

REPORTABLE (8)

GLENS REMOVAL AND STORAGE ZIMBABWE (PRIVATE) LIMITED

v

PATRICIA MANDALA

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC, PATEL JCC & GUVAVA JCC
HARARE, MARCH 5, 2014**

Ms F Mahere, for the applicant/appellant

E Matinenga, for the respondent

CHIDYAUSIKU CJ: This matter was initially set down on the Supreme Court roll as an appeal matter. At the hearing of the appeal, the respondent submitted that the matter raised a constitutional issue of whether the law of *parate executie* violates the access to the courts provision, s 69(3) of the current Constitution of Zimbabwe (“the Constitution”). Mr *Matinenga* applied for a referral to the Constitutional Court for the determination of that issue. The application was granted and the court issued the following order:

“IT IS ORDERED BY CONSENT THAT -

1. The matter be and is hereby postponed *sine die* with no order as to costs, the reason being that the matter raises a constitutional issue as to whether the law of *parate executie* violates section 69(3) of the Constitution of Zimbabwe.
2. The matter to be heard by the full Bench of the Constitutional Court.”

The facts of this matter are fairly simple and straightforward. They are virtually common cause. They are as follows.

The respondent (the plaintiff in the court *a quo* and hereinafter referred to as “the plaintiff” for convenience) entered into a contract of storage with the applicant (the defendant in the court *a quo* and hereinafter referred to as “the defendant” for convenience), in terms of which she lodged her goods with the defendant. The agreement provided that the goods were to attract a monthly storage charge and that payment was to be made in advance. The agreement included as a material term of the contract that if the storage charges:

“... remain unpaid for three consecutive months Glens (the applicant) reserved the right to sell part or all of the goods by Public Auction without notice to defray the accrued charges”.

The plaintiff breached the above clause of the agreement. The defendant sold the goods by public auction. It used part of the proceeds to defray costs and kept the balance for collection by the plaintiff at her convenience.

The plaintiff, aggrieved by this, approached the High Court for redress. The plaintiff claimed damages for the loss of her goods and damages for pain and suffering as a result of the defendant’s actions. The High Court found for the plaintiff and the defendant was ordered to pay damages in the sum of US\$20 000, being the value of the plaintiff’s property, which the defendant had, according to the court *a quo*, “wrongfully and unlawfully” sold. The defendant was also ordered to pay damages for pain and suffering in the sum of US\$1 500.

The defendant was dissatisfied with the judgment of the court *a quo* and appealed to the Supreme Court. As I have already stated, at the commencement of the hearing of the

appeal the constitutionality of the *parate executie* clause was raised and the matter was referred to this Court for determination.

Before considering the constitutional issues referred to this Court, I wish to make the following observations on issues which were inadvertently left open by the Supreme Court. The issues are not constitutional issues. They therefore fall outside the jurisdiction of this Court.

The defendant appealed against the judgment of the court *a quo* on the following grounds:

- “1. The learned Judge *a quo* erred in holding that the Appellant was liable to compensate the Respondent for selling her property by Public Auction.
2. The learned Judge *a quo* misdirected himself on a point of law by finding that the *parate executie* did not apply in this matter when in fact the parties upon concluding the contract had agreed that it shall apply.
3. The learned Judge *a quo* erred in the exercise of his discretion in holding that the respondent was entitled to damages in the sum of US\$20 000.00 in circumstances where the respondent had miserably failed to prove her claim.
4. The appellant will pray that the appeal be allowed with costs and that the judgment of the High Court be set aside and substituted in place thereof by an order that the respondent’s claim against the appellant be and hereby dismissed with costs, including costs of two (2) counsels where two (2) counsels are employed.”

The defendant’s argument in simple terms is that the plaintiff’s pleadings establish no cause of action, in that the claim for damages cannot be founded on a breach of contract. If anything, it was the plaintiff who was in breach of the contract, which led the defendant to enforce the contract and sell the goods by public auction in terms thereof. The defendant further contended that the plaintiff’s cause of action could not be founded in delict, as the

pleadings did not set out the requirements for a delictual action. The defendant's contention appears unassailable.

Mr *Matinenga*, for the plaintiff, did not make any meaningful submissions to the contrary. He virtually conceded the point and predicated his case on the unconstitutionality of the *parate executie* clause in the contract.

It is not for this Court to determine issues raised before the Supreme Court that are not constitutional. Those issues are for the Supreme Court to determine. The Supreme Court has the final word on those issues. Ideally the Supreme Court should have determined those issues and thereafter referred the issue of the constitutionality of *parate executie* to this Court if so persuaded.

I now turn to deal with the constitutional issues raised in this case.

Mr *Matinenga*, as I have stated, rested his case on the illegality of *parate executie*. He submitted that this is a point of law which can be raised for the first time on appeal. In support of his case, Mr *Matinenga* made the following submissions in para 6 of his heads of argument:

“6. These heads of argument address the issue of *parate* execution in three stages.

Firstly, it is argued that *parate* execution is not of general application. It is limited to a specific type of contract – a pledge. In this type of contract there is no dispute on the principal obligation between the creditor and (the) debtor.

Secondly, and in the event that the court does not find favour with the above argument, it is argued that, on the facts, the respondent suffered prejudice and that *parate* execution was inappropriate.

Thirdly, and lastly, it is argued that the concept of *parate* execution is outmoded and has no place in modern jurisprudence and does not pass the test of constitutionality in our law.”

Ms *Mahere*, for the defendant, submitted that the essence of the plaintiff’s contention is that *parate executie* is unconstitutional on the basis that it offends the “access to the courts” provision of the Constitution and that the plaintiff, in her heads of argument, made reference to both the former and the current Constitutions of Zimbabwe. She further submitted that the reference to the Constitution in the instant case is inapposite because at the time that the *parate executie* clause was carried into effect by the defendant, and at the time it was adjudicated upon, the Constitution had not come into effect.

The issues that arise from these contrary positions and which fall for determination are –

- (1) Whether or not *parate executie* offended the “access to the courts” provision in the former Constitution of Zimbabwe (“the former Constitution), namely s 18(9), as read with s 16(7), of the former Constitution;
- (2) Whether or not *parate executie* offends the “access to the courts” provision in the Constitution, namely s 69(3) of the Constitution; and
- (3) If *parate executie* is compliant with the provisions of both the former Constitution and the Constitution, what is its extent and whether this Court, using its powers in terms of s 176 of the Constitution, should outlaw *parate executie* on the grounds that it has no place in modern jurisprudence, on the ground that it is against public policy.

IS PARATE EXECUTIE COMPLIANT WITH THE PROVISIONS OF THE FORMER CONSTITUTION, NAMELY S 18(9), AS READ WITH S 16(7)?

The issue of whether or not *parate executie* complied with the former Constitution is not, as Ms *Mahere* correctly submitted, a new issue. The issue was raised in the case of *Nyamukusa v Agricultural Finance Corporation* SC 174/94. The facts of the *Nyamukusa* case *supra* are that the appellant's farm had been seized and sold because the appellant had failed to repay a loan. The respondent in the matter acted pursuant to a contractual clause, which read as follows:

“Should the borrower commit or be in breach of any of the terms and conditions of this agreement the Corporation specifically stipulates, as provided in section 40 of the Act, that it shall have the right in terms of that section of the Act, after demand by registered letter addressed to the borrower at his last known address or to the address given by him in his application for this loan, and without recourse to a court of law, to enter upon the property hypothecated and to take possession thereof and sell and dispose of the same in whole or in part as the Corporation may determine always in terms of and subject to the provisions of the Act.”

The appellant in that matter challenged the above clause on the basis that it offended the provisions of s 18(9) of the former Constitution. The court held that the *parate executie* clause in *Nyamukusa's* case *supra* was lawful and permissible in terms of s 18(9), as read with s 16(7), of the former Constitution.

The plaintiff *in casu*, as in *Nyamukusa's* case *supra*, seeks to rely on the “access to the courts” provision set out in s 18(9) of the former Constitution, which provided:

“18 Provisions to secure protection of law

(9) Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.”

The import of the words “subject to” is to render this access to the courts provision subservient to other provisions of the former Constitution.

In *S v Pillay* 1995 (2) ZLR 313 (H) at 315H CHATIKOBO J interpreted the meaning of the phrase “subject to” in the following manner:

“The phrase ‘subject to’ has been interpreted to mean ‘except as curtailed by’.”

See also *Commissioner of Police v Wilson* 1981 ZLR 451.

It follows therefore, as Ms *Mahere* correctly submitted, that the “access to the courts” provision set out in s 18(9) of the former Constitution is applicable except as curtailed by other provisions of that Constitution. In the former Constitution, s 16(7) curtailed s 18(9) in the following terms:

“16 Protection from deprivation of property

(7) 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 for the acquisition of any property or any interest or right therein in any of the following cases —

(a) - (c) ...

(d) as an incident of a contract, including a lease or mortgage, which has been agreed between the parties to the contract, or of a title deed to land fixed at the time of the grant or transfer thereof or at any other time with the consent of the owner of the land; ...

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.”

Thus, quite clearly, *parate executie* was permissible in terms of s 16(7) of the former Constitution.

It is apparent, therefore, that the “access to the courts” provision enshrined in s 18(9) of the former Constitution applies, except as curtailed by s 16(7) of the former Constitution which sanctions *parate executie*.

In the result, I am satisfied that the “access to the courts” provision enshrined in s 18(9) of the former Constitution applies, except as curtailed by s 16(7) of the former Constitution which sanctions *parate executie*. The former Constitution did not outlaw *parate executie per se*. It was lawful to the extent allowed by s 16(7) of the former Constitution, which exception covered the facts of this case.

**DOES SECTION 69(3) OF THE CONSTITUTION RENDER UNCONSTITUTIONAL
PARATE EXECUTIE?**

The issue of whether s 69(3) of the Constitution renders *parate executie* unconstitutional, of necessity raises the issue of whether or not s 69(3) of the Constitution has retroactive effect and applies to the clause of *parate executie* that was entered into, executed and adjudicated upon by the High Court before the Constitution came into operation. Put differently, does s 69(3) of the Constitution have retroactive effect?

I have no doubt in my mind that s 69(3) of the Constitution has no retroactive effect.

In common law countries, one of the fundamental rules of construction of Statutes is the presumption against retrospectivity. The right of access to courts or other lawful tribunals for the resolution of disputes is a substantive right and can only apply retrospectively where the legislation in question clearly provides for such a construction.

Ms *Mahere* argued that statutes must be presumed not to prohibit or to prevent what has been done in the past. In support of this submission she cited the case of *Jockey Club of South Africa v Transvaal Racing Club* 1959 (1) SA 441 (A) and the case of *Phillips v Eyre* [1870] LR 6 QB 1 at 23 (as quoted from Francis Bennion *Statutory Interpretation* (1984) 444), wherein WILLES J made the following remarks:

“... the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.”

These authorities are in line with the maxim *lex prospicit non respicit* (law looks forward and not back). The rationale for this presumption under the common law is that new legislation must not be used to limit the enjoyment of fruits of legal agreements entered into on the basis of an existing law. To allow statutes to be interpreted and applied retrospectively would be tantamount to second-guessing contracts entered into in good faith between two agreeing parties. Therefore, whenever there is a substantive statute which seeks to limit the rights that parties already have under a concluded contract, the presumption should be applied in order to safeguard the legitimate interests of contracting parties unless this is impossible, regard being had to the language used in the legislation. In this regard GUBBAY CJ had this to say in the case of *Nkomo and Anor v Attorney-General and Others* 1993 (2) ZLR 422 (S) at 428H-429C:

“It is a cardinal rule in our law, dating probably from *Codex I:14:7*, that there is a strong presumption against a retrospective construction. See *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication. See *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684E-F; ...” .

In England the presumption against retrospective application of substantive law enjoys an almost hegemonic position in the *corpus* of the law. In *In Re Athlumney* [1898] 2 QB 547 at 551 (as quoted from Bell and Engle (eds) *Cross on Statutory Interpretation* 2 ed (1987)) R S WRIGHT J explained the law in the following words:

“Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter(s) of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

Similarly, the Canadian approach with regard to the presumption against retrospective construction and application of the law is summarised as follows by Professor P W Hogg in *Constitutional Law of Canada* 3 ed (1992) at para 33.10 as follows:

“Section 58 of the Constitution Act, 1982 provides that the Act is to come into force on a day to be fixed by proclamation. That proclamation was issued by the Queen, who came to Canada for the purpose, at a ceremony in Ottawa on April 17, 1982; and the proclamation fixed April 17, 1982 as the day upon which the Constitution Act, 1982 was to come into force. The Charter of Rights accordingly came into force on that day, and operates only prospectively from that day. A statute (or regulation or by-law or other legislative instrument) which was enacted before April 17, 1982, and which is inconsistent with the Charter, will be rendered ‘of no force or effect’ by the supremacy clause of the Constitution, but only as from April 17, 1982. Action of an executive or administrative kind, such as search, seizure, arrest or detention, which was taken before April 17, 1982, cannot be a violation of the Charter, because the Charter was not in force at the time of the action.”

The same proposition was stated in *R v James; R v Dzagic* (1988) 33 CRR 107 at 131-2, wherein TARNOPOLSKY JA opined:

“It is not an effective way to promote respect for Charter rights to apply new effects to actions taken before the Charter came into effect ... it is important that actions be determined by the law, including the Constitution, in effect at the time of the action.”

In *Society for the Propagation of the Gospel v Wheeler* 2 Gall. 105 at 139 (Cir. 1814) it was held:

‘Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective ...’.

In my view, the presumption against retrospectivity is a necessary safeguard against the interference with legally obtained rights *ex post facto*. This stems from the belief that at some point the State, the parties and third parties are entitled to rely on a common understanding of the nature of the rights acquired or transactions completed. See *Du Toit v Minister for Safety and Security and Anor* [2009] ZACC 22; 2010 SACR 1 (CC); 2009 (12) BCLR 1171 (CC) per LANGA CJ at para 36. The question which inevitably follows is whether s 69(3) of the Constitution takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty or attaches a new disability in respect of already completed transactions.

On the authority of the above cited cases and the wording of s 69(3) of the Constitution, s 69(3) must be presumed to have no retrospective effect. Section 69(3) provides as follows:

“69 Right to a fair hearing

(3) 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.”

There is nothing in the language of s 69(3) of the Constitution which suggests that it is to be applied retrospectively, thus overriding the presumption.

Since s 69(3) of the Constitution is not retroactive, it does not apply to the contract between the defendant and the plaintiff, which was concluded before the Constitution came into operation. Therefore the constitutional issue is determined in favour of the defendant.

SHOULD THIS COURT OUTLAW *PARATE EXECUTIE* ON THE GROUNDS OF PUBLIC POLICY?

Finally, Mr *Matinenga* submitted that *parate executie* should be abolished as part of our common law on the grounds that it offends public policy. I am not persuaded by this argument for the following reasons.

Mr *Matinenga* submitted that this court should reconsider the cases of *Aitken v Miller* 1950 SR 227; 1951 (1) SA 153 (SR) and *Changa v Standard Finance Ltd* 1990 (2) ZLR 412 (SC), which cases are to the effect that *parate executie* is both lawful and constitutional.

Mr *Matinenga* urged the court to follow the approach adopted by South African courts in the cases of *Chief Lesapo v North West Agricultural Bank and Anor* 2000 (1) SA 409 (CC) and *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (NPD), in which cases *parate executie* was held to be both unlawful and unconstitutional.

In *Chief Lesapo v North West Agricultural Bank supra* the Constitutional Court of South Africa had this to say at p 416C:

“The judicial process, guaranteed by s 34, also protects the attachment and sale of a debtor’s property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution and includes the control that is exercised over sales in execution.”

Thus, *Chief Lesapo's* case *supra* is authority for the proposition that *parate executie* is not only unlawful but unconstitutional, in that it violated the access to courts right guaranteed by s 34 of the South African Constitution.

Chief Lesapo's case *supra* was followed in *Findevco's* case *supra*, where FRONEMAN J had this to say at 256E-G:

“If legislation which allows the attachment and sale of movable goods given as security without recourse to courts is unconstitutional, even where there is no dispute about the debtor’s indebtedness, why should the common law allow it? I can see no valid reason why it should. Section 39(2) of the Constitution applies to the interpretation of both legislation and the common law. The leading case for upholding the validity of *parate executie* clauses in respect of movables is *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531. In that case the rule against self-help was considered unimportant (at 541, but compare *Iscor Housing Utility Co and Anor v Chief Registrar of Deeds and Anor* 1971 (1) SA 613 (T) at 616H). *Lesapo's* case *supra* tells us that the rule is of fundamental importance to our Constitution. I consider myself bound by the *ratio* of *Lesapo's* case *supra* in the present matter.”

The above South African cases were interpreting s 34 of the South African Constitution, which provides as follows:

“Access to courts

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

A comparison of s 34 of the South African Constitution and s 18(9), as read with s 16(7), of the former Constitution reveals that the two provisions are very different. The South African provision is much wider than the provisions of the former Constitution. Thus, in terms of the former Constitution, *parate executie* was expressly permitted. Accordingly, the above cited

South African cases are of no assistance when interpreting s 18(9), as read with s 16(7) of the former Constitution.

I accept, however, that s 34 of the South African Constitution is very similar to s 69(2) and (3) of the Constitution, although not couched in exactly the same terms. They are of the same purport. I also accept that the cases of *Chief Lesapo supra* and *Findevco supra* were interpreting s 34 of the South African Constitution and are authorities for the proposition that *parate executie* is unconstitutional in terms of s 34 of the South African Constitution.

However, these two cases have not been followed in a number of other South African cases. In some instances it was held that they were wrongly decided.

In *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) HARMS JA was led to state the following in relation to the constitutionality of *parate executie* clauses:

“... I find it difficult to extend the prescription of these statutory provisions by the Constitutional Court to *parate executie* of movables which are lawfully in the possession of the creditor. ... since the debtor may seek the protection of the court if, on any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor acted in a manner which prejudiced him in his rights, the creditor cannot be said to be the judge in his own cause.”

In that case the court came to the conclusion that the judgment in the *Findevco* case *supra* finding that the law relating to *parate executie* of movables is unconstitutional was wrong.

Similarly, in *Juglal v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) the Supreme Court of Appeal upheld the validity of a notarial covering bond which entitled the creditor, in the event of default on the part of the debtor, to take possession of the debtor's

business and assets as security for the debt, to sell the assets and to apply the proceeds in settlement of the debt as *parate executie*. The court *a quo* had granted an order perfecting its security. The judge had expressly declined to follow the *Findevco* case *supra*. HEHER J commented at para 9 of his judgment that the refusal was justified by the decision in *Bock supra*. He also declared in para 11 of his judgment that the common law in relation to *parate executie* does not limit the right of access to the courts, “nor does it fall short of the spirit, purpose or the object of the Bill of Rights”.

Again, in *SA Bank of Athens Ltd v May van Zyl* [2006] 1 All SA 118 (SCA) the learned judge held at p 11 of the cyclostyled judgment that:

“I am, however, unpersuaded that *parate* execution is *per se* unconstitutional or offensive to public policy.”

Thus, in South Africa the cases of *Chief Lesapo* and *Findevco supra* have not been followed in a number of cases.

Section 69 of the Constitution provides as follows:

“69 Right to a fair hearing

(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.

(2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.

(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

(4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum.”

As I have already stated, this provision, although worded differently, bears the same import as s 34 of the South African Constitution. I see nothing in the wording of both these provisions which explicitly or by necessary implication renders *parate executie* unconstitutional.

A party that is aggrieved by the manner in which *parate executie* has been carried out by the creditor has the right to approach the courts to complain about the manner in which he/she has been prejudiced by the application of *parate executie*. The debtor's right of access to the courts remains intact and he is free to exercise it.

This approach was highlighted in the case of *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 at 547 where it is stated:

“It is, however, open to the debtor to seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.”

Similarly, in the case of *Changa supra* the court held:

“An agreement for the delivery of movables by a debtor to a creditor and their sale by the latter by means of *parate* execution is valid and binding subject to the qualification that the creditor is not entitled to act in a manner so as to prejudice the debtor in his rights.”

In *Nyamukusa supra* this court adopted the same approach and concluded that *parate executie* was both constitutional and lawful.

I respectfully associate myself with the authorities that have held that *parate executie* is not only lawful but constitutional for the simple reason that the debtor's right of access to

the courts is not taken away by *parate executie*. The debtor has unlimited access to the courts to complain about the manner in which the creditor has performed the contract. To allow the debtor to escape liability freely and openly undertaken on the basis of *parate executie* smacks of duplicity and strikes at the heart of the time honoured principle of the sanctity of the freedom to contract. The courts should respect the parties' freedom to contract and not seek to rewrite contracts for the parties.

In the result, it is declared that *parate executie* is part of our common law and that it does not contravene s 69(3) of the Constitution as being contrary to public policy in the context of the right of access to the courts.

There shall be no order as to costs.

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

Mtewa & Nyambirai, applicant's/appellant's legal practitioners

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