LOVEMORE HAMILTON PAZVAKAVAMBWA
versus
PORTCULLIS (PRIVATE) LIMITED
T/A FINANCIAL CLEARING BUREAU

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 7 June 2011 and 13 September 2011

M. Nkomo, for the applicant
E.K. Mushore, for the respondent

PATEL J: The background to this matter is as follows. The respondent's business is to collect, store and disseminate public information on persons likely to use the banking services or credit facilities of financial institutions. In terms of the respondent's standard contract with its clients, the latter use its centralised system to check the antecedents of their customers so as to avoid the possibility of civil or criminal default. According to the Preamble to that contract, the respondent operates a credit protection bureau on behalf of the Zimbabwe Financial Clearing Association (ZFCA). The ZFCA provides information for its registered and associated members, on a confidential basis, as to the creditworthiness of persons and companies referred to it by its members for research. The contract is concluded between the respondent and any client who is a ZFCA member subscriber and who wishes to join the respondent in order to utilise its services.

The applicant was employed by the National Insurance Company of Zimbabwe (NICOZ) as its Managing Director until his dismissal in 1996. Subsequently, in 1997, he was convicted on five counts of contravening section 3(1)(f) of the Prevention of Corruption Act [*Chapter 9:16*]. Following his conviction, he was sentenced to a fine of $30,000 or 5 years and 8 months

imprisonment in default of payment of the fine. He appealed to the Supreme Court, but his conviction and sentence were both upheld.

The matter was reported in *The Herald* of 31 July 1998. According to that report, the applicant made four unlawful donations and corruptly sanctioned a loan to a co-operative of which he was a member. He was found guilty of corruption for having deliberately concealed these five transactions from the NICOZ Board. The respondent then extracted the report and kept a record of it in its database. The contents of that record are contractually availed to and accessed by financial institutions wishing to establish the creditworthiness of prospective customers. The effect of this listing is that the applicant has been unable to access banking services and loans from financial institutions.

The applicant's lawyers have written to the respondent and its lawyers requesting that he be de-listed from the respondent's database. He has not received any response to this request. He now seeks an order declaring unlawful his continued listing on the respondent's database. He also seeks an order directing the respondent to expunge his name from its database.

The Arguments

The applicant contends that he continues to be denied access to banking services and loans despite having served his criminal sentence. There is no law that authorises the respondent's blacklist or any legal basis for his listing being maintained. Moreover, the maintenance of criminal records *ad infinitum* is unreasonable and causes disproportionate prejudice to past offenders. It should therefore be declared unlawful as being contrary to the public policy of rehabilitating offenders and the right of offenders to reintegrate into society. The relevant contracts between the respondent and its clients are also contrary to public policy.

In this regard, Mr. *Nkomo* submits that these contracts must operate within the bounds of reasonableness. The period over which

the database records are maintained, *i.e.* in perpetuity, is unreasonable and contrary to the sentencing policy of rehabilitation. In the instant case, having regard to the sentence imposed upon the applicant, a period of 5 years would have been reasonable. He further submits that the right to freedom of expression and information is not absolute and must be balanced against the rights of other individuals and broader public policy. The rights of the applicant have been violated for an unreasonable period of time. The prejudice occasioned to the applicant is greater than the prejudice likely to be suffered by the respondent. In this respect, the interests of the individual should take precedence over the rights of juristic persons.

The respondent's case is that it provides a service to banks at their request. The banks rely on the information provided in dealing with grants of credit to their customers. The respondent does not decide whether or not to grant credit. The decision in each case lies with the bank concerned. The respondent is merely a custodian of information in the public domain or contained in public court records. There is no law that precludes anyone from maintaining a database of records in the public domain. The respondent is operating lawfully and in good faith. In any event, it is not practically possible to expunge from its records what has already happened. This would entail a breach of its duty of care to enable its clients to make sound decisions on credit clearance and the grant of banking facilities. Allowing the relief sought by the applicant would assist him in concealing facts of importance to banks in deciding whether or not to grant credit.

Adv. *Mushore*, for the respondent, submits that it would be contrary to public policy to prevent the dissemination of public information. This is underscored by the constitutional right to the freedom of expression and information. She further submits that the declaratory order sought by the applicant is incapable of being granted inasmuch as the dissemination of information of a criminal

conviction cannot be declared to be unlawful. For that reason, and because the application is unwarranted and without merit, the applicant's conduct should be disapproved by an award of costs on a higher scale or *de bonis propriis*.

Freedom of Expression and Information

Section 20(1) of the Constitution of Zimbabwe guarantees the freedom of expression, *viz.* the freedom to hold opinions and to receive and impart ideas and information without interference. Section 20(2)(a) allows for derogations from this freedom under the authority of any law to the extent that the law in question makes provision in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health. Section 20(2)(b) permits further derogations under the authority of any law for the purpose of, *inter alia*, protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings. However, any such derogation is not permissible where it is shown not to be reasonably justifiable in a democratic society.

It will be noted that section 20(2)(a) does not contemplate the possibility of any derogation under the specific head of public policy. Nevertheless, it seems to me that the public policy of Zimbabwe should be a legitimate consideration in assessing the constitutionality of any law formulated or conceived under section 20(2)(b) to restrain any act or conduct impinging on the reputations, rights and freedoms of other persons. In other words, conduct in pursuit of the freedom of expression or information may be lawfully curtailed where it is contrary to any public policy pertaining to the rights and freedoms of others.

Public Policy and Reasonableness

As was clearly recognised by Hungwe J in *Tel-One (Pvt) Ltd* v *Communications & Allied Services Workers Union of Zimbabwe* HH 74-2007 at p. 4, the concept of public policy in any given society is

an elusive one, depending upon transient and sometimes subjective views on what is in the public benefit or what constitutes the public good. See also my observations in *Gramara (Pvt) Ltd & Another* v *Government of the Republic of Zimbabwe & Others* HH 169-2009 at p. 14. Nevertheless, it is generally accepted that an act will be regarded as being contrary to the public policy of Zimbabwe if it violates notions of elementary justice or constitutes a palpable inequity that would hurt the conception of justice in Zimbabwe. See the remarks of Makarau J in *Pamire & Others* v *Dumbutshena N.O. & Another* 2001 (1) ZLR 123 (H) at 128.

I do not think it can be disputed that sentencing policy in criminal matters, as enunciated through legislation and the courts, is an integral part of the public policy of Zimbabwe. It is also well established that our sentencing policy is geared towards the rehabilitation of offenders and their reintegration into society. The question that arises for determination *in casu* is whether the retention of a criminal record in perpetuity on the database of a credit protection bureau, for disclosure to its clients on a confidential basis, violates our notions of elementary justice or constitutes a palpable inequity that is contrary to public policy.

A South African case that is clearly germane to this question is that of *Ebrahim t/a Broadway Fisheries* v *Mer Products CC & Another* 1994 (4) SA 121 (C). The court in that matter was seized with the issue of liability arising from the respondents having divulged, confidentially and within their particular trade, adverse information relating to the creditworthiness of the applicant. This resulted in credit to the applicant being curtailed and his business activities being severely hampered. It was held by Williamson J, at 123A-C, that:

> "The swopping of information about the creditworthiness of clients or prospective clients in a trade is the most natural and normal thing and everybody in business would know this. Applicant obviously knew it for he gave trade references. Provided the information is given honestly and

> *bona fide* I can see absolutely nothing wrong with this practice."

It was argued for the applicant in that matter that, even if the respondents were merely acting in good faith within the normal parameters of business, their actions could nevertheless be wrongful if, according to the *boni mores* of the community, the exercise of their rights was unreasonable. Reliance was placed in this connection on the decision in *Hawker* v *Life Offices Association of South Africa & Another* 1987 (3) SA 777 (C) at 781D-I, where Howie J stated:

> "However, insofar as counsel sought to contend that unreasonableness did not result in unlawfulness, I disagree. If interference with another's subjective right is unreasonable according to the standard of the *boni mores* of the community then it is unjustifiable and thus unlawful.
>
> …Whether respondent's action in the present matter was unreasonable and thus unlawful involves a weighing up of the particular conflicting interests of the parties, their relationship to one another, the circumstances of the case and considerations of social policy. *Law of South Africa* vol 8 para 20 and see the *dicta* quoted by *Van Heerden and Neethling* (*op cit* at 70), especially in *Atlas Organic Fertilisers (Pty) Ltd* v *Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188H-189A, where the importance is stressed of having regard to 'the morals of the market place, the business ethics of that section of the community where the norm is to be applied'."

Reverting to *Ebrahim's* case, at 126A-C, Williamson J concluded as follows:

> "The creditworthiness of clients or potential clients is a matter of vital interest and any information honestly given to people who are legitimately interested in it does not, in my view, attract liability, no matter the consequences to the client. …If one were to enquire of the notional reasonable man in the marketplace in which these parties operate whether he thought that the behaviour of either respondent conflicted with the *boni mores* of the community, I am sure that there would be shocked surprise that such a question could even arise on the facts of this case."

Mr. *Nkomo* submits that *Ebrahim's* case is distinguishable from the present in that the Court is confronted with the blacklisting

of the applicant on the basis of a criminal judgment as opposed to the exchange of information as a matter of course within a closed business community. He further submits that such sharing of information on creditworthiness is not the same as the blacklisting of the applicant by a credit bureau.

In my view, *Ebrahim's* case is not distinguishable on the facts in the present case, which also involves an exchange of information within a closed business community, namely, the financial institutions that are members of the ZFCA and the respondent. The information distributed by the respondent is confined to this closed community. Moreover, it cannot be said that the respondent's database consists of a "blacklist" inasmuch as it is not a national credit protection agency whose information is accessible to the public at large. Rather, it gathers relevant information for capture on its database and is contractually bound to furnish any information in its possession to a client subscriber who makes an enquiry pertaining to that client's existing or prospective customers.

Duration of Information

I now turn to consider the indefinite period for which the information *in casu* has been retained on the respondent's database. In this regard, Mr. *Nkomo* relies upon the provisions of the South African legislation governing credit bureaux to argue that the perpetual retention of this information is unreasonable and disproportionately prejudicial to the applicant.

According to its long title or preamble, the object of the National Credit Act No. 34 of 2005 is to regulate credit information in South Africa and to establish national norms and standards relating to consumer credit. Section 73 of the Act requires the framing of regulations prescribing the time frame and the form and manner in which consumer credit information held by credit bureau must be reviewed, verified, corrected or removed. Such regulations, as enacted in May 2006 and amended in November 2006, prescribe

the maximum retention periods for which consumer credit information may be displayed and used for purposes of credit scoring or credit assessment. The prescribed period for civil court judgments and rehabilitation orders is 5 years, while the applicable retention period for administration orders and sequestrations is 10 years. Liquidations form the one category in relation to which information may be displayed and used for an unlimited period.

In support of his argument, Mr. *Nkomo* also cites section 3 (now repealed and replaced by Act 23 of 2004) of the Prevention of Corruption Act [*Chapter 9:16*]. This section empowered the convicting court to give summary judgment in favour of the accused's principal in addition to passing sentence on the convicted person. Such judgment would have the same effect as if the judgment had been given in a civil action instituted in the convicting court. Consequently, so it is argued, the maximum retention period of 5 years prescribed for civil judgments under the National Credit Act should serve as an appropriate guideline in the present matter. What this argument overlooks is that the summary judgment envisaged by this provision may be granted in addition to the criminal sentence imposed on the convicted person. Consequently, any supposed correlation between the two becomes tenuous and of no particular assistance in the present matter.

As for the broader submission, while I might be inclined to accept the South African legislation as affording a useful analogy to some extent, I do not think that the argument for applying those provisions can be sustained *in casu*. Firstly, the South African law provides for the registration of credit bureaux nationally and governs consumer credit information generally. It also prescribes maximum retention periods for the specific purpose of credit scoring or credit assessment. Its basic objective, as I perceive it, is to regulate the provision of consumer credit in the national marketplace, not only by financial institutions but by business enterprises of all kinds. In the instant case, however, we are

concerned with a somewhat different scenario, *i.e.* the accessing of relevant information by a limited group of financial institutions under the terms and conditions of a subscription contract, concluded with a single credit protection bureau affiliated to a financial clearing association, the ZFCA. Secondly, and more significantly, the South African law is centred on information pertaining to civil liabilities and obligations and the judgments of civil courts. It is wholly unconcerned with information relating to criminal convictions and sentences imposed in the criminal context. This is for the obvious reason that criminal liability is a totally distinct and separate matter calling for entirely different legislative treatment, assuming that such is possible in any event.

Quite apart from the fact that there is no relevant legislation on the point, it seems to me virtually impossible to assess what would constitute an appropriate period for retaining the record of a criminal conviction and resultant sentence. The length of a sentence of imprisonment does not necessarily afford a useful guide because of the infinite variability of criminal sentences. For instance, a custodial term may be imposed as an option to the payment of a fine, it may be wholly or partially suspended subject to the fulfilment of one or more conditions, it may be fixed to run concurrently or consecutively in the case of several counts, or it may be reduced by way of remission during the course of incarceration itself. There is also the situation of habitual offenders who might be subjected to the operation of previously suspended sentences or who are serving several sentences arising from multiple offences committed at different times. In short, any attempt to rely upon temporal proportionality as a criterion for assessing the reasonableness of retaining criminal records would be purely arbitrary and nothing more than an exercise in imprecision.

In any event, it is axiomatic that criminal conduct is morally more reprehensible than civil misconduct and that its consequences are inherently more serious than the implications of civil liability.

This is well illustrated by the 20 year period of prescription applicable to the prosecution of criminal offences generally (other than murder) in terms of section 23(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. *A fortiori*, it seems logical to postulate that there can be no prescriptive period for the retention of records relating to proven criminal conduct. Moreover, the fact that a person convicted of a crime involving dishonesty has served his sentence does not necessarily mean that he is reformed and that he is no longer a credit risk. In each case, a proper assessment would have to be made by the financial institution concerned on the basis of all relevant information, *i.e.* the individual's past record as well as such additional information as he proffers in order to demonstrate that he is now creditworthy. For all of the foregoing reasons, I am not convinced that the retention of a criminal record on a creditworthiness database for an indefinite duration can logically be characterised as being disproportionate or unreasonable.

Conclusions

In the instant case, it is common cause that the respondent avails its database to its client subscribers in terms of its standard contract and under the strictest confidentiality. The relevant information is only furnished to a subscriber member with a genuine interest in that information, *i.e.* one that requires it in order to evaluate the creditworthiness of persons seeking its credit or other financial facilities. This information is not disseminated indiscriminately to all and sundry. As discussed in the South African cases cited earlier, the respondent operates in good faith to furnish relevant information on a confidential basis to persons with a legitimate interest in that information.

In any event, insofar as concerns the information specifically relating to the applicant himself, it is information that was initially published in and extracted from the public domain. The fact that it

has been retained on the respondent's database for an indefinite period does not, as I have concluded above, detract from the reasonableness or legitimacy of the respondent's actions.

In the final analysis, it is necessary in each case to balance the social policy of rehabilitation and reintegration of offenders as against prevailing community interests and standards. I have no doubt that the closed financial community within which the respondent operates its service would not find anything objectionable in the conduct complained of by the applicant. As for the larger community, the applicant has failed to persuade me that the notional reasonable man on the proverbial commuter omnibus would consider that conduct to be unreasonable. All in all, I am satisfied that the service provided by the respondent and the underlying standard contract with its subscriber clients are not contrary to public policy.

As for costs, Ms. *Mushore* for the respondent has not established any convincing ground for an award of punitive costs as against the applicant or his counsel. I do not consider the applicant's claim to be merely frivolous or vexatious. He obviously bears a genuine grievance and the arguments advanced on his behalf by Mr. *Nkomo* were not only of considerable substance but also meritoriously delivered. In any event, I take the issues raised by this application to be matters of considerable public importance. Accordingly, in keeping with past judicial practice in relation to such matters, I am disinclined to award any costs against the applicant, even though he has not succeeded in these proceedings.

In the result, the application is dismissed with no order as to costs.

Donsa-Nkomo & Mutangi, applicant's legal practitioners

Atherstone & Cook, respondent's legal practitioners