

REPORTABLE (3)
Judgment No. SC 3/03
Civil Appeal No. 28/02

Matabeleland Zambezi Water Trust V
(1) Zimbabwe Newspapers (1980) Limited
(2) The Editor Of The Chronicle

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JANUARY 20, 2003

R M Fitches, for the appellant

R Moyo, for the respondents

CHEDA JA: This appeal is against the refusal of the High Court to grant the following order –

IT IS ORDERED THAT

1. The respondents be and are hereby ordered and directed to supply in writing to the applicant's legal practitioners, within seven days of the date of issue of this order, the following –
 - (a) all the names, (and) positions held within the applicant, of employees, officials and trustees of the applicant who are alleged to have acted in a fraudulent or dishonourable or negligent manner, or any other manner which is inconsistent with the aims and objectives of the applicant, and which conduct is the subject of the articles and editorials set out in Annexures 'A' to 'F', inclusive, annexed to this application;

- (b) the dates and places and the description of alleged acts of misconduct set out in Annexures 'A' to 'F' inclusive, and the names of the alleged perpetrators of the aforesaid alleged misconduct.
2. In the event that the two respondents fail to comply with paragraph 1 above, the first and second respondents shall be held to be in contempt of court and pay a fine of \$10 000.00 a day until they comply with the provisions of paragraph 1 above.
3. That the two respondents pay the costs of this application.

After hearing submissions by the appellant's counsel, we dismissed the appeal with costs, without hearing the respondents' counsel, and said our reasons would follow. These are the reasons.

The above order was sought by the appellant following a series of articles in the newspaper called "*The Chronicle*", which is edited by the second respondent.

The first story was published on 27 October 1999 with the heading "MZWT loses thousands to fraudulent claims". The first part of the story read:

"Tens of thousands of dollars have been allegedly looted from the Matabeleland Zambezi Water Trust by officials who make fraudulent claims particularly after foreign trips, it was learnt recently."

This was then followed by more details on the story, which covered two half columns on the front page and a quarter of the centre page.

The following day, 28 October 1999, a further article appeared on the front page headed "MZWT Board to hold urgent meeting on claims". On p 4

of that paper there was a Comment Column headed "MZWT should probe claims". The comment urged the appellant to investigate the matter by carrying out an audit.

On 29 October 1999 the paper carried another story headed "MZWT urged to tick off contempt officials". The first part of the story read:

"The Matabeleland Zambezi Water Trust has been called upon to purge itself of officials suspected of pilfering the Trust's funds."

When the matter came to the High Court the respondents opposed the application. The editor of the newspaper, Mr Stephen Mpofu, the second respondent, who made an affidavit on behalf of the two respondents, pointed out that the articles were directed, not at the Matabeleland Zambezi Water Trust ("the Trust") itself, but at the officials and employees of the Trust, and that none of the articles ever pointed at the Trust as being corrupt. He pointed out that the report of the then Mayor of Bulawayo was also to the same effect. The second respondent denied any defamation of the Trust itself and said it had never been alleged that the Trust was corrupt and therefore its reputation had never been damaged.

The second respondent said there was no duty on the respondents to do the applicant's work for it, as it could investigate for itself and that the appellant seemed to be on some fishing expedition. He said it would not be in the public interest or the interest of justice for him to be ordered to divulge the information sought.

When its application was dismissed, the appellant appealed on the following grounds, which I deal with in turn –

1. THE LEARNED JUDGE IN THE COURT A QUO ERRED IN LAW IN FINDING THAT SECTION 20(1) OF THE CONSTITUTION OF ZIMBABWE DID NOT CREATE A RIGHT OF ACCESS TO INFORMATION

This is not a constitutional case. The above section falls under Chapter III, which is the Declaration of Rights and is headed "Protection of freedom of expression". The section deals with freedom of expression and freedom to receive or impart ideas without interference. In short, where there is a right to receive certain information, it is that right which should not be interfered with. The one who claims under the section should first of all establish such right, then show that such right is being interfered with.

In this case that right has not been established. The section does not, in my view, cover a situation where one can approach and demand information from another party.

The right to demand information can arise but under different circumstances, which I will deal with as it falls under the next ground of appeal.

2. THE LEARNED JUDGE ERRED IN FACT IN FINDING THAT THERE WAS NO POINT IN GRANTING THE RELIEF SOUGHT BY THE APPELLANT AGAINST THE RESPONDENTS BECAUSE THE APPELLANT HAD NO CAUSE OF ACTION AGAINST THE SAID EMPLOYEES, WHEREAS THE APPELLANT HAD MADE IT CLEAR THAT AS A PUBLIC BODY IT NEEDED TO INVESTIGATE THE ALLEGATIONS OF SLEAZE MADE AGAINST IT AND THEREAFTER IF NECESSARY TAKE WHATEVER ACTION WAS NECESSARY

Firstly, the appellant is demanding from the respondents information which it has in its records. The appellant would know which of its

officials have travelled outside the country, and it should be easy to trace even their travel claims.

Secondly, it is the appellant which indicated to the respondents that it did not intend to sue, thus raising the question as to what the information was required for.

Thirdly, it was pointed out that there was no allegation against the Trust, but against its officials and employees. The appellant has not indicated what cause of action it has, but has not ruled out any action.

Fourthly, even under circumstances where a party intends to sue, it cannot start by demanding information in order to found a claim against its opponent. The court cannot order the other party to provide information that will open it to legal action by the party asking for information. The court can only make an order for disclosure where action has been commenced and the suing party needs the information during the pleadings under the Rules on requests for further particulars. It is also permissible to seek disclosure of information but the authorities seem to limit this to cases where the party actually intends to take action. A number of South African authorities deal with this point –

In *Stuart and Ismael* 1947 AD 328, it was stated in the headnote that:

“The power of a Court to order a person in possession of the necessary information to disclose the names of persons for the purposes of an action which the applicant intends to bring exists when justice would be defeated without such a disclosure and is not confined to cases where information is required of the names of members of an unincorporated body.”

The decision of the court which had granted an order under the above circumstances was upheld.

In *Friday v Thos. Cook & Son (SA) Ltd* 1952 (4) SA 761, VAN WINSEN J stated at p 764:

"I was, however, unable to find any authority for the proposition that one person is entitled to obtain the production for inspection of the books and documents of another, and in which he has no proprietary interest, in circumstances where litigation is neither pending between such persons nor even certain to eventuate."

I consider that the principle of disclosure is the same in the above case as in the case before this Court.

In *Singer Manufacturing Company v Kilov and Ano* 1959 (3) SA 215 the case is summed up in the headnote which reads:

"A person who *bona fide* wishes to sue a partnership but does not know the names of the partnership with certainty may request any known partner or other person who is known to be connected with the business, to reveal the names. If the partner or other person refuses, the Court will order him to give the names and to pay the costs occasioned by his unwarranted refusal."

See also *Cerebos Food Corporation v Diverse Foods SA (Pty) Ltd and Ano* 1984 (4) SA 149.

All these authorities have two things in common, that is, the person must be in need of, and does not have, the information, and the information must be required for purposes of bringing an action against a certain party. The information cannot be sought on a fishing expedition.

In this case the appellant does not intend to bring any action against anyone. It has clearly said so. In addition, to that, it has already

argued that when an audit was carried out no wrongdoing was established against its officials or employees.

The question that arises is "What is the information required for"? The appellant does not intend to bring any action against its officials or employees. While it submits that it needs the information in order to deal with its officials or employees, I do not consider that the principles that compel such information to be given cover administrative actions.

It is not in the interest of justice to order disclosure in this case, since there is also the hidden danger that publication of the names of the persons concerned would open the respondents to an action for defamation by the persons who will have been named who would also rely on the statement by the appellant that no wrongdoing was established against them.

It does not assist the appellant at this stage to suggest that it might consider suing. It should not have taken a position so prematurely if the possibility of suing still existed. It is not clear how the appellant can turn against its own finding that there was no wrongdoing by its officials.

3. THE LEARNED JUDGE ERRED IN LAW IN NOT FINDING THAT BECAUSE –
(A) THE ALLEGATIONS MADE AGAINST THE APPELLANT BY THE
RESPONDENTS WERE DEFAMATORY (AND)
(B) THE APPELLANT, PRIMA FACIE, HAD A CAUSE OF ACTION AGAINST
BOTH RESPONDENTS AND/OR ITS EMPLOYEES OR OFFICIALS
THE RESPONDENTS HAD A COMMON LAW DUTY TO DISCLOSE THE
INFORMATION THE APPELLANT SOUGHT

Part of this ground of appeal has been covered in ground two above, save to add that the respondents merely blew the whistle about the

activities of the appellant. There is no defamation of the appellant. If any action for defamation was to be raised, it can only be by the officials and employees concerned, that is, if they were named. There is no common law duty to disclose as claimed by the appellant. Reporting dishonest activities of the appellant's officials is different from "taking part in the *tortious* conduct" of another party. Accordingly, the duty to assist the appellant does not arise at all.

4. THE LEARNED JUDGE ERRED IN FACT IN FINDING THAT THE DISCLOSURE SOUGHT WAS FOR THE PURPOSES OF GRATIFICATION OF CURIOSITY AND NOT FOR THE PURPOSES OF VINDICATING RIGHTS

I have already pointed out that the appellant said it had found no wrongdoing on the part of its officials and employees and did not intend to sue. The learned judge was therefore entitled to come to that conclusion in the absence of any other reason for wanting the information. The appellant cannot be wanting to discipline its employees when it has already told us it found no wrongdoing on their part.

5. THE LEARNED JUDGE ERRED IN FACT IN FINDING THAT THE APPELLANT DID NOT BELIEVE THAT ITS RIGHTS WERE VIOLATED BY EMPLOYEES

It is not clear here which employees are referred to. If it is the respondents' employees, I have already dealt with the fact that the appellant was not defamed. If it is the appellant's employees, the appellant has already openly defended them against any wrongdoing. It cannot again be heard to say they violated its rights.

6. THE LEARNED JUDGE ERRED IN FACT IN FINDING THAT THE APPELLANT COULD OBTAIN THE INFORMATION IT SOUGHT FROM THE RESPONDENTS THROUGH ITS OWN INTERNAL INVESTIGATIONS

In fact, the appellant has obtained the information from its records. That is why it is able to say there was no wrongdoing on the part of its officials or employees. This is strengthened by an article published by the respondents, wherein a director of the appellant, Mr Eric Bloch, responded to the paper's stories. The article is headed "MZWT funds safe in financial houses". He stated as follows in part of that article:

"It must be stressed moreover that no expenditure has been incurred by the Company other than fees paid to the Registrar of Companies, printing of stationery, and a limited amount on promotion of share subscriptions.

All monies received are invested in building society accounts and Treasury Bills funding investment into economic ventures. None of the officials of the Trust have any access to the funds."

In another part of the same article he says:

"While I have no knowledge as to the substance or otherwise of the allegations against the Trust and its officials, they in no manner pertain to the Company and shareholders' funds are wholly secure."

To sum up, I begin by pointing out that at the hearing of the appeal the appellant could not even explain what the cause of action was founded on when asked.

When the information was sought, there was no intention to sue the respondents. According to the appellant's own report following an investigation or audit, there was no wrongdoing on the part of its officials and employees. Trust funds were invested and were safe. The officials of the Trust have no access to the funds. The question remains unanswered as to what the information is sought for.

It was argued that the appellant has a right to the information sought. The constitutional provision referred to under the Declaration of Rights is concerned with the interference with the right to receive information. It is

based on human rights. Even if one argues that it applies to the appellant in this case, in order to bring a claim the appellant must first establish the right to receive such information, then prove that such right is being interfered with. In my view, this means that information is supposed to flow from a certain source and the respondents are interfering with that flow of information to the appellant.

In this case, that right to the information has not been established.

Refusing to disclose certain facts or information cannot be held to be interference.

On the other hand, it has been argued by the respondents that the appellant is asking for information which it has in its records. That is why the appellant has been able to respond and say there is no wrongdoing on the part of its officials and employees.

The appellant now suggests that it may sue for defamation. Who is to be sued for defamation? If the appellant said its officials defamed it but it is not aware of their identity, and the appellant needs that information in order to institute an action, then the basis of the request may be understood. But that is not the case here. If the appellant wishes to sue the respondents it can proceed to do so without asking for the names of its employees, and the identity of the employees would then be sought under our rules of discovery, depending on the need to do so. The respondents cannot be asked to make a disclosure that will make them open to an action by the officials and employees since the appellant has already said they did no wrong.

It was conceded by counsel for the appellant that the respondents had not involved themselves in some "*tortious* conduct" against the appellant. So no duty arises to give information on that basis.

Reference was made to the case of *Shamuyarira v Zimbabwe Newspapers* 1994 (1) ZLR 445. That case deals with issues that arose during litigation. It is distinguishable from this case where, according to the appellant, litigation was not intended at the time of the court application. I referred earlier to South African authorities which dealt with the issue where litigation is intended.

Even the Zimbabwean authorities of *Shamuyarira's* case *supra*, and *Irvine v Serfontein, Irvine v de Villiers* 1979 RLR 273 deal with these points because there was litigation.

The fact that the appellant has not taken a clear position whether it intends to sue or not supports the argument that it is on a "fishing expedition". The appellant cannot even state that it intends to bring an action, for what wrong, and against which party.

I am satisfied that the appellant has not shown that it is owed a duty of disclosure by the respondents.

Accordingly, the decision to dismiss its application was upheld, and the appeal was dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Manase & Manase, appellant's legal practitioners

Coghlan & Welsh, respondents' legal practitioners