

REPORTABLE: (113)

ANDREW RANGANAI CHIGOVERA
V
(1) **MINISTER OF ENERGY AND POWER DEVELOPMENT**
(2) **ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY (ZETDC)**

SUPREME COURT OF ZIMBAWE
GUVAVA JA, MAVANGIRA JA & KUDYA AJA
HARARE 7 JULY 2020 & 15 OCTOBER 2021

L. Madhuku, for the appellant

T. Shumba, for the first respondent

Z.T. Zvobgo, for the second respondent

Judgment No. SC115/21
Civil Appeal No. SC 609/19

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KUDYA AJA: This is an appeal against the whole judgment of the High Court, Harare, dated 25 July 2019. The court *a quo* dismissed with costs the application for a declaratory order that had been filed by the appellant.

THE FACTS

The appellant is the owner of an immovable property situated in Mabelreign, Harare. He leased the property to one Crossland Mupfurutsa between June 2013 and August 2017. The tenant concluded an agreement for the supply of electricity with the Zimbabwe Electricity Transmission and Distribution Company (ZETDC or the second respondent). The second respondent duly opened an account for the supply of electricity in the name of the tenant. All the supply and payment transactions were recorded in this

account. The tenant abandoned the immovable property in August 2017. He left an unpaid electricity bill of \$ 4 689.89.

In September 2018, the second respondent installed a prepaid meter in the name of the appellant on the property. Acting in terms of s 3 (1) of The Electricity (Unpaid Bills, Prepayment Meters and Smart Meters) Regulations, SI 44A of 2013, which was promulgated in terms of s 65 of the Electricity Act [Chapter 13:19] (the enabling Act), the second respondent unilaterally transferred the debt incurred by the tenant to the appellant. The debt was to be liquidated by the unilateral debit of at least 50% of the prepaid electricity purchases made by the appellant.

On 1 June 2019, SI 44A of 2013 was repealed by s 12 of SI 85/2018.

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Subsequent to the repeal, the appellant approached the High Court on 3 September 2019, seeking two declaratory orders. The first was that s 3 of the repealed enactment be declared *ultra vires* the enabling Act and therefore a nullity. The second declaratory order was predicated on the first. The appellant sought that the transfer of the debt to him be declared unlawful and that the second respondent be ordered to stop the ongoing deductions from his periodic prepaid electricity purchases. The application was opposed by the second respondent and not by the first respondent (the Minister).

When he filed his application, the appellant was not aware that the enactment he sought to impugn had been repealed. This is apparent from the manner in which he asserted his cause of action in his founding affidavit. The tenor of his averments tended to suggest that the impugned enactment was still extant. The second respondent was equally oblivious to this

fact, otherwise it would have raised it in its opposing affidavit. That the enactment had been repealed was only disclosed by the appellant in his answering affidavit. He, however, with this belated knowledge, elected to proceed with the application in its original form.

The first respondent did not file opposing papers or seek an upliftment of the automatic bar. His legal practitioner appeared in the court *a quo*, where he was, however, granted a watching brief.

It was common cause that the second respondent continued to make debits on the appellant's prepaid electricity purchases to defray the outstanding debt after the impugned enactment had been repealed. This is clearly established by annexures C, D and E dated 15 August 2018, 14 September 2018 and 4 October 2018, respectively.

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THE CONTENTIONS A QUO

The appellant advanced three contentions in the court *a quo*. The first was that s 3(1) of the repealed subsidiary legislation was *ultra vires* s 65(2) (h) of the Electricity Act. He argued that it was incongruous for the subsidiary legislation to cast liability for outstanding electricity debts on the immovable property when the principal legislation imposed liability therefor on a licensee or consumer. These terms were specifically defined in the enabling Act to mean a person. The second was that the implied transference of the debt from the consumer to the owner contemplated in s 3(2) of the repealed enactment violated the established doctrine of privity of contract. Lastly, that the unabated deductions that continued to take place after the repeal of the enactment were unlawful.

In his heads of argument, counsel for the second respondent took two preliminary points against the relief sought by the appellant. He argued that it was bad at law for the appellant to seek a declaration of invalidity against an enactment that had been repealed. He also argued that it was incompetent for the appellant to predicate the second declaratory order on a repealed provision of the repealed enactment.

On the merits, the second respondent made the following counter arguments. That s 65(1) of the Act, vests the Minister with the untrammelled power to make any regulations required or permitted by the Act, which are necessary or convenient for the carrying out or giving effect to the Act. In promulgating any regulations, the Minister is guided by the 17 requirements that are listed in s 65(2), amongst which are paras (h) and (q). While para (h) prescribes the promulgation of regulations in respect of “fees, levies, or other charges payable in terms of the Act by licensees or consumers”, para (q) confers on the Minister the power to make “such other regulations as may be required.” The Minister utilized para (q) to make the impugned enactment that placed liability for outstanding debts at the time a prepaid meter was installed on the property rather than on a person. The same regulations also required the user of the prepaid meter to satisfy any debt that was incurred at the property before the installation of the prepaid meter from a portion of the prepaid electricity purchases.

Regarding, the deductions post the repeal of the impugned enactment, the second respondent contended that they were saved by the provisions of s 17(1)(c) of the Interpretation Act [*Chapter 1:01*], which preserved “any right, privilege, obligation or liability acquired or accrued or incurred under the enactment so repealed.” Counsel for the second respondent further argued that the right to debit the prepaid electricity purchases

accrued to the second respondent on the date the prepaid meter was installed in September 2018. He, therefore, submitted that the post repeal deductions were lawful.

THE FINDINGS A QUO

The court *a quo* held, correctly that, in terms of s 14 of the High Court Act [Chapter 7:14], it has a discretion to grant a declaratory order. Regarding the requirements for such an order, it found the appellant to be an interested person. This was because the debt that had been incurred by his tenant was imputed to him. It further held that the impugned enactment, save for the accrued rights and obligations ceased to be part of our legislation on the date on which it was repealed on 1 June 2018. Consequently, the appellant could not on 3 September 2018, after the repeal of the impugned enactment, competently found a cause of action on the non-existent enactment nor, thereafter, seek a declarator against it. The learned judge stated, at p 4-5 of his judgment that:

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“It is clear to me that as of 1 June 2018 when SI 44A was repealed, the section complained of ceased to be of legal validity. Thus as at 3 September 2018 when applicant filed this application he was seeking to have a nullity (sic) declared *ultra vires* the enabling Act. There was virtually nothing for this court to declare as *ultra vires* the enabling Act....In as far as the fulcrum of the applicant’s application was for an order declaring s 3 of SI 44A of 2013 *ultra vires* the Electricity Act and thus null and void I am of the view that such an application was improper as that SI had already been repealed by the time applicant filed this application.”

The court *a quo*, therefore declined to exercise its discretion in respect of the first declaratory order in favour of the appellant on the basis that the impugned section ceased to exist on 1 June 2018.

The court *a quo* also declined to grant the second declaratory order. It found that the cause of action pleaded in the founding affidavit did not support such a declaratory order.

At p 5 of the appealed judgment, the court *a quo* remarked that:

“Whilst indeed applicant may feel aggrieved by the actions of the second respondent in making him liable for his tenant’s debt, it is my view that the applicant ought to have decided on a proper cause of action especially after learning that the SI in question had been repealed. As it is clause 2 of the prayer in which he seeks to be declared not indebted to second respondent, is premised on this court first declaring the section in question as *ultra vires* the enabling Act. It is only after such a declaration that the issue of his indebtedness or otherwise would arise.

In as far as an application stands or falls on the founding affidavit, it follows that the application cannot succeed on the present papers. Upon realising that the provision in question had been repealed well before filing the application, applicant ought to have withdrawn the application and explored other viable causes of action which recognised the fact that the provision in question had been repealed and any relief had to be on other legal grounds.”

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The court *a quo* further held that s 17(1) (c) of the Interpretation Act preserved the accrued rights and the incurred obligations that existed at the time of repeal. It, however, dismissed the second declaratory order sought on the basis that it was consequential to, and dependent on, the grant of the first declaratory order.

Undaunted by the dismissal of his application, the appellant appealed to this court. He raised the following grounds of appeal.

1. The court *a quo* erred and misdirected itself in law in finding the Statutory Instrument 44A/2013 could no longer be challenged on the grounds that same had been repealed in circumstances where the cause of action arose before the repeal of the Statutory Instrument 44A/2013.

2. Alternatively; the court *a quo* erred in law in not finding that a repealed statutory instrument can be declared null and void where, despite its repeal, a litigant is still adversely affected by what the statutory instrument brought into being.
3. The court *a quo* erred and misdirected itself in law by dismissing the challenge to Statutory Instrument 44A/2013, in the absence of any opposition given that the second respondent had no *locus standi in judicio* to oppose the challenge.

The appellant, accordingly, sought the vacation of the whole judgment of the court *a quo* and its substitution with an order granting the application and a declaration of invalidity against s 3 of the repealed enactment.

THE ISSUE FOR DETERMINATION

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Mr *Madhuku*, for the appellant, did not motivate the third ground of appeal. We regarded it as abandoned. He also conceded that the alternative ground meant the same thing as the first. He therefore conflated it into the main ground. The sole issue for determination is whether or not the court *a quo* erred in finding that the appellant could not seek a declaratory order in respect of a repealed enactment.

THE SUBMISSIONS BEFORE US

The main contention moved by Mr *Madhuku* in oral argument is that s 17(1) (a) of the Interpretation Act preserved the provisions of the repealed enactment where a cause of action arose from the enactment before it was repealed. He contended that the preserved

provisions remained in existence and were therefore susceptible to a declaration of invalidity for being *ultra vires* the enabling Act.

In his written heads, Mr *Madhuku*, did not assail the dismissal of the second declaratory order or seek any relief in respect to it. He was content to attack the adverse finding made against the appellant *a quo* on the main declaratory order. It was perhaps in the realization of this shortcoming that Mr *Madhuku* half-heartedly introduced in oral argument the “live effects of the repealed enactment” discourse into contention. He used it to augment his main submission that the repealed provision and enactment were susceptible to a declaration of invalidity even though they had been repealed. He did not introduce the new argument to support the grant of the second declaratory order nor did he move us to substitute that order for the order of dismissal.

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Per contra, Mr *Zvobgo*, for the second respondent, argued against the insertion of the words “where a cause of action arose before the repeal of” the impugned enactment, which appears in the first ground of appeal. He contended that it was improper for the appellant to introduce and raise for the first time on appeal an issue that had neither been pleaded in the founding affidavit nor argued in the court *a quo*.

He further contended that the attack on s 3(1) in the founding affidavit was premised on the misconception that the impugned enactment was still in existence. It was not based on the period when the cause of action arose. He argued strongly that the repeal of the impugned enactment rendered the founding affidavit ineffectual. Consequently, the court *a quo* was correct to find the application to declare s 3 (1) invalid to be incompetent.

He also argued that the introduction of the “live” consequences of the repealed enactment was a new submission unsupported by the cause of action pleaded in the founding affidavit and the evidence on record.

Mr *Shumba*, for the first respondent, appeared before us. Apparently, the first respondent was served with the notice of set down by the Registrar and subsequently timeously filed his heads of argument. We indulged him. He contended that the relief sought by the appellant after the repeal of the enactment was an academic exercise. That the retrospective declaration of invalidity of the repealed enactment was moot as the issue was no longer alive. It was his further contention that the appeal constituted a classic search for a legal opinion on an abstract or academic issue that did not have any practical relevance to the parties.

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THE LAW

It has been stated in a number of judgments of this Court that an application stands or falls on its founding affidavit. In *Muchini v Adams & Ors* SC 47/13 at p 4, ZIYAMBI JA pertinently observed that:

“It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein & van Winsen* the Civil Practice of the Superior Courts in South Africa 3rd ed p 80 where the authors state:

“The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out”

The reason for the rule is that the founding affidavit constitutes the foundation of the applicant's case, which the respondent is called upon to admit or deny. The averments also delineate the parameters that bind the court in adjudicating the dispute between the parties.

In our law, a cause of action consists of all the facts upon which the relief sought is based. In *Patel v Controller of Customs and Excise* 1982 (2) ZLR (HC) 82 at 86C-E GUBBAY J, as he then was, stated that:

"In *Controller of Customs v Guiffre* 1971 (2) SA 81 (R) at 84A, BECK J, in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637 WATERMEYER J stated:

"The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. (See Halsbury, vol 1, sec 3, and the cases there cited.) (My underlining for emphasis).

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To the same effect is *Peebles v Dairiboard (Private) Limited* 1999 (1) ZLR 41 (H) at 54E-F, where MALABA J (as he then was) defined it as follows:

"A cause of action is defined by Lord Esher in *Reed v Brown* (188) 22 QB 131 as every fact which it would be necessary for the plaintiff to prove if transversed in order to support his right to judgment of the court. In the same case, Lord Fry at 132-133 said the phrase meant everything which if not proved gives the defendant an immediate right to judgment. In *Letang v Cooper* [1965] 1 QB 232 at 242-3 Diplock LJ (as he then was) said a cause of action is simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another person"

There is a further principle that is aligned to the abiding nature of a founding affidavit and cause of action. It is that an Appeal Court will generally not entertain a new issue that is raised on appeal for the first time. This principle was affirmed by GUVAVA JA in *Bakari v Total Zimbabwe (Pvt) Ltd* SC 21/19 at p14-15 in these words:

“In any event, as evidenced in the judgment of the court *a quo*, the issue of novation did not arise before the court *a quo*. The appellant sought to raise it for the first time on appeal. In respect to raising issues for the first time on appeal CHIDYAUSIKU CJ in *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd. And Ors* SC 80/06 stated as follows:

“The general rule, as I understand it, is that a question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party at whom it is directed. See *Estate Lala v Mohamed* 1994 AD 324. The principles applicable to the raising of a point of law for the first time on appeal were succinctly set out by KRIEGLER in the case of *Donnelly v Barclays National Bank Ltd* 1990(1) SA 375 at 380H-381B, where the learned judge had this to say:

“.....generally speaking, a Court of Appeal will not entertain a point not raised in the court below and especially one raised on the pleadings in the court below. In this regard I need do no more than refer to Herbstain and Van Winsen, *The Civil Practice of the Superior Courts in South Africa* 3ed at 736-737. In principle, a Court of Appeal is disinclined to allow a point to be raised for the first time before it. Generally it will decline to do so unless;

1. the point is covered by the pleadings;
2. there would be no unfairness on the other party;
3. the facts are common cause or well-nigh incontrovertible; and
4. there is no ground for thinking that other or further evidence would have been produced that could have affected the point.”

The statutory provisions that are relevant to the determination of this matter are the impugned provision, s 14 of the High Court Act and s 17(1) of the Interpretation Act.

S 3 read:

- (1) “Any electricity charges outstanding on the date on which a prepaid meter is installed shall be debts of the property in which that prepaid meter was installed and shall be reflected as a debit in the installed prepaid meter.

- (2) Any person who owns the property upon which the prepaid meter has been installed has the right to recover the debts of the property from any person who is responsible for incurring the debts.
- (3) An owner of a property may enter into an agreement with any person who intends to occupy the property regarding the manner in which they will make payments towards the unpaid bill in the prepaid meter.”

Section 14 of the High Court Act provides as follows:

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

The meaning of this section was authoritatively determined in *Johnsen v Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at 72 E-F where GUBBAY CJ said that:

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“The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction.”

Lastly, s 17 of the Interpretation Act states that:

“17 Effect of repeal of enactment

- (1) Where an enactment repeals another enactment, the repeal shall not—
 - (a) revive anything not in force or existing at the time at which the repeal takes effect; or
 - (b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
 - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or
 - (d)
 - (e) affect any.....legal proceeding or remedy in respect of any such right, privilege, obligation.....and any such.... legal proceeding or remedy

shall be exercisable, continued or enforced.....as if the enactment had not been so repealed.”

This section preserves the effects of a repealed enactment. These include any accrued rights and privileges and any incurred obligations and liabilities and any pending legal proceedings and consequential remedies.

The above section first appeared in our statute book as s 12 of the Interpretation Act, 1954. It was re-enacted as s 15 of the Interpretation Act [Chapter 1] before its transmutation in the Revised Ed of 1996 to the Interpretation Act [Chapter 1:01].

The meaning, purpose and application of this provision in this jurisdiction was enunciated by the majority decision of the Federal Supreme Court of Rhodesia and Nyasaland in *Ranger v Greenfield NO & Anor* 1963 (2) SA 207 (FC); *Zimbabwe Township Developers (Pvt) Ltd v Lou’s Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 380A-C.

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In the *Lou’s Shoes* case, at 380 A-C GEORGES CJ outlined the history and pronounced the purpose of the provision. He said:

“An examination of the history of s 11 of the English Interpretation Act which is in language very similar to our s 15 confirms this. Prior to that enactment the common law was that if an Act of Parliament which repealed former statutes was itself repealed by an Act which contained nothing indicating that the former laws should continue repealed, the former laws would by implication be revived by the repeal of the repealing statute - *Tattle v Grimwood* (1826) 3 Bing 493 at 496. Further in *In Re Mexican and South B American Co* (1859) 4 De G J 544 at 557 it was stated to be clear that where an Act of Parliament was repealed it had to be considered, except as regards transactions past and closed, as if it had never existed. The English Interpretation Act changed that inconvenient situation.”

It is plain from the above quotation that the purpose behind the promulgation of s 17(1) (a) of the Interpretation Act was to prevent the revival of the legal position that existed before the promulgation of the repealed enactment. In other words, the repeal of the substituting enactment could not result in the retrospective revival of the legal position that preceded it. Such a repeal could only have prospective application. That is what the words “revive anything not in force or existing at the time at which the repeal takes effect” have been construed to mean.

Para (b) of s 17(1) means that the repeal of an enactment does not affect the validity of the actions taken and obligations suffered during the time the enactment was in force. The import of both paras (a) and (b) of s 17(1) is, therefore, that the repeal does not revive a right that has been extinguished nor extinguish the validity of the past rights and obligations that were exercised during the time the enactment was in force. See *SC 60/10*, Judgment No. SC115/21 Civil Appeal No. SC 60/10, *supra*, at p 379A-D.

In my view, while para (c) has been the hot subject of construction in past court decisions in this and other jurisdictions, I venture to add that the same meaning applies to para (e) of s 17 (1) of the Interpretation Act. This is because the two paras, although they apply to different circumstances, serve the same purpose.

The first warning shot, on the meaning of the English equivalent of this para was fired by Lord HERSCHELL in *Abbott v Minister of Lands*, (1895) A.C. 425 at 431. He said:

“It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far-reaching.

It may be, as WINDEYER, J., observes, that the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed.

Their Lordships think not, and they are confirmed in this opinion by the fact that the words relied on are found in conjunction with the words 'obligations incurred or imposed'. They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment.” (My underlining for emphasis).

Lord HERSCHELL, therefore, held that a right could only accrue to a beneficiary who would have asserted that right before the repeal of the enactment that embodied such a right. The claimant was required to establish some positive individual effort or action towards invoking the latent right before it could be found to have been acquired or accrued. This is because all the words accompanying “accrued” in the paragraph connote positive action and not passive absorption. The above cited passage was cited with approval by the Privy Council in *Director of Public Works v Ho Po Sang*, 1961 (2) A.E.R. 721 at p. 732.

The Lord HERSCHELL formulation was adopted lock, stock and barrel by the South African Courts in construing the analogous s 1 of their Interpretation Act (Act 30 of 1906), and its subsequent promulgations in *Mahomed v Union Government, (Minister of the Interior)* 1911 AD 1 at p. 8 and *Rustenburg Platinum Mines Ltd v Motletlegi*, 1954 (2) SA 597 (T) at 603. In the *Mohamed* case, *supra*, INNES JA pertinently remarked that:

“Turning now to the section, it is clear that the rights and privileges intended to be kept alive were rights and privileges acquired under the repealed Act; because it was only with the effect of the second Act upon the first that the section was concerned.

Now, a right or privilege could only be acquired under the Act of 1902 if it was given by the Act, and if the beneficiary had duly availed himself of the statutory provisions. A thing acquired under an Act must necessarily be conferred by the Act; it must be something which, but for the passing of the measure, the beneficiary would not have been entitled to.” (My underlining for emphasis).

In Zimbabwe, CONROY CJ (NR) with whom FORBES FJ concurred in the *Ranger* case, *supra* at 219H adopted wholesale the meaning of s 12 (1) (c) (the precursor to our s 17 (1) (c)) given by Lord HERSCHELL. In so doing, they were following upon the footsteps of CLAYDEN J, in *Midgley v Gelman*, 1956 R. & N. 684 at p. 690. The learned CHIEF JUSTICE stated at 219H that:

“In *Moakes v Blackwell Colliery Co. Ltd.*, H 1925 (2) K.B. 64 at p. 70, SCRUTTON, L.J., points out that when an Act contains a provision which alters the provision of a previous Act, it repeals that provision. This case would therefore appear to be authority for the proposition that sec. 12 (1) (c) applies not only to a repealing Act, but also to a repealing and replacing Act. The provisions of sec. 12 are similar to those of sec. 38 of the Interpretation Act, 1889, of the Imperial Parliament.”

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And concluded at 221D that:

“I come, therefore, to the conclusion that the applicant did acquire a right, or that a right had accrued to the applicant, not to be deemed a prohibited immigrant, by virtue of the provisions of sec. 12 of the Interpretation Act, 1954.”

On the facts of that case and in consideration of the repealed and repealing enactments he held at 222B-D that, although *Ranger* had acquired domicile by demonstrable active steps before the promulgation of the repealing enactment, his right had, on “the only reasonable interpretation to be put upon the new legislation” been taken away by the deliberate intention and object of the repealing enactment to ouster s 12 (1) (c) of the Interpretation Act.

I derive two legal principles from the *Ranger* case, *supra*, that are relevant to the determination of the present appeal. The first is that the rights preserved under s 17(1) (c) only accrue if they are actively exercised before the repository enactment is repealed. The second (at 221H-222D) is that the cause of action for the beneficiary is invoked at the time “any legal proceeding” is instituted.

Lastly, in *Chivore v Vainona Primary School Parents Association* 1992 (1) ZLR 322 (S), a parent challenged the retrospective invocation of a provision in a repealed enactment that had not been re-enacted in the repealing enactment. The *ratio decidendi* of GUBBAY CJ at 324H -325A was that the non-retention of the repealed provision was irrelevant. This was because a new section, which preserved the agreement that preceded the repeal, had been inserted in the repealing enactment. That section vested in the Minister the unfettered power to consummate an agreement similar to the one under attack. On the alternative, in remarks that can only be *obiter dictum*, the learned Chief Justice opined that the right to raise levies had become vested, and was therefore safeguarded at the date of the repeal by s 15 (1) (c) of the Interpretation Act. The *obiter dictum* was based on *Craies on Statute Law*, 17th ed at p 415, where the learned authors say:

“If a right has once been acquired by virtue of some statute, it will not be taken away by the repeal of the statute under which it was acquired. ‘The law itself’, says Pupendorf, in his *Law of Nature and Nations*, Bk 1, c 6, s 6, ‘may be disannulled by the author, but the right acquired by virtue of that law whilst in force must still remain; for, together with a law, to take away all its precedent effects would be a high piece of injustice.’” (My underlining for emphasis).

Regrettably, the persuasive force of the *obiter dictum* is undermined by two factors. The first is that the facts of the case do not disclose whether or not the Parents

Association raised the levies before or after the date of the amendment. The second is that the learned CHIEF JUSTICE did not interrogate the meaning of “acquired” posited in the academic works of Pupendorf and the authors of *Craies on Statute Law*. This could have been for the obvious reason that the highly persuasive precedent of *Ranger’s* case, *supra*, was never brought to his attention.

ANALYSIS OF THE ARGUMENTS

In his foundational document, the appellant nailed the colours of his case on the mast of the declaration of invalidity of s 3 (1) of the repealed enactment. His claim was not premised upon the ongoing effects of the repealed enactment. He could therefore not rely on the declaration of invalidity against s 3 (1) to obtain the second relief sought. Nor could he rely on a ground of appeal he did not plead or argue in the court *a quo*. The issue pertaining to the crystallization of his cause of action pre-dating the repealing enactment was a new issue that he did not plead in his founding affidavit or argue during the trial. On the authority of the *Bakari* case and the cases cited therein, the appellant was precluded from raising this issue on appeal. The failure to plead and argue it *a quo* was unfair and prejudicial to the respondent especially in the light of the two propositions that arise from the *Ranger* case, *supra*. The appellant did not demonstrate in his founding affidavit that he had asserted and therefore acquired or accrued any rights to sue the respondents from the repealed enactment.

In addition, it is a condition precedent to the exercise of the High Court’s discretion to invoke the provisions of s 14 of the High Court Act for an applicant for a declarator to demonstrate that the section or enactment that he seeks to annul is extant. A disannulled enactment is for all intents and purposes dead. It cannot be resurrected. In my

estimation, it cannot even be revived by the continuing effects preserved by s 17 (1) (c) of the Interpretation Act. Those continuing effects may, however, be disannulled on proof that they were rights or obligations acquired or accrued from the repealed enactment. The appellant woefully failed to plead a proper cause of action that would entitle him to the relief he sought *a quo*.

It is for these reasons that I hold that the findings of the court *a quo* are unassailable. Accordingly, the contentions advanced by Mr *Madhuku* in respect of the first ground and the kindred alternative second ground of appeal were misconceived. They are devoid of merit and ought to be dismissed.

COSTS

The second respondent sought costs on the legal practitioner and client scale while the first respondent prayed for ordinary costs. Costs are always in the discretion of the court. I am satisfied that the appeal was irredeemable. It did not raise any important legal issues. It must have been apparent to the appellant that his appeal was unmeritorious. It is axiomatic that one cannot flog a dead horse to life. The appeal was merely intended to harass the respondents. It, therefore constituted an abuse of the appeal process. I am satisfied that this is a proper appeal for mulcting the appellant with costs on the higher scale as prayed for by the second appellant. It does not appear proper to me to award the first respondent who really had no right of audience before this court any order of costs.

DISPOSITION

The appellant could not properly seek a declarator against a repealed enactment. He could seek such a declarator against the continuing effects arising from the rights or

obligations accrued or acquired or imposed by the disannulled enactment. He could not do so by predicating such relief on a defective cause of action for the disannulment of a repealed enactment. The case of *Ranger, supra*, and not *Chivore, supra*, properly defines the stage at which a right or obligation accrues under s 17 (1) (c) of the Interpretation Act. It accrues only when the beneficiary takes active steps to assert the right or obligation before the repeal of the Act and is preserved if the repealing Act does not in context oust the provisions of s 17 (1) (c) of the Interpretation Act. The appellant failed to discharge the onus, on a balance of probabilities, of his entitlement to the declarator that he sought *a quo* and on appeal.

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs of appeal of the second respondent on the scale of legal practitioner and client.

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GUVAVA JA : I agree

MAVANGIRA JA : I agree

Dururu A & Associates, the appellant's legal practitioners

Civil Division of the Attorney General's Office, the 1st respondent's legal practitioners

Dube, Manikai & Hwacha, the 2nd respondent's legal practitioners.

