), the respondent was unfairly dismissed. Subsection (3) provides F as follows:

> "(3) An employee is deemed to have been unfairly dismissed –
>
> (a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
>
> (b) if, on termination of an employment contract of fixed duration, the employee – G
>
> (i) had a legitimate expectation of being re-engaged; and
>
> (ii) another person was engaged instead of the employee."

[2] The respondent was employed by the appellant on a fixed term contract for a period of two years from 30 March 2009 to 29 March 2011. Before the expiry of the contract it was renewed for a further year until 31 March 2012. H Clause 9 of the renewal contract provided:

> "The renewal of this contract is entered into with no guarantee of long term A employment or any expectation of any further renewals."

During that year the respondent worked with a student on attachment named Mapepa. It is common cause that following the completion of a year on attachment, Mapepa was given a one year contract operative from 2 March 2012.

[3] On 26 March 2012, the respondent was advised by the appellant that B his contract would not be renewed further. The respondent was dissatisfied and caused the dispute, in due course, to be placed before an arbitrator. The arbitrator found

(1) that by placing the respondent on continuous fixed term contracts the appellant had "casualised labour"; C

(2) that the job in question was of a permanent nature and that the respondent ought to be reinstated as a permanent employee;

(3) that the clause to the contrary contained in the contract was of no consequence;

(4) that the student who was given a contract for a year had effectively D replaced the respondent.

In view of the above it was the arbitrator's finding that the appellant had violated the provisions of s 12B(3)(b) set out above. He ordered the reinstatement of the respondent to his post without loss of salary; and that the appellant confirm his position as permanent. In the alternative, the parties were

to agree E on damages in lieu of reinstatement failing which they were to approach the arbitrator for quantification of the said damages.

[4] The appellant, aggrieved by the arbitral award, appealed to the Labour Court. That court dismissed the appeal, holding that a clause such as the one set out above was a ploy to circumvent the provisions of s 12B(3)(b) F of the Act and ought to be ignored. It accordingly upheld the award. Still dissatisfied, the appellant appealed to this court.

Whether the respondent was unfairly dismissed

[5] As is clear from s 12B(3) *supra,* the employee who alleges that his dismissal should be deemed unfair must show: G

- that he had a contract of fixed duration;
- that he had a legitimate expectation to be re-engaged; *and*
- that another employee was engaged in his stead [1] .

Ziyambi JA

The A first requirement is common cause between the parties. It is mentioned here only to draw attention to the fact firstly, that contracts of fixed duration are part of our labour law and the adoption of that type of contract is a prerogative of the employer; and, secondly, that the contract of fixed duration is the basis of the legitimate expectation sought to be enforced by the respondent. If there is no contract of fixed duration, the issue of legitimate expectation does not B arise. It is therefore a contradiction to state that the respondent had a legitimate expectation to be re-engaged and at the same time find that the contract of fixed duration is an abuse of authority or casualization of labour as put by the arbitrator and the Labour Court respectively. For in terms of subs (3)(b) there can be no legitimate expectation without a contract of fixed duration.

[6] Section 12 of the Act makes specific provision for employment contracts C of fixed duration. It provides:

> "12 Duration, particulars and termination of employment contract
>
> (1) …
>
> (2) An employer shall, upon engagement of an employee, inform the employee in writing of the following particulars –
>
> (a) the name and address of the employer; D
>
> (b) *the period of time, if limited, for which the employee is engaged;*
>
> (c) …" (my emphasis).

The Labour Court therefore erred in upholding the arbitrator's ill-advised description of such contracts, which are a clear exercise of a right conferred by the Act, as an abuse of authority. E

Legitimate expectation

[7] The respondent was offered, and accepted, a renewal of the contract on the understanding that the renewal would not create an expectation of further renewals[2]. Prior to the renewal for one year his contract had been renewed once and for a period of two years. This was therefore a second renewal for F a shorter period. It is difficult to see how, in these circumstances, he could have a legitimate expectation to be re-engaged. I agree with counsel for the appellant that no legitimate expectation was shown by the respondent to exist. That should be the end of the matter because that finding, on its own, is fatal to the respondent's case. However, since it was argued before us, I proceed to determine the third leg of the enquiry. G

Whether another was employed in the respondent's stead

[8] From the record it is not shown what was the nature of the work in which the respondent was engaged, nor was it established in what manner he had

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Ziyambi JA

been supplanted by another employee. His complaint that Mapepa had been A employed in his stead was not substantiated. What appears on the record is that on 1 March 2012, the Human Resources Officer recommended that Mapepa should be given a one year contract from 5 March 2012 to 28 February 2013 to "*take up a position left by Kuimba who transferred to Warren Park last year*" (my emphasis). Kuimba had sought a transfer from Masvingo to Harare for personal reasons. Mapepa, who had been working as a student B on attachment together with the respondent at the Masvingo station, was subsequently given a one year contract in terms of the recommendation. This occurred before the expiry of the respondent's contract. Thus from the evidence on the record Mapepa was to replace Kuimba. The respondent provided no evidence as to the nature of his employment or that of Mapepa. There was thus no basis for the finding by both the arbitrator and court C*a quo* that Mapepa was employed in his stead.

[9] It follows from the above that the respondent did not establish that he was unfairly dismissed.

[10] Accordingly, the Labour Court erred in upholding the award of the arbitrator. D

[10] It is for the above reasons that after hearing the parties, the court ordered as follows:

"1. The appeal is allowed with costs.

2. The judgment of the Labour Court is set aside and substituted with the following: E

'The appeal is allowed with costs.

The award of the arbitrator is set aside'".

GARWE JA and GOWORA JA concurred.

Dondo & Partners, appellant's legal practitioners F

Tamuka Moyo Attorneys, respondent's legal practitioners

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

2 *UZ-UCSF supra*; *Magodora & Ors* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S)

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OK ZIMBABWE LTD v MSUNDIRE 2015 (1) ZLR 741 (S)

Citation	2015 (1) ZLR 741 (S)
Case No	Judgment No. S-23-15
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Hlatshwayo JA
Heard	16 July 2013
Judgment	16 July 2013
Counsel	*D Ochieng*, for the appellant *S Hashiti,* for the respondent
Case Type	Civil appeal

Annotations No case annotations to date

Flynote

Contract – C *exemption clause – validity – when courts will uphold exemption clause – principles – conduct not covered by exemption clause*

Delict – *unlawful arrest and detention – action may be brought against private person – presumption of animus injuriandi*

Headnote

Whilst D an action for unlawful arrest and detention is usually brought against the police or other uniformed forces, a private individual can also commit this delict. The position is also settled that in our law, unlike South Africa, once unlawful arrest or imprisonment are proved, *animus injuriandi* is presumed and intention is not a requirement for this delict.

In general, parties to a contract are at liberty to exempt each other from the E consequences flowing from a breach of the contract. For this reason, corporate entities and public institutions providing a particular service or engaged in a contractual relationship with another exempt themselves from liabilities they would otherwise incur. In general, if both parties are aware of the exemption no real difficulties are encountered. However, F such an exemption can be an expensive trap for an unwary client. The courts, in order to protect the public, have set limits to the exemptions that they will permit by interpreting such a clause narrowly. In doing so, the court endeavours to ascertain what the parties intended the exemption to cover. An exemption that is *contra bonos mores* will not be permitted. For example, a party may not exempt himself from his own fraud. G

Any ambiguity as to meaning and scope of the exemption must be interpreted against the *proferens* unless he proves that the words used embraced the contingency that has arisen. If there is not an express reference to negligence in the exemption, the court must consider whether the words are wide enough to cover negligence on the part of the defendant H or his servants and if so whether the claim for damages may be based

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2015 (1) ZLR p742

Garwe JA

on some ground other than negligence. Where the existence of an A exemption excluding liability for negligence is not in dispute, the burden of establishing any other possible ground for liability such as gross negligence or *dolus*, rests upon the claimant. The exemption must be within the knowledge of the other party at the time the contract is entered into. A party cannot exempt himself from liability for wilful misconduct, or criminal or dishonest activity of himself, his servants B or agents or from damage resulting from gross negligence on his part or that of his servants.

In a related context, the Consumer Contracts Act [*Chapter 8:03*], provides that where a court finds a consumer contract to be unfair, it may, *inter alia*, cancel the whole or part of a contract, vary the contract, enforce C part only of the contract, declare the contract enforceable for a particular purpose only, order restitution or reduce any amount payable under the contract. Such power may be exercised by a court *mero motu* or on application by any affected party. A court is, *inter alia*, entitled to find a contract to be unfair if, in all the circumstances, the contract is unreasonably oppressive. D

Editor's note:

(1) Decision of Bere J in *Musundire* v *OK Zimbabwe Ltd* 2012 (1) ZLR 292 (H) upheld.

(2) Although the Supreme Court's decision was announced on 13 July 2013, the reasons for the decision were only made available in May 2015, hence the 2015 judgment number. E

Cases referred

Botha v *Zvada & Anor* 1997(1) ZLR 415 (S)

Tubbs (Pvt) Ltd v *Mwamuka* 1996 (2) ZLR 27 (S) F

Legislation considered

Consumer Contracts Act [*Chapter 8:03*]

Case information

D Ochieng, for the appellant

S Hashiti, for the respondent G

Judgment

Garwe JA

[1] After hearing submissions from counsel, the court issued the following order:

"(1) The appeal be and is hereby dismissed with costs.

(2) The reasons for this order are to follow." H

Garwe JA

[2] A What follows are the reasons for the order.

Factual background

[3] The appellant, OK Zimbabwe, is a company duly incorporated in terms of the laws of Zimbabwe. It is a major player in the retail sector and for a number of years has conducted what has come to be known as the "OK B Grand Challenge Promotion." That promotion provides an opportunity for a number of its customers to win various items, such as motor vehicles, residential stands and electrical goods.

[4] The respondent, Eric Msundire, was employed as manager by the Zimbabwe Institute of Public Administration situated at Darwendale just C outside Harare. It was common cause at the trial that he purchased various grocery items from the OK Bazaars Supermarket in Marimba worth $999.98. Consequently he was given a number of coupons which he completed and deposited into a selected container.

[5] On 9 June 2010 the appellant, through the public media, announced a list of names of persons who had won various items in the promotion. The D respondent's name was one of the names so announced.

[6] Shortly thereafter, the appellant's risk and services manager, one Osborne Tariro Mawere, received what he termed an anonymous call. The caller suggested that there had been fraud in the manner in which some of the participants had obtained coupons to participate in the promotion. Mawere E accordingly proceeded to Braeside Police Station where he lodged a complaint based on the anonymous call and consequently a docket was opened for the purpose of investigating the complaint.

[7] It is pertinent to mention that Mawere had been a police officer in the Zimbabwe Republic Police and at the time he retired from the force occupied F the rank of Assistant commissioner. At the time of the 2010 promotion he had been employed by the appellant for 13 years. He also was the holder of a Bachelor of Commerce Degree in Risk Management.

[8] The appellant invited the winners of the promotion to attend the prize giving ceremony at the Rainbow Towers, Harare, on 16 June 2010. It is G common cause that the invitation was intended to identify certain of the winners of the promotion and to cause their arrest by the police. The police also attended the ceremony at the behest of Mawere but stood some distance away, near Mawere's vehicle, which the latter had provided to facilitate the apprehension and conveyance of the suspects.

[9] The respondent attended the event in the company of his family and H workmates, some of whom had also been announced as winners. Mawere

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then lured the respondent and two of his colleagues to the car where the police A were waiting. At the vehicle, it was alleged that they had been involved in the fraudulent acquisition of the coupons used in the competition. In the company of the police, Mawere then drove them to Braeside Police Station where they were detained.

[10] For a period of four days, the respondent and his colleagues were B transferred from one police station to another. They were made to endure extremely difficult and painful conditions and in particular were made to sleep in squalid conditions.

[11] It was common cause at the trial that at the time of their arrest, no investigations had in fact been carried out to ascertain whether or not C the respondent had in fact been involved in any fraudulent acquisition of coupons. It was also common cause that the investigations were carried out by Mawere only after the arrest of the respondent and his colleagues. It was also common cause that when Mawere eventually took the coupons used by the respondent to the relevant branch for verification, he confirmed that in fact the purchase had been in order and that the respondent had not been involved in any wrong doing. D

[12] The respondent and his colleagues were only released after Mawere had deposed to an affidavit in which he exonerated them of any wrong doing.

The proceedings in the court *a quo*

[13] The respondent, feeling aggrieved, instituted an action in the E High Court seeking damages for defamation, *inuria* and deprivation of liberty.

[14] The appellant denied all liability, pointing out that all it had done was to make a report to the police. The appellant also sought to rely on an exemption clause that indemnified it against all claims of any nature whatsoever arising out of the promotion.

Findings by the court *a quo*F

[15] The facts giving rise to the delictual claim were found by the court to be largely common cause. It was Mawere who had personally conducted the investigations and was present at all times when the respondent was being interviewed. The court found that Mawere had handled the investigations in G an "extremely reckless" manner and had caused the arrest of the respondent without verifying the authenticity of the anonymous call or carrying out investigations into the allegations, even after the respondent had protested his innocence.

[16] The court further found that it was Mawere who had "masterminded" the arrest, used his vehicle to "deposit" the respondent at Braeside Police H

Garwe JA

Station, A actively participated in the interrogation and that, at the time the police officers detained the respondent, they personally had no reasonable suspicion that the latter had committed an offence and appeared content to leave everything in the hands of Mawere. The court also found that whilst it would have been more prudent for the respondent to have sued the police as well, such non-joinder was not fatal. B

[17] The court *a quo* was also of the view that owing to the reckless and malicious manner in which Mawere had conducted himself, the exemption clause had to be restrictively interpreted in order to protect members of the public such as the respondent against blatant abuses of exemption clauses. The court *a quo* accordingly found that the appellant could not exempt itself C from Mawere's reckless and unacceptable conduct in causing the unnecessary arrest of innocent members of the public before carrying out even the most basic of investigations.

[18] In the result the court awarded judgment in favour of the respondent in the sum of $8 500 for unlawful arrest, interest thereon at the prescribed rate and costs of suit. D

[19] It is against that order that the appellant has appealed to this court. The appellant's grounds of appeal raise four issues. These are:

19.1 that the court *a quo* erred in concluding that the appellant had restrained the liberty of the respondent or had directed that this be done.

19.2 that the court erred in concluding that the appellant had acted with E*animus injuriandi*.

19.3 that the court *a quo* erred in finding that the appellant was liable for the acts of the police who arrested and detained the respondent in the exercise of their own discretion.

19.4 alternatively, that the court *a quo* erred in not finding that the appellant's F liability was excluded by the exclusionary clause contained in the rules of the competition.

Court *a quo* made findings of fact

[20] The facts before the court *a quo* were largely common cause. Based on G those facts the court found that Mawere did not simply report a suspected fraud. He had in fact fully participated in stage - managing the award winning event in order to identify the respondent and others and cause their arrest. He had no iota of evidence that the respondent had committed an offence. Indeed the police had no such evidence and were happy to allow Mawere to lead the investigations. In short, although the police detained the respondent, H this was at the instance of Mawere, in circumstances where neither Mawere

nor the police officers had reasonable suspicion that an offence had been A committed. For an arrest to be lawful, the arresting detail has to show that he had reasonable grounds for suspecting that the accused had committed an offence: *Botha* v *Zvada* & *Anor* 1997(1) ZLR 415 (S) at 419 A-B.

Whether the court *a quo* erred

[21] It is important to reiterate that the findings made by the court *a quo*B were consistent with the facts which were generally agreed by the parties. Consequently, in the absence of a suggestion that the court *a quo* misdirected itself in making those conclusions, this court, as an appellate court, has no power to interfere with those findings. My view of the matter is that not only is there no basis upon which this court can interfere with the findings of fact made by the court *a quo* but also that the findings were in fact consistent C with the proven facts.

[22] The finding by the court *a quo* that the appellant, through Mawere, together with some members of the police force, unlawfully detained the respondent cannot be impugned.

[23] The position is now settled that whilst the action for unlawful arrest and D detention is usually brought against the police or other uniformed forces, a private individual can also commit this delict: Feltoe *A Guide to the Zimbabwe Law of Delict* 3 ed (2001) p 56.

The question of *animus injuriandi*

[24] The position is also settled that in our law, unlike South Africa, once E unlawful arrest or imprisonment are proved, *animus injuriandi* is presumed and intention is not a requirement for this delict: Feltoe *op cit* p 56. The submission by the appellant that the court *a quo* erred in finding that the appellant had acted with *animus injuriandi* consequently is without merit.

The exemption clause F

[25] The exemption clause that formed part of the promotion read:

> "All participants and winners indemnify OK Zimbabwe Limited, The Advertising Agencies and partners against any and all claims of any nature whatsoever in the promotion (including as a result of any act or omission, whether negligent or otherwise on the part of OK Zimbabwe)"

[26] The appellant argued in the court *a quo* that based on this clause, it G was not liable in delict for the misfortunes that befell the respondent, such liability having been indemnified by the respondent in deciding to participate in the promotion on that basis.

[27] The court *a quo*, relying on various authorities, concluded that such clauses are not religiously accepted and that where a party seeks to indemnify H

itself A against the reckless and malicious conduct of its employees, such indemnification must be curtailed and the party may not seek to avoid liability as a consequence thereof.

The question is whether the court *a quo* was correct in this regard.

[28] In general, parties to a contract are at liberty to exempt each other from B the consequences flowing from a breach of the contract. For this reason, corporate entities and public institutions providing a particular service or engaged in a contractual relationship with another exempt themselves from liabilities they would otherwise incur. In general if both parties are aware of the exemption no real difficulties are encountered. However, such an C exemption can be an expensive trap for an unwary client.

[29] For the above reason, the courts, in order to protect the public, have set limits to the exemption that they will permit by interpreting such a clause narrowly. In doing so the court endeavours to ascertain what the parties intended the exemption to cover. However an exemption that is *contra bonos mores* will not be permitted. For example a party may not exempt himself D from his own fraud.

[30] The approach of the courts is to adopt a narrow interpretation of exemption clauses and adopt the principle that, unless the scope of the exemption is clearly expressed, it must be interpreted as giving minimum protection to the party in whose favour it operates. E

[31] In *Tubbs (Pvt) Ltd* v *Mwamuka* 1996 (2) ZLR 27 (S), this court had occasion to restate the principles applicable in exemption clauses. These may be summarised as follows:

- the words of the exemption clause must be read as part of the contract and must be sufficiently clear and comprehensive for a court to give F effect to them.
- any ambiguity as to meaning and scope of the exemption must be interpreted against the *proferens* unless he proves that the words used embraced the contingency that has arisen.
- if there is not an express reference to negligence in the exemption, the court G must consider whether the words are wide enough to cover negligence on the part of the defendant or his servants and if so whether the claim for damages may be based on some ground other than negligence.
- where the existence of an exemption excluding liability for negligence is not in dispute, the burden of establishing any other possible ground H for liability such as gross negligence or *dolus*, rests upon the claimant.

Garwe JA

- the exemption must be within the knowledge of the other party at the A time the contract is entered into.
- a party cannot exempt himself from liability for wilful misconduct, or criminal or dishonest activity of himself, his servants or agents, or from damage resulting from gross negligence on his part or that of his servants. B

[32] In a related context, the Consumer Contracts Act [*Chapter 8:03*] provides that where a court finds a consumer contract to be unfair, it may, *inter alia*, cancel the whole or part of a contract, vary the contract, enforce part only of the contract, declare the contract enforceable for a particular purpose only, order restitution or reduce any amount payable under the contract. Such power may be exercised by a court *mero motu* or on application by any affected C party. A court is, *inter alia*, entitled to find a contract to be unfair if, in all the circumstances, the contract is unreasonably oppressive.

[33] Whilst participation in a promotion might not constitute a "consumer contract" as defined, and I make no firm pronouncement in this regard, it is clear that the general principles applicable to exemption clauses have been captured in the Act. D

Disposition

[34] I agree with the court *a quo* that Mawere was both reckless and malicious. He was acting within the scope of his duties as a risk and loss manager. It would be unconscionable for the appellant to seek to be exempted from liability in these circumstances. E

[35] For the above reasons the appeal was found to be without merit and was dismissed with costs.

ZIYAMBI JA and HLATSHWAYO JA concurred

Atherstone & Cook, appellant's legal practitioners F

Mtombeni, Mukwesha, Muzawazi & Associates, respondent's legal practitioners

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MBCA BANK LTD v RESERVE BANK OF ZIMBABWE & ANOR 2015 (1) ZLR 749 (H)

Citation	2015 (1) ZLR 749 (H)
Case No	Judgment No. HH-482-15
Court	High Court, Harare
Judge	Mathonsi J
Heard	19 May 2015; *CAV*
Judgment	27 May 2015
Counsel	*I Chagonda*, for the applicant *V Mkwachari*, for the first respondent *P C Paul*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *parties – joinder – party having potential claim against it by one of parties to litigation – avoidance of multiple suits* – D *joinder ordered*

Headnote

The applicant was a commercial bank which was being sued by the second respondent ("Portland"), one of its depositors, for certain sums of foreign currency which were the balances standing to its credit in the current E accounts it held with the applicant. The balances were affected by a directive issued by the first respondent, the Reserve Bank ("RBZ"), in October 2007 in terms of which it centralised all foreign currency accounts by directing that they be lodged with it. The applicant complied with the directive and lodged the second respondent's bank balances with the RBZ. This directive was later held by the Supreme Court to F be *ultra vires*.

The second respondent did not cite the RBZ as a party. The applicant filed a plea in which it admitted the deposits but averred that, upon the issue of the directive, it had notified Portland that the money was being transferred to RBZ in terms of the directive. It further averred that G Portland "consented to the new arrangement", alternatively there was quasi-mutual assent to it. The parties therefore novated the agreement by delegation. The applicant averred that thereafter Portland directly transacted with RBZ on its account held by RBZ. It successfully made some

withdrawals and as such was aware from 2007 that it was RBZ, H not the applicant, which held Portland's money.

2015 (1) ZLR p750

The applicant sought to have the RBZ joined as a party. It argued that Portland A was aware of the transfer and acquiesced; and that it was entitled to an indemnity from the RBZ.

The RBZ opposed the application on the basis that the directive did not create a relationship, legal or otherwise, between itself and Portland. It did not, at any stage, take charge or transfer of Portland's account and did not transact with Portland. It had no interest in the legal dispute B between the applicant and Portland. Portland opposed the application on the basis that its claim was only against the applicant and no relief was sought against the RBZ.

Held, that a defendant in an action has a right to seek the joinder of a co-defendant at any stage of the proceedings. In terms of r 85 of the High C Court Rules 1971, two or more persons may be joined in one action as plaintiffs or defendants where, if separate actions were brought against each of them, some common question of law or fact would arise in those actions and also rights to relief claimed arise out of the same transaction. Joinder of a party to proceedings is something within the discretion of the court, which discretion of course should be exercised judiciously. D

Held, further, that a joinder can be sought at any stage of the proceedings. The proceedings are commenced when a summons is issued and completed upon delivery of a judgement. This application had been made during the proceedings and the court was at liberty to order a joinder.

Held, further, that the applicant did not convert Portland's money to its own E use. It transferred it to RBZ in compliance with a directive which was *ultra vires* the enabling regulations. The end-user of Portland's funds was the RBZ, which was now distancing itself from liability on the basis that it had no relationship with Portland. This might be so, but the applicant was entitled to demand some form of indemnity from RBZ, if for no other reason than it was the RBZ which induced it to breach F its contract with Portland and also that RBZ wrongfully interfered with contractual rights.

Held, further, that the consequences of the non-joinder of RBZ would be that the applicant would have to pay Portland, money which in all fairness RBZ should pay as it appropriated it. While the RBZ would like to stay G as far away as possible from the suit, it was the source of the problem and should participate in the determination of the matter. If it were not joined, the applicant would have to litigate against it in a separate action. The joinder of RBZ would bring all matters in dispute in the cause under one umbrella and they will be effectually and completely determined in the spirit of r 87(2)(b). H

2015 (1) ZLR p751

Mathonsi J

Cases referred to A

Barclays Bank of Zimbabwe Ltd v *RBZ & Anor* 2013 (2) ZLR 459 (H)

Bawden v *Ndebele & Anor* HB-110-11

Marais & Anor v *Pongola Sugar Milling Co & Ors* 1961 (2) SA 698 (N)

Pitsiladi & Ors v *ABSA Bank & Ors* 2007 (4) SA 478 (SE)

Sibanda v *Sibanda & Anor* 2009 (1) ZLR 64 (H) B

Standard Chartered Bank Zimbabwe Ltd v *China Shougang Intl* 2013 (2) ZLR 385 (S)

Trojan Nickel Mine Ltd v *Reserve Bank of Zimbabwe* 2013 (1) ZLR 444 (H)

Legislation considered C

High Court Rules 1971, rr 85 & 87(2)(b)

Case information

I Chagonda, for the applicant

V Mkwachari, for the first respondent

P C Paul, for the second respondent D

Judgment

Mathonsi J: The applicant is a registered commercial bank which has been sued by one of its depositors, Portland Holdings Ltd, in HC 160/14 for payment of the sums of US$62 223.94 and ZAR6 764 987.94, being balances standing to its credit in current accounts held with the applicant. E

As is now common cause, the balances were affected by a directive issued in October 2007 by the first respondent (RBZ), whose function it is to regulate and supervise banking institutions. In terms of the directive it centralised all foreign currency accounts by directing that they be lodged with it. The applicant complied with the directive and lodged the second respondent's bank balances with the former. F

In HC 160/14, the second respondent (Portland) did not cite RBZ as a party to the proceedings. It averred that it had deposited its money into foreign currency accounts held with the applicant. On 25 October 2013, it demanded the payment of the money from the applicant which has failed and/ or refused to repay the amounts of US$62 223.94 and ZAR6 764 987.94. Portland then G prayed for judgment in the two sums together with prescribed interest and costs of suit.

After causing appearance to be entered, the applicant filed a plea in which it admitted the deposits but averred that upon the issue of the RBZ directive, it had notified Portland that the money was being transferred to RBZ in H terms of the directive. It further averred that Portland "consented to the

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new arrangement" or alternatively there was quasi-mutual assent to it. The A parties therefore novated the agreement by delegation.

The applicant pleaded that the existence of the new arrangement was demonstrated by the fact that thereafter Portland directly transacted with RBZ on its account held by RBZ. It successfully made some withdrawals and as such was aware from 2007 that it was RBZ and not the applicant that held Portland's money. B

The applicant has launched this application seeking to join RBZ as a party to the proceedings and asserts, in the founding affidavit of Neeta Joshi, the head of Legal, Governance and Compliance, that when it complied with the RBZ directive it notified its clients including Portland, which was, at all material times, aware of the transfer of its foreign currency balances to C RBZ. Indeed, for quite some time after that transfer, Portland was transacting on its account which had been transferred to RBZ by making withdrawals, successfully dealing directly with RBZ. In fact, in one letter Portland addressed to RBZ on 20 February 2008 requesting the release of its foreign currency it had concluded:

> "Portland Holdings Ltd appreciates the support given by the Reserve Bank of D Zimbabwe to Portland Holdings Ltd in the past, and we earnestly hope that the present delay in the RBZ allowing for the payment of our foreign creditors will be resolved IMMEDIATELY so that the company can settle these accounts and maintain operations."

In yet another letter written by Portland to the applicant on 1 August 2013, it had stated: E

> "We request that you forward this application to the Reserve Bank of Zimbabwe (RBZ) for their approval and for the release of our funds held by the RBZ."

The applicant insists that, unlike in *Standard Chartered Bank Zimbabwe Limited* v *China Shougang International* 2013 (2) ZLR 385 (S), in which the Supreme Court held that the actions of RBZ in issuing the directive F referred to above did not absolve the bank from its contractual obligations to its depositor to pay the bank balance on demand, in the present case Portland was not only aware of the transfer of its money to RBZ, it also participated by demanding and making direct withdrawals from RBZ. This therefore distinguishes this case from that of *Standard Chartered Bank*, *supra*, which had raised the defence that it had been discharged from its contractual G obligations to its depositor by a supervening impossibility, the RBZ directive

Mr *Chagonda*, who appeared for the applicant, took the argument further, by submitting that the applicant is entitled to demand an indemnity from RBZ and intends to amend its plea to include that averment in the event that the order for joinder is granted. H

Mathonsi J

RBZ A has opposed the application for joinder on the basis that it issued the directive in good faith and without negligence, which directive did not create a relationship, legal or otherwise, between itself and Portland. It did not, at any stage, take charge or transfer of Portland's account and did not transact with Portland. It has no interest in the legal dispute between the applicant and Portland. As there is no legal foundation for its joinder, the B application should fail.

Portland surprisingly also opposed the application, maintaining that its claim is only against the applicant on the basis of the authority of *Standard Chartered Bank Ltd supra*. RBZ does not have any interest in the claim being made against the applicant and no relief is sought by it against RBZ. C As such, joining RBZ as a party would be meaningless.

Although RBZ had raised a number of defences, including the issue of prescription, failure to give notice of the suit in terms of s 63B of the Reserve Bank Act [*Chapter 22:15*] as read with s 6(1) of the State Liabilities Act [*Chapter 22:13*] and its immunity to suit for anything done in good faith D and without negligence, Mr *Mkwachari*, who appeared for RBZ, appeared to abandon those arguments at the hearing, content to anchor his opposition on the basis that there is no claim being made against RBZ by Portland and the applicant in the main action. For that reason, joinder should be refused. He relied on the authority of *Pitsiladi & Ors* v *ABSA Bank & Ors* 2007 (4) SA 478 (SE) and *Bawden* v *Ndebele & Anor* HB-110-11 (unreported). E

In *Pitsiladi & Ors* the court reasoned at 482H that:

> "It must be accepted that where the applicant's case against the third party is undoubtedly without any merit, the granting of leave to join the third party would be pointless and be prejudicial to the plaintiff, whose claims would be unnecessarily delayed and to the prejudice of the third party, who would F unnecessarily become a party to the proceedings and incur costs."

I do not think that the applicant's case is without any merit. For a start, a defendant in an action has a right to seek the joinder of a co-defendant at any stage of the proceedings. In terms of r 85 of the High Court of Zimbabwe Rules 1971, two or more persons may be joined in one action as plaintiff's G or defendants where if separate actions were brought against each of them some common question of law or fact would arise in those actions and also rights to relief claimed arise out of the same transaction.

In terms of r 87(2):

> "At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either on its own motion or on application –
>
> (a) … H

Mathonsi J

> (b) order any person who ought to have been joined as a party or whose presence A before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party.
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

So joinder of a party to proceedings is something within the discretion of B the court, which discretion of course should be exercised judiciously. The first respondent has submitted that the court can only make an order of joinder under r 87 after hearing evidence or in the course of a trial. It is not clear from where the first respondent derives such assertion. A joinder can be sought at any stage of the proceedings. The proceedings are commenced C when a summons is issued and completed upon delivery of a judgment. This application has been made during the proceedings and the court is at liberty to order a joinder.

What appears to be common cause is that the applicant did not convert Portland's money to its own use. It transferred it to RBZ in compliance with a directive which the Supreme Court has now ruled, in *Standard Chartered Bank*, D*supra*, as having been *ultra vires* the enabling regulations. The end-user of Portland's funds is there: it is RBZ which is now distancing itself from liability on the basis that it had no relationship with Portland. This may be so, but surely the applicant is entitled to demand some form of indemnity from RBZ, if for nothing but that it is RBZ which induced it to E

breach its contract with Portland and also that RBZ wrongfully interfered with contractual rights: *Trojan Nickel Mine Ltd* v *Reserve Bank of Zimbabwe* 2013 (1) ZLR 444 (H).

I am aware that the judgment in *Trojan Nickel Mine Ltd* is still the subject of an appeal wherein the Supreme Court has reserved judgment. It has not F been overturned. I therefore do not have any reason to shift my position from the findings made in that case where I in fact distinguished that case from *Standard Chartered Bank supra* on the basis, *inter alia*, that RBZ had not been cited. *In casu*, the applicant would like RBZ to be cited and, in my view, RBZ has to explain itself on a number of respects including why it should not indemnify the applicant against the suit brought by Portland. G

The consequences of the non-joinder of RBZ are pretty obvious. The applicant will have to pay Portland, money which in all fairness RBZ should pay as it appropriated it. In *Marais & Anor* v *Pongola Sugar Milling Co & Ors* 1961 (2) SA 698 (N) the court adopted a two-tier approach in the determination of a joinder application, namely: H

Mathonsi J

(1) A that a party must have a direct and substantial interest in the issues raised in the proceedings.

(2) that his rights may be affected by the judgment of the court.

Understandably RBZ would like to stay as a far away from the suit as possible, but surely it is the source of the problem and in my view should B participate in the determination of the matter. I associate myself fully with the remarks of Cheda J in *Sibanda* v *Sibanda & Anor* 2009 (1) ZLR 64 (H) at 66H-67A where he said:

> "It is therefore, pertinent to enquire as to the consequences of a non-joinder. The prejudice is there for anyone to see: there will be a lot of inconvenience, not only to the applicant, but to the court as well. No doubt this will result in the applicant C being oppressed and, in an attempt to extricate herself there from, there will be a multiplicity of actions, a situation which should be avoided if possible. See *Morgan & Anor* v *Salisbury Municipality* 1933 AD 167."

In the present case, if the RBZ is not joined as a party the applicant may be made to pay Portland by virtue of the pronouncement of the Supreme Court in *Standard Chartered Bank*, *supra*; That will however certainly not be D the end of the matter. The applicant will no doubt litigate against RBZ to recover the loss. This court will then sit separately to determine that other suit and whether the applicant should indemnified. There will be an inconvenience on both the applicant and the court. On the other hand, the joinder of RBZ will bring all matters in dispute in the cause under one umbrella and they E will be effectually and completely determined in the spirit of r 87(2)(b). I am therefore inclined to join the RBZ.

The argument raised by RBZ relating to notice cannot possibly be made in an application for joinder. This is because the application for joinder is not a claim for money. Even if it was, one would condone the failure to give adequate notice, especially as RBZ was forewarned of the impending F litigation: *Barclays Bank of Zimbabwe Ltd* v *Reserve Bank of Zimbabwe & Anor* 2013 (2) ZLR 459 (H).

The question of prescription and indeed immunity are issues RBZ can raise in its plea once it has been joined. It is not apparent that they may defeat the applicant's case as to lead one to conclude that it is undoubtedly without G any merit: *Pitsiladi & Ors supra*.

In the result, it is ordered that

1. The first respondent be and is hereby joined as the second defendant in case number HC 160/14
2. Leave be and is hereby granted to the second respondent's legal H practitioners to serve all court processes including summons

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Mathonsi J

commencing action issued under case number HC 160/14 on the A first respondent.

3. The costs of this application shall be costs in the main cause.

Atherstone & Cook, applicant's legal practitioners

T H Chitapa & Associates, first respondent's legal practitioners B

Wintertons, second respondent's legal practitioners

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CHIMUZA v DZEPASI 2015 (1) ZLR 757 (H)

Citation	2015 (1) ZLR 757 (H)
Case No	Judgment No. HH-487-15
Court	High Court, Harare
Judge	Mwayera J & Tagu J
Heard	31 March 2015; *CAV*
Judgment	27 May 2015
Counsel	*T Mpofu,* for the appellant *G T Mharapara,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court – *judicial officer – magistrate – resignation of – effect on part-heard proceedings – options available – parties agreeing to let another magistrate read the record and deliver a judgment – judgment arising* D *from such course a nullity*

Headnote

In this dispute over the ownership of a house, the presiding magistrate recorded the and heard *viva voce* evidence from witnesses for the plaintiff and the defendant respectively. The magistrate left the service and a joined private practice, not having attended to writing and delivery of E a judgment. The parties subsequently agreed that another magistrate should peruse the record and come up with a judgment, and this was done. The legal issue raised was whether the judgment by a magistrate who did not preside over the proceedings was a nullity.

Held, that the trial magistrate, in coming up with a judgment, has to assess not only the evidence adduced, but demeanour. It is a holistic assessment F and analysis of evidence which leads the magistrate to choose which story carries the day. Credibility of witnesses is best tested by the person who observes and hears witnesses testify. A new magistrate, on simply reading the record, may not appreciate the unwritten aspects such as demeanour and thus might come up with a judgment prejudicial to one of the parties. The fact that the parties agreed to an illegality did not G make the proceedings legal.

Held, further, that where a magistrate retires or is incapacitated or recuses himself or becomes *functus officio*, the proceedings are a nullity. The proceedings are deemed aborted and have to be started afresh before a different magistrate. In a situation where a magistrate has been transferred H or has resigned before completing a partly heard matter, the correct and

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expedient approach is to utilise administrative remedies of recalling the A magistrate to come in and complete the partly heard matters. Also, in the case of a magistrate who has resigned or retired, as *in casu*, administrative remedies like recalling the former magistrate and having him take an oath of office to finalise the partly heard matter would cure delays caused by proceedings starting *de novo*. B

Held, further, that the fact that civil proceedings are party driven does not make them any different from criminal proceedings. The civil court, just like the criminal court, is duty bound to appreciate the full facts and the evidence and then assess. The court is the umpire and has to come up with the judgment; this duty does not fall on the parties to the proceedings. C

Cases cited

S v *Likwenga & Ors* 1999 (1) ZLR 498 (H)

S v *Tsangaiza* 1997 (2) ZLR 47 (H)

Case information

T Mpofu, for the appellant D

G T Mharapara, for the respondent

Judgment

Mwayera J: The appellant approached the court expressing disagreement with the Chinhoyi magistrate court judgement wherein the court ordered the appellants to be evicted from house number 14317 Brundish, Chinhoyi.

It is apparent from the record of proceedings that the appellants and the E respondent at different times and for different purchase prices purchased the house in question from the seller one Solomon Mukwidza. The scenario envisaged by evidence is that of double sale. The appellant raised eight grounds of appeal:

(a) The magistrate erred in holding that the appellants were aware of the F dispute between Phiona Moyo and Solomon Mukwidza before cession was effected.

(b) The magistrate erred in holding that the appellants deliberately ignored the court case that was pending before the Chinhoyi magistrates court between respondent and the seller of the house 14317 Brundish Chinhoyi. G

(c) The magistrate erred in holding that the appellants were aware that house 14317 Brundish, Chinhoyi, had been sold to a third party before taking occupation and making improvements.

(d) The magistrate erred in holding that the appellants had not extended that house in question from four to seven rooms. H

(e) A The magistrate erred in accepting the evidence of the Chamber Secretary of the Municipality of Chinhoyi despite its glaring inconsistencies.

(f) The magistrate erred in holding that cession of right, title and interest in appellant's names was improperly done, hence was null and void.

(g) The magistrate erred in holding that they were no appeal circumstances B justifying appellants in defeating the eviction proceeding.

At the hearing the applicant's counsel raised a legal issue that the judgement was a nullity and on that the trial court's judgement ought to be set aside. It is settled a legal issue may be raised at any stage in an appeal.

The record of proceedings shows that the matter was heard before magistrate C Mr Gayikayi who recorded and heard *viva voce* evidence from witnesses for the plaintiff and defendant respectively. The magistrate left service and joined private practise before attending to writing and delivery of judgement. The parties subsequently agreed that another magistrate peruse the record and come up with judgement. Indeed a magistrate attended to judgement D and delivered a judgment which forms subject of this appeal. The legal issue raised is that the judgment by a magistrate who did not preside over the proceedings is a nullity and as such it cannot stand.

Mr *Mharapara,* while conceding that ordinarily only the presiding magistrate ought to have assessed, analysed and come up with judgement presented E argument that in circumstances of this case the judgement was valid. He based his argument on the fact that the appellant is the one who initiated the request for a different magistrate to write and come up with a judgment. The parties agreed and acceded to having the judgment delivered and such it was not a nullity.

The question that begs of answer is whether or not by the agreement of F parties would clothe a nullity to be legally binding.

For a concise and precise answer to this question to come out one has to look at the rational or basis of the settled position that the presiding magistrate ought to come up with a judgment. It is not in dispute that the trial magistrate in coming up with a judgment has to assess not only the evidence adduced G but demeanour. It is a holistic assessment and analysis of evidence which leads the magistrate to choose which story carries the day. Credibility of witnesses is best tested by the person who observes and hears witnesses testify. A new magistrate on simply reading the record may not appreciate the unwritten aspects such as demeanour and thus might come up with a H judgment prejudicial to either of the parties

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2015 (1) ZLR p760

Mwayera J

Once appreciative of the rationale behind the desire for the presiding magistrate A to writes judgment it becomes abundantly clear that an agreement by parties does not have the effect of clothing a nullity, so as to become valid. The fact that the parties agree to an illegality does not change the complexion of an illegality to be legal

I subscribe fully to the sentiments echoed by Bartlett J in *S* v *Likwenga*B*and Ors* 1999(1) ZLR 498 (H) wherein he quoted with approval Gillespie J's reasoning in *S* v *Tsangaiza* 1997 (2) ZLR 47 (H). Both judges were of the opinion that where a magistrate retires or is in capacitated or recuses him/herself or becomes *functus officio* the proceedings are a nullity. The proceedings are deemed abortive and have to be started afresh before a different magistrate. In a situation where a magistrate has been transferred or C has resigned before completing a partly heard matter, the correct and expident approach is to utilise administrative remedies of recalling the magistrate to come in and complete the partly heard matters. Also in the case of a resigned or retired magistrate as *in casu*, again administrative remedies of recalling and having the individual take oath of office to finalise the partly head matter would cure the anomaly of delay of proceedings starting *de novo*. D

Handing over a record of proceedings for assessment of evidence and judgement before a new magistrate, albeit by consent, of the partis does not paint the proceedings with legality. There are obvious prejudices which are occasioned by not having a complete assessment of the matter. It is my E considered view that the fact that civil proceedings are party driven does not make them any different from criminal proceedings. The civil court, just like the criminal court, is duty bound to appreciate full facts, evidence and then assess. The court is the umpire and has to come up with the judgment and this duty is not on the parties to the proceedings.

It is clear therefore that wrong procedure was adopted to come up with a F judgment and as such the judgment by a magistrate who did not preside over the hearing is invalid and thus a nullity. Having pointed out that there is no judgment before this court it is therefore not necessary to look into the grounds of appeal for there is strictly speaking nothing before the court since the court *a quo* judgment is a nullity.

In the premises the judgement of the court *a quo* must be set aside. G

Accordingly it is ordered that

1. The judgment of the court *a quo* be and is hereby set aside
2. The matter is referred to the trial court for the original presiding magistrate to finalise the matter or, in the event that the magistrate H

Mwayera J

is A not available, for trial *de novo* before another magistrate who has not dealt with the matter.

3. Each party is to bear its costs.

TAGU J concurred. B

Mushinga, Mutsvairo & Associates, appellant's legal practitioners

Mtombeni, Mukwesha, Muzawazi & Associates, respondent's legal practitioners

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BHILA v THE MASTER & ORS 2015 (1) ZLR 762 (H)

Citation	2015 (1) ZLR 762 (H)
Case No	Judgment No. HH-549-15
Court	High Court, Harare
Judge	Mwayera J
Heard	20 January 2015; *CAV*
Judgment	28 May 2015
Counsel	Miss *R Venge*, for the applicant *C Mucheche*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights* C *– protection against discrimination (s 56) – right not to be discriminated against on grounds of being born out of wedlock – common law provision denying right to illegitimate child to succeed to father's estate if he dies intestate – such provision unconstitutional*

Succession – *intestate – right of illegitimate child to succeed to father who* D *dies intestate – common law provision denying such right unconstitutional*

Headnote

The applicant was married to a man under the civil law; they had four children. He died intestate. After his death it was found that he had E another three children born out of wedlock. These children, the third to fifth respondents, sought to inherit a child's share each from their late father's estate. The applicant argued that they were not entitled to inherit *ab intestato*, being born out of wedlock. She had, in terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*] received the matrimonial home. F

Held, the common law position of excluding children born out of wedlock violated the constitutional rights to protection of the law and freedom from discrimination. These rights had always been in the 1980 Zimbabwean Constitution and have been more pronounced by the wording in the 2013 Constitution. To seek to discriminate the third to fifth respondents G on basis of them being born out of wedlock would not only be unfair and unjust but undemocratic, for it would amount to punishing innocent children in an inhuman manner for an iniquity beyond their control, an "iniquity" by the man who sired them; this would surely be discrimination which no civilised democracy would legally sanction. Under s 56(3) of the 2013 Constitution, "Every person has the right not to be treated in H

Mwayera J

an A unfairly discriminatory manner on such grounds as … whether they were born in or out of wedlock." Discrimination occasioned on basis of being born out of wedlock to exclude children or descendants of a deceased man from inheriting from the estate of their father *ab intestato* is *ultra vires* the Constitution.

Held, further, that the constitutional provisions outlawing discrimination B on basis of being born out of wedlock find support in international conventions and indeed reflect progressive development of the law in response to social and cultural development. Children's rights, as outlined in arts 2 and 3 of the Convention on the Rights of the Child and arts 3 and 4 of the African Charter on the Rights and Welfare of the Child C emphasise the best interest of the child being of primary importance and also emphasises the right to non-discrimination. The fifth respondent, as a juvenile, was further protected by s 81(1)(a) of the Constitution, which provides for equal treatment of every child before the law.

Editor's note: in *Mayiswa* v *The Master & Ors* 2011 (2) ZLR 441 (H) at 447-448, D Gowora J (as she then was) touched on, but did not decide, the constitutionality of the common law position. Counsel acting as *amicus curiae* had argued that various provisions of the 1980 Constitution were breached. In *Zawaira* v *Nyampfudza & Ors* 2011 (2) ZLR 375 (H) Chitakunye J upheld the common law position, as did Cheda AJ in *Fitzgerald* v *Chong* 2012 (1) ZLR 472 (H).

Cases referred to E

Mayiswa v *The Master and Anor* 2011 (2) ZLR 441 (H)

Smyth v *Ushewokunze and Anor* 1997 (2) ZLR 544 (S)

Zimnat Insurance Co (Pvt) Ltd v *Chawanda* 1990 (2) ZLR 145 (S)

Legislation considered F

Constitution of Zimbabwe 2013, ss 2, 44, 56(3), 81

Deceased Estates Succession Act [*Chapter 6:02*], ss 3, 3A, 10

International instruments

Convention on Rights of the Child

African Charter on the Rights and Welfare of the Child, arts 3 and 4 G

Case information

Miss *R Venge*, for the applicant

C Mucheche, for the respondent

Judgment

Mwayera J: This is an application to set aside the first respondent's (the H Master of High Court) direction wherein the Master allowed the third to fifth

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Mwayera J

respondents to inherit from the estate of late Hoyini Hilary Komati Bhila. A The bone of contention is that the third to fifth respondents were born out of wedlock.

The brief background of the matter is that the applicant was married civilly to the late Hillary Hoyini Komati Bhila. The marriage was blessed with four children. In 1999 Hillary Hoyini Komati Bhila passed on, prompting B the registration of the deceased estate. The applicant, as surviving spouse, was appointed the executrix of the estate. At the time of the death of her husband, the applicant and her late husband were staying at 1247 Ardbennie Township, also known as 1247 Mukuvisi Road, Houghton Park. Upon processing the estate, the applicant, who had advertised the estate, got to know that her late husband had three children born out of wedlock, these C being the third to the fifth respondents. The three children or their guardians then sought to inherit from their late father's estate. It was then that the first respondent appointed a neutral executor, the second respondent. The second respondent subsequently prepared a distribution plan wherein the Houghton Park property was treated as matrimonial property and awarded to the applicant as the surviving spouse. D

The rest of the property, which included a Borrowdale house, was then treated as free residue of the estate. Irked by this distribution plan, the applicant raised an objection with the first respondent. The first respondent directed that the distribution plan as given by the second respondent be advertised. It is these directions by the Master (first respondent) which the applicant E wishes set aside.

The applicant argued all the property is under the umbrella of the matrimonial estate and that during the subsistence of the marriage she was gainfully employed and contributed to the estate, even though the properties were not registered in her name, given the prevailing legal situation then, prior to the F legal age of majority which emancipated women to own property. She further argued that the third to fifth respondents are precluded from inheriting *ab intestato* because they are children born out of wedlock.

In summary, the issues which fall for determination in circumstances of this case can be outlined as follows: G

1. Whether or not children born out of wedlock can inherit *ab intestato* from the estate of their father.
2. Whether or not the Borrowdale house falls within the free residue of the estate of the late Hillary Hoyini Komati Bhila.
3. Whether or not the first respondent's directions should be set aside. H

2015 (1) ZLR p765

Mwayera J

It A is not in dispute that the deceased died intestate. The legislative inroads on administration of estates cannot be ignored in dealing with the present application. The legal position, which is fairly settled on inheritance, will be of guidance and equally the supreme law of the country the Constitution of Zimbabwe 2013, international provisions and case law will be of assistance in determination of issues at hand. B

Section 3A of the Deceased Estates Succession Act [*Chapter 6:02*] deals thus with inheritance of matrimonial home and household effects:

> "The surviving spouse of every person who, on or after [the first November 1997], dies wholly or partly intestate shall be entitled to receive from the free C residue of the estate –
>
> (a) the house or other domestic premises in which the spouses or the surviving spouse, as the case maybe, lived immediately before the person's death; and
>
> (b) the household goods and effects, which immediately before the person's death, were used in relation to the house on domestic premises referred to D in paragraph (a);
>
> where such house, premises, goods and effects form part of the deceased person's estate".

The applicant as surviving spouse was, in compliance with the Deceased Estates Succession Act, given as entitled to the matrimonial home goods and effects in Houghton Park where she and her husband were staying at E the time of his death.

The remaining estate falls in the basket of free residue to be determined again in terms of the law.

Section 3 of the Act clearly spells out the entitlement of a spouse of a deceased F who dies intestate. The section, in specifying the entitlement of a surviving spouse, also outlines the entitlement of

descendants and parents, brothers or sisters. The use of the word "descendant" together with parent, brother or sister in the relevant statutory provision cannot be given a blind eye. The argument by the applicant that a "descendant" is not defined therein is simply to distort the legislative intention. The question that begs an answer G with that line of argument is why the applicant seeks to confine the argument of definition to descendant only and not extend it to parent, brother and or sister, for they are equally not defined in the Act.

A "descendant" is defined in the *Oxford Dictionary Thesaurus and Word Power Guide Indian Edition* as "child, heir, scion, successor, family issue, H offspring posterity, and progeny".

2015 (1) ZLR p766

Mwayera J

A descendant by no means excludes a child by virtue of status of marriage. A It is my considered view that a child, whether born out of or in wedlock, is one's child and thus one's descendant.

In outlining the entitlement of a spouse, and specifically mentioning the situation which will prevail where there is no descendant, the legislature clearly recognised entitlement of both surviving spouse and descendants. Section 3 reads: B

> "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's estate according to the following rules –
>
> (a) if the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato,* the C surviving spouse 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 share of the joint estate to the extent of a child's share or to D so much as, together with the surviving spouse's share in the joint estate, does not exceed the specified amount, whichever is the greater;
>
> (b) if the spouses were married out of community of property and the deceased's spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse of such person shall –
>
> (i) be entitled to receive from the free residue of the deceased spouse's E estate, as his or her sole property, the household goods and effects and 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 the greater;
>
> (c) if the spouses were married in or out of community of property and the F deceased spouse leaved no descendant who is entitled to succeed *ab intestato* but leaves a parent or brother or sister, whether of the full or half blood, who is entitled to succeed the surviving spouse shall –
>
> (i) be entitled to receive from the free residue of the joint estate or the deceased spouse's estate, as the case may be, as his or her sole property, the household goods and effects in such estate; G
>
> (ii) succeed in respect of the remaining free residue of the deceased spouse's share of the joint estate or the deceased spouse's estate, as the case may be, to the extent of a half share or to so much as does not exceed the specified amount, whichever is the greater;
>
> (d) in any case not covered by paragraph (a), (b) or (c), the surviving spouse shall be the sole intestate heir." H

2015 (1) ZLR p767

Mwayera J

A A reading of these provisions clearly maps the way for sharing of property in situations where there are surviving spouse, descendants, parents, brother and or sister.

There is no insinuation in the legislative provisions that reveals where the deceased dies leaving living descendants they ought to be excluded from B inheriting a share of the free residue on basis of being illegitimate.

The common law position of excluding children born out of wedlock violated the constitutional rights to protection of the law and freedom from discrimination. These rights have always been in the Zimbabwean Constitution 1980 and have been more pronounced by the wording in the C new Constitution of Zimbabwe 2013.

I propose to revisit the constitutional provisions after a brief discussion of the Deceased Estate Succession Act [*Chapter 6:02*]. Section 10 is to the effect that nothing in Part III shall affect or alter the laws of Zimbabwe regarding inheritance *ab intestato*.

The question is, what is the law as regards inheritance *ab intestato*? The D Constitution is the supreme law of the country. Section 2 thereof reads:

> "(1) This Constitution is the supreme law of Zimbabwe and any law, practices, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
>
> (2) 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 E by them."

The Master is duty bound to apply the law as espoused by the law giver. In the present case the Master, the first respondent, accepted the registration of the estate of the late Hillary Hoyini Komani Bhila, who during his lifetime was married in monogamous type of marriage to the applicant. The F first respondent appointed the applicant as an executor. Upon being given information, which is not in dispute, that the applicant's late husband had sired three children (third to fifth respondent) out of wedlock, the first respondent procedurally appointed a neutral executor dative, the second respondent. The second respondent, in the process of distribution plan attainment, G included the three respondents. The estate has not been wound up, given the common cause facts. There is no basis for arguing that the Constitution is not applicable as this is viewed by the applicant as retrospective application of the law. The Constitution of Zimbabwe has always been the supreme law and applicable further in this case because the estate has not been wound up. The provisions of the Constitution had immediate application as law on H the date the Constitution became law.

2015 (1) ZLR p768

Mwayera J

The first respondent's directions do not only conform with the Deceased A Estate Succession Act in so far as it provides for descendants, but his directions also resonate with the Constitution in so far as the law should not discriminate. I find solace in the remarks expressed in *Smyth* v *Ushewokunze and Anor* 1997 (2) ZLR 544 (S), wherein the court expressed the view that the provisions of the Constitution must be given a purposive interpretation B so as not to strangle the right that is being protected. To seek to discriminate against the third to fifth respondents on basis of them being children born out of wedlock would not only be unfair and unjust but undemocratic for it would amount to punishing innocent children in an inhuman manner for an iniquity beyond their control. An "iniquity" by those who sired them, at no request by the said children let alone their consultative input, would surely be discrimination which no civilised democracy would legally sanction C

In the Zimbabwean context, the question whether or not children born out of wedlock can inherit *ab intestato* from the estate of their father is ably answered by the provisions s 56(3) of the Constitution 2013, which provides:

> "Every person has the right not to be treated in an unfairly discriminatory manner D on such grounds as their nationality, race, colour, tribe, place of birth, ethnic 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*."

A reading of this section clearly outlaws discrimination on basis of being born out of wedlock. The third to fifth respondents have a right to equality and non-discrimination. The Constitution itself actually regulates its application E and interpretation. Section 44 reads:

> "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 this Chapter".

It accordingly follows that the Declaration of Rights in Chapter 4 must be F given full effect so as not to distort the purpose of the lawmaker in protecting the right in question. It would therefore follow that discrimination occasioned on basis of being born out of wedlock to exclude children or descendants of a deceased from inheriting from the estate of their father *ab intestato* is *ultra vires* the Constitution. In *Mayiswa* v *The Master and Anor* 2011 (2) ZLR 441 (H) G Gowora J (as she then was) outlined an interesting debate on the common law position wherein children born out of wedlock were excluded from inheriting from their father's estate, when it was remarked that would be in violation of constitutional right to protection of the law, freedom from discrimination and to

privacy. The Constitution referred to then is the one repealed and replaced by the current Constitution. The current Constitution H

2015 (1) ZLR p769

Mwayera J

outlaws A any sort of discrimination against children on basis that they are born in or out of wedlock. The law is not static but dynamic, going along with economic social and cultural values. If the law is construed in a narrow sense, negating the social values on which the Constitution (which is the supreme law) is anchored, then the law will not resonate with what is reasonable. It will cease to serve the purpose for which it is enacted and society will not B have respect for the law, thus leading to lawlessness and anarchy.

In the present case one cannot turn a blind eye to the values of the Constitution in seeking to bridge the gap between children born in and out of wedlock.

The reasoning where children born out of wedlock were viewed as "devils, bastard illegitimate" is unacceptable and has been overtaken by dynamics C in culture society and legal development. I subscribed to the sentiments echoed in *Zimnat Insurance Company (Pvt) Ltd* v *Chawanda* 1990 (2) ZLR 145 (S) wherein it was held:

> "If the law is to be a living force it must be dynamic and accommodating to change. It must adapt to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based D on human necessities and experiences of the actual affairs of men rather than a philosophical notion it will one day be cast off by the people because it will cease to serve any useful purpose".

The constitutional provisions outlawing discrimination on basis of being born out of wedlock find support in international conventions and indeed reflect progressive development of the law in response to social and cultural E development.

Children's rights, as outlined in the Convention on Rights of the Child and the African Charter on the Rights and Welfare of the Child arts 3 and 4, emphasise the best interest of the child being of primary importance and also emphasises the right to non-discrimination. Article 3 provides: F

> "Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this charter irrespective of the child's or his or her parents' or legal guardian's race, ethnic group, colour, sex language, religion political or other opinion, national and social origin, … *birth* or other status.".

Clearly, therefore, discrimination on basis of maternity status is unacceptable.

Social and legal dictates clearly show that no child should be punished by G virtue of not having been sired in a registered union or marriage. It is not in dispute third to fifth respondents are the late Hillary Komati Bhila's children, thus his descendants and beneficiaries to the estate.

The fifth respondent is a juvenile and again well protected by the law. Section 81 of the Constitution clearly spells out the rights of children. Section 81(1)(a) H states:

2015 (1) ZLR p770

Mwayera J

> "Every child, that is to say every boy and girl under the age of eighteen years A has the right to *equal treatment* before the law, including the right to be heard" (my emphasis).

Section 81(2) states:

> "A child's best interests are paramount in every matter concerning the child."

Section 81(3) states: B

> "Children are entitled to adequate protection by the courts, in particular the High Court as their upper guardian."

It is with this background and in particular s 81(3) that in the exercise of my discretion, upon observing that there is no report by the curator accompanying the fifth respondent's opposition papers, the court held the view that as upper guardian of the minor child the best interest of the child would be best served C by full ventilation into the matter. More so, given that the natural mother and legal guardian of the minor, one Mary Ncube, deposed to an affidavit in opposition and that all the three children inclusive of the fifth respondent are legally represented by the same legal practitioner. There is no prejudice which will be occasioned, given that the best interests of the child

are of D paramount interest and that clearly from evidence the fifth respondent, just like the third and fourth respondent, cannot be discriminated against on basis of being born out of wedlock.

Turning now to whether or not the Borrowdale house falls within the free residue of the estate, from evidence filed it is not in dispute that immediately before the late Hillary Komati Bhila passed on he was staying with the E applicant at their Houghton Park house. Further, it is common knowledge that both the Houghton Park and Borrowdale houses fall into the estate of the deceased since these properties were registered solely in the name of the deceased. There is no argument that the applicant is the surviving spouse and in compliance with the s 3A of the Deceased Estate Succession Act the applicant's entitlement to the matrimonial home and household goods F and effect is unquestionable. This then leaves the other property forming the estate for consideration. It is for this property that the first respondent gave a directive that the house in which the applicant was not immediately staying in at the time of death of her husband fell under free residue. This brings in the last issue of whether or not in the circumstances of this case G the direction should be set aside for being in conflict with the legal position.

Section 3 and 3A sought to cure the mischief which was created in estates were spouses died intestate and relatives embarked on property grabbing. It is crystal clear from the Act that the matrimonial home, which is the house in which the surviving spouse was residing in immediately before death of the spouse, is inherited by the surviving spouse without debate. The applicant's H

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matrimonial A house or home per evidence is the Houghton Park house which she was allocated. The same Act, in seeking to redress anomalies on inheritance *ab instestato*, is clearly couched to show the descendants, parents, brother or sisters get a share of the free residue while the spouse also gets a share over and above the matrimonial assets. The legislature made inroads, giving guidance on the sharing ratio to cater for situations where an individual has B died without a will. The Constitution outlaws rules, conduct, practice and law which are discriminatory. Hence, the third to fifth respondents, as off spring/descendants/children/progeny, albeit out of wedlock, are also entitled to a share of the free residue just like the children/descendants or offspring born in wedlock. The first respondent directed that the distribution plan factor in the factual position of the additional three children. That cannot C be viewed as a directive not based on existing law, given the constitutional and legislative provisions. The applicant's husband died intestate and hence the estate must be administered accordingly.

The recognition of one individual's rights has to be as much as practically possible upheld, while at the same time bearing in mind that the next person D equally has rights that have to be upheld. It is in that process of seeking to balance all individuals' rights that of necessity the rights of one do not necessarily retain the absolute status.

The surviving spouse is entitled to the matrimonial house plus goods and effects and in case of a civilly married spouse he or she is entitled to a share E in the joint estate and further share in free residue while descendants, parent, brothers or sisters are also entitled to a share in the free residue. In absence of all these descendants, parents, brother or sisters then the surviving spouse, under the Act, inherits as the sole intestate heir.

The first respondent's directive after appointment of a neutral executor was above board and in compliance with the laws of this country. Clearly F children, whether born in or out of wedlock, are beneficiaries in the estate of their biological father or mother who has died intestate. The application lacks merit and must fail.

Accordingly the application is dismissed with costs. G

Mambosasa, applicant's legal practitioners

Matsikidze and Mucheche, third to fifth respondents' legal practitioners

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HOSHO v HASISI 2015 (1) ZLR 772 (H)

Citation	2015 (1) ZLR 772 (H)
Case No	Judgment No. HH-491-15
Court	High Court, Harare
Judge	Tsanga J
Heard	14 May 2015; *CAV*
Judgment	2 June 2015
Counsel	*P Kashiri*, for the plaintiff Defendant in person
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Customary law – *marriage – proof of – need to show that roora/lobola paid* C *– desirability of registering customary law union – effects of failure to register and possible inability to prove existence of marriage*

Headnote

In terms of the relevant law impacting on widows, s 68(3) of the Administration D of Estates Act [*Chapter 6:01*] recognises a union contracted according to customary rites, notwithstanding that it has not been formally solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]. As such, the absence of a marriage certificate is not at all fatal to the recognition of such a union when it comes to inheritance. The law is very clear E in its protection of widows, not just in the Administration of Estates Act, but in the new Constitution, as well as in other significant human rights instruments Zimbabwe has ratified. Section 68(3) is already in consonance with s 26(d) of the Constitution, which requires the State, in the event of dissolution of marriage through divorce or death, to F ensure that provision is made for the children and spouses. Where such an unregistered union or marriage is proven to exist, in the event of a property dispute on intestacy, s 68F(d) makes it clear that where the deceased is survived by one wife, the surviving wife gets ownership or, if impracticable, the usufruct of the house in which the spouse lived G at the time of the deceased's death. This is together with the household goods in that house. This provision is equally consistent with the spirit and intent of art 21 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, a charter which Zimbabwe has ratified and which provides that the widow has the right to continue living in the matrimonial house. H

However, A where a party relies on an unregistered customary marriage, central to asserting widowhood and claiming the protection accorded widows under relevant legislation is proof that such customary union indeed existed. For a union to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump sum payment of money (called B*rutsambo* among the Shona) as well as cattle, though increasingly the money equivalent is paid in today's society. Its payment is part

of the culture for the majority of the citizens who adhere to customary ways of marrying. In terms of s 63 of the Constitution, every person has a right to participate in the cultural life of their choice although such freedom cannot be exercised in a manner which violates the fundamental human C rights and freedoms that are guaranteed in the Constitution.

Despite growing qualms about the blatant commercialisation and valid feminist concerns about the inherent contradictions and implications for gender equality arising from the payment of *roora/lobola*, it remains a fact that the customary meaning accorded to a customary marriage revolves D around the payment of *roora/lobola.* The payments made traditionally secure the wife's domestic services, as well as the man's rights to any children that are to be born to the marriage. Yet the constitutional and legal reality is that parental rights to children, regardless of the type of marriage, have nothing to do with the payment of *roora/ lobola* but have E everything to do with the best interests of the child. Furthermore, men and women now constitutionally have an equal status in marriage. Even though in practice a *roora/lobola* debt is often not fully discharged, it is unlikely that young men who find themselves in debt at the start of a marriage owing to unfulfilled payment obligations will continue to laud its customary value even if they generally reap patriarchal dividends F from its payment. Also, since it is paid in anticipation of children being born, it is equally discriminatory on the basis of culture and custom to make someone a castaway just because they do not have children. Nonetheless, where it has not been paid there is, strictly speaking, no customary marriage to talk about. There are considerable limits to the G extent to which in practice the law can effectively run ahead of people's thinking in society. The continued payment of *roora/lobola* for women in Zimbabwe, regardless of legislative inroads, bears testimony to this. Where, therefore, an unregistered customary marriage is averred, proof of the existence of a recognisable customary union is fundamental. The process of paying *roora/lobola* and the ceremony itself involves key H representatives from both families, as well as other people who can attest

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to the process having taken place. Furthermore, in today's reality there A is also often documentary evidence in the form of a book of record kept by the receiving and paying families respectively of what has been paid and what remains owing.

Despite the increased recognition of the unregistered customary union within aspects of our own law, a registered marriage is ultimately more B secure for women. The international standard in relevant instruments is also in favour of registration. For instance, art 6(d) of the Protocol to the African Charter requires States to take measures to ensure that "every marriage is recorded in writing and registered in accordance with national laws, in order to be legally recognised". The problem is certainly not in the content of our law in this regard, but more generally lack of C ready access to administrative facilities for registration, as well as lack of knowledge about the law, further hampered by attitudes among the populace, patriarchal or otherwise. Addressing these challenges requires proactive measures by relevant State bodies so as to protect vulnerable groups from the results of failure to register. D

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 68(3) & 68F(d)

Constitution of Zimbabwe 2013, ss 26(d) & 63

*International instruments*E

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, arts 6(d) & 21

Case information

P Kashiri, for the plaintiff

Defendant in person F

Judgment

Tsanga J: The plaintiff, Nathan Hosho, seeks an order for the eviction of the defendant from Stand N0. 4020 Ngoni Township Norton, which property is registered in his name under Deed of Transfer

No. 2820/09. The plaintiff bases his claim on purchase and subsequent transfer under an agreement of sale with one Zekiya Mutandwa. The defendant, Lillian Hasisi, opposes G the eviction on the basis that she is entitled to the house by virtue of being a surviving spouse as a result of an unregistered customary law union.

The issues referred for trial were:

1. Whether or not the plaintiff is the rightful and registered owner of Stand No. 4020 Ngoni Township, Norton. H

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2. A Whether or not the defendant has any lawful right to occupy the above property.
3. Whether or not the defendant and all those who claim occupation through her should be evicted from the property.

Since he currently lives in Australia, the plaintiff was represented at the B trial by one Gloria Musavengana, his sister-in-law, under a power of attorney. Her evidence was that in 2008, the plaintiff asked her to look for a house for purchase. She found a house within his stipulated budget in the newspaper. The house was being sold by an estate agent on behalf of one Zekiya Mutandwa. She stated that she went to see the house that was being sold although she did not go inside. She was familiar with the house as she C was aware that the house belonged to the late Robert Jaure whom she had once worked with at ZIPAM. An agreement of sale was duly entered into in October 2008 through the estate agent and ownership was subsequently transferred. It was when she went to advise the occupants to vacate that she was told by the defendant that the house was not for sale and that it had been wrongly sold by one Claude Jaure, her step son, to Zekiya Mutandwa. D The latter had then sold the house to the plaintiff. Gloria said that she was not aware at the time of purchase that there were any disputes pertaining to the house as it would have made no sense for her to expend money on a property that was the subject matter of any dispute.

The defendant was the sole witness in her case. She said that she had an E unregistered customary law union which came into being in 1993 with the late Robert Jaure. She did not have any children with the deceased but had her own two children from a previous marriage. The deceased, however, had one child, Claude Jaure, from a previous union. Her narrative was that the house was acquired in 1997 during her marriage to the late Robert Jaure who died in 2003. The house was registered in the deceased's name only. F

She said that after Robert Jaure died she had a dispute with his sisters over the estate. She further stated that Claude Jaure had stolen the documents from her that enabled him to sell the house to Zekiya Mutandwa. She said she had also told others who had previously come to view the house that it had not been for sale. Whilst she stated that she had shooed away five G purchasers, in reality the evidence confirmed that the house was sold by Claude Jaure to Zekiya Mutandwa in the initial instance, and then by the latter to the plaintiff, Nathan Hosho.

Although the defendant alleged that she had a customary marriage she was unable to support her claim through any witnesses from those who were H present at the *roora/lobola* ceremony. She stated that all material witnesses

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who had been a part of the process were since deceased. Her narrative of the A marriage therefore largely relied on their residence together over a period of ten years and also on the fact that two documents, namely the deceased's medical aid card, and secondly, a loan application form filled during his life time had listed her under "spouse" as Lilian, which is her first name. She also highlighted that his death certificate indicated him as married. Her evidence was also that the deceased had lived with at least five different women and B that he had mental problems as evidenced by his often reckless disposal of household property for small sums of money. Only she had managed to stay with him for as long as she did. However, there was no evidence to verify that she was the "Lilian" being referred to in both these documents. Even if she is accorded the benefit of the doubt that the name referred to her, the C claim of an existence of a customary law union was not supported in court.

The court also sought clarification from her on whether she had received the deceased's pension benefits in her capacity as a spouse. She told the court that the deceased's sister, and not her, had received his pension benefits because the family did not recognise or consider her as a wife and had told D his employers that he did not have one. She was also asked whether the magistrate's court had recognised or confirmed her as a surviving spouse in winding up the estate. Her evidence was that the deceased's family had not informed her about the registration of her husband's estate and that she had just stayed at home waiting for them to approach her.

She did not dispute the facts as contained in the plaintiff's summary of evidence E that the estate was registered under case no. DR 741/04 in the magistrate's court and that Claude Jaure was appointed as executor pursuant to an edict meeting held on May 20 2004. Letters of administration are said to have been issued to him and the property had been subsequently transferred to him at the Municipal offices on the strength of these. He had then sold the F property to Zekiya Mutandwa who later sold the property to Nathan Hosho in 2008. It was after the property was sold that she said she got to know about the sale and sought to reverse the transfer on the basis that the house documents had been illegally taken from her.

In terms of the relevant law impacting on widows, Section 68 (3) of the G Administration of Estates Act [*Chapter 6:01*] recognises a union contracted according to customary rites notwithstanding that it has not been formally solemnised in terms of the Customary Marriages Act [*Chapter 5:07*]. As such, the absence of a marriage certificate is not at all fatal to the recognition of such a union when it comes to inheritance. The law is very clear in its protection of widows not just in the Administration of Estates Act but in the H

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new A (2013) Constitution as well as well as other significant human rights instruments we have ratified.

Section 68(3) is already in harmony with s 26 (d) of the Constitution which requires the State, in the event of dissolution of marriage through divorce or death, to ensure that provision is made for the children and spouses. B Where such an unregistered union or marriage is proven to exist, in the event of a property dispute on intestacy, s 68F(d) makes it clear that where the deceased is survived by one wife, the surviving wife gets ownership, or if impracticable, the usufruct of the house in which the spouse lived at the time of the deceased's death. This is together with the household goods in that house. This provision is equally in sync with the spirit and intent of C art 21 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, a continent inspired charter which we have ratified and which provides that the widow has the right to continue living in the matrimonial house.

However, where a party relies on an unregistered customary union, central D to asserting widowhood and claiming the protection accorded widows under relevant legislation, is proof that such customary union indeed existed. The subject matter of a customary marriage is clearly one to which customary law applies. I say "marriage" for while it is often referred to as a customary law union to distinguish it from a registered customary marriage, in reality at least customarily, it is for all intents and purposes, a marriage. E

For a marriage to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump sum payment of money (called *rutsambo* among the Shona) as well as cattle, though increasingly the money equivalent is paid in today's society. Its payment is part of the culture for the majority of F the citizens who adhere to customary ways of marrying. Constitutionally, in terms of s 63, every person has a right to participate in the cultural life of their choice although such freedom cannot be exercised in a manner which violates fundamental human rights and freedoms that are guaranteed in the constitution.

Despite growing qualms about the blatant commercialisation and valid G feminist concerns about the inherent contradictions and implications for gender equality arising from the payment of *roora/lobola*, it remains a fact that the customary meaning accorded to a customary marriage revolves on the payment of *roora/lobola.* No doubt these courts will be called upon from time to time to squarely address some of the inherent contradictions in its H payment in light of the Bill of Rights. The payments made traditionally secure

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the wife's domestic services as well as the man's rights to any children that A are to be born to the marriage. Yet the constitutional and legal reality is that parental rights to children regardless of type of marriage have nothing to do with the payment of *roora/lobola* but have everything to do with the best interests of the child. Furthermore men and women now constitutionally have an equal status in marriage. See s 26(c). Even though in practice a *roora/lobola* debt is often not fully discharged, it is unlikely that young men B who find themselves as much as $10 000 to $15 000 in debt at the start of a marriage owing to unfulfilled payment obligations, will continue to laud its customary value even if they generally "reap patriarchal dividends" from its payment. Also since it is paid in anticipation of children being born, it is equally discriminatory on the basis of culture and custom to make someone a castaway just because they do not have children. C

Despite these observations, suffice it to say that where it has not been paid there is strictly speaking no customary marriage to talk about. There are considerable limits to the extent to which in practice law can effectively run ahead of people's thinking in society. The continued payment of *roora/lobola* for women in Zimbabwe regardless of legislative inroads, bears testimony D to this. Its continued existence is about a way of life and a distinct sense of "African" identity – it is an unspoken resistance to what is often perceived as cultural imperialism from the rapid westernisation of African societies. What is therefore fundamental, where an unregistered customary marriage is averred, is proof of the existence of a recognisable customary union. E

The process of paying *roora/lobola* and the ceremony itself involves key representatives from both families, as well as other people who can attest to the process having taken place. Furthermore, in today's reality there is also often documentary evidence in the form of a book of record kept by the receiving and paying families respectively of what has been paid and what remains owing. F

In this instance, evidentiary facts on the customary law marriage were less than satisfactory. In fact there was no evidence of a cultural marriage besides the mere allusion to *roora/lobola* having been paid. The plaintiff's narrative of wifehood tended to emphasise the reality of having lived together as husband and wife over a period of years with the deceased during his life G time. That may very well be the case and constitute a pointer to a valid union in certain jurisdictions that recognise common law marriages but our law only recognises three types of marriages: the registered civil or Christian marriage; the registered customary law marriage; and for certain purposes such as inheritance among others, the unregistered customary union/marriage. Payment of *roora/lobola* remains the most cogent and valued proof and H

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indicator A of a customary union/marriage, particularly when it has not been formally registered. It is this that the defendant has failed to prove, given the basis of her claim to being a surviving spouse by virtue of such.

Facts such as this bring to light yet again the very reason why, despite the increased recognition of the unregistered customary union within aspects of B our own law, a registered marriage is ultimately more secure for women. The Customary Law Marriages Act generally requires such. The international standard in relevant instruments is also in favour of registration. For instance art 6(d) of the Protocol to the African Charter referred to earlier is categorical that States are to take measures to ensure that "every marriage is recorded in writing and registered in accordance with national laws, in order to be legally C recognised". The problem is certainly not in the content of our law in this regard but more generally lack of ready access to administrative facilities for registration as well as lack of knowledge about the law further hampered by attitudes among the populace, patriarchal or otherwise. Addressing these challenges requires proactive measures by relevant state bodies so as to protect vulnerable groups from the results of failure to register. D

The defendant also refuses to vacate the house on the basis that there is still a case pending between herself and Claude Jaure under HC 3671/09. The plaintiff herein is the fourth defendant in that matter. On 13 January 2010, the defendant further obtained a court order to serve the application under HC 3671/09 upon Claude Jaure by publication once in the *Herald* newspaper. According to the order, the application was to be published in E the following form:

"Notice is hereby given that an application will be made to the High Court, Harare, for an order setting aside the sale of Stand No. 4020 Ngoni Township, Norton and transfer of the of the stand to Applicant. Notice of opposition shall be filed with the Registrar, High Court, Harare and the same shall be served on F the undersigned Legal Practitioner within 10 days of publication of this notice."

To date, some five years later, the application has yet to be published in the *Herald*. This means that Claude Jaure, the main defendant upon whom her claim rests, is not even aware of the pending matter before the court as he has not yet been served with process. The defendant's argument that she G has not pursued the matter because Claude Jaure was nowhere to be found makes little sense. The fact that he was nowhere to be found was the very reason why the court granted her an order to publish the application by way of substituted service. Her additional argument that she has failed to raise money for publication although she is willing to pursue the matter, is merely designed to buy time given the length of time that has passed without H any action being taken to notify the defendant of the pending case by way

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of substituted service. Adverse inferences must indeed be drawn from her A failure to pursue the matter over the last five years. She has been represented by legal practitioners in the past. If the defendant genuinely believed that the property had been fraudulently sold she would have sought speedy resolution of the matter.

The plaintiff herein acquired the property as a *bona fide* purchaser from B Zekiya Mutandwa who in turn had acquired it as a *bona fide* purchaser from Claude Jaure. The latter had title which has not been effectively challenged. There remains no finding by any court that the property was improperly sold. Without notification to Claude Jaure there is no pending court process to effectively talk about.

The plaintiff argued that the requirements for eviction should be the focus in C this matter. These are that one should be a lawful owner and that the occupant must be in occupation unlawfully. The plaintiff acquired title following the agreement of sale and is therefore the rightful owner of the property. In the absence of any concrete evidence to support the defendant's assertion that she is a wife by reason of customary law marriage, this court finds that there is no basis at law for the defendant's occupation of the above property. D

Accordingly the plaintiff's claim is granted as follows

1. The defendant and all those claiming unlawful occupation through her are evicted from Stand No. 4020, Ngoni Township, and Norton within 14 days of this order. In the event of it being necessary the Sheriff is ordered to assist in ensuring compliance with the order of this court. E
2. In the event of it being necessary, the Sheriff is further directed to enlist the services of the Zimbabwe Republic Police in implementing and giving effect to this order.
3. The defendant shall pay costs of suit.

Thondhlanga & Associates, plaintiff's legal practitioners F

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GRAIN MILLERS' ASSOCIATION OF ZIMBABWE v MINISTER OF AGRICULTURE & ORS 2015 (1) ZLR 781 (H)

Citation 2015 (1) ZLR 781 (H)

Case No Judgment No. HH-497-15

Court High Court, Harare

Judge Mafusire J

Heard 28 May 2015; *CAV*

Judgment 3 June 2015

Counsel *T Bhatasara,* for the applicant
T Tabana and *K L Murefu,* for first & fifth respondents
Third respondent in person
No appearance for second and fourth respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – constitutional application – which matters are exclusive preserve of Constitutional Court – application to declare executive action to be unconstitutional –* D *may be made to High Court*

Constitutional law – *principles – separation of powers – when such powers may overlap – interdict sought against State – matter pertaining to exercise of executive power and making of policy – caution to be exercised by courts* E

Court – *High Court – jurisdiction – constitutional matters – court having power in any constitutional matters other than those which are exclusive preserve of Constitutional Court*

Interdict – *application – interdict sought against State – matter pertaining to exercise of executive power and making of policy – caution to be* F *exercised by courts*

Headnote

The applicant was a voluntary association of grain millers. The membership was said to comprise 68 milling enterprises nationwide. Because of the drought situation in the country, and the ensuing shortage of maize G meal, the Government decided to allow the import of large quantities of maize meal. The applicant had, before the Government took this step, embarked on contract farming with some local farmers to grow maize. It claimed that the government's conduct in issuing import permits for maize meal to various other persons had threatened the applicant's very existence. Its membership was said to have dwindled; most had ceased H operations. They could not compete with cheap maize meal imports that,

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it was said, had flooded the domestic market. The applicant brought an A urgent constitutional application, alleging breaches of various provisions of the Constitution, namely, the right to administrative justice (s 68), the right to food and shelter (s 77), the right of access to information (s 62) and the obligation of the Government to ensure food security. It also sought the cancellation of all the import licences or permits for maize meal that the first respondent had issued, as well as an order directing B the first respondent to suspend the issuing of further import permits for maize meal.

The first respondent argued that the High Court had no jurisdiction to deal with a complaint that touched on the Declaration of Rights as enshrined in Chapter 4 of the Constitution. It was argued *in limine* that only the C Constitutional Court had jurisdiction over such matters.

Held, that the Constitution was quite plain regarding the jurisdictional limits of the courts in respect of constitutional matters. Section 167(3), as read with s 175(1), provides that it is the Constitutional Court that makes the final decision on whether or not an Act of Parliament, or the conduct of the President, or that of Parliament, is constitutional. It is that D court that must confirm any order of constitutional invalidity made by another court before that order has any force. Other matters are made the exclusive preserve of the Constitutional Court by s 167(2).

Complaints such as those raised by the applicant were not the exclusive domain of the Constitutional Court. E

Held, further, that none of the constitutional provisions cited by the applicant had any relevance to the kind of complaint that it brought before the court. Even though it cited those sections, the real motive and intention behind its application were that the applicant was stung by the competition and that the maize and flour milling industry had been opened up to other players. In the drought situation that existed, the balance of convenience F eminently favoured the issuing of more import licences to more players to bring in large quantities of the staple food. In contrast, the applicant's fear of losing its market share was manifestly inconsequential. Sectarian interests had to give way to the bigger threat of hunger and starvation facing the nation. Not only did the application lack any legal standing, G but also it lacked any moral basis. It seemed the applicant was only concerned with the welfare of its members. Nothing was said about the interests of the larger body of consumers. If the first respondent's actions had the effect of bringing down the prices of mealie-meal and flour, why would a reasonable court want to stop that just because a cartel of 68 members wanted to maintain its market share and margins of profit. H

Held, A further, that the first respondent's decision to open up the milling industry to other players so as to avert hunger and starvation in the current drought situation was an executive decision and polycentric function. It was more than a mere administrative function. In a constitutional democracy, there are three arms of government, namely the legislature, the judiciary and B the executive. Each one of them has an exclusive domain of operation. One arm may not interfere with the other arms. But our constitutional democracy has a system of checks and balances. In appropriate situations one arm may straddle on the domain of the others. That is how the machinery of State functions. The duty of determining how public resources are to be drawn upon and reordered lies at the heart of the C executive's function and domain. Without any proof of unlawfulness or fraud 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. The collection and ordering of public resources inevitably D call for policy-laden and polycentric decision-making. The courts are not always well suited to make decisions of that order. A court considering the grant of an interim interdict against the exercise of power within the camp of government must have the separation of powers consideration at the very fore front. E

Cases referred to

Commaf Hldgs (Pvt) Ltd v *General Chemicals (Pvt) Ltd & Anor* 1999 (2) ZLR 160 (H)

Flame Lily Invstm Co (Pvt) Ltd v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G) F

Hix Networking Technologies v *System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A)

Kuvarega v *Registrar-General & Anor* 1998 (1) ZLR 188 (H)

National Treasury & Ors v *Opposition to Urban Tolling Alliance* 2012 (6) SA 229 (CC)

Lees Import & Export (Pvt) Ltd v *Zimbank* 1999 (2) ZLR 36 (S) G

Setlogelo v *Setlogelo* 1914 AD 221

Tribac (Pvt) Ltd v *Tobacco Marketing Bd* 1996 (1) ZLR 289 (S)

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

ZLHR v *Min of Transport & Ors* 2014 (2) ZLR 44 (H) H

Mafusire J

Legislation considered A

Constitution of Zimbabwe 2013, ss 62(1), 68(1), 69(3) & (4), 77(c), 166(3), 167(2) & (3) & 175(1)

Case information

T Bhatasara, for the applicant

T Tabana and *K L Murefu,* for first & fifth respondents B

Third respondent in person

No appearance for second and fourth respondents

Judgment

Mafusire J: This was an incredible application. It was brought under a certificate of urgency. Its ostensible basis was an alleged contravention of certain fundamental rights and freedoms as enshrined in the Constitution of C Zimbabwe, namely the right to administrative justice (s 68), the right to food and shelter (s 77), the right of access to information (s 62) and the obligation of the Government to ensure food security. The evidence in support of the application ranged from media reports, a lobby letter by a trade union, a demand letter by lawyers, and the government's ZimASSET (Zimbabwe Agenda for Sustainable Socio-Economic Transformation) economic blue print. D

But the application was a dog's breakfast. After argument I dismissed it with costs. The reasons would follow later. These are they.

The applicant was a voluntary association of grain millers. The membership was said to comprise 68 milling enterprises nationwide. As final relief, the applicant sought an order declaring that the issuing by the first respondent (to E other players) of import licences (for maize meal) contravened the applicant's right (to administrative justice and food sufficiency), allegedly in breach of ss 68(1) and 77(b) of the Constitution. (The information in parentheses herein has been added due to the imprecision of the applicant's draft order.)

The applicant also sought the cancellation of all the import licences or F permits for maize meal that the first respondent had issued. The relevant period was not stated.

As interim relief, the applicant sought an order directing the first respondent to suspend the issuing of (further) import permits for maize meal and to forthwith announce such suspension to *all* the permit holders. By "*all*" the applicant evidently meant respondents 2, 3 and 4. They were cited as entities G that had been "*wrongfully issued*" with import permits.

The applicant's basis for such relief was this. Its members mill maize and wheat into mealie-meal and flour for sale on the domestic market. They buy the grain from the local farmers. It said that in order to ensure food security in the country, the applicant had embarked on contract farming with some local H

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farmers. A It averred that its members are not allowed by the Government to export and import maize meal or flour. The members depend entirely on the domestic market for survival. It was argued that the Government's conduct, through the first respondent, in indiscriminately issuing import permits for maize meal to disparate players has ominously threatened the applicant's very existence. Its membership was said to have dwindled. It was said most had B ceased operations. They could not compete with cheap maize meal imports that allegedly have flooded the domestic market.

The applicant's justification for such a complaint was this. In return for the applicant facilitating optimum capacity utilisation by local farmers through contract farming, the Government had promised to create an enabling C environment for the applicant's members. Among other things, it banned imports of cheap maize meal. That was in 2012. The applicant's members had embarked on the project in earnest. Natural farming regions 1, 2 and 3 were developed. The first respondent's predecessors kept their word. But not the first respondent.

The applicant said the first respondent reneged on the Government's promise. D Among other things, he abandoned the practice or custom of actively engaging or consulting the applicant on every prospective application for an import licence. In the past, the Government would not consider any prospective application for an import licence if it was not accompanied by a letter of support from the applicant. Such conduct by the Government had insulated E the applicant's members from unfair competition. But from about 6 May 2015 onwards, the applicant had got wind that the first respondent was dishing out import licences to non-established businesses.

The applicant said a meeting held with the first respondent's officials, as well as representatives from organisations such as the CZI (Confederation of F Zimbabwe Industries), ZNCC (Zimbabwe National Chamber of Commerce) and the GMB (Grain Marketing Board) had yielded no results. Matters deteriorated rapidly. Among other things, the applicant was forced to slash the price of maize grain sourced from the local farmers from $320 per tonne to as low as $140 per tonne. The milling industry trade union lobbied G the Government to reconsider its position. It said many jobs were at stake. But the Government had remained unmoved. The applicant declared a dispute and got its lawyers to write a letter of demand. But the first respondent did not respond.

Thus the applicant's case for an interdict was this. The issuing of import licences by the Government (to other players) without consulting it, as had H been the practice in the past, was a breach of s 68(1) of the Constitution in

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Mafusire J

relation to the applicant. It was argued that the applicant had a legitimate A expectation to be consulted because the Government's conduct threatened the continued viability of its members.

Section 68(1) of the Constitution reads:

> "68 Right to administrative justice
>
> (1) Every person has a right to administrative conduct that is lawful, prompt, B efficient, reasonable, proportionate, impartial and both substantively and procedurally fair."

The applicant's next argument was that the first respondent's conduct was said to violate its members' rights as set out in s 77(c) of the Constitution. The section reads:

> "77 Right to food and shelter C
>
> Every person has the right to –
>
> (a) …
>
> (b) …
>
> (c) sufficient food;
>
> and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of D this right."

The applicant's third argument was that, by withholding information on the number of the permits that he had issued, the first respondent had violated the applicant's right of access to information, as spelt out in s 62(1) of the Constitution. The section reads:

> "62 Access to information E
>
> (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwe media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability."

The applicant argued that there was now a glut of the maize meal on the F market. Prices have become severely depressed. The competition is unfair. The new traders are being issued with licences to import up to 8 000 tonnes of GMO+ (Genetically Modified Organism Positive) maize meal. Yet the applicant's members are not allowed to import the same cheap product. They were now being compelled to drastically slash downwards the price of grain paid to the local farmers in order for them to remain viable. That is a sure G way of chasing the farmers away from the farms. Such a development is threat to ZimASSET. Furthermore, most of the applicant's members would now abandon contract farming. The job losses would be phenomenal. Thus, the matter was crying out for urgent intervention by the judiciary.

That was the applicant's case. H

Mafusire J

The A first respondent opposed the application. So did the third. Nothing was heard from the second and fourth respondents. But copies of the application had been duly served on them.

There was a little matter that concerned me before the start of the proceedings. The third respondent is a company. At the hearing it was not represented B by a legal practitioner, but by two

of its officials. One of them, Benjamin Bondera ("Mr Bondera"), had filed a notice of opposition and deposed to an affidavit, purportedly on behalf of the third respondent. The capacity in which he had done that was not stated. His position at the third respondent was not stated either. There was no telling whether he was a director or employee. In the affidavit he relied on a purported resolution of the third C respondent authorising him and the second official, Eniya Gore ("Ms Gore"), to represent the company in all litigation matters. The resolution was jointly signed by Mr Bondera and one other person. But again, neither his position nor that of Ms Gore was stated in that resolution. At the hearing Ms Gore said she would speak for the third respondent. D

My concern was that it is a long standing rule of practice that a company does not have an absolute right to appear in the superior courts without legal representation, even though the court may, on good cause shown, grant audience to an individual who is the sole controlling authority and the sole directing mind of the company: see *Lees Import and Export (Pvt) Ltd* v *Zimbank* 1999 (2) ZLR 36 (S) and *Commaf Holdings (Pvt) Ltd* v E*General Chemicals (Pvt) Ltd & Anor* 1999 (2) ZLR 160 (H).

I voiced my concern, in spite of the provisions of s 69(3) of the Constitution that say that every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute. F Section 69(4) also says that every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum. However, notwithstanding these provisions, my *prima facie* view was that they do not grant an absolute or automatic right to anybody from the company to just pitch up, or sign up process in the superior courts on behalf of the company. G

However, I did not decide the matter. Despite Mr *Bhatasara*, for the applicant, labelling those beneficiaries of the new import licences "brief case businesses" i.e. fly-by-night entities, he was unconcerned that Ms Gore could speak on behalf of the third respondent. So also was Mr *Tabana*, for the first and fifth respondents. In the end, I granted Ms Gore audience, but without deciding H the point. I still leave it open in this judgment.

2015 (1) ZLR p788

Mafusire J

The first respondent raised three points *in limine.* The first was that the matter A was not urgent. It was said that the import licences complained of had been issued from about mid-April 2015. The urgent application was filed only on 22 May 2015, i.e. more than a month later.

However I dismissed the point and held that the matter was urgent. The applicant had not, as it were, sat back when the need to act had arisen: see B*Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 (H). It said it had got wind from about 6 May 2015 that the first applicant was now issuing more import permits for maize meal, in breach of the Government's undertaking to it. It had engaged government in a number of ways that had culminated in a letter of demand by its legal practitioners. The letter gave the first respondent until 19 May 2015 to confirm the suspension of the import licences that had C already been issued, and to confirm the suspension of the entire process altogether. When the deadline expired without any response from the first respondent, the applicant sued. Its application was filed on 22 May 2015.

Thus, I was satisfied that even if the applicant's actions had been naïve or misguided, nonetheless it had treated its case with some urgency by taking some action when the need to do so had arisen. D

The first respondent's next point *in limine* was that this court has no jurisdiction to deal with a complaint that touches on the Declaration of Rights as enshrined in Chapter 4 of the Constitution. It was argued that only the Constitutional Court has jurisdiction over such matters. Support for this contention was said to derive from s 166(3) of the Constitution. That section provides, E in the first paragraph, that cases before the Constitutional Court concerning alleged infringements of a fundamental human right or freedom enshrined in Chapter 4, or concerning the election of a President or Vice-President, must be heard by all the judges of the Constitutional Court. The second paragraph provides that other cases not mentioned in the first paragraph must be heard F by three judges of that court.

Plainly, there was no merit in the first respondent's second point *in limine*. In s 166(3), the Constitution simply prescribes the composition of the Constitutional Court for particular cases. It shall sit as a full complement of all the judges in some types of cases, and as three judges in others. That is G not the same thing as saying all other courts lack jurisdiction in those cases.

The structure of the Constitution is quite plain regarding the jurisdictional limits of the courts in respect of constitutional matters. Section 167(3), as read with s 175(1), provides that it is the Constitutional Court that makes the final decision on whether or not an Act of Parliament, or the conduct of the President, or that of Parliament, is constitutional. It is that court that H

Mafusire J

must A confirm any order of constitutional invalidity made by another court before that order has any force.

There is nothing in the above sections that says that the determination of a complaint against an alleged infringement of any of the fundamental human rights and freedoms under Chapter 4 is the exclusive preserve of the B Constitutional Court. Matters that are made the exclusive preserve of the Constitutional Court are listed in s 167(2). They are:

(a) rendering advice on the constitutionality of any proposed legislation;

(b) determining disputes relating to the election of the President

(c) determining disputes relating to the qualification of the Vice-President;

(d) determining whether the President or Parliament has failed to fulfil a C constitutional obligation.

Thus, complaints such as those raised by the applicant herein are not the exclusive domain of the Constitutional Court.

The first respondent's last point *in limine* was that the applicant had adopted the wrong procedure. It was argued that, since its complaint was that it had D been denied administrative justice, the applicant ought to have proceeded by way of review, and in accordance with the provisions of the Administrative Justice Act [*Chapter10:28*].

However, that point also lacked merit. That the applicant could proceed by way of an ordinary application for review did not preclude it from seeking an interim interdict on an urgent basis. E

On the merits, the first respondent's major defence was that the country was in a drought situation. The Government had taken a decision to import large quantities of maize meal to avert hunger and starvation. The first respondent denied having himself or his predecessors made any promises to the applicant to consult it, let alone exclusively, before any decision to grant F or refuse any player other than the applicant's members, an import licence for maize and flour. He denied that the maize meal being imported into the country was GMO+. He pointed out that it was an express condition of the import licences that no genetically modified organism were involved in the production of seed, planting material, plant parts, etc. A sample of an import licence issued on 6 May 2015 with that condition was attached. G

The first respondent also denied that the applicant's members were precluded from importing maize meal. He said they were free at any time to apply for the necessary licences. Reference was made to the Control of Goods (Import and Export) (Agriculture) Order 1993 (SI 350 of 1993). Maize meal is amongst the list of products that can be imported through an import licence in terms H of that Order. Any person can apply.

Mafusire J

The first respondent expressed ignorance on the arrangement alleged by the A applicant that on the basis of promises made to its members, they had entered into contract farming schemes with local maize farmers to whom they had now become yoked to an uncompetitive price of $320 per tonne. He denied any breach of promise. He denied any breach of the constitutional provisions cited. He said he was not bound to consult the applicant before issuing new import licences. He said the application was nothing more than an attempt B to get the courts to sanction price manipulation by a privileged cartel so as to exclude competition for the sake of profits.

On its part, the third respondent fumed at being called a "brief case company". It claimed that it was well established. It denied that it was importing GMO+ maize meal and challenged the applicant to provide the proof. C

The applicant's case was undoubtedly limping. There was no proof that the new traders were bringing in GMO+ mealie-meal. But this was just a minor point. The first respondent denied every

material fact upon which the application was predicated. It was therefore applicant's word against that of the first and third respondents. Thus, none of the requirements for an interim interdict was proved. They are these: D

- a *prima facie* right, even if it be open to some doubt;
- a well-grounded apprehension of an irreparable harm if the relief is not granted;
- that the balance of convenience favours the granting of the interdict;
- that there is no other satisfactory remedy. E

See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd* v *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 Co (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378 (G); *Universal Merchant Bank Zimbabwe Ltd* v F*The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) at 238.

None of the constitutional provisions cited by the applicant had any relevance to the kind of complaint that it brought before the court. Even though it cited those sections, the applicant betrayed the real motive and intention behind its application. Undoubtedly, the applicant was stung by the competition. The maize and flour milling industry had been opened up to other players. G The founding affidavit was replete with statements that gave the game away. These were some of those statements:

- "[*Applicant's*] *membership has dwindled* as most of its members were forced to stop operations due to the first respondent's acts of policy inconsistency and arbitrary decisions." H

Mafusire J

- "An A intrusion on the local market by competing foreign finished products consequently *diminishes applicant's members' market share and competitive advantage.*"
- "… first respondent … undertook *to protect* [the] local market from cheap imports."
- "The issuance of import permits by first respondent which has led to [a] glut in B the market, has now depressed prices of local maize from $320 per tonne … to a range of $140 to $200 per tonne. This is tragic."
- "The imports will mean *for applicant's members to survive (sic*) will pay a price of range (sic) $1400 to $200 to the farmers which will simply put them in a negative position of about $130" (my emphasis).

There were several such statements. They would probably make much sense C in a lobbying forum like Parliament or a business convention. It is altogether different in a court of law. A judicial officer has to consider, as in this case, real infringements of existing or prospective legal rights.

In this matter the applicant failed to show a *prima facie* right accrued, or accruing to it, that could be said to have been breached by the respondent. D

The apprehension of an irreparable harm that the applicant alleged was unreasonable. It was not traceable to any wrong done by the first respondent. The country was in a drought situation. The first respondent said that the strategic grain reserves in the country were dangerously low. Therefore, the balance of convenience eminently favoured the issuing of more import licences E to more players to bring in large quantities of the staple food. In contrast, applicant's fear of losing its market share was manifestly inconsequential.

Finally, there was an alternative and effective remedy. The applicant's members were free to join the queue for applications for import licences.

On the bigger scale, the application was an attempt to muzzle free trade. It F was designed to use the court to get what lobbying, dialogue or bargaining processes probably had failed to achieve. There was nothing to counter the first respondent's strong claim that the country was in a drought situation. Sectarian interests had to give way to the bigger threat of hunger and starvation facing the nation. Not only did the application lack any legal standing, but also it lacked the moral basis. It seems the applicant was only concerned G with the welfare of its members. Nothing was said about the interests of the larger body of consumers. If the first respondent's actions had the effect of bringing down the prices of mealie-meal and flour, something that the application unwittingly disclosed, why would a reasonable court want to stop that just because a cartel of 68 members wants to maintain its market H share and margins of profit?

Mafusire J

There was yet another bigger picture. The first respondent's decision to open A up the milling industry to other players so as to avert hunger and starvation in the current drought situation was an executive decision and poly-centric function. It was more than a mere administrative function. I repeat what I said in my judgment in *Zimbabwe Lawyers for Human Rights* v *Minister of Transport & Ors* 2014 (2) ZLR 44 (H). In a constitutional democracy B such as ours, there are three arms of government, namely the legislature, the judiciary and the executive. Each one of them has an exclusive domain of operation. One arm may not interfere with the other arms. But our constitutional democracy has a system of checks and balances. In appropriate situations one arm may straddle on the domain of the others. That is how the machinery of state functions.

In *National Treasury & Ors* v *Opposition to Urban Tolling Alliance*C 2012 (6) SA 229 (CC) the Constitutional Court of South Africa stated as follows in paras 66 to 68 of its judgment:

> "[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 or duty that the law has vested in the authority to be interdicted. Thus courts D 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. E
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> [67] … [T]he 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 implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament. F
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> [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 considering the grant of an interim interdict against the exercise of power within the camp of government must have the separation of powers consideration at the very forefront."

The above remarks applied with equal force to the present matter. It was for G these reasons that I dismissed the application with costs.

Mupanga Bhatasara Attorneys, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first and fifth respondents' legal practitioners H

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TURNER & SONS (PVT) LTD v THE MASTER & ORS 2015 (1) ZLR 793 (H)

Citation	2015 (1) ZLR 793 (H)
Case No	Judgment No. HH-498-15
Court	High Court, Harare
Judge	Makoni J
Heard	12 July 2013; *CAV*
Judgment	3 June 2015
Counsel	

Mrs *J B Wood,* for the applicant
F Girach, for the second respondent
A P de Bourbon SC, for the intervener

Case Type Opposed matter

Annotations No case annotations to date

Flynote

Practice and procedure C – *affidavits – answering affidavits – filing of – may not be filed after respondent's heads of argument have been filed, unless court grants leave – contents of – must be brief*

Headnote

The D sequence of affidavits in motion proceedings, as set out in Order 32 of the High Court Rules 1971, is: (1) founding affidavit; (2) notice of opposition and opposing affidavits; (3) answering affidavit; (4) further affidavits. Thereafter the rules provide for the set down of the matter and the filing of heads of argument. The thinking of the drafters of the rules was that E heads of argument, in which legal arguments are presented, are filed *after* the parties have presented their factual positions, in affidavits, before the court. This is in order to avoid the situation where a substantial portion of an answering affidavit is devoted to answering the legal arguments raised in the heads of argument. Although the Rules are silent on whether leave is required if an answering affidavit is to be filed after heads of F argument have been filed, an applicant who intends to file an answering affidavit after the filing of heads of argument must seek leave of the court and must be able to establish a proper and satisfactory explanation why the answering affidavit was not filed in the proper sequence. The usual factors determining whether condonation should be granted will be taken into account. If condonation is not granted, the affidavit will G be expunged from the record.

Answering affidavits should not contain new material or bring fresh allegations against the respondent. They should also be brief, not voluminous. If they are unnecessarily prolix or do not comply with the requirements of r 227 regarding the layout and contents of affidavits, an adverse order H of costs may be made.

2015 (1) ZLR p794

Makoni J

Cases cited A

Basset v *Platt* 1954 (1) SA 264 (N)

JDM Agro-Consult & Mktg (Pvt) Ltd v Editor, The Herald & Anor 2007 (2) ZLR 71 (H)

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

Magurenje v Maphosa & Ors 2005 (2) ZLR 44 (H) B

Min of Environmental Affairs & Tourism & Ors v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA)

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

Sango v Chrmn, PSC,& Anor HH-28-96

Legislation considered C

Companies Act [*Chapter 29:03*], ss 222, 273 & 276

High Court Rules 1971 (RGN 1047 of 1971), rr 227, 230, 233, 234, 235, 236 & 283

Case information

Mrs *J B Wood,* for the applicant

F Girach, for the second respondent D

A P de Bourbon SC, for the intervener

Judgment

Makoni J: There have been running battles between the applicant and the intervener in this court over the Zambezi Paddle Steamer (Pvt) Ltd (the company). E

The main disagreements between them culminated in the applicant being compelled to initiate court proceedings for the liquidation of the company. This resulted in a very detailed judgment by Kudya J where he gives a detailed background to the matter and finally granted a provisional order for the liquidation of the company. The second respondent came on the fray then. The provisional order was confirmed 18 November 2009. F

The applicant now approaches the court seeking an order in the following terms.

"1. The decision by the first and second respondents to allow the claim of the third respondent in the sum of US$315 084.16 in respect of operating expenses and US$71 567 in respect of a loan account held in Zambezi G Paddle Steamer (Pvt) Ltd be and is hereby set aside.

2. Any sum paid by the second respondent to the third respondent pursuant to allowing the said claim shall be repaid and shall be held by the first respondent pending the finalization of this matter.

3. Forthwith upon service of this order, the first respondent shall cause an independent firm of auditors to conduct an audit into the financial affairs H

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of A the Zambezi Paddle Steamer (Pvt) Ltd from 1994 to 2009 and, upon conclusion thereof, shall give such directions to the liquidator of Zambezi Paddle Steamer (Pvt) Ltd as are necessary arising from the audit report.

4. The second respondent shall pay the costs of the said audit.

5. The second respondent be and is hereby removes from office as liquidator of Zambezi Paddle Steamer (Pvt) Ltd and in her place shall be appointed B Winsley Militala of Petwin Executor & Trust Co (Pvt) Ltd.

6. The first respondent shall supervise the transfer of all books of account, records and other documents pertaining to the liquidation of Zambezi Paddle Steamer (Pvt) Ltd from the second respondent to her replacement.

7. The costs of this application shall be borne by the second and third respondents, jointly and severally the one paying the other to be absolved, C on any attorney/client scale."

I will give, at this stage, a detailed chronological account of how the papers in this matter were filed as it will become relevant later on in the judgment.

The present application was filed on 10 October 2011. The opposing papers by both the second respondent and the Intervening party were filed on 24 October D 2011.On 3 August 2012, the intervening party filed its head of argument. The applicant then filed two answering affidavits on 16 August 2012. It filed its heads of argument on 6 September 2012. On 17 September 2012, the legal practitioners for the intervener wrote a letter to the Registrar of the High Court, which was copied to and served on the applicant's legal practitioners E on 18 September 2012. The letter pointed out that the filing of the answering affidavit in respect of the Intervener was an improper procedure. It also gave notice that an application would be made to expunge the answering affidavit from the record. At the end of May 2013 parties received notice that the matter had been set down for 20 June 2013. On 12 June 2013 the intervener filed supplementary heads of argument making submissions regarding the F admissibility of the answering affidavit.

On 20 June 2013 the matter was removed from the roll and re-enrolled for 12 July 2013. On 5 July 2013, the applicant filed an application for condonation of filing answering affidavit after intervener's heads of argument. The intervener filed a notice opposing the application. The matter was then G heard on 12 July 2013.

The applicant's complaints against the second respondent can be summarised as follows:

(1) that the second respondent was biased against the applicant from the onset and that this had a bearing in the manner in which she had acted H in that –

Makoni J

(i) she has failed to collect the sum of 87 000 which was unlawfully A withdrawn by the Intervener from the company's account

(ii) she accepted a loan account which accrued in Zimbabwean dollars and paid it in United States dollars

(iii) she paid out a large amount to the intervener as post-liquidation expenses B

(2) The second respondent misrepresented the true legal position of the issue involved in the liquidation.

(3) Failure to seek independent legal advice in that she took advise from Atherstone and Cook who are lawyers for the intervener.

(4) She failed to action a directive by the first respondent in that she ignored C a request by the first respondent to look into irregularities in respect of the financial mismanagement of the Company by the intervener

(5) She failed to establish the financial position of the company in that she did not examine all relevant books such as the ships log book which she deemed irrelevant. D

(6) She misapplied funds under her control in that she paid to the Intervener, a loan account accrued in Zimbabwe dollars and the post liquidation expenses.

(7) That there had been under invoicing by the Intervener prior to liquidation. E

The second respondent opposed the application and raised a point *in limine* that she was not properly cited as she was not cited in her capacity as the liquidator of the company. On the merits, the second respondent opposed the application on the basis that the applicant is improperly before the court in that s 222(3) of the Companies [*Chapter 24:03*] (the Act) is specifically F designed to challenge a decision of a liquidator in circumstances where the liquidator acts contrary to a resolution of either the creditors or of the contributories. The basis upon which the applicant seeks the relief in the draft order remains far from clear and the evidence relied upon by the applicant is difficult if not impossible to discern. As regards the relief under s 273(1) of the Act, the applicant does not state in her founding papers what precise G grounds or subsection(s) of the section are being relied upon.

The intervener raised the point that the party cited as the third respondent does not exist as a registered company and that the claim against the third respondent be dismissed with costs on a higher scale personally against the applicant. H

Makoni J

It A also raised the point that the applicant is not a creditor of the company in liquidation and is not entitle to utilize s222(3) of the Act as a means of approaching this court for relief.

It also confirmed the point taken by second respondent that she is not properly cited as required by s 276(1) of the Act.

It B also took the point that the challenge in the present proceedings were not brought within a reasonable time after the alleged cause of complaint arose.

On the merits in respect of relief in terms of s 222(3) of the Act the intervener contends that it is not clear which decision, stated in the singular in para 6 of the founding affidavit, it is attacking. If it relates to the acceptance of the loan account, such acceptance was a decision by the Master and not the C second respondent. Such a decision cannot be attacked in terms of s 222(3) of the Act. If any person is aggrieved by the decision of the Master he or she can bring the decision on review to the High Court.

If challenge relates to the post liquidation expenses, no grounds were set out to impeach the decisions or actions of the liquidator.

If D it relates to the loan account being settled in United Stated Dollars when it accrued during the Zimbabwe dollar era, the Intervener contends that the United Stated dollar is the *de facto* currency of both the account and payment in Zimbabwe. The exchange rate was determined by the Master, in terms of the discretion vested in him, based on an independent calculation by Sabre E Services (Pvt) Ltd. If the applicant has an issue with the determination, she cannot challenge it in terms of s 222

(3) of the Act. As regard the application in terms of s 273 (1) (b) of the Act the intervener contends that the applicant has failed to furnish evidence in support of the allegations summarised above against the second respondent.

As F already mentioned earlier on in this judgment, the intervener filed heads of argument before the applicant filed its answering affidavit in respect of the intervener. The intervener gave notice on 17 September 2012 that the filing of the answering affidavit was an improper procedure and that an application would be made to expunge the answering affidavit from the record. The applicant then filed an application for condonation for the filing of an G answering affidavit after heads of argument had been filed. The application was placed before me for determination. It will therefore first of all determine that application as it has a bearing in the determination of the main matter.

Application for condonation

It is the applicant's contention that the application is made out of an abundance H of caution as there is no provision in the Rules which requires that answering

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affidavit to be filed before heads of arguments. The Rules provide that an A answering affidavit can be filed 10 days before the day of hearing.

The applicant further contends that the reason for the delay in filing the answering affidavit is that the applicant had to investigate matters by herself due to the second respondent's gross negligence and the first respondent's failure to conduct its own private investigation into the intervener's unlawful B activities. The investigation revealed that the Intervener had clearly defrauded the applicant by systematically externalizing foreign currency. The proof of this externalization was attached to answering affidavit as Annexures C and D and it was only available to the applicant in July 2012.

The application is challenged by the intervener on the basis that the application C was not brought expeditiously and does not meet the requirements for condonation. The explanation given by the applicant is not reasonable. The intervener also makes the point that the applicant persists in citing the third respondent is Dobrock (Pvt) Ltd, which company does not exist and that the answering affidavit does not comply with r 227 of the High Court Rules 1971 (the Rules). D

The second respondent opposes the application on the same ground as advanced by the intervener. She raised a further point that the answering affidavit raises new matters which is not permissible and that they are unnecessarily voluminous. E

Mrs *Wood* for the applicant submitted that the answering affidavit in respect of the second respondent was filed on time and that any submissions by Mr *Girach* should be ignored.

She further submitted that the third respondent, as in the founding affidavit in the present application is the third respondent at this time and that she will be making an application for amendment of its citation. F

She further contended that the Rules do not provide that an answering affidavit cannot be filed after heads of argument. She argued that the judgment of Ndou J in *Magurenje* v *Maphosa & Ors* 2005 (2) ZLR 44 (H) at 47 was not correct. If the Rules required that leave be obtained to file answering affidavit after heads of argument they would have said so. She further submitted that G the applicant's explanation for the delay is reasonable. The applicant was carrying out investigations which revealed damming evidence against the Intervener which is to sole reason why he wants that evidence to be struck out. The evidence was attached to the answering affidavit in respect of the second respondent and not that of the intervener. She further submitted that the court can grant condonation for departure from the Rules in the interest of H

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justice. A There was no prejudice to the intervener as it had filed supplementary heads of argument to deal with issues raised in the answering affidavit.

Mr *Girach* for the second respondent abided by the submissions by Mr *de Bourbon*. He made a further submission that the answering affidavits were voluminous and contained new matters in the form Annex C and D. He submitted that it is a cardinal rule that new issues should not be canvassed B in an answering affidavit.

Mr *de Bourbon* submitted that the applicant, under oath stated in para 4 of the founding affidavit in the application for condonation, that the third respondent is Dobrock (Pvt) Ltd despite it being pointed out that there is no such entity. He further submitted that the judgment by Ndou J in *Magurenje*C*supra* was correct. The substantial portion of the applicant's answering affidavit is in answer to the legal arguments in the heads of argument filed by the intervener.

He further contended that the applicant was warned about the impropriety of the answering affidavit and she decided to ignore the warning. She only D applied for condonation 9 months after the warning.

He further submitted that the applicant does not explain why further investigations were necessary and the dates when the further investigations were done and why they had not been done before the institution of proceedings.

Citation of Dobrock (Pvt) Ltd

The E applicant cited Dobrock (Pvt) Ltd in her founding affidavits in the main matter and in the present application as the third respondent. The intervener, Dobrock Holdings (Pvt) Ltd, has had to seek leave to intervene in these proceedings as it has an interest in this matter. This is despite the fact that it has previously been pointed out to the applicant as evidenced in para 3, on F p 70, and the special plea on pp 154-156 of the applicant's papers founding papers that Dobrock (Pvt) Ltd does not exist. The applicant persists with the citation of the third respondent as Dobrock (Pvt) Ltd in the present application and contends that an application will be made to amend the citation.

I agree with the submissions by Mr *de Bourbon* that this goes beyond mere carelessness. It shows lack of attention to detail and total confusion on the G part of the applicant and those representing it of the real parties in the present matter. This is not an issue that should have detained the court considering that notice was given that this point will be taken in the letter dated 17 September 2012 to the Registrar and served on the applicants legal practitioners.

One wonders why we have got to this stage of the proceedings before the H appropriate application to amend the citation is made. One might be excused

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Makoni J

for believing that the applicant had not done anything about this issue as A it believes that there is no prejudice to the intervener. My view is that it is essential in proceedings to clearly define which party is before the court. Herbestein and van Winsen *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed p 143 put it this way:

> "Before one cites a party in a summons or in application proceedings, it is important to consider whether the party has *locus standi* to sue or be sued (*legitima persona*B*standi in judicio*) ad to ascertain what the correct citation of the party is."

This enables the appropriate party to respond accordingly and it saves time on the part of the court .The court would then deal with the substantive dispute between the parties rather than being bogged down with preliminary issues. In this instance the intervener has had to approach the court to seek leave C to file papers in these proceedings which would have been avoided had the applicant been vigilant in the preparation of its papers. The claim against the third respondent is dismissed.

Answering affidavits

The applicant is her founding papers and submissions believe that in terms D of the Rules there is no provision that the answering affidavit must be filed before heads of argument. It can be filed up to ten days before the hearing. The Rules are silent on whether leave is required if answering affidavit is filed after heads of argument had been filed. She makes the application *ex abundante cautela*.

It is my view that I must first determine whether leave of the court is required E before determining the issue of condonation.

Ndou J in the *Magurenje* case *supra* was confronted with the same situation as in the present matter. At p 47H and 58A-C he had this to say:

> "In my view, the filing of an answering affidavit after the parties have filed heads of argument can only be done in exceptional cases and only with the leave of the F judge. The applicant did not seek such leave. Instead, he submitted that he was entitle to do so in terms of the rules. He is mistaken as such a procedure would defeat the whole purpose of filing heads of argument as set out in r 238(1)(a). For departure from the proper sequence, the indulgence from court or judge is necessary. In this record, I refer to *James Brown & Hamer (Pty) Ltd* v *Simmons NO* 1963 (4) SA 656 (A) where at 660D-F Ogilvie Thompson JA said: G
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> 'It is in the interest of the administration of justice that the well known and well established general rules regarding the number of sets and *the proper sequence* of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: *some flexibility controlled by the presiding judge exercising his discretion* in relation to the facts of the case before him, must necessarily also be permitted'" (my emphasis). H

2015 (1) ZLR p801

Makoni J

I A agree entirely with the position adopted by Ndou J in this matter. The sequence of affidavits in motions proceedings is set out in Order 32:

Rule 230 – Founding affidavit

Rule 233 – Notice of Opposition and Opposing Affidavits

Rule 234 – Answering affidavit B

Rule 235 – Further affidavits

Thereafter the rules provide for set down of the matter and the filing of heads of argument in rr 236 and 283 respectively.

The thinking of the drafters of the rules was that heads of argument, in which legal arguments are presented, are filed after parties have presented their C factual positions, in affidavits, before the court. This is in order to avoid the situation that the applicant found itself in where a substantial portion of its answering affidavit is devoted to answering the legal arguments raised in the intervener's heads of argument. My view is that an applicant who intends to file an answering affidavit after the filing of heads of argument must seek D leave of the court and must be able to establish a proper and satisfactory explanation why the answering affidavit was not filed in proper sequence.

Now I will revert to the application for condonation. The requirements for an application for condonation are trite. These are well captured by Sandura JA in *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S) at 315 B-D. E

> "The factors which the court should consider in determining an application for condonation are clearly set out in Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed by van Winsen, Cilliers and Loots at pp 897-898 as follows:
>
> 'Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient F cause to excuse him from compliance ...
>
> The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, G and in essence it is a matter of fairness to both sides in which the court will endeavor to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... Include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the H avoidance of unnecessary delay in the administration of justice."

2015 (1) ZLR p802

Makoni J

The court is enjoined to exercise its discretion in the interests of justice and A when the reasons for non-compliance with rules have been explained to the satisfaction of the court grant condonation.

In casu, the applicant became aware, as far back as 3 August 2012, that the Intervener was going to take issue with answering affidavit filed after it had filed its heads of argument. This position is

made clear in para 8 p 228 of the intervener's heads of argument which concludes by saying; B

> "It is submitted that any attempt by the applicant to file a replying affidavit in response to the filing if these heads of argument should not be accepted by this Honorable Court, save as further evidence of clear intention and motivation of Angela Allanby to delay the finalization of not only this application but of the liquidation process." C

The heads of argument were served on the applicant on 6 August 2012. What does the applicant do? She proceeds to file an answering affidavit to the notice of opposition filed by the intervener on 15 August 2012. On 17 September 2012 the intervener, through its legal practitioners, complains of the improper procedure and gives notice that an application will be made to expunge the affidavit. Still the applicant does not react or respond. The matter D was set down for hearing initially on 20 June 2012. The intervener, through its legal practitioners, filed supplementary heads of argument on 12 June 2013 where again the issue of the impropriety of the answering affidavit is raised. The applicant did not do anything. The matter was, on 20 June 2013, removed from the roll. It was later re-enrolled for 12 July 2013. That is when E the applicant then filed the present application, a mere five days before the day of hearing. There is no explanation given by applicant, for the delay bearing in mind that the issue was of law which ought to have been known to the applicant's legal practitioners. In any event this issue had specifically been raised in the letter to the Registrar of 17 September 2012 and served on the applicant's legal practitioners. It took the applicant 10 months to apply F for condonation despite the warnings given to it. My view is that the degree of non-compliance in this matter is gross. The remarks by Chidyausiku J (as he then was) in *Sango* v *Chairman, Public Service Commission and Anor* HH-28-96 at p 2 of the judgment are apposite.

> "Those who sit on their litigation until cows come home have only themselves G to blame if condonation is refused when they finally wake up from their years of somnambulism"

The explanation given by the applicant for the delay in filing the answering affidavit is that it had to investigate matters herself which the first and second respondent had failed to investigate. The question to ask would be why file an application before you have established the full facts and then H

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investigate A later. The issues that the applicant claim to have investigated on, such as alleged under invoicing and externalisation of foreign currency by the Intervener were live issues before the main application was filed. It should have done its investigations before it instituted the proceedings. It is trite that a case stands or falls on its founding papers. My view is that the explanation for the delay in filing the answering affidavit is not reasonable B in the circumstances.

The applicant argues that through its investigations it discovered irregular and unlawful behavior by the intervener which it attached to the second respondent's answering affidavit. This brings to the fore the issue raised by C Mr *Girach* of new matters in an answering affidavit.

The answering affidavit contains fresh allegations in the form of Annexures H and I to the answering affidavit on pp 283-287 and 309-311 and para 13 on p 354 of the answering affidavit to the notice of opposition by the intervener which should have been contained in the founding affidavit. Neither the second respondent nor the intervening party has been afforded the opportunity to D deal with those facts in an opposing affidavit.

As was stated by Herbstein and van Winsen *op cit* at p 429

> "The primary purpose of the replying affidavit (answering affidavit) is to put up evidence which serves to refute the case made out by the respondent in the answering affidavit (notice of opposition)."

It E is not to be used to bring fresh allegations against the respondents as the door would have been closed to them before they could be respond.

The other point taken by the second respondent and the intervener is the voluminous nature of the answering affidavits. They are indeed voluminous, with a lot of annexures attached to them. In preparing answering affidavits F consideration should be given to the remarks by Schutz JA in *Minister of Environment Affairs and Tourism and Others* v *Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism and Others* v *Bato Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at 439 G-H where he stated;

> "There is one other matter that I am compelled to mention: replying affidavits. In G the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below,

> filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily H prolix replying affidavits and upon those who inflate them."

2015 (1) ZLR p804

Makoni J

The answering affidavits are fraught with other irregularities. They do not A comply with r 227(1)(b) as they are not divided into paragraphs numbered consecutively, each paragraph containing separate allegations.

After considering all the circumstances in this matter, it is my finding that the application for condonation was not bought expeditiously and does not meet the requirements of such an application. In the result, the application B for condonation for the late filing of answering affidavit after the intervener's head of argument is dismissed. The answering affidavit in respect of the intervener is expunged from the record. Such other issues as the voluminous nature of the affidavits and that they do not comply with the rule, standing on their own, would not, in my view, result in the affidavits being expunged from the record. Rather it should give rise to an adverse order of costs. C

The second respondent's answering affidavit was filed before the second respondent had filed its heads of argument. It is therefore properly before the court. However, fresh matters in the form of Annexures H and I on pp 283-287 and 309-311 and para 13 on p 354 in the answering affidavit in response to the second respondent's notice of opposition are hereby expunged from the record. D

Main matter

The second respondent took the point in *limine* that the application is fatally defective for want of proper citation of the second respondent. The second respondent is cited as Theresa Grimmel, in her personal capacity. It is clear from the founding papers that the basis upon which she is being sued is E because she is the liquidator of the company.

Section 276 (1) of the Act which deals with the citation of the liquidator provides:

> "A liquidator shall be described by the style of the liquidator of the particular company in respect of which he is appointed and not by his individual name." F

The provision is peremptory and makes it clear that a liquidator cannot be cited in his or her own name. On this point Herbstein and van Winsen *op cit* at p 147 state the following:

> "If a person is suing or being sued in a representative capacity, for example as executor or trustee, r 17(4) requires that the summons should make this quite G clear. The words in his (or her) capacity as should be added after the person's name. If a person is sued in a representative capacity, judgment cannot be given against him or her personally or *vice versa.*"

They refer to *Basset* v *Platt* 1954 (1) SA (N) in which a summons was held to be irregular and was set aside where the plaintiff, in issuing summons in which she claimed an order declaring a will to be null and void, had not H

2015 (1) ZLR p805

Makoni J

made A it clear to the defendant whether he was being sued in a representative capacity as executor or in his personal capacity. See also *J D M Agro-Consult & Marketing (Pvt) Ltd* v *Editor, The Herald & Anor* 2007 (2) ZLR 71 (H).

My view is that the mischief behind s 276(1) becomes clearer when one looks at the execution of the court order. Execution cannot be done against B an individual for acts done in a representative capacity.

This issue was brought to the attention of the applicant in para 2 of the second respondent's notice of opposition. Its response at p127 was as follows:

> "This is denied. They are one and the same person. It is further submitted moreover that the manner in which second respondent has cited makes her personally liable. I am in formed and surely believe that it is not necessary to C cite first respondent (sic) in her formal capacity. However, out of an abundance of caution, and without admitting the requirement thereof, application will be made to amend the citation thereof."

The applicant sought to argue that s 276(1) of the Act is applicable when dealing with a situation where proceedings are being instituted against a liquidator in his/her capacity as a representative of the company in liquidation. D*In casu* it is the applicant's allegation that the liquidator has been completely remiss in her duties and should as a consequence be removed in terms of s 273(1). In my view this is splitting hairs.

In her submissions, Mrs *Wood* contented that she is sued in both capacities and an application will be made to cite her as Theressa Grimmel *NO* to E cover both respects.

As was correctly pointed out by Mr *Girach*, this stance is clearly at odds with the founding papers and the relief being sought by the applicant. The entire application is premised on the second respondent being a liquidator. The use of s 222(3) of the Act is telling, in that it sets out the relief to be F obtained by a person aggrieved "by any act or decision of the liquidator." The applicant also seeks relief in terms of s 273(1) which deals with removal of a liquidator. I also agree with the submission by Mr *Girach* that what the applicant is seeking to do is to join a party and not amend the citation. According to the position adopted by the applicant, Theresa Grimmel in her G personal capacity will remain as cited. She will then have to join Theresa Grimmel in her capacity as the liquidator of company. The reason being you cannot ask the court to remove a party, as a liquidator, which is not before the court.

Again we have got to this stage of the proceedings when it is not clear who the second respondent is. The applicant has known for more than a H year that the citation of the second respondent is an issue. It threatened to

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file an application to amend the citation but up to the date of hearing such A application had not been filed. As I stated earlier on, before one cites a party it is important to ascertain what the correct citation of the party is. This is so so that the party cited may know right from inception the case against it that it is being sued. *In casu* it is not clear who the second respondent is.

In view of the above, clearly, the application is fatally defective for want of B proper citation of the second respondent. In view of the above finding, the applicant's case collapses.

The second respondent and the intervener applied for costs *de bonis propriis*. No arguments were advanced in support of such an award. However, I will not hesitate to award costs on a punitive scale. There are innumerable blunders in the applicant's case which might give credence to the intervener's contention C that the litigation is meant to harass the Intervener and delay the finalisation of the liquidation process in the matter. Those blunders were pointed out to the applicant but it persisted with them until the day of the hearing. This is a typical case that McNally JA had in mind in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290C-E, as quoted in the *Kodzwa* case *supra*, when he said the following; D

> "More recently, in own jurisdiction, my brother McNally said the following in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290C-E:
>
> 'It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, E for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. In competence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus subveniunt*-roughly translated, the law will help the vigilant but not the sluggard." F

In the result I will make the following order:

(1) The application is dismissed .

(2) The applicant is to pay the second respondent's and the intervener's costs on a legal practitioner and client scale. G

Venturas & Samukange, applicant's legal practitioners

Coghlan, Welsh & Guest, second respondent's legal practitioners

Atherstone & Cook, intervener's legal practitioners H

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S v MADONDO & ANOR 2015 (1) ZLR 807 (H)

Citation	2015 (1) ZLR 807 (H)
Case No	Judgment No. HH-512-15
Court	High Court, Harare
Judge	Mawadze J
Heard	5 June 2015
Judgment	5 June 2015
Counsel	*T Chakurira*, for the appellants *E Makoto*, for the respondent
Case Type	Bail appeal
Annotations	No case annotations to date

Flynote

Criminal procedure – C *arrest – maximum time for which an arrested person may be detained without warrant for further detention issued by competent court – continued detention in excess of that time illegal and arrested person entitled to immediate release – magistrate having jurisdiction to order release*

Headnote

The appellants D were arrested on charges of fraud but only taken before a magistrate 72 hours later. No warrant for their further detention had been obtained before the expiry of 48 hours from the time of their arrest. When the appellants were arraigned before the magistrate, an application for their immediate release was made on the basis that they had been detained in excess of 48 hours, in violation of their constitutional right to liberty. The magistrate, though accepting that the appellants had been E detained in excess of 48 hours, declined to release them on the basis that the magistrate had no powers at law to release the appellants and that it was the High Court which was vested with such powers in terms of s 50(7) of the Constitution. The magistrate proceeded to deal with F the application for bail by the appellants and declined to admit both appellants to bail. The appellants appealed to the High Court against the magistrate's refusal to admit them to bail.

Held, that before the court could even deal with the appeal against the magistrate's refusal to grant bail, the legality of the detention in excess of G 48 hours should be dealt with. In terms of s 50(2) of the Constitution, any person who is arrested or detained by the police should be brought before a court within 48 hours. Under s 50(3), unless the person's detention has been earlier extended by a competent court, the person must be released immediately on the expiry of the initial 48 period. Under s 50(8), an arrest or detention in contravention of the section is illegal. There was H no basis for the magistrate's view that only the High Court could order

Mawadze J

the appellants' release. Section 50(7) was irrelevant in this situation. The A appellants were illegally detained and the magistrate should not have condoned the illegality. The magistrate had the jurisdiction to release the appellants, and should have released them. Their immediate release would be ordered.

Case referred to B

S v *Makwakwa* 1997 (2) ZLR 298 (H)

Legislation considered

Constitution of Zimbabwe 2013, s 50(2), (3), (7) & (8)

Case information

T Chakurira, for the appellants C

E Makoto, for the respondent

Judgment

Mawadze J: The appellants were arrested on 1 May 2015 by detectives from Braeside Police Station in Harare and were only arraigned before the magistrate sitting at Mbare magistrates court on 4 May 2015. It is apparent D from the facts that the police details had tried and failed to obtain the appellants' warrants for further detention both at Mbare and Harare magistrates court before the expiry of the 48 hours. In their wisdom the police details decided to detain the appellants until 4 May 2015.

The appellants are being charged of the offence of fraud as defined in E s 136(a) of the Criminal Law Code [*Chapter 9:23*]. The allegations are that the appellants, acting in concert with the other accused persons who are at large, flighted an advertisement in *The Herald* on 18 March 2015 that a residential stand no. 1145 Sunningdale 3, Prospect, Harare was being sold for US$13 500. The complainant, one Erick Chagwedera, in response to the advertisement contacted one Cain Tigere (who is at large), whose F real name is Tendai Nyambuya, as per the advertisement who claimed to be the legitimate owner of the stand who in turn referred the complainant to the first appellant who pretended to be the agent for Tendai Nyambuya to carry out the verification process at the Deeds Office. As a result, the complainant was given by Tendai Nyambuya a photocopy of the Deed of G Transfer Number 113/96 in the name of Cain Tigere and Tapiwa Tigere. The complainant and Tendai Nyambuya proceeded to Marondera where they met the second appellant who identified herself as Tapiwa Tigere. The first appellant then produced an agreement of sale and the second appellant produced photocopies of passports in the names of Cain Tigere and Tapiwa Tigere, who were ostensibly husband and wife. The complainant then made H

Mawadze J

a part A payment of US$7 000 as deposit for the stand to Tendai Nyambuya in presence of both appellants, leaving a balance of US$6 500. On 30 April 2015 the complainant tried to contact the appellants and Tendai Nyambuya to pay the outstanding amount and realised that he had been duped as the telephone number he had been given was not reachable. A report was made B to the police and the appellants were arrested.

When the appellants were arraigned before the magistrate court at Mbare on 4 May 2015, an application for their immediate release was made on the basis that they had been detained in excess of 48 hours in violation of their constitutional right to liberty. The magistrate who was seized with this matter accepted as per the submission of both the State and counsel for C appellants that the appellants had been detained in excess of 48 hours. The magistrate however declined to release the appellants on the basis that the magistrate had no powers at law to release the appellants and that it was the High Court which was vested with such powers in terms of s 50(7) of the Constitution. The magistrate proceeded to deal with the application for bail D by the appellants and declined to admit both appellants to bail on the basis that they have the propensity commit similar offences, as they were arrested after placing further advertisements in the newspaper to dupe other people.

While the appellants appealed to this court against the magistrate's refusal to admit them to bail, what exercised my mind is the continued detention E of the appellants. It is my view that before this court can even deal with the appeal against refusal to grant bail by the lower court the legality of the detention in excess of 48 hours should be dealt with.

Section 50 of the Constitution deals with the rights of arrested and detained person. The provisions of s 50(2) are clear and straightforward and they are F as follows:

> "(2) Any person who is arrested or detained –
>
> (a) for the purpose of bringing him or her before a court; or
>
> (b) for an alleged offence;
>
> and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the G detention began, as the case maybe, whether or not the period ends on a Saturday, Sunday or public holiday."

In terms of s 50(2), any person who is arrested or detained by the police should be brought before a court within 48 hours. As already said, the appellants were not brought before the court within the stipulated 48 hour period.

Section 50(3) H of the Constitution provides as follows:

Mawadze J

> "(3) Any person who is not brought to court within the forty-eight period referred A in subsection (2) *must be released immediately* unless their detention has earlier been extended by a competent court" (emphasis is my own).

Further to this, s 50(8) of the Constitution provides as follows:

> "(8) An arrest or detention which contravenes this section, or in which the conditions set out in this section are not met is illegal." B

It is common cause that the appellants were not brought before the magistrates court within the stipulated 48 hours as provided for in s 50(2) of the Constitution, and that their continued detention was not extended by a competent court in terms of s 50(3) of the Constitution. Further, the applicants were not released immediately after the expiry of the 48 hours. In terms of s 50(8) the continued detention of the appellants contravenes the provisions C of both s 50(2) and s 50(3) of the Constitution and is without doubt illegal.

Judicial officers like the magistrates should familiarise themselves with the provisions of the Constitution in order to protect the rights of arrested and detained persons who in most cases are first brought before them. The Constitution is the supreme law and should be complied with. I am surprised D that the magistrate before whom the appellants were brought at Mbare was at pains to find ways not to apply the clear and unambiguous provisions of the Constitution. One of the important duties of a judicial officer is to apply the law without fear or favour. The administration of justice is put into disrepute if judicial officers duck and dive to avoid their responsibilities.

I am amazed that the magistrate reasoned that only the High Court has E jurisdiction to deal the over-detention of the appellants. The magistrate for some strange reason made reference to s 50(7) of the Constitution, which clearly is irrelevant to circumstances of the appellants. The remedy for breaching s 50(2) of the Constitution is provided for in s 50(3) of the same Constitution, which is to release the detained person immediately in the absence of an extension of such a detention by a competent court. The F reason for that is clear as such continued detention is illegal as it offends s 50(8) of the Constitution.

It is clear from the facts of this case that the appellants were over detained in excess of 48 hours without due authority of a competent court. The magistrate before whom the appellants appeared cannot and should not have condoned G that illegality. It was incumbent upon the magistrate in the face of such an illegality to immediately release the appellants as provided for in s 50(3) of the Constitution. The magistrate has jurisdiction to act in that manner.

I am not inclined in this case to deal with the appeal of the appellants in relation to bail application as to do so would amount to condoning a clear H

Mawadze J

illegality. The consequences A of unlawful detention are clear. See *S* v *Makwakwa* 1997 (2) ZLR 298 (H). I am therefore obliged to act in terms of s 50(3) of the Constitution and order the immediate release of the appellants as their continued detention is illegal. In the result I make the following order:

It is ordered that the appellants Panganayi Davison Madondo and Marvelous Culvate be released immediately.

Zimudzi & Associates, appellants' legal practitioners B

National Prosecuting Authority, respondent's legal practitioners

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MLISWA v CHAIRPERSON, ZEC & ORS 2015 (1) ZLR 812 (H)

Citation	2015 (1) ZLR 812 (H)
Case No	Judgment No. HH-586-15
Court	High Court, Harare
Judge	Uchena J
Heard	8 June 2015; *CAV*
Judgment	9 June 2015
Counsel	*T Zhuwarara,* for the applicant *T Kanengoni*, for the first and second respondents *I Ndudzo*, for the third and fifth respondents Mrs *V Munyoro*, for the fourth and the sixth to eleventh respondents
Case Type	Electoral application
Annotations	No case annotations to date

Flynote

Election – *application – procedure – normal procedure provided by High Court Rules to be followed – dies induciae – same as in High Court Rules – if application urgent, procedure for urgent application should be followed – modification of High Court Rules by Electoral Court – court may modify rules as it thinks necessary* D

Election – *Electoral Court – jurisdiction – court having exclusive jurisdiction in election applications and appeals*

Headnote

The applicant was an independent candidate for a forthcoming by-election E for Parliament. By an ordinary court application, he applied to the Electoral Court for an order suspending the holding of elections in the constituency due to alleged violence and intimidation. Alternatively, he sought orders compelling various of the respondents to make statements, through fliers and radio

broadcasts, correcting the impression created by certain of the respondents about how voters should go to the polls and F vote. The application was served on some of the respondents six days before the date on which the matter was set down, while others were only served two days before.

Two of the respondents raised the point *in limine* that they were entitled to the *dies induciae* provided for in r 232 of the High Court Rules 1971, G that is, ten days. The applicant argued that, in terms of the Electoral (Applications. Appeals and Petitions) Rules, the registrar and all parties are required to ensure that the matter is dealt with as quickly as possible, so he (the applicant) gave the respondents three days to respond. Other respondents contended that the court had no jurisdiction to deal with the matter as the legislature had not specifically conferred jurisdiction on it. H

2015 (1) ZLR p813

Held, that the A need to hear electoral cases urgently was not in dispute. Such cases should be heard as soon as possible, but an applicant has to follow the correct procedures to achieve that objective. It does not assist the smooth and efficient administration of justice for an applicant to apply for remedies at the eleventh hour, and for his legal practitioners to choose a wrong procedure and thereafter expect the court to extricate them from B their chosen timing and procedure. Under s 165(4) of the Electoral Act [*Chapter 2:13*], until rules are made for the Electoral Court, the High Court Rules apply, with such modifications as *the court* thinks necessary. It is not for an applicant unilaterally to decide on the modifications, but to convince the court of the necessity for the modification. If he wanted C the matter dealt with urgently, he should have brought it as an urgent application.

Held, further, that while it was correct that, under s 161 of the Electoral Act before its amendment in 2012, the court could only exercise jurisdiction over cases where the legislature specifically conferred jurisdiction on it, the amendment did confer exclusive jurisdiction on the court over D all electoral cases, except criminal cases and cases which have been specifically allocated to other courts. Applications in terms of the Act were among those over which the court had exclusive jurisdiction. "Exclusive jurisdiction" meant that the court did not share concurrent jurisdiction with any other court on matters it has jurisdiction on. E The granting of the power to give judgments and orders the High Court might give enabled the Electoral Court to exercise jurisdiction over cases in which it previously used to decline jurisdiction; such cases would be heard by the High Court. The court had simply been given exclusive jurisdiction with unlimited power to hear and determine cases under the Electoral Act.

Case referred to F

Makone & Anor v *Chairperson, ZEC & Anor* 2008 (1) ZLR 230 (H)

Legislation considered

Electoral Act [*Chapter 2:13*], s 161(1) & (2)

Electoral (Applications, Appeals and Petitions) Rules (SI 74A of 1995), r 31 G

High Court Rules 1971 (RGN 1047 of 1971), rr 164(4), 231, 232 & 244

Case information

T Zhuwarara, for the applicant

T Kanengoni, for the first and second respondents H

2015 (1) ZLR p814

Uchena J

I Ndudzo, for the third and fifth respondents A

Mrs *V Munyoro*, for the fourth and the sixth to eleventh respondents

Judgment

Uchena J: The applicant is an independent candidate for the Hurungwe West by-election scheduled for 10 June 2015. By ordinary application he applied for an order suspending the holding of elections

in Hurungwe West on B 10 June 2015 due to alleged violence and intimidation. In the alternative he seeks orders compelling the first, second,fourth, and sixth to tenthrespondents to make statements through fliers and radio correcting the impression created by the third to tenth respondents about how voters in the constituency shall go to the polls and vote on 10 June 2015. C

The first respondent is the Chairperson of the Zimbabwe Electoral Commission to whom the applicant complained by letters dated 12 and 14 May 2015 about the violence and intimidation which was being unleashed in Hurungwe West by the third to tenth respondents.

The second respondent is the Zimbabwe Electoral Commission. D

The third respondent is Zimbabwe African National Union (Patriotic Front) (ZANU PF), a political party which fielded the fifth respondent for the Hurungwe West by-election.

The fourth respondent is the Secretary for Administration for the third respondent who is being sued in his personal capacity for inciting violence and intimidation in Hurungwe West Constituency. E

The fifth respondent is a contestant fielded by the third respondent for election as a member of Parliament for Hurungwe West in the 10 June by-elections.

The sixth to tenth respondents are traditional leaders who the applicant alleges have been tasked with the role of systematically heading their subjects to polling stations and monitoring how they will vote, to identify those who F will vote for the applicant.

The eleventh respondent is the President of Zimbabwe cited in his official capacity as the official responsible for proclaiming dates for elections.

As already said, the applicant applied by ordinary application for the above G mentioned orders. In that application he sought to have the hearing set down for 5 June 2015 even though he only served the application on the sixth to tenth respondents on 6 June 2015. It was served on the first, second, third and fourth respondents on 2 June 2015. The registrar set it down for 8 June 2015. Most of the respondents were served with notices of set-down on 8 June 2015. H

Uchena J

On 8 June A the respondents' counsel raised three preliminary issues. Mr *Ndudzo* for the third and fifth respondents raised a preliminary issue on his clients being entitled to the *dies induciae* permitted in terms of the rule the applicant used to file his application. Mr *Kanengoni,* for the first and second respondents, raised a preliminary issue on whether or not this court has B jurisdiction to hear the applicant's application. Mrs *Munyoro* for the fourth and sixth to eleventh respondents raised a preliminary issue alleging that the fourth respondent had been incorrectly cited in his personal capacity.

After hearing submissions from the parties I postponed the case to 9 June 2015, when I ruled in favour of the third and fifth respondents' preliminary issue and dismissed the first, second and fourth respondents' preliminary C issues. I indicated that my reasons for judgment would follow; these are they.

Dies induciae

In his submission Mr *Ndudzo* argued that the applicant consciously chose the procedure through which he brought his application to this Court. That D procedure determines the time frames within which the respondents are expected to file their responses. He submitted that where an applicant files an ordinary application in terms of r 231(3) of the High Court Rules 1971, which the applicant used, a respondent is in terms of r 232 entitled to file his response within not less than 10 days, exclusive of the day E of service, plus one day for every additional 200 kilometres or part thereof where the place of service is more than 200 kilometres from the court where the application is to be heard. He submitted that the application has been prematurely set down as the *dies induciae* has not yet lapsed and the third and fifth respondents are entitled to file their responses within the time permitted by the rules.

Mr *Zhuwarara,* for the applicant, instead of relying on the procedure in the F High Court Rules which the applicant used in filing the application, and invoking corrective measures, sought to expedite the hearing of the application by invoking the provisions of r 31 of the Electoral Court's Rules SI 74A of 1995. Rule 31 provides as follows:

> "The Registrar and all parties to any stated case, petition, appeal or application referred to in these rules shall take all steps necessary to ensure that the matter G is dealt with as quickly as possible"

He submitted that the applicant gave the respondents three days to respond in view of the provisions of r 31. This submission is not consistent with what the applicant said in his founding affidavit on p 10 para 12, where he said;

> "I have given the respondents three days to respond. This is a modification of H the rules of the High Court as contemplated in s 164 (4)"

2015 (1) ZLR p816

Uchena J

Mr *Ndudzo* in response submitted that r 31 is not applicable to the present A application as it is not one of the applications mentioned in those rules. He analysed the applications covered by the 1995 Electoral Court rules and demonstrated how those rules do not apply to the applicant's application. He further submitted that the applicant cannot unilaterally decide on the *dies induciae* especially after choosing the ordinary application procedure instead B of using the urgent application procedure in terms of which an applicant can in terms of the proviso to rule 232 specify a shorter *dies induciae* "if the court on good cause shown agrees to such shorter period". He further submitted that the applicant should have applied by urgent chamber application accompanied by a certificate of urgency in terms of r 244.

The need to hear electoral cases urgently is not in dispute. I accept that such C cases should be heard as soon as possible, but an applicant has to follow the correct procedures to achieve that objective. It does not assist the smooth and efficient administration of justice for an applicant to apply for remedies at the eleventh hour, and for his legal practitioners to choose a wrong procedure and thereafter expect the court to extricate them from their chosen timing and procedure, without their doing what the law of procedure requires D them to do, to achieve that objective. Section 165(4) provides for the use of High Court Rules as follows;

> "(4) Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction." E

Section 165(4), makes it clear that modifications of the High Court Rules must "appear to the Electoral Court to be necessary". This means an applicant cannot unilaterally decide that issue, but has to first convince the court of the necessity of the modification. The applicant did not do so. While using the procedure which gives the respondents the longest *dies induciae*, he F unilaterally modified the rule to reduce that period. In my view the applicant should have simply applied by urgent application which in terms of r 244 allows a judge to call parties to make submissions on the issue of urgency. Rule 244 reads:

> **"**Where a chamber application is accompanied by a certificate from a legal G practitioner in terms of paragraph (*b*) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith:
>
> *Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent" (*emphasis added). H

2015 (1) ZLR p817

Uchena J

Rule 244 A makes it clear that urgency has to be determined by a judge after hearing the parties' submissions on it. In this case it was not possible to determine that issue within an ordinary application in terms of r 232, to which r 244 does not apply. It is for these reasons that the third and fifth respondents' insistence on the *dies induciae* provided for in r 232 cannot be interfered with, unless the applicant invokes remedial remedies to enable B the hearing of its application without having to wait for the expiry of the *dies induciae* he trapped himself into. The applicant's application must, therefore, be removed from the roll.

Jurisdiction

Mr *Kanengoni* for the first and second respondents raised a preliminary C issue on whether or not this court has jurisdiction to hear an application for which the Electoral Act does not specifically confer jurisdiction. Relying on *Makone & Anor* v *Chairperson (ZEC) & Anor* 2008 (1) ZLR 230 (H), he

submitted that this court can only exercise jurisdiction over cases where the legislature specifically conferred jurisdiction on it.

Mr *Zhuwarara* in response submitted that s 161(2) as currently worded confers jurisdiction on the Electoral Court in respect of all applications arising from the Electoral Act. He submitted that s 161 must be read as a whole to get its full meaning. I agree that provisions of a statute must be construed within the context in which they are found.

The Electoral Act has been extensively amended since my decision in *Makone* s*upra*. The wording of the current s 161 is totally different from the earlier version. In the 2004 version, which applied in 2008, s 161 provided as follows:

> "(1) There is hereby established a court, to be known as the Electoral Court, for the purpose of hearing and determining election petitions and other matters in terms of this Act.
>
> (2) The Electoral Court shall have no jurisdiction to try any criminal case.
>
> (3) The Electoral Court shall be a court of record."

Section 161 of the Electoral Act as amended by Act 3 of 2012 now reads as follows:

> "(1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.
>
> (2) The Electoral Court shall have exclusive jurisdiction –
>
> (a) to hear appeals, applications and petitions in terms of this Act; and
>
> (b) to review any decision of the Commission or any other person made or purporting to have been made under this Act; and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court:

Uchena J

> Provided that the Electoral Court shall have no jurisdiction to try any criminal case.
>
> (3) Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court."

Subsection (2) brought in changes which make the decision in *Makone* s*upra* inapplicable. The Electoral Court now has exclusive jurisdiction, which it did not have in 2008. The word "exclusive", means this court now has a domain over which it does not share its jurisdiction with any other court. That domain is marked by s 161(2)(a) and (b), which caps it all by adding that this court now has powers similar to those exercised by the High Court, when it determines electoral issues. The combination of exclusive jurisdiction and the addition of powers similar to those exercised by the High Court means this court now enjoys unlimited jurisdiction over all electoral cases, except criminal cases and cases which have been specifically allocated to other courts. Applications are now specifically mentioned as falling within the Electoral Court's jurisdiction. In 2008 they fell under "other matters". The Electoral Court now has "power to give such judgments, orders and directions in those matters as might be given by the High Court". The granting to the Electoral Court of exclusive jurisdiction, and power to give such judgments, orders and directions in those matters as might be given by the High Court, is a clear enhancement of the Electoral Court's jurisdiction after the *Makone* case s*upra*. The fact that the legislature which is deemed to know the law made these deliberate changes, means it intended to alter case law by giving this court jurisdiction the *Makone* case s*upra* said it did not have. Exclusive jurisdiction means this court does not share concurrent jurisdiction with any other court, on matters it has jurisdiction on. The granting of power to give judgments and orders the High Court might give enables this court to exercise jurisdiction over cases in which it used to decline jurisdiction and such cases would be heard by the High Court. It has simply been given exclusive jurisdiction with unlimited power to hear and determine cases under the Electoral Act just as the High Court had jurisdiction to hear such cases during the era when the Electoral Court did not have exclusive jurisdiction.

I therefore find that this court has jurisdiction to hear and determine the applicant's application.

Citation of the fourth respondent

Mrs *Munyoro* submitted that the fourth respondent should have been cited in his Ministerial capacity, in view of the alternative order sought by the applicant. In para 4 of his draft order the applicant sought the following order:

"That the fourth respondent be and is hereby ordered to issue and cause to be circulated in Hurungwe West, the following statement in both Shona and English; H

2015 (1) ZLR p819

Uchena J

'Each A voter has a right to go to the polling station at a time convenient to her/him and need not be accompanied by their village head'".

She submitted that the applicant can only make the statement sought in his capacity as the Minister of Local Government.

Mr *Zhuwarara* in response submitted that the fourth respondent was correctly B cited in his personal capacity, because of what he is alleged to have said and done in Hurungwe West constituency. He referred to the applicant's allegations against the fourth respondent as the basis on which he was cited in his personal capacity. On p11 para 16 of his application the applicant, said:

"The fourth respondent, in the presence of the fifth respondent and in the name C of the third respondent, has addressed several campaign meetings at which he has issued threats against any person who intends to vote for me. There is video evidence of these meetings and the fourth respondent's utterances. If the fourth respondent denies ever making these statements, I will seek leave of the court to submit the video evidence."

Mr *Zhuwarara* further submitted that the fourth respondent can issue the D statement sought in the alternative order in his personal capacity.

In response Mrs *Munyoro* submitted that if the statement is issued by the fourth respondent in his personal capacity it will not have the weight it would have if he made it in his ministerial capacity.

On p 9 para 5 the applicant clearly states that he is aware of the fourth E respondent's Ministerial office but was suing him in his personal capacity. The cumulative effect of paras 4 and 9 of the applicant's founding affidavit indicates that the fourth respondent is being deliberately sued in his personal capacity for the threats and utterances he made at campaign meetings in his capacity as one of the leaders of the third respondent. It is clear why F the applicant sued the fourth respondent in his personal capacity. It was a deliberate choice the applicant while well aware of the fourth respondent's official capacity. I am satisfied that the fourth respondent's official capacity has nothing to do with the alleged threats and utterances. The applicant seems to be merely seeking a retraction of the utterances made by the G fourth respondent at campaign meetings as opposed to a weighty Ministerial statement. A litigant has a right to sue an official in his personal capacity if the alleged conduct has nothing to do with his office. I am satisfied that the applicant correctly cited the fourth respondent in his personal capacity.

I therefore uphold the first H preliminary issue and dismiss the second and third preliminary issues. In the result I granted the following order;

2015 (1) ZLR p820

Uchena J

1. The third and fifth respondents are entitled to the *dies induciae*A provided for by the rules in terms of the type of application the applicant filed.
2. The first and second respondents' preliminary issue is dismissed with costs.
3. The fourth respondent's preliminary issue is dismissed with costs B
4. The applicant shall pay the third and fifth respondents' costs.
5. The applicant's application is removed from the roll.

Kadzere, Hungwe & Mandevere, applicant's legal practitioners

Nyika, Kanengoni & Partners, first and second respondents' legal practitioners C

Ndudzo & Partners, third and fifth respondents' legal practitioners

Attorney-General's Office, Civil Division, fourth and sixth to eleventh respondents' legal practitioners

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MICRO PLAN FINANCIAL SERVICES (PVT) LTD v CHESETS TRADING (PVT) LTD & ORS 2015 (1) ZLR 821 (H)

Citation	2015 (1) ZLR 821 (H)
Case No	Judgment No. HH-513-15
Court	High Court, Harare
Judge	Bhunu J
Heard	8 May 2015; *CAV*
Judgment	10 June 2015
Counsel	No Details supplied
Case Type	Chamber application for default judgment
Annotations	No case annotations to date

Flynote

Contract – *penalty clause – penalty out of proportion to prejudice suffered by creditor – court entitled to reduce penalty payable – maximum amount of interest may not exceed the unpaid capital, irrespective of* D *what contract says*

Interest – *in duplum rule – interest ceases when double has been reached – penalty clause providing for interest in excess of the double – not enforceable*

Practice and procedure – *default judgment – liquidated demand – demand* E *arising out of unpaid loan – interest and other charges bringing total demanded to more than double the unpaid loan – court entitled to reduce penalty payable accordingly*

Headnote

The applicant sought default judgment against the defendants, who had failed to enter appearance to defend a claim arising out a failure to repay a loan. F The original debt was slightly under US$8 000, but the total demanded was in excess of $30 000, the difference being made up of interest to the limit under the *in duplum* rule, charges thereon, interest at the penalty rate stipulated in the contract (10 per cent a month), collection commission, and costs on the higher scale. The judge raised the issue of G the applicability of s 4 of the Contractual Penalties Act [*Chapter 8:04*], which allows a court to reduce a penalty provision to such extent as it considers fair if the court is of the opinion that the penalty is out of proportion to the prejudice suffered by the creditor. The applicant argued that the contract allowed for the penalty demanded.

Held, that the issue was not the interpretation of the contract, but justice, H equity and fairness among litigants. Once a court is of the view that

Bhunu J

a contractual penalty is unjust, exploitative or unduly oppressive it is A automatically conferred with an unfettered discretion to intervene by operation of law in the interest of the due administration of justice, regardless of what the contract says. The object and purpose of the legislator in this regard was to protect gullible members of the public from unjust and oppressive contractual penalties, as appeared to be B the case here. This rate of interest specified in the

penalty clause was undoubtedly usurious. Interest was being compounded and charged on interest, among a host of other punitive penalties relating to costs and collection commission. The computation of interest violated the well-known *in duplum* rule which provides that stops running once it equals the unpaid capital. The rule is immutable; it cannot be waived C or excluded by contractual provisions.

Held, further, that it was fair and just that the applicant be entitled to no more than the maximum allowable interest according to the *in duplum* rule, plus costs at the ordinary scale. The defendants were not liable to costs at the higher punitive scale because they did not defend or oppose plaintiff's claim. The applicant was not entitled to both his costs and D collection commission, there being no evidence that subsequent to the issue of summons the defendants agreed to pay collection commission.

Cases referred to

CBZ v *MM Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); E1997 (2) SA 285 (ZH)

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

SEDCO v *Guveya* 1994 (2) ZLR 311 (H)

Legislation considered F

Contractual Penalties Act [*Chapter 8:04*], s 4

Judgment

Bhunu J: This is an application for default judgment in terms of r 57 of the High Court Rules 1971. The plaintiff's claim against the defendants is, joint and severally the one paying and the others to be absolved, couched in the following terms: G

"(a) Payment of the sum of US$16 596.78 made up of cumulative unpaid capital sum of US$7 997.64, cumulative unpaid interest of US$7 997.64 and the cumulative charges $601.50, due in respect of an unpaid loan facility;

(b) Interest on the sum of US$16 596.78 at the agreed penalty rate from time to time, currently 10 per cent per month, calculated on the daily balance H

Bhunu J

and A compounded on a monthly basis with effect from the date of payment in full.

(c) An order declaring the third defendant's immovable property hypothecated by Deed of Hypothecation No. 2301, being an undivided 5.75 per cent share, being Share No. 4, in certain piece of land situate in the District of Salisbury, called lot 151J Block C Avondale, measuring 228 square metres, B held under deed of transfer No. 1155/2001 dated 11 February, 2001, specially executable;

(d) Collection commission thereon calculated in accordance of By-Law 70 of the Law Society of Zimbabwe By-Laws 1982; and

(e) Costs of suit on the legal practitioner and client scale."

The rule C entitles a plaintiff whose claim is for a debt or liquidated demand to apply for default judgment in chambers. It provides that:

"Claim for debt or liquidated demand only and no appearance entered

In cases where the plaintiff's claim, not being a claim for provisional sentence, is for a debt or liquidated demand only, and the defendant has failed to enter appearance within the period prescribed in the summons for entering appearance, D or, having entered appearance, has been duly barred for default of plea, the plaintiff may without notice to the defendant make a chamber application for judgment, and thereupon judgment may be granted or such order may be made as the judge considers the plaintiff is entitled to upon the summons or declaration."

It is plain that the rule confers on the judge discretion to grant judgment E according to what he considers to be the plaintiff's entitlement in the summons.

In this case the applicant's papers are in order, in that:

1. The defendants were duly served with the summons.
2. They did not enter appearance to defend.

3. The time for entering such appearance has since expired. F

Despite the applicant's papers being in order, I was unable to grant the default judgment offhand as claimed, because I considered that the interests, costs and penalties being claimed are unconscionably usurious, exploitative and extortionate. My rough estimate is that, if I grant the order sought, the defendants will end up paying in excess of US$30 000 on an original debt G of US$7 997.64.

Considering that a judge's function is to do justice between litigants and not to rubber stamp claims, I sought to direct counsel for the applicant to give notice to the other parties to enable me to hear both sides before proceeding in terms of s 4 of the Contractual Penalties Act [*Chapter 8:04*], H which provides as follows:

2015 (1) ZLR p824

Bhunu J

"Penalty stipulations enforceable A

(1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.

(2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may –

(a) reduce the penalty to such extent as the court considers equitable under the B circumstances; and

(b) grant such other relief as the court considers will be fair and just to the parties.

(3) Without derogation from its powers in terms of subsection (2), a court may–

(a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys hat the debtor has paid; or C

(b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.

(4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question." D

My directive was, however, met with stiff resistance with counsel for the applicant replying in the following vein in a letter addressed to the Registrar:

"Dear Sir

RE: MICRO PLAN FINANCIAL SERVICES (PRIVATE LIMITED – v – CHESETS TRADING (PVT) LTD & THREE OTHERS: CASE No. 3182/15. E

Your letter dated 12 May 2015 refers.

We have noted the comments raised by the Honourable Justice Bhunu in this matter. However, we submit that in terms of Clause 14. 2 as read with Clauses 8.3 and 13, penalty interest at an agreed rate of 10% per month to accrue automatically in the event of breach or failure by Defendant to pay any instalment due., in which case the full amount outstanding immediately becomes due and payable. F As such, there is no obligation or requirement for Plaintiff to issue any notice to defendants in this regard.

We therefore should be pleased if you could place this minute and our chamber application before his Lordship for consideration.

Yours Faithfully

Signed G

Costa & Mudzonga

Cc: Client"

I have no quarrel with counsel's interpretation of the contractual document. Counsel, however, misses the point. The question at hand has nothing to do with the interpretation of the contractual provisions but justice, equity and fairness among litigants. H

2015 (1) ZLR p825

Bhunu J

In A terms of s 4 of the Act, once a court is of the view that a contractual penalty is unjust, exploitative or unduly oppressive, it is automatically conferred with an unfettered discretion to intervene by operation of law in the interest of the due administration of justice regardless of what the contract says. The object and purpose of the legislature in this regard was to protect gullible

members of the public from unjust and oppressive contractual penalties as B appears to be the case here.

In this case, the penalty clause imposes a penalty of 10 per cent per month which works out at 120 per cent per annum. This kind of interest is undoubtedly usurious. Interest is being compounded and charged on interest among a host of other punitive penalties relating to costs and collection commission. C The computation of interest appears to violate the well-known *in duplum* rule which provides that interest cannot exceed the capital amount. In other words, interest stops running once it equals unpaid capital. See *Commercial Bank of Zimbabwe* v *MM Builders & Suppliers (Pvt) Ltd and Others* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (ZH). The rule is a legal instrument based on public policy meant to protect debtors against exploitation and usurious D abuse by lenders. The rule is immutable: it cannot be waived or excluded by contractual provisions. See *Georgias & Anor* v *Standard Chartered Finance Zimbabwe* 1998 (2) ZLR 488 (S).

Under the circumstances, I felt quite strongly that failure to intervene according to law would amount to gross dereliction of duty and grave miscarriage of E justice. Courts and judges are not slaves of the rules. For that reason the law does not require slavish adherence to the rules.

Rule 4C allows a departure from the rules in order to do justice according to law. It reads:

> "Departures from rules and directions as to procedure
>
> The court F or a judge may, in relation to any particular case before it or him, as the case may be –
>
> (a) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;
>
> (b) give G such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

From the foregoing it is plain that I was within my rights when I directed that notice be served on the defendants so that I could make a fair and just determination from an informed position in terms of s 4 of the Contractual H Penalties Act, Now that the applicant is uncomfortable with having the

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defendants heard on the pertinent issue of the appropriate interest and A penalties applicable, it is only fair that I proceed to determine this issue on the papers without hearing the applicant as well.

Having perused the papers, it is my considered view that in the circumstances of this case it is fair and just that the applicant be entitled to no more than the maximum allowable interest according to the *in duplum* rule, plus costs at the B ordinary scale. The defendants are not liable to costs at the higher punitive scale because they did not defend or oppose plaintiff's claim.

The applicant is not entitled to both his costs and collection commission. In *SEDCO* v *Guveya* 1994 (2) ZLR 311 (H), it was held that:

> "It was not appropriate to order that collection commission be paid as well as costs. A contractual provision to that effect would be penal in nature. Collection C commission can only be charged on moneys actually collected by the legal practitioner. Once summons has been issued for any debt, the legal practitioner is entitled to claim his costs, not collection commission, unless subsequent to the issue of summons the debtor has agreed to pay collection commission."

I have disallowed the claim for collection commission because there is no evidence that subsequent to the issue of summons the defendants agreed to D pay collection commission.

The bald unsubstantiated claim of US$601.50 is disallowed.

In the result, it is accordingly ordered that default judgment be and is hereby entered against all the four defendants jointly and severally one paying and the others to be absolved in the following terms: E

1. That the defendants be and are hereby ordered to pay plaintiff the sum of US$16 696.78, being loan capital amount together with total cumulative interest.
2. That the third defendant's immovable property hypothecated by Deed of Hypothecation No. 2301, being an undivided 5.75 per F cent share, being Share No. 4, in certain piece of land situate in the District of Salisbury, called lot151J Block C Avondale, measuring 228 square metres, held under deed of transfer No. 1155/2001 dated 11 February, 2001, be declared specially executable;

3. Costs of suit at the ordinary scale.

Costa & Mudzonga, applicant's legal practitioners G

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ZIMBABWE BATA SHOE CO LTD v CHAIRMAN, NEC FOR LEATHER INDUSTRY & ANOR 2015 (1) ZLR 827 (S)

Citation	2015 (1) ZLR 827 (S)
Case No	Judgment No. S-27-15
Court	Supreme Court, Harare
Judge	Gwaunza JA, Guvava JA & Mavangira AJA
Heard	16 February 2015; *CAV*
Judgment	10 June 2015
Counsel	*R Goba,* for the appellant *M Nkomo,* for the first respondent *T Mpofu,* for the second respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Arbitration – *appeal – voluntary submission to arbitration – no appeal possible – only course open to dissatisfied party is to apply to High* D *Court to set aside award*

Headnote

The employers in the tanners and shoe manufacturing industry, of which the appellant was a member, had a wage dispute with employees in the industry who were affiliated to the second respondent, a trade union. Conditions of employment for the industry were governed by a E collective bargaining agreement (CBA). Wage negotiations were held, which resulted in deadlock and the matter being referred to voluntary arbitration. A panel of two arbitrators, one appointed by the employers and one by the union, made an award in terms of which the employers were to effect a 9.1 per cent increase across the board. The NEC for the industry issued a wage increase notice, to be observed by all employers.

The appellant F purported to file a written application with the NEC, seeking exemption in terms of s 2 of the CBA, on the basis of lack of financial capacity. The council of the NEC decided that it had no jurisdiction to interfere with an arbitral award. The appellant approached the Labour Court, seeking a review of the NEC's decision. The Labour Court held that if the appellant disagreed with the NEC's decision, it should have G appealed on a point of law, and dismissed the application.

Held, that on the evidence, the parties voluntarily subjected themselves to arbitration. It was not part of the arbitration agreement that the award would form part of the CBA or that the unsuccessful party could seek exemption in terms of the CBA. There was thus no basis for relying on H the CBA to seek exemption. It was in the contemplation of both parties

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2015 (1) ZLR p828

Tsanga J

that the arbitral award would not only be final in its effect, but that it A would also bind all employers and employees in the industry.

Held, further that the only court vested with jurisdiction, and limited jurisdiction at that, to interfere with a voluntary arbitration award is the High Court. In terms of art 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*], recourse to the High Court is to be made only in cases where one party seeks to have the arbitral award or part thereof B set aside, and on the specific grounds set out therein. Thus, unless one seeks to have the award or any part thereof set aside, the award will for all intents and purposes be assumed to have final effect. The appellant sought an exemption, and did not file its application in the High Court. The application in the Labour Court was doomed to failure, though not because the appellant did not file an appeal. The appellant did not have C that option.

Case cited

Zimbabwe Educational Scientific Social & Cultural Workers Union v *Welfare Educational Institutions Employers' Assn* 2013 (1) ZLR 187 (S) D

Legislation considered:

Arbitration Act [*Chapter 7:15*], First Schedule, art 34

Case information

R Goba, for the appellant

M Nkomo, for the first respondent E

T Mpofu, for the second respondent

Judgment

Gwaunza JA: At the close of argument in this matter, it was the unanimous view of the court that the appeal lacked merit and we dismissed the application with costs. We indicated that the full reasons for the judgment would follow, and these are they. F

This is an appeal against the whole judgment of the Labour Court dismissing an application for review of a decision of the National Employment Council for the Leather Industry ("NEC"). The NEC declined to hear the appellant's application for an exemption from the terms of an arbitral award in favour of the second respondent, on the basis that it lacked jurisdiction. G

The facts of this matter are largely common cause. The employers in the tanners and shoe manufacturing industry – of which the appellant was a member – had a wage dispute with employees in the industry who are affiliated to the second respondent. The dispute related to the wages for the period 1 July to 31 December 2010. The conditions of employment for the employees were H

2015 (1) ZLR p829

Gwaunza JA

governed A by the Collective Bargaining Agreement: Leather and Shoe, Sports Equipment, Animal Skin Processing and Taxidemy, Leather Goods, Travel and Canvas Goods Manufacturing Industries, SI 246 of 1993 ("CBA"). Collective bargaining negotiations were held under the chairmanship of the first respondent, NEC, and ended in a deadlock. The result was that NEC, B following an agreement jointly signed by and on behalf of the employers' and employees' representative associations, referred the matter for voluntary arbitration. A panel of two arbitrators, one appointed by the employers' association and the other by the second respondent, duly heard the matter and made an award in terms of which they ordered the employers to effect a 9.1 per cent wage increase across

the board in respect of their employees C for the relevant period. Pursuant to this award NEC issued a wage increase notice for the said period, which was to be observed by all employers.

On 11 November 2010 the appellant purported to file a written application with the NEC, in terms of s 2 of the CBA, seeking exemption from implementing the stipulated wage increase. The basis of the application was given as the D lack of financial capacity to comply with the award. Proof of such incapacity was furnished together with the application.

The matter was considered by a sub-committee of the NEC which, upon failing to reach agreement, referred it to full council. The council met on 1 March 2011 and, without going into the merits of the dispute, issued a decision to E the effect that they had no jurisdiction to consider an application requiring them to interfere with an arbitral award. The appellant then approached the court *a quo* with an application for review of NEC's refusal to entertain the matter on the merits. The court dismissed the application, having reasoned as follows;

> F "The bottom line in this case is that the NEC simply said that it had no jurisdiction. The applicant agreed that indeed that is a question of law. With due respect this is where the case ends. There is nothing grossly irregular about an authority saying that in the circumstances of a particular case it has no jurisdiction at law. Any party that is not in agreement with such a view should simply appeal on a point of law as provided for in the law ..."

The appeal raises the following issues: G

(i) whether or not the parties agreed to be bound by the arbitral award;

(ii) whether or not the court *a quo* erred at law when it held that the decision of the NEC declining to hear the matter on the basis that it had no jurisdiction, raised a point of law and was therefore appealable and not H reviewable;

(iii) whether the NEC and the Labour Court had jurisdiction to hear this A matter.

The parties through their authorised representatives agreed, in writing, to submit the dispute in question to voluntary arbitration. They further agreed to be bound by the award resulting from such arbitration. Specifically, the agreement concerned included a declaration on its last page, which read in B part as follows after the citation of the two parties;

> "… do hereby declare that the Parties shall be bound with the award from the Arbitration Panel" (*sic*).

It cannot therefore be disputed that the parties freely and voluntarily subjected themselves to voluntary arbitration. It was not a term of the arbitration C agreement between them that the award would form an integral part of the relevant CBA (SI 246 of 1993), nor that the unsuccessful party would seek exemption in terms of s 2 of the CBA. It is pertinent in this respect to note (and *Mr Goba* for the appellant properly concedes the point), that the arbitral award was not statutorily incorporated into or made a part of the CBA. There D thus was no basis for relying on the terms of the CBA to seek an exemption from a provision of the voluntary arbitral award. The two were separate and distinct in terms of character and effect. The assumption can therefore safely be made, that it was in the contemplation of both parties that the arbitral award would not only be final in its effect, but that it would also bind all employers and employees in the Tanners and Shoe Manufacturing Industry. E

The effect of an award of this nature is authoritatively stated in the case of *Zimbabwe Educational Scientific Social and Cultural Workers' Union* v *Welfare Educational Institutions Employers' Assn* 2013 (1) ZLR 187 (S):

> "It is trite that where parties make submissions to arbitration on the terms that they choose their own arbitrator(s), formulate their own terms of reference to F bind the arbitrator and agree that the award will be final and binding on them, the court of law will proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. See *ZESA* v *Maposa* 1999 (2) ZLR 452(S). Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The standard is high." G

Indeed, so high is the standard that the only court vested with jurisdiction, and limited at that, to interfere with a voluntary arbitration award, is the High Court. It derives this authority from the Arbitration Act [*Chapter 7:15*], in particular, art 34 of the Model Law which provides as follows in its introductory part: H

Gwaunza JA

> "*Application* A *for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be *set aside* by the High Court only if –
>
> (a) the B party making the application furnishes proof that ..." (my emphasis).

My reading of the provision cited above suggests that recourse to the High Court is to be made only in cases where one party seeks to have the arbitral award or part thereof set aside, and on the specific grounds set out therein. It follows from this that unless one seeks to have the award or any part thereof set aside, the award will for all intents and purposes be assumed to C have final effect. *In casu* the appellant did not seek to have the award or any part thereof set aside, it sought exemption from the provision that obliged it to effect the pay rise in question. This is clearly not the type of "exclusive relief" envisaged in art 34 of the Model Law, cited above. The appellant in any case did not file its application before the High Court.

Against D this background, I find that the decision by the NEC to the effect that it had no jurisdiction to interfere with the arbitral award, cannot be faulted. It also becomes evident that the court *a quo* was handicapped in the same way as the NEC, and could not have properly heard the matter, either as an appeal or an application for review. While it may well be true, as stated by the court *a quo*, that in some circumstances a point of law justifies an appeal E rather than review, this clearly was not such a circumstance. The application in the court *a quo* was therefore doomed to failure, but not on the basis on which the court dismissed the application.

Consequently, while the correctness of the dismissal by the court *a quo* of the application is beyond dispute, that decision was nevertheless based on F the wrong premise. The option of an appeal against NEC's decision was not one that was open to the appellant. A misdirection on the part of the court *a quo* is therefore manifest.

It appears to me that the parties – and the court *a quo* for that matter – misguidedly expended valuable time on an irrelevant issue of whether the decision made by the NEC was reviewable or appealable. This appears to G have diverted attention from the real dispute, which simply was whether a voluntary arbitral award was appealable or could otherwise be interfered with, by any court, given the circumstances of the case.

In the result, the appeal was found to lack merit, hence the order of this court H to dismiss it with costs.

Gwaunza JA

GUVAVA JA and MAVANGIRA AJA concurred. A

Danziger & Partners, appellant's legal practitioners

*Donsa, Nkomo & Mutangi, f*irst respondent's legal practitioners

*Matsikidze & Mucheche, s*econd respondent's legal practitioners B

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PAGET-PAX ENDOWMENT TRUST v HIGHLIFE INVESTMENTS (PVT) LTD 2015 (1) ZLR 833 (H)

Citation 2015 (1) ZLR 833 (H)

Case No	Judgment No. HH-518-15
Court	High Court, Harare
Judge	Mafusire J
Heard	20 & 21 May 2015; *CAV*
Judgment	10 June 2015
Counsel	*R Chibaya,* for the plaintiff *J Samukange,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Church – *structure and organisation – ministries or groupings within church – not separate legal entities – trust established by church to manage propriety affairs of church – not a separate legal entity*

Landlord and tenant – D *statutory tenant – may be evicted if landlord shows "good and sufficient" grounds – landlord averring that he wants premises for his own use – what landlord must show – once good and sufficient grounds established, position of tenant irrelevant*

Headnote

The defendant E was statutory tenant of business premises which were owned by the Anglican Church. The plaintiff trust had been set up to manage the proprietary affairs of the Church, including the premises in question. The trust sought the eviction of the respondent, having given notice to vacate to the defendant, on the grounds that the Church's Mothers' Union required the premises, so that it could run income-generating F projects with the aim of raising income for the Church. The defendant refused to vacate, claiming that it was not true that the premises were required for the plaintiff's own use. The Mothers' Union, it said, was not the plaintiff. It was not cited in the deed of trust as a beneficiary. There was only one beneficiary, the Church.

Held, that a G statutory tenant is one whose continued occupation of the landlord's premises after the expiry of the lease agreement, either by the effluxion of time, or on due notice of termination having been given, is by operation of the law, that law being the rent regulations. The statutory tenant must continue to pay the rent due within seven days of the due date, and to perform all the other conditions of the expired lease. However, such a H tenant can still be evicted if the landlord proves to the court that he has

"good and sufficient grounds" for wanting back the premises. But it is A not "good and sufficient grounds" that the lessee has refused an increase in rent, or that the landlord wants to let the premises to somebody else. If the landlord proves that he needs the premises for his own use, that should qualify as "good and sufficient grounds". The court, though, would want to know the precise use to which it was intended to put the premises. If that were found to be illegal or frivolous or, having regard B to the owner's circumstances, unreasonable, the eviction of the lessee would be refused. The judicial officer looks at the position of the lessor, not that of the lessee, to determine whether there are good and sufficient grounds for the lessor wanting his premises back. If the lessor has good and sufficient grounds, that is the end of the matter. In making his value C judgment, the judicial office takes no account of the position of the lessee.

Held, further, that what had to be resolved was: who was the real plaintiff in this matter? It was the generic church, the Anglican Church, or, more precisely, the Diocese of Harare in the Anglican

Church of the Province of Central Africa. The Church was a voluntary and unincorporated association of individuals united on the basis of an agreement to be bound D in their relation to each other by certain religious tenets and principles of worship, government and discipline. Being bound in their relation to one another, the members were divided into various ministries that comprised the men, the women and the youth, all of them with general or specific functions. They might be different ministries or groupings E but they remained parts of one body, the Church. For good governance and discipline, particularly in relation to the ownership, management and control of the property of the Church, a trust was formed. Amongst its objects was the utilisation of the income from, *inter alia*, the premises in question. The fact that the trust was a special creation by the Church did not mean that it was divorced from the Church. It was a special F creation *for* the Church *by* the Church. In any case, a trust is not a legal *persona*. The true parties to the action were the trustees behind the trust. The notices to vacate given by the secretary of the trust, using the Church's letter-head, were notices by the Church, the real owner of the premises, but which were managed and administered by the plaintiff. The Mothers' Union was also not a legal entity, let alone an entity separate G from the Church.

Held, further, therefore, that the eviction order would granted.

Cases referred to

Boka Entprs (Pvt) Ltd v *Joowalay & Anor* 1988 (1) ZLR 107 (S) H

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Church of the Province of Central Africa v *Diocesan Trustees, Harare Diocese* 2012 (2) ZLR 392 (S) A

Crundall Brothers v *Lazarus* 1990 (1) ZLR 290 (H)

Film & Video Trust v *Mahovo Entprs (Pvt) Ltd* 1993 (2) ZLR 191 (H)

Gold Mining & Minerals Development Trust v *Zimbabwe Miners' Federation* 2006 (1) ZLR 174 (H)

JGE v *Portsmouth Roman Catholic Diocesan Trust* [2012] 4 All ER 1152 (CA) B

Kingstons Ltd v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S)

Moffat Outfitters (Pvt) Ltd v *Hoosein & Ors* 1986 (2) ZLR 148 (S)

Newman v *Biggs* 1945 EDL 51

Old Mutual Life Assurance Co Zimbabwe (Pvt) Ltd v *Raftopoulos*C 2010 (1) ZLR 439 (H)

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), s 22(2)

High Court Rules 1971 (RGN 1047 of 1971), rr 7 & 8

Case information

R Chibaya, for the plaintiff D

J Samukange, for the defendant

Judgment

Mafusire J: The plaintiff sued the defendant for eviction from certain premises situate in Harare. The sole point for determination was whether the E plaintiff required the premises for its own use. Such an issue arose because the defendant disputed the identity of the plaintiff. Therefore, the question was, largely: who was the real plaintiff?

Most facts were common cause. In fact, at the commencement of the trial, Mr *Samukange*, for the defendant, suggested that the matter could proceed F by way of a special case as he felt that none of the relevant facts were in dispute. But I did not have to decide the issue. Ms *Chibaya*, for the plaintiff, was flatly opposed to the suggestion. In terms of Order 29, for a matter to proceed as a special case, either the parties have to concur, or the court may give a directive if it is convenient that any cause or question of law be G decided first. None of these conditions was present.

Because of the nature of the defence, much of the effort at the trial was to unpack the plaintiff. For it, this was done through two witnesses; Reverend Clifford Dzavo ("Rev Dzavo") and Mrs Faith Gandiya ("Mrs Gandiya"). The totality of their evidence was this. The premises in question belonged to their church. The church's full name was said to be Diocese of Harare in the H Anglican Church of the Province of Central Africa (hereafter referred to as

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"the Church"). The plaintiff was a trust. It was set up in terms of a notarial A deed that was executed in 1979. The object of the trust was to manage and control the proprietary affairs of the Church, including the premises in question, for the benefit of the Church. The Church was made up of different ministries or organs, namely the men, the women and the youth.

The plaintiff was administered by trustees appointed by the Church. In terms B of the trust deed, the trustees had the power, *inter alia*, to institute or defend legal proceedings. In terms of clause 11 of that deed, the trustees had power to employ, among others, a secretary to administer or assist in any business of the trust. Rev Dzavo was the secretary. He had been the secretary at all relevant times. He said he had been authorised and empowered by the trustees to represent the trust in court and to speak on its behalf. C

Both witnesses for the plaintiff stressed that the premises were required by the plaintiff for its own use. The "own use" referred to the Mothers' Union. It was an integral part of their Church, they said. It was a ministry within the Church. Its object was to render all kinds of support to families on behalf of the Church. The witnesses said that the Mothers' Union wanted the premises D so that it could run some income generating projects with the aim of raising income for the Church. The projects would include the selling of Christian material such as Bibles, hymn books, sacraments for Holy Communion, office requirements, uniforms, and the like. The Mothers' Union would not be paying rent.

Mrs Gandiya was the president of the Mothers' Union. She said that, although E initially she had had to contest for that position and had prevailed against other eligible ladies, the constitution of the Mothers' Union had subsequently been amended to make the wife of the sitting Bishop the *ex officio* president. Her husband was the sitting Bishop.

The plaintiff's witnesses said that the idea to recover the premises for use by F the Mothers' Union had been conceived in 2011. The Union had submitted a project proposal and an application to the Board of Trustees. The application had been granted. Preparatory work for the project had included getting approvals and relevant licences from the local authority. The defendant had been given the requisite period of notice to vacate the premises. The notice G had been given by the plaintiff because it was the one mandated by the Church to manage its property affairs. However, the defendant had refused to vacate, claiming that it was a statutory tenant and that it was not true that the premises had been required for the plaintiff's own use.

That was the plaintiff's case. H

The A defence case was told by Dr Michael Ngoni Mambo ("Dr Mambo"). The defendant was a duly registered company. He himself was a co-shareholder and co-director. The other co-shareholder and managing director was his wife, Mrs Lena Mambo ("Mrs Mambo"). In reality, she was the soul and face of the defendant. Unfortunately, she was currently undergoing medical B treatment in the United States of America. As a matter of fact, the trial of this matter had been delayed on one or two occasions in the hope that she would be well enough to travel and attend court. However, she had still not recovered sufficiently by the time of the trial.

Dr Mambo's evidence was this. The defendant's business comprised a hair salon and a boutique. They had acquired it from someone else for whom C Mrs Mambo had been working for many years. The defendant had been in occupation of the premises since 1995. In 2010 the defendant had a three year lease with the plaintiff. That lease expired in December 2012. It was not renewed. The defendant had become a statutory tenant. The plaintiff was saying it wanted the premises for its own use. Notices to vacate had been received. However, the defendant did not believe that the

plaintiff required D the premises for its own use. The Mothers' Union was not the plaintiff. It was not cited in the deed of trust as a beneficiary. There had only been one beneficiary, i.e. the Church.

Dr Mambo said that the defendant had invested a lot of money in its business. It was literally Mrs Mambo's whole life. They could not think of relocating E and starting afresh elsewhere. Otherwise they might just as well close shop.

Dr Mambo further claimed that the plaintiff was jealous of the success of the defendant's business. It wanted to take advantage of the goodwill that the defendant had generated at the premises. It was also claimed that Mrs Gandiya wanted the premises for her own personal use. The Mothers' Union F was just a façade. Mrs Gandiya had on occasions sent several women to harass Mrs Mambo. All over the world it is not the business of mothers' unions to run businesses.

To back up this latter claim, Dr Mambo produced a copy of the Constitution of the Mothers' Union for the Diocese of Manchester in the United Kingdom. G He said he had surfed on the internet for constitutions for mothers' unions in other parts of the world, particularly countries or regions such as Canada, Trinidad and Tobago and southern Africa. Their objects were identical. Mothers' unions had nothing to do with the running of commercial enterprises within the Church.

Dr Mambo questioned the legitimacy of the claim by the plaintiff's witnesses H that the premises were required for the purposes of running a business to

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benefit the Church. The plaintiff was already making a lot of money from A the rentals that the defendant was paying. He said those rentals were much higher than the market averages. Furthermore, the defendant was up to date with its rent payment. It always paid promptly on due dates.

The defendant said that, as a statutory tenant, it was protected from capricious evictions by virtue of s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) ("the rent regulations" or "the regulations"). B

Dr Mambo said that at one time there was a leadership wrangle within the Diocese of Harare for the Anglican Church, that pitted one Bishop Kunonga and Bishop Gandiya against each other. Bishop Kunonga and his faction had been in charge of the Church. During his reign, his wife had wanted to wrestle the premises from the defendant for her own personal use. The defendant had C successfully warded her off. Eventually Bishop Gandiya and his faction had taken over. That development had given the defendant hope that its tenure at the premises would now be more secure since it considered the incoming faction as "good people". However, the defendant was soon disappointed that the same problems that it had faced during Bishop Kunonga's reign were now repeating themselves in the new dispensation. But the defendant had D resisted being pushed out. The plaintiff had reacted by increasing the rentals.

That, basically, was the defendant's case.

Rev Dzavo denied that the plaintiff had increased the rentals when they had come in from "exile". The rent, at $1 200 per month, had been pegged at that level during Bishop Kunonga's tenure. It was still at the same level. E He said when the new administration of Bishop Gandiya had taken over, it had made an inventory of all the leases and the lessees to all the Church's premises. In 2011 the Mothers' Union's business proposals had been accepted. In February 2013 all the tenants had been invited to submit copies of their current leases. The letter to the defendant was dated 20 February 2013. All the F other tenants had complied. The defendant had not. It was soon discovered that the defendant's lease had expired in December 2012. It had not been renewed but the defendant had remained in occupation.

Rev Dzavo said that it had been decided that the defendant would be accommodated up to December 2013. On 27 June 2013 he wrote to the defendant reminding it of the expiry of the lease and giving notice that it G had to vacate the premises by not later than 31 December 3013. He said the Church now wanted the premises for its own use.

There were negotiations between the parties. On 10 July 2013, Rev Dzavo, as diocesan secretary, and using the Church's letter-head, wrote to the defendant offering a one year lease, from 1 January 2013 to 31 December 2013. Rev H

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Dzavo said A in one of the discussions the possibility of the parties sharing the premises for some time from 2014 had been considered. However, according to Rev Dzavo, Mrs Mambo had not come back to him on the feasibility of sharing. On the other hand, Dr Mambo said that the responsibility to check on the feasibility of the parties sharing had been left to the Church, not Mrs Mambo. But the Church had done nothing about it.

On the one B year lease up to 31 December 2013, the defendant had responded on 16 September 2013, through its legal practitioners, Venturas & Samukange. The material portion of that letter read as follows:

> "We must bring to your attention that our client has been occupying the premises for more than 15 years. They are currently statutory tenants due to the fact [that] C the previous lease agreements have expired.
>
> Your demand that our client vacates[s] the premises by December 2013 shall be vigorously challenged. Please note [that] our client has kept the premises in good order and have [*sic*] spent their money to improve it which has resulted in yourselves benefiting especially during the period when there was serious disputes between yourselves and the Kunonga faction. As statutory tenants, our D client ha[s] complied with the terms of the old lease."

Rev Dzavo, again as diocesan secretary, and on the same letter-head, again wrote directly to the defendant on 7 October 2013 giving three months' notice to vacate the premises. The notice would run from 1 November 2013 to 31 January 2014. The reason for terminating the lease was that "… the premises are now required solely for the owner's occupation effective E 1 February 2014."

Venturas & Samukange responded on 10 September 2013. They denied that there was any legal basis for wanting the defendant out. They claimed that the premises were not required for own use but for letting to somebody else. Noting that a notice had previously been given, they alleged that such conduct showed confusion within "your organisation".

Thereafter, the plaintiff sued. F

That was the case before me.

A statutory tenant is one whose continued occupation of the landlord's premises after the expiry of the lease agreement, either by the effluxion of G time, or on due notice of termination having been given, is by operation of the law. That law is the Rent Regulations. The statutory tenant must continue to pay the rent due within seven days of the due date, and to perform all the other conditions of the expired lease. However, such a tenant can still be evicted if the landlord proves to the court that he has "good and sufficient grounds" for wanting back the premises. But it is not "good and H sufficient grounds" that the lessee has refused an increase in rent, or that the landlord

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wants to let the premises to somebody else. Subsection (2) of s 22 of the A Regulations is worded thus:

> "(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee –
>
> (a) continues to pay the rent due, within seven days of due date; and B
>
> (b) performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that –
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person." C

What constitutes "good and sufficient grounds" in the Regulations is not capable of precise or exhaustive definition. Every case depends on its own set of facts. However, if the landlord proves that he needs the premises *for his own use*, that should qualify as "good and sufficient grounds". In *Moffat Outfitters (Pvt) Ltd* v *Hoosein & Ors* 1986 (2) ZLR 148 (S) at 154C-D: Gubbay JA (as he then was) said: D

> "It is hardly possible and, in my opinion, certainly undesirable, to attempt any definition of the words 'good and sufficient grounds' which appear in the latter part of … s 22(2) of the Regulations. Whether a lessor succeeds in overcoming the burden they create depends on the particular circumstances of each case, viewed against the real purpose behind the Regulations. That purpose … is to E 'to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing the tenants' rents unjustifiably'. The court is enjoined to exercise a value judgment, which if arrived at without caprice or bias or the application of a wrong principle, will not lightly be interfered with."

See also *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 457C.

However, it is not enough that the landlord should simply assert that he F wants the premises for his own use. The court would want to know what use. In *Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor* 1988 (1) ZLR 107 (S) Gubbay JA said [1] :

> "Each case of an owner genuinely seeking the use of lease premises for himself must be assessed on its own merits. It will not be enough for him somewhat naively to proclaim: 'The premises belong to me and I now desire to use them G for my own purposes'. That would not constitute good and sufficient grounds. The court would want to know the précises use to which it was intended to put

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> the premises. A If that were found to be illegal or frivolous or, having regard to the owner's circumstances, unreasonable, the eviction of the lessee would be refused."

Earlier on in the same judgment, at 114E-F, the learned judge of appeal had said:

> "The phrase 'good and sufficient grounds' is not defined in the Regulations. Save B for providing that such grounds exclude the refusal of the lessee to agree to an increase in rent and the wish of the lessor to lease the premises to someone other than the lessee, no guidance is given to the court as to the factors to be taken into account in making its determination.
>
> In the nature of things, it is hardly possible, and certainly undesirable, for this court to attempt to itemise the grounds which would be regarded as good C and sufficient. And no general rule would be likely to cover all the varying circumstances which may arise in determinations of this type. What is clear, however, is that the court is enjoined to exercise a value judgment."

In casu, Ms *Chibaya* argued that the Church and its various organs such as the Mothers' Union and the plaintiff was one entity. There was no justification D for the artificial fragmentation urged by the defendant. Even though the ultimate beneficiary would be the Mother's Union, it being part of the Church, this did not detract from the fact that the premises were required by the plaintiff for its "own use". She stressed that the Mothers' Union would not be paying any rent.

On the other E hand, Mr *Samukange* stressed that no notice to vacate had been given by the proper plaintiff, i.e. the trust. He stressed that all the relevant notices had been on the letter-head of the Church. He argued that the trust was capable of suing and being sued. He also alleged that the Mothers' Union had its own administration that was separate from that of the Church or the trust, and that it had its own separate constitution. As such, he continued, F the Mother's Union was capable of suing and being sued in its own right.

Mr *Samukange* concluded by accusing the Church of corruption. He said it was unacceptable that it was the wife of the head of the Church that was gunning for the premises for her own use.

In my view, the first issue to be resolved is who was the real plaintiff in G this matter? I have no doubt that the real or true plaintiff was the generic church, the Anglican Church, or, more precisely, the Diocese of Harare in the Anglican Church of the Province of Central Africa.

In this country a church is an unincorporated entity. In *Church of the Province of Central Africa* v *Diocesan Trustees, Harare Diocese* 2012 (2) ZLR 392 (S) H the Supreme Court (*per* Malaba DCJ at 410A) described the church as:

> "… a voluntary and unincorporated association of individuals united on the basis A of an agreement to be bound in their relation to each other by certain religious tenets and principles of worship, government and discipline."

From the above definition I unpack the true plaintiff this way. I believe that the Anglican Church calls itself by that name because of certain religious beliefs, practices and traditions of its members

that identify it as such. Being bound in their relation to one another, the members are divided into various B ministries that comprise the men, the women and the youth, all of them with general or specific functions. They may be different ministries or groupings but they remain parts of one body, the Church. For good governance and discipline, particularly in relation to the ownership, management and control of the property of the Church, a trust was formed. It had specific powers set out in its deed of trust. Amongst its objects was the utilisation of the income C from, *inter alia*, the premises in question. This was for the benefit of the Church. The trustees have the specific mandate to manage the property of the Church for the Church.

But that the trust, i.e. the plaintiff herein, was a special creation by the Church, does not mean that it was divorced from the Church. It was a special creation D*for* the Church *by* the Church. At any rate, it is trite that in law a trust is not a juristic person. It has no corporate personality. It has no existence separate from that of the trustees. A trust is no more than a legal arrangement through which one administers property for another or for some impersonal object: see Honoré *The South African Law of Trusts* 5 ed p 419; *Crundall Brothers* v *Lazarus* 1990 (1) ZLR 290 (H); *Gold Mining & Minerals Development Trust* v *Zimbabwe Miners' Federation* 2006 (1) ZLR 174 (H). E

In terms of Order 2A r 8 of the rules of this court, associates may sue or be sued in the name of their association. In terms of r 7, "association" includes a trust. "Associate", in relation to a trust, means a trustee.

Therefore, whilst the citation and description of the plaintiff in the declaration, F namely, "… a trust duly formed and registered in terms of the laws of Zimbabwe …", seemed to imply corporate personality, this does not detract from the fact that a trust is not a juristic person and that the true party to the action were the trustee behind the trust. Furthermore, in the same citation, the plaintiff, i.e. the trust, was said to be "… under the control of the Anglican Church of the Province of Central Africa (Diocese) of Harare." G

Thus, I find that the notices to vacate given in writing by Rev Dzavo, at all times the secretary of the trust, but using the Church's letter-head, and signing the letters as "Diocesan Secretary", were notices by the Church, the real owner of the premises, but which were managed and administered by the plaintiff. I find that the Rent Regulations were complied with as far as the H

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giving of A notice was concerned. I agree with Ms *Chibaya* that it is common practice in most parts of the Christian world that churches vest the control and administration of their properties under special boards of trustees. She referred me to the English case of *JGE* v *The Portsmouth Roman Catholic Diocesan Trust* [2012] 4 All ER 1152 (CA), where Ward LJ noted as follows:

> B "The diocese comprises the people within a defined territory who have been entrusted to the care of a bishop as pastor. Since the law of England and Wales does not recognise the Catholic Church as a legal entity in its own right, but sees it as an unincorporated association with no legal personality, the diocese usually establishes a charitable trust to enable it to own and manage property and otherwise conduct its financial affairs in accordance with domestic law. The C defendant trust is such a charity."

Thus, there was no basis in the argument by the defendant that the Mothers' Union in this case was a different and separate entity capable of suing and being sued. It was part of the Church.

Mr *Samukange* relied on *Old Mutual Life Assurance Co Zimbabwe (Pvt) Ltd* v *Raftopoulos* 2010 (1) ZLR 439 (H) D to argue that the Mothers' Union was different and separate from the generic church, or the plaintiff, and that therefore, it could not be said that the plaintiff had proved that it required the premises for its own use. In that case the plaintiff, Old Mutual Life Assurance Company Zimbabwe (Pvt) Ltd ("the Old Mutual"), was said to be the holding company of the Central Africa Building Society ("CABS"). E But the two were separate entities. It was said that the Old Mutual wanted the premises for "own use", this being to lease them to CABS. CABS would be paying rent like any other tenant. At 449A-C Mtshiya J held:

> "*In casu*, the lessor is the plaintiff. Irrespective of any relationship, CABS cannot, in these proceedings, be defined as the lessor. The Regulations, in my view, are F meant to define the relationship between the lessor and the lessee. Accordingly, when the lessor declares the need for own use of the leased premises, it is logical that the lessee should understand that to mean 'own use' by the lessor to whom the rent is payable. As per the Regulations, the lessor cannot repossess the premises for the reason of 'leasing the premises to some other person'. That would certainly be against the spirit of the law. It was conceded that CABS is a separate legal entity that would also be required to pay rent for the premises as a G

lessee. That concession to me disposes of this matter because it clearly establishes that the plaintiff wanted to lease the premises to another person – a third party."

There was a world of difference between the *Old Mutual* case and the present. In *Old Mutual*, the Old Mutual required the premises to let to somebody else. Not only was that contrary to the *spirit* of the law, but actually it was H in direct conflict with the *letter* of the law.

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Mafusire J

In the present case, the Mother's Union was not a legal entity, let alone an A entity separate from the Church. Furthermore, it was not in issue that the Mothers' Union would not be paying rent. Therefore, the defendant could not rely on *Old Mutual*.

It is now trite, in my view, that the judicial officer looks at the position of the lessor, not that of the lessee, to determine whether there are good and B sufficient grounds for the lessor wanting his premises back. If the lessor has good and sufficient grounds, that is the end of the matter. In making his value judgment, the judicial office takes no account of the position of the lessee: see *Boka Enterprises (Pvt) Ltd* v *Joowalay & Anor*, *supra, Film & Video Trust* v *Mahovo Enterprise (Pvt) Ltd, supra*, and *Kingstons* v CL *D Ineson (Pvt) Ltd, supra*.

Thus, the defendant's argument herein that it had been on the premises in question for close to twenty years; or that it had invested a lot of money in its business; or that the business was Mrs Mambo's whole life and that it would rather close shop if required to move out than start somewhere else D again, were all irrelevant.

It also trite, on the authority of the above cases, and, additionally, *Newman* v *Biggs* 1945 EDL 51, that in proving "good and sufficient grounds" the landlord needs no more than assert his reasons *in good faith* and then bring *some small measure of evidence to demonstrate the genuineness of his assertion* (my E emphasis). It rests upon the lessee who resists ejectment to bring forward circumstances casting doubt on the genuineness of the lessor's claim.

In casu, Mr *Samukange* charged that the plaintiff corruptly wanted the premises to let them to Mrs Gandiya personally. It was manifestly a wild charge. There was not iota of evidence. On the contrary, the plaintiff's claim F that it wanted the premises for use by the Mothers' Union was, among other things, backed up by a fairly detailed business proposal. Furthermore, Mrs Gandiya's evidence that the Union had obtained the necessary licences from the local authority was not refuted successfully. The objects of the constitutions for mothers' unions in other parts of the world such as that of G the Mother's Union for the Diocese of Manchester in the United Kingdom, did not preclude the kind of activity for which the plaintiff had earmarked the premises in this case. Thus, the defendant failed to bring any circumstances casting doubt on the genuineness of the plaintiff's claim.

The plaintiff was quite entitled to its relief as claimed in the summons. H

2015 (1) ZLR p845

Mafusire J

Disposition A

1. The defendant, and all those claiming occupation through it, shall vacate the plaintiff's premises situate ground floor, Pax House, Kwame Nkrumah Avenue, Harare within seven days of the date of this order.
2. The costs of suit shall be borne by the defendant.

Sawyer & Mkushi, plaintiff's legal practitioners B

Venturas & Samukange, defendant's legal practitioners

1 At 115A-B, a passage quoted approvingly in, among others, *Film & Video Trust* v *Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 at 203E-F; and *Kingstons Ltd* v *L D Ineson (Pvt) Ltd supra* at 456A-B

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MUSHONGA v ZINHUMWE 2015 (1) ZLR 846 (H)

Citation	2015 (1) ZLR 846 (H)
Case No	Judgment No. HH-519-15
Court	High Court, Harare
Judge	Uchena J & Mwayera J
Heard	19 March 2015; *CAV*
Judgment	10 June 2015
Counsel	*S M Hashiti,* for the appellant *F Chimwa Murombe*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Delict – *liability – vicarious liability – rationale for – motor vehicle accident – person causing accident authorised to drive defendant's car but not employed by her – whether employer-employee relationship must exist for liability to arise – need for nexus between wrongdoer's conduct and owner of vehicle* D

Headnote

The appellant claimed damages arising out of an accident between his car and one owned by the respondent but driven by another person, with her permission. She had parked her car at a hotel where the driver worked and he had driven it (presumably in order to park it). The magistrate E granted absolution on the grounds that there was no employer-employee relationship between the respondent and the person who drove her car.

Held, that the standard test for vicarious liability requires the court to decide whether the wrong doer was engaged in the affairs or business of the employer when he committed the delict. Put differently, the consideration F is whether or not the wrong doer was acting in the scope and course of employment. Where an employee deviates completely from the employer's scope and mandate of business, removing the causal link between the wrongdoer's conduct and the employer, it would not only be superfluous but fallacious to impute vicarious liability. This would G be the case where the deviation completely severs any nexus between the wrongdoer and the business of the employer. The only reason for the appellant to suggest placing liability on the respondent was that she was the owner of the vehicle. This would not only be unjust but illogical, for it would cast the net too wide and dangerously, to the extent where innocent owners of abused property would be held liable. H

Mwayera J

Held, further, that A the rationale behind holding employers vicariously liable for the acts of their employees, even where they have deviated from the strict course of their duty, is that it is right and proper, where one of two innocent parties has suffered a loss arising from the misconduct of a third party, that the loss should fall on the one of two who could most B easily have prevented the happening or recurrence of the mischief. While there need not necessarily be an employer-employee relationship, there has to be a nexus between the wrongdoer's conduct and the owner of the thing. In the eyes of the law, there has to be a relationship analogous or akin to that of employer and employee. Liability is anchored on authorisation and connection of the acts to those authorised. The driver C of the respondent's car was not an employee or agent acting in the scope and course of employment in the furtherance of the respondent's business. To find the owner liable, the owner ought to be shown to have authorised the use and to be capable of controlling the actions of the wrongdoer.

Cases referred to

Anderson v *Hlongwane* [2012] ZAGPJHC 107 D

Biti v *Min of State Security* 1999 (1) ZLR 165 (S)

Boucher v *du Toit* 1978 (3) SA 965 (O)

Cold Chain (Pvt) Ltd v *Makoni* S-9-12

Gascoyne v *Paul & Hunter* 1917 TPD 170

Lourenco v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) E

Messina Associated Carriers v *Kleinhaus* [2001] 3 All SA 285 (SCA)

Min of Law and Order v *Ngobo* 1992 (4) SA 822 (A)

NSSA v *Dobropoulus & Sons (Pvt) Ltd* 2002 (2) ZLR 617 (S)

Rodrigues & Ors v *Alves & Ors* 1978 (4) SA 834 (A)

Supreme Service Station 1969 (Pvt) Ltd v *Fox and Goodridge (Pvt) Ltd* 1971 RLR 1 (A); 1971 (4) SA 90 (RA)F

United Air Charters (Pvt) Ltd v *Jarman* 1994 (2) ZLR 341 (S)

Case information

S M Hashiti, for the appellant

F Chimwa Murombe, for the respondent G

Judgment

Mwayera J: This appeal challenges the court *a quo's* decision of absolution from the instance at the close of the plaintiff's case. The appellant sued the respondent for $9 059, being damages for vicarious liability occasioned by an accident between the appellant and the respondent's vehicle, when it is H alleged one Partson Mugadami caused the accident by driving in a grossly

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negligent manner. The context in which the appellant frames his argument A is as follows:

On 19 May 2013 at about 19:30 hours at the corner of Josiah Tongogara Road and Claxton Road, Harare, an accident occurred between a Land Cruiser Saloon registration ACO 2875 belonging to the appellant and Toyota Spacio registration number ABZ 2561 belonging to the respondent, being driven by B one Partson Mugadami with authorization from the respondent. The appellant argued that the respondent was vicariously liable for the damages occasioned by the negligence of Partson Mugadami. The appellant further argued that the court *a quo* erred when it granted absolution from the instance, for it misinterpreted the law and gave a narrow interpretation of vicarious liability to only cover employer-employee relationships. C

The grounds upon which the appeal is brought as discerned from the record are as follows:

2.1. The magistrate erred and misdirected herself in finding that there was no employer and employee relationship between the first defendant and the second defendant to justify a claim for vicarious liability on the part D of the second defendant.

2.2. The magistrate erred in taking an armchair approach to the issue of vicarious liability, restricting it to the narrow confines of basic master and servant relationship.

2.3. The magistrate erred and misdirected herself in failing to appreciate E that the first defendant was involved in an accident negligently whilst driving the second defendant's motor vehicle without any claim by the second defendant that the first defendant's driving of the motor vehicle was illegal, criminal and unauthorized by herself.

2.4. No criminal report or averment to that effect was ever made in pleadings and under cross-examination of the plaintiff by the second defendant. In F the absence of these averments the only logical inference and implication is that the first defendant was an authorized driver of the second defendant.

2.5. It is trite law that in a motor vehicle driven not by the owner but at the request and on behalf of the owner, the owner is vicariously liable for the delict committed by the authorized driver. G

2.6. This is the principle of an authorized driver who has tacit authority to assume the power and control over the second defendant's vehicle.

2.7. In an authorized driver scenario there is no need for a formal contract of employment, no need for any remuneration to be paid nor any need for any permanency about the arrangement for a relationship giving rise to H

2015 (1) ZLR p849

Mwayera J

vicarious A liability to arise: *Rodrigues* v *Alves* 1978 (4) SA 834 (A) and *Boucher* v *du Toit* 1978 (3) SA 965 (O)

2.8. If a person drives a motor vehicle at the request and on behalf of the owner, under circumstances in which the owner has a right of control over the manner in which the driver drives the vehicle, the owner is B vicariously liable for the delict committed by the driver. A mere sound interest as opposed to a proprietary interest of the owner in the driving of his vehicle should be sufficient to find vicarious liability.

3. Evidence given in the plaintiff's case on the accident and repairs plus the default judgment against the first defendant to the third defendant were sufficient evidence on record to put the second defendant on her C defence and the trial magistrate erred in ignoring all that was on record as well as direct evidence led in court.

4. The second defendant had a duty to rebut the evidence on record that her authorized driver negligently caused an accident and caused damages to the appellant without relying on the master and servant relationship D to find liability.

The appellant prays that:

1. The judgment by the trial magistrate on absolution from the instance be set aside.

2. In its place it be ordered that the respondent has a case to answer on E vicarious liability to the appellant for the negligence of the respondent's authorized driver.

3. The respondent is put to her defence on her liability to the appellant and the matter is to continue into the defence case before the same magistrate.

4. The respondent is to bear the costs of the appeal. F

The central question for determination is whether or not in the circumstances of this case the court *a quo* misdirected itself in granting absolution from the instance at the close of the plaintiff's (now appellant's) case.

The test for absolution from the instance at the close of the plaintiff's case G was lucidly laid down by Beadle CJ in *Supreme Service Station 1969 (Pvt) Ltd* v *Fox and Goodridge (Pvt) Ltd* 1971 RLR 1 (A); 1971 (4) SA 90 (RA) where he quoted with approval the test laid down in *Gascoyne* v *Paul and Hunter* 1917 TPD 170 at 173. The test was formulated

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable H court might find for the plaintiff? …

2015 (1) ZLR p850

Mwayera J

> The question therefore is, at the close of the case for the plaintiff, was there A a prima facie case against the defendant … in other words, was there such evidence before the court upon which a reasonable court *might*, give judgment against [the defendant]."

See also *Lourenco* v *Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) and *United Air Charters (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341 (S). The test applied can be viewed as akin to application for discharge B of an accused at the close of the state case. In the present case the court *a quo* answered the question in the affirmative and ruled that at the close of the plaintiff's case there was no *prima facie* case established hence ordered absolution from the instance.

The reasons for judgment as laid out in the court *a quo* show that the basis for C granting absolution was that at the close of the plaintiff's case no vicarious liability had been established since it was evident that the respondent and Partson Mugadami were not in an employer-employee relationship. Further, the respondent had just left this vehicle parked at a hotel and had not authorized Partson Mugadami to drive her vehicle. It is common cause from the record that there was no relationship between the respondent and the said D Partson Mugadami who drove the vehicle which was involved in an accident with the appellant's vehicle.

The law of vicarious liability has been discussed in many cases within and without this jurisdiction. What sticks out with slight variations is the common fact that the standard test for vicarious liability requires the court E to decide whether the wrong-doer was engaged in the affairs or business of the employer when he committed the delict. Put differently, the consideration is whether or not the wrong-doer was acting in the scope and course of employment. In *Minister of Law and Order* v *Ngobo* 1992 (4) SA 822 (A) at 827A-C Kumleben JA rang warning bells on the wide interpretation of the relationship of employer employee coming into play depending on F circumstances, when he remarked as follows:

> "The critical consideration is therefore whether the wrong-doer was engaged in the affairs or business of his employer (I shall refer to it as the 'standard test' or 'general principle'). It has been consistently recognized and applied though – since it lacks exactitude – with difficulty when the facts are close to the borderline." G

This remark resonates well with situations where an employee deviates completely from the employer's scope and mandate of business thus removing the causal link between the wrong-doer's conduct and the employer to an extent that it would not only be superfluous but fallacious to impute vicarious liability. This would be in situations where the deviation completely dissociates a nexus between the wrong-doer and the business of the employer. H

Mwayera J

The A deviations can be equated to complete severance, like the separation of the umbilical cord of a newly born from its mother for the newborn to lead its own life. In the circumstances of the case before the court *a quo,* the said driver was not the employee of the respondent. He was employed at a hotel which has links with the appellant. The circumstances under which the hotel seconded him to drive the respondent's vehicle which was parked B at the hotel were not blessed or sanctioned by the respondent. The only reason for placing liability on the respondent at the close of the plaintiff's case per record was that she was the owner of the vehicle. This imputation would not only be unjust but illogical, for it would cast the net too wide and dangerously to the extent where innocent owners of abused property C would be held liable. Our law on vicarious liability is clear. The courts have given a wide interpretation of vicarious liability to exist where there is an employer-employee relation and the employee is acting in the course of his employment. Where there is slight deviation in terms of distance and time and the employee was acting within the parameters of the scope of his employment the employer has been held vicariously liable. In D*Cold Chain (Pvt) Ltd* v *Makoni* S-9-12 Sandura JA, in dismissing an appeal against a finding of vicarious liability by this court, stated that the driver who was an employee was involved in an accident whilst on the authorised route. He was to return the vehicle to the company premises at Chitungwiza that evening and there was no deviation in terms of time and space which would remove E the employer from liability.

In the *Cold Chain* case s*upra* the learned judge of appeal referred to *Biti* v *Minister of State Security* 1999 (1) ZLR 165 (S) wherein the driver of a government vehicle which was involved in an accident at a place about 5 km deviation from the routes he would have to drop government officers. F The driver's duty was not only transporting of government officers to their homes but also

keeping the vehicles in safe overnight custody. It was held that although the driver had deviated from his authorised route, the deviating, in terms of time and space was not such as to convert it into "a frolic of his own." The improper mode of exercising his duty of keeping the vehicle safely overnight was *still done within the course of his employment and the*G*ministry which employed him was vicariously liable* (my emphasis).

What is proved from the cases referred to above is the nexus between the wrong-doer and the employer. Once established the wrong-doer was authorised and indeed acting within the scope of his employment or mandate then, despite slight deviations which do not break the nexus, the employer H cannot be shielded from vicarious liability.

2015 (1) ZLR p852

Mwayera J

In deciding whether or not one is vicariously liable the rationale behind A the doctrine of vicarious liability has to be put into perspective. In *NSSA* v *Dobropoulus & Sons (Pvt) Ltd* 2002 (2) ZLR 617 (S) the Supreme Court stated that the rationale behind holding employers vicariously liable for the acts of their employees, even where they have deviated from the *strict course* of their duty, is that it is right and proper, where one of two innocent parties has suffered a loss arising from the misconduct of a third party, that B the loss should fall on the one of two who could most easily have prevented the happening or recurrence of the mischief.

In the circumstances of the present case, it is not in dispute that the respondent is not the employer of the driver, Partson Mugadami who was involved in an accident occasioning damages to the appellant's vehicle. The first rung C of the standard test or principle of relationship of authorisation or employer-employee has not been established. In the case of the respondent it was clear as perceived by the trial court that the driver Partson Mugadami was not an employee or agent acting in the scope and course of employment in the furtherance of the respondent's business. The facts of this case are clearly distinguishable from facts in *Cold Chain (Pvt) Ltd* v *Makoni* and D*Biti* v *Minster of State Security* cited above. In the cases referred to, unlike the case on hand, the wrong-doers, although they deviated from the strict course of their duties, they were employed by employers and were not only charged with driving but safe-keeping of the vehicles. The wrong-doers, the drivers, were authorised and the acts committed were connected with the authorised acts though improperly done. The nexus and close link between the conduct E complained of and the wrong-doer's duty have to be present for vicarious liability to be imputed.

The remarks by Weiner J in *Anderson* v *Hlongwane* [2012] ZAGP JHC 107 are quite appropriate in determining whether or not vicarious liability can be imputed. I subscribe fully to his sentiments when he held "vicarious F liability is not limited to employment relationships." In *Messina Associated Carriers* v *Kleinhaus* [2001] 3 All SA 285 (SCA) at (10) the court noted that:

> "The law will permit the recovery of damages from one person for a delict committed by another where the relationship between them and the interest of the one in conduct of the other is such as to render the situation analogousto that G of an employee acting in the course and scope of his or her employment or ... where 'in the eye of the law' the one was in the position of the other's servant."

What sticks out of interest here is the fact that there has to be a nexus between the wrong-doer's conduct and the owner of the thing. In the "eyes of the law" *there has to be a relationship analogous or akin to that of employer-employee*. The owner ought to be shown to have authorised the use and ought to be H

2015 (1) ZLR p853

Mwayera J

shown A to be capable of controlling the actions of the wrong-doer. In other words it is not only ownership of the object which would establish vicarious liability. There has to be a link established by virtue of a relationship with the wrong-doer. The owner has a right to control his vehicle once he transfers the same to another; in situations where an accident occurs within the course and scope of furtherance of the interest of the owner, then vicarious liability B attaches. Clearly principles of vicarious liability do not include situations where a wrong-doer without the authorisation of the owner, and without any links, embarks on a frolic of his own and causes damages. *Liability is anchored on authorisation and connection of the acts to those authorised.* There has to be a relationship akin to master-servant, where the master is viewed as having control. In the case before the court *a quo* at the close of C the plaintiff's case, the only link was ownership of the

vehicle. By parking her car at the hotel where Partson Mugadami worked, the respondent cannot be viewed as having engaged Partson Mugadami. The evidence before the trial court was clear that Partson Mugadami was unrelated or connected in any manner to the appellant as an employee, and without authorisation D drove and was involved in an accident causing damages. Such a scenario does not reveal a basis for vicarious liability on the part of the respondent. It was against that back drop that the court *a quo* formulated an opinion, upon application, that there was no evidence upon which a court directing its mind might find for the appellant. There was no *prima facie* case established at the close of the plaintiff's case hence the order of absolution from the instance. E The appeal has no merit and must fail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed
2. The appellant shall pay the respondent's costs.

UCHENA J concurred. F

Mushonga, Mutsvairo & Associates, appellant's legal practitioners

Danziger and Partners, respondent's legal practitioners

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S v CHINYAMA & ANOR 2015 (1) ZLR 854 (H)

Citation	2015 (1) ZLR 854 (H)
Case No	Judgment No. HH-530-15
Court	High Court, Harare
Judge	Tagu J
Heard	11 june 2015
Judgment	11 June 2015
Counsel	No Details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – contempt of court* C *– contempt in facie curiae – what must be shown – need for there to be intent to bring administration of justice into contempt – legal practitioner failing to appear – good reason for non-appearance and delay had been communicated to court officials – no contempt shown*

Headnote

Two legal practitioners were appearing on behalf of an accused person in D a bail application being heard by a provincial magistrate in Chinhoyi. Both practitioners resided in Harare. The hearing

was adjourned, and the practitioners undertook to be present at the resumed hearing. However, they did not appear at the appointed time, as they were at the office of the E National Prosecuting Authority to negotiate with that office to consent to bail. The practitioners finally appeared several hours late, having earlier advised the prosecutor of the reason for the delay. The magistrate refused to accept their apologies or the reasons therefor, and summarily convicted them of contempt of court. They were both fined. On review:

Held, that the crime of contempt is only committed if the accused had actual F or legal intention to bring the administration of justice into contempt. The lawyers were trying to obtain the consent of the NPA with the view of curtailing proceedings. Their intention was not to bring the administration of justice into contempt. Nor was it their intention to violate the dignity or authority of the court. What the magistrate either G overlooked or accorded insufficient weight to was the fact that the lawyers had communicated or attempted to communicate with officials of the court their intention not to appear in time. This was a case where the court should have cautioned the accused without a conviction and a fine for contempt of court. The conviction would be set aside. H

2015 (1) ZLR p855

Tagu J

Cases referred to A

S v *Mushonga* 1994 (1) ZLR 296 (S)

Weston v *Courts Administration, Central Criminal Court* [1977] QB 32 (CA); [1976] 2 All ER 875 (CA)

Legislation considered B

Magistrates Court Act [*Chapter 7:10*], s 71(3)

Judgment

Tagu J: This is a review matter from the Provincial Magistrate, Mashonaland West, Chinhoyi who convicted and sentenced two legal practitioners for contempt of court in contravention of s 71(3) of the Magistrates Court Act C [*Chapter 7:10*], which says:

> "If any person wilfully disobeys or neglects to comply with an order of a magistrate issued under the powers conferred upon him by this Act, the magistrate may by warrant signed by him impose on the offender a fine not exceeding level five or commit him to prison for a period not exceeding six months, or both impose such a fine on him and commit him to prison for such a period:"

The facts D of the matter are that on 2 February 2015 the two defence counsel appeared at Chinhoyi magistrates court representing one Themba P Mliswa in a bail application. The matter was remanded to 3 February 2015. The two defence counsel, despite that they reside in Harare, committed themselves to be at court by 8.30 am for the continuation of the bail application. The E following day at 9.00 am both counsels were not present in court. The public prosecutor, Mr Matura, told the presiding magistrate that one of the lawyers, Mr Chinyama, had phoned and indicated that they were in the corridors of the National Prosecuting Authority (NPA) in Harare. The prosecutor applied that the matter be stood down to 11:00 am in the spirit of fair play, and to allow the lawyers to arrive. The lawyers managed to arrive late, at 2.50 pm.

At 14:50 Mr Chinyama F apologised to the magistrate for their failure to appear in court at 8.30 am. This is what he said:

> "We have to apologise for our no show in the morning. After adjourning yesterday, I advised the State counsel that it was prudent to approach the head office first with a view regarding the possible admitting of accused to bail. I thought I G would meet Mr Mutangadura or Mr Dube but I failed. I then phoned the State counsel at midnight. I think he was shocked. One of the law officers advised us to bring the Form 242 at head office today in the morning at 10 am. That was not to be. We eventually saw Mr Dube at 12 pm who then told us that we could get to Chinhoyi since they were sending written confirmations to Mr Matura. We harboured under the mistaken belief that by engaging the other party we will save this court from lengthy submissions. We seriously apologise to the H court for keeping it waiting for all this time."

2015 (1) ZLR p856

Tagu J

The magistrate would not accept the apology. He summarily convicted the A two lawyers for being in contempt of court. His reasons were that whilst the court had no misgivings for the counsels' conduct for wanting to obtain "a consent to bail" by the NPA, at least one of them should have been available for court to commence at 8.30 am, whilst the other pursued a consent to bail. By so doing no time would have been wasted. He dismissed the explanation in the following words: B

> "I will not accept the apology. You are both found guilty of contempt of court for failing to appear at 8.30 am."

The two were each sentenced to pay a fine of $50 or in default five days' imprisonment.

The provincial magistrate who presided over the matter has now referred the C record of proceedings for review to this court with the following comments:

> "May you please lay the above record before the Honourable Judge of the High Court for review with the undersigned's following remarks:
>
> 'On reflection the court feels that it was too harsh with the two lawyers. It is the court's considered view that a caution without a conviction and a fine for contempt would have been justified under the circumstances.' D
>
> I however, will remain guided by the Honourable Judge."

The issue of non-attendance by legal practitioners in court was long ago considered by the Court of Appeal in England. In *Weston* v *Courts Administration of the Central Criminal Court* [1977] QB 32 (CA); [1976] 2 All ER 875 (CA), Lord Denning MR remarked at 881h-j: E

> "I have no doubt that if a solicitor deliberately fails to attend – with intent to hinder or delay the hearing and doing so – he would be guilty of a contempt of court. He would be interfering with the course of justice. But in this case the conduct of the solicitor was not done with intent to hinder or delay the hearing. He took the view that, in fairness to the accused, the case could not be forced on for trial at such short notice before he was ready and that, as it was bound to be F adjourned, he did not propose to attend. That was, I think, a serious discourtesy and even a breach of duty. But it did not affect the trial of the street trader. His trial was, in fact, adjourned; and it was, in fact, heard in the following week at the earliest moment that it could have been."

The same sentiments were expressed by Gubbay CJ in *S* v *Mushonga* 1994 (1) ZLR 296 (S), where it was held that – G

> "Non-appearance by a lawyer in a case may go beyond mere discourtesy and amount to a criminal contempt of court; provided always that the intention, whether actual or constructive, was to interfere with the process of the court and the administration of justice ... In most cases of alleged contempts by legal practitioners the matter should simply be referred to the Law Society for investigation and possible disciplinary action. Only in an exceptional case, such H

Tagu J

> as where the A legal practitioner has used scurrilous language *in facie curiae*, should the court invoke its criminal jurisdiction to deal with the matter."

What the two authorities recognise is that the crime of contempt is only committed if the accused had actual or legal intention to bring the administration of justice into contempt.

In casu, B the issue to be decided is whether or not the two lawyers had intention to violate the dignity or authority of the court by not appearing in court at the stipulated time. The circumstances of this case are that the lawyers were trying to obtain the consent of the NPA with the view of curtailing proceedings. Their intention was not to bring the administration of justice into contempt. Nor was it their intention to violate the dignity or C authority of the court. What the provincial magistrate either overlooked or accorded insufficient weight to is the fact that the lawyers had communicated or attempted to communicate with officials of the court their intention not to appear in time. They had phoned the public prosecutor in advance. This was brought to the attention of the magistrate.

In my view, D as the magistrate later realised, this was a case where the court should have cautioned the accused without a conviction and a fine for contempt of court. The accused's non-appearance at 8.30 am did not manifest an actual or constructive intention to disrespect the court or bring the administration of justice into contempt as contemplated in s 71(3) of the Magistrates Court Act. The case did not even warrant being referred to the E Law Society for investigations.

In terms of the powers vested in me in terms of s 29 of the High Court Act [*Chapter 7:06*], I set aside the conviction and sentence and direct that the accused, if they had paid the fines, to be refunded in full.

In the result, the convictions and sentences are set aside. The provincial F magistrate is directed to recall the accused, advise them of the order and reimburse them the fine paid, if any was paid.

Mawadze J agrees.

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TRUSTEES, LEONARD CHESHIRE HOMES ZIMBABWE CENTRAL TRUST v CHIITE & ORS 2015 (1) ZLR 858 (S)

Citation	2015 (1) ZLR 858 (S)
Case No	Judgment No. S-24-15
Court	Supreme Court, Harare
Judge	Malaba DCJ, Garwe JA & Mavangira AJA
Heard	9 February 2015; *CAV*
Judgment	15 June 2015
Counsel	*T Magwaliba,* for the appellant *T Mpofu,* for the respondents.
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure – *onus of proof – matter previously not in issue* C *– defendant raising issue during trial – onus on defendant*

Practice and procedure – *parties – trust – action brought in name of trust – not necessary for names of trustees to be listed unless defendant so requests* D

Headnote

The trustees of a home for the care and rehabilitation of physically impaired people decided, for financial reasons, that the home should be closed and the respondents, who were inmates at the home, should be moved to other establishments. A few years later, the trustees decided that the home should be sold. They instituted proceedings, in the name of the E Trust, for an order for the eviction of the respondents. It was made clear in the declaration that the action for eviction was being brought in the name of the Trust and the averment to that effect was admitted by the respondents. Their defence was that they had a right to remain because the Trustees who admitted them to the home had assured them that they F could stay as long as was necessary.

They did not challenge the right of the trustees to institute the proceedings and this was not one of the issues referred to trial.

During the trial, it was suggested in cross-examination to one of the trustees that his term of office, and those of three other trustees, had expired and G that their decisions were therefore invalid. The trial judge, despite the objections that this matter had not been put in issue and the validity of the decisions was not open to challenge, held that this was a question of law which could be raised at any time. The evidence showed that, though the terms of some of the trustees had expired, the terms of others had not, and that there had been a sufficient quorum in respect of one H

2015 (1) ZLR p859

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of the A earlier decisions of the trustees. In respect of the later decision, the evidence was inconclusive about whether the terms of office of two trustees had expired. The trial judge found that the terms of office of the trustees who made the earlier decision had not expired, and the decision was valid. However, in respect of the later one, he ruled that the B appellants bore the onus of proving that the decision was valid and that they had not discharged this onus. He ruled that the decision to initiate proceedings to evict the respondents was not valid.

On appeal, the respondents sought to impugn the validity of the proceedings in the court *a quo* on the ground that each trustee was not named as plaintiff in the document commencing proceedings.

Held, that if C the question of the fact of the expiry of the terms of office of the trustees had been properly placed before the court for determination, it had been the respondents who raised the issue of validity of the trustees' decision, so they bore the onus of showing that the trustees' terms of office had expired.

Held, further, that the issue as to whether the trustees' terms of office had D expired was one of fact, not a question of law. It could only be answered by reference to facts established by evidence. The issue of whether a particular trustee had exceeded his term of office at the time a decision was made did not need an explanation of what the law was. Once a question requires a court to consider whether certain facts have been established E in order to answer it, the court is to determine a question of fact.

Held, further, that, in the absence of proof by the defendants to the contrary, the court *a quo* was bound, in light of the admission made in the plea, to accept that the terms of office of the trustees concerned had not expired when the decision to evict the defendants from the premises was made.

Held, further, that, r 8A of the High Court Rules makes it clear that it is not F necessary to list trustees by name when they sue on behalf of a trust. It was clear that the proceedings were instituted by the Trust. The Deed of Trust granted the Trust the power to sue and be sued. It is only where a defendant to a suit, by the trustees on behalf of the trust, has requested from the trust names and addresses of the individual trustees that the G listing of the names of trustees is required.

Judgment of Uchena J in *Trustees, Leonard Cheshire Homes Zimbabwe Central Trust v Chite & Ors* 2010 (1) ZLR 631 (H) reversed.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 7, 8 & 8A H

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Malaba DCJ

Case information

T Magwaliba, for the appellant A

T Mpofu, for the respondents.

Judgment

Malaba DCJ: On the day of the hearing we allowed the appeal with costs and indicated that reasons for the decision were to be availed in due course. These are they. B

This is an appeal against the High Court's decision dismissing a claim for an order of eviction of the respondents by the appellant (hereinafter referred to as the Trust), from the premises commonly known as 85 Baines Avenue, Harare. The facts of the matter are as follows.

The Leonard Cheshire Homes Zimbabwe Central Trust was established C on 3April 1981, by a Deed of Trust for the purposes of raising funds and to provide means for the care and rehabilitation of permanently physically impaired people. The affairs of the Trust are administered by six Trustees who are appointed in terms of clause 5 of the Trust Deed for a period of 5 years. In pursuance of the objectives of the Trust, the Trustees established a number of homes within Harare, one of which is the Masterson Home which is located at No. 85 Baines Avenue, Harare. D

The policy of the Trustees has been to admit into the Masterson Home a specific number of inmates at a given time, rehabilitate them and release them for integration into the community. Many permanently physically impaired persons have been rehabilitated by the Trust and have found settlement in the public thereafter without any problem. E

At a meeting held on 12 March 1998 the Trustees decided that consideration be given to having the Masterson Home ("the Home") closed because it had become difficult to run the institution on the stringent budget available. On 30 November 1999 a firm decision was taken by the Trustees that the Home be closed. The proposal was that the property would be sold and part of the F proceeds used to help the respondents (hereinafter referred to as Beneficiaries) to start their own income generating projects in the communities into which they would be integrated. It was also decided that those who were not ready for integration would be transferred to a home in Kambuzuma, Harare.

Pursuant to the decision of the Trustees to sell the home, an assessment of G the inmates was carried out in order to determine the needs that were peculiar to each of them. The purpose of the assessment of each beneficiary's needs was to ensure that the programme envisaged did not adversely prejudice the beneficiaries. The assessment exercise was undertaken by a consultancy firm which was mandated to look at the feasibility of the anticipated programme and make recommendations. At all material times the beneficiaries were H

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advised of the A fact that there would be a need to vacate the premises to pave way for the sale of the home. It was made clear to the beneficiaries that they were not going to be thrown into the streets, but that each individual's needs would be assessed and a program of rehabilitation or integration suitable to him or her put in place. They were also advised that part of the proceeds from the sale of the property would be used to finance integration projects in B the communities in which they were to be resettled. The beneficiaries were asked to indicate the types of projects they wanted to undertake.

The beneficiaries accepted the proposals and undertook to move out of the premises sometime in the year 2005. They later reneged from their undertaking and refused to vacate the building arguing that the Trustees who admitted C them into the home had promised to let them occupy the premises for as long as they wanted. They started denying entry into the home to members of staff. They also let out part of the premises to medical practitioners who converted them into surgeries. Some of the rooms were let out to members of the public who used them as phone shops, tuck shops and living rooms.

The beneficiaries D collected monthly rentals from the occupants of the rooms they let out illegally. The home was turned into a commercial centre. The beneficiaries did all these things without lawful authority from the Trustees. The actions were against the spirit of the Trust. The premises were not maintained causing deterioration in the state of repair of the building and the general health conditions.

On E 26July 2004, a decision was taken by the Trustees to sell the Home. On 2 August 2004 the Trustees instituted proceedings, in the name of the Trust, for an order of eviction against the beneficiaries. The beneficiaries opposed the action. The Trustees made it clear in the declaration that the action for eviction was being brought on behalf of the Trust. The averment is contained F in para. 13 of the declaration which reads as follows:

"13. *All* the defendants are beneficiaries of the Leonard Cheshire Homes Zimbabwe Central Trust, a trust duly registered, *whose trustees are the Plaintiffs. The Defendants all occupy the apartments at the property referred to in paragraph 11 (above) in their capacity as beneficiaries of the trust*" (my emphasis).

In their G plea, the beneficiaries admitted the averment made by the Trustees that the eviction proceedings were instituted in the name of the Trust by the Trustees who had authority to do so. In para. 1 of the plea which addressed the averments in paras. 1– 13 of the declaration, the beneficiaries stated as follows:

"1. Ad Para 1 – 13

H This is admitted."

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Malaba DCJ

The substance of the defence by the beneficiaries to the claim by the Trustees A was that they had a right to continued occupation of the premises. They alleged that the Trustees who admitted them to the home had assured them that they would stay at the institution for as long as it was necessary. Their defence did not challenge the right of the Trustees to institute proceedings for their eviction from the premises. The *locus standi* of the Trustees in the proceedings was not an issue between the parties. The issues that were B referred to trial were:

i. Whether the plaintiff has failed to provide the defendants with the assistance and support set out in paragraph 3 (i) (a) of the Trust Deed;

ii. Whether the defendants are entitled to remain in occupation of the property; C

iii. If the answer to (ii) is No, whether the plaintiff is entitled to an order evicting the defendants from the property?

At the hearing the plaintiff called one B Chikwanha as a witness. When he was being cross examined by Mr *Mehta* for the defendants, it was put to him that his term of office and terms of office of Mr Gomwe, Mr Mills and D Mr Hungwe had expired at the time the decisions to evict the defendants and sell the Home were made. Mr *Mehta s*uggested that the decisions were invalid. Mr *Magwaliba* who represented the Trustees objected to the line of cross examination on the ground that it raised a question of fact of the expiry of the terms of office of the Trustees. Mr *Magwaliba* argued that the matter of expiry of the terms of office of the Trustees had not been put in E issue in the pleadings. He indicated that in light of the admission made by the defendants that those who instituted the proceedings were Trustees of the plaintiff it was not open to Mr *Mehta* to challenge the validity of the decisions made by the Trustees on the allegation that their terms of office had expired at the time the decisions were made. F

The learned judge took the view that the question of the expiry of the tenures of office of the Trustees had a bearing on the validity of the decisions that were made in respect of the closure of the home on 30 November 1999 and 26 July 2004. He ruled that the issue was a question of law which the defendants could raise at any time during the proceedings and as a result G overruled the objection by Mr Magwaliba. Mr *Mehta* was allowed to cross examine Mr Chikwanha on the alleged expiry of the terms of office of the Trustees who made the respective decisions. The evidence showed that although the terms of office of some of the Trustees who made the decision of 30 November 1999 had expired, the number of Trustees whose terms of office had not expired formed a quorum in terms of clause 5 of the Deed H

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of Trust. A In respect of the decision made on the 26 July 2004 the evidence was not conclusive as to whether the terms of office of Mr Mills and Mr Muzondo had expired. The fact that the evidence was inconclusive did not justify a finding that the terms of office of the Trustees had expired.

As to the other Trustees the evidence suggested that their terms of office had B not expired. Mr Choto was appointed in 2004. The evidence suggested that Mr Muzondo could have been appointed on 9 February 2004. There was no evidence to suggest that he had already been appointed Trustee prior to that date. The evidence also suggested that Mr Mills would not have been a Trustee before 30 of November 1999. That meant he could not have been appointed before that date. The terms of

office of Mills, Muzondo and Choto C were current on 26 July 2004, when the decision to evict the beneficiaries was made.

When the learned judge made the decision on the expiry of the terms of office of the Trustees, he had considered the matter to be a question of law. He however found as a matter of fact that the terms of office of the Trustees, D who made the decision of 30November 1999, had not expired. On the basis of that evidence the learned judge found that the decision of 30 November 2004 was valid. The learned judge also held that there was inconclusive evidence on the question of expiry of the terms of office of Mr Mills and Muzondo.

The learned judge held that the plaintiff bore the onus of proving that the E decision taken on the 26 July 2004 was valid. As a result he held that the plaintiff had not discharged the evidential burden of establishing the facts on which the question of invalidity of the decision could be made. The learned judge misplaced the evidential onus on the plaintiff because he misunderstood the content of the matter in issue. The question to be decided was whether the decision was invalid. It was the defendants who raised the question of the F invalidity of the decision of 26 July 2004. They bore the burden of producing evidence to prove the facts of the expired terms of office of the Trustees on which the question of invalidity of the decision could be determined.

The learned judge determined that the decision made by the Trustees on 26 July 2004 to evict the beneficiaries was invalid. The plaintiff's case was G dismissed with costs. Aggrieved by the decision of the court *a quo,* the appellants noted the appeal on the following grounds:

1. That the court *a quo* misdirected itself in finding that the issue whether the appellants had exceeded their five year terms in terms of Clause 5 (c) of the Deed of Trust was a question of law as opposed to an issue of H fact.

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2. The court *a quo* further fundamentally misdirected itself in allowing the A respondents to raise the new issue which was not pleaded in their pleadings with the first witness for the Appellant. The court *a quo* therefore erred in overruling the appellant's objection to the respondents' raising of a new defence at the trial.
3. The court *a quo* further misdirected itself in finding that the appellant B had the onus to prove that the Trustees had not exceeded their five year terms and were therefore entitled to make a resolution for the ejectment of the respondents thereby making the appellant liable to prove the respondents' new defence.
4. The court *a quo* further erred in making findings of fact on the question of whether the Trustees had exceeded the five year term limit in terms C of the Deed of Trust based on incomplete and inconclusive evidence led by the parties thereby contradicting an earlier finding that the issue was a point of law.
5. The court *a quo* further misdirected itself in failing to find that the respondents had abandoned and not proved their pleaded defence, that is D that upon being accepted as beneficiaries to the trust, they were promised to live at the premises in issue, No. 85 Baines Avenue, Harare for life or for as long as they wished.
6. In the event therefore, the court a quo erred in dismissing the appellants claim.

On the question whether or not the court *a quo* correctly decided that the E issue of the expiry of the terms of office of the Trustees was a question of law, the court holds that the decision was wrong. The question was a question of fact which could only be answered by reference to facts established by evidence. The court *a quo* would have had to ask itself the question whether or not sufficient evidence had been placed before it to prove on a balance F of probabilities the facts on which it would make a finding that the terms of office of the Trustees had expired. The court would not have gone into the question of evidence on the expiry of the terms of the Trustees to answer a question of law. The law on the matter was clear in that a Trustee could only serve a term of 5 years. The issue of whether a particular Trustee had exceeded his term of office at the time a decision was made did not need an G explanation of what the law was. Once a question requires a court to consider whether certain facts have been established in order to answer it, the court is to determine a question of fact.

The court *a quo* appears to have appreciated the position when it determined the question whether the decision of 30 November 1999 was valid or not. To H

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arrive at that A decision it analysed the evidence led on the terms of office of the Trustees concerned and concluded that, the fact of the expiry of the terms of office of the Trustees who constituted a quorum had not been proved. That was a contradictory position taken by the court if the question whether the terms of office of the Trustees had expired was a question of law. The same goes for the question whether the decision to sell the home taken on 26 July 2004 B was valid. The court *a quo* found itself having to go into the evidence of the fact of the expiry of the terms of office of the Trustees. It came to the conclusion that there was no sufficient evidence to prove whether or not the terms of office of Mr Mills and Mr Muzondo had expired.

The court erroneously placed the evidential burden on the plaintiff when it C was the defendants who had raised the issue of the expiry of tenure of office of the Trustees. If the question of the fact of the expiry of the terms of office of the Trustees had been properly placed before the court for determination, the onus would have been on the defendants who made the allegations.

The finding by the court *a quo* on the inconclusiveness of the evidence on the D expiry or otherwise of the terms of office of Mr Mills and Mr Muzondo, was wrong. The evidence showed that when the decision to evict the respondents was made, Mr Muzondo had served three years as a trustee. Under cross examination, Mr Chikwanha explained that Mr Muzondo was appointed in February 2004. To say the evidence was inconclusive when there was no evidence to contradict what Mr Chikwanha said was a misdirection. The E evidence showed that Mr Mills could not have been in office before 30 November 1999. In the absence of proof by the defendants to the contrary, the court *a quo* was bound, in light of the admission made in the plea, to accept that the terms of office of the Trustees concerned had not expired when the decision to evict the defendants from the premises was made on F 26 July 2004.

Mr *Mpofu* sought to impugn the validity of the proceedings in the court *a quo* on the ground that each Trustee was not named as plaintiff in the document commencing proceedings.

On the issue of the failure to cite, as plaintiff, each trustee by name in the document commencing the proceedings, Mr *Magwaliba* made reference to G the High Court Rules 1971. The effect of r 8A is that it is not necessary to list trustees by name when they sue on behalf of a trust. It is clear that the proceedings were instituted by the Trust. The Deed of Trust grants the Trust the power to sue and be sued. The respondents had challenged the *locus standi* of the Trustees to sue on behalf of the Trust.

The relevant rules provide as follows: H

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> "ORDER 2A A
>
> PROCEEDINGS BY OR AGAINST ASSOCIATIONS, ETC
>
> 7. Interpretation in Order 2A
>
> In this Order –
>
> "associate", in relation to–
>
> (a) a trust, means a trustee; B
>
> (b) an association other than a trust, means a member of the association;
>
> "association" includes –
>
> (a) a trust; and
>
> (b) a partnership, a syndicate, a club or any other association of persons which is not a body corporate.
>
> 8. Proceedings by or against associations C
>
> Subject to this Order, associates may sue and be sued in the name of their association.
>
> 8A. Naming of associates
>
> (1) In any proceedings to which an association is a party, any other party may, by written notice to the association, require a statement of the names and places D of residence of the persons who were the association's associates at the time the cause of action accrued.
>
> (2) A person who receives a notice in terms of subrule (1) shall, within five days after receiving it –

(a) furnish the party concerned with a written statement containing the required information; and E

(b) file a copy of the written statement with the registrar;

and the proceedings shall continue in the same manner, and the same consequences shall follow, as if the associates had been named in the summons or notice commencing the proceedings:

Provided that the proceedings shall continue in the name of the association except F where a writ of civil imprisonment is sought against an associate, in which event the associate shall be specifically named in the civil imprisonment proceedings."

A proper reading of the provisions of r 8A of the High Court Rules establishes that it is not a requirement for the names of Trustees to be listed when they bring an action on behalf of the Trust. The only place where the issue of the listing of the names of trustees when an action has been instituted on G behalf of the trust is where a defendant to a suit by the trustees on behalf of the trust, has requested from the trust names and addresses of the individual trustees. This would be in line with r 8A (1) of the High Court Rules, 1971.

It was for these reasons that the court found that the decision of the court *a quo* could not stand and accordingly allowed the appeal with costs. H

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GARWE JA and MAVANGIRA AJA concurred. A

Magwaliba and Kwirira, appellants' legal practitioners

Lawman Chimuriwo Attorneys At Law, respondent's legal practitioners

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S v CHAGOMOKA 2015 (1) ZLR 868 (H)

Citation	2015 (1) ZLR 868 (H)
Case No	Judgment No. HH-584-15
Court	High Court, Harare
Judge	Matanda-Moyo J
Heard	16 June 2015
Judgment	16 June 2015
Counsel	No details supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *statutory offences – failure to pay* C *maintenance in terms of maintenance order (s 23(1) of Maintenance Act [Chapter 5:09]) – purpose of maintenance order – need to impose sentence that will ensure maintenance is paid – imprisonment should be reserved for serious defaulters*

Family law – *child – maintenance order in favour of – failure to pay –* D *appropriate penalty*

Headnote

It has never been the intention of the legislature to have defaulters of maintenance serve effective prison terms until the defaulter becomes a habitual offender. Such sentences should only be imposed on very E serious wilful defaults. Once a person serves an effective prison term, his or her job is most likely to be lost. Once the job is lost, it means the children would not be looked after. The provisions of the Maintenance Act [*Chapter 5:09*] ought to be used to ensure that the rights and best interests of children, as enshrined in s 81 of the Constitution, are upheld, by holding parents to their duty to maintain their children. The judiciary F must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. It is a function of the State not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important G mechanisms to give effect to the rights of children protected by the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weakness of the system.

Magistrates must strive to use other sentencing options that ensure the best interests of the children are catered for. Criminalisation of failure to H

2015 (1) ZLR p869

Matanda-Moyo J

pay maintenance A is a way of ensuring that parents take the issue of maintenance seriously. However, magistrates must familiarise themselves with alternative sentencing principles, that ensure the interests of the children are not compromised. A prison term should be reserved for serious defaulters. Magistrates should make use of payment of fines, periodical imprisonment, writs of execution and suspended sentences.

Editor's note: on this topic, see also *S* v *Chikwata* HH-455-15 (*ante*, at p 688 of this volume). B

Cases referred to

Bannatyne v *Bannatyne (Commission for Gender Equality, as* amicus curiae*)* 2003 (2) SA 363 (CC)C

S v *Chipere* HH-314-83

S v *Msakasa* HH-302-83

S v *Musakiwa* HH-239-83

S v *Visser* [2004] 1 All SA 605 (SCA); 2004 (1) SACR 393 (SCA)

Legislation referred to D

Constitution of Zimbabwe 2013, s 81

Maintenance Act [*Chapter 5:09*], s 23

Judgment

Matanda-Moyo J: E This matter was forwarded to me for review. The accused was charged with failure to pay maintenance in violation of s 23 of the Maintenance Act [*Chapter 5:09*]. The accused was in maintenance arrears of $240. The conviction was proper. The magistrate sentenced the accused to three months' imprisonment and in addition he was sentenced to a further three months wholly suspended on condition that the accused F paid his maintenance arrears. The regional magistrate queried the sentence by the magistrate. The regional magistrate felt that the trial court sentenced the accused to two prison terms for the same offence and that it is improper to do so.

The brief facts are that the accused was ordered by the Harare magistrates civil court on 17 April 2013 to pay $80 a month maintenance for his two G children beginning 30 April 2013. The accused failed to comply with such order, resulting in him having arrears to the tune of $240 by October 2014. He was arraigned before the courts for the non-payment of maintenance.

Whilst the conviction is proper, the magistrate erred in sentencing the accused person twice for the same offence. Such a sentence has been held H to be incompetent in a plethora of cases. See *S* v *Chipere* HH-314-83, *S* v

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2015 (1) ZLR p870

Matanda-Moyo J

Msakasa HH-302-83 and *S* v *Musakiwa* HH-239-83. Looking at the sentence A of an effective prison term, it has never been the intention of the legislature to have defaulters of maintenance serve effective prison terms until one becomes a habitual offender. Such sentences should be imposed on very serious wilful defaults. It is obvious that once a person serves a three months effective prison term, his or her job is most likely to be lost. Once the job is lost, it means the children would not be looked after. B

In any case the magistrate herein imposed an effective prison term without conducting a proper enquiry into accused's financial circumstances. The provisions of the Maintenance Act ought to be used to ensure that the rights and best interests of children are upheld as enshrined in s 81 of the Constitution, by holding parents to their duty to maintain their children. C Mokgoro J in *Bannatyne* v *Bannatyne (Commission for Gender Equality, as* amicus curiae*)* 2003 (2) SA 363 (CC) said:

> "[27] Systemic failures to enforce maintenance orders have a negative impact on the rule of law. The courts are there to ensure that the rights of all are protected. The judiciary must endeavour to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. If court D orders are habitually evaded and defied with relative impunity the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised by those most dependent on the law.
>
> [28] It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms E to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weakness of the system."

In *S* v *Visser* [2004] 1 All SA 605 (SCA); 2004 (1) SACR 393 (SCA) at 399E-F van Heerden AJA (as she then was) said:

> "Effective enforcement of maintenance payments is necessary, not only to secure F the wishes of children but also to uphold the dignity of women and promote the constitutional ideals of achieving substantive gender equality. It is therefore important that courts regard deliberate failures to comply with maintenance orders as serious offences and punish such failures accordingly."

Before sentencing a defaulter to an effective jail term the magistrate must first make a finding that the default is deliberate. G

The magistrates must thrive to use other sentencing options that ensure the best interests of the children are catered for. Criminalisation of failure to pay maintenance was a way of ensuring that parents take the issue of maintenance seriously. However, the magistrates must familiarise themselves with alternative sentencing principles that ensure the interests of the children H

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are not compromised. A A prison term should be reserved for serious defaulters. Magistrates should make use of payment of fines, periodical imprisonment, writs of execution and suspended sentences.

In the matter *in casu,* it is obvious the sentence by the magistrate is incompetent in so far as she pronounced two sentences for one offence.

In sentencing B the accused, the magistrate fell into error in bringing an already fulfilled suspended sentence into operation. Such sentence was discharged upon payment of arrear maintenance.

Considering that the accused did not fail to pay anything towards maintenance but partially complied with the order, I am of the view that another suspended sentence would have met the justice of this case.

Accordingly C the sentence is set aside and substituted with the following:

"3 months' imprisonment wholly suspended on condition accused pays the full arrears of $240 on or before 30 June 2015 through the Clerk of Court Harare."

Musakwa J agrees.

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MANJORO v MINISTER OF HOME AFFAIRS & ORS 2015 (1) ZLR 872 (H)

Citation	2015 (1) ZLR 872 (H)
Case No	Judgment No. HH-536-15
Court	High Court, Harare
Judge	Muremba J
Heard	28 May 2015; *CAV*
Judgment	17 June 2015
Counsel	*N P Timba*, for the plaintiff *C Garise-Nheta*, for first & second defendants
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Delict – *actio injuriarum – wrongful arrest and imprisonment and malicious* C *prosecution arising therefrom – when cause of action arises – no action lying until criminal proceedings terminated in favour of plaintiff*

Police – *action against – prescription – cause of action founded in delict – prescription period provided by Police Act [Chapter 11:10] applicable* D

Practice and procedure – *parties – police – action against – prescription period applicable*

Prescription – *extinctive – action against police – action must be brought within period prescribed by Police Act [Chapter 11:10] – normal period provided by s 15 of the Prescription Act [Chapter 8:11] not applicable* E – *cause of action – when arises – arises when every act material to prove plaintiff's case has occurred*

Headnote

The plaintiff issued summons against the defendants for damages for unlawful arrest, assault, past and future medical expenses, pain and suffering, F humiliation, loss of income and malicious prosecution. She alleged that she had been wrongfully arrested on 30 May 2011 in connection with the murder of a police officer, held in custody and while there assaulted. She was, after seven months in detention, granted bail but still was prosecuted. Some 28 months after her arrest, on 19 September 2013, she was acquitted of the charges at the close of the State case. On G 7 January 2014 the defendants were advised of her intention to sue and summons were issued on 12 June 2014.

The defendants filed a special plea, to the effect that in terms of s 70 of the Police Act [*Chapter 11:10*] the claim had prescribed when she issued out summons. It should have been instituted within eight months of the cause of action arising. They also averred that the cause of action H

arose at A the time of her arrest; the plaintiff's response was that her cause of action commenced on the day that she was arrested and continued right up to the day that she was acquitted. Her acquittal pointed to the wrongfulness of the arrest and the malicious nature of the proceedings instituted against her. Her cause of action was a continuous process from the day of arrest right through detention, and finally prosecution. She B became aware of the full particulars of her claim against the defendants when she was acquitted of the charges against her. She also argued that her claim was founded in delict and not on the Police Act, so the ordinary prescription period would apply.

Held, that while the plaintiff's claim was founded in delict, the cause of action was derived from the actions of the police who are governed by C the Police Act, the legislative instrument governing the establishment of the organisation and control of the Police Force. If police officers do any act or omit to do any act during the course of their duties, civil proceedings can be instituted against the organisation, and s 70 of the Act governs the prescription period for bringing civil suits against the D organisation. The prescription period of three years provided by s 15 of the Prescription Act [*Chapter 8:11*] applies except where any other enactment provides otherwise.

Held, further, that a cause of action is the combination of facts that are material for the plaintiff in order to succeed in his claim and includes E every act which is material to be proved to entitle a plaintiff to succeed in his claim. In the present case an entire set of facts which would enable the plaintiff to prove her claim constituted facts about her arrest, her detention both in police and prison custody, her prosecution and her acquittal. The proceedings from arrest to acquittal were continuous. In an action based on malicious prosecution, no action will lie until the F criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudiced by the civil action. The action therefore only arises after G the criminal proceedings against the plaintiff have terminated in his favour or where the Prosecutor-General has declined to prosecute. The same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened here. The proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise H until the prosecution has been determined by his discharge. The cause of

Muremba J

action here arose on the date the plaintiff was acquitted, and proceedings A were instituted within eight months of that date.

Cases referred to

Dube v *Banana* 1998 (2) ZLR 92 (H)

Masenga v *Min of Home Affairs* 1998 (2) ZLR 183 (H) B

Mukahlera v *Clerk of Parliament & Ors* 2005 (2) ZLR 365 (S)

Stambolie v *Commr of Police* 1989 (3) ZLR 287 (S)

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

Legislation considered C

Police Act [*Chapter 11:10*], s 70

Prescription Act [*Chapter 8:11*], s 15

Case information

N P Timba, for the plaintiff

C Garise-Nheta, for first & second defendants D

Judgment

Muremba J: On 12 June 2014 the plaintiff issued summons against the defendants for payment of damages for unlawful arrest, assault, past and future medical expenses, pain and suffering, humiliation, loss of income and malicious prosecution.

In her declaration the plaintiff stated that on 30 May 2011 she was wrongfully arrested by the functionaries of the first and second defendants for the murder E of a police officer which happened at Glen View 3 Shopping Centre, Harare. What caused her to be arrested was her motor vehicle, a Mazda Demio registration number ACA 5099 which had been spotted at the murder scene.

The plaintiff stated that despite giving an *alibi* that she was attending church at the time the murder was committed and stating that it was her boyfriend, F one Darlington Madzanga who was in possession of her car at the material time, the police went ahead and arrested her. The plaintiff stated that following her arrest she was unlawfully detained in police custody. She alleged that while in police custody the police severely assaulted her, resulting in her sustaining severe injuries causing her to seek medical treatment. She said G that when she was taken to court the third respondent's representatives declined to consent to bail in spite of compelling circumstances. She said that she was only granted bail after seven months in prison detention. She said that the third respondent went ahead and prosecuted her. However, she was acquitted of the charges at the close of the state case on 19 September 2013. She stated that her arrest, detention and prosecution were unlawful H

and A malicious. She said that while in detention she lost income in the form of salaries and benefits.

In pleading to the plaintiff's claim, the first and second defendants filed a special plea to the effect that in terms of s 70 of the Police Act [*Chapter 11:10*] the claim had prescribed when she issued out summons. The provision reads:

> "…any civil B proceedings instituted against the State or member in respect of anything done or omitted to be done under this Act shall be commenced *within eight months after the cause of action has arisen*" (my emphasis).

The first and second respondents stated that they received the plaintiff's notice of intention to sue on 7 January 2014, but it was dated 30 November 2014. The first and second respondents aver that the plaintiff instituted C proceedings 29 months after being arrested. They argued that the plaintiff's cause of action arose between 30 May 2011 when she was arrested and 3 June 2011 when she was taken to court for initial remand. Consequently her claim is out of time.

In opposing the special plea the plaintiff stated that her cause of action arose not on 30 May 2011 which was the day of her arrest, but on 19 September 2013 D which was the day of her acquittal. The plaintiff averred that her cause of action commenced on the day that she was arrested and continued right up to the day that she was acquitted. She stated that her acquittal points to the wrongfulness of the arrest and the malicious nature of the proceedings instituted against her. She argued that her cause of action was a continuous E process from the day of arrest right through detention, and finally prosecution. She averred that she became aware of the full particulars of her claim against the defendants when she was acquitted of the charges against her.

In the heads of argument the plaintiff's counsel raised another defence to the special plea. The defence was to the effect that s 70 of the Police Act is F not applicable in this case because the plaintiff's claim is founded in delict not under the Police Act. It is true that the plaintiff's claim is founded in delict, but the cause of action is derived from the actions of the police who are governed by the Police Act. In her declaration the plaintiff even stated that the first defendant is being sued as the public official with the overall supervision of the Zimbabwe Republic Police in terms of the Constitution G of Zimbabwe. The Police Act is the legislative instrument governing the establishment of the organisation and control of the Police Force. So police officers in carrying out their duties are controlled by this Act. It therefore follows that if they do any act or omit to do any act during the course of their duties, civil proceedings can be instituted against the organisation. Section 70 is the provision that governs the prescription period for bringing H of civil suits against the organisation. Since the prescription period is provided for

Muremba J

under this Act I hold the view that the Prescription Act [*Chapter 8:11*] is not A applicable. Section 15 of the Prescription Act even states that:

> "The period of prescription of a debt shall be –
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> …
>
> (d) except where any enactment provides otherwise, three years, in the case of any other debt."

What this means is that if there is a different enactment which provides for a B prescription period in respect to a particular organisation as is in the present case, the prescription period provided for in that enactment is the one that is applicable, not the prescription period provided for under the Prescription Act.

In *Masenga* v *Minister of Home Affairs* 1998 (2) ZLR 183 (H) the plaintiff issued summons claiming damages arising out of a shooting incident involving C the Zimbabwe Republic Police Riot Squad. The plaintiff was wounded in his arm. It was held that civil proceedings against the State or a police officer, should, in terms of s 70 of the Police Act, be commenced within 8 months after the cause of action has arisen. See also *Stambolie* v *Commissioner of Police* 1989 (3) ZLR 287 (S).

In view of the foregoing I will dismiss the plaintiff's averment that the D prescription period in this case is in terms of the Prescription Act.

I will now deal with the other defence that the plaintiff raised. This defence is to the effect that the cause of action arose on 19 September 2013 which is the date of her acquittal, not 30 May 2011 which was the date of her arrest. I am persuaded by the plaintiff's argument. As correctly argued by the plaintiff, E the question that the court ought to answer is, when did the cause of action for unlawful arrest and malicious prosecution arise?

To answer this question I will start by determining what is meant by "a cause of action". In *Dube* v *Banana* 1998 (2) ZLR 92 (H) at 95G Smith J said:

> "The cause of action means the combination of facts that are material for the F plaintiff in order to succeed in his action."

In *Mukahlera* v *Clerk of Parliament and Ors* 2005 (2) ZLR 365 (S) at 368H the phrase was defined as "the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim."

So in the present case an entire set of facts which will enable the plaintiff G to prove her claim constitutes facts about her arrest, her detention both in police and prison custody, her prosecution and her acquittal. The proceedings from arrest to acquittal are continuous.

In *Thompson & Anor* v *Minister of Police & Anor* 1971(1) SA 371 (E) at 375A-C it was said: H

Muremba J

> "In an A action based on malicious prosecution it has been held that no action will lie until the criminal proceedings have terminated in favour of the plaintiff. This is so because one of the essential requisites of the action is proof of a want of reasonable and probable cause on the part of the defendant, and while a prosecution is actually pending its result cannot be allowed to be prejudiced by the civil action (*Lemve* v *Zwartbooi, supra* at p 407*)*. The action therefore only arises after the criminal proceedings against the plaintiff have terminated B in his favour or where the Attorney-General has declined to prosecute. *To my mind the same principles must apply to an action based on malicious arrest and detention where a prosecution ensues on such arrest, as happened in the present case. The proceedings from arrest to acquittal must be regarded as continuous, and no action for personal injury done to the accused person will arise until the prosecution has been determined by his discharge. (Bacon* v *Nettleton* 1996 TH C 138 at 142-3)" (my emphasis).

In *Stambolie* v *Commissioner of Police supra*, Gubbay JA (as he then was) citing with approval *Thompson* v *Minister of Police supra* said that,

> "Whereas in the case of false arrest and imprisonment, the cause of action arises on the day the arrest is effected, in the case of malicious arrest and detention the cause of action arises only when the criminal proceedings have been terminated D in favour of the plaintiff" (headnote at p 289G**).**

The above cited authorities make it abundantly clear that the cause of action for unlawful arrest and malicious detention arise when criminal proceedings have been finalised and they should have been finalised in the plaintiff's favour. *In casu* the criminal proceedings were finalised on 19 September

2013 E which is the day the plaintiff was acquitted. 19 September 2013 is therefore the date the plaintiff's cause of action arose. As such the plaintiff instituted legal proceedings against the defendants within eight months as is required by s 70 of the Police Act.

In the result, the special plea by the first and second defendants is dismissed with costs.

Kantor & Immerman, plaintiff's legal practitioners F

Civil Division of the Attorney General's Office, first and second defendants' legal practitioners

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MADZARA v STANBIC BANK ZIMBABWE LTD & ORS 2015 (1) ZLR 878 (H)

Citation	2015 (1) ZLR 878 (H)
Case No	Judgment No. HH-546-15
Court	High Court, Harare
Judge	Tsanga J
Heard	25 March 2015; *CAV*
Judgment	17 June 2015
Counsel	*L T Biti,* for applicant *T Mpofu,* for the first respondent No appearance by the second to fifth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – rights of women and* C *effect of customs and tradition – failure by woman to act in support of rights claimed – not necessarily indicative of culture and tradition preventing her from doing so – may be woman's own choice*

Family law – *husband and wife – property rights – rights in respect of* D *matrimonial home – whether existing laws unconstitutional and not giving sufficient protection to woman – need for legislative intervention*

Practice and procedure – *declaratory order – purpose of – matters which may be subject of such orders*

Practice and procedure – *judgment – setting aside of – limited grounds on* E *which judgment may be set aside by court of parallel jurisdiction – not permissible to review earlier judgment under guise of declaratory order*

Headnote

The applicant sought a declaratur. The subject matter of the application was the matrimonial home. She and her husband, the second respondent, had F married under customary law in 1997; the marriage was converted to a registered civil marriage in 2002. The matrimonial home was acquired in 2000. As the applicant and her husband did not have a registered marriage at the

time, a mortgage bond was taken out by her husband and the property registered in his name. She claimed to have paid the deposit on the loan and to have serviced the loan, enabling the development G of the house. She said that she was an educated professional woman who ran her own organisation and did consultancy work for numerous institutions.

In 2014 she discovered that a writ of execution and bond of indemnity had been issued by the first respondent against her husband, in respect of a loan granted by the bank to her husband. In her application, she sought H

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an A order seeking the setting aside of the writ of execution and that the mortgage bond be declared a nullity.

It was asserted that she was guaranteed constitutional rights to the property by virtue of s 26 of the Constitution of Zimbabwe which provides that "the State must take appropriate measures to ensure that there is equality B of rights and obligations during marriage and its dissolution". She also relied on s 56(1) which guarantees equality before the law; s 56(2) on equal treatment, including equal opportunities in the economic, cultural, and social sphere; and s 80, which provides that "all customs and traditions which infringe on the rights of women conferred by the constitution are void to the extent of that infringement". It was argued C that the common law should be developed in favour of the property rights of spouses who do not hold title by casting real rights in relation to matrimonial property against these constitutional rights.

The Bank opposed the application. Firstly, it argued that there was no evidence to support the applicant's claim to have paid for the property and thus to be the real owner; secondly, that she was estopped from making the D claim, as she did nothing more for than a decade to assert her claims; thirdly, that s 14 of the Deeds Registries Act [*Chapter 20:05*], which conveys real rights, was not about women, but for the protection of everyone's interests; and, fourthly, that there was an extant judgment of the High Court which authorised disposal of the property and which could be set aside by a court of parallel jurisdiction except on limited E grounds which did not apply here.

In reply, it was argued for the applicant that anything that treated the property as belonging exclusively to the husband was not binding. The declaration sought would not release the husband's indebtedness to the bank or have consequences on what to do with the immovable property as the issue F was about declaring ownership and rights. The rights that were sought to be spelt out were those of a spouse in relation to a home that is registered in the name of the other spouse only and that the declaration sought to inform the bank in particular of the rights and interests of such spouse.

Held, that the purpose of a declaration is to define rights of the parties. Issues G such as title to property are generally the subject matter of declarations, as is a wide range of other issues that hinge on the construction of instruments such as wills, leases and policies. Generally, where a declaration is sought, the facts will not be contentious. Where rights are spelt out, the expectation is that the other party will obey. Only if the other party fails to take action does the first party seek to enforce. H The court must be satisfied that the person is an interested party in an

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existing, future or contingent right or obligation. If satisfied on this point A then the court must also decide whether the case is a proper one for the exercise of the discretion conferred.

Held, further, that it is incompetent for a judge to set aside the judgment of another judge of parallel jurisdiction except in respect of a judgment granted by default or where a judgment is granted in error. The court B may not review its orders under the guise of a declaratory order. The declaration sought instant coercive relief that impacted on the judgment that had been granted in favour of the Bank, which judgment had not been set aside, while circumventing the main grounds and avenues upon which such a judgment can be set aside.

Held, further, on the issue of whether this was a proper case for the grant of a C declaratory order (even if one could be made), with regard to the impact of the Deed Registries Act on real rights, the applicant's problem was not one that emanated from any inherent bias in the application of the law, but more fundamentally from the legal rights accorded any property owner regardless of the person's sex. When courts accord centrality to real rights, they are thus governed by the

meaning as articulated in the D appropriate legislation. It is the content of the law that accords the person with registered title full legal rights to that property. The agreement that the Bank had with the husband was in accordance with procedural and substantive requirements relating to real rights.

Held, further, that it is true that in practice the effect of a husband having real E rights in his name may have deep seated, gender-related, implications that play out differently for women, but by no means a peculiarity to this aspect of the law. With the standard in law having been for a long time essentially male, almost every aspect of the law, when scrutinised with gender lenses, will fall foul of gendered-ness in its effects. Gender-ness also does not lead automatically to an inference of unconstitutionality F unless this can be illustrated. The fact that the property was not registered in the applicant's name had nothing to do with the law. Registration in a name other than the owner's can be rectified.

Held, further, that whilst culture and tradition may indeed act as strong factors militating against action and the applicant's inaction might be G an indicator of the power imbalances within a marriage, particularly where *lobola* has been paid, the reality is complex and is certainly not so linear as to lead to the inference that it is culture and tradition that bear the responsibility for inaction. Just as there are women who are hampered by the power and pull of tradition and culture from taking action, there are just as many who assert their rights in spite of societal H

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expectations. A It would therefore be inaccurate to portray the vibrational pulse of women's engagement with issues that affect them as being at the level of simple "victimology" purportedly emanating from culture and tradition. That a woman of the applicant's calibre, not only highly educated but of economic prowess and running an entire organisation, did not act is indicative of her own choice and could hardly be laid on B the door of any supposed unconstitutionality of culture and tradition.

Held, further, that there is a lacuna in the law which needs to be addressed legislatively in terms of spelling out the exact parameters of the protection of the matrimonial home. The legislature already has measures in place that articulate what should happen to property rights on divorce or on C death in the context of marriage. However, there is less legislative detail articulating property rights during marriage, since how people get on with the business of being married is generally left to them. Ordinary rules regarding property apply in the context of everyday existence without regard to sex. The facts in this case, and indeed those from cases that had come before this one on this very issue, pointed to one overwhelmingly D one conclusion: married couples, particularly women, do expect the law to intervene with normative guidelines on the matrimonial home, not just on divorce or death, but during the course of the marriage. Thus legislative reform is where the energy should have been placed a long time ago. Much as judicial activism has its place in law's advancement, E given the absence of constitutional breach in the manner averred by the applicant in this case, and the clear recognition of a legislative gap that the State can be pressed to rectify, these are not issues that can be addressed through the enthusiastic pen of an overly activist judge. These issues require informed dialogue and the legislator's engagement with relevant stakeholders on what would be realistic. Sight should also not F be lost of the significance of participation for efficacy of laws by those on whom they will have a bearing.

Cases referred to

Chivise v *Dimbwi* 2004 (1) ZLR 12 (H)

Deputy Sheriff v *Kingsley & Anor* 2014 (2) ZLR 394 (H) G

Lafontant v *Kennedy* 2000 (2) ZLR 280 (S)

McGaili v *Menezes* 1971 (2) SA 12 (C)

Maponga v *Maponga & Ors* 2004 (1) ZLR 63 (H)

MDC v *President of Zimbabwe & Ors* 2007 (1) ZLR 257 (H)

Mudawadzuri v *Kingdom Bank and Ors* HH-95-15

Muganga v *Sakupwanya* 1996 (1) ZLR 217 (S) H

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Munn Publishing (Pvt) Ltd v *ZBC* 1994 (1) ZLR 337 (S) A

Musariri v *Ndavayi & Ors* 2010 (1) ZLR 475 (H)

Mushoho v *Mudimu & Anor* 2013 (2) ZLR 642 (H)

Muswere v *Makanza* 2004 (2) ZLR 262 (H)

Mutyasira v *Gonyora NO and Ors* HH-180-14

Muzanenhamo v *Katanga & others* 1991 (1) ZLR 182 (S) B

National Provincial Bank v *Ainsworth* [1965] 2 All ER 472 (HL)

Nyamweda v *Georgias* 1988 (2) ZLR 42 (S)

Semwayo & Anor v *Chatara & Anor* HH-48-07

Takafuma v *Takafuma* 1994 (2) ZLR 103 (S)

Tewe v *Hanoki & Ors* S-55-03

Young v *van Rensburg* 1991 (2) ZLR 149 (S) C

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

Legislation considered

Constitution of Zimbabwe 2013, ss 26, 46(2), 56, 80(3) & 176

Deeds Registry Act [*Chapter 20:05*], ss 2 & 14 D

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

High Court Rules 1971 (RGN 1047 of 1971), rr 63 & 449

Matrimonial Causes Act [*Chapter 5:13*], s 7

Foreign legislation E

Family Law Act R.S.O. 1990, Chapter F.3 (Ontario, Canada), ss 19 & 21

Case information

L T Biti, for applicant

T Mpofu, for the first respondent

No appearance by the second to fifth respondents F

Judgment

Tsanga J: This is an opposed application in which the applicant seeks a declaratur which essentially addresses the tensions between matrimonial property, real rights and personal rights. What is sought is an order that a spouse should be able to veto an encumbrance of the matrimonial home and G that they have a right to be consulted. As the applicant put it, at its heart is a quest to reverse the common law position that personal rights, more often than not those of a wife, against a husband's real rights, are not protected at all. She further seeks that the writ of execution on the immovable property issued by the Registrar be set aside and that the mortgage bond in favour of the first respondent be declared a nullity. H

Tsanga J

The context A

Sometime in October 2014 the applicant says she came across a writ of execution and bond of indemnity issued by the first respondent, Stanbic Bank, (the Bank) against Clever Hama Madzara (her husband) who is the second respondent in this matter. The writ declared that certain property,

B being stand 17759 Harare Township, was especially executable. Unbeknown to her, the property had been encumbered by her husband for a loan advanced by the Bank without her consent. She states that she married her husband under customary law in 1997 and subsequently converted this marriage to a registered civil marriage in 2002. According to her founding affidavit, the C property in question was acquired sometime in 2000. As the parties did not have a registered marriage at the time, and since a mortgage loan was needed to develop the property, which loan her husband was able to get, and the bond was registered in his name. However, she states that she paid not only for the deposit on the property but that she was the central person who serviced the loan and later developed the house to its present five bedrooms and three D lounges status. By way of background to economic enablers, she describes herself as a professional woman, highly educated with undergraduate and post graduate qualifications acquired both locally and abroad. She also says she runs her own organisation and has does work in a consultative capacity for numerous local and international institutions.

Immediately E upon learning of the writ of execution she states that she had informed the Bank of the reality of the facts behind the "real" acquisition of the property and her interest as "owner". This was done both orally and in writing. Having received no response in her endeavour to stem the impending sale, she had thus brought this application.

Applicant's argument F

In her application, she asserts that she is guaranteed constitutional rights to the property by virtue of s 26 of the Constitution of Zimbabwe which provides that "the State must take appropriate measures to ensure that there is equality of rights and obligations during marriage and its dissolution". G She also draws strength from s 56(1), which guarantees equality before the law, and s 56(2) on equal treatment, including equal opportunities in the economic, cultural, and social sphere. Equally harnessed in support of her claim is s 80, which provides that "all customs and traditions which infringe on the rights of women conferred by the Constitution are void to the extent of that infringement". The applicant further relies on s 7 of the Matrimonial H Causes Act [*Chapter 5:13*] to assert that since she would have rights in the

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property on divorce, that in reality this right is a continuous one and is not A just applicable on divorce.

Mr *Biti*, who appeared for the applicant, distilled the above provisions as collectively constituting a genre of rights created by the Constitution that essentially equalise rights between men and women. In particular, he emphasised that s 46(2) requires the court to be guided by the spirit and objectives of the Declaration of Rights in developing common law and B customary law. This exhortation, he pointed out, is further repeated in s 176. The core to his argument, therefore, was that the common law should be developed in favour of the property rights of spouses who do not hold title by casting real rights in relation to matrimonial property against the constitutional rights thus stipulated. He contended that this court should draw progressive C strength from the thrust adopted in *Chawanda* v *Zimnat Insurance Co Ltd* 1990 (2) ZLR 143 (S) at 154B-D *w*hich was guided by a living approach to developing customary law on the issue of spousal recognition arising from an unregistered customary law marriage. He located the gist of the problem as being the adoption by our courts of the interpretation of real rights *vis-à-vis* matrimonial property as expressed in the English case of *National Provincial Bank*D v *Ainsworth* [1965] 2 All ER 472 (HL) where it was held that, where property is registered in the husband's name, then the wife's status gives her personal rights against her husband and that she is in the house not because of any contract or licence but by virtue of her marriage.

Among the numerous citations placed before the court, Mr *Biti*'s major point E was that the reasoning in this decision was particularly adopted in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) and in *Muzanenhamo* v *Katanga & others* 1991 (1) ZLR 182 (S). The latter case, he stated, has been confirmed in numerous other decisions which he also pointed out. [1] He further drew attention to the real difficulties the court in *Muswere* v *Makanza* 2004 (2) ZLR 262 (H) had with the common law position as fundamentally disadvantaging women. F

In addition to the call for judicial activism, Mr *Biti* emphasised the need to take into account international conventions ratified by Zimbabwe which advance equality such as the Convention on

the Elimination of all forms of Discrimination against Women (CEDAW). He contended that this court is only being asked to confine itself to the sphere of the law of marriage as G opposed to making a finding that would affect all registered property that

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are subject A to claims. He argued that lenders and bankers would be forced to seek the other partner's consent where matrimonial property is involved. He pointed out that this is something that local authorities are already doing where a married person seeks to dispose of rights in immovable property. He further espoused that litigants have duty to test the legality of laws and that what applicant seeks is to test the legality of the common law rule in B light of the constitution. He argued that whether Parliament decides to pass a law or not would be another matter.

The bank's position

Only the Bank as the first respondent submitted papers in response to this C application. The second to fifth respondents did not submit any papers and will be bound by the decision of this court. The Bank vehemently opposed the application on a number of grounds explored below.

The Bank's standpoint was that there is a material dispute of fact in that the claim by the applicant that she purchased the property singlehanded is not supported by any concrete evidence. According to the Bank, this is more so D given that the agreement of sale, the loan agreement, and the title deed are all in the husband's name. The husband's failure to depose to an affidavit in support of his wife's assertions was put forward as a pointer to the falsity of the position. Its position, as argued by Mr *Mpofu* in court, was that there is no factual basis as presented by the papers that could lead to a finding that E the applicant is the owner of the property.

He also argued that there is in reality no cause of action since the applicant admits that she does not have real rights, which means that she has personal rights which are not enforceable against the whole world. According to Mr *Mpofu* the applicant's claim, if any, is for contributions made to the F development of the property in the event of divorce.

The Bank's further position argued on its behalf was that the applicant is estopped from making her claim because she did nothing for more than a decade to let the world know that she has rights which she now seeks to assert. It countered that the constitutional provisions cited by the applicant G do not advance the matter in favour of the applicant because the law does not disentitle her from being registered as a joint owner. It was argued that evidence of title is not conclusive evidence of ownership and that the respondent could have, at an earlier stage, sought to have her name added. As such, it maintains that there is no infringement of constitutional rights. It is also denied that the bond is voidable as the property belongs to the person H who has full dominium.

Mr *Mpofu* further indicated that s 2 as read with s 14 of the Deeds Registry A Act [*Chapter 20:05*], which conveys real rights, is not about women and is not about a cultural practice. The law, he emphasised, is for the protection of everyone's interests and, in his view, though this particular law may affect women, it is not about them. He was of the view that this is a matter for legislative reform in terms of the ambit of any protection to be accorded the matrimonial home. B

Another major objection raised by the Bank to this application was that it has been brought against a backdrop of an existing judgment granted by Musakwa J on 18 June 2014, which in essence authorised the disposal of the property. It is the Bank's position that, with this judgment not having been set aside, there is effectively no litigant before this court as that judgment C remains extant. The gist of the objection that was articulated by Mr *Mpofu* was that this court cannot interfere with the order of another judge of parallel jurisdiction since such order can only be set aside in terms of r 63 of the High Court Rules 1971 which deals with a default judgment; or alternatively in terms of r 449, whereby a judgment can be set aside if it was made in error; D or it can be set aside on appeal by the Supreme Court. He emphasised that, regardless of the applicant's arguments, her position boils down to asking this court to set aside the execution process. It was thus argued that addressing this primary issue will effectively dispose of this matter.

Mr *Biti*'s response to the above arguments was that what the court is being E asked to do is make a finding that the applicant has a right in the immovable property. He emphasised that the core of his argument is that anything that treats the property as belonging exclusively to the husband is not binding. His position was that the declaration sought will not release the husband's indebtedness to the Bank. He also argued that the declaration will not naturally have consequences on what to do with the immovable property as F the issue is about declaring ownership and rights. He further maintained that the rights that are sought to be spelt out are those of a spouse in relation to a home that is registered in the name of the other spouse only and that the declaration seeks to inform the Bank in particular of the rights and interests of such spouse.

Analysis of declaration sought G

The applicable provision which empowers the court to make a declaratory order in an appropriate case is s 14 of the High Court Act [*Chapter 7:06*]. The purpose of a declaration is to define rights of the parties. Issues such as one before me, to declare title to property, are generally the subject matter of declarations, in addition to a wide range of other issues that hinge on the H

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Tsanga J

construction of A instruments, be they wills, leases, policies, among others. Generally, also, where a declaration is sought, the facts will not be contentious. Where rights are spelt out, the expectation is that the other party will obey. Only if the other party fails to take action does the other party seek to enforce.

Key to the exercise of its discretion is that the court must be satisfied that B the person is an interested party in an existing, future or contingent right or obligation. If satisfied on this point then the court must also decide whether the case is a proper one for the exercise of the discretion conferred. See *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S); *MDC* v *President of Zimbabwe & Ors* 2007 (1) ZLR 257 (H) at 267. In *MDC* v *President of Zimbabwe* it was also stated that the court must be satisfied that that there C are interested person upon whom the declaration will be binding and that by binding is meant that the decision of the court operates as *res judicata* between the parties.

The applicable procedure for rescission or setting aside an existing judgment, on the other hand, has been amply dealt with by our courts as resting on three D possible avenues: an application brought in terms of r 63 for a judgment granted in default; an application in terms of r 449 where a judgment is granted in error; an application in terms of the common law. Outside these avenues it is incompetent for a judge to set aside the judgment of another judge of parallel jurisdiction. See for instance *Mushoho* v *Mudimu & Anor* 2013 (2) ZLR 642 (H), which goes into depth about the use of each of these E procedures.

In *Mutyasira* v *Gonyora NO and Ors* HH-180-14 Mawadze J put it thus:

> "In my view the applicant cannot seek to have this court review its own orders under the guise of a declaratory relief. This court can only vary or rescind its judgments and orders in terms of r 449(1)(a) to (c) of the High Court Rules 1971. The applicant has not approached the court on that basis but seeks a F declaratory relief".

It thus necessary to examine the content of the declaration to assess whether it indeed seeks to vary a judgment that is in place.

The order sought was initially couched as follows:

> "IT IS ORDERED THAT:
>
> 1. The G Applicant owns stand 17759 Blakeway Drive, Lincoln Green, Harare
> 2. The rights of the applicant in the property cannot be defeated by the mortgage bond registered in favour of the First Respondent.
> 3. The mortgage bond registered in favour of the First Respondent by the second Respondent be and is hereby declared null and void.
> 4. The execution and implementation of the Writ of Execution of immovable H property issued by the Registrar of the High Court at the special instance

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Tsanga J

of the First Respondent under Case Number HC 495/12 on 29 September 2014 A be and is hereby set aside forth with.

5. The Respondents to pay costs of suit each paying the other to be absolved."

At the hearing, the applicant sought to amend the first paragraph so that it addresses the constitutional issue at the nub of the matter. The quest in the first paragraph was therefore altered to read as follows: B

"The common law position that recognises real rights in the matrimonial property as superior to personal rights held by the other spouse in the same property is in breach of s 80(3) and s 56 of the Constitution."

On the other hand, the order that was granted by Musakwa J on 18 June 2014 in the matter of *Stanbic Bank Zimbabwe Ltd* v *HBD (Pvt) Ltd & Ors* HC 495/12 reads as follows: C

"IT IS ORDERED THAT

1. The second, third and fourth defendants shall jointly and severally, one paying the other to be absolved, pay the plaintiff the amount of US$96 348.99.
2. The second, third and fourth defendants shall jointly and severally, the one paying the other to be absolved pay interest on the amount of US$96 348.99 D at the rate of 31.85 per cent per annum from 04 November 2011 up to the date of payment in full.
3. Certain piece of land situate in the District of Salisbury called Stand 17759 Harare Township Salisbury Township Lands held under Deed of Transfer No. 11912/2001 dated 23 November 2001, be and is hereby declared especially executable. E
4. The second, third and fourth defendants shall jointly and severally, the one paying the other to be absolved, pay plaintiff's costs of suit on the higher scale of legal practitioner and client."

Juxtaposing the existing order with the declaration sought, there is no denying that the declaration seeks instant coercive relief that impacts on the judgment that has been granted in favour of the Bank and which has not been set aside. F It seeks coercive relief in the active setting aside of the mortgage bond, the basis upon which the Bank regards the property as executable. The declaration also seeks to declare the bond null and void. It also seeks to set aside the writ of execution and its implementation. All these are the issues that are at the heart of what informed the order that was sought before Musakwa J on G 18 June 2014. This leaves no doubt that that it seeks to set aside an existing court judgment while circumventing the main grounds and avenues upon which such a judgment can be set aside.

But even if I am wrong in concluding that this matter is hampered in its tracks by procedural irregularities of a judgment in place which has not been set aside, the issue of whether this is a proper case for the exercise of H

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the court's A discretion in light of the circumstances and arguments advanced by the applicant needs to be considered.

The import of the Deeds Registry Act on real rights

A real right is defined in s 2 of the Deeds Registry Act [*Chapter 20:05*] as "any right which become is a right upon registration". Section 14 of the B same Act essentially deals with how such real rights are transferred. For instance, ownership of land is transferred from one person to another through a deed of transfer executed or attested by a registrar. The reality of having the property registered in one's name is that during the course of they can dispose of it at will. Where however a party owns ones half the property then a party as the right to dispose of that half share. See *Mudawadzuri* v C*Kingdom Bank and Ors* HH-95-15.

Mr *Biti* attributes the real problem in failing to make headway on this issue with regards to matrimonial property, to what he sees as slavish adherence to precedents. Yet from examining the above legal provision on real rights, the applicant's problem is not one that emanates from any inherent bias in D the application of the law, but more fundamentally from the legal rights that are accorded any property owner regardless of their sex. When courts accord centrality to real rights they are thus governed by the meaning as articulated in the appropriate legislation. It is the content of the law that accords the person with registered title full legal rights to that property. The order by Musakwa J was not, in any manner or form, erroneously granted since the E title deeds upon which the Bank sought to execute were in the husband's name. It cannot be said that legally the husband

acted wrongfully in using the title deed that was in his name to secure the loan. The Bank was right in accepting the deed at face value in terms of who the owner of the property was. In entering into the loan agreement and accepting the deed, the Bank did not act outside any legal parameters. It relied for its security on the title F deeds which were clearly in the borrower's name. Thus for all intents and purposes, the agreement that the Bank had with the husband was in accordance with procedural and substantive requirements relating to real rights.

Mr *Biti*'s argument is that the manner in which the law on real rights has gendered effects in practice must be recognised and addressed by this court. G In other words, to put his argument in context that feminists have articulated the problem, this is a "gender neutral law that encounters a gender specific reality". That being the case, the argument put forward by Mr *Biti* is that the court must of necessity recognise the inappropriateness of this aspect of the law of property on real rights when applied to a matrimonial context and hold the resultant gendered reality that emerges unconstitutional.

That in H practice the effect of a husband having real rights in his name

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may have deep seated gendered implications that play out differently for A women is true, but by no means a peculiarity to this aspect of the law. With the standard in law having been for a long time essentially male, almost every aspect of the law when scrutinised with gender lenses will fall foul of gendered-ness in its effects. Gender-ness also does not lead automatically to an inference of unconstitutionality unless this can be illustrated. It may B be more illustrative of the ways in which existing laws need to be gender sensitised for their efficacy. Thus gender neutral laws encountering such gender specific realities has in fact been at the root of the use of law reform as one of the central strategies in addressing problematic areas of the law that hamper substantive equality between men and women.

The applicant in her founding affidavit, states that in reality she is the one C who acquired the property and offers the motivation for the sole registration in her husband's name as having been "mortgage" related. A mortgage was required to acquire the property. It was the husband who was in a position to acquire a mortgage. They had no marriage certificate so the mortgage was acquired solely in his name although she says in reality she serviced it. D The details of how this was done are, however, not provided. The bottom line is that it had nothing to do with the law. This is more so given that the registration of the property in a party's name who is not the actual owner for reasons that can be explained is legally something that can be reversed. Although the applicant rests her argument on the new Constitution, this issue has been a thorn in the flesh for the court in a number of instances E that have been handled by this court. Admittedly the new Constitution has run the extra mile compared to its predecessor in articulating fundamental rights that impact on the private sphere of people's lives in very specific detail. Yet it is also a reality that the core constitutional arguments that are at the heart of this case in interpreting the common law on real rights F*vis-à-vis* matrimonial property were just as easily made with the previous constitution. See *Deputy Sheriff* v *Kingsley & Anor* 2014 (2) ZLR 394 (H). In that case Bere J, in 2011, declined to refer a matter that was before him to the Supreme Court on the constitutionality of the effects of the common law on real rights in a matrimonial setting on the basis that there was no discrimination or violation of any constitutional rights. His reasoning in the G case that was before him was that the applicant could have taken steps to have the property registered in her name. He relied on relevant authorities such as *Lafontant* v *Kennedy* 2000 (2) ZLR 280 (S); *Nyamweda* v *Georgias* 1988 (2) ZLR 42 (S); *McGaili* v *Menezes* 1971 (2) SA 12 (C) at 14; *Young* v *van Rensburg* 1991 (2) ZLR 149 (S). H

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The customs, traditions and cultural argument A

It is with regard to the applicant's failure to act that Mr *Biti* draws on the negative effects of culture and tradition to locate her inaction. His argument is that the applicant being a married woman for whom culturally *lobola* had been paid, she could not have acted as freely as it is assumed to have the house later registered in her name. This is because its payment supposedly B results in "power over" the woman for whom it is has been paid. He thus asks this court to be guided by s 80(3) of

the Constitution which elaborates rights of women and states as follows regarding laws customs traditions and cultural practices which infringe the rights of women:

> "All laws, customs, traditions and cultural practices that infringe the rights of C women conferred by this Constitution are void to the extent of the infringement."

Whilst I acknowledge this argument that culture and tradition may indeed act as strong factors militating against action and that her inaction in this case may be an indicator of the power imbalances within a marriage, particularly where *lobola* has been paid, the reality is complex and is certainly not so D linear as to lead to the inference that it is culture and tradition that bear the responsibility for inaction. The payment of *lobola* is also a cultural practice of choice.

The formal law is admittedly far from being centre stage in the everyday lives of people in our normatively plural African context. Religion and culture are important and may be far more central tenets upon which women negotiate E marriage as well as their everyday existence. It is these equally powerful "social fields" that in reality may have more *gravitas* in people's lives than the law. Moreover, some women may indeed harbour imagined fears of being single as a result of divorce in a context where the socialisation puts the status of being married at a premium. Some may not wish to sacrifice their F marital status on the altar of assertiveness. Despite its widespread reality, the status of being single attracts the social stigma somewhat worse than that of a leper, especially in religious circles. Regrettably too, an inordinate amount of energy is often expended denouncing "rights activism" at social gatherings such as kitchen tea parties and some women's church meetings which urban women attend and tune in on societal expectations regarding G appropriate marital behaviour. Furthermore, inaction may simply be because a person could not have foreseen that this kind of situation would arise. Also, legal consequences may be unappreciated by most women until trouble comes knocking at the door.

Nonetheless, the reality is also that in a modern social setting, the options in the H nature of social messages being channelled are all too often legion. As such,

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choosing to operate within a cultural or religious bubble is significantly also A a choice which the court cannot ignore. Women are not an undifferentiated whole. Just as there are women who are hampered by the power and pull of tradition and culture from taking action, there are just as many who assert their rights in spite of societal expectations. Married women, in particular, are constantly bombarded with messages surrounding law and marriage. There are a plethora of women's organisations working on women's legal B rights issues ranging from organisations such as ZWLA [2] , WLSA [3] and WAG [4] to the weekly televised "*Mai Chisamba Show"*, a talk show which examines a range of social issues, mostly those impacting on women and children.

Thus, women have choices. Women make choices. Others, even when they have the knowledge, may still choose to adhere to the influences of religion C and culture. Others still may move from silence to voice and make a deliberate choice to confront patriarchy in the face by recognising that "she, whom patriarchy calls bad, is in fact good". They thus use their knowledge to assert their rights and consciously fashion alternative realities. In this regard, many have heeded the call by women's groups to approach marriage as a D partnership from the onset and to have the matrimonial home registered in the names of both spouses and also not to shy away from owning their own property. It would therefore be inaccurate to portray the vibrational pulse of women's engagement with issues that affect them as being at the level of simple "victimology" purportedly emanating from culture and tradition. This would be pure expediency to facilitate the applicant's case. E

The applicant herself makes a substantial issue of being well educated – a reality that could, from a logical perspective, been harnessed in her favour to familiarise herself with the marital consequences of her marriage and to act accordingly to protect her rights. This court is being asked to believe that a woman of her calibre, not only highly educated but of economic prowess and running an entire organisation, nonetheless lacks personal F empowerment to navigate culture and tradition. This is for even the minimum act of having at least insisted that she keeps the title deed, given her claim to having ploughed money on her own into the property. That she did not act is indicative of her own choice and can hardly be laid on the door of any supposed unconstitutionality of culture and tradition. G

Also if, as Mr *Biti* has argued on behalf of his client, that she may have subsequently failed to take action to have the property registered in her

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name A because of cultural constraints, when she clearly could have done so to avert the problem at hand, then the core problem has nothing to do with the application of the law on real rights or its supposed unconstitutionality. Knowing where the problem lies is vital in adopting the correct strategy. Where the law is in place that could have been harnessed to prevent the problem in question and where, despite this reality, action is not taken, this B has everything to do with changing attitudes that prevent women from being assertive. It is about giving meaning to "empowerment" which eventuates when women who not only know their rights but also take steps to assert them and actively to change their reality. The strategy for this to occur is thus awareness and consciousness raising.

Locating C the applicant's problem in this regard as one of empowerment and consciousness raising rests on appreciating the symbiotic relationship and interplay between the substantive, structural and cultural components of any legal system. Where a problem emanates from the content and substance of the law, the strategy is generally law reform. Where it relates to its structural component, that is, as arising from the law's application by the courts and other D related agencies, then the strategy is generally advocacy and representation within these structures. Where the problem relates to the cultural component as exemplified by attitudes and shared values, the strategy is education. [5]

The issue of inaction on the applicant's part is not about the content or the application of the law within its structures. It is about attitudes and E personal choices. The applicant in her affidavit did not proffer the payment of *lobola* as the explanation for her inaction. It would be far too simplistic for to lay the blame on culture and tradition as primary causes for inaction without any real evidence having been articulated of how these realities actually played themselves out in the applicant's case. It is hard to imagine that a woman in her position, who by her own admission is economically independent, would F have been cowed by the payment of what would today in all probability amount to no more than a few hundred dollars of *lobola*.

Her husband's evidence is also conspicuous by its absence and tends to bolster Mr *Mpofu*'s argument of likely collusion. Whether the absence of his evidence is from collusion or from any sense of guilt as to the consequences G that have befallen the family as a result of his action, or some solace in having the blame thrust at the bank, the reality is that its absence takes no further the wife's assertions that she is owns the whole property. The affidavit

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from the sellers of the property cannot be the sole foundation of her factual A claim and neither can counsel's speculation regarding the effects of culture or tradition on her failure to assert her rights. I will address her 50 per cent argument when I examine the full import of s 26(c).

Why legislative reform

Even in those countries where *lobola* is not paid women may still face B similar challenges regarding the matrimonial home if it is not legislatively protected as an asset of joint interest in the course of the marriage. That the protection of the matrimonial home is legally desirable does not need much argument because of its important role in any family context. That being the case, it is nonetheless crucial to address the issue of whether the problem is one to be addressed through creative judicial interpretation or C whether it is an issue best addressed by comprehensive law reform, given that no law is being violated. Notably, by arguing for the most apart that the house is in fact hers, the applicant has nothing against real rights as such. The law is the same for both men and women, so there no violation of s 56 of the Constitution regarding non-discrimination and equal treatment. Her D argument, in any event, is not that the home cannot be used as security for a loan, but rather that where a matrimonial home is used then the other spouse should play a role in consenting and that where consent has not been given such encumbrance should not be sanctioned. This is indicative of a *lacuna* in the law which needs to be addressed legislatively in terms of spelling out the exact

parameters of the protection of the matrimonial home. I say this E for a number of reasons which I detail below.

Section 26(c), which Mr *Biti* relies on from his argument on equal rights during marriage and at its dissolution, is couched as follows:

> "The State must take appropriate measures to ensure that **–**
>
> ... F
>
> (c) there is equality of rights and obligations *during marriage* and *at its dissolution*" (my emphasis).

The provision is part of the national objectives in the Constitution which are designed to guide the State and all its institutions in formulating and implementing laws and policy decisions. Materially, it does not fall under fundamental rights whereby the applicant can say her rights have been G violated. Its primary thrust is to guide the State and its institutions. It can thus be used to its fullest to cajole the State to take concrete action and measures on an issue that requires its intervention. The State includes its rule making and its rule implementing bodies. Appropriate measures are to be taken in anticipation of an event that may hamper equality or in the event of their H

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being A needed to effect equality. Legislative intervention is what is needed herein for the following reasons.

The legislature already has measures in place that articulate what should happen to property rights on divorce or on death in the context of marriage. However, there is less legislative detail articulating property rights during B marriage, since how people get on with the business of being married is generally left to them. Ordinary rules regarding property apply in the context of every day existence without regard to sex.

There is no doubt that s 7 of the Matrimonial Causes Act [*Chapter 5:13*] kicks in where the marriage is ending. Section 7(1) is prefixed thus:

> "Subject to this section, in granting a decree of divorce, judicial separation or C nullity of a marriage or at any time thereafter, an appropriate court may make an order with regard to …"

Other key pieces of legislation that impact on the matrimonial home include the Deceased Estates Succession Act [*Chapter: 6:02*] and the Administration of Estates Act [*Chapter 6:01*][6] which kick in on dissolution of a marriage D by death.

The facts in this case, and indeed those from cases that have come before this one on this very issue, point to one overwhelmingly one conclusion – which is that married couples, particularly women, do expect the law to intervene with normative guidelines on the matrimonial home, not just on divorce or death but during the course of the marriage. Thus legislative reform is where E the energy should have been placed a long time ago.

What constitutes a matrimonial home if a spouse is to be prevented from encumbering such a home, whether by sale, mortgage or pledge for a debt, needs to be legislatively articulated. What constitutes an encumbrance itself needs to be spelt out. Furthermore, the conditions under a party may be F allowed to encumber the property, whether by consent or court order would need to be fully spelt out, given that a spouse may have no objections to the matrimonial home being used as security where they envisage that likely benefits will flow from being given a loan. The rights of the untitled party also need to be addressed where the property is not jointly owned as in this case.

In sum, G much as judicial activism has its place in law's advancement, given the absence of constitutional breach in the manner averred by the applicant in this case, and the clear recognition of a legislative gap that the State can be pressed to rectify, these are not issues that can be addressed through the enthusiastic pen of an overly activist judge. These issues require informed

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dialogue and the legislator's engagement with relevant stake holders on A what would be realistic. Sight should also not be lost of the significance of participation for efficacy of laws by those on whom they will have a bearing.

When there is such appropriate legislation outlining the operative framework for dealing with the matrimonial home, then indeed it would be the full responsibility of lenders to ensure that what they are dealing with is not a B matrimonial home. In addition, what these facts also point to, is that apart from clear legislative guidelines, there is also a need for local banks to adopt best practices and a code of ethics in how they engage with parties in relation to matrimonial property, given the tremendous impact that the sale inevitably has on the family.

Purely by way of example as to how some jurisdictions have addressed the C issue of protecting the matrimonial home from encumbrances, in Canada (Ontario) for instance, the issue is comprehensively addressed under the Family Law Act R.S.O. 1990, Chapter F.3. The gist of their legislative provisions in s 19(1) of the above Act is to the effect that a person has an interest in that property if it was ordinarily occupied by the person and his or her spouse as their family residence or their matrimonial home. Furthermore, D both spouses have an equal right to possession of a matrimonial home. The Act also clearly sets out in s 21(1) when and how a spouse can dispose of encumber an interest in a matrimonial home. On alienation of the matrimonial home, the other spouse for instance, must join and consent to the instrument; or the other spouse must release all rights by a separation agreement; or a E court order must have authorised the transaction; or the property must not have been designated as a matrimonial home. [7] In England, too, following the case of *Ainsworth supra* in 1967, which Mr *Biti* says is the basis upon which our courts have followed the real rights argument slavishly, the Matrimonial Homes Act of 1967 was passed, whose main thrust was to ameliorate the effects of this decision by providing for the interests of a married spouse to F the matrimonial home regardless of the fact that it is not registered in their name. Banks in England have also subsequently adopted an ethical code of conduct regarding the sale of the matrimonial home.

In summary, in my view legislative intervention that addresses the rights of the spouse to the matrimonial home during the course of the marriage is G where the energy should be. Even when cases such as this one are lost, they

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nonetheless A play an important role in fore-fronting the types of problems that need the legislator's attention. Accordingly for the reasons I have outlined above, I pass the following order:

It be and is hereby ordered that this application is dismissed with costs.

Tendai Biti Law, applicant's legal practitioners B

Mawere & Sibanda, first respondent's legal practitioners

1 These were stated as being: *Maponga* v *Maponga & Ors* 2004 (1) ZLR 63 (H); *Chivise* v *Dimbwi* 2004 (1) ZLR 12 (H); *Semwayo & Anor* v *Chatara & Anor* HH-48-07; *Musariri* v *Ndavayi & Ors* 2010 (1) ZLR 475 (H); *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S); and *Tewe* v *Hanoki & Ors* S-55-03.

2 Zimbabwe Women Lawyers Association

3 Women and Law in Southern Africa

4 Women's Action Group

5 I draw here on the general structure and interactions of the of the legal system articulated in the book M Schuler (ed) *Empowerment and the Law: Strategies of Third World Women* (Washington, OEF International) 1986 at pp 22-23

6 Reference here is with particular to Part IIIA of the Administration of Estates Act.

7 See more fully ss 19 & 21 of the Ontario Family Law Act R.S.O 1990 Chapter F.3 which can be accessed on the internet. The issues that deal with the matrimonial home are addressed comprehensively under part II of the Act, devoted to the matrimonial home.

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JANI v OIC ZRP MAMINA & ORS 2015 (1) ZLR 898 (H)

Citation	2015 (1) ZLR 898 (H)
Case No	Judgment No. HH-550-15
Court	High Court, Harare
Judge	Chigumba J
Heard	26 May 2015; *CAV*
Judgment	17 June 2015
Counsel	*N Mugiya,* for the applicant Ms *S Chihuri,* with *K Mawodzwa,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Police – *discipline – proceedings before a single officer – may be reviewed* C *by the High Court*

Review – *High Court's powers of review over inferior tribunals – review of uncompleted proceedings – such proceedings only reviewable in exceptional circumstances* D

Headnote

The applicant was a police woman. She had been charged under the Police Act [*Chapter 11:10*] before a single officer. At the end of the prosecution case she applied for her discharge but the trial officer dismissed the application and went on to hear the rest of the case. She was convicted E and sentenced to imprisonment in the police detention barracks. Her appeal to the Commissioner General of Police failed. In the meantime, she had brought an urgent application to the High Court for review of the trial officer's decision not to grant her application for discharge. The application to the High Court was dismissed on the merits and she filed F an appeal to the Supreme Court. The appeal lapsed due to her failure to furnish funds for the cost of the record and it became necessary to apply to the Supreme Court for reinstatement of the appeal. She was told by the first respondent, her member in charge, to report to him for the purposes of being detained at the detention barracks. She then brought an urgent application to the High Court for an order barring the police G from detaining her until the finalisation of her appeal.

Held, that the requirements for entertaining the application on an urgent basis were largely present, the only issue in this respect being whether there was any other satisfactory alternative remedy. The answer to this question was intertwined with a consideration of the merits of the matter, H

and a A resolution of the question whether the applicant was entitled to an interdict against the respondents in the circumstances of this case.

Held, further, that both the interim relief and the final relief were aimed at barring the respondents from detaining the applicant pending determination of the application for reinstatement of the appeal against the dismissal of the application for the stay of the trial proceedings, B pending the application for review before the High Court. It was necessary to decide whether the appeal that

was sought to be reinstated by the applicant before the Supreme Court had prospects of success. If it had such prospects, then the applicant might be found to have established, at the interim stage, *prima facie* evidence of a clear right. The applicant's c right to have an appeal which had merit to be determined would then be infringed with resultant prejudice to the applicant if the relief that she sought were not granted. Finally, there must be no alternative remedy which was adequate in the circumstances, a legal remedy, and which was capable of granting similar protection.

Held, D further, that in terms of s 26 of the High Court Act [*Chapter 7:06*], the High Court had review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. The High Court may therefore exercise its full review jurisdiction over decisions of single officers and/or the Commissioner General, with no extraneous restrictions.

Held, E further, that the prospects of success of the appeal being sought to be reinstated could be assessed by considering what the law says about the review of unterminated legal proceedings. The statutory powers of review under the High Court Act can be exercised at any stage of criminal proceedings before an inferior court. However, the High Court F will only exercise its review powers of unterminated proceedings in exceptional cases, where grave injustice might otherwise result or where justice might not by other means be attained. In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and G to the fact that redress by means of review or appeal will ordinarily be available. No exceptional circumstances were alluded to or averred by the applicant which would give the court any confidence that the application for review of the refusal to discharge the applicant at the close of the State case before the trial officer was likely to succeed. If there was no *prima facie* evidence that the application for review was H likely to succeed, the appeal against the dismissal of the application for

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stay of the trial proceedings pending review was not likely to succeed, A nor was the application to reinstate that appeal.

Held, further, that consequently the requirements of an interim interdict were not met in this case; the applicant did not have a clear right.

Cases cited

Chatukuta v *Nleya NO & Ors* 2014 (2) ZLR 852 (H) B

Church of the Province of Central Africa v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364 (H)

Denenga v *Ecobank* HH-177-14

Diepsloot Residents' & Landowners' Assn & Anor v *Administrator Transvaal* 1994 (3) SA 336 (A)

Finwood Invstms (Pvt) Ltd & Anor v *Tetrad Invstm Bank Ltd & Anor*C 2014 (2) ZLR 767 (H)

Flame Lily Invstm Co (Pvt) Ltd v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378

Ginsberg v *Additional Magistrate, Cape Town* 1933 CPD 357

Kuvarega v *Registrar-General and Anor* 1998 (1) ZLR 189 (H) D

Madzivanzira & Ors v *Dexprint Invstms (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H)

Mafu & Ors v *Solusi University* HB-53-07

Masedza & Ors v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36 (H)

Rascher v *Min of Justice* 1930 TPD 810 E

Rateyiwa v *Kambuzuma Housing Co-op & Anor* 2007 (1) ZLR 311 (H)

S v *Mugodi* HB-74-02

S v *Rose* 2012 (1) ZLR 238 (H)

Tribac (Pvt) Ltd v *Tobaccco Mktg Bd* 1996 (2) ZLR 52 (S)

Setlogelo v *Setlogelo* 1914 AD 221

Wahlhaus v *Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A)F

Williams v *Kroutz Invstms (Pvt) Ltd & Ors* HB-25-06

Legislation considered

Constitution of Zimbabwe 2013, ss 49, 70 & 171

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 198 G

High Court Act [*Chapter 7:06*], ss 26, 27 & 29

Police Act [*Chapter 11:10*], ss 29, 33 & 34

Police (Trials and Boards of Inquiry) Regulations 1965 (RGN 97K of 1965), s 11

Supreme Court Rules 1964 (RGN 380 of 1964), rr 12, 15 & 34 H

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Chigumba J

Case information

N Mugiya, for the applicant A

Ms *S Chihuri,* with *K Mawodzwa,* for the respondents

Judgment

Chigumba J: The provisions of the Police Act are clear. There is no provision for an appeal or review to this court from a decision of a single B officer. This court may only review the decision of a board of officers, or entertain an appeal against the decision of a board of officers. The reasoning behind this discrimination is clear. Single officers may only adjudicate on simple offences which do not attract stiff penalties. They preside over a simple and fast and streamlined procedure designed to clear less serious infractions. Section 33(2) of the Police Act gives the right to any person convicted of C an offence by a board of officers to appeal to the High Court against such conviction or order by the Board. The provisions of the High Court Act which relate to appeals from the magistrates court apply to such appeals. These provisions relate to the prosecution of such appeals, the power of the High Court on such appeal, the execution and suspension of sentence and the institution of further proceedings after a conviction has been set aside.

No similar D provisions are set out in the Police Act for appeals from decisions of single officers. If we read these provisions of s 33 as applying equally to reviews, we would be forgiven for coming to the conclusion that no appeal or review lies to the High Court against a decision of a single officer. An appeal or review against a decision of a single officer lies with the Commissioner E General of Police. One interpretation of s 34(7) of the Police Act is that once the Commissioner General has dismissed an appeal to him against a decision by a single Officer, the matter should end there. However, the jurisdiction of the High Court which is conferred upon it by s 171(1)(d) of the Constitution is that it has such appellate jurisdiction as may be conferred on it by an Act of Parliament. It might seem to be safe to assume, that if F the Police Act is silent on the issue of whether an appeal lies to the High Court from a decision of a single officer, then the High Court has no such jurisdiction. A reading of s 30(2) of the High Court Act will soon put paid to that notion. The High Court has jurisdiction in all civil matters unless such jurisdiction is expressly ousted by an act of Parliament. The Police G Act is silent on whether an appeal lies to the High Court from a decision of single officer. Silence is not equivalent to express ouster. See *Rateyiwa* v *Kambuzuma Housing Co-op & Anor* 2007 (1) ZLR 311 (H). This matter came before me via the urgent chamber book on 21 May 2015. I instructed my assistant to set the matter down for hearing on 22 May 2015 at 1230 pm. At the allotted hour, I was advised that counsel for the applicant was in court H before my sister Ndewere. We waited for him to appear, in vain. The matter

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was postponed further, and finally heard on 26 May 2015. The applicant is A employed by the Zimbabwe Republic Police, which is administered by the third respondent. She is currently stationed at Mamina police station. The relief that the applicant is seeking is an order barring the respondents

from detaining her until the return date. On the return date, the applicant wants the court to make an order that the respondents be barred from detaining her until the finalization of the cases SC240/15, SC471/14 and HC816/14.

The background to this matter is that, on 12 February 2014, the applicant appeared before a single officer of the Zimbabwe Republic Police, and was charged with contravening para 27 of the schedule to the Police Act [*Chapter 10:11*], as read with s 29 and s 34 of the same Act. She pleaded not guilty and after the State case, made an application for discharge as provided for by s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The application for discharge was dismissed and no reasons for the dismissal were given by the trial officer. The trial officer merely stated that the State had managed to prove the essential elements of the offence beyond a reasonable doubt. The applicant made an application for review of this alleged procedural irregularity, under case number HC2101/14. She then filed an urgent chamber application seeking an order to stay the trial proceedings pending the finalization of the application for review.

The urgent chamber application for stay of the trial proceedings was placed before Mwayera J, who dismissed it on the basis that the application for review lacked merit. The applicant contends that the application for review was not properly before Mwayera J, and that she did not have sight of the record of proceedings of the application for review when she dismissed the application. The applicant noted an appeal against the dismissal of the urgent chamber application for stay of the trial proceedings, her appeal was filed of record under case number SC471/14. She maintains that she made a tender and gave an undertaking to pay for the costs of the preparation of the record for appeal. When her legal practitioners were asked to pay the costs of preparation of the record by the Registrar of the High Court on 11 February 2015, she as on leave and had gone to her rural home and had been transferred to Mamina police station.

The applicant's counsel of record, Mr *Norman Mugiya,* deposed to a supporting affidavit in which he confirmed that he tried to contact the applicant in February when he received the letter form the Registrar of the High Court to pay for the cost of preparation of the record of proceedings. He stated that the applicant could not be reached on her mobile phone. She was no longer residing at her last known address, and had been transferred to Mamina police station. The urgent chamber application which was placed before me was premised on

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the averment that the applicant had been advised by the first respondent that she would be detained forthwith, at Chikurubi Detention Barracks, which are manned by the second respondent. The applicant's contention was that the proposed detention would cause irreparable harm and prejudice to her because she had mounted a challenge to her conviction and sentence by the respondents to the Supreme Court under case number SC471/15. It was contended that the respondents would not suffer any prejudice if they stayed the applicant's proposed detention. The applicant deposed to the founding affidavit in which she stated that on 10 May 2015 the first respondent had advised her in a telecom to report to him for purposes of being detained by the third respondent on 11 May 2015. The basis of this proposed course of action was the dismissal of the appeal filed by the applicant under case number SC471/14. Annexure "A" is a letter dated 11 February 2015, addressed to the applicant's legal practitioner's by the Registrar of the High Court in which the applicant is advised to pay the sum of US$280 within five days. That sum is the cost of preparing the appeal record.

The applicant contends that this latter was written in error, and for that reason, she filed an application for reinstatement of her appeal, on 24 April 2015, which appeal is currently pending before the Supreme Court. According to the chamber application for reinstatement of appeal which was filed in terms of r 15(8b) of the Supreme Court Rules 1976 as amended, the applicant contends in the founding affidavit that she never failed to pay for the costs of the preparation of the record as alleged or at all. The applicant contends that she did not fall foul of r 34(1) of the Supreme Court Rules, that is, failure to pay the cost of the preparation of the record of appeal within the stipulated time period. She applies for the reinstatement of the appeal in terms of r 12 as read with r 15(8b) of the Supreme Court Rules.

A note of opposition was filed on behalf of the respondents on 15 May 2015. The opposing affidavit was deposed to by the third respondent who took a point *in limine* that this matter did not meet the requirements of urgency. The basis for this view was the averment that the application for reinstatement of the appeal against the ruling made by Mwayera J was now academic. The applicant

had been placed on her defence. The trial had proceeded and G been concluded. The applicant had no legal basis to apply to stay the trial proceedings when they had already been concluded. The applicant had been convicted, and sentenced. It was contended that the application before me had fundamental material flaws.

The judgment in the disciplinary appeal to the third respondent, was attached H to the respondents' opposing papers. The judgment shows that the applicant

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was charged with contravening para 27 of the Schedule to the Police Act, A as read with ss 29 and 34 of the Police Act, i.e:

> "soliciting or accepting any bribe or soliciting any present, reward or consideration whatsoever in connection with his position or duties as a member or accepting such a present, reward or consideration without the authority of the Commissioner general of police".

And, contravening para 11 of the Schedule to the police act, as read with B ss 29 and 34 of the Police Act, i. e;

> "without good and sufficient cause, disobey or refuse or omit or neglect to carry out any lawful order, written or otherwise".

It was alleged that on 29 April 2012, the applicant had solicited a bribe of US$20 from one Peter Bhona who had been arrested for flouting the C Road Traffic Act [*Chapter 13:11*]. She was seen and arrested by Assistant Commissioner Murwira. On the second account, the applicant was alleged to have failed to comply with the contents of radio communication DM 507-12 dated 2 April 2012 regarding the conducting of road blocks by police officers. The State had led the evidence of eight witnesses to prove its case. The appeal against conviction was dismissed on the basis that the grounds D of appeal on both counts were "spurious". He appeal against sentence was dismissed on the basis that the sentences imposed were not "manifestly excessive". The trial officer relied on the *dicta* set out in *S* v *Mugodi* HB-47-02 that the appellant's actions involved "a flagrant breach of trust" and that "… a serious view must be taken of corruption by policemen or for that matter any public official". E

The first issue that falls for consideration naturally is whether the requirements of urgency have been established in this matter. The test for urgency is settled. It has been held that:

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, F 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 and Anor* 1998 (1) ZLR 189 (H).

It has also been held that: G

> "For a court to deal with a matter on an urgent basis, it must be satisfied of 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 if the applicant does not act immediately and waits for doomsday to arrive, and H

> does not A give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…"

See *Madzivanzira & Ors* v *Dexprint Invstms (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H); *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H); *Williams* v *Kroutz Invstms (Pvt) Ltd & Ors*B HB-25-06; and *Mafu & Ors* v *Solusi University* HB-53-07.

In my view, which I previously expressed in *Finwood Invstms (Pvt) Ltd & Anor* v *Tetrad Invstm Bank Ltd & Anor* 2014 (2) ZLR 767 (H)[1] , that, 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: C

(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 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 D delay in taking action.

(e) there is no satisfactory alternative remedy."

It is my view that the need to act arose at the time when the applicant was advised that she should report to the third defendant for detention. She filed her application for reinstatement of the appeal shortly thereafter, and brought these proceedings which are currently before me a few days after E that notification. The applicant acted when the need to act arose. Clearly, if the applicant is detained and she serves her sentence of seven days' imprisonment, that will constitute irreparable prejudice to whatever rights she may have in the appeal process. This court must deal with the matter straight away, without delay. The record is replete with *prima facie* evidence that the applicant treated this matter as urgent, when she was advised to report for F detention at Chikurubi Barracks. This court finds that there was no delay in taking action. The last requirement of urgency gave the court pause. Does the applicant have a satisfactory alternative remedy? The answer to this question is intertwined with a consideration of the merits of the matter, and a resolution of the question whether the applicant is entitled to an interdict G against the respondents in the circumstances of this case.

In order to obtain a final mandatory interdict (a *mandamus),* the applicant must show the following requirements;

(i) A H clear or definitive right – this is a matter of substantive law.

(ii) An A injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.

(iii) The absence of similar protection by any other ordinary remedy – the alternative remedy.

See *Tribac (Pvt) Ltd v Tobbacco Marketing Board* 1996 (2) ZLR 52 (S) at 56, *Setlogelo* v *Setlogelo* 1914 AD 221 at 227,*Flame Lily Investment Company*B*(Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor* 1980 ZLR 378 (G) *, Boadi* v *Boadi & Anor* 1992 (2) ZLR 22, *Diepsloot Residents' and Landowners' Association & Anor* v *Administrator Transvaal* 1994 (3) SA 336 (A) at 344H.

In the matter under consideration both the interim relief and the final relief are aimed at barring the respondents from detaining the application pending C determination of the application for reinstatement of the appeal against the dismissal of the application of the stay of the trial proceedings pending the application for review before the High Court. The court must decide whether the appeal that is sought to be reinstated by the applicant before the supreme court has prospects of success. If it has prospects of success, then the applicant may be found to have established at the interim stage, *prima facie*D evidence of a clear right. The applicant's right to have an appeal which has merit to be determined will then be infringed with resultant prejudice to the applicant if the relief that she seeks is not granted. Finally, there must be no alternative remedy which is adequate in the circumstances, a legal remedy, and which is capable of granting similar protection. E

The prospects of success of the appeal being sought to be reinstated can be assessed by considering what the law says about the review of unterminated legal proceedings. This multiplicity of litigation was born when the applicant applied for review of the trial Officer's refusal to discharge the State's case, and to put her to her defence. It is trite that this court will only exercise its review powers of unterminated proceedings in exceptional cases. See F*S* v *Rose*2012 (1) ZLR 238 (H) **.** In Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 932 the difference between the remedy of appeal and that of review are explained as follows:

> "The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is G by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a H

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> review, A upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

The power of a superior court to review the proceedings of an inferior court covers various stages in a criminal proceeding before an inferior court. The stages are prior to conviction, after conviction but before sentence, and after B sentence has been passed by an inferior court.

The first question that arises is whether the decision to refuse to discharge the applicant at the close of the state case of the single office is valid.

The second question is whether the applicant was correct to bring that decision to the High Court on review.

Part IV C of the High Court of Zimbabwe Act [*Chapter 7:06*] enumerates the High Court's statutory powers of review. Section 26 provides that, subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. Section 27(1) provides that subject D to the provisions of that Act and any law, the grounds of review are absence of jurisdiction, bias and gross irregularity in the proceedings or decision. Section 27(2) provides that nothing in that particular section shall affect the provisions of any other law relating to review of inferior courts, tribunals or authorities. Section 29(1)(b) provides that for purposes of reviewing any E criminal proceedings the High Court may hear any evidence in connection with the proceedings. Section 29(2) states that if on review of any criminal proceedings the High Court considers that the proceedings are not in accordance with real and substantial justice it has the power to do various things, including the power to alter and quash the conviction or to set aside or correct the proceedings or "generally give such judgment or make such F order as the inferior court or tribunal ought, in terms of any law, to have given, imposed or made on any matter which was before it in the proceedings in question." Section 29(3) specifically provides that no conviction or sentence shall be quashed or set aside in terms of s 29 by reason of any irregularity or defect on the record of proceedings unless the High Court considers that G a substantial miscarriage of justice has actually occurred.

It is clear from the foregoing that the statutory powers of review under the High Court Act, can be exercised at any stage of criminal proceedings before an inferior court.

Further, the authorities indicate that this court has an inherent power of H review. In *Rascher* v *Minister of Justice* 1930 TPD 810 at 820 Krause J said:

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> "... a wrong decision of a magistrate in circumstances which would seriously A prejudice the rights of a litigant would justify the court at any time during the course of the proceedings in interfering by way of review ...
>
> The above principles were laid down in a civil case, and they would apply with greater force where the proceedings are of a criminal nature and a miscarriage of justice might result in the circumstances from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby." B

In *Ginsberg* v *Additional Magistrate, Cape Town* 1933 CPD 357 at 360 Gardiner JP observed:

> "Now, as a rule, the court's power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the Court would not exercise that power ... before a termination of a case, if there were gross irregularity in the proceedings." C

See *Wahlhaus* v *Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A).

This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner D and Lansdowne *SA Criminal Law and Procedure* (6 ed vol 1 p 750) state:

> "While a superior court having jurisdiction on review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained ... In general, however, it will E hesitate to

> intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

A review of an interlocutory decision was held in *Masedza & Ors* v *Magistrate, Rusape & Anor* 1998 (1) ZLR 36(H) to be possible and permissible. It was held that: F

> "….however, it is only in exceptional circumstances that the court will review a decision in an interlocutory decision before the termination of the proceedings. It will only do so if the irregularity is gross and if the wrong decision will seriously prejudice the rights of the litigant or the irregularity is such that justice might not otherwise by other means be attained". G

No exceptional circumstances were alluded to or averred by the applicant, which would give the court a smidgeon of confidence that the application for review of the refusal to discharge the applicant at the close of the state case before the trial Officer, is or was likely to succeed. Further, the grounds for review which the applicant seeks to rely on are not the proper grounds for review provided for in terms of s 27(1)(a) of the High Court Act. If there is H

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no *prima facie*A evidence that the application for review was likely to succeed, how then is the appeal against the dismissal of the application for stay of the trial proceedings pending review which was dismissed by Mwayera J due to lack of merit likely to succeed? If the appeal against the ruling by Mwayera J that the application for review was devoid of merit is not likely to succeed, then it must follow that the application to reinstate that appeal, B which was deemed lapsed, is not likely to succeed. It's a chicken and egg situation because of the multiplicity of litigation, but the underlying issues are as clear as spring water.

Not to be overlooked is the analysis of the provisions of the Police Act provided for in *Chatukuta* v *Nleya NO & Ors* 2014 (2) ZLR 852 (H) by C Mawadze J. The facts of that case are somewhat similar to those in this case under consideration. However, in that case there was an appeal to this court, not an application for review and this renders the finding in that case distinguishable. In that case the applicant was tried by a single officer in terms of s 34 of the Police Act. The offence which he was charged with is not D similar to the offences that the applicant in this case was charged with. Both were convicted of their charges, but the applicant Chatukuta was sentenced to nine days in detention barracks. He appealed to the Commissioner General of the police in terms of s 34, 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 altered to four days' imprisonment E as the applicant had already served five out of the nine days' imprisonment which had been imposed.

The question that arose before Mawadze J, from my reading of his judgment, on an urgent basis was whether the applicant was entitled to file an appeal to the High Court against the decision of the Commissioner General of Police. F The applicant contended that his right to personal liberty as enshrined in s 49 of the Constitution and his right to appeal against conviction and sentence, enshrined in s 70(5)(b) of the Constitution were about to be violated by the respondents when they detained him to serve his sentence in barracks despite the noting of the appeal. The learned judge found that s 34 of the Police Act does not provide for an appeal against the decision of the Commissioner G General. He contrasted s 34 with s 33 which confers the right to appeal to the High court against the decision of a Board of Officers.

The legal conundrum that the conclusion reached by my brother presents to me in the matter under consideration is the distinction that is glaringly obvious. In this case the application for review pertained to the refusal by a H single officer to discharge the applicant at the close of the State case.

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Section 171(1)(d) of the Constitution confers the High Court with such A appellate jurisdiction as may be conferred on it by an act of Parliament. Granted, the Police Act does not confer appellate jurisdiction on the High Court in respect of decisions of single officers. The High Court has "original jurisdiction over all civil and criminal matters" in Zimbabwe. If its appellate jurisdiction must be conferred on it by an Act of Parliament it follows that so B must its review jurisdiction. What then does the High Court Act say about this court's own powers of appeal and review? On the power to review:

> "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" C (my emphasis).

It is my considered view that the power of the High Court on appeal is not to be confused with its power on review. My reading of s 26 of the High Court Act is that this court's powers of review are wider than its appellate powers. I hold this view because s 26 gives it the authority to review *all* proceedings and decisions of *all inferior courts of justice, tribunals and administrative*D*authorities.* Although the powers of review are subject to the High Court Act and any other act, in this case the other act the Police Act is silent. In my view, this means that the High Court may exercise its full review jurisdiction over decisions of single Officers and or the Commissioner General, with no extraneous restrictions. Having established that this court's review powers E are wide ranging and restricted only to the grounds of review, it follows that the two cases that we were referred to by counsel are not instructive in this matter, both of them being in regards to appeals against the decisions of the Commissioner General.

Let us suppose that this court's powers of appeal are not expressly ousted F by the Police Act from decisions of single officers, because the Police Act is silent and does not expressly oust the court's appellate jurisdiction. What of this court's review powers against decisions of single officers? We come full circle and are guided by the numerous decided cases that limit this court's powers of review to exceptional circumstances in an interlocutory decision G before the termination of the proceedings. In my view, the refusal to discharge at the close of the State case cannot by any stretch of the imagination be viewed as an irregularity which is gross. There is no serious prejudice o the rights of the litigant. It is not such an irregularity that "justice might not otherwise by other means be attained". The litigant will be put to its defence and not non suited. H

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For A these reasons, I find that the requirements of an interim interdict not met in this case, the applicant does not have a clear right. The application for review was dismissed. The trial proceedings which were sought to be stayed were brought to finality. There are no prospects of the appeal which is sought to be reinstated to succeed. This is so because the appeal seeks to be brought to challenge an interlocutory decision. The leave of Mwayera J was B not sought to note an appeal against her decision to dismiss the application for stay of the trial proceedings. To compound matters, the attempt to bring a review of the incomplete trial of the applicant by a single officer is not likely to succeed because of the absence of exceptional circumstances. The application before the court is dismissed.

Mugiya & Macharaga, applicant's legal practitioners C

Civil Division of the Attorney General's Office, first, second and third respondents' legal practitioners

1 See also *Denenga* v *Ecobank* HH-177-14.

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PHIDA & ANOR v EAST VIEW HIGH SCHOOL 2015 (1) ZLR 991 (H)

Citation 2015 (1) ZLR 991 (H)

Case No Judgment No. HB-127-15

Court	High Court, Bulawayo
Judge	Takuva J
Heard	5 June 2014; *CAV*
Judgment	25 June 2015
Counsel	Mrs *N Dube-Tachiona*, for the plaintiffs (respondents) *N Ndlovu*, for the defendant (excipient)
Case Type	Exception
Annotations	No case annotations to date

Flynote

Delict – *actio legis Aquiliae – claim for nervous shock – plaintiff not a* C *witness to event – whether plaintiff can claim for nervous shock – such shock must be foreseeable*

Practice and procedure – *exception – grounds – allegation that pleadings* D *are vague and embarrassing – what excipient must show*

Headnote

An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain E the specific cause of action or the specific defence relied upon. The aim of the procedure is to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner. Pleadings whose contents are so vague that it is impossible to determine the nature of the claim or defence and pleadings which are bad in law, in that their contents do not support a discernible and legally F recognized cause of action or defence, are struck out.

Where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it is also something which is insufficient in law to support in whole or in part the action or defence. The test as to whether a pleading is vague and embarrassing has also been stated to be whether an intelligible cause of action (or defence) can G be ascertained. An exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action or the defence.

The plaintiff is required to furnish an outline of its case. The outline may be imperfect and possess rough edges not obvious until actually explored H by evidence. Provided the defendant is given a clear idea of the material

facts which are necessary to make the cause of action intelligible, the A plaintiff will have satisfied the requirements

The first plaintiff was the mother of the second, who was a boarder at the defendant school. It was alleged that, contrary to standard policy, the school gave the second plaintiff a school day gate pass. The second plaintiff went to a party at which she was allegedly drugged and raped by one of the boys who attended the school. The first plaintiff claimed B damages for the emotional and psychological trauma she endured after the rape of and exposure to drugs of the second plaintiff, which was negligently caused by the school. The second plaintiff claimed damages for pain and suffering suffered her as a result of the sexual assault and use of drugs on her by one of the students at the school which affected C her emotional, physical and psychological integrity; this, it claimed, was negligently caused by the defendant. She also claimed for future medical expenses for fees for psychologists and counsellors. The defendant excepted to the claim, on the grounds that (a) the first plaintiff had no cause of action, as she was not the person who was injured, nor

did she witness the injury; (b) the second plaintiff's claim was vague D and embarrassing, as the summons did not state what the nature of the injuries was or whether medical treatment had been obtained; (c) the claim for future medical expenses was also vague and embarrassing, as there was no claim for special damages and no medical expenses had been incurred. E

Held, that the Aquilian action is the general remedy for wrongs involving harm to a person's bodily integrity (including a person's emotional well-being and susceptibility to pain and suffering) and property (including a person's financial sphere and goodwill). Damages under this action are for calculated pecuniary loss. The *actio injuriarum* provides the general remedy for wrongs to personality (including physical integrity, dignity, F privacy and reputation). Damages under this action are for sentimental loss. Under the Aquilian action, damages may be claimed for nervous shock where the shock is substantial and not of short duration; the shock must be reasonably foreseeable before the defendant can be held liable for causing such injury. As regards the problem of the person who G is especially susceptible to nervous shock, provided psychiatric injury of sufficient gravity to be actionable is foreseeable, the victim can recover more extensive psychiatric damage attributable to his pre-existing weaknesses. There must be a particular relationship of proximity between the claimant and the party said to owe the duty. Proximity is not confined to particular relationships, such as husband and wife or H

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parent and child, and the concept of proximity also includes proximity A of the plaintiff to the accident in time and space. While there have been cases where persons have suffered nervous shock although they did not witness the event but were simply told of it, the present position in both South Africa and the United Kingdom is that liability in all such cases is to be determined simply by applying the ordinary test for negligence, B namely reasonable foreseeability.

Held, further, that the defendant made an issue of whether there was a difference between nervous shock and emotional and psychological trauma. There was no difference, as both affected a person's mental condition.

Held, further, that the claim on behalf of the second plaintiff mentioned that C the assault on her was sexual and that she was raped. That sufficiently informed the defendant of the nature of the claim. It was not necessary at this stage to state the extent of the physical harm; that should be reserved for the trial.

Held, accordingly, that the exception would be dismissed.

Cases cited D

Delta Beverages v *Rutsito* 2013 (2) ZLR 298 (S)

Gweru Tourism Promotions (Pvt) Ltd v *Sadler & Anor* 2011 (2) ZLR 265 (H)

Jowell v *Bramwell-Jones* 1998 (1) SA 836 (W)

McLoughlin v *O'Brian* [1983] 1 AC 410; [1982] 2 All ER 298 (HL) E

Masiba v *Constantia Ins Co Ltd* 1982 (4) SA 333 (C)

Nyaguse v *Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H)

Case information

Mrs *N Dube-Tachiona*, for the plaintiffs (respondents)

N Ndlovu, for the defendant (excipient) F

Judgment

Takuva J: The plaintiffs issued summons against the defendant. Their claim is an order for the following:

"1. Payment in the sum of US$20 000, being damages for the emotional and psychological trauma endured by the first plaintiff after the rape of the second G plaintiff, her minor child, and exposure to drugs which was negligently caused by the defendant on 11 October 2013.

2. Payment of US$ 20 000 for pain and suffering suffered by the second plaintiff as a result of the sexual assault and use of drugs on her by one of the students at the defendant's school which affected her emotional, physical and psychological integrity which was negligently caused by the H defendant.

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3. Payment of US$5 000 for future medical expenses in fees to be paid to A psychologists and/or counselors as the second plaintiff deals with the aftermath of the rape and use of drugs on her.
4. Payment of costs of suit on attorney-client scale by defendant."

In her founding affidavit, the first plaintiff declared as follows:

> "… On 11 October 2013, the defendant issued a school day gate to the second B plaintiff a minor child. The defendant acted negligently and unreasonably by allowing the second plaintiff, a minor child, to leave school premises without the authority of the first plaintiff her mother, despite the fact that it was a standard and agreed policy known to both the first plaintiff and the defendant's staff members that the second plaintiff could only be released from school with the first plaintiff's verbal or a written authority and on condition that the first plaintiff collects the second plaintiff from the school. As a result of the defendant's gross C negligence and failure to exercise its quasi-parental obligation to protect the second plaintiff, the second plaintiff attended a sexual party where several other minor children from the school were and was drugged and raped by one of the form four boys attending at defendant's school".

The plaintiff alleged that as a result of defendant's gross negligence, she suffered damages mentioned in para 1 above and the second plaintiff suffered D damages mentioned in paras 2 and 3 above. The defendant entered appearance to defend on 29 January 2014 and on 17 February 2014 filed an exception to the claim. The exception is based on the following grounds:

"1. The first plaintiff has no cause of action against the defendant. She seeks damages for emotional and psychological trauma as a result of the alleged rape and drug use of her child who is a student at defendant. Under the law E of delict, damages cannot be claimed for nervous distress or emotional and psychological trauma when the first plaintiff is not the one who suffered the injury nor did she witness the injury. The first plaintiff as the mother of the second plaintiff cannot at law sue for damages in an injury case except as a guardian of the minor child. The claim by the first plaintiff should therefore be dismissed with costs as it has no foundation in our law. F
2. The claim of the second plaintiff is vague and embarrassing. The second plaintiff claims US$20 000 for pain and suffering. Damages for pain and suffering can only be claimed in bodily injury cases. The nature of the injury has to be pleaded. The summons is silent on the nature of injuries. The summons is silent on whether any medical treatment was sought for the bodily injury. Actually, no basis has been laid down for the claim for G pain and suffering as no bodily injury has been alleged and its particulars thereof.
3. The claim for US$5 000 for future medical expenses is vague and embarrassing. The second plaintiff has not made any claim for special damages and there is no basis for claiming future medical expenses when there are no medical expenses which have already occurred. H

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4. The defendant entered into a contract with one Perseverance Phida and not A Perseverance Phidha. As such the first plaintiff has no cause of action against the defendant as she is not privy to the contract signed by the parties."

In terms of r 137(1)(b) of this court's rules, a party may except to the pleadings or to single paragraphs thereof if they embody separate causes of action or B defence, as the case may be.

Herbstein and van Winsen *Civil Practice of the High Courts of South Africa* 5 ed vol 1 at pp 630-1, define an exception in the following terms:

> "An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific C cause of action or the specific defence relied upon … The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner. Thus pleadings whose contents are so vague that it is impossible to determine the nature of the claim or defence and pleadings which are bad in law in that their contents do not support a discernible and legally recognized cause of action or defence are struck out."

In *Gweru Tourism Promotions (Pvt) Ltd* v *Sadler & Anor*D 2011 (2) ZLR 265 (H) Gowora J (as she then was) held that an exception is taken in order to avoid the leading of unnecessary evidence. See also *Nyaguse* v *Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H).

In casu there are two real issues for determination, namely: E

(1) whether or not a person who does not personally suffer injury or witness the injury can claim under the law of delict damages for emotional and psychological trauma;

(2) whether or not the second plaintiff's claim is vague and embarrassing.

Jonathan Burchell *Principles of Delict* 1 ed p 19 states: F

> "The foundation stones of the law of delict are the Aquilian action and the *Actio injuriarum.*
>
> The Aquilian action is the general remedy for wrongs involving harm to a person's bodily integrity (including a person's emotional well-being and susceptibility to pain and suffering) and property (including a person's financial sphere and G goodwill. Damages under this action are for calculated pecuniary loss.
>
> The *actio injuriarum* provides the general remedy for wrongs to personality (including physical integrity, dignity, privacy and reputation). Damages under this action are for sentimental loss".

Dealing with the issue of emotional and nervous shock, the same author H states at p 59 that:

Takuva J

> "In the early cases in South Africa liability for negligently inflicted nervous shock A was restricted by two facts: The nervous shock had to result in physical injury and the plaintiff must have feared for his or her own safety. The first of these restrictions was based on the outdated distinction between mind and matter and based on the view that injury to the physical body was the subject of Aquilian liability and that damage to the individual's nervous system on its own was not sufficient for such liability. The second factor was a way of limiting the scope of potential liability to someone who in fact ran the risk of being physically injured. B
>
> The above approach to nervous shock cases has now been regarded as two restrictive – see *Bester* v *Commercial Union van SA Bpk* 1973 (1) SA 769 (A) where it was held that
>
> > 'the brain or nervous system is just as much part of the physical body as an arm or a leg. Injury to the nervous system, therefore, constitutes bodily injury. The nervous shock in order to give rise to a claim for damages under C the Aquilian action must be substantial and not of short duration and such shock must be reasonably foreseeable before the defendant can be held liable for causing such injury.'"

As regards the problem of the person who is especially susceptible to nervous shock, Boberg *The Law of Delict* Vol 1 p 24-26 suggested that "provided psychiatric injury of sufficient gravity to be actionable is foreseeable, the D victim can recover more extensive psychiatric damage attributable to his pre-existing weaknesses".

The law now is that fear for one's own safety is no longer a pre-requisite for the recovery of damages for nervous shock, provided the other requirements of liability are satisfied: *Masiba* v *Constantia Insurance Co Ltd* 1982 (4) SA 333 (C). E

In *McLoughlin* v *O'Brian* [1983] 1 AC 410; [1982] 2 All ER 298 (HL) the plaintiff's husband and children had been injured, one fatally so, in a car accident. The plaintiff was not present when the accident occurred but, after being told of it, she rushed to hospital to find her husband and children still F bloody from the accident and she was told of her daughter's death. As a result of witnessing the aftermath of the accident she suffered severe nervous shock. The House of Lords granted her damages for nervous shock.

In these cases, what is critical is that there must be a particular relationship of proximity between the claimant and the party said to owe the duty. Proximity is not confined to particular relationships such as husband and wife or parent G and child and the concept of proximity also includes proximity of the plaintiff to the accident in time and space.

Corbett, Buchanan and Gauntlett *Quantum of Damages in Bodily Harm and Fatal Injury Cases* 3 ed at pp 51-2 state the legal position in the following terms: H

Takuva J

> "A claim for damages in respect of pain and suffering strictly constitutes more than A a head in a general Aquilian action; it is in original a separate remedy. It aims at compensating the victim for all pain, suffering, shock and discomfort suffered by him as a result of the wrongful act. *It includes both physical and mental pain and suffering and both past and future pain and suffering …*" (my emphasis).

Professor G Feltoe in *A Guide to the Zimbabwean Law of Delict* 2 ed pp 23-24 B also states:

> "Whereas damages can be claimed for pain and suffering, damages are never recoverable for transient nervous distress which does not lead on to a recognized psychiatric complaint requiring treatment".

On the issue of whether a person or relative who does not personally witness C an accident but is shocked by the aftermath, the learned author states:

> "Over the years a wide variety of fact situations have come before the English and South African courts wherein the psychiatric harm has occurred when one person has been shocked about what has happened to another person. These situations include cases D where persons have suffered nervous shock when they have witnessed their close relatives being killed right in front of them, cases where the witness is a stranger to the person who dies or is injured *and cases where a relative has not seen the accident but is shocked when he is informed* about it sometime later.
>
> The present position in both South Africa and the United Kingdom as a result of decisions by the highest courts in these two countries is that liability in all such cases is to be determined simply by applying the ordinary test for negligence, E namely reasonable foreseeability … *There is no leading Zimbabwean case* laying down definitively what approach is to be adopted in this sort of situation and if such a case comes before our courts a decision will have to be made as to *how we should tackle these sort of cases*" (my emphasis).

In casu, counsel for the defendant referred me to *Delta Beverages* v *Rutsito* 2013 (2) ZLR 298 (S). In that case Garwe JA dealt on appeal with two F questions: firstly, whether the respondent had developed a medical condition following his consumption of a beverage he alleged contained "a rusting iron nail and blackish foreign substances", and secondly, whether or not negligence was proved. In respect of the first issue the learned judge of appeal held:

> "Clearly, whatever distress or anxiety or nervous shock he may have experienced G was transitory and no psychiatric or other medical condition requiring treatment eventuated".

As regards the second issue, he held at 307E that

> "In an Aquilian action in which a plaintiff claims damages whether for patrimonial or non- patrimonial loss, it is, I believe, incumbent upon such plaintiff to plead negligence on the part of the defendant and to set out the particulars of such H negligence. Where such particulars are not set out, the defendant is embarrassed

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Takuva J

> in his defence as he cannot know the basis on which liability is claimed. It is A not enough to allege negligence and fail to give particulars of such negligence."

This case did not decide the crisp issue referred to by Professor Feltoe *supra.*

In casu, the defendant's counsel seems to have taken issue with the fact that "there is no claim on the pleadings that the first plaintiff's claim is for nervous shock, neither is there any allegation that such condition required medical treatment." The first plaintiff's claim in the summons is described thus: B

> "Payment in the sum of US$20 000, being damages for *emotional and psychological trauma* endured by the first plaintiff after the rape of the second plaintiff her minor child and exposure to drugs which was negligently caused by the defendant on 11October 2013" (my emphasis).

The defendant seems to be making a distinction between "nervous shock" C and "emotional and psychological trauma". In my view, it is not a question of nomenclature but one of substance. There is no real difference between "nervous shock" and a "trauma" arising from emotional or psychological disturbance in that both affect a person's mental condition. For these reasons, the exception relating to the first plaintiff's claim is without merit and is hereby dismissed. D

As regards the second basis for the exception, the defendant contends that:

> "the claim for the second plaintiff is vague and embarrassing. The second plaintiff claims US$20 000 for pain and suffering. Damages for pain and suffering can only be claimed in *bodily injury cases.* The *nature* of the *injuries* has to be E pleaded. The summons is silent on the nature of injuries. The summons is silent on whether any medical treatment was sought *for the bodily injury*. Actually, no basis has been laid

down for the claim for pain and suffering as no *bodily injury has been alleged* and its particulars thereof" (my emphasis).

In *Jowell* v *Bramwell-Jones* 1998 (1) SA 836 (W) at 899-903 Heher J stated the following general principles relating to an exception taken on the ground that a pleading is vague and embarrassing: F

"1. The object of all pleadings is that a succinct statement of grounds upon which a claim is made or resisted shall be set forth shortly and concisely and the pleading is thus merely required to plead a summary of the material facts.

2. It is therefore incumbent upon a plaintiff only to plead a complete cause of G action which identifies the issues upon which he seeks to rely and on which evidence will be led, in intelligible and lucid forum and which allows the defendant to plead to it.

3. Where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it is also something which is insufficient in law to support in whole or in part the action or defence. H

2015 (1) ZLR p999

Takuva J

4. The test whether a pleading is vague and embarrassing has also been stated A to be whether an intelligible cause of action (or defence) can be ascertained.

5. An exception that a pleading is vague and embarrassing may only be taken when the vagueness and embarrassment strikes at the root of the cause of action or the defence.

6. An exception that a pleading is vague and embarrassing strikes at the B formulation of the cause of action/or defence and not its legal validity. Minor blemishes are irrelevant and pleadings must be read as a whole no paragraph may be read in isolation.

7. A distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are secondary allegations upon which the plaintiff will rely in support of C primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest they are matters for evidence. Only facts need to be pleaded; conclusions of law need not be pleaded.

8. An exception that a pleading is vague and embarrassing ought not be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged …"

Applying these principles to the present case, it is difficult to comprehend D how the second plaintiff's pleadings can be labeled vague and embarrassing. The second plaintiff has mentioned the *nature* of the assault as sexual. Not only that, she has explicitly stated that she was raped. This in my view, sufficiently informs the defendant of the nature of plaintiff's claim. It is not E necessary at this stage to state the extent of the physical harm by producing a medical report as this constitutes the *facta probanda* which should be reserved for the trial.

Here the *facta probanda* are that:

1. the minor child was raped
2. the child suffered emotionally, physically and psychologically F
3. the defendant owed the first plaintiff a duty of care as the parent to the minor child
4. the first plaintiff suffered emotionally as a result of the rape.

In *Jowell's* case *supra,* it was stated that:

"The plaintiff is required to furnish an *outline* of its case. That does not mean that G the defendant is entitled to a frame work like a cross word puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and *possess rough edges not obvious until actually explored by evidence.* Provided the defendant is given *a clear idea of the material facts which are necessary to make the cause of action intelligible*, the plaintiff will have satisfied the H requirements" (my emphasis).

2015 (1) ZLR p1000

Takuva J

For these reasons, I find that the second plaintiff's claim of pain and suffering A is not vague and embarrassing. This ground has no merit and is hereby dismissed.

The defendant also excepted to the plaintiff's claim on the basis that the claim for US$5 000 for future medical expenses is vague and embarrassing in that there is no basis for claiming future medical expenses when there are B no medical expenses which have already occurred. In my view whether or not the second plaintiff can sufficiently allege that she is entitled to damages for future

medical expenses and whether she suffered any pain is an issue of evidence. This pleading is lucid and logical in that the cause of action appears clearly from the factual allegations made. Therefore this ground lacks merit and is dismissed. C

The last ground is that the plaintiff's name is put as Perseverance Phidha when the name that appears in the contract is Perseverance Phida. As such the first plaintiff has no cause of action against the defendant as she is not privy to the contract signed by the parties. Apparently the defendant wants to rely on a spelling error by the first plaintiff's legal practitioner. Now the position of the law on spellings is clear. It is that, as long as the claim is sufficiently D articulated to the extent that the defendant knows who he is dealing with, a spelling error in a name is immaterial. *In casu*, the defendant knows who Perseverance Phida is and hence it cannot claim that she is not privy to the contract signed by the parties.

Accordingly, the defendant's exception is dismissed in its entirety with costs. E

Dube-Tachiona & Tsvangirai, applicant's legal practitioners

Cheda & Partners, respondent's legal practitioners F

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TROTS INVESTMENTS (PVT) LTD & ANOR v MAMBIRO FIBRE (PVT) LTD 2015 (1) ZLR 1001 (H)

Citation	2015 (1) ZLR 1001 (H)
Case No	Judgment No. HB-130-15
Court	High Court, Bulawayo
Judge	Makonese J
Heard	8 June 2015; *CAV*
Judgment	25 June 2015
Counsel	*J Sibanda* for the applicants *N Mazibuko* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure *– parties – substitution of – summons issued against* C *a non-existent company – intended respondent an individual operating under a trade name – summons a nullity and incapable of amendment*

Headnote

The applicants sought an order against a company named in the papers as D Mambiro Fibre (Pvt) Ltd. They had done this despite being told that no such company existed and that the correct

citation of the respondent should be Samuel Lazarus Mambiro, trading as Mambiro Fibre and E Timber Industries. The applicants' attitude to this was that they would to apply to amend the pleadings by deleting the name of Mambiro Fibre (Pvt) Ltd wherever it appeared and substitute it with "Samuel Lazarus Mambiro, trading as Fibre and Timber Industries". It was submitted that there would be no prejudice caused by such a substitution.

Held, that the summons, citing, as it did, a non-existent person, was a nullity F and incapable of amendment. While 8C of the High Court Rules allows a person carrying on business in a name or style other than his own name to sue or be sued in that name or style as if it were the name of an association, this was not a situation where the rule applied for the simple reason that, on the papers filed of record, there was no respondent.

Cases cited G

Devonia Shipping Ltd v *MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C)

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

JDM Agro-Consult & Mktg (Pvt) Ltd v *The Editor, The Herald & Anor*H 2007 (2) ZLR 71 (H)

2015 (1) ZLR p1002

Makonese J

Steward Scott Kennedy v *Mazongororo Syringes (Pvt) Ltd*A 1996 (2) ZLR 565 (S).

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 8C

Case information

J Sibanda for the applicants B

N Mazibuko for the respondent

Judgment

Makonese J: This is an application for a declaratur and ancillary relief against the respondent, in the alternative the applicants apply for an order allowing them to amend their pleadings in the main action. The relief sought by applicants is couched in the following terms: C

"IT BE AND IS HEREBY DECLARED THAT:

1. By offering the respondent through letter dated 30 July 2014 the property known as number 9 Welback Road, Thorngrove, also known as stand 6435A Bulawayo Township, the second applicant complied with the alleged agreement between the parties for respondent to be offered right of first refusal in respect thereof. D
2. The respondent failed to exercise the said option, causing it to lapse.
3. The first applicant is granted leave to put up the property for sale in the open market.
4. The respondent shall allow any prospective purchaser to view the property and shall not hinder any such prospective purchaser from having access to E the property.
5. The order of this court in HC2455/11 between the first applicant and respondent hereby lapses.
6. The respondent shall pay the costs of this application.

Alternatively, F

1. The first applicant is hereby granted leave to amend its summons and declaration in case number HC 1668/11 as it sees fit to cover any claims arising after the issue of summons and closure of pleadings in case HC 1668/11.
2. The respondent is granted leave to plead such amendment according to law.
3. Either party is granted leave to file further pleadings as are necessary to take into account any such amendment. G
4. The parties shall attend a further pre-trial conference prior to applying for a trial date.
5. Respondent pays the costs of this application."

The respondent has opposed the application and in his opposing affidavit, Samuel Lazarus Mambiro states as follows: H

Makonese J

> "Although I have previously pointed out to the applicants in other court cases A where we are involved, that there is no legal entity called Mambiro Fibre (Pvt) Ltd, the applicants continue citing Mambiro Fibre (Pvt) Ltd in their papers. To the best of my knowledge, the respondent should be myself trading as Mambiro Fibre and Timber Industries and the fact that applicants have cited a non-existent respondent means that its papers are fatally defective and for that reason alone, the application ought to be dismissed with costs on a punitive scale."

In response to the point *in limine*, the applicant responded in paragraph 2 of B the answering affidavit as follows:

> "The point is taken. I shall apply at the hearing of this matter to amend the applicants' papers by making the necessary substitution. I submit that no prejudice shall occur to respondent since opposing papers have been filed in any event."

The applicant filed heads of argument on 4 February 2015, where the issue C of the point *in limine* raised by the respondent is dealt with. The applicant avers that an application is being made to amend the pleadings by deleting the name of the respondent wherever it appears, and its substitution with the following:

> "Samuel Lazarus Mambiro, trading as Fibre and Timber Industries." D

In support of its application to amend and substitute the names of the respondent, the applicant placed reliance on the authority of *Devonia Shipping Ltd* v *MV* Luis *(Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C), at 369 where it was held by Innes J as follows:

> "A material amendment such as the alteration or correction of the names of the E applicant, or the substitution of a new applicant, should in my view be granted to the considerations mentioned of prejudice to the respondent … The risk of prejudice will usually be less in the case where the correct applicant has been incorrectly named and the amendment is sought to correct the misnomer than in the case where it is sought to substitute a different applicant. The criterion in both cases, however, is prejudice which cannot be remedied by an order as F to costs and there is no difference in principle between the two cases."

I must point out from the outset that *Devonia Shipping Ltd supra* involved a case where an *ex parte* application was brought to court as a matter of urgency on behalf of *Devonia Shipping Ltd* for the arrest of the vessel *Luis*, which at the time was berthed in Cape Town Harbour. The heading to the notice of motion gave the name of the applicant as "Devonia Shipping (Pty) Ltd", G but the supporting affidavit annexed to the notice of motion stated that the

> "applicant is Devonia Shipping Ltd, a company duly incorporated and registered with limited liability in accordance with the laws of the United Kingdom which carries on business as charterers in London."

The vessel *Luis* was cited as respondent. The court allowed the amendment of H the names "Devonia Shipping Ltd" to read "Devonia Shipping Agency Ltd",

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on the grounds, primarily, that there was no prejudice to the respondent. The A case referred to by the applicant in the instant case is clearly distinguishable from the facts of the present application.

In this matter, the applicants have cited the respondent as "Mambiro Fibre (Pvt) Ltd", supposedly a company duly registered as alleged by the applicants. However, it is common cause that there is no such entity as Mambiro Fibre (Pvt) Ltd. B

Order 2A r 8C of the High Court Rules, 1971, allows the citing of a person on the papers in that person's trade name. The rule provides as follows:

> "Subject to this Order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings." C

The trading name of the respondent is, in fact, Mambiro Fibre and Timber Industries, with Samuel Lazarus Mambiro being the principal respondent. It is my view that Order 2A r 8C of the High Court Rules does not apply for the simple reason that on the papers filed of record, there is no respondent. For that reason the court application is invalid and null and void *ab initio*. D The court application being invalid is therefore not capable of amendment. This issue was canvassed in *JDM Agro-Consult*

& Marketing (Pvt) Ltd v *The Editor, The Herald & Anor* 2007 (2) ZLR 71 (H) at 75D where Gowora J stated as follows:

> "The entity sued by the plaintiff as the second defendant is *The Herald* newspaper. E It is not a registered company and does not exist in any other form. Consequently, the plaintiff issued summons against a non-existent being. The amendment to the second defendant's name, therefore, was of no force or effect, as the summons itself was a nullity."

In *Gariya Safaris (Pvt) Ltd* v *van Wyk* 1996 (2) ZLR 246 (H) at 252, Malaba J stated as follows: F

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

See also *Steward Scott Kennedy* v *Mazongororo Syringes (Pvt) Ltd* 1996 (2) ZLR 565 (S). G

The merits

The background facts are common cause. The first applicant commenced legal proceedings on 17 June 2011 against the respondent seeking an order for ejectment from the premises known as number 9 Welback Road, Thorngrove, Bulawayo. The respondent opposed the action and alleged that H

Makonese J

there was no cause to terminate the lease agreement. The respondent filed A a counterclaim, alleging that he enjoyed a right of first refusal in respect of the premises in question, which right he alleged he had been given verbally by the then trustee of second applicant (since deceased), his former landlord. The respondent therefore sought an order cancelling the transfer of B the property in dispute and for an order that the second applicant offer the property to him at the same cost that it had sold it to the first applicant. The matter proceeded in the normal course of events up to trial stage. The property which is the subject of the dispute between the parties under case number HC 1668/11 is therefore *res litigiosa* and not subject to be dealt with by either party unilaterally until the main action has been disposed of C by the court. In the meantime, however, the applicants have purported to give the respondent the option to exercise its right of first refusal in terms of the lease agreement with the second applicant without first withdrawing its action under case number HC 1668/11 and acceding to the counter-claim for the reversal of the transfer of the property from the first applicant back to the second applicant. In effect, the applicants are trying to have their D cake and eat it at the same time.

It is my view that for an offer to be valid, it must be made by an identifiable person or legal entity. From a reading of the papers, it is clear that the offeror was not clearly identified. It could not be both applicants making the offer because they do not own the property jointly. If the offer was being made E by the second applicant in terms of the lease agreement that it had with the respondent, then such an offer would be invalid because the property is presently registered in first applicant's names. It stands to reason that the second applicant cannot purport to extend a right of first refusal in respect of a property it no longer owns. If the offeror was the first applicant, it F would not amount to an offer in terms of the lease agreement which the respondent has with the second applicant as there is no privity of contract between the first applicant and the respondent. Such an offer would have no bearing on the main action between the parties under case number HC 1668/11. For that offer to be valid, the first applicant would have to agree to a reversal of the transfer of the property to enable the second applicant to G extend the offer in terms of the agreement between the parties. If one were to assume for argument's sake that the identity of the offeror was not critical to the acceptance of the offer, it would seem that there was an unequivocal acceptance of the figure of US$48 500 as offered by the applicants. The respondents did not counter-offer the amount but merely proposed in their H acceptance how the amount would be liquidated. It is beyond dispute that

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as long as case number HC 1668/11 is pending, the applicants would have A no basis for insisting on the relief sought in the Draft Order.

As regards the alternative prayer in the draft order wherein it is proposed to seek an amendment to the papers, the purported amendment is unclear, vague, and embarrassing and prejudicial to the respondents. The applicants ought to have stated explicitly what nature and form those amendments would take. B

In the premises, it is my finding that there is no valid application before the court as no proper respondent has been cited. I have however considered the merits of the matter in order to adequately dispose of the matter. I am satisfied that applicants have failed to justify the relief sought in the draft order. It is therefore proper to make the following order.

The application be and is hereby dismissed with costs on the ordinary scale. C

Job Sibanda and Associates, applicants' legal practitioners

Calderwood, Bryce Hendrie and Partners, respondent's legal practitioners

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H BANK ZIMBABWE LTD v ZIMBABWE REVENUE AUTHORITY 2015 (1) ZLR 1007 (H)

Citation	2015 (1) ZLR 1007 (H)
Case No	Judgment No. HH-575-15
Court	Special Court for Income Tax Appeals, Harare
Judge	Kudya J
Heard	4 November 2014; *CAV*
Judgment	25 June 2015
Counsel	*F Girach,* 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 – assessment – objections to or appeal against – revenue authority forming opinion that set of facts constituted a tax avoidance scheme – onus on taxpayer to show the* D *contrary*

Revenue and public finance – *income tax – tax avoidance scheme – what constitutes – taxpayer conducting affairs so that lower income is earned – not a tax avoidance scheme – bank holding money in non-interest bearing accounts outside Zimbabwe – sound financial policy reasons for* E *so doing – higher interest possible if money held in riskier investments within Zimbabwe – no requirement for bank to hold money in those investment schemes – revenue authority not entitled to charge notional interest based on interest that could be earned in Zimbabwe*

Headnote

The appellant bank, in line with exchange control regulations and international F banking practice, maintained "Nostro" accounts with foreign banks outside Zimbabwe. In these accounts were held

funds denominated in the currencies of the countries in which those foreign banks were domiciled. Nostro accounts constituted current accounts that were used to facilitate international trade and foreign currency transactions. G In addition, they also constituted corresponding assets for foreign currency liabilities for the bank. In the absence of the conventional liquidity management instruments of operating a local currency, such as an interbank market and lender of last resort and a viable primary and secondary money market, Nostro accounts were also used to carry the liquidity support for the banking industry in the imperfect multicurrency H money market regime in Zimbabwe. In setting Nostro balances, the

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bank was influenced by the composition of the deposits, established A funding arrangements, market risks assessments and product and service strategies underpinned by the Reserve Bank's prescribed minimum ratio of liquidity to depositors' funds. Central banks normally prescribe a minimum rather than a maximum ratio of liquidity of depositors' funds. Money in Nostro accounts is physically in the countries in which the account is domiciled and notes and coins are withdrawn by the bank such B as the appellant in the offshore country and flown onshore to Zimbabwe. The terms for Nostro accounts are negotiated and agreed between the local and foreign banks. Bank charges are levied and interest may be credited but the prevailing general international trade practice precludes Nostro accounts from earning interest, subject to the discretion of the C correspondent bank. Interest would ordinarily be earned on transfer of funds from the Nostro accounts to separate call accounts subject to the requirements of the Zimbabwean exchange control regulations.

The bank used Nostro accounts to maintain liquidity. Under the foreign currency system, banks in financial difficulties could not borrow from D the RBZ because it had no resources to fulfil the role of the bank of last resort, as it could not print any of the multi-currencies recognised as local legal tender.

The respondent conside

red that, in terms of s 98 of the Income Tax Act [*Chapter 23:06*], this was a tax evasion scheme, and charged notional E interest, based on the rates prevailing in the investment market in Zimbabwe, on the ground that the Nostro account balances maintained by the appellant over the years in question were far in excess of its international trade facilitation and foreign currency transactional needs. The Commissioner formed the opinion that the appellant moved huge F sums from the high interest local market regime to the offshore sub-zero nterest market in a bid to avoid payment of income tax on the higher interest rate earnings and imputed the interest rate at the lower end of the local lending rates on the Nostro accounts, rather than the call rates in the countries in which those accounts were domiciled. The Nostro accounts actually generated little or no interest. The bank's policy was G that it was not in the business of making profits at any cost but would forego profits in order to protect both depositors and the financial system, especially in times of financial upheavals. The central bank had never directed the appellant to direct funds from its Nostro accounts to the Reserve Bank's accounts. H

The issue of the onus of proof was also raised. The appellant argued that, A since the respondent claimed that income tax was due, the onus was on it to justify its opinion.

Held, that the present case was an appeal under the Income Tax Act, in which the appellant averred that it was not liable to income tax on notional interest income imputed by the respondent. Section 63 of the B Act squarely cast the burden of proof on the appellant and not on the Commissioner. All that was required of the Commissioner was to set out the grounds on which his opinion was based, which grounds triggered the objection and grounds of appeal. The onus was on the taxpayer, once the Commissioner formed the opinion that the transaction, operation or C scheme had the effect of avoiding, postponing or reducing liability for income tax, to show that the decision made on the basis of the opinion and, by implication, the opinion was wrong.

Held, further, that the Nostro accounts in question constituted a "transaction, operation or scheme", in terms of s 98, but it was not one which had the effect of avoiding or postponing liability for tax on income or reducing D the amount thereof. Nostro accounts, being non-interest bearing current accounts, did not produce any income and so did not in the normal scheme of things attract any tax liability. Accordingly, they did not have the effect of avoiding or postponing or even reducing the amount of tax liability.

Held, further, that the average amounts held in the Nostro accounts at the end E of each tax year were far in excess of the trade and liquidity requirements of the bank's customers, but the evidence showed that the ways and means the appellant operated its Nostro accounts were normal and in tandem with those associated with the operation of such accounts by prudent Nostro account holders.

Held, further, that there was no evidence that the way the Nostro accounts F were operated constituted a simulated transaction, to hide the real transaction underneath. The evidence did not disclose that the purpose of the transaction was only to achieve an object that allowed the evasion of tax, or of a peremptory law, nor that the avoidance, postponement or reduction of tax liability were some of the purposes for keeping the G excess amounts in Nostro. The Commissioner could not invoke s 98 against a tax payer who abstains from earning income and to whom no income accrued or was received or was deemed to have accrued or received. He had no business making pure banking decisions on prudential banking considerations. In doing so, he compromised the H remit of banking regulators and the high profile of the bank.

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Cases cited A

A v *CoT* 1985 (2) ZLR 223 (H)

CIR v *IHB & AH King* 1947 (2) SA 196 (A)

CoT v *F* 1976 (1) RLR 106 (A)

CoT v *Rendle* 1964 RLR 462;1965 (1) SA 59 (RA); (1965) 26 SATC 326

Commr, SA Revenue Svcs v *NWK Ltd* 2011 (2) SA 67 (SCA)B

Commr, SA Revenue Svcs v *Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266; 2014 (5) SA 231 (SCA)

Erf 3183/1 Ladysmith (Pty) Ltd & Anor v *CIR* 1996 (3) SA 942 (A)

G Bank Zimbabwe Ltd v *ZRA* HH-207-15 (see *ante* at p 348 of this volume)

Relier (Pty) Ltd v *CIR* (1997) 60 SATC 1

Roshcon (Pty) Ltd v *Anchor Auto Body Builders CC & Ors* 2014 (4) SA 319 (SCA)C

Sec for Inland Revenue v *Geustyn, Forsyth & Joubert* 1971 (3) SA 567 (A)

Legislation considered

Income Tax Act [*Chapter 23:06*], ss 63 & 98 D

Case information

F Girach, for the appellant

T Magwaliba, for the respondent

Judgment

Kudya J: The appeal relates to the application of s 98 of the Income Tax Act [*Chapter 23:06*] to Nostro accounts. E

The appellant is a registered commercial bank in Zimbabwe that provides retail, corporate and investment banking services. The respondent is a statutory body established in terms of the Zimbabwe Revenue Authority Act [*Chapter 23:11*].

On 16 November 2012 the respondent issued three amended assessments F against the appellant for income tax for the tax years ending 31 December 2009, 2010 and 2011. The respondent invoked the provisions of s 98 of the Income Tax Act and deemed the Nostro accounts held in the name and to the credit of the appellant in the offshore banks as interest earning investments to which it imputed a rate of interest applicable to domestic lending on the ground that the Nostro account balances far exceeded the operational G requirements to facilitate trade and foreign currency transactions for each month from 2009 to April 2012.

It levied tax shortfalls in the sum of US$1?485?353.47 for 2009, US$1 379 542.70 for 2010 and US$2 540 277.41 for 2011. The three amended assessments issued in November 2012 thus brought to account income that H

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had not accrued to the appellant. These amounts were not actually received A but were deemed to have been received.

On 12 December 2012 the appellant objected to the amended assessments. The objections were disallowed on 15 August 2013. The appellant noted the present appeal on 3 September 2013. In both the objection and the appeal, the respondent acceded to the request of the appellant to freeze the imputed B tax pending the conclusion of the appeal.

The appellant filed its six paged case on 6 November 2013. In response thereto, the Commissioner's 11 paged case was filed on 28 November 2013. In addition, the Commissioner filed a 140 page document in terms of rule 11 of the Twelfth Schedule of the Income Tax Act after the commencement of C the appeal hearing. The appeal was heard on 4 November 2014.

The appellant called the sole evidence of its Finance Director who also doubles as its Chief Finance Officer and through him produced one documentary exhibit consisting of three schedules. The finance director qualified as a chartered accountant in 1998. He holds a Master's degree in Business Leadership D from UNISA 2009 and is an associate member of the Institute of Bankers. He held senior managerial positions in finance and investment in four other companies before joining the appellant in 2007 as a financial controller. He has been a finance director of the appellant since 2008 and as such sits on the main board of directors of the appellant. The 2010 and 2011 annual reports show that he is a member of the Loan Review Committee, the Executive E Committee, also known as the Country Management Committee, the Assets and Liability Committee (ALCO), and the Risk Management Committee also known as the Risk and Control Committee, which are sub-committees of the main board of directors.

The respondent did not call any evidence but relied on the averments made in the Commissioner's case and the information contained in the r 11 documents.

The facts F

The facts in this matter are derived from the evidence in chief of the finance director of the appellant who also doubles as its chief finance officer, the r 11 documents filed by the respondent, the appellant's and the commissioner's respective cases. The facts are largely common cause.

In line with exchange control regulations and international banking practice G the appellant maintains Nostro accounts with foreign banks outside Zimbabwe, in which are held funds denominated in the currencies of the countries in which those foreign banks are domiciled. The finance director correctly defined a Nostro account as an account held by a domestic/local bank with H an offshore /foreign bank in the currency of that foreign country. Nostro

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accounts constitute current accounts that are used to facilitate international A trade and foreign currency transactions. In addition, they also constitute corresponding assets for foreign currency liabilities for the bank. The finance director for the appellant established in his evidence that, in the absence of the conventional liquidity management instruments of operating a local currency, such as an interbank market and lender of last resort and a viable primary and secondary money market, Nostro accounts were also B used to carry the liquidity support for the banking industry in the imperfect multicurrency money market regime in Zimbabwe. The liquidity needs of the bank sustained depositors' confidence that payment would be met on demand. In setting Nostro balances, the bank was influenced by the composition of the deposits, established funding arrangements, market risks C assessments and product and service strategies underpinned by the central bank's prescribed minimum ratio of liquidity to depositors' funds set out in the Exchange Control Directive of 23 February 2009 issued in terms of s 35(1) of the Exchange Control Regulations 1996. Central banks normally prescribe a minimum rather than a maximum ratio of liquidity of depositors' funds. It was common cause that money in Nostro accounts is physically D in the countries in which the

account is domiciled and notes and coins are withdrawn by the bank such as the appellant in the offshore country and flown onshore to Zimbabwe.

The sole witness further established that the terms for Nostro accounts are negotiated and agreed between the local and foreign banks. Bank charges are E levied and interest may be credited but the prevailing general international trade practice precludes Nostro accounts from earning interest subject to the discretion of the correspondent bank. Interest would ordinarily be earned on transfer of funds from the Nostro accounts to separate call accounts subject to the requirements of the Zimbabwean exchange control regulations.

The finance director defined liquidity as the immediate availability of a F customer's deposit on demand. He stated that the responsibility for the allocation of bank capital lies with the main board of directors. It delegates the allocation of funds to ALCO, a mandatory committee sanctioned by both local and international banking regulations and practice. The primary objective of ALCO is to enable the bank to earn sustainable profits in adherence to the G risk management framework of the appellant. It manages liquidity guided by the nature of the deposits. Bank deposits consist of short term and fixed term deposits. Revenue streams for the bank also comprised equity investments, property investments, loans and advances and fees and commissions which by nature do not immediately avail cash on demand and are not as liquid as Nostro account balances. It surveys returns in the local market and the H

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global market and projects/forecasts possible returns in those markets. It A decides the amount to be invested and the amount to be retained for customer instructions. It must study the economic environment both locally and in the countries where the Nostro accounts are domiciled. Prudential banking practice demands that the appellant plans for the worst case scenario and utilise case studies such as spectacular collapse of sturdy banking houses B such as the Royal Bank of Scotland, Baring Bank and Lehman Brothers that gripped the world financial markets in the global financial crisis of 2008 and 2009. It also studies political influence on the economy in the full knowledge that the loss of value of one currency may prompt demand for convertibility into more stable currencies. ALCO strives to strike a balance C between income generation and the availability of money on demand and to honour obligations through prudent risk management policies. The bank uses Nostro accounts to maintain liquidity. The financial director's testimony that "under the foreign currency system, the Nostro balance is the main source or main investment for liquidity" went uncontroverted. He demonstrated by live examples of local distressed, failing and fallen banks that the failure D to manage risk creates reduced confidence in banks. The tell-tale signs first manifest in limited cash withdrawals that graduate to unavailability of cash, placement on curatorship and end in the closure of the affected banks. The affected banks could not borrow when short from the RBZ because it had no resources to fulfil the role of the bank of last resort as it could not print any of the multi-currencies recognised as local legal tender. He made a E compelling case for the use of the Nostro account to manage and control the appellant's liquidity.

That the appellant prioritised liquidity over profitability is apparent from the statements made in the annual reports. In 2009 the capital adequacy ratio of the Bank was 39 per cent, in 2010 it was 24 per cent and in 2011 it was 20 per F cent against the regulatory minimum of 10 per cent. The liquidity ratio was 80 per cent in 2009, 72 per cent in 2010 and 69 per cent against regulatory minimum of 10 per cent in 2009, 20 per cent in 2010 and 27.5 per cent in 2011. That the appellant's loan loss ratio remained within 1 per cent in each of those three tax years was a sure sign of the existence of a very high quality loan book. It was on the basis of these ratios that the appellant could boast G in the 2010 annual report that its adherence to prudential lending practices over its very long existence in Zimbabwe had helped in unlocking value of the natural, artificial and intellectual resources of Zimbabwe commerce without exposing depositors to excessive risk by offering security of deposits.

The respondent charged notional interest on the ground that the Nostro H account balances maintained by the appellant over the three years in question

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were far in excess of its international trade facilitation and foreign currency A transactional needs. The Commissioner formed the opinion that the appellant moved huge sums from the high interest local market regime of between 13 per cent and 35 per cent to the offshore sub-zero interest market in a bid to avoid payment of income tax on the higher interest rate earnings**.** The commissioner proceeded to impute the interest rate at the lower end of the local lending rates of 14 per cent per annum on the Nostro accounts rather B than the call rates in the countries in which those accounts were domiciled.

The first schedule of exh 1 lists the 22 Nostro accounts and one call account, the average yearly balances in each account and the actual interest earned in each account in each year from 2009 to 2011. The call account was opened with a related party in 2010. It held an average balance of US$60 C million in 2010 and earned interest of US$12 187.50. The average balance for the same account in 2011 was US$ 35 003 333.33 from which interest of US$ 93 298.60 was earned. In regards to the 22 Nostro accounts, five were denominated in United States dollars of which four were with related parties and 1one was with an unrelated party; two were in Japanese yen and were D both held with unrelated parties; three were in Euros and were all held with related parties, three were in South African rands and were all held with unrelated parties; one each was held in a related party in British pounds, Zambian kwacha, Botswana pula, and Kenyan shillings and one each with unrelated parties in Malawi kwacha, Swedish kroner, Canadian dollars, Australian dollar, and Swiss francs. E

In 2009 only one Nostro accounts earned interest. Two of these, in South African rands, were with unrelated parties and one in British pounds was with a related party. The rand accounts held ZAR4 012 543.25 and earned interest of ZAR339 359.42 while the other rand account had an average balance of ZAR1 278 838.78 and earned interest of ZAR38 006.51. The F third account had GBP1 084 015.23 and earned interest of GBP9 271.68. The same Nostro accounts in 2010 had average balances of ZAR2 249 910 (earned interest of ZAR 167 217.43), ZAR800 968.95 which earned interest of ZAR14 264.80 and the third had GBP745 600.44 and earned interest of GBP3 683.92. Lastly, in 2011, the same three accounts had average G balances of ZAR3 714 031.49 that earned interest of ZAR127 195.42, ZAR286 505.24 that earned interest of ZAR2 610.29 and GBP538 116.60 that earned interest of GBP2 773.29. In addition, one of the US dollar Nostro accounts with a related party, with an average balance of USD58 134 452.23, earned interest of USD18 891.15. In 2009 and 2010 that Nostro account had average balances of USD40 781 041.78 and USD63 858 456.64, respectively, for which no H

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interest was earned. All the interest earned was accounted for in the bank's A books of account in each respective tax year.

The first schedule demonstrated that the appellant's Nostro accounts held by both related parties and unrelated parties did not actually earn interest except for the three that consistently earned interest income in all the three B tax years under consideration and a fourth one in 2011. The schedule proved on a balance of probabilities that Nostro accounts, whether held with related or unrelated parties, do not generally earn interest income. In view of the wide geographic spread of the Nostro accounts, straddling as they do North America, Europe, Asia, Australia and Africa, I am satisfied that this principle is of worldwide application.

Schedule 2 of exh 1 represents the computation of possible interest income C at call rates prevailing in each market in which the Nostro accounts were domiciled in each respective tax year. The lowest call rate, at 0 per cent, was in respect of the Swiss franc, Malawi kwacha and Japanese yen Nostro accounts in each of the tax years 2009 to 2011, while the highest call rate was 9 per cent in respect of the Zambian kwacha. The interest due on the Zambian D kwacha would have been equivalent to US$333.00 in 2009, US$24.00 in 2010 and US$94.00 in 2011. The call rate in respect of each of the three South African Rand Nostro accounts was 6.9 per cent in 2009, 6.2 per cent in 2010 and 5.4 per cent in 2011. The aggregate notional interest that would have been earned by the three accounts would have been

- US$51 417.00 (made up of USD38 894 + 11 759 + 764) in 2009 E
- US$27 978.00 (made up of US$20 524 + 7 306 +148) in 2010; and
- US$ 26 082.00 (made up of US$24 154 + 1928; the third account had been closed).

The call rate for each of the five US dollar accounts was 0.1 per cent in 2009, F 0.2 per cent in 2010 and 0.1 per cent in 2011. The total interest that would have been earned would have been

- in 2009, US$46 252 (made up of US$45 661+ 269 + 160 + 134 + 28); and
- in 2010, US$101 706 (made up of US$101 366+ 118 + 441 + 741 + 40); and
- in 2011, US$68 837 (made up of US$67 880 + 957, the other three G having been closed).

The call rates for the Euro accounts was 0.3 per cent in 2009 and 2010 and 0.7 per cent in 2011. The interest due would have been equivalent to

in 2009, US$1 157 (made up of US$1 104 + 34 + 19); and

- in 2010, US$537 (made up of US$516 + 19 + 2); and H

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- in 2011, for the one active Nostro account the interest that would have A been earned amounted to US$2 770.

The call rates for the Botswana pula Nostro account were

- in 2009, 6.1 per cent with a possible interest income of US$4 646;
- in 2010, 6.2 per cent with notional interest income of US$10 549; and
- in 2011, 5.5 per cent, with a notional income of US$1 162. B

The call rates for the Australian dollar accounts were 2.8 per cent in 2009, with notional interest of US$1 412. In 2010 and 2011 the Australian dollar Nostro account had been closed.

The call rate for the Kenyan shilling account was 3 per cent in 2009 and would have earned interest of US$3, while in 2010 it was 1.8 per cent, earning interest of US$5 and in 2011 it was 8.2 per cent, earning interest of US$50. C

The Canadian dollar call rate was 0.1 per cent in 2009, earning interest income of US$10, 0.5 per cent in 2010, earning income of US$111 and 0.9 per cent in 2011 with a possible income of US$129.

The respective call rates and possible interest income for the Swedish kroner account were 0.1 per cent and US$3 in 2009, 0.4 per cent and US$3 in 2010 D and 1.7 per cent and US$29 in 2011.

The respective call rates and notional interest income for the British pound sterling account were 0.4 per cent and US$6 415 in 2009, 0.4 per cent and US$ 4 487 in 2010 and 0.5 per cent and US$3832 in 2011. E

The total average amount of all the Nostro accounts in 2009 in the functional currency of the appellant were in the sum of US$44 369 931. The weighted average yield of the call rates in all the Nostro accounts markets was 0.25 per cent in 2009. Had the amounts been placed in call accounts in their respective jurisdictions, it would have earned interest of US$109 651. The total in 2010 was equivalent to US$71 723 463 with possible interest F earning of US$ 154 348 and the weighted call rate yield was 0.22 per cent in 2010, while in 2011 the total amount averaged US$ 93 706 692 with a possible return of US$ 145 317 where the weighted average call rate yield was 0.16 per cent. The balance that would remain after deducting "marked and committed facilities" from the total balance in 2009 G of US$11 780 493 would leave an average balance of US$ 32 589 438. The sum of US$29 113 would have been abated from the notional call interest, leaving the interest at US$80 538 for the whole of 2009. In 2010 the adjusted average balances after deducting commitments would aggregate to US$41 241 008 and earn notional interest of US$ 88 750. The sums for 2011 would amount to US$54 162 838 and US$83 992 respectively. H

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Schedule 2 established that the interest rates in call placements were very low, A hovering between 0 per cent in the developed economies such as Japan and Switzerland and 9 per cent in the developing economies such as Zambia. In the United States dollar denominated Nostro account markets, the call rates averaged between 0.1 per cent and 0.2 per cent per annum. The appellant proved beyond a balance of probabilities that the call rates in these markets B were nowhere near the 13 per cent to 35 per cent per annum that prevailed in Zimbabwe at the time. Schedule 3 of exh 1, extracted from the Reuters financial service, listed the maximum possible interest rates applicable to each market on both call and term investments in South Africa, Stockholm, London, Toronto,

South Africa, New York, Zurich, Gaborone, Blantyre, C Tokyo, Nairobi and Australia. The term investment rates were categorised in tenures of 30 days, 60 days and 1 year. The rates for all USD accounts were at 0.2 per cent for the 30 and 60 day term investments in each of the three tax years under consideration. The yield for the 1 year term investments were 0.9 per cent in 2009, 1.1 per cent in 2010 and 0.9 per cent in 2011. The financial director emphasised that such investments required approvals from D the Reserve Bank of Zimbabwe and had to be weighed against the liquidity requirements of customers and the balances in each Nostro account. Again, the appellant established that the call and term investments in the relevant United States denominated Nostro accounts were extremely low, hovering between 0.9 per cent and 1.1 per cent.

The evidence of the finance director in regards to these three schedules was E uncontroverted. It demonstrated the depressed nature of markets in which the United States dollar denominated Nostro accounts were held. The effect of his evidence was that, in weighing the various investment options with a paramount eye on profit generation against the possible market returns and the attendant risks involved, ALCO adopted a conservative but prudent F approach of safeguarding and growing deposits thereby ensuring liquidity to customers. The bank elected to hold the structure of the balance sheet to shore up customer confidence and sustain other sources of revenue such as fees and commissions. He testified that the bank was not in the business of making profits at any cost, but would forego profits in order to protect both G depositors and the financial system especially in times of financial upheavals. He was adamant that it would not have been prudent for the bank to move all the funds in Nostro accounts to Zimbabwe for on-lending, as this would have compromised the very survival of the bank. In any event the bank retains 74.5 per cent of the profits after tax of 24.5 per cent. The issue of tax avoidance would not arise in these circumstances. ALCO assessed that H it would have lost money in chasing higher returns. The appellant thus took

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a purely business decision based on the normal banking considerations in A Zimbabwe and in the global environment to keep the amounts offshore and in Nostro accounts. The desire to secure depositors funds and the corresponding imperative to support prompt settlement of customer's transactions constituted "legitimate and pure business choices in the normal remit of banking" that prompted the appellant to forego short term profits in order to contain the long run cost of funding and current and future default risk and loan write B offs arising from non-performing loans in favour of a secure and stable bank for depositors and regulators. His testimony in this regard resonated well with the sentiments of the Bank Chairman in the 2010 Annual report that:

> "The Bank's risk appetite continued to respond to progressive credit risk assessments benchmarked on both local economic conditions and international best practice to assure our depositors of a Bank that is highly secure and liquid. C The Bank has thus continued a prudent approach to growing its loan book. Whilst this might be viewed as foregoing some short term benefits it remains the Bank's belief and commitment that the Bank keeps its focus on creating and preserving value over the long term. The Bank's long heritage is a product of such prudential risk processes and focus on long term sustainability."

This approach of the Bank is repeated on later in the same annual report D where the appellant proclaims that it professionally manages targeted risk by identifying all key risks; it measures them, and allocates cash in line with risk management policies, systems, changing markets and product and best market practices that achieve balance between risk and return. He reiterated that the operations of the bank over those three years satisfied the monetary E authorities who never directed the appellant to transfer Nostro funds to the RBZ Nostro account in each of the countries that they were held to settle specific international transactions.

The bank has detailed written principles and policies that govern overall risk management. These are spelt out in detail in the 2010 Annual Report F and replicated in the 2011 Annual Report]. It defines risk as the possibility of losses or profits foregone arising from internal or external forces. The specific financial risk areas covered by written policies include foreign exchange, interest rate, credit, liquidity, market, operational, legal, strategic and reputational risks. Some of these, like credit risks, are mitigated by taking security for funds advanced in the form of mortgages over residential and commercial properties and charges over business assets like premises, G inventory and accounts receivable, moveable assets and shares, credit scoring all customer borrowing applications and only lending to those who meet set criteria. The internal rating comprises 23 grades ranging from 1-14 who fall into the investment grade through 15-21 who require standard monitoring and 22-23 who fall into default grade. Credit risk for the Bank is concentrated H

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in 10 industrial sectors under the rubrics of trade and services, energy and A minerals, agriculture, construction and property, light and heavy industry, physical persons, transport and distribution, financial services, the State and generic others. It advanced loans in the sum of US$43 638 980 of which US$1 349 212 were impaired and only US$123 was written of in 2010. In 2011 the total amount advanced was US$59 530 899 with no impairments B or write offs. In both financial years the Bank did not advance loans to the energy and minerals, financial services, State and the generic other sectors.

The Bank defines "liquidity risk" as the possible failure repay deposits on demand and fulfil lending commitments. It manages through ALCO this risk through the use of advanced models that compare possible liquidity C shortfalls against the maturity profiles of its assets and liabilities and closes the gap in advance. The models utilize balance sheet liquidity ratios and measure them against internal and regulatory benchmarks. On a practical plane, ALCO monitors daily allocation and use of funds and maintains a high balance of cash for easy allocation to areas of need. To do so it requires a wide diversification source of funding.

The issues D

The first issue referred to trial was whether it was open to the respondent on the facts of this matter to invoke s 98 of the Act and deem certain income to have accrued to appellant as and by way of interest on Nostro accounts and secondly, if so, what per centage of interest should apply.

The law E

Section 98 states:

> "Tax avoidance generally
>
> Where any transaction, operation or scheme (including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out, F which has the effect of avoiding or postponing liability for any tax or of reducing the amount of such liability, and which in the opinion of the Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out –
>
> (a) *was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction,* G *operation or scheme of the nature of the transaction, operation or scheme in question; or*
>
> (b) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question;
>
> and the Commissioner is of the opinion that the avoidance or postponement H of such liability or the reduction of the amount of such liability was the *sole*

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> *purpose or one of the main purposes* of the transaction, operation or scheme, A the Commissioner shall determine the liability for any tax and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he considers appropriate for the prevention or diminution of such avoidance, postponement or reduction" (my emphasis).

The onus B

The section has been subject of judicial interpretation in this country, in South Africa and in other jurisdictions that have had a similar provision. I also had occasion to interpret the applicability of this section to Nostro accounts in *G Bank Zimbabwe Ltd* v *ZRA* HH-207-15 from 11-17 of the judgment [1] . In that case the parties were agreed that the onus was on the taxpayer to show, on a balance of probabilities, that the Commissioner wrongly exercised his s 98 C opinion. In the present matter Mr *Girach*, for the appellant, without citing any authority, submitted that the onus was on the Commissioner to justify his opinion. I suppose that he was relying on the common law principle that

he who alleges must prove. Mr *Magwaliba*, for the respondent, made a contrary submission and relied on the provisions of s 63 of the Income Tax Act. The section reads: D

> "63 Burden of proof as to exemptions, deductions or abatements
>
> In any objection or appeal under this Act, the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms of this Act or credit, shall be upon the person claiming such exemption, non-liability, deduction or credit and upon the hearing of any appeal the court shall E not reverse or alter any decision of the Commissioner unless it is shown by the appellant that the decision is wrong."

In my view, the present case is an appeal under the Income Tax Act in which the appellant avers that it is not liable to income tax on notional interest income imputed by the respondent. Section 63 squarely casts the burden of proof on the appellant and not on the Commissioner. That Mr *Magwaliba*F is correct is buttressed by two cases, the South African Supreme Court of Appeal case of *Commissioner, SA Revenue Services* v *Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266; 2014 (5) SA 231 (SCA) and the local Appellate Division case of *Commissioner of Taxes* v *F* 1976 (1) RLR 106 (A). In the *Pretoria East Motors* case, in para [6] Ponnan JA stated dealt with the G incidence of onus in thus:

> "In terms of s 82 of the IT Act –
>
> 'The burden of proof that any amount is –
>
> (a) exempt from or not liable to any tax chargeable under this Act; H

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> … shall be upon the person claiming such exemption, non-liability, A deduction, abatement or set-off, … and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.'
>
> A similar provision is to be found in s 37 of the VAT Act. The present appeal must therefore be approached on the basis that the onus was on the taxpayer to show B on a preponderance of probability that the decisions of SARS against which it appealed were wrong (*CIR* v *SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A) at 538D). That, however, is not to suggest that SARS was free to simply adopt a supine attitude. It was bound before the appeal to set out the grounds for the disputed assessments and the taxpayer was obliged to respond with the grounds of appeal and these delineate the disputes between the parties."

In *Commissioner of Taxes* v *F supra* at 115F-116A Macdonald JP (as he C then was) further underscored that:

> "The next point is that the Commissioner is obliged to exercise his powers under the section if the transaction, operation or scheme has the stipulated 'effect', if he is of the 'opinion' that the requisite abnormality is present and if he is further of the 'opinion' that the taxpayer's purpose was as stated in that section. Here again there is a clear indication that it is the intention of the Legislature to cast D the net in such a way as to block every possible avenue of escape. *This intention is also manifest by the further provision that when the stipulated effect is present and the requisite opinions are held, the onus rests on the taxpayer (under the Eleventh Schedule to the Act) to establish on a balance of probabilities that he did not have the purpose set out in the section.* Moreover, the section strikes not only at avoidance but also at mere postponement and reduction. This is a further E indication of the Legislature's intention to make the section all-embracing. In short, the Legislature, by every conceivable means, has endeavoured to make it extremely difficult for a taxpayer to avoid the payment of tax which, in the normal course of his business and but for his desire to avoid, postpone or reduce such payment, would fall due" (my emphasis).

Ponnan JA stated beyond a peradventure that the onus rests on the taxpayer. F All that is required of the Commissioner is to set out the grounds on which his opinion is based which grounds trigger the objection and grounds of appeal. Macdonald JP held that the onus is on the taxpayer, once the Commissioner forms the opinion that the transaction, operation or scheme has the effect of avoiding, postponing or reducing liability for income tax.

The opinion of the Commissioner is triggered by the tax returns made by G the taxpayer. The Commissioner assesses the returns and may request for further information before he makes an opinion. Invariably, the opinion is grounded on "facts" provided by the taxpayer. These facts are often challenged verbally or in writing before formal objection is raised. By the time an appeal is noted the grounds for the opinion would have crystallised. H In the present case, the "facts" on which the opinion was based were that

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the appellant held amounts in its Nostro accounts that were far in excess of A its international transactional requirements in each of the three tax years in question. The money was kept offshore at zero interest rates. At the time onshore interest rates ranged between 13 per cent and 35 per cent. It was common cause that these facts were correct.

The appellant challenges the correctness of the conclusion reached by the B appellant that it held Nostro accounts in order to avoid, postpone or reduce tax liability. The incidence of onus to prove the challenge rests on the appellant both as a matter of common sense and by virtue of s 63 of the Income Tax Act. Once the Commissioner forms an opinion based on what appears to be reasonable and tangible grounds, the onus rests on the appellant to show that the decision made on the basis of the opinion and by implication the C opinion was wrong. The onus, therefore, rests on the taxpayer to establish on a balance of probabilities that the opinion formed by the Commissioner was wrong. I therefore agree with Mr *Magwaliba* that the Commissioner bears no onus to establish on a balance of probabilities that his opinion was correct.

The essential elements of s 98 of the Income Tax Act

The various requisites which must co-exist to justify the Commissioner's D invoking his powers under s 98 were enumerated by Smith J in *A* v *Commissioner of Taxes* 1985 (2) ZLR 223 (H) at 232F-233B, by reference to *Secretary for Inland Revenue* v *Geustyn, Forsyth & Joubert* 1971 (3) SA 567 (A) at 571E-H in these terms:

> "(a) a transaction, operation or scheme entered into or carried out; E
>
> (b) which has the effect of avoiding or postponing liability for tax on income or reducing the amount thereof; and which
>
> (c) in the opinion of the Secretary, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out –
>
> (i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a F transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or
>
> (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; and that G
>
> (d) the avoidance, postponement or reduction of the amount of such liability was, in the opinion of the Secretary, the sole or one of the main purposes of the transaction, operation or scheme."

The application of the facts to the law

I apply the above factors to the facts of this case. H

Kudya J

*(a) any transaction, operation or scheme entered into or carried out*A

The words "any transaction, operation or scheme entered into or carried out" have in this jurisdiction been given a wide and all-embracing meaning which encompasses all spheres of a taxpayer's endeavours. Macdonald JP, as he then was, put it with customary clarity in *Commissioner of Taxes* v *F*B*supra* at 115E thus:

> "Each of these words is of wide and general import and there are few activities of a taxpayer which will not be appropriately described by one or other of them."

I did not hear Mr *Girach* make a contrary submission. I am satisfied that the opening and operations of Nostro accounts by the appellant constituted "any transaction, operation or scheme". The Commissioner was correct to C treat the Nostro accounts in question as constituting a transaction, operation or scheme.

(b) which has the effect of avoiding or postponing liability for tax on income or reducing the amount thereof

It seems to me that Nostro accounts being in nature non-interest bearing D current accounts do not produce any income. They are not designed to earn any income. It was common cause that the Nostro account in question did not earn any interest. Interest could only accrue on transfer to call

accounts in those jurisdictions that they were held or on transfer onshore. They, for that reason, do not in the normal scheme of things attract any tax liability. In these circumstances, it is not possible to find that they therefore have E the effect of avoiding or postponing or even reducing the amount of tax liability. The second requisite factor does not apply to the Nostro accounts held by the appellant.

(c) [*and which*] *in the opinion of the Secretary, having regard to the circumstances under which the transaction, operation or scheme was*F*entered into or carried out,*

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

*(ii) has created rights or obligations which would not normally be*G*created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question*

Mr *Girach* submitted that the appellant, tthrough the evidence of the financial director, established on a balance of probabilities that the Nostro accounts H were neither opened nor operated in an unusual manner not associated with

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such accounts. The annual reports of the appellant revealed that the appellant A treated all deposits made by customers in one of three ways. A portion was held in cash and of the remainder one portion was deposited with the central bank and the balance was deposited in Nostro accounts. It was common cause that Nostro accounts are a matter of international banking necessity. They are held by all onshore and offshore banks including central banks. B Our very own Reserve Bank of Zimbabwe holds such Nostro accounts. A bank cannot possibly transact in a currency other than the one printed in its country of domicile without a Nostro account. The means and ways the appellant entered into and carried out its Nostro accounts were in line with what banks of its remit were wont to do. It was common cause that as at the date forming the subject matter of the dispute there were no guidelines from C the Reserve Bank of Zimbabwe specifying the per centage of depositor's funds that could be held offshore. Banks were at liberty to hold as much as they wanted in Nostro accounts. In 2009 and 2010 before the introduction of the RTGS platform in multicurrency Zimbabwe, all funds were transacted through Nostro accounts which in the uncontroverted testimony of the financial director were the main source for liquidity. The appellant made legitimate D and pure business decisions on the amount to retain in the Nostro accounts against the amount for investment in interest bearing financial instruments. The decisions were guided by liquidity considerations, which entailed forecasting the spending patterns and requirements of its in excess of 130 000 customers. These were juxtaposed against projections of the future behaviour of the Zimbabwe economy and the economies of all the countries in which E the Nostro accounts were held. This delicate balancing act was carried out by a specialist committee, ALCO, constituted by highly qualified and skilled experts who understood the economic environment and all the nuances that affect both their customers' and the countries that hold the Nostro accounts, especially in the wake of the 2008 world financial crisis that witnessed the F spectacular collapse of outwardly solid banks such as Lehman Brothers in the US and the Royal Bank of Scotland in the United Kingdom.

The Commissioner did not attack the means of entering into these accounts. Rather, he attacked the manner in which these accounts were operated. It was common cause that the average amounts held in the Nostro accounts G at the end of each tax year were far in excess of the trade and liquidity requirements of the bank's customers. It was common cause that interest rates on call accounts in the countries in which the Nostro accounts were domiciled were very depressed hovering between 0.9 per cent and 1.1 per cent in the developed capital markets and running up to 9 per cent in the developing countries such as Malawi and Zambia while those prevailing in H

Zimbabwe were very high and attractive in the 13 per cent to 35 per cent A band. Mr *Magwaliba* forcefully contended that the excess amounts should have been remitted to Zimbabwe for on lending at the higher interest rates obtaining in Zimbabwe at the time in line with the profit motive that drives the very essence of banking. He submitted that the appellant deliberately avoided

earning income in Zimbabwe on these excess funds in order to B avoid, postpone or reduce its tax liability.

The evidence of the financial director that the appellant had a low risk appetite was reinforced by the policies, practices and procedures on risk management found in the two annual reports produced under the rule 11 documents. The Annual reports demonstrate that the appellant was a cautious conservative C institution that was familiar with the operating economic environment in Zimbabwe. It was deeply involved in lending to various industrial sectors in Zimbabwe. It did not lend blindly but did so after carrying out various assessments dictated by its policies, procedures and practices. These policies were fomented in the cauldron of the appellant's longstanding presence in this country. It appreciated that high returns come with high risks. It is D equally true that high risks may result in even greater losses. The appellant followed the strategic course of preserving liquidity:

> "The strategy paid off for the bank. Both deposits and corresponding liquid assets of the bank progressively increased from 2009 to 2011".

Its brand became demonstrably solid and its reputation increased. Deposits E and customers increased as did profits from non-funded income. It also increased lending. It could boast in the financial reports of 2010 and 2011 "that the Bank is satisfied with its risk management processes and systems in place which have enabled the Bank to minimise losses" and remained true to the Chairman's word in the 2011 Annual Report that it has followed a "safe bank model that ensures utmost security of depositor's funds and F enjoyable transactions for big and small customers" which has seen the growth of the high credit quality loan book underpinned by disciplined risk processes adhering to rigorous credit processes and prudent lending guidelines in safeguarding depositor funds hence loan loss ratio remained under 1 per cent.

In hindsight, these policies boded well for the appellant. It had a high liquidity G ratio which progressively decreased from 80 per cent in 2009 through 72 per cent in 2010 to 69 per cent in 2011. It survived the upheavals that afflicted banks that looked to high interest rates without making prudent assessments on the quality of their loan books. In essence, the appellant did not view the local high interest rates as sustainable. It appears that most of the potential H local borrowers were not creditworthy. It realised that local lending in the face

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of declining capacity was likely to result in interest reversals, debt write-offs A and downward revision of interest that characterised the Zimbabwe bank market after 2012. The 2010 Chairman's statement demonstrated that the appellant was alive to the short term nature of banking deposits in Zimbabwe and the structural deficiencies of the absence of an interbank market to support liability and asset products and the absence of an independent credit B ranking agency to vet borrowers who often were multi-borrowed in bank and non-banking credit. The appellant also used the market risk tools of Value risk (VaR) and daily value at risk (DVaR), Stress tests and annual earning at risk (AEaR) to measure the estimated loss in its investment portfolios against the projected changes in the fair value of its financial instruments dictated by up and downward movement of interest rates, exchange rates, C and share prices. The projected volatility of market interest rates militated in favour of holding non-interest bearing amounts in 2010 of US$80 043 734 comprising of cash and bank balances of US$38 584 852 and US$77 449 936 and US$34 051 513 respectively in 2011.

I am satisfied that the appellant established on a balance of probabilities that D the way it operated its Nostro accounts, which resulted in high liquidity ratios of 80 per cent in 2009, 72 per cent in 2010 and 69 per cent in 2011, adjudged against the economic environment subsisting both in the countries where the Nostro accounts were domiciled and in Zimbabwe was normal. It was, like any bank, driven by liquidity concerns and the desire to satisfy unpredictable customer instructions. I am satisfied that it made pure banking decisions E that appear to have been beyond the comprehension of the Commissioner.

The appellant has discharged the onus on it to show that the way and means it operated its Nostro accounts were normal and in tandem with those associated with the operation of such accounts by prudent Nostro account holders.

In regards to the arm's length principle, the appellant established that it F actually earned nominal interest with related parties. It further established that zero interest was the prevailing banking practice and that it did not earn interest from unrelated parties and thus discounted any transfer pricing differentials in its operation of these accounts against unrelated parties such as the Reserve

Bank of Zimbabwe to the advantage of related parties. The FD wrote to the case manager of the respondent on 22 November 2012 thus: G

> "Nostro accounts, like current accounts that they are, do not create entitlement to interest regardless of whether they are held with related or unrelated entities. Thus, other Nostro balances outside related parties, including the balances held through the RBZ RTGS NOSTRO account, referred to above, and which is now the major account pays nil or negligible interest. It is not possible for any holder of the NOSTRO account to force interest rates to be paid that are outside H

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> the normal offering that defines a NOSTRO account and outside the market A conditions prevailing where the Nostro accounts are domiciled. It should also be noted that Nostro accounts cannot be held locally, by nature. Interest rates applying to other products of different markets can therefore not be imputed to a Nostro account balance held in a specific domicile."

I am also satisfied that the appellant did not create abnormal rights and B obligations with any of its Nostro banks. It did not earn interest on Nostro accounts held with unrelated parties just as it did not do so from related parties. In fact the little interest it earned was from some three Nostro accounts it held with related parties.

*(d) the avoidance, postponement or reduction of the amount of such liability was, in the opinion of the Secretary, the sole or one of the main purposes*C*of the transaction, operation or scheme*

Mr *Magwaliba* relied on the authority of *Commissioner, SA Revenue Services* v *NWK Ltd* 2011 (2) SA 67 (SCA) para [55] for the submission that the holding of excess funds in the Nostro accounts constituted simulated transactions. Lewis JA stated:

> "In D my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If E the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation."

The meaning and effect of the above paragraph was explained at length by F both Shongwe and Wallis JJA in *Roshcon (Pty) Ltd* v *Anchor Auto Body Builders CC and Others* 2014 (4) SA 319 (SCA) in paras 15, 27, 32, 33, 35 and 37. In determining whether a transaction is disguised the court looks at all the circumstances surrounding it. If the circumstances disclose a secret understanding that is covered up in the purported transaction then it will G strip it off the false veneer and give effect to the real but hidden transaction. Some of the terms that have been used to describe a simulated transaction are "disguise true nature", "pretence" "in fraud of legislation", "fraudulent pretence". In paras 27, 33 and 37 Wallis JA noted that:

> "[27] Whether a particular transaction is a simulated transaction is therefore a question of its genuineness. If it is genuine the court will give effect to it and, H if not, the court will give effect to the underlying transaction that it conceals.

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> And whether it is genuine will depend on a consideration of all the facts and A circumstances surrounding the transaction."
>
> "[33] In the income tax cases, the parties seek to take advantage of the complexities of income tax legislation in order to obtain a reduction in their overall liability for income tax. There are various mechanisms for doing this, but they all involve taking straightforward commercial transactions and adding complex additional elements designed solely for the purpose of claiming increased or additional B deductions from taxable income, or allowances provided for in the legislation. The feature of those that have been treated as simulated transactions by the courts is that the additional elements add nothing of value to the underlying transaction and are very often self-cancelling. Thus in *Erf 3183/1* Hefer JA said that 'there is a distinct air of unreality about the agreements'. In *Relier* Harms JA referred to the 'unusual and unreal aspects' of the transactions. The analysis C by Lewis JA of the transactions in *NWK* clearly demonstrated that a range of unrealistic and self-cancelling features had been added to a straightforward loan. They served no commercial purpose, were based on no realistic valuation of the different elements

of the transaction and were included solely to disguise the nature of the loan and inflate the deductions that *NWK* could make against its taxable income. In those circumstances the courts stripped away the unrealistic elements in order to disclose the true underlying transaction." D

"[37] For those reasons the notion that *NWK* transforms our law in relation to simulated transactions, or requires more of a court faced with a contention that a transaction is simulated than a careful analysis of all matters surrounding the transaction, including its commercial purpose, if any, is incorrect. The position remains that the court examines the transaction as a whole, including E all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated."

The evidence of the financial director established that one of the main purposes of the transaction, operation or scheme was to maintain liquidity for customers. The Nostro accounts with the highest amounts were held with F related parties who had between them a credit rating of A+. This is apparent from the information on p 119 where the appellant disclosed that in 2011 bank balances of US$113.8m (2010 US$110m) except for US$23.2m in RBZ was held with banks with A+ credit ratings. The Bank gives the assurance to its stakeholders "that total capital for the bank is assessed to be sufficient to support current business and planned capital projects and that growth in G advances will continue to be pursued cautiously and in such a way as to achieve economic asset yields". It promises that:

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"The bank will continue to grow the loan book in 2012 in line with risk management A policies while at the same time maintain a balanced liquidity position after considering the resources available to do more business in the future."

It seems to me that the appellant's sole purpose is to continue to serve generations and leave its footprint in the development of Zimbabwe as it has done in the past. The appellant entered into and carried out genuine commercial B transactions, much like in the *G Bank* case, *supra.* The sentiments in *NWK supra* are inapplicable in the present case. The facts of the present matter do not disclose that the purpose of the transaction was only to achieve an object that allows the evasion of tax, or of a peremptory law. They also do not disclose that the avoidance, postponement or reduction of tax liability C were some of the purposes for keeping the excess amounts in Nostro.

Like in the *G Bank* case, *supra,* the appellant attacked the misapplication of s 98 by the respondent. It contended that the respondent had no business making pure banking decisions on prudential banking considerations. In doing so, he compromised the remit of banking regulators and the high profile of the bank. The profile of the appellant was what drew customers D with high balances looking for a safe haven for their funds to the bank. It was improper for the Commissioner to make investment choices for both the bank and its customers. The customer with high deposit in the Nostro held account risked being taxed for not placing his money in an interest earning account; a tomato vendor who sells his or merchandise down town risked E being taxed on notional income on uptown sales. See *CIR* v *IHB and AH King* 1947 (2) SA 196 (A) at 207-208. The balances were not excessive for the bank requirements to serve actual and possible transactions commensurate with the profile of its deposits. The right of choice of placement of funds was a fundamental strategic function that drove the product and service strategies of the bank. The Commissioner was ill equipped to make such F choices for the bank. He could not usurp the role of the central bank, which eventually flexed its muscles through the Exchange Control Directive of 21 February 2012 that directed banks to maintain a maximum threshold of 25 per cent of their foreign account balances in their Nostro accounts to meet their day to day international payment obligations. The maximum balance in Nostro accounts was increased to 30 per cent from 30 June 2012. The G ledger balances of foreign currency accounts deposits held with the central bank and statutory reserve liabilities did not form part of that maximum threshold. The reason behind the directive was to enhance market liquidity. The effect of the directive was to transfer balances in excess of 25 per cent to RBZ Nostro held with the Federal Reserve Bank in NY earning zero per cent H interest and which, in any event, did not come to Zimbabwe for on lending.

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Like Beadle CJ in *CoT* v *Rendle* 1965 (1) SA 59 (RA) at 61B; A (1965) 26 SATC 326; 1964 RLR 462 I would remind the respondent once again that:

"It is not for the Commissioner to direct how a taxpayer should run its business."

Like in *G Bank*, based on the authority of the *King* case, s*upra*, I am satisfied that the Commissioner cannot invoke s 98 against a tax payer who abstains from earning income and to whom no income accrued or was received or is deemed to have accrued or received. B

I am satisfied that the appellant has established on a balance of probabilities that the respondent wrongly invoked s 98 to the Income Tax Act to bring to account notional interest to its taxable income in each of the three years in issue.

In the light of this conclusion, it is unnecessary to determine the second C issue that was referred to trial.

Costs

Mr *Girach* 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 terms of s 15 (2) (aa) of the Income Tax Act. The prayer was not opposed. It will D therefore be granted.

Disposition

It is accordingly ordered that:

1. The appeal be and is hereby allowed. E
2. The respondent is directed to withdraw and amend the three assessments in respect of the tax years ended 31 December 2009, 31 December 2010 and 31 December2011 issued against the appellant on 16 November 2012.
3. The costs incurred by the appellant in respect of the objection and F 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*].

Scanlen & Holderness, appellant's legal practitioners G

1 See *ante* at pp 361F-366H of this volume. – *Editor.*

2 *Erf 3183/1 Ladysmith (Pty) Ltd & Anor* v *CIR* 1996 (3) SA 942 (A)

3 *Relier (Pty) Ltd* v *CIR* (1997) 60 SATC 1

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TEL•ONE (PVT) LTD v BHIZA & ORS 2015 (1) ZLR 1031 (H)

Citation	2015 (1) ZLR 1031 (H)
Case No	Judgment No. HH-592-15
Court	High Court, Harare
Judge	Mathonsi J
Heard	29 June 2015
Judgment	29 June 2015

Counsel *S Hwacha,* for the applicant
A Bangidza, for the first respondent
Second and third respondents in default

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Arbitration – *award – registration of – award made under Labour Act* C *[Chapter 28:01] – noting of appeal against award – does not suspend award appealed against – execution of award – suspension of – need for party to apply to Labour Court to suspend award pending determination of appeal – when such application made, execution would be improper*

Arbitration – *award – registration of – gross amount of award subject to* D *payment of tax – tax not assessed – not proper to execute on award*

Headnote

The applicant's property had been placed under judicial attachment at the instance of its former employee, the first respondent, in pursuance of E an arbitral award made by an arbitrator in a labour dispute. The award was registered unopposed as an order of the High Court for enforcement purposes. Before the award was registered, the applicant had noted an appeal to the Labour Court against the arbitrator's award. When the first respondent issued a writ against the applicant's property the applicant made an application to the Labour Court in terms of s 92E(3) of the F Labour Act [*Chapter 28:01*] for an interim determination to suspend the arbitral award pending the hearing of the appeal. This application had not been heard by the Labour Court, but the first respondent instructed the Sheriff to proceed with execution against the applicant's property, resulting in the applicant's property being attached. The applicant brought an urgent application to the High Court seeking a stay of execution on G the grounds that it had appealed to the Labour Court against the award, which appeal had yet to be determined, and that the arbitral award in its present form was not capable of enforcement because the income tax payable in terms of the award has not yet been determined.

Held, that the lodging of an appeal to the Labour Court was not a ground to H resist the enforcement of the arbitral award, by virtue of the provisions

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2015 (1) ZLR p1032

Mathonsi J

of s 92E(2) of the Act, which states that an appeal does not have the A effect of suspending the determination or decision appealed against. However, after lodging the appeal the applicant went on to approach the Labour Court in terms of s 92E(3) for suspension of the arbitral award and that application had yet to be determined. It would be improper for execution to be levied as if no such approach has been made. There is B a pressing need for certainty in court proceedings. It is undesirable for parties to jump backwards and forwards, taking advantage of a perceived good position, which may subsist today but be wiped out tomorrow. The moment the application for a stay of execution was lodged in the Labour Court, the first respondent should have waited for it to be determined before proceeding with execution. The application might well succeed C and as such, executing in the face of it tended to bring the administration of justice to disrepute.

Held, further, that the arbitrator's award specifically provided that the payments were subject to income tax, which had not been assessed. As an employer, the applicant was obliged to deduct the tax from the total amount due to the first respondent, who could not issue a writ of D execution on the gross amount before deduction of tax.

Cases cited

Greenland v *Zichire* HH-93-13

Kukura Kurerwa Bus Co v Mukwena & Ors HH-477-14

Kuzamba v Innscor Africa Ltd HH-505-14 E

Legislation considered

Labour Act [*Chapter 28:01*], s 92E

Case information

S Hwacha, for the applicant F

A Bangidza, for the first respondent

Second and third respondents in default

Judgment

Mathonsi J: The applicant is a telephone service provider whose property has been placed under judicial attachment at the instance of its former employee, the first respondent, in pursuance of an arbitral award made by G an arbitrator in a labour dispute. The award was registered unopposed on 23 April 2015 as an order of this court for enforcement purposes.

Prior to registration of the award, the applicant had lodged an appeal against it to the Labour Court on 13 April 2013. As the first respondent escalated the "war effort" by issuing a writ against property the applicant made an H

Mathonsi J

application to the Labour Court on 15 May 2015 in terms of s 92E(3) of A the Labour Act [*Chapter 28:01*] (the Act) for an interim determination to suspend the arbitral award pending the hearing of the appeal.

Both the application for interim determination and the appeal itself are yet to be set down and remain pending in the Labour Court. Undeterred, the B first respondent instructed the Sheriff to proceed with execution against the applicant's property resulting in the applicant's property being attached on 18 June 2015.

Notice of its removal on 24 June 2015 in pursuance thereof was also given. This has propelled the applicant to launch this urgent application seeking the following relief: C

> "A. TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms –
>
> 1. That (*sic*) warrant of execution issued under Case No HC 3051/15 be and is hereby set aside.
> 2. Execution is hereby permanently stayed until the determination of matter D Case No. LC/H/316/15 by the Labour Court.
> 3. That the first respondent shall bear costs of suit of these proceedings.
>
> B. INTERIM RELIEF GRANTED
>
> Pending the return date, the applicant is granted the following relief –
>
> 1. That the execution of the writ issued under Case No 3057/15 be and is E hereby suspended pending the return date.
> 2. That the second respondent and third respondent, its deputies or any of its officers shall not remove or sell in execution any of the applicant's movable or other property pending the return date.
> 3. Costs shall be determined on the return date."

Paragraphs 2 and 3 of the interim relief that the applicant seeks are F superfluous and extremely unnecessary. They are the fruit of undue exuberance.

Be that as it may, the applicant states in the founding affidavit of its legal advisor Lindy Dziripi that it would want execution to be stayed for essentially two reasons namely that it has appealed to the Labour Court against the award which appeal is yet to be determined and that the arbitral award G in

its present form is not capable of enforcement because the income tax payable in terms of the award has not yet been determined, the applicant is not entitled to the sum of $37 593.17 which she seeks to recover but to that amount less the tax payable on it.

Mr *Bangidza* for the first respondent took a point *in limine* that the matter is H not urgent by reason that the applicant was aware that the first respondent

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2015 (1) ZLR p1034

Mathonsi J

intended to execute from the moment she filed an application for registration A of the arbitral award. Having done nothing about the matter right up to the time of execution, the applicant cannot be heard on an urgent basis now it having created the urgency.

I do not agree that the applicant has only acted now. The applicant did note an appeal and then made an approach to the Labour Court for interim relief. B That application is yet to be determined. I think Mr *Bangidza* misses the point in that urgency has arisen because, despite the pending application for a stay of execution, the applicant is proceeding with execution as if nothing has happened. There is therefore no merit in the point in *limine*, which is dismissed. C

This court has repeatedly pronounced that the lodging of an appeal to the Labour Court cannot be a ground to resist the enforcement of an arbitral award by virtue of the provisions of s 92E(2) of the Act which states that an appeal does not have the effect of suspending the determination or decision appealed against: *Kuzamba* v *Innscor Africa Ltd* HH-505-14; *Greenland* v *Zichire* HH-93-13. D

Therefore the first ground for seeking a stay of execution is without merit and should not have been relied upon at all. However, I tend to view this matter in slightly different light because after lodging the appeal the applicant went on to approach the Labour Court in terms of s 92E(3) for a suspension of the arbitral award and that application is yet to be determined. In E*Kukura Kurerwa Bus Company* v *Mukwena and Others* HH-477-14 I made the point that a litigant who has challenged an arbitral award by way of an appeal or review to the Labour Court must go on to approach that court, nor the High Court, in terms of s 92E(3) of the Act for interim relief. I still stand by that pronouncement. F

Significantly, that is what the applicant herein has done. The application for interim relief is yet to be determined and it would be improper for execution to be levied as if no such approach has been made. There is a pressing need for certainity in court proceedings it being undesirable for parties to jump backwards and forwards taking advantage of a perceived good position which G may subsist today but be wiped out tomorrow. In my view, the moment the application for a stay of execution was lodged in the Labour Court, the first respondent should have waited for it to be determined first before proceeding with execution. The application may well succeed and as such executing in the face of it tends to bring the administration of justice to disrepute. H

2015 (1) ZLR p1035

Mathonsi J

In addition to that, there is substance in the argument made by the applicant A that the writ of execution being pursued is defective and irregular. The operative part of the arbitral award being executed states:

> "In the result (it) is ordered as follows:
>
> 1. That the respondent be and is hereby ordered to pay the claimant $18 345.17 in back pay and benefits with interest at the prescribed rate from 12 December 2014 B to date of full payment.
> 2. That the respondent be and is hereby ordered to pay the claimant $19 248 damages for premature loss of employment with interest at the prescribed rate from 12 December 2014 to the date of full payment.
> 3. *The payments being gross are subject to taxation per ZIMRA directive.*
> 4. Each party to pay 50% arbitration costs" (the emphasis is mine). C

While the first respondent is to be paid back pay, benefits and damages the figures set out in the award are subject to taxation by the revenue authorities. As an employer the applicant is obliged to deduct the tax from the total amount due to the first respondent. To the extent that the arbitrator added the rider in paragraph 3 of the award, the first respondent could not issue D a writ of execution on the gross amount before deduction of tax. I do not agree with Mr *Bangidza* that the defect could be cured by the first respondent making an undertaking to remit the tax to ZIMRA

herself. An employer has obligations relating to deduction of tax. There is therefore something very wrong with the order for registration issued on 23 April 2015 which reads:

"IT IS ORDERED THAT E

1. The award made on 11 March by the Honourable Arbitrator Joel Mambara in the sum of US$37 593.17 be and is hereby registered as an order of this court.
2. Interest at the prescribed rate calculated from 12 December 2014 to date of payment in full.
3. Costs of suit." F

It ignored the issue of tax which was to be deducted.

I am therefore satisfied that the applicant has made a case for the interim relief that it seeks.

Accordingly the provisional order is granted in terms of the draft order as G amended.

Dube, Manikai & Hwacha, applicant's legal practitioners

Tavenhave & Machingauta, first respondent's legal practitioners H

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