## EX PARTE CORSYN CONSOLIDATED MINES LIMITED AND ANOTHER 1980 ZLR 1

**Court** **General Division, Salisbury Petition**

Beadle, AJ

4th January, 1980

### Flynote

Administration of minor's estate - Guardian's Fund - illiterate parent unable to manage money paid to minor child - whether justification for money being paid into Guardian's Fund - proof of facts justifying such payment.

### Headnote

The petitioners applied for an order directing that money which the first petitioner owed the second petitioner's minor son should be paid into the Guardian's Fund rather than to the second petitioner, since the second petitioner was an illiterate labourer unable to manage the money. There was nothing in the papers, however, to explain why the money should be paid into the Fund.

*Held* that the facts that the second petitioner could not himself manage the money and that he requested the order, constituted a special reason for paying the money into the Guardian's Fund.

*Held,* further, that to save unnecessary expense the Court should accept as proven the facts of the case as stated from the Bar rather than ask for a supplementary affidavit to be filed.

Case cited:

*Moshesh NO v Marine and Trade Insurance Co Ltd* 1971 (4) SA 288 (D).

*P Sullivan*, for the second petitioner.

### Judgment

**Beadle AJ:** In this matter the first petitioner is a company which operates a mine. The second petitioner is an African and I am informed he is employed as a general labourer on the mine, operated by the first petitioner. A son of the second petitioner was injured as a result of the negligent operating of an electric cable by the first petitioner in the



Copyright Juta & Co Ltd

course of its mining operations. It is conceded that the son had a case against the first petitioner and his claim has been settled. The first petitioner agreed to pay the son of the second petitioner a sum of $4 000 in settlement of the claim of the son against it.

The first order which was asked for was for the Court in its capacity as upper guardian of the minor to confirm this settlement of the son's claim against the first petitioner. The second prayer in the petition, however, asks that the sum of $4 000 be paid by the first respondent, not to the second respondent in his capacity as father and natural guardian of his son, but into the Guardian's Fund where it would be administered by the Master on behalf of the minor. There is nothing in the papers which explains why it was necessary for this sum to be paid into the Guardian's Fund and not to be paid direct to the second petitioner in his capacity as guardian of his son.

In the circumstances, the Master, not unnaturally, objected to receiving this sum into the Guardian's Fund. Inquiries have since been made, however, and it appears that the second petitioner is an illiterate African of the labourer type who is quite incapable of administering any sum of money on behalf of his child and that he himself wishes the money to be paid into the Guardian's Fund on his son's behalf, as he himself is incapable of administering this money. These facts should have appeared in the petition and, had they appeared in the petition, the Master is unlikely to have raised any objection to receiving this amount into the Guardian's Fund. See *Moshesh NO v Marine and Tree Insurance Co Ltd* 1971 (4) SA 288 (D).

However, in order to avoid unnecessary expense, I have not ordered, as I would normally have done, that a supplementary affidavit be filed setting out these facts, but on the assurances given me from the Bar, I accept these facts as proven, the facts that the second respondent not only is an illiterate African incapable of managing this amount of money, but has, at his own request, asked that this money be paid into the Guardian's Fund. This seems a sufficient "special reason" for paying this money into the Guardian's Fund.

In the circumstances, the Master now raises no objections. I point out however, that the proper course in cases of this sort, the "special reasons" should be set out clearly in the papers. I therefore make an order in terms of the draft order, which reads as follows:

---



BEADLE, AJ

"IT IS ORDERED:

1. That full and final settlement of all claims by Silas Makota in his capacity as father and natural guardian of Lackson Makota, and more especially for damages for shock, pain and suffering, loss of amenities of life and future medical expenses in respect of injuries suffered by the said Lackson Makota in the vicinity of the Lonrho shaft at the Mazoe Mine on the 15th January, 1976, against Corsyn Consolidated Mines Limited, in the sum of $4 000, be and is hereby confirmed.

2. That the said sum of $4 000 shall be paid by the said Corsyn Consolidated Mines Limited into the Guardian's Fund administered by the Master of this Honourable Court for the benefit of the said Lackson Makota until the said Lackson Makota attains his majority, provided that until the said Lackson Makota attains his majority, the Master of the High Court may pay income and, if such income is insufficient,

**Copyright Juta & Co Ltd**

capital, for the education, welfare, maintenance and advancement in life of the said Lackson Makota.

3. The costs of this petition shall be paid by Corsyn Consolidated Mines Limited.

BY THE COURT.

Registrar.".

*Honey & Blanckenberg,* attorneys for the petitioners.



## REGINA v CHINYERERE 1980 ZLR 3

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Macdonald, CJ, Lewis, JP and Davies, JA

16th January, 1980

### Flynote

Criminal law - conspiracy - liability of conspirator who withdraws from conspiracy before commission of offence - liability of conspirator who withdraws after housebreaking but before theft of goods from premises.

### Headnote

A conspirator who withdraws from the conspiracy to commit a crime before the conspiracy is consummated may be found guilty only of conspiracy to commit the crime even if the crime is subsequently committed, unless he also incited, commanded or procured the other conspirators to commit the crime.



LEWIS JP

Housebreaking with intent to steal and theft are two separate offences, so a conspirator who assists in the breaking and entering of premises but dissociates himself from the theft of goods therefrom may be convicted of housebreaking with intent to steal and conspiracy to commit theft.

Authorities cited:

Burchell & Hunt, *South African Criminal Law and Procedure*, volume I, pages 406 and 410;

*R v Njenje & Ors* 1965 RLR 586 (AD); 1966 (1) SA 369 (SRAD);

*R v Nyamande & Ors* AD 166/67 (unreported);

Copyright Juta & Co Ltd

Hunt, *South African Criminal Law and Procedure,* volume II, page 664.

Appellant in person.

*J H C Friedman*, for the respondent. The extent of the appellant's assistance as a lookout and of his consequent liability is that envisaged in the passages cited from *R v Mbande & Ors* 1933 AD 382 at 393. The appellant's participation was as much intended to assist his accomplices in the offence of theft, which was the ultimate purpose, as in the incidental preliminary offence of breaking into the premises; it would be artificial and illogical to confine his liability only to the breaking, especially since it is not clear whether when he withdrew his accomplices had yet completed the breaking.

As a matter of general principle with regard to the inchoate offences of attempt, incitement and conspiracy, if the offence is consummated the participant is liable to conviction for the completed offence itself: Burchell and Hunt, *South African Criminal Law and Procedure*, volume 1 at page 406, note 255; *R v Njenje & Ors (supra), R v Nkwane & Ors* 1969 (2) RLR 530 (GD) at 533G-H; 1970 (2) SA 165 (R) at 168. Withdrawal by an accomplice from a criminal enterprise before the completion of the offence as a means of avoiding liability is postulated by W J Millar in Rhodesian Accomplice Law (unpublished thesis, 1969) at pages 147-151 on the basis of the following cases: *R v Njenje & Ors (supra); R v Nyamande & Ors (supra)* at pages 4-6; *R v Mkize & Ors* 1960 (1) SA 276 (N) at 282 E-H; *S v Malinga & Ors* 1963 (1) SA 692 (AD). Also cited are a number of English and American authorities. It is there submitted on the basis of these authorities that before a person can withdraw from a criminal purpose he must effectively negative the consequences flowing from his own previous participation, for example, by preventing or endeavouring to prevent the commission of the offence or by giving timely warning to the authorities. Even where a person does withdraw in this manner, and whether or not the offence is then committed, he may be held liable for his own participation prior to his withdrawal and be convicted of any of the inchoate offences of incitement, conspiracy or attempt.



LEWIS JP

There are the following criticisms against the proposition that an accomplice who withdraws from an offence which is subsequently committed may escape liability for that offence, or be convicted of only a conspiracy or incitement to commit it-

(a) it offends against the general principle that where the offence is completed the participant is liable for the completed offence;

(b) of the cases cited, only that of *R v Nyamande Ors (supra)* really supports the acceptance of withdrawal,

(c) to make liability depend upon whether or not or to what extent the withdrawer is able to prevent the completion of the offence is too much dependent on the factual variations of individual cases to be elevated to the level of a general principle. Of course, where the main offence is not completed there is only liability for the inchoate offence anyway.

Accordingly, where a conspirator withdraws in circumstances where the normal incidents of

**Copyright Juta & Co Ltd**

participation and of *mens rea* would give rise to full liability, his withdrawal should be accorded recognition rather in a reduction in sentence or in a decision by the relevant authorities not to prosecute. A decision not to prosecute would normally occur where the erstwhile accomplice becomes a witness for the prosecution.

## Judgment

**Lewis JP:** The appellant in this case was convicted in the magistrates Court of the crime of housebreaking with intent to steal and theft. He was sentenced to 12 months' imprisonment with labour, three months of which were ordered to run concurrently with the sentence he was already serving for another offence at the time when he was convicted. That sentence was one of two years' imprisonment with labour, of which 15 months were suspended on certain conditions. In other words, an effective sentence of nine months. The net effect, therefore, of the sentence in this case was that he received an additional effective period of nine months' imprisonment with labour. He has appealed to this Court against his conviction.

The evidence established that on the night of the 1st February, 1979, a gang of persons broke into a shop known as Sanremo Take Aways in Rezende Street, Salisbury, and stole a large quantity of goods valued at $841,81, none of which was recovered. Members of the gang made a hole in the security fence surrounding the property and then drilled a series of small holes in the wooden door of the shop in order to form a large hole



big enough to allow a person to crawl through. The only evidence connecting the appellant with the offence was his own extra-curial statement to the police which was put in as Exhibit 1. That reads as follows:

> "We approached from the back, Benjamin and Robert, I was standing outside I did not get inside they broke the back door. It took quite a long time to break the door. It was too late in the night. I got scared and decided to leave them. After an hour I was apprehended by a night watchman at the Bus Stop for attempting to break into Emen Stores, a case for which I am in custody. I did not see any of the goods."

When the appellant applied for a certificate enabling him to prosecute this appeal in person, I referred the matter to the Attorney-General for his views as to whether the appellant should have been convicted of the actual theft of the property rather than of conspiracy to steal and housebreaking with intent to steal. A law officer in the department of the Attorney-General, in his reply on behalf of the Attorney-General, said the following:

> "In our respectful submission, the appellant's presence as a look-out or as a ready means of help was an assistance to the main offenders. For example, it must have been of comfort to them to know that one aspect of approach was sealed by him and that he would be able to help carry the bulky goods at a later stage.
>
> It is accordingly respectfully submitted that the appellant is guilty of housebreaking with intent to steal.
>
> We are of the view that his running away, coming, apparently, soon after the break-in was effected, was sufficient dissociation from the theft and that he should only have been found guilty of conspiracy to commit the theft. At the stage of the theft any assistance to be gained from his presence had obviously fallen away with his departure."

Copyright Juta & Co Ltd

In granting a certificate, I remarked that the arguable point was that raised in the Attorney-General's minute. Today, Mr *Friedman*, who appears for the Crown, has expressed his disagreement with the views expressed in that minute and has made the submission that the appellant was properly convicted as charged, in other words, of the crime of housebreaking with intent to steal and theft. He concedes that the interpretation to be placed on the extra-curial statement is that the appellant ran away before the goods were stolen.

Mr *Friedman* made the broad submission that as a matter of general principle a participant in the inchoate offences of attempt, incitement and conspiracy is liable to be convicted of the completed offence itself if that offence is consummated, and he relied on a passage in Burchell and



LEWIS JP

Hunt's *South African Criminal Law and Procedure*, volume I at page 406, note 255. That passage does not support the proposition that a mere conspirator, who is not also guilty of incitement, may not escape conviction of the ultimate offence which is the subject of the conspiracy by withdrawing from the enterprise before that offence is committed. A similar submission in that form was rejected by this Court in the case of *R v Njenje & Ors* 1965 RLR 586 (AD) at 594C-E; 1966 (1) SA 369 (SRAD) at page 376B and C The learned authors Burchell and Hunt, in the same volume at page 410, go on to say:

> "Where the crime which is the subject of the conspiracy is in fact committed the question of whether a conspirator is liable as a principal offender or only liable for conspiracy depends upon the degree of his participation in the crime. LEWIS, AJA., expressed the law as follows in *R v Njenje:*
>
> > 'If . . . the conspirator also incites, commands or procures the other conspirators to commit the crime, it seems that he may be liable to conviction as a principal offender, even though he is not present when the crime is committed. If, on the other hand, he is not that type of conspirator, then it seems that he can only be convicted as a principal offender if it is proved that he otherwise aided and abetted in the actual commission of the crime.'."

It seems to me that the policy of the law must be to encourage people to refrain from crime by having a change of heart, whether through fear or for some other motive, and to eschew the crimes which they have conspired to commit even at the last stage before the actual commission of the crime. This view of the law is also borne out by the decision of a full bench of this Court, consisting of QUENET JP MACDONALD JA (as he then was), and FIELDSEND AJA in the case of *Regina v Nyamande & Others,* Appellate Division Judgment No. 166/67 dated the 22nd December, 1967 (not reported). That case concerned the conviction of six appellants under section 37 (1) (a) of the Law and Order (Maintenance) Act [*Chapter 39*] as it was then. The offence consisted of setting on fire, or attempting to set on fire, a motor-omnibus belonging to the Salisbury United Omnibus Company Limited, in which there were passengers, by the use of petrol or other inflammable liquid, in other words, by the use of petrol bombs. In the case of the sixth appellant, the Court was constrained to rely solely upon his own extra-curial confession, which read as follows:

> "Before the arrival of the bus we talked amongst ourselves that we would be arrested. I and David told Francis and Lovemore that when the bus came they should break the bottles. George and Cassion were standing at the bus

Copyright Juta & Co Ltd

stop with some other people. Nyamande and other were on the way coming.



LEWIS JP

The bus arrived. George entered in the bus. It was between Francis and Lovemore, one of them broke a bottle near the front of the bus on the side of the driver. We then ran away and the driver drove the bus away. I threw the matches away."

After quoting from the confession, QUENET JP expressed the view that the meaning was equivocal but went on to say:

"Since the extra-curial statement is capable of an innocent interpretation the fact that in his statement from the dock he repudiated the whole of it does not fill the gap left by the absence of sufficient evidence of his participation. His failure to give evidence is consistent not only with a consciousness of guilt but with the fear, if he gave evidence, of implicating his co-accused. In the circumstances, I am of the opinion the sixth appellant should have been convicted not on the main count but on the alternative charge of conspiring to contravene section 37 (1) (a) of the Law and Order (Maintenance) Act [*Chapter 39*]."

In dealing with sentence, the learned JUDGE PRESIDENT said:

"The extent of his responsibility must be limited to his agreeing to accompany the other conspirators to the scene, and actually accompanying them there. Before the bus arrived he decided not to go on with the attack, and from that moment he attempted to frustrate the plan,"

That is clear authority, therefore, for the proposition that a conspirator can withdraw from the enterprise even at the last moment, and in the event of his withdrawal he is entitled to his acquittal on the main charge, and is liable to be convicted only of the offence of conspiring to commit the crime in question. It has been suggested in the course of Mr *Friedman's* argument that it is necessary at the same time for the person withdrawing to attempt to frustrate the plan which is the subject of the conspiracy. It seems to me, however, that QUENET JP was not laying this down as a condition. He had concurred in the judgment in *Njenje's* case *(supra)* the previous year, in which no such condition had been suggested. He merely referred to the sixth appellant's conduct in frustrating his own attempts to set fire to the bus by throwing away the matches and breaking the bottle of petrol on something outside the bus, as evidence of the fact that he had decided to withdraw from participation in the whole enterprise, albeit at the last moment.

Mr *Friedman* also submitted that the assistance given by the appellant in the initial stages of the housebreaking was such that it must be considered as assistance in the achievement of the ultimate result, which was the theft of the goods from the shop, and that consequently he could



LEWIS JP

not at that late stage escape conviction of the crime of theft by withdrawing before the final object of the conspiracy had been achieved. One has to bear in mind, however, that housebreaking with intent to steal and theft are two separate offences. This is made clear in Hunt's *South African Criminal Law and Procedure,* volume II. The learned author traces the history of housebreaking with intent to steal and theft and points out that under the old

Copyright Juta & Co Ltd

Roman-Dutch law housebreaking with intent to steal and theft was simply regarded as an aggravated form of theft. However, in the modern South African law this is no longer the case. The learned author at page 664 says this:

> "The effect of this development is that, unlike Roman-Dutch law, house breaking is no longer regarded as an aggravated form of theft. The housebreaking with intent to steal and the theft are two separate offences, though they are in practice charged and punished as one offence, so that in such cases the result is the same."

Since there are two offences involved, there does not seem to be any reason in principle why a person who has aided and abetted in the initial stage of housebreaking with intent to steal and theft should not dissociate himself from the ultimate offence, that is the theft of goods from the premises broken into, before that theft has been perpetrated and thus escape conviction of that offence as a principal.

There is nothing to suggest that the appellant in this case was anything more than a metre co-conspirator with the others who broke into these premises. There is no basis for finding that he incited the others to commit the crime or that he was in any way a ringleader in the enterprise. In the circumstances, therefore, it seems to me that the opinion expressed on behalf of the Attorney-General in the minute in response to my query, from which I have already quoted above, was the correct view of the matter.

In the result, therefore, I would allow the appeal against conviction to the limited extent of altering the conviction from one of guilty of housebreaking with intent to steal and theft to one of guilty of housebreaking with intent to steal and conspiracy to commit theft. As in *Nyamande's* case *(supra)*, this reduction in the verdict entitles the appellant to some reduction in the sentence. It does not seem to me that the reduction should be a substantial one because he has a record of crimes of dishonesty. As I have already said, at the time he was convicted of the current offence, he was already serving a sentence of two years' imprisonment with labour, of which 15 months was suspended, and prior to that he had the following previous convictions: on the 30th April, 1975, he





was convicted in the magistrates court of theft by pocket-picking and was sentenced to six months' imprisonment with labour; and on the 5th December, 1977, he received nine months' imprisonment with labour for attempted theft. However, he is entitled, as I have said, to some slight reduction in the sentence. It seems to me that the appropriate form which this reduction should take would be to suspend a portion of the 12 months' imprisonment with labour imposed for the current offence (instead of ordering a part of it to run concurrently). This will mean that although his effective sentence will be less, he will have a greater period of imprisonment suspended and hanging over his head, to deter him from committing further crimes of dishonesty when he comes out of gaol. I would, therefore, set aside the sentence and substitute the following sentence:

Twelve months imprisonment with labour, six months of which will be suspended for five years on condition that the appellant is not again convicted of any crime involving dishonesty committed within that period for which he is sentenced to imprisonment without the option of a

**Copyright Juta & Co Ltd**

fine.

**Macdonald CJ:** I agree.

**Davies JA:** I agree.



## HAYES v BALDACHIN AND OTHERS 1980 ZLR 11

**Court** **General Division, Salisbury**

Civil Action

Waddington, J

14th, 15th, 16th and 23rd January, 1980

### Flynote

Practice - O 9 R 62 of high Court (General Division) Rules, 1971 - withdrawal from action by plaintiff - when Court may grant find judgment in favour of defendant.

Costs - attorney and client costs - precipitate withdrawal from action and vexatious conduct by plaintiff - whether defendants entitled to attorney and client costs.

### Headnote

Three times during the hearing of the action the plaintiff, who was appearing in person, applied unsuccessfully for its postponement *sine die* so that he could apply to the Governor for the rescission of an order that the hearing be held *in camera.* On the third day of the hearing, when his application was refused for the third time, he withdrew precipitately from the Court before the closure of his case and abandoned the action. Counsel for the defendants, having led evidence, applied for final judgment in their favour.

*Held* that in the circumstances there was sufficient cause for the purpose of Order 9 Rule 62 of the High Court (General Division) Rules, 1971, for the Court to exercise its inherent jurisdiction and grant defendants final judgment rather than absolution from the instance.

*Held,* further, that because the Plaintiff's conduct in Court and his claim itself were vexatious and an abuse of the Court's process, costs on the attorney and client scale should be awarded against him.

Cases cited:

*Collins v van der Merwe* 1908 TS 1086;

*Verkouteren v Savage* 1918 AD 143;

*Bosman v du Toit's Executors* 1937 CPD 209;

Copyright Juta & Co Ltd

*O'Brien v Nurick* 1930 WLD 322;

*Mahomed & Son v Mahomed* 1959 (2) SA 688 (T).



WADDINGTON J

Plaintiff in person.

*N M R Gardener* with him *B H Christie*, for the defendants.

## Judgment

**Waddington J:** The Plaintiff in this case claims $24 600 jointly and severally from the three defendants who were all employees of the Posts and Telecommunications Corporation (hereinafter called the Corporation). The claim arises in this way. Plaintiff was an employee of the Corporation and as such was the subject of a confidential report on his performance. The report was compiled by the first defendant in collaboration with the third and fourth defendants. The action against another defendant was withdrawn before trial. Plaintiff in his declaration alleges that the confidential report contained statements defamatory of him. The defence raised, on behalf of the defendants, was that the report enjoyed qualified privilege. For his part, plaintiff alleged that the report was untrue and made maliciously and that he was, therefore, entitled to damages.

This was an unusual case. On the first day of the trial the plaintiff, who appeared in person, applied for the postponement of the matter *sine die*. The application was made for this reason. Before the trial-on the 11th January, 1980, to be precise-the Secretary for Justice delivered to the Registrar of the General Division a certificate issued in terms of section 4 (2) of the Emergency Powers (Judicial and Other Proceedings) Regulations, 1975, requiring the court to hold the trial *in camera* and directing that no document requested or subpoenaed by the plaintiff should be made available or transmitted to him unless a judge of the General Division had first examined such document and was satisfied that it was reasonably necessary for the determination of the case that it should be made available or transmitted to plaintiff. The certificate also directed that no copies of any such documents referred to above should be made and that all documents should be returned to the Corporation. In his application, plaintiff stated that the evidence he would adduce would disclose various corrupt practices in the Salisbury telephone exchange and that it was vital in the public interest to publicize those practices. In the event, the plaintiff eventually withdrew his application and proceeded to present his case. After calling two witnesses he then elected to give evidence himself. By the end of the first day of the trial plaintiff's cross-examination by Mr *Gardener* had commenced. It should also be added that during the course of the first day of the trial plaintiff asked the Court whether he would be entitled to approach His Excellency the Governor in order to request the lifting of the direction contained in the certificate referred to above. He was informed that it would be open to



WADDINGTON J

Copyright Juta & Co Ltd

him to do so. For the sake of convenience it should be explained that the powers which the Secretary purported to exercise under the regulations in question have been vested in His Excellency the Governor in terms of section 4 of the Constitution (Interim Provisions) Ordinance, 1979, and that His Excellency has, in terms of section 6 of the same Ordinance, delegated those powers to the Secretary for Justice.

On the second day of the trial plaintiff renewed his application for a postponement *sine die,* stating that a member of the staff of His Excellency the Governor had indicated that His Excellency would be prepared to give consideration to his, the plaintiff's, request. Not being satisfied that a postponement *sine die* would be necessary for this purpose, the Court granted an adjournment of the matter until 2.15 p.m. that day and then again until 9.30 a.m. the following day to enable the plaintiff to submit written representations to the appropriate authority in this regard. plaintiff stated that he would be able to do so by the late afternoon on the 15th January.

At 9.30 a.m. on the third day of the trial (the 16th January) plaintiff informed the Court that he might expect a reply to his written representations by no earlier than the afternoon of the 17th January. Plaintiff again applied for a postponement *sine die* reiterating his original reason for making the application and raising for the first time certain other grounds in support of that application. After considering the application the Court dismissed it for the reasons contained in the judgment of the Court given during the morning of the 16th January. Immediately the decision of the Court was pronounced the plaintiff stated that he did not wish to proceed with the trial and that he would have nothing to do with **a secret trial.** He was enjoined to do nothing precipitate which might prejudice his claim and the Court then explained to him what the consequences of his withdrawal might be. He was informed that he might withdraw the action with the consent of the defendants or close his case or simply withdraw from the case. He was warned that if he simply withdrew from the case the Court might grant absolution from the instance or possibly give a final judgment in favour of the defendants. The ramifications thereof were explained to him in detail. Plaintiff indicated that he would "rather die" than proceed with a secret trial and he then withdrew from the court room without further ado.

Mr *Gardener* then applied for leave to lead evidence on behalf of the defendants in order to rebut the evidence of the plaintiff so that he could, in due course, apply for final judgment in favour of the defendants. On



WADDINGTON J

the authority of the decision of INNES CJ, in *Collins v van der Merwe,* 1908 TS 1086, defendants were given leave by the Court to lead that evidence. In due course Mr *Gardener* closed his case and applied for final judgment in favour of the defendants. Rule 62 of the High Court (General Division) Rules, 1971, provides:

> "62. When on the calling of any case the defendant appears in court personally, or by his counsel, and the plaintiff makes default, the defendant shall be absolved from the said suit or action, unless sufficient cause to postpone the same, or to make some other order therein, appears to the court."

In the circumstances of this case it was, in my opinion, open to me to grant final judgment in favour of the defendants. In the case of *Verkouteren v Savage,* 1918 AD 143 at page 144,

Copyright Juta & Co Ltd

INNES, CJ, is reported as saying:

> "I assume the correctness of the principle laid down in *Collins v van der Merwe (supra),* for there must be an inherent right in a Supreme Court, under special circumstances, to finally determine an action with which the plaintiff neglects to proceed. But that right should be carefully exercised. The circumstances in *Collins*' case were very special."

Then in *Bosman v du Toit's Executors,* 1937 TPD 209 at 210, DAVIS, J, stated:

> "Rule of Court No. 177 is as follows: 'When on the calling on of any cause, the Defendant shall appear in Court personally, or by his counsel, attorney, or agent, and the Plaintiff shall make default, the said Defendant shall be absolved from the said suit or action, unless where sufficient cause to postpone the same, or to make other order therein, shall appear to the Court.' It is difficult to see what further alternative could be open to the Court than either to take the ordinary course of granting absolution or, instead of doing that, give the plaintiff further time by postponing the case or to give the plaintiff no further opportunity by giving judgment for, the defendant. It seems to me that under our Rules provision is specially made that where there is sufficient cause shown the Court may grant judgment for the defendant. But that that is in any case, apart from the rule, the inherent prerogative of the Court is shown by the case of *Collins v van der Merwe* (1908 TS 1086) which has been commented on and followed by the Appellate Division in *Verkouteren v Savage* (1918, AD 143). A case has also been cited to me from our own Court, *Kriel v van der Merwe*, which was decided on the 16th October, 1924, where this course was adopted. In *Verkouteren v Savage (supra),* INNES, CJ, pointed out that the right finally to determine an action in these circumstances is one that should be carefully exercised, and it is suggested that there should be special circumstances. On my reading of Rule 177, that Rule requires very much the same thing, because it is only where 'sufficient cause' is shown that the Court can depart from the ordinary procedure laid down by that Rule of granting absolution from the instance.
>
> I have to consider in this case whether such sufficient cause has been shown to me as to warrant my acceding to the request of the defendants."

---



WADDINGTON J

In the case of *O'Brien v Nurick*, 1930 WLD 322, SOLOMON, J, considered an application for final judgment in the following circumstances. Plaintiff's counsel on the first day of the trial applied for a postponement *sine die* on the strength of a medical certificate over the signature of a doctor, which certificate was to the effect that the plaintiff was suffering from a good deal of nervous shock and pain and that in the opinion of the doctor he should have complete rest in bed for at least one week. Counsel for defendant requested that the doctor should appear in the witness box for cross-examination and as a result of the cross-examination it transpired that the plaintiff, although he had had a tooth extracted the day before the trial, was in a fit condition on the day of the trial to appear in Court and give his evidence. When the application for a postponement was refused plaintiff's counsel withdrew from the case. Defendant's counsel was not satisfied with absolution from the instance on the plaintiff's claim, but asked leave to call the defendant on the strength of *Collins v van der Merwe (supra)* so that on his evidence he might get final judgment. The judgment of SOLOMON, J, then reads:

> "Now I have read the judgment of the CHIEF JUSTICE in that case, and the principle underlying the judgment appears to be that there is no objection to granting an application such as Mr *Rathouse* has made, provided it is clear to the Court that the plaintiff is not in default through circumstances beyond his control. If he is in default through circumstances beyond his control, as for instance the plaintiff would have been to-day had he been in truth too ill to attend, of course no Court would grant final judgment, but I am quite satisfied from the evidence of Dr. Myerson that the plaintiff is not in default through circumstances beyond his control but is making a deliberate

---

**Copyright Juta & Co Ltd**

default, and this finding is confirmed by the Act that the plaintiff's counsel has not been instructed for trial. In the circumstances I think the procedure in *Collins* v *van der Merwe (supra)* may be adopted here, and having heard the defendant's evidence I give judgment for the defendant . . . "

The cases which I have mentioned above all concerned matters where the plaintiffs themselves were in default on the first day of the trials. The fact that the plaintiff in the instant case was originally present and had commenced to lead evidence, including his own evidence, does not, in my view, detract in any way from the proper application of the principle in the cases referred to above to the circumstances of the present case. In considering the circumstances of this case I must satisfy myself that there is "sufficient cause" to grant final judgment in favour of the defendants. In this case plaintiff was clearly able to continue prosecuting his action on and after the third day of the trial. He was actually under cross examination and was physically able to proceed. He had in fact proceeded with the trial on its first day despite the fact that the trial was then



WADDINGTON J

being held *in camera.* It was only on the third day of the trial that he said that he was not prepared to participate in a secret trial. The situation on the third day was no different from the first day. Furthermore, plaintiff knew that His Excellency the Governor was prepared to consider his application to lift the certificate of the Secretary for Justice, that His Excellency was in possession of his written submissions and that he might receive a reply as early as the afternoon of the fourth day of the trial. In the course of the judgment of the Court on plaintiff's application for a postponement *sine die* it was remarked that plaintiff seemed to be intention ensuring that the defendants and the Corporation be exposed to public opprobrium following the revelation of plaintiff's allegations concerning the existence of malpractices in the Salisbury telephone exchange which forms part of the Corporation's various premises. Plaintiffs inconsistent attitude towards continuing with the prosecution of his action on the third day of the trial fortifies me in this belief. He originally, as I have said, was prepared to commence leading his evidence; no new circumstances beyond the plaintiffs control had arisen such as would have justified granting a postponement. When he withdrew from the case he did so deliberately for the sole reason apparently that he had not succeeded in obtaining a postponement *sine die*. His conduct smacked of petulance. The defendants were ready for trial and plaintiff on the first day had not indicated that he was in any way unprepared to commence the trial. He did, however, suggest in his renewed application on the third day of the trial that the presentation of his case would be prejudiced in this way. If the trial were to be held in open court, he argued, members of the public who had paid bribes to members of the Corporation for various reasons would, on reading the Press reports of the trial, be induced to offer themselves to plaintiff as witnesses in order to substantiate plaintiff's allegations regarding malpractices in the Salisbury telephone exchange. I consider that there was no merit in this submission and dealt with it in my judgment on the application for a postponement on the morning of the third day of the trial.

In my view all these circumstances constitute sufficient cause for departing from the ordinary procedure laid down in Rule 62 of the Rules of Court of granting absolution from the instance.

[The learned Judge then dealt with the merits of the action and continued:]

Copyright Juta & Co Ltd

I find that, although the defendants had no reason for holding the plaintiff in any esteem, they bore no malice towards him in the compilation of Exhibit 15. Their communication of the contents of the report was, in



WADDINGTON J

my view, within the privilege they claim. The plaintiff failed to prove affirmatively that the defendants were activated by malice in reporting in the manner they did.

I now turn to the question of costs. There is no question that costs should, in the ordinary course of events, be awarded to the defendants. But Mr *Gardener* has argued that costs should be awarded against the plaintiff on the attorney and client scale. In seeking this special order, Mr *Gardener* relies on two main grounds.

First, he points to the manner in which the plaintiff conducted himself in court. While the plaintiff was testifying, the following occurred:

> "MR HAYES: Yes, my Lord. The impression I get from the confidential report is that there are no reports in existence which in any way qualify it. Soon after I was asked to-told to leave the international exchange, I was then sent to Gatooma as a relief operator, so that I could cause pandemonium down there.
>
> MR JUSTICE WADDINGTON: Q I beg your pardon? A I was sent to Gatooma telephone exchange so that I could cause havoc in the Gatooma telephone exchange, because that is the opinion my superiors had of me.
>
> Q. Is that a facetious remark or is it intended seriously? A It is a serious remark.
>
> Q. You were sent to Gatooma to cause pandemonium?
>
> A. Yes. It was thought that as I was a man of disruptive tendencies I would cause pandemonium on the Gatooma telephone exchange. If your lordship is bored with me or my methods I would like your lordship to tell me why.
>
> MR JUSTICE WADDINGTON: I must warn you . . . "

Plaintiff's intonation when uttering the words underlined above was impertinent as was the statement itself. Plaintiff was, therefore, warned of the consequences of impertinence and contemptuous behaviour towards the Court. Mr *Gardener* also draws attention to the fact that the plaintiff, having first abandoned his application for a postponement sine die and having proceeded to prosecute his action for two days, then left the courtroom when a subsequent similar application failed in circumstances identical to those obtaining at the time of the first application. I agree with Mr *Gardener* that this conduct was vexatious and an abuse of the process of the Court and justifies the making of a special order. (See *Mahomed and Son v Mahomed,* 1959 (2) SA 688 (T) at page 692G.)



WADDINGTON J

Mr *Gardener* also argues that plaintiff's claim was itself vexatious. The uncontradicted evidence led on behalf of the defendants demonstrates clearly that plaintiff had for some time before the confidential report which forms the substance of plaintiff's claim been considered inefficient,

Copyright Juta & Co Ltd

rude and a disruptive element in the Salisbury and Gatooma telephone exchanges. Of this, furthermore, he had been made aware previously. Notwithstanding this, he has made far reaching and serious accusations, particularly in regard to the first defendant, of malice in the compilation of the confidential report. He stated that no one could honestly have believed in the truth of the report. It was inconsistent with all the available evidence and it was compiled in terms adverse to him in retaliation for criticisms he had levelled against the defendants in a report plaintiff had previously made to the Postmaster-General. (Exhibit 3 refers.) In the light of the evidence given by first defendant I am satisfied that there was absolutely no foundation for plaintiff's accusation that first defendant had been activated by malice. So far as the other two defendants are concerned, Exhibit 3 does not name them and no other cogent evidence was adduced at all that either of them knew or must have known that they had been seriously criticised by plaintiff on any occasion. There is no justification, therefore, for the view that either the second or third defendants had any reason for acting maliciously *vis-à-vis* plaintiff. In my view, the plaintiff himself has been guilty of the very conduct of which he has complained. I therefore have no hesitation in finding that a special order should be made on the ground that plaintiff has brought these proceedings vexatiously. It is unnecessary to consider Mr *Gardener's* remaining submission which was based on the inconvenience occasioned to the defendants by the bringing of this action.

In conclusion reference must be made to the certificate of the Secretary for Justice. Since this judgment mainly concerns matters of procedure and has not canvassed any matter the disclosure of which would be inimical to the public interest, I do not consider that it is incumbent on me to suppress its terms from public perusal.

Judgment is accordingly given for the defendants with costs on the attorney and client scale.

*Coghlan, Welsh and Guest,* attorneys for the defendants.



## REGINA v NYAKUWA AND ANOTHER 1980 ZLR 19

**Court** **Appellate Division, Salisbury**

Question Reserved on Criminal Trial

Macdonald, CJ, Lewis, JP., and Davies, JA

23rd January and 6th February, 1980

### Flynote

Amnesty Ordinance, 1979 - section 2 - scope and purpose of Ordinance - onus of proof that conduct is amnestied - how discharged - meaning of "in good faith" in section 2 (2) (b) of Ordinance.

### Headnote

The clear intention of section 2 (2) (b) of the Amnesty Ordinance, 1979, is to extend an amnesty to all acts without exception committed during the period covered by the Ordinance, provided

Copyright Juta & Co Ltd

only that the person seeking its protection can establish on a balance of probability that his true purpose was resistance to or frustration of the previous Government. The words "in good faith" do not restrict the amnesty to particular acts but merely emphasize that the purpose mentioned in the section must be genuinely entertained.

*C J Glaum S C* with him *M J Gillespie,* for the Crown. It seems clear that the accused's acts were done in the furtherance of the purpose "of resisting or frustrating the administration ..."

The words "in good faith" in section 2 (2) (b) of the Amnesty Ordinance, 1979, merely serve to accentuate the need for honesty and an absence of an ulterior motive on the part of the person performing the act in question. This meaning was given to the expression in the context of the Indemnity and Compensation Act, 1975 (which is legislation of a kindred nature to that of the Amnesty Ordinance), in *S v Gwevera and Others*, 1978 RLR 466 (GD). No other meaning can be given to the expression. The need for good faith will be particularly important in cases where a person acts out of a dual motive or seeks to hide his real motive behind the cloak of "resisting or frustrating the administration". It will be necessary in such cases to ascertain the perpetrator's real motive. Even though



MACDONALD CJ

the acts done may have had the effect of resisting or frustrating the administration this would not assist the perpetrator if his true motive was, say, the satisfaction of a personal grudge or the attainment of personal enrichment. The question of good faith would also be of particular importance in cases where "mistake of fact" is raised by the perpetrator of an act. See the remarks at page 253 of Burchell and Hunt, *South African Criminal Law and Procedure,* volume I, under the heading "Genuine Ignorance or Mistake". The same meaning was given to the expression by the Court *a quo* in the instant case and it is conceded that it was correct in so doing. In *Gwevera*'s case (*supra)* BECK J emphasized the need for an absence of "wanton or capricious oppression" but this was considered by the Court *a quo.* The Court a *quo's* conclusion that "BRISTOWE J used the words 'wanton or capricious oppression' (in *Dedlow v Minister of Defence and Provost Marshal* 1915 TPD 543 at 562) as being very much *eiusdem generis* in meaning with the words ulterior motive" is correct.

In interpreting these words sight should not be lost of the purpose behind the legislation in which they are used. The purpose of the legislation is to make the amnesty effective by protecting each party to the conflict against reprisals by the other party. It is surely envisaged that guerillas who, in the prosecution of their fight against the administration, have committed the most heinous atrocities imaginable can come forward without fear of court action being taken against them. The nature of their acts cannot therefore be the yardstick against which the protection of the Ordinance is measured. As pointed out by the Court *a quo* "The yardstick is the purpose for which the acts were committed, not the nature of the acts themselves nor the likelihood of those acts achieving their objective. The nature of the acts is only a relevant consideration in determining what their purpose was, and once it is accepted . . that the sole purpose of committing these acts was to frustrate the administration purporting to be the Government, these acts must fall within the ambit of the Amnesty Ordinance, 1979".

Copyright Juta & Co Ltd

It is respectfully submitted that precisely the same considerations apply to the protection afforded by section 2 (2) (a) of the Ordinance.

*W R Sandura* for the accused. The alleged acts of the accuseds were committed in good faith within the meaning of section (2) (b) of the Ordinance. An act is done in good faith when it is done honestly without any ulterior motive. The phrase "good faith" has been defined in certain English statutes. See *Words and Phrases Legally Defined,* Second Edi-



MACDONALD CJ

tion, volume 2 at page 324. In terms of the Bills of Exchange Act, 1882, a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. In *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 All ER 647 at 649 G-H, LORD DENNING said, "To my mind, under this Act [The Leasehold Reform Act 1967] a claim is made in good faith when it is made honestly and with no ulterior motive". In *Dedlow v Minister of Defence and Provost Marshal* 1915 TPD 543 at 562, BRISTOWE, J, used the words "wanton or capricious oppression" to convey the meaning of ulterior motive. Furthermore, the facts in *Dedlow*'s case bear no resemblance to the facts of the present case.

## Judgment

**Macdonald CJ:** The two accused were charged in the General Division of this Court with murder, alternatively with contravening section 50 (1) of the Law and Order (Maintenance) Act [*Chapter 65*] and on a second count with contravening section 50 (1) of the same Act.

The trial Court held that the acts alleged to have been committed by the accused fell within the ambit of section 2 (2) (b) of the Amnesty Ordinance, 1979, and accordingly upheld the objection to the indictment.

Acting under the provisions of section 42 of the High Court Act [*Chapter 14*] the learned trial Judge reserved the following question for decision by this Court: "Does the Amnesty Ordinance apply to the offences set out in the indictment in the instant case?"

The relevant facts were summarised in the judgment of the Court *a quo* as follows:

> "The acts alleged against the accused in the indictment as supplemented by the facts set out in the summary of the Crown case and by the facts set out in the outline of the case for the defence, which appear to be common cause, are these. The Accused No. 1 was a ZANLA terrorist. The Court takes judicial notice of the fact that ZANLA is a military wing of a political organization of the type commonly known locally as a terrorist organization whose objectives were to overthrow the government which existed in this country before the 11th December, 1979, and to instal a different form of government in the country; an organization which has sought to attain its objectives through violence. Accused No. 2 was a mill owner who owned a motorcar. The accused No. 1, together with another member of the ZANLA forces, constructed a time bomb. The bomb was taken by Accused No. 2 in his motor-car and deposited at Macey's Supermarket Store, Salisbury, at a place that is used for the storage of waste paper. The tomb there exploded, killed the deceased and did considerable damage to property. On count 2 it is alleged that the first accused, assisted by another ZANLA member, constructed a time bomb which was subsequently placed by others on the verandah of the Sunray Store, Mrewa township. There it detonated caused considerable damage, but apparently did not injure anyone."

Copyright Juta & Co Ltd

MACDONALD CJ

The relevant portions of the Ordinance read:

> "2. (1) No legal proceedings whatsoever, whether civil or criminal, shall be instituted in any Court of law in respect of any act to which this section applies, done within Southern Rhodesia or elsewhere, before the appointed day.
>
> (2) The acts to which this section applies are-
>
> (a) ...
>
> (b) the establishment of, membership of, support of or adherence to any organisation having the purpose of resisting or frustrating the administration purporting to be the government of the territory of Southern Rhodesia established under any of the instruments styling themselves respectively 'The Constitution of Rhodesia, 1965', 'The Constitution of Rhodesia, 1969', and 'The Constitution of Zimbabwe **Rhodesia, 1979', and any acts done between 11 November, 1965,** and the appointed day (whether or not done on the orders of any such organization) which were dole in good faith in furtherance of that purpose or with a view to assisting any pension acting in furtherance of that purpose;
>
> (c) any acts (including acts by way of conspiracy or incitement) preparatory or incidental to any of the aforesaid acts."

Two questions arise for consideration:

(1) Were the acts alleged done in furtherance of the purpose of "resisting or frustrating the administration"? and (2) were they done "in good faith"? The trial Court in effect answered both these questions in the affirmative and Mr *Glaum,* who appears for the Crown, has not challenged the correctness of the trial Court's conclusions.

I agree that the facts clearly established that the acts alleged were, having regard to the admissions made by the Crown, done with the purpose of frustrating the administration previously responsible for the government of this country and were not done with a purpose not covered by the Ordinance. It is unnecessary to add anything to what was said in the Court below on this aspect of the case.

The question of whether the acts were done "in good faith" occasions greater difficulty. The onus of showing that an act otherwise criminal is covered by the Ordinance is clearly upon the person claiming its protection and there can be no doubt that it is necessary for such a person in the discharge of the onus to establish on a balance of probability that his true purpose in committing the act was to resist or frustrate the previous administration. It is not sufficient that this was or was likely to be the *result* of what was done since purpose and result are different conceptions



MACDONALD CJ

and the perpetrator may have been motivated by considerations other than resistance to or frustration of the administration. The result, however, more often than not will be circumstantial evidence of the purpose with which the act was carried out.

Copyright Juta & Co Ltd

In the context of the terrorism to which the people of this country have been habitually subjected for many years, the use of the words "in good faith" is wholly inappropriate. A civilized person will not readily understand how an act of terrorism such as the indiscriminate murder of women and children can fittingly be described as having been done "in good faith". Once terrorism is adopted as the means of achieving a political result, it necessarily follows that the more barbaric and cruel the acts of terrorism are the greater their anticipated political effect may be expected to be. The clear intention of the Ordinance is to extend the amnesty to all acts of terrorism without exception committed during the period covered by the Ordinance, provided only that it can be established on a balance of probability by the person seeking its protection that he had as his *true* purpose resistance to or frustration of the previous administration. It follows that the unhappy use of the words "in good faith" does not restrict the amnesty granted by the Ordinance to particular acts of terrorism. Those words must necessarily be interpreted as doing no more than emphasize that the purpose mentioned in section 2 (2) of the Ordinance as the reason for the amnesty must be genuinely entertained.

The question reserved for decision by this Court is answered in the affirmative.

**Lewis JP:** I agree.

**Davies JA:** I agree.

*Winterton, Holmes and Hill,* attorneys for the defence.

---



## HICKMAN v ATTORNEY-GENERAL 1980 ZLR 24

**Court** **General Division, Salisbury**

Petition

Goldin, J

24th January and 6th February, 1980

### Flynote

Defence Act [Chapter 94] - section 12 (1) - power of President to retire officers - whether limited by section 17A and regulations made under section 15 - extent of Minister's powers to retire of Ricers under section 12 (2).

Statute - interpretation - "subject to" - meaning of.

### Headnote

The words "subject to the provisions of section *seventeen A* and of regulations referred to in section *fifteen*" in section 12 (1) of the Defence Act [*Chapter 94*] limit the President's power to place officers on a retired list in terms of that section. Thus the President may retire officers on the grounds of abolition of office or reorganization of the Force concerned only in terms of

---

Copyright Juta & Co Ltd

section 17A, and officers with twenty years' service or more only in terms of the regulations concerned. The Minister's power to retire certain officers under section 12 (2) of the Act is, however, subject to no such limitation.

Authorities cited:

*Akisatan Apena of Iporo & Ors v Akinwande Thomas & Ors* [1950] AC 227;

*Hawkins v Administration of SWA* 1924 SWA 57;

*Vizirgianakis v Karp,* 1965 (2) SA 145 (W);

*Massey-Harris Co v Strasburg* [1941] 4 DLR 620;

*C & J Clark Ltd v Inland Revenue Commissioners* [1973] 2 All ER 513,

*Words and Phrases Legally Defined*, 2nd edition.

*N M R Gardener*, for the petitioner.

*W J Millar, SC*, for the respondent.

## Judgment

**Goldin J:** On the 6th March, 1979, the petitioner, a Lieutenant-General and Commander of the Rhodesian Army, was placed on the retired list of officers of Rhodesia.



GOLDIN J

The petitioner contends that the Acting President acted *ultra vires* in placing him on the retired list of officers, and his decision should be declared to be of no force and effect. I am concerned essentially with questions of law. The reasons for placing him on the retired list have not been relied upon or even mentioned in the affidavits before me.

The Defence Act [*Chapter 94*] provided in section 12 as follows:

> "12. (1) The President may place any officer on a retired list.
>
> (2) The Minister may place an officer of the rank of-
>
> (a) major, in the case of an officer in the Army; or
>
> (b) squadron leader, in the case of an officer in the Air Force; or any lower commissioned rank, on a retired list.
>
> (3) An officer placed on a retired list in terms of this section shall be entitled to retain his rank and wear uniform on appropriate occasions."

By section 8 (a) of the Defence Amendment Act, 1976 (No. 51 of 1976), section 12 (1) was amended by adding the words "subject to the provisions of regulations referred to in section *fifteen"* between the word "may" and the word "place". By section 8 of the General Laws

Copyright Juta & Co Ltd

Amendment Act, 1978 (No. 41 of 1978), this section was again amended as follows:

"8. (1) The Defence Act [*Chapter 94*] is amended-

(a) in section 12 by the insertion in subsection (1) after 'provisions of of 'section'

(b) by the insertion after section 17 of the following section -

Discharge on redundancy.

'17A. (1) Subject to the provisions of subsection (2) -

(a) the President may at any time place any officer in the Regular Force on a retired list; and

(b) the Commander may at any time discharge any member of the Regular Force, other than an officer;

on the grounds that the abolition of his office or the reorganization of the Regular Force necessitates such an action.

(2) The Commander shall not discharge a member of the Regular Force in terms of paragraph (b) of subsection (1) unless the Minister has approved the abolition of office or reorganization of the Regular Force or the discharge of the member of the Regular Force concerned.'."



GOLDIN J

In the result, the President's powers to place an officer on the retired list at the relevant time were governed by section 12 (1) as amended which, for the purpose of clarity, reads:

"The President may, subject to the provisions of section 17A and of regulations referred to in section 15, place any officer the retired list."

The real question that arises for decision is whether the amendments to section 12 (1) have the effect of curtailing the President's original powers of placing an officer on the retired list. This was contended to be the position on behalf of the petitioner. Mr *Millar*, for the respondent, submitted that the words after "subject to" do not have this result but are to be interpreted so as to leave the President's powers unaffected, and to treat the two amendments as not curtailing the wide powers originally conferred under section 12 (1). He therefore contended that the words "subject to" should be interpreted as meaning "without prejudice to" or, for that matter, "notwithstanding these amendments".

The rights conferred upon the President in; the unamended section 12 (1) vested in the President unfettered and unlimited discretion or power to place any officer on the retired list. If it had been the intention of the Legislature to retain his powers regardless of the provisions of section 17A or relevant regulations made in terms of section 15, it could have been achieved by the use of appropriate language. I appreciate that that is precisely what Mr *Millar* contends, by submitting that the words "subject to" have that effect. The use of the words "subject to" does in my view *prima facie* curtail his powers unless, in the context in which they appear and on a study of the Act as a whole, the Court is justified in interpreting them as meaning "without prejudice to" or "notwithstanding" or some similar wording, which is usually employed to

Copyright Juta & Co Ltd

preserve existing rights.

Generally speaking, the words "subject to" have the effect of introducing a qualification, limitation or condition precedent, thereby curtailing a person's exercise of otherwise unlimited or unrestricted rights. It does not, in this sense, mean an alternative or optional right which does not affect an unfettered original right. I was referred to the case of *Akisatan Apena of Iporo & Ors v Akimwande Thomas & Ors* [1950] AD 227. In that case, the words "subject to" were held not to constitute a limitation of original rights, but as equivalent to "without prejudice to". A study of this decision, however, shows that it was arrived at by reference to relevant antecedent legislation and the context in which the term "subject to" was used. In *Hawkins v Administration*



GOLDIN J

of *South-West Africa*, 1924 SWA 57 at 67, the words "subject to" were interpreted to mean "except as curtailed by". (See also *Vizirgianakis v Karp,* 1965 (2) SA 145 (WLD) at 147; *Massey-Harris Co. v Strasburg* [1941] 4 DLR 620 at 622; C & J *Clark Ltd v Inland Revenue Commissioners* [1973] 2 All ER 513 at 520, Butterworths *Words & Phrases Legally Defined,* 2nd edition, volume 5, at 134.)

Section 15 of the Defence Act reads as follows:

> "15. Subject to the provisions of this Act, the Minister may, in terms of subsection (1) of section *one hundred and twenty-one,* make regulations providing for the conditions of engagement and service of members."

In terms of section 15 the Defence (Regular Force) (Officers) Regulations, 1976, published in Rhodesia Government Notice 99 of 1976, came into existence. These regulations provide, *inter alia,* in section 8 (2):

> "(2) The Minister may, on giving twelve months' written notice to the officer of his intention to do so, require a permanent-service officer whose pensionable service amounts to twenty years or more to retire."

Accordingly, section 17A, as introduced by section 8 (1) of Act 41 of 1978, gives the President power to place any officer in the Regular Force on the retired list on the grounds that the abolition of his office or the reorganization of the Regular Force necessitates such action. Section 8 (2) of the Regulations provides for the retirement of a permanent service officer whose pensionable age amounts to 20 years or more. The effect of section 8 (2) of the Regulations and section 17A of the Act is to confer rights and deal with the treatment of an officer in the Regular Force or a permanent service officer in prescribed circumstances. It was the intention of the Legislature that where a Regular Force officer is retired on the grounds of abolition of office or the reorganization of the Regular Force, he should be retired in terms of section 17A. If it had been intended to retain the wide powers originally given to the President by section 12 (1), there would have been no need for the provisions of section 17A because the President could have retired - as he was entitled to do - any officer irrespective of the reasons which justified such a step. Accordingly, section 17A was introduced so that a Regular Force officer who is retired on the grounds of abolition of his office should be retired as provided in section 17A. To be retired in terms of section 12 (1) can often carry a stigma or result in dissatisfaction or doubt and general speculation concerning the possible but unknown reasons

Copyright Juta & Co Ltd

for being retired. Section 17A was therefore introduced so that a Regular Force officer would be retired on the grounds mentioned in



GOLDIN J

that section when that was the reason for his retirement, so that he and everybody else would know the grounds upon which he was retired. The right to respire him already existed under section 12 (1), but section 17A specified a reason for doing it and how to do it when such grounds for retirement were invoked. Similarly, section 8 (2) of the Regulations confers benefits on permanent service officers whose pensionable service amounts to 20 years or more, by providing them with adequate prior notice of the fact of their retirement, the precise reason for being retired and an assured income for a period of 12 months.

On this approach, section 12 (1), as amended, was intended to confine the President to the right to deal with an officer who is retired on the grounds mentioned in section 17A, to his power under that section. Similarly, the President is deprived of the power to place a permanent service officer whose pensionable service amounts to 20 years or more, on the retired list in terms of section 12 (1), thereby preserving the benefits which section 8 (2) of the Regulations confer upon such an officer. The President, of course, retains the power of retiring all other officers who do not qualify for retirement or whose retirement is not possible in terms of the amendments inserted in section 12 (1).

It will be observed that section 12 (2) confers upon the Minister the same powers of placing an officer of the rank of major or squadron leader or any lower commissioned rank, on a retired list in the same manner as the President was entitled to do. No amendments similar to that now contained in section 12 (1) have been made to section 12 (2). Mr *Millar*, for the respondent, understandably raised the question why a major can be placed on the retired list, thereby depriving him of the benefits and advantages contained in section 17A of the Act and section 8 (2) of the Regulations, but not an officer of higher rank who is retired by the President. This can only be answered on the basis that for reasons best known to the Legislature the aforesaid amendments were introduced in section 12 (1), which deals with the President's powers, but have not been applied to section 12 (2), which deals with the Minister's powers. On any view of the matter, even if the words "subject to" in section 12 (1) are to be given the meaning contended for by Mr *Millar,* namely as not affecting the President's rights to place any officer on the retired list, the question 'still remains why it was found necessary to amend section 12 (1) and not to amend section 12 (2) if the amended section 12 (1) means the same as the unamended section 12 (2). It can certainly be said that section 12 (1) was amended in 1976 and in 1978 for necessary and meaningful reasons. It could not have been done for the purpose of conferring wider powers



GOLDIN J

than those in existence. The President's powers were unlimited. The intention was either to curtail his powers or to leave them unaltered. If amendments were required to leave his powers

Copyright Juta & Co Ltd

unaltered, then similar amendments would have had to be introduced in respect of section 12 (2), so that the Minister and the President would each continue to enjoy their respective identical wide power. The Minister's powers were left unamended, retaining their existing unlimited scope. Therefore the amendments to section 12 (1) concerning the President's powers must have been introduced to curtail his powers in respect of officers mentioned in section 17A of the Act and section 8 (2) of the Regulations. This fortifies the view that the words "subject to" have to be interpreted and applied as curtailing the President's original powers. It may not be readily understandable or explicable why junior officers can be retired by a Minister under section 12 (2), thereby depriving them of the benefits and advantages conferred under section 17A and, in particular, under section 8 (2) of the Regulations. The Legislature has, however, amended section 12 (1), which deals with the President's powers and left the Minister's powers under section 12 (2) unaltered.

The petitioner was not retired and could not have been retired on the grounds provided in section 17A of the Act. He was, however, eligible by reason of his length of service as a permanent service officer, for retirement in terms of section 8 (2) of the Regulations. The respond dent's answer to this in his affidavit is relevant. It reads:

> "With reference to paragraphs 8 and 9, it is admitted that it would have been legally possible for the then Joint Ministers of Defence to have given the Applicant notice in terms of section 8 (2) of the Defence (Regular Force) (Officers) Regulations, 1976, as read with section 15 of the Act, to retire on twelve months' notice. Nevertheless it was not considered that such a course was appropriate in the circumstances of the Applicant and, accordingly, it was recommended on what were deemed good and sufficient grounds (the nature of which have been communicated to the Applicant and are not understood to be disputed for the purpose of these proceedings) to the Acting President that he exercise the alternative power vested in him by section 12 (1) of the Act to require the immediate retirement of the Applicant."

For the reasons already mentioned, I do not agree with the contention that section 12 (1), as amended, has the effect of leaving the President's wide powers of placing an officer on the retirement list unaltered or unrestricted, and that section 17A of the Act and section 8 (2) of the Regulations are merely alternative ways or means of retiring officers.

---



GOLDIN J

I was referred to the insertion of the words "Subject to the provisions of section *seventeen A"* in the existing section 18 (1) of the Defence Act. That section deals with the right of commanders to discharge a member, other than an officer, for various reasons, including when such person "is found to be mentally or physically unfit for further service by a medical board". I confess that I fail to see how the provisions of section 17A have any bearing in respect of a soldier who is mentally unfit for service. If he is mentally or physically unfit for further service, then it is not easy - and I find it impossible - to understand how the right to discharge him on such a ground is in any way affected or can be affected by whether or not there has been abolition of office or reorganization of the Regular Force. Nevertheless, the difficulty imposed by the amendment of section 18 (1) of the Act by section 8 (1) (c) of the General Laws Amendment Act, 1978 (No. 41 of 1978), only causes its own problem but does not shed any light (upon the interpretation of the amendments to section 12 (1).

---

**Copyright Juta & Co Ltd**

It was also contended by Mr *Millar* that in any event the President enjoyed the right summarily to dismiss the petitioner under the common law. Assuming this to be correct, the President has not done so. It is common cause that the President exercised powers under section 12 (1) of the Act. It is nowhere alleged that he acted under or was entitled to or had grounds for dismissing him under the common law.

For these reasons, I am of the view that the application must succeed.

As I have said, it is common cause that the applicant would have been entitled to the benefits conferred by section 8 (2) of the Regulations. I have not overlooked that section 8 (2) confers a right upon a Minister to retire such an officer, but in my view by including the Minister's right in section 12 (1) concerning the power of the President to retire officers, this is of no significance. I therefore uphold the petitioner's contention that the Acting President acted *ultra vires* in placing the petitioner on the retired list of officers in terms of section 12 (1).

The petitioner asserts in his petition that he has no intention of seeking reinstatement as Commander of the Army of Rhodesia, but merely seeks an order declaring that his placing on the retired list was invalid. It appears from earlier proceedings (case No. GD 684/79) that the petitioner is seeking additional payments to which he would have become entitled if he had not been retired under section 12 (1). Respondent agrees that "it would be inappropriate in the circumstances for applicant to be reinstated as the Commander of the Army in the event of this Honourable Court finding in petitioner's favour". In any event, an officer can be



GOLDIN J

removed from office or from army service in terms of other provisions of the Act. Moreover, the fact that he was wrongly placed on the retired list may not necessarily preclude or prevent other proceedings or procedures which may have the same result, even in a more undesirable form. The reasons far placing him on the retired list are not before me, and are not in issue. The only reference to this aspect is in paragraph 5 of respondent's affidavit. These considerations would also justify an order that he should not be reinstated as Commander of the Army.

The parties agreed that costs should follow the result, including the costs incurred in case No. GD 684/79.

Accordingly, it is ordered -

(a) that the action of the Acting President of Rhodesia placing the petitioner on the retired list of officers on the 6th day of March, 1979, is declared to have been *ultra vires* and of no force or effect,

(b) that it is declared that the petitioner is not entitled to be reinstated as Commander of the Army of Rhodesia;

(c) that the respondent pay the costs of these proceedings and the costs of the proceedings in case No. GD 684/79.

Copyright Juta & Co Ltd

*Gill, Godlonton & Gerrans,* attorneys for the applicant.

*State Attorney,* attorney for the respondent.



## REGINA v SMITH 1980 ZLR 32

**Court** **General Division, Salisbury**

Criminal Review

Beck, J

6th February, 1980

### Flynote

Mental disorder - automatism - onus of proof of allegation that accused committed crime when in state of automatism - whether accused who proves allegation entitled to acquittal.

Road Traffic Act, 1976 (No. 48 of 1976) - section 54 - evidence in criminal trial indicting that accused may super from amnesia and automatism - duty of Court to inquire into accused's competence to drive motor-vehicle in terms of section 54.

### Headnote

On trial for a driving offence the accused claimed that he had been severely concussed in a previous road accident and that as a result there had been periods when his mind had gone blank and he had been left with no recollection of what had occurred; the alleged offence, he claimed, had been committed during one of these periods. He led no medical evidence in support of his claim and was convicted as charged. On review.

*Held* that in this country the onus of proving assertions such as those the accused made (which would raise in a South African Court the defence known as "sane automatism") lies on the accused.

*Held,* further, that the accused's assertions would, if accepted, entitle him only to a special verdict under section 28 (1) of the Mental Health Act, 1976, not to an acquittal.

*Held,* further, that in the absence particularly of medical evidence the accused had not discharged the onus of proving his assertions.

*Held,* further, that because the evidence raised the possibility that the accused suffered from bouts of amnesia and automatism and had not been cured, the magistrate should have inquired in terms of section 54 of the Road Traffic Act, 1976, into the accused's competence to continue driving a motor-vehicle; and should now be directed to open such an inquiry.

Case cited:

Copyright Juta & Co Ltd

*Attorney-General v Senekal* 1969 (2) RLR 368 (AD); 1969 (4) SA 478 (RAD).



BECK J

## Judgment

**Beck J:** the space of ten weeks the accused was involved in two serious road accidents of his own making. First of all, on the 29th April, 1979, he overturned a vehicle because he drove too fast and lost control.

At the time he had a blood-alcohol content of 96 milligrams of alcohol per 100 millilitres of blood. Then, on the 7th July, while going home from a drive-in cinema, he drove at speed through a robot-controlled intersection against the red light and collided with the tail-end of a car that was lawfully crossing the intersection. The accused simply sped on home after the impact without stopping.

On the 5th November, 1979, he was brought to trial on six counts under the Road Traffic Act, 1976. Courts 3 and 6, in respect of which he was properly convicted and sentenced, are not of importance in relation to this judgment. Courts 1 and 2 arose out of the first accident of the 29th April and were, respectively, for contravening section 45 (1) (too high a blood-alcohol content), and for contravening section 43 (1) (negligent driving). Courts 4 and 5 arose out of the accident of the 7th July and were, respectively, for negligent driving and for not stopping after an accident. The accused, who was not legally represented, pleaded guilty to all six counts but, for a reason to be stated hereunder, the magistrate properly entered pleas of not guilty to counts 2, 4 and 5. After evidence was heard in relation to these last-mentioned counts the accused was convicted of all the offences with which he was charged and was duly sentenced - somewhat leniently in my opinion - to fines that totalled $170.

The reason why the magistrate entered pleas of not guilty to counts 2, 4 and 5 was that the accused, while not disputing the State's evidence, said that he had no recollection of either accident. The accused seems to have been severely concussed in the first accident and he claimed to have been left with a retrograde amnesia for that accident. With regard to the second accident the accused claimed that as an aftermath of the concussion that he sustained in the first accident he had severe headaches, and he said there were times prior to the second accident when his mind went blank and he was left with no recollection of his behaviour during these blank episodes. He said that he remembered nothing of the journey home on the 7th July from the time that he left the drive-in cinema, and he was therefore unaware that he had flagrantly disobeyed a red light and collided with another vehicle in consequence. Since he tendered pleas of guilty to all counts in spite of these assertions one wonders whether he intended to press them seriously; but perhaps it is more probable that he did not realize that these assertions, if accepted by the court,



BECK J

Copyright Juta & Co Ltd

would constitute a defence to counts 4 and 5 to the extent that they negatived his *mens rea.*

I should add, at this stage, that the accused went on to say that he had undergone an operation some time after the second accident and that a blood clot was then removed from his brain, since which time he had not experienced any further headaches or any "blackouts".

No query presents itself as far as the convictions under counts 1 and 2 are concerned, for the defence of automatism did not, of course, fall to be considered in respect of the first accident. He was not behaving in a state of automatism when he drove the vehicle with a prohibited amount of alcohol in his blood, and when he negligently overturned it. He merely has a post-accident amnesia for the events that occurred shortly before he was concussed.

With regard to counts 4 and 5 the question presents itself whether the magistrate accepted the evidence that indicated a state of automatism, and, if so, whether he was not then bound to have entered special verdicts under section 28 (1) of the Mental Health Act, 1976, in view of the very wide interpretation that was given in *Attorney-General v Senekal* 1969 (2) RLR 368 (AD); 1969 (4) SA 478 (RAD) to the statutory definition of a "mentally disordered or defective" person. At page 378 A-B (page 488 A-B of the South African report) BEADLE CJ said:

> "The second principle which emerges from RUMPFF JA's judgment is that the cause of the mental disorder or disability is irrelevant. If, therefore, the accused's mind was disabled at the relevant time, he falls within the definition no matter what caused the disability. This also, with respect, seems common-sense. From the point of view of the law, it can make little difference whether the blood clot which disables the mind results from a thickening of the arteries, or results from some purely physical cause such as a blow on the head. The law is concerned with the result, not the cause. The cause may be organic, functional or physical."

And at page 379E (page 489B of the South African report) he went on to say: -

> "I conclude, therefore, that a person who was not responsible in law for his action because he acted in a state of automatism due to injuries received to his head is not entitled to a verdict of not guilty but only to a special verdict under section 31 (1)."

Section 31 (1) of the former Mental Disorders Act corresponds with section 28 (1) of the 1976 Act.

---



BECK J

In the light of that decision it would seem that in Rhodesia the onus of proving assertions such as those that the accused has made (assertions which would raise, in a South African Court, the defence known as "sane automatism") lies on the accused. On the scanty evidence that was before him the magistrate could not, in my view, properly have returned special verdicts under counts 4 and 5. The inquiry into the accused's alleged temporary mental disability was of the sketchiest kind. In particular, no medical evidence, such as is required by section 28 (1) of the Mental Health Act, was heard. Nor indeed, as I understand the magistrate's judgment, did he make a firm finding that the accused was in a state of automatism at the time of the second accident. Thus, in his judgment on sentence, and with regard to the accused's guilt under counts 4 and 5, the magistrate made the equivocal observation:

> "*Either* you should not have been driving if you had these black-outs, or you were simply negligent and you drove

---

**Copyright Juta & Co Ltd**

away."

It seems clear therefore that the magistrate did no more than recognize a possibility that the accused may have been in a state of automatism but, correctly, did not find - on the strength of such tenuous evidence - any balance of probability in favour of a state of affairs that the defence had to prove. Since that onus was not discharged, the convictions under counts 4 and 5 were correct.

However, the matter cannot be allowed to rest there. The evidence as a whole raises the distinct possibility that the accused may indeed have suffered from recurring bouts of amnesia and automatism after the first accident and, despite his allusion to the removal from his brain of a clot by surgery to which he was subjected after the second accident, there can, on the present information, be no certainty that he has been cured of such bouts. If he is not cured it would clearly be dangerous to himself and to others if he were to continue to drive a motor-vehicle, and his competence to do so should have been inquired into by the magistrate after the trial in terms of section 54 of the Road Traffic Act, 1976.

At the time of the second accident the accused did not hold a Rhodesian driver's licence, although he did hold a foreign driver's licence. It was, in parathensis, this omission on his part to have obtained a Rhodesian licence before the expiry of the period allowed in terms of section 18 of the Road Traffic Act, 1976, that led to the charge that was the subject of count 6. In terms of section 19 of the Act the accused, as the holder of a foreign licence, may readily obtain a Rhodesian licence without having to undergo an examination of his competency to drive, and





for all one knows the accused may by now be the holder of a Rhodesian driver's licence.

The convictions and sentences are all confirmed. Any driver's licence presently held by the accused, or that may be issued to him on or before the 5th November, 1984, is to be endorsed with the particulars of the convictions and sentences on counts 1, 2, 4 and 5. The trial magistrate is directed to cause the accused to appear before him for the purpose of inquiring, in terms of section 54 of the Road Traffic Act, 1976 (which inquiry is to include medical evidence), into the accused's competence to drive or control a motor- vehicle.

My brother Waddington agrees.



## BICKLE v MINISTERS OF LAW AND ORDER 1980 ZLR 36

**Court** **General Division, Bulawayo**

Civil Action

Beadle, AJ

Copyright Juta & Co Ltd

4th, 5th and 8th February, 1980

## Flynote

Negligence - demeaning of gross negligence - relationship between negligence and damage - importance of in assessment of whether or not negligence was gross.

## Headnote

The Commissioner of Police had contracted to indemnify the plaintiff against damage caused to his aircraft while it was being used on Police duties provided that the damage was not due to "gross negligence or a wilful and malicious act on the part of the pilot". Before taking off one day on Police duty the plaintiff started to do a compression test of the aircraft's engine by turning the propeller backwards. He knew the keys of the aircraft were in the ignition but had not noticed the ignition was switched on. By a very remote chance amounting to a freak accident his turning of the propeller started the engine, and the aircraft careered out of control across the airport and was destroyed. The Commissioner of Police refused to indemnify him on the ground that the loss was due to his gross negligence.

---



BEADLE AJ

*Held* that in the context of the agreement "gross negligence" meant ordinary negligence of an aggravated form which fell short of wilfulness; the degree of aggravation was incapable of precise definition but the test was objective (*Rosenthal v Marks,* 1944 TPD 172 at 180, distinguished).

*Held*, further, that the plaintiff as a reasonably prudent pilot ought to have known that the ignition was switched on, and his actions had to be judged on the basis of his so knowing; on this basis, by pulling the propeller without first satisfying himself that the ignition was switched off, he was guilty of negligence,

*Held,* further, that although the accident could be called a freak accident, the plaintiff's negligence was sufficiently related to the damage to make it causally responsible for it, on the basis that because of the high risk involved if the accident did happen and the case of avoiding its happening, the ordinary prudent pilot would guard against its happening by ensuring that the ignition was switched off before commencing a compression test *(Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* l 973 (1) RLR 356 (AD) at 363; 1973 (4) SA 523 (RAD) at 524-5, applied).

*Held,* further, that the Plaintiff's negligence could not be categorized as gross because -

(a) so to categorize it would lead to the illogical result that because his ordinary negligence was followed by a freak accident, the freak accident converted his ordinary negligence to gross negligence;

(b) the *causa causans* of the damage, the firing of the engine, was very close to being a *novas actus interveniens,* and had it been so the plaintiff could not have been found guilty of any negligence; the degree of the plaintiff's negligence therefore in relation to

Copyright Juta & Co Ltd

the damage proximated more closely to no negligence at all than to gross negligence.

Cases cited:

*Rosenthal v Marks (supra)*;

*R v Ncetendaba and Anor.,* 1952 SR 45; 1952 (2) SA 647 (SR),

*Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson (supra)*

*C W Jordaan,* for the plaintiff.

*I A Donovan,* for the defendants.

## Judgment

**Beadle AJ:** In this matter the plaintiff is a pilot in the Police Reserve Air Wing and he owns a Cessna light aircraft. The defendants are the joint Ministers of Law and Order, sued in their official capacities.

In January, 1972, the plaintiff leased his aircraft to the Commissioner of Police. The terms were that normally the plaintiff would fly the aircraft himself, and the lessee indemnified him against damage to the aircraft whilst it was engaged on Police Reserve duties, provided, and I quote from clause 6 (ii) (b) of the agreement:



BEADLE AJ

(b) "The damage or loss is not due to gross negligence or a wilful and malicious act on the part of the pilot nominated or agreed to by the Lessor, or the Lessor, nor to a breach of the Air Navigation Regulations."

In September, 1978, the plaintiff had an accident with this aircraft, in which the aircraft sustained damage in the sum of $32 000, which sum has been agreed to by the parties. The plaintiff now claims this sum from the defendants, but the defendants have repudiated liability on the ground that the accident was due to the plaintiffs gross negligence.

The plaintiff submitted an accident report, which he was obliged to do in terms of the lease agreement. Apart from a short paragraph which deals with the engineer of RUAC leaving the electric starter switch in the "both magnetos on" position, all the facts stated in this report are common cause. The report reads:

The Provincial Inspector,

Police Reserve,
P.O. Box 2085,
BULAWAYO.

Dear Sir,

ACCIDENT REPORT VP-YYB

Following my letter of the 3rd October 1978 concerning the above and your subsequent request for a more

Copyright Juta & Co Ltd

detailed account of the events which led to the destruction of my aircraft, I now advise as follows:

On Saturday 30th September at 0700 hours P R./Obs. Taylor and myself proceeded to the main airport in order to fly to Salisbury in accordance with the instruction contained in Flight Authorisation No. 282/78.

On arrival at No. 2 hangar, we found the aircraft had been parked about 30m. from the hangar entrance facing the main runway.

I proceeded to open the cabin door and place my flightbag in the aircraft, while P R Taylor proceeded to the Fire Hangar in order to telephone the flight plan to the briefing officer, using the call sign Copper 71.

Having set the parking brake in the aircraft, I proceeded to reset the function of the electric booster pump which I suspected of being sluggish. This possible defect had been reported to the RUAC engineer who had carried out the 100-hour check the previous day.

I noticed that the fuel selector had been left on, contrary to my normal practice, and that the keys were in the ignition switch, although I did not see that they were in the 'both magnetos on' position.

In order to test the electric boost pump I turned on the master switch and the pump switch and placed the throttle and mixture levers fully forward.

When the fuel pressure gauge needle gave a steady reading, I switched off the electric pump and the master switch and went forward to see whether excess fuel was running from the manifold, intending to return to the cabin and re-set the engine controls before continuing with the pre-flight check.



## BEADLE AJ

During this time, the RUAC attendant, Mpala, was standing by under the starboard wing with the fire extinguisher.

Having checked the overflow of fuel, I proceeded to check the starboard wing, undercarriage and brake assembly before walking back past the nose of the aircraft to get to the cabin.

At this point, my attention was distracted by PR Taylor, who shouted to me from the direction of the Fire Hangar. Having replied to him, I turned back to the aircraft and as I was standing immediately in front of the propeller, I gripped it with one hand on either side of the spinner, and pulled the nose of the aircraft down to test the inflation of the nose oleo.

Then through sheer force of habit, I stood back from the propeller and started to pull it through to check compressions. I had moved it through only a short arc when I realised that the engine controls were still set forward, and that the ignition keys were not in the customary place on top of the instrument panel, so as to be visible from outside the aircraft, but were in the ignition switch. Unfortunately, although I immediately released the propeller the momentum of the swing carried it through one revolution of the engine. As it was primed with fuel, and had only recently been completely overhauled, the cylinder immediately hired.

This could not have happened had the key not been left by the engineer in the "both magnetos on" position and in fact was found in this position subsequently.

I charged back to the cabin door and shouted to Mpala to hold on to the starboard strut, whilst I held the port strut, and stied at the same time to get the door open which had been blown shut by the force of the propeller wash.

Unfortunately, he did not react in time and the engine quickly developed full power. The handbrake did not hold and the aircraft started to move forward.

I got the door open at this stage and let go of the strut to try and reach the engine controls, but the blast of the slipstream combined with the violent surge forward of the aircraft knocked me off balance and I was unable to do

**Copyright Juta & Co Ltd**

so.

The aircraft gathered speed and finally hit the fence on the south side of the field, broke through and crashed into the trees, when it was totally destroyed.

Yours faithfully,

C L PICKLE."



BEADLE AJ

In evidence the plaintiff explained that he used the word "revolution" in the report inadvertently, the word should have been "compression".

The defendants allege the plaintiff's gross negligence consisted of the following acts -

"(a) he failed to check that the ignition was in the off position before leaving the aircraft;

(b) he failed to reduce the fuel mixture to the idle cut off position and to close the throttle before leaving the aircraft;

(c) he failed to ensure that the ignition of the aircraft was in the off position before carrying out physical checks of the propeller and engine compression and, in particular, turning the propeller by hand."

The issue before the Court, therefore, is whether or not the plaintiff's actions as resected in his report could correctly be classed as gross negligence, as opposed to ordinary negligence.

[The learned Judge then analysed the facts and continued:]

The majority of the salient facts in this case were common cause and did not require much elaboration by oral evidence. The important question of how likely it was for the aircraft to have started in these circumstances is, however, an issue which has to be determined. Palmer seemed to me to be a little equivocal on this point, but the plaintiff and his two witnesses were not and I rely on their evidence. They were emphatic that the likelihood of the aircraft engine starting in these circumstances was very remote indeed, especially as the propeller was being pulled back in the opposite direction to that in which it usually revolves. Michael Garde, for example, said that when he first heard how the accident happened he "could not believe it". He was not cross-examined on this evidence. I accept that evidence. On the evidence of the plaintiff and his witnesses, therefore, I am satisfied that the risk of the engine starting in these circumstances was a very remote one indeed, so remote that the accident may very well be described as a "freak accident".

So much for the facts of the case. I now turn to apply the law to those facts.

I start by examining the meaning to be given to the words "gross negligence" in the agreement. The words must be construed in the context in which they are used because the words may have different meanings in different contexts. It is to be noted that clause 6 (ii) (b) of the agreement



Copyright Juta & Co Ltd

BEADLE AJ

uses the words "a wilful and malicious act" as well as the words "gross negligence". In their context, therefore, the words "gross negligence" must be construed as something different from wilful. They must mean precisely what they say, ordinary negligence of an aggravated form which falls short of wilfulness. How aggravated must negligence be before it can be characterized as "gross"? All the books are agreed that the words "gross negligence" are incapable of precise definition, but a generally accepted broad definition is the definition given in the oft-quoted case of *Rosenthal v Marks* 1944 TPD 172 at 180, where MURRAY J is quoted as saying:

> "Gross negligence *(culpa lata, crassa)* connotes recklessness, an entire failure to give consideration to the consequences of his actions, a total disregard of duty (see *per* WESSELS J in *Adlington*'s case *(supra)* at page 973, and *Cordey v Cardiff Ice Co* (88 LT 192))."

This broad definition does, however, have an element of *mens rea* in it, and, as I have already pointed out, in their context in this case the words have no such element. As there is no element of *mens rea,* it seems to me clear that the test to be applied must be an objective and not a subjective one. See *R v Ncetendaba and Another* 1952 (2) SA 647 (SR) at 649, *(1) and the cases there cited. This, however, helps the plaintiff not at all. It is not a question of what the plaintiff knew when he pulled the propeller; it is a question of what he ought to have known. The plaintiff cannot shelter behind his own negligence. As a reasonably prudent aircraft pilot he ought to have known when he pulled the propeller that the ignition switch was in the switched "on" position, and therefore it must now be assumed against him that he did know this fact and his actions must be judged on the basis of his so knowing.

I reject Mr *Jordaan's* argument that the plaintiff is not guilty of negligence at all because when he pulled the propeller he did not consciously realize that the ignition switch was in the "on," position and that in the circumstances he could be forgiven for not knowing it. I am satisfied from all the evidence (and this includes the plaintiffs own reactions when he first realised that the key was in the ignition switch) that no reasonably prudent aircraft pilot would do a compression test without first satisfying himself that the ignition was switched off. To switch off the engine before doing this test is a standard practice. I am satisfied, therefore, that the plaintiff was guilty of an act of negligence here, this negligence being that he pulled the propeller without first satisfying himself that the ignition was switched off. I will canvass the relationship of this negligence to the cause of the damage later.



BEADLE AJ

This is only the start of the inquiry. What must next be considered is the causal connection between this negligent act and the damage, and I stress here the use of the word "damage". What must first be considered is whether the negligent act is causally sufficiently closely related to the damage to attract liability. If it is decided that it is, the next step is to determine whether it was gross or not. I propose to start this inquiry by adopting the approach that I took in the case of *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson,* 1973 (4) SA 523 (RAD) at 524-525, *(2) where I said:

**Copyright Juta & Co Ltd**

> "What a prudent man would or would not do, or would or would not fore see in any particular case, must depend on a very wide variety of circumstances and few cases are ever identical in the relevant circumstances. The sort of circumstances, however, which the Courts often look to in cases such as this in deciding what degree of foreseeability must be proved by the plaintiff before a defendant can be held responsible for the resultant damage are these: (1) how real is the risk of the harm eventuating? (2) if the harm does eventuate, what is the extent of the damage likely to be; and (3) what are the costs or difficulties involved in guarding against the risk?"

I examine each of these three factors together in relation to the facts of this case, and in the end I must make a value judgment.

(1) How real was the risk of the harm eventuating? The answer here to this question is minimal. As I have said, this accident could be called a "freak accident".

(2) If the harm did eventuate, what was the extent of the damage likely to be? The answer here is very considerable indeed. In addition to the damage actually suffered, which is not inconsiderable, the plaintiff himself might well have been seriously injured, and the possibility of the aircraft, when it careered across the airport out of control, colliding with another aircraft could not be excluded.

(3) What was the difficulty involved in guarding against this risk? The answer here is nil. The plaintiff would simply have had to switch off the ignition key.

The answer to the first question is so overwhelmingly in the plaintiff's favour that it could be argued that the accident was not foreseeable at all by a reasonable pilot and that the plaintiff was not even guilty of ordinary negligence. But the answers to questions (2) and (3) are so overwhelmingly against the plaintiff that, though this is a borderline case, I



think the negligence is sufficiently related to the damage to make it causally responsible for it, on the basis that because of the high risk involved and the case of avoiding that risk, the ordinary prudent pilot, remote though the risk might be, would guard against it happening by ensuring that the ignition was switched off before commencing the compression test. The fact that it is the standard practice of a prudent pilot to switch off underscores this argument.

I find, therefore, that the plaintiff was guilty of negligence in relation to the damage suffered. But was his negligence gross or ordinary? That is the next question. Here again, of necessity, the Court must make a value judgment. It has no guidelines to follow other than the *dicta* of MURRAY, J, in *Rosenthal's* case *(supra)* and many other similar *dicta,* none of which are really helpful. I propose first to analyse the causation of the damage. It will be seen that the damage was really caused by a combination of two factors-(1) the negligence of the plaintiff coupled with (2) the happening of a freak accident. Each of these two factors played a fundamental part in the causation link between the negligence and the damage. To say that this constitutes gross negligence would be tantamount to saying that because the plaintiff's ordinary negligence was followed by a freak accident, that freak accident converted the ordinary negligence into gross negligence. This, to my mind, is quite illogical. Another approach produces the same answer. If the engine had not fired, no damage would have resulted at all. The *causa causans* of the damage was the engine firing, and the firing of the engine was such an unlikely event that it

**Copyright Juta & Co Ltd**

comes close to a *novas actus interveniens* in the causal tie-up between the plaintiff's negligence and the damage. If the firing of the engine was considered a *novus actus interveniens,* then the plaintiff could not even be found guilty of ordinary negligence in relation to the damage suffered, because the cause of the damage would have been the freak accident and not the plaintiff's ordinary negligence. It is a forgone conclusion that if he could not have been found guilty of ordinary negligence, he could not have been found guilty of gross negligence. The firing of the engine, though not actually a *novus actus interveniens,* was very close to being one. The degree of the plaintiff's negligence, therefore, in relation to the damage suffered, proximates more closely to no negligence at all than to gross negligence. In their degree of negligence I would regard the plaintiff's acts as *culpa levissima* rather than *culpa lata,* that is, "minor" rather than "gross".

The onus was on the defendants to prove that the plaintiff's negligence was gross. They certainly have not succeeded in discharging that onus.

---



BEADLE AJ

On the contrary, the plaintiff has succeeded in establishing that his negligence was not gross. The Court order, therefore, is judgment for the plaintiff in the sum of $32 000 and costs of suit. The plaintiff and the two witnesses called by him are declared necessary witnesses.

---



## KELLY v PICKERING AND ANOTHER 1980 ZLR 44

**Court** **General Division, Salisbury**

Civil Application

Beck J

12th and 13th February, 1980

### Flynote

Evidence - attorney and client privilege - whether precludes attorney representing two parties from disclosing to one party statement made by other party - when privilege waived.

### Headnote

The defendant applied for the striking-out of portions of his own affidavits and affidavits filed by the insurance company which was the third party to the action, on the ground that they referred to a privileged statement he had made to an attorney instructed by the company to defend him in a criminal trial. The company's affidavits had originally been filed in previous proceedings between the parties, and the defendant had not then claimed privilege but sought to explain the statement. He had subsequently consented to the affidavits being allowed to stand as

---

Copyright Juta & Co Ltd

pleadings.

*Held* that by his prior conduct the defendant had probably waived the protection of any privilege.

*Held,* further, that the affidavits contained secondary evidence obtained as a result of the defendant's statement and, while the Court had an equitable jurisdiction to exclude illegally obtained evidence, the defendant had not been so unfairly dealt with by the attorney and the insurance company that the secondary evidence should be excluded.

*Held,* further, that in the circumstances the confidentiality of the statement did not prevent its being revealed to the insurance company, because when one attorney is engaged by two parties a communication made to him in his



BECK J

character of attorney for both parties may be used against one of them, and, in any event, there was a strong indication that the defendant in fact intended the statement to be passed on to the insurance company.

Cases cited:

*S v Mushimba and Ors* 117 (2) SA 829 (AD);

*Baugh v Cradocke* (1832) 1 Moo & R 182; 174 ER 62;

*Perry and Ors v Smith* (1842) 9 M & W 682; 152 ER 288

*A P de Bourbon,* for the defendant.

*I A Donovan,* for the third party.

## Judgment

**Beck J:** In April, 1977, the plaintiff was injured in a motor accident. She was a passenger in a car driven by the defendant and comprehensively insured by the third party. It is common cause that the defendant negligently caused the accident, and it is now common cause that the plaintiff's damages total $18 786. The only issue that remains to be tried concerns the defendant and the third party alone, and that is whether the third party is liable to indemnify the defendant in this amount in terms of the insurance policy that the third party issued to the defendant. It is the third party's contention that the policy is vitiated by reason of a material non-disclosure by the defendant when completing the proposal form for the policy, and the trial of this solitary issue is about to commence before me.

Before any witnesses are called, I am required to rule on the admissibility of certain evidence that the third party (to whom I shall henceforth refer as "the insurer") proposes to rely on. The matter arises this way. When the defendant was sued by the plaintiff, the defendant applied by way of notice of motion for the joinder of the insurer as a third party to the action. The insurer unsuccessfully resisted that application. In the affidavits that were then filed on the insurer's

Copyright Juta & Co Ltd

behalf, reference was made to a statement that had been uttered by the defendant to a Mr Powell, which reveals, so the insurer contends, that when that portion of the proposal form was completed which reads: "Do you suffer from defective vision or hearing or from any physical or mental infirmity?" the defendant was guilty of a material non-disclosure.

Mr Powell was the insurer's attorney, who was nominated by the insurer to defend the defendant in a magistrates Court against a criminal charge of reckless or negligent driving, arising out of the accident. The nomination was made in terms of the following clause in the insurance policy:



BECK J

> "The company will pay solicitor's fees for defending in any magistrates court any criminal proceedings in respect of any act causing or relating to any event which may be the subject of indemnity under this section, provided always that the company shall be entitled to nominate its own solicitor, but where such nomination is not made, the company's liability for such fees shall be limited to the sum of $50 in respect of any one accident."

In the course of interviewing the defendant with a view to undertaking his defence, Mr Powell elicited from him a statement the admissibility of which is now in dispute. I might say that, in consequence of that statement, Mr Powell concluded that the insurance policy was vitiated *ab initio* and that the insurer was thus not liable to cause the defendant to be defended at its expense. Accordingly, he did not undertake that defence and the defendant was thereafter defended at the criminal trial by another attorney.

When the defendant filed his answering affidavit in the notice of motion proceedings for the insurer to be joined as a third party, he said that when he spoke to Mr Powell he was under the impression that the statement would be privileged. He did not, however, seek to rely on any such privilege as against the insurer and did not seek to have all reference to what he told Mr Powell struck from the affidavits.. on the contrary, he admitted having communicated to Mr Powell something of the kind that Mr Powell recorded, but disputed that Mr Powell had accurately reflected what it was that he had said, and he went on to explain just what it was that he had sought to convey to Mr Powell concerning any physical infirmity affecting him.

After he had granted the application for the joinder of the insurer as a third party, PITTMAN J, was approached in chambers for directions that all the affidavits that had been filed be allowed, by consent of the parties, to stand as pleadings between the defendant and the insurer, and that application was acceded to.

It is against this background that the insurer claims to be allowed to rely on all the evidence in these affidavits that arises from the communication made by the defendant to Mr Powell and revealed by Mr Powell to the insurer, whereas the defendant now contends that all this evidence, including the defendant's own sworn admissions and explanations in regard to what he communicated to Mr Powell, should be struck out as being part of or inextricably connected with a confidential utterance to his own attorney for the purpose of obtaining legal assistance.



Copyright Juta & Co Ltd

BECK J

It seems to me, in the first place, that when the defendant elected to join issue with the insurer as to just what it was that he told Mr Powell, and to place before this Court his own version of what he said, and again when the defendant made common cause with the insurer in asking the Court to direct that the affidavits in which this issue had been canvassed stand as pleadings, the defendant very probably waived the protection of any privilege to which he might otherwise have been entitled. In the second place, it is to be noted that the privilege, if it extended to precluding Mr Powell from revealing to the insurer what he learned from the defendant, has already been breached by Mr Powell, and there is in the affidavits secondary evidence that is *prima facie* relevant to the issue of material non-disclosure, and that has probably come into being as a result of Mr Powell's disclosure of what the defendant told him, Accepting that the Court has an equitable jurisdiction to temper the rule that evidence that has been illegally obtained is not for that reason inadmissible (and compare in this connection the decision in *S v Mushimba & Ors* 1977 (2) SA 829 (AD)), I do not consider that the conduct of Mr Powell or of the insurer was such that the defendant was so unfairly dealt with that even the secondary evidence to which objection has also been taken should be excluded. The defendant must be taken to have known from the outset that Mr Powell was the insurer's solicitor whom the insurer had nominated in terms of 'its policy to defend him, but whom he was not obliged to accept and confide in. The defendant obviously knew that the insurer was jointly interested with him in the accident and in its consequences for both of them, since the insured vehicle had been severely damaged and a passenger seriously injured, so that as between himself, the insurer and the joint attorney, Mr Powell, the defendant had every reason to contemplate that what he told Mr Powell was not intended to be kept secret from the insurer. Moreover, it is common cause on the affidavits that Mr Powell at once expressly drew the defendant's attention to the fact that he, Mr Powell, intended to inform the insurer of what the defendant had said to him concerning a possible physical infirmity, and the defendant does not claim to have raised any protest against such intended disclosure. In the face of this apparent initial acquiescence, as well as the defendant's later attitude, to which I have already referred, when he chose in his notice of motion proceedings to meet and elaborate on the evidence concerning what he told Mr Powell, I do not consider that dictates of fairness now require me to strike from the affidavits the secondary evidence relative to a possible material non-disclosure that has come into being because Mr Powell revealed to the insurer what he had been told by the defendant.



BECK J

But thirdly, and in any event, I do not think in the particular circumstances of this case that the confidentiality of what the defendant said to Mr Powell extended to non-revelation to the insurer. It is a settled principle that when one attorney is employed, a communication made to him *in his character of attorney for both parties* may be used against one of them (*Baugh v Cradocke* (1832) 1 Moody & Robinson 182; 174 ER 62; *Perry & Ors v Smith* (1842) Meeson & Welsby 682; 152 ER 288). Wigmore (McNaughton Revision) volume VIII, section 2312, gives at page 604 the following illustration of the application by the Federal Supreme Court of the principle that a communication by A to X as the common attorney of A and B who afterwards become party opponents, is not privileged as between A and B since there is no secrecy between them

**Copyright Juta & Co Ltd**

at the time of communication: a communication by an insured to the attorney of the insurer is made while both had a joint interest with respect to the accident, held not privileged in a subsequent action by the insurer for a declaratory judgment of non-liability for lack of co-operation by the insured.

In the instant case, there is a very strong indication that no secrecy between the defendant and the insurer concerning the defendant's medical history was contemplated when the defendant spoke to Mr Powell and that what the defendant said to Mr Powell that was relevant to a possible material non-disclosure, such as might vitiate the insurance, far from being intended for Mr Powell's ears only, was, on the contrary, actually intended by the defendant to be passed on by Mr Powell to the insurer, because it is common cause that the defendant told Mr Powell that the insurer had long since been assured by a neurosurgeon on the defendant's behalf that the defendant had been examined and found safe to drive a motor-vehicle. In short, what was said to Mr Powell by the defendant concerning his medical history is, on the one hand, not suggested to have been relevant in any way to the criminal charge that had been preferred against him and thus to have been said for the purpose of obtaining Mr Powell's professional assistance in that regard, while, on the other hand, all the indications are that the defendant did not intend, at the time that it was said, that the information was to be withheld by Mr Powell from his principal, the insurer.

Accordingly, I hold that none of the passages to which objection has been taken in the affidavits that have been directed to stand as pleadings falls to be struck out, and the application to do so is accordingly dismissed.

---



BECK J

Any extra costs that may have been occasioned by the argument for striking out are reserved for decision at the conclusion of the trial.

*Granger & Archer,* attorneys for the defendant.

*Atherstone & Cook,* attorneys for the third party.

---

1980 ZLR p49

## REGINA v AGRIPPA 1980 ZLR 49

**Court** **General Division, Salisbury**

Criminal Review

Waddington, J

13th February, 1980

**Flynote**

---

Copyright Juta & Co Ltd

Road Motor Transportation Act [Chapter 262] - section 36 - failure to produce road service permit or certificate of fitness on demand - meaning of "fails to comply" - whether blameworthiness element of offence - whether driver of vehicle my be convicted of offence.

## Headnote

Blameworthiness is an element of the offence of failing to produce a road service permit or certificate of fitness on demand in contravention of section 36 (2) as read with 36 (1) (a) of the Road Motor Transportation Act [*Chapter 262*].

Although the driver of a public service vehicle has no duty to secure the carriage of the relevant road service permit and certificate of fitness, if through his own blameworthiness he makes it impossible for himself to comply with a request to produce one of those documents he could be convicted of contravening section 36 (2) of the Road Motor Transportation Act [*Chapter 262*].

Cases cited:

*Jaga v Donges, NO and Anor.,* 1950 (4) SA 653 (AD);

*R v Jack,* 1953 (2) SA 624 (AD);

*R v Chimhanda,* G-S-26-80 (unreported).

## Judgment

**Waddington J:** The accused in this case was charged with the offence of contravening section 5 (1) (b) of the Road Motor Transportation Act [*Chapter 262*], alternatively with the offence of contravening



WADDINGTON J

section 36 (1) (a) of the same Act. The alternative allegation was that the accused, being the driver of a public service vehicle and having been stopped by a police officer, inspecting officer, examiner or appropriate officer, and unlawfully failed to produce on demand the road service permit issued by or on behalf of the Controller authorizing the use of such vehicle. The accused was acquitted on the main charge but was convicted on his plea of guilty to the alternative charge. When the plea was taken, the accused's reply was cryptically recorded by the magistrate in the following terms:

"Breakdown in Mount Darwin and couldn't collect permit. I had it but wasn't carrying it."

When the matter came before a scrutinizing magistrate he entertained some doubt regarding the propriety of the conviction because a driver of a public service vehicle who, through no fault of his own, does not possess the appropriate road service permit cannot be criminally responsible for failing to comply with a lawful request to produce it. The scrutinizing magistrate accordingly submitted the case for review. I have obtained the views of the Attorney-General who does not wish to support the conviction.

Copyright Juta & Co Ltd

Section 36 of the Road Motor Transportation Act [*Chapter 262*] provides, *inter alia:*

"(1) Any police officer, inspecting officer, examiner or appropriate officer may stop any public service vehicle and -

(a) demand from the driver thereof production of the road service permit or other permit issued by or on behalf of the Controller authorizing the use of such vehicle;

(b) require the driver thereof to produce for inspection the certificate of fitness in respect of that vehicle;

.....

(2) Any person who fails to comply with a request lawfully made In terms of subsection (1) shall be guilty of an offence." .

In the present case we are dealing with a statute which creates a criminal offence and it cannot lightly be assumed that in a matter of this description the Legislature, when it used the words "fails to comply", did not use that expression deliberately instead of the words "does not comply" and that it intended the Crown should not have the burden of proving blameworthiness on the part of an accused person. If it is assumed that the words "fails to comply" are capable in their context of another meaning, namely, "does not provide" they are clearly also



WADDINGTON J

capable of connoting blameworthiness on the part of an accused person.

On this assumption subsection (2) of section 36 is capable of two alternative constructions and the construction that should be adopted is the one in *favorem libertatis.* (See *Jaga v Donges, NO & Another* 1950 (4) SA 653 (AD) at pages 657, 661 and 668.) It seems to me, therefore, that the words "fails to comply" should be considered as connoting blameworthiness on the part on an accused person and not as meaning only "does not provide". (cf. *R v Jack,* 1953 (2) SA 624 (AD) at pages 626 and 627.)

In the instant case the suggestion implicit in the explanation of the accused is that although he did not comply with the request to produce the road service permit in question he was unable to do so through no fault of his own. This explanation, which the Crown did not rebut, was inconsistent with blameworthiness on his part. The position would have been quite different of course had the accused, having been the driver of the public service vehicle in question, deliberately failed to produce the permit upon demand had that permit been available for production at the time.

The Attorney-General points out that in further considering the overall provisions of Chapter 262 it is noteworthy that the situations referred to in section 36 (1) (a) and (b), namely, carriage of the permit and certificate of fitness are made the responsibilities only of the owner by section 12 (1) (a) and (b) of the Act. Section 12 casts no duty on drivers to secure the carriage of such documents. The Attorney-General submits, therefore, that this in itself is an indication that it was not the intention that a mere driver should be liable for a failure to carry either of these documents. I agree with these sentiments. (See the decision of BECK, J, in *R v Chimhanda*, G-S-26-80, unreported). I would add, however, that the driver of a public service vehicle who, through his own blameworthiness, makes it impossible for himself to comply with a request

Copyright Juta & Co Ltd

made in terms of section 36 of the Act to produce one of the documents mentioned therein, would not necessarily in my view escape conviction under that section.

In the circumstances, the conviction and sentence must be set aside.

If the fine of $100 which was imposed has been paid, it must be refunded.

My brother Beck agrees with this judgment.

---



## REGINA v JAMES 1980 ZLR 52

**Court** **General Division, Salisbury**

Criminal Review

Waddington, J

13th February, 1980

### Flynote

Criminal procedure - award of compensation in terms of section 341 of Criminal Procedure and Evidence Act [Chapter 59] - meaning of "forthwith" in section 341 (1) - when award may be made - whether omission to make award may be rectified on review.

### Headnote

The word "forthwith" in section 341 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*] does not mean that a trial Court may make an award of compensation immediately after conviction only. In proper cases an omission to make an award due solely to the trial Court's forgetfulness may be rectified on review in terms of section 64 (2) (c) of the Magistrates Court Act [*Chapter 18*].

Case cited:

*R v Mkize,* 1961 (2) SA 769 (D.).

### Judgment

**Waddington J:** The accused, a member of the Army, pleaded guilty to and was properly convicted of the theft of the sum of $10 in cash from the complainant committed during a search of her hut. After conviction the accused stated that he had repaid $6 to the complainant. At that point, acting in terms of section 341 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*], the prosecutor made an application for an award of compensation in favour of the complainant in the amount of the outstanding balance of $4. The accused indicated that he had no objection to the making of such an award. Thereafter the accused made a number of statements in mitigation. The magistrate thereupon proceeded to sentence the accused but

---

Copyright Juta & Co Ltd

forgot to make the order of compensation.



WADDINGTON J

The trial magistrate, in submitting the case for scrutiny to a regional magistrate, has suggested that the matter be referred for review in the ordinary way so that his omission may be corrected. Section 341 (1) of the Code provides, *inter alia,* when any person is convicted by any Court with jurisdiction in civil cases of an offence which has caused loss of property belonging to some other person the Court trying the case may, "after recording the conviction" and upon the application of the injured party or of the prosecutor acting on the instructions of such party, "forthwith award him compensation for such damage or loss". The question which arises is whether, in the exercise of the powers conferred upon a reviewing Judge by section 64 of the Magistrates Court Act [*Chapter 18*], I am entitled to supply the omission in view of the fact that an award of compensation should be made "forthwith". Subsection (4) of section 341 of the Code reads:

> "For the purposes of determining the amount of compensation or the liability of the accused therefor, the Court may refer to the proceedings and evidence at the trial or hear further evidence, either upon affidavit or verbal."

It appears, therefore, that despite the use of the word "forthwith" in subsection (1) of section 341, a trial Court may make an award of compensation even though it might first be necessary to adjourn the proceedings for the purpose of hearing verbal evidence or evidence upon affidavit. In my view section 341 (1) should in consequence not be construed as meaning that the trial Court may make an award of compensation immediately after conviction only. (Cf. *R v Mkize,* 1961 (2) SA 769 (D.), where an award of compensation was made following an application after the passing of sentence.) In proper cases I can see no reason why an omission to make an award of compensation due solely to the forgetfulness of the trial Court should not be rectified on review in terms of section 64 (2) (c) of the Magistrates Court Act [*Chapter 18*].

In the instant case all the conditions precedent to the making of an award of condensation were present. The value of the loss was clearly established; application for the award was, in conformity with the Code, made after conviction and the accused had no objection to the making of the award. The complainant was a peasant who would have viewed the loss of the sum of $4 with concern and the recovery of that sum by the exercise of her civil remedies with even more concern. I consider that the unusual circumstances of this case justify me in supplying the omission in the interests of real and substantial justice.



WADDINGTON J

I am indebted to the Attorney-General for his assistance in this matter.

The conviction and sentence are confirmed, but the following award of compensation is made:

> "The accused shall repay the sum of $4,00 to the complainant."

Copyright Juta & Co Ltd

My brother Goldin agrees with this judgment.



## REGINA v KADONGORO 1980 ZLR 54

**Court** **General Division, Salisbury**

Criminal Review Beadle, AJ

13th February, 1980

### Flynote

Criminal law - attempted culpable homicide - whether offence recognized in our law.

### Headnote

The accused had negligently shot the complainant with a rifle. The complainant did not die.

*Held* that in the circumstances it would not be appropriate to convict the accused of attempted culpable homicide, but rather of negligently pointing a firearm in contravention of section 40 of the Firearms Act [*Chapter 308*].

Authorities cited:

Burchell & Hunt*, South African Criminal Law and Procedure,* volume I, page 378;

Hunt, *South African Criminal Law and Procedure,* volume II, pages 388-9.

### Judgment

**Beadle AJ:** The accused was charged with the crime of attempted murder, it being alleged that he shot the complainant with a rise. The complainant did not die. In finding the accused guilty of attempted murder, the magistrate said he was "unable to find with any confidence that you fired the shot deliberately", and he then went on to say: "In my



BEADLE AJ

view, therefore, whilst you had no actual intent it must be said that by virtue of your gross negligence you had a constructive or legal intent." He thereupon found the accused guilty on the doctrine of *dolus eventualis.*

It seemed to me that the magistrate was clearly wrong in confusing *dolus eventualis* with gross negligence, and that the conviction in its present form cannot stand.

The problem, therefore, is: what is an appropriate substitute verdict? Had the complainant died, in view of the magistrate's finding that the accused was guilty of gross negligence, he would

Copyright Juta & Co Ltd

undoubtedly have been found guilty of culpable homicide, but the complainant did not die. In these circumstances, is it permissible to find him guilty of the crime of attempted culpable homicide? Put differently, is there such a crime as attempted culpable homicide when applicable to circumstances such as these?

I referred the matter to the Attorney-General for his views, and these are his views:

> "The main difficulty in the way of the existence of attempted culpable homicide lies in the requirement that for attempt it is necessary that the accused person should intend to commit the offence in question and that such intention must consist of actual or constructive intent (see Burchell & Hunt, South African Criminal Law arid Procedure, volume I, at page 378).Such exceptions as exist only go to prove this rule. The first such category of exception would occur where an accused person attempted to kill another but in circumstances of partial excuse so that had he in fact succeeded he would only have been convicted of culpable homicide and not murder (for example, where there are grounds for the use of self-defence but a moderate excess of force is employed). The second category is where the crime by definition requires *mens rea* in the form of negligence to be constituted; if the accused person intends to commit that crime but fails he may be convicted of such an attempt. Such an example might be where a person, knowing that his vehicle has defective brakes, attempts to start it in order to drive it but fails to do so. (See also, Hunt, South African Criminal Law and Procedure, volume II, at pages 388-389.)
>
> Another primary difficulty in the way of a conviction of attempted culpable homicide lies in the unique nature of this offence. By definition it is only committed when the victim is killed. On the other hand, the offence of assault requires *mens rea* in the form of intention, either actual or constructive.
>
> Assault, therefore, by and large would be categorized as a crime consisting of circumstances, whereas culpable homicide is a crime of consequences. If not unique, it is certainly unusual for a common-law offence to be committed only by negligence and this is obviously the case with culpable homicide

---



BEADLE A J

> because of the seriousness with which the law regards the loss of life. It may, nevertheless, be considered somewhat anomalous that a man may be permanently crippled by the negligent conduct of another, yet if he does not die the criminal law takes no cognizance of his actions.
>
> However, to meet this situation by recognizing the offence of attempted culpable homicide is fraught with uncertainties since there would be no practical limit to this offence. Persons are convicted daily of negligent driving in circumstances where others might easily have been killed but were saved by luck. Are they to be convicted of attempted culpable homicide? A similar situation exists in numerous cases of assault.
>
> It is submitted that these considerations illustrate what is in fact common knowledge, that our law does not in general recognise the offence of attempted culpable homicide save, perhaps, in the exceptional cases mentioned. Further evidence of this lies in the Criminal Procedure and Evidence Act [*Chapter 59*], where there is no mention of attempted culpable homicide in the section relating to competent verdicts, in particular section 200. The verdict of attempted culpable homicide on a charge of attempted murder is in fact not a competent one (see also sections 195 (1) and 339). On the facts of the present case it is respectfully submitted that the accused is only liable to conviction, in terms of section 200 (c) of the Criminal Code, of pointing a firearm at the complainant in contravention of section 40 of the Firearms Act [*Chapter 308*], for which the maximum penalty provided is a fine of $100 or imprisonment for six months.
>
> The record is returned."

I agree substantially with the reasoning of the Attorney-General. I do not think in these circumstances it would be appropriate to convict the accused of attempted culpable homicide,

---

**Copyright Juta & Co Ltd**

but that the proper verdict should be to convict him of contravening section 2 (c) of the Criminal Procedure & Evidence Act [*Chapter 59*] as read with section 40 of the Firearms Act [*Chapter 308*]. The verdict is altered to a conviction of a contravention of these Acts. It was a serious breach of the statute and I think the accused should receive the maximum penalty permissible-imprisonment with labour for six months.

The verdict and sentence are altered accordingly.

My brother Goldin agrees with this judgment.



## REGINA v HADJIVASSILI 1980 ZLR 57

**Court** **Appellate Division, Salisbury**

Criminal Appeal Macdonald, CJ, Lewis, JP, and Davies, JA

19th February, 1980

### Flynote

Criminal procedure - sentence - prospective deportation of accused - whether mitigatory.

### Headnote

The appellant had been convicted of buying foreign currency in contravention of section 3 (1) (a) (i) of the Exchange control Regulations, 1977; as it was his second conviction for an offence under the Act imprisonment was mandatory and he was sentenced to an effective term of imprisonment accordingly. On appeal it was argued that because he was due to be deported from the country as a result of his previous offence, the whole of his sentence should have been suspended.

*Held* that in the circumstances the appellant's impending deportation was not a mitigating factor.

*Held,* further, that the courts should not refrain from imposing what is the proper sentence for an offence merely because executive action will be taken against the offender by way of deportation.

Case cited:

*S v Horwitz,* 1976 (1) RLR 241 (AD).

*R*. *Jagger* for the appellant, cited the following cases:

*S v Horowitz (supra)*;

*R v Poswell and Anor.,* 1969 (4) SA 194 (R),

*R v Barclay,* 1975 (2) RLR 87 (AD); 1969 (4) SA 195 (RAD);

Copyright Juta & Co Ltd

*R v Pretorius and Anor.,* 1969 (2) RLR 402 (GD); 1969 (4) SA 198 (R)

*R. W  Pollard,* for the respondent.

## Judgment

**Lewis JP:** The appellant in this case was convicted in the Court of the Provincial Magistrate at Fort Victoria of the crime of contravening subparagraph (i) of paragraph (a) of subsection (1) of section 3 of the Exchange control Regulations, 1977, that is to say, unlawfully buying



LEWIS JP

foreign currency. He was sentenced to three months' imprisonment with labour and to a fine of $171 or, in default of payment, one month's imprisonment with labour. The foreign currency involved in the  transaction, consisting of 210 South African rends, was declared forfeited.

He noted an appeal to this Court against both conviction and sentence, but Mr *Jagger* who appeared for him today has informed the Court that although not authorized to abandon the appeal against conviction he  finds himself unable to advance any argument in support of that appeal. That attitude is readily understandable. The guilt of the appellant was established beyond any doubt at all. What happened was that the appellant, who was a store-keeper in Fort Victoria, was approached by an African who wanted to buy a bed. He had R210 in notes. The African  bought the bed from the appellant for $75, handed over his R210 and received $135 by way of change. In effect, therefore, this was the buying of R210 for $210. The evidence of the African concerned, who was admittedly an accomplice, was corroborated in full by the appellant's extra-curial statement, the admissibility of which was not challenged and  the accuracy of which was established beyond any reasonable doubt.

As regards sentence, as this was the appellant's second conviction for the same offence, a prison sentence was mandatory. The fine imposed was also mandatory, the equivalent of the foreign currency involved.

The only basis upon which Mr *Jagger* has found himself able to support the appeal against sentence is the simple one that the appellant is due to be deported from the country. This deportation order arises from his previous conviction and not as a consequence of the current conviction. We are urged to suspend the whole of the sentence because of this factor.

In considering this argument, it is necessary to consider the appellant's background. He came here originally as an immigrant from Cyprus as a  youngster, and on the 4th March, 1970, he was convicted of the crime of criminal *injuria* at Fort Victoria and was sentenced to a moderate correction of six cuts with the cane. In consequence of that conviction, he was declared a prohibited immigrant and deported back to Cyprus.

He re-entered this country apparently some time in 1975 on a temporary  residence permit and it must be assumed that this was granted to him, having regard to his previous background, only on condition that he behaved himself in this country and properly observed the laws of this country. On the 17th May, 1979, he was convicted of contravening section

Copyright Juta & Co Ltd

LEWIS JP

5 (1) (a) (i) of the Exchange control Act [*Chapter 170*], as read with section 5 (1) of the Exchange control Regulations, that is possessing foreign currency to the value of more than $20, and also of contravening section 5 (1) (a) (i) of the Exchange control Act, as read with section 16 (1) (b) of the Exchange control Regulations, in attempting to export foreign currency without the permission of the Minister. The foreign currency involved in those offences was the very large sum of R22 000, plus U S.$448 and £130 sterling. On that occasion, both counts being treated as one for sentence, he was sentenced to a fine of $18 400 (which was presumably the equivalent of the foreign currency involved), or, in default of payment, to undergo 18 months' imprisonment with labour, and the usual forfeiture order was made in regard to the currency. Despite that severe warning one finds, a mere five months later, in October of last year he was commencing to build up another fund of foreign currency in precisely the same way. He admitted at his trial in the instant case that the R22 000 which he had accumulated and which was the subject of the previous offences was all accumulated as a result of buying rends from Africans employed in Johannesburg on the mines through the WENELA organization. These Africans on their return to this country had sold their rends to him instead of exchanging them for dollars at the bank at the proper rate of exchange, as they should have done. There was evidence from the police that this practice of selling dollars to Africans of the WENELA organization returning to this country in exchange for rends at favourable rates of exchange was extremely prevalent, and that this was having a serious effect on this country's foreign currency reserves because the money was finding its way into the hands of traders such as the appellant instead of being exchanged at the proper rate of exchange through the banks.

Now, the argument is that the whole of the prison sentence in this case should have been suspended because of the deportation order in force against the appellant, which is in itself a severe punishment. The principle to be applied where, as in the present case, a prison sentence is a mandatory one laid down by the Legislature was formulated in the case of *S v Horowitz,* 1976 (1) R L.R 238 (AD) by the CHIEF JUSTICE. In a judgment, in which I concurred, the learned CHIEF JUSTICE said at page 242:

> "Where the Legislature has decreed a mandatory prison sentence, a Court will not lightly order the whole of that sentence to be suspended (compare the remarks in *S v Mtembu,* 1970 (1) SA 435 (N.)) and will only do so when the mitigating circumstances clearly make such a course desirable. On the 20th August, 1971, the appellant had received a clear and explicit warning of what would happen if he contravened the Exchange Control legislation again and,



LEWIS JP

> notwithstanding that warning, he did so on about the 30th May, 1973, that is only some 20 months after his first conviction."

I pause here to reiterate that in the instant case it was only a bare five months after the first conviction that the appellant blatantly contravened the regulations again. Then, at page 241H,

Copyright Juta & Co Ltd

the CHIEF JUSTICE said:

> "In considering whether part or whole of the sentence should have been suspended, it is important to consider the seriousness of the earlier and present offences and to give due weight to the appellant's personal circumstances. It is accepted that the earlier offences were committed when the appellant sent money to Israel to assist an indigent relative, not to create a fund for the appellant's own use outside the country. The charitable motive behind the commission of the earlier offences reduced the appellant's moral blameworthiness for those offences."

It was then pointed out in the judgment that so far as the current offences were concerned there was also the mitigating feature that originally the appellant expected to receive the necessary funds for importing machinery for his business from moneys which he had in Zambia, but that fell through; initially he had no intention of contravening the law, but he was tempted, because of his failure to obtain access to his Zambian funds, to break the law in order to get the machinery which was vitally needed into this country. Those circumstances were clearly mitigating circumstances both as regards the earlier offences involved in the previous convictions and the later offences, and certainly as regards the earlier offences the circumstances were far more mitigatory than in the instant case, yet this Court refused to order the suspension of the whole of the prison sentence, but merely reduced the effective period to one of two months.

Bearing in mind the principle laid down, it does not seem to me that it can be said that it is a mitigating circumstance of this current offence that the appellant will be deported from the country. This is something which arose out of his first conviction under the Exchange control Act. Moreover, it does not seem to me that Courts should refrain from imposing what is the proper sentence for an offence merely because executive action will be taken against the offender by the authorities by way of deportation. That is a matter for the Executive. The immigration authorities may, in their discretion, decide to deport the appellant immediately, as has been done in other cases in the past, and in that event he would not serve the sentence imposed upon him. As far as this Court is concerned, its concern is to see that the sentence is an appropriate one for the offence committed, having regard to the appellant's record, and bearing in mind the need to deter others from committing such offences.

---



LEWIS JP

Apart from that, the appellant can be said to have brought this misfortune upon his own head. He was allowed into this country again, having previously been deported, clearly on condition that he behaved himself. He committed a gross breach of the law in his first offence involving R22 000, to the prejudice of this country. A mere five months later he was again engaging in the same activity. It does not seem to me that the appellant is entitled to any sympathy from this Court. In my view, the sentence, if it erred at all, erred on the side of leniency, and I would dismiss the appeal.

**Macdonald CJ:** I agree.

**Davies JA:** I agree.

*Byron Venturas & Travlos,* attorneys for the appellant.

---

**Copyright Juta & Co Ltd**

## KELLY v PICKERING AND ANOTHER 1980 ZLR 61

**Court** **General Division, Salisbury**

Civil Action

Beck, J

13th, 14th and 20th February, 1980

### Flynote

Insurance - duty of insured to disclose in proposal form facts relevant to risk - extent of duty - whether insured must disclose possible disability which subsequently turns out to have been non-existent - interpretation of warranty to disclose all facts.

### Headnote

After he had had a fit while undergoing military training the defendant was diag nosed as a very mild epileptic. However, when he took out a motor insurance policy with the insurance company which was the third party to the action, this insurance broker answered "no" on his behalf to a question in the proposal form asking if he suffered from any physical or mental disability, despite his having advised the broker to consult his doctor before answering the question. Subsequent medical tests indicated that the defendant was probably not an epileptic after all, nevertheless, the insurance company repudiated the



policy on the ground that the defendant had breached his common-law duty of disclosure as well as a warranty in the proposal form that his answers were true, correct and complete and contained all information known to him affecting the risk to be insured.

*Held* that the defendant had given two warranties in the proposal storm: that his answers were true, correct and complete, and that he had given all information apart from that requested in the form which affected the risk (*Yorkshire Insurance Co. Ltd v Ismail,* 1987 (1) SA 353 (T), followed).

*Held,* further, that the defendant's unqualified answer breached both warranties: it was not complete in view of the then-existing possibility of epilepsy, and still less did it give all the information known to him affecting the risk to be insured.

*Held,* further, that the defendant had breached his common-law duty to disclose all material facts within his knowledge which would influence the insurer in deciding whether or not to accept the risk; the fact that the risk of epilepsy might subsequently have turned out to be non-existent did not relieve him of the duty (MacGillivray and Parkington on *Insurance Law,* 6th edition, paragraph 759, and *Seaman v Fonerau,* 2 Strange 1183; 93 ER 1115, referred).

Copyright Juta & Co Ltd

*Held,* further, that the defendant's duty to disclose material facts was absolute and could not be avoided by delegation to his insurance broker (Hardy Ivamy, *General Principles of Insurance Law,* 3rd edition, page 139, referred).

Authorities cited:

*Yorkshire Insurance Co. Ltd v Ismail (supra)*;

MacGillivray and Parkington, *op. cit.*

*Seaman v Fonerau (supra);*

Hardy Ivamy, *op. cit.*

*C W Jordaan,* for the plaintiff.

*A P de Bourbon,* for the defendant.

*I A Donovan,* for the third party.

## Judgment

**Beck J:** The issue to be determined in this trial is whether the third party (hereinafter called the insurer) is liable, in terms of a comprehensive motor insurance policy that it issued to the defendant, to indemnify the defendant in the sum of $18 786, being the amount of damages suffered by the injured plaintiff as the result of an accident that was caused by the defendant's negligent driving.

In January, 1976, the defendant completed a proposal form that contained the following declaration:



BECK J

> "I hereby declare that the above particulars and statements are true, correct and complete and contain all information known to me affecting the risk to be insured, and that this and any other written statement made by me or on my behalf for file purposes of the proposed insurance shall be the basis of, and incorporated in, the contract between me and the Company, and shall be promissory. I further agree to accept insurance on the terms and conditions set forth in the Company's policy."

Consequent upon this proposal the insurer issued the policy of insurance for the period 1st February, 1976, to 31st January, 1977. The policy contains the following preamble and condition:

> (Preamble): "Whereas the insured described in the Schedule hereto by a Proposal and Declaration (dated as stated in the Schedule) which shall be the basis off this contract and is deemed to be incorporated herein has applied to the Standard General Insurance Company Ltd for the Insurance herein after contained . . ."
>
> (Condition): "9. The due observance and fulfilment of the terms and conditions of this Policy by the Insured in so far as they relate to anything to be done or complied with by the Insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy. No waiver of any of the terms conditions and endorsements of this Policy shall be valid unless

Copyright Juta & Co Ltd

made in writing signed by a duly authorized officer of the Company "

This policy was renewed on the 31st January, 1977, for a further twelve months. The accident that has given rise to this suit occurred in April, 1977.

The following question in the proposal form was answered in the negative by a broker acting as the defendant's agent: "Do you, or any other person who to your knowledge will drive, suffer from defective vision or hearing or from any physical or mental infirmity?"

The evidence has established that the defendant, in 1967 at the age of 13, became prone to recurrent severe migraine attacks associated with visual disturbance, nausea and paresthesia, notably of the left hand and arm. These attacks decreased in intensity and frequency as the defendant passed beyond adolescence, but in April or May, 1974, during or shortly after strenuous exercise while on military training, the defendant had a fit with accompanying total unconsciousness and was taken to hospital, where he later had another episode in which he bit his lip. It was suspected by a military doctor that he had suffered an epileptic "Grand Mal" seizure and the defendant was referred to a neurological surgeon for examination. Electro-encephalogram tests were conducted which gave borderline results, and in June, 1974, the neurosurgeon expressed the



view to the military doctor that the defendant should be categorized as a very mild epileptic and be exempted from further active military duties. Although it is not clear exactly what was then told to the defendant by the neurosurgeon concerning this diagnosis, it is apparent that before the proposal form was submitted the defendant was made aware that it has been said that he was a mild epileptic and had on that account been returned by the military authorities to his civilian occupation. In June, 1974, he was advised by the neurosurgeon to return for a further EEG examination in six months' time, and in the meantime to continue to take Epanutin tablets daily, a medication which the defendant knew to be a prophylactic prescribed to ward off possible future seizures. Although the defendant chose after a while to discontinue the use of Epanutin he did not experience any further seizures, but he did continue to experience occasional migraine attacks from which he found relief by using an analgesic at the time of such attacks. In April, 1975, after a protracted spell of dizziness, he underwent another EEG test. This was within normal limits, but daily use of Epanutin was again prescribed for him. In October, 1975, he was again seen by the neurosurgeon who found him very much more settled and having no further seizures, but who nevertheless advised the defendant that "certainly for the next year he should continue with his medication (*viz*. daily Epanutin) and return at that time for an EEG and review". During the next twelve-month period the defendant only infrequently experienced ill-health and he did not, in the result, return for the suggested EEG and review of his condition, which he says he assumed was a suggestion that had been made at the behest of the military authorities who wanted, so he thought, a periodic check on his condition. However, on the 25th January, 1977, only days before the policy fell due for renewal, the defendant, having again been called up by the military authorities, certified the complete correctness of the under mentioned answers to the following questions on the military Medical Examination Form:

Copyright Juta & Co Ltd

"Have you suffered from any of the following? Give dates:

1. Fits or convulsions? Answer: Yes, May, 1774. Severe or 'sick' headaches, migraine? Answer: Yes, continuous. At infrequent intervals (last on 3rd November, 1976)."

The defendant was forthwith categorized as unfit for any military duty (category "E"), was not called up, and it was again explained to him that he had been categorized as a mild epileptic by his neurosurgeon.

The neurosurgeon has very recently examined the defendant again, and has found him to be quite fit, although the neurosurgeon was not told that in 1978 the defendant had again suffered three severe migraine



BECK J

attacks with associated visual disturbance and nausea, that had necessitated medical treatment for relief. The neurosurgeon is of the view that the defendant has never really been a victim of epilepsy but merely of severe migrainous headaches that have lessened with the passage of time. It is his opinion that the defendant's susceptibility to such headaches did not amount to a physical infirmity; nor, in his opinion, did it impair the defendant's ability to drive a motor-vehicle, because the onset of such headaches is preceded by warning symptoms such as would cause the defendant to refrain from driving before finding himself in the throes of an attack when he would be quite incapable of controlling a motorcar. It is the neurosurgeon's opinion therefore that the negative answer that was given in January, 1976, to the question in the proposal form that I have previously set out was, objectively speaking, true.

None of this information was revealed to, or known by, the insurer, either at the time when the insurance was proposed in January, 1976, or at the time when, a year later, it was renewed. It is not suggested that the accident, in April, 1977, was at all occasioned by any physical defect in the defendant that impaired his driving ability. The insurer's contention is simply that, in the light of the facts that I have recounted, the negative answer to the question in the proposal form to which I have referred is a breach of the warranties contained in the declaration made by the defendant in that proposal form, and constituted conditions precedent to any liability on the insurer's part by condition 9 of the policy. Additionally, the insurer contends that the defendant's failure to furnish this information to the insurer when proposing and renewing the insurance was a breach of the defendant's common-law duty to disclose material information within his knowledge such as would influence the judgment of a prudent, or reasonable, insurer in determining whether to accept the risk or in fixing the premium.

In Yorkshire *Insurance Co. Ltd v Ismail,* 1957 (1) SA 353 (1.), the view was expressed by KUPER, J, at page 356H, with regard to an identically worded declaration in a proposal form, that:

" . . . the grammatical construction of the declaration is clear. The position of the comma after the word 'true', and the use Of the word 'and' after 'correct' show that the first part of the declaration was that the particulars and statements were true, correct and complete. The words 'and contain all information known to me' express a further warranty (designed to deal with particulars and statements not requested in the proposal but which affect the risk)

Copyright Juta & Co Ltd

and cannot qualify the preceding warranty."



BECK J

I am in agreement with that view which seems to me to? be obviously correct.

When those two warranties were given the defendant was aware that fairly recent tests (the most recent of which was done only three months previously) had indicated that he might have been a mild epileptic, that a future EEG test was still intended before it could be determined whether that possible condition was a thing of the past, and that medical advice was that he should continue the daily use of a prophylactic to ward or possible future seizures - advice, incidentally, that he had chosen not to follow. However much the neurosurgeon may today be confident that he was not epileptic in fact, and that, as an objective fact, it is true that he did not super from "defective vision or hearing or from any physical or mental infirmity" (except for temporary visual disturbance and infirmity when in the throes of a migraine attack), I fail to appreciate how it can be contended that the unqualified negative response to the question asked was a "complete" answer, having regard to the possibility, as matters then stood, of a continuing mild epilepsy. Still less can it be said, in my opinion, that the "particulars and statements" comprehended within the simple answer "No" to the question put, contained "all the information known to (the defendant) affecting the risk to be insured". The suddenness of a possible epileptic seizure with its attendant total impairment of the ability to control a motor-vehicle is, it need hardly be said, a matter that very gravely affects the risk to be insured and, as the defendant's own expert witness freely conceded, information indicating a mere possibility that a proposer for motor insurance might be an epileptic sufferer, however mild, would most certainly put a prudent insurer on guard and on further inquiry before determining whether to accept the risk and on what terms. Much stress was laid by counsel for the defendant on the circumstances that only short-term insurance was being proposed, and that the question, as framed by the insurer, related to the present physical condition of the defendant only, and not to past maladies. The fact remains, however, that when the defendant gave those warranties his knowledge was such that he could not be sure that he was presently free from a susceptibility to mild epileptic seizures, but had, on the contrary, been told to use daily medication for months to come to reduce the likelihood of suffering such episodes.

I am of the opinion that the defendant must accordingly be found have breached both the warranties that are contained in the declaration of January, 1976, that he gave when he proposed the insurance that he



BECK J

sought, and that the insurer is entitled, in terms of condition 9 of the policy, to avoid liability in consequence. If I am correct in that view need not go on to consider whether, regardless of the warranties given, the defendant in any event breached his common-law duty to disclose all material facts within his knowledge which would influence the judgement of a prudent or reasonable insurer in determining whether, and on what terms, he will accept the risk.

Copyright Juta & Co Ltd

Nevertheless, I am prepared to hold that the evidence equally establishes such a breach by the defendant. Both in January, 1976, and again in January, 1977, it was material to the risk accepted for the insurer to have been told that, as the defendant well knew, specialist medical opinion had not pronounced him free of a suspected tendency to mild epilepsy; and, indeed, that in January, 1977, he had been totally exempted from military service by reason of that very risk, namely that he might still be mildly epileptic. The fact, assuming it to be a fact, that this risk has subsequently turned out to have been non-existent cannot operate to relieve the defendant from his duty of disclosure at the time. (MacGillivray and Parkington on *Insurance Law* 6th edition, paragraph 759, *Seaman v Fonerau*, 2 Strange 1183; 93 ER 1115).

Accordingly, it must be held that the defendant is not entitled to the indemnity that he has sought from the insurer. It may not be unhelpful to say that one has a measure of sympathy for the defendant on all the evidence that has been heard. I did not detect in his evidence any indication that he ever intended to deceive his insurer in any way. It is likely that in January, 1976, he personally considered that any possible epileptic condition was a thing of the past and that his occasional migraines were irrelevant to the question asked of him in the proposal form Even so, however, it was his testimony that, on coming to the question in the proposal form concerning his health, he did not answer it then and there, but suggested to his agent - an employee of the insurance brokers who were placing the insurance - that she make inquiries of his usual general practitioner before answering the question, which she later answered in her handwriting. Whether or not she made any such inquiry before completing the form on his behalf, I do not know, but if he did make that suggestion to her it does underline his *bona fides.* Unfortunately for the defendant, the duty to disclose material facts within his knowledge is absolute and cannot be avoided by delegation, so that his conduct cannot be taken into consideration as in any way defeating the insurer's right to avoid liability. (Ivamy, *General Principles of Insurance Law,* 3rd edition, at page 139). Moreover, I think it not improbable that, had the disclosure been made and had the



insurer been able to make further inquiry from the neurosurgeon, the insurer may well have decided to issue the policy nevertheless. I say that on the strength of the neurosurgeon's evidence before me which seems to indicate that the categorization of the defendant as a mild epileptic may well have been an over-cautious description. In making these observations I do not for a moment wish to suggest that the insurer was not fully entitled, morally as well as legally, to resist liability when it was revealed that the defendant had at all material times known of the possibility that he might be mildly epileptic. Now that the matter has been more fully canvassed and the insurer is possessed of the broader picture, it may be felt that the defendant's conduct was not as blameworthy as might first have been thought to be the case.

There will be a declaratory order that the third party (the insurer) is not liable to indemnify the defendant in the amount of plaintiffs claim. Judgment is entered for the Plaintiff in the sum of $18 786 and the Plaintiff is declared to be a necessary witness. The Plaintiff's costs, and the costs of the third party, in these proceedings, including the reserved costs incurred in the application to join the third party and the reserved costs arising from the defendant's application

**Copyright Juta & Co Ltd**

*in limine* to strike out certain portions of the affidavits filed in the notice of motion proceedings, will all be borne by the defendant.

*Calderwood, Bryce Hendrie & Partners*, Bulawayo, and *Gill, Godlonton & Gerrans, Salisbury*, attorneys for the plaintiff.

*Granger & Archer*, attorneys for the defendant.

*Atherstone & Cook,* attorneys for the third party.



## ZIMBABWE AFRICAN NATIONAL UNION (PATRIOTIC FRONT) v UNITED AFRICAN NATIONAL COUNCIL AND OTHERS 1980 ZLR 69

**Court** **General Division, Salisbury**

Petition

Goldin J and Beck J

23rd February, 1980

### Flynote

Electoral law - treating - what amounts to - importance of purpose for which food, drink and entertainment is provided for voters - whether food, drink, entertainment and lotteries may be provided at political rallies.

Practice - interdict - locus standi of political party to seek to interdict unlawful campaign practices of rival party - degree of proof required for unlawful practices to be interdicted.

### Headnote

The applicant, a political party contesting the general elections held in February, 1980, sought to interdict a rival party from providing food, drink and entertainment at a four-day political rally it was holding, and from conducting a draw at the rally with six motor-cars as prizes.

*Held* that providing voters with food, drink and entertainment becomes the offence of treating in terms of section 111 of the Electoral Act, 1979, only if it is done in order to influence the voters how to vote, but not if it is done merely to enable or induce them to attend a political rally.

*Held,* further, that the proposed draw of motor-cars was not necessary to enable persons to attend the rally, and amounted to the offence of bribery in terms of section 113 of the Electoral Act.

*Held,* further, that it was not necessary for an interdict to be granted that the existence of unlawful practices should be proved beyond a reasonable doubt.

*G G Chidyausiku,* for the applicant.

Copyright Juta & Co Ltd

*R R Horn, SC,* for the respondents.



GOLDIN J

## Judgment

**Goldin J:** Under the new Constitution, an election for 80 members to be elected by African voters is due to commence on the 27th of this month and to last until the 29th, a period of three days. The applicant and the first respondent are both parties participating in this election. The applicant now seeks to prevent the manner in which a four-day rally, which has already commenced, is taking place and is to continue taking place.

This rally has been advertised to last for four days. The advertisement placed before us (Annexure "A" to the Petition) - and there is no reason at all to doubt that this advertisement was placed by the party concerned - states, *inter alia*:

> "The biggest rally in the history of Zimbabwe starts on Thursday, February 21st. There will be so much to hear, so much to see and so much to do that the UANC Huruyadzo Rally will last for four days, until Sunday, February 24."

Then the highlights are listed:

> "All-denominational church services;
> District choirs;
> Soul Savers pop band;
> Aerobatic display:
> The Prime Minister and leader of the U A.N.C., Bishop Abel Muzorewa, will address the rally at 11.30 a.m. (on the Sunday)."

Also placed before us - and it can certainly be accepted as at least *prima facie* proof - is a press cutting to the effect that transport has been arranged on a large scale to enable persons to attend this rally from far away. Something in the neighborhood of about 500 buses and about eight or nine trains have been hired in order to serve this purpose. At this rally, food is being supplied to all those present, and some persons who live in Salisbury may even become entitled to take their rations and cook them at home - that is, where they live in Salisbury or nearby. In addition to that, shorter and drink is also provided, and a variety of forms of entertainment, including aerobatics, wrestling matches and so forth.

In addition to all that, about a quarter of a million leaflets have been distributed, each of which carries a number, and there will be a draw, so it is stated, on Sunday, the 24th February, at the Zimbabwe grounds to determine the winners, and six motor-cars are available as prizes; therefore six lucky winners, that is, holders of the right six numbers, will each obtain a motor-car. This relates to Annexure "D 1" before us. It is relevant to mention that this leaflet not only announces the four-day



GOLDIN J

rally and talks of the lucky draw for the six motor-cars to be won, but also has underneath in

Copyright Juta & Co Ltd

prominent print the words:

> "Vote the winners. Vote U A.N.C.
> Vote Bishop Abel Muzorewa."

and then there appears the symbol of the party and an indication of how to vote for that particular party.

The applicant in the first place sought to ban, or interdict, the holding of this rally. I think this part of the petition was rightly withdrawn, because obviously any political party is entitled to hold rallies and to hold meetings and have speeches and so forth. So the rally itself cannot be banned.

It is also noteworthy that under our legislation it is permissible for a political party to convey people free of charge, in any numbers and no matter from how far away, to the place where a political rally is to take place. This is of importance, in my view, because it departs from the normal type of electioneering that one might have considered in the past. Some voters live far away, and in order to gather them up the Legislature and those responsible for legislation have permitted the bringing of any number of people, free of charge, to a particular place where a meeting is to be held. Moreover, provisions in the Electoral Act that music and bands and things like that cannot be employed do not apply to this election. Therefore the legislators have had in mind that parties can bring people to Salisbury (as is the case here) from far away, free of charge, and they can provide them with music and similar entertainment. Nevertheless, one has to have regard to section 111 of the Act, which reads as follows:

> "(1) Any person who corruptly by himself or by any other person, whether before, during or after an election directly or indirectly gives or provides or pays wholly or in part the expense of giving or providing any food, drink, entertainment, lodgings or provisions to or for any person -
>
> (a) for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at an election; or
>
> (b) on account of such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at an election;
>
> shall be guilty of the offence of treating."

Subsection (2) also renders it an offence not only to provide food and entertainment, but also to receive it:

> "(2) Any voter who corruptly accepts or takes any food, drink, entertainment, lodging or provisions supplied by a person guilty of an offence in terms of subsection (1) shall be guilty also of the offence of treating."



GOLDIN J

The persons attending this rally will be receiving food and drink and entertainment of a type I have referred to previously, and in my view this constitutes a *prima facie* contravention of section 111. Mr *Horn,* for the respondent, argued, however, that the important aspect is to determine the purpose for which this gathering is taking place and the purpose for which food and drink and entertainment are provided. He made the point that the object of giving food and

**Copyright Juta & Co Ltd**

entertainment is not to influence persons how to vote, but to induce persons to attend the meeting or rally, which will then enable speakers so to influence them. In other words, the provision of food and entertainment is a means of bringing people to attend the meeting. But securing their attendance is not necessarily corruptly influencing them how to vote. This is an important aspect, because it affects the question of the type of relief that we can grant to the applicant. If the applicant had a clear right, that is, clear proof of a right being infringed or breached, then, in my view, there would probably be only one possible remedy in these circumstances, and that is to have granted this interdict. But I am not satisfied that a clear right has been established. In my view, paragraph (a) of subsection (1) of section 111 has to be read by giving full emphasis and meaning to the words "for the purpose of corruptly influencing". It is not an offence to provide food or drink or entertainment. It only becomes an offence if it is done for the purpose of corruptly influencing a voter how to vote, in other words, either to vote or to refrain from voting in the particular manner so influenced.

[The learned Judge then dealt with factual considerations and, having declined to interdict the provision of food and drink at the rally, continued:]

I now turn especially to Exhibit D 1., to which I have already referred.

That is in relation to the matter of the draw. In my view, the draw falls into quite a different category altogether. You may have to bring people to Salisbury, and you are allowed to bring people to Salisbury in order to attend the rally. That is perfectly permissible. You may provide them with food and drink in order to enable them to participate in the meeting and listen to speakers in the manner I have described. They would then be enabled to attend, because they have got to be a considerable time and distance away from home. What is being done may in fact - I do not say it is - be for the purpose of gathering them up, and from the mere fact that they are present it does not necessarily follow that you are getting them there for the purpose of influencing their vote in a corrupt manner.



GOLDIN J

This, however, does not apply to the draw, nor do the other facts which I have mentioned, namely the possibility of a reaction from the crowds. If you deprive them of food, drink or shelter, there can be very little doubt - or certainly one has to take into account - that they may react in a manner leading to breaches of the law on a very widespread scale. But in relation to the draw, this is probably prompted from different motives altogether.

Firstly, it is not necessary to give motor-cars in order to make it possible for persons to be present at a meeting. This type of draw is not necessary in order to enable a person who otherwise would not be able to attend the meeting, as may be the case in relation to transport, food and so on, to attend the meeting.

The other aspect is that I do not think that if this draw were interdicted it would result in the same reaction or anything remotely resembling the reaction that would follow if we had to interdict the provision of food, drink, or even entertainment. I have listened to the police evidence, and I found it to be honest and straightforward, but it does not establish that to

Copyright Juta & Co Ltd

interdict this draw would result in violence. In fact, as I understood the evidence, there would be very little expected at the gathering at all. The possible danger is that after the meeting had taken place, and else where, members of the respondent party would try to seek revenge by assaulting members of the applicant party for being "spoil-sports" and depriving them of their right to have an opportunity of winning a motorcar.

In all these circumstances, I feel that this draw is a violation of section 113. It was submitted by Mr *Horn* that the Court requires proof beyond reasonable doubt that the law has been contravened. I do not think that consideration arises in this case, because I am not approaching it on the basis of a clear right at all. But even if I approached it on that basis, in a case of this nature it would not require that type of proof. The urgency and the facts before us justify the exercise of a discretion at this stage.

In my view, the interdict requested in respect of the draw for these vehicles should be granted. Accordingly, I would grant an interdict restraining and prohibiting the holding of the draw concerning the winning of six or any number of vehicles at the rally by the respondent party.

[The learned Judge then dealt with the question of costs.]

---



BECK J

**Beck J:** I agree with the reasons given in the judgment which my brother has delivered and with the order that he has read. I would only wish to add that, in relation to the draw for the motorcars, I am satisfied that the evidence indicates a *prima facie* contravention of section 113 and no more than that. That being so, the Court, of course, has a discretion, and those factors which inhibited us from exercising our discretion in favour of granting an interdict in relation to the other matters complained of do not apply in relation to this matter. It is for that reason that I agree that the interdict should he granted with regard to the draw for the motor-cars.

**Goldin J:** There will be an order in the terms I have indicated.

---



## REGINA v MHOSVA 1980 ZLR 74

**Court** **General Division, Salisbury**

Criminal Review

Beadle AJ

27th February, 1980

### Flynote

Amnesty Ordinance 1979 - application of to cases where accused convicted but not sentenced before

Copyright Juta & Co Ltd

appointed day.

## Headnote

Before the 21st December, 1979, the appointed day for the purposes of the Amnesty Ordinance 1979, the accused had been convicted of an offence to which the Ordinance applied. Sentence, however, had been passed on him after that date. On review.

*Held* that although the conviction was valid, the magistrate had no jurisdiction to pass sentence on the accused after the 21st December, 1979.

Case cited:

*S v Simbi,* 1975 (2) RLR 50 (AD).

## Judgment

**Beadle AJ:** The accused in this case was convicted on the 20th November, 1979, of contravening section 51 of the Law and Order (Maintenance) Act [*Chapter 65*]. It was an offence to which the Amnesty Ordinance 1979 (No. 3 of 1979) applies. The Amnesty Ordinance 1979



BEADLE AJ

came into effect on the 21st December, 1979. The accused was sentenced on the 21st December, 1979, and the question is whether or not the Amnesty Ordinance 1979 applies to his case.

Subsection (4) of section 2 of the Amnesty Ordinance 1979 states:

> "(4) The provisions of subsection (1) shall be without prejudice to any conviction sustained, sentence imposed or civil judgment given before the appointed day . . . "

The question for decision is whether in this case the proceedings were concluded before the appointed day.

A criminal case is not completed until the final sentence is delivered.

See *S v Simbi,* 1975 (2) RLR 50 (AD) at 52G-H, and section 255A of the Criminal Procedure and Evidence Act [*Chapter 59*]. In the circumstances, the proceedings in this case had not been completed before the appointed day. Accordingly, the Amnesty Ordinance 1979 applied and the magistrate had no jurisdiction to pass sentence.

In this case the conviction is confirmed, but it is ordered that the magistrate had no jurisdiction to pass sentence. The sentence is accordingly set aside. The setting aside of this sentence is actually only a bare technicality because the accused, on the same day, received a sentence of nine years' imprisonment with labour for stock theft, and the sentence he received for contravening the Law and Order (Maintenance) Act was ordered to run concurrently with that sentence.

Copyright Juta & Co Ltd

My brother Beck agrees with this order.



## MINISTER OF INFORMATION IMMIGRATION AND TOURISM AND ANOTHER v MACKESON 1980 ZLR 76

**Court** **Appellate Division, Bulawayo**

Civil Appeal

Macdonald, CJ, Lewis, JP., and Davies, JA

20th and 29th February, 1980

### Flynote

Immigration - deportation of prohibited person - whether prohibited person may be deported to country of origin - Immigration Act, 1979 - section 8 - detention of prohibited person - whether grounds of detention may be challenged if Minister's decision that person is undesirable inhabitant is not challenged"

Costs - appellant succeeding on ground not relied on in grounds of appeal - whether entitled to costs.

### Headnote

The first appellant had decided that the respondent was an undesirable inhabitant of this country in terms of section 14 (1) (h) of the Immigration Act, 1979, probably as a result of allegations of fraud made against the respondent in Britain, his country of origin. As a consequence of the Minister's decision the respondent became a prohibited person in terms of the Act. Thereafter he was detained in terms of section of the Act and efforts were made to deport him to Britain, which efforts he successfully resisted. He obtained an order from the General Division that his detention was unlawful in that it had been motivated by the improper purpose of returning him to Britain to stand trial. He did not challenge the Minister's decision in terms of section 14 (1) (h). On appeal.

*Held* that once a valid decision to deport a prohibited person has been made in terms of the Immigration Act, an immigration officer is entitled to arrange the prohibited person's deportation to his country of origin, even if criminal proceedings are pending against him there *(R v Brixton Prison (Governor), ex parse Soblen* [1962] 3 All ER 641, referred).



*Held,* further, that once the respondent had decided not to challenge the validity of the Minister's decision that he was an undesirable inhabitant and so a prohibited person, he rendered impossible an attack on the immigration officer's decision to detain him preparatory to his deportation, since there was no evidence that the immigration officer had any intention other than to give effect to the Minister's decision.

*Held,* further, that the appellants were entitled to costs despite the fact that they had not relied

Copyright Juta & Co Ltd

specifically on the point on which they had succeeded.

Case cited:

*R v Brixton Prison (Governor), ex parse Soblen (supra)*.

*R R Horn SC,* with him *B H Christie,* for the appellants. The Court *a quo* found that the detention of the respondent was effected pursuant to the policy of the first appellant's Ministry to ensure that persons such as the respondent, who were due to face criminal charges in their home countries, were sent back to those countries to face sum charges; this policy, it found, was impermissible and improper.

The principles governing the law of deportation in this country are basically the same as those in the United Kingdom in 1962, in regard to which, see the observations of LORD DENNING in *R v Brixton Prison (Governor), ex parte Soblen* [1962] 3 All ER 641, at 660B-D. In *Soblen*'s case it was suggested to the Court that by reason of the common law a man could not be deported, even to his own country, if he was a criminal who had fled from it. This submission was rejected by LORD DENNING at pages 660H to 661B.

The policy pursuant to which the respondent was declared to be an undesirable inhabitant of this country and subsequently detained pending his deportation, is to deport to their home countries persons who are required there to face serious criminal charges which, if the offences had been committed in this country, would have been crimes in this country and which are not crimes of a political nature. The implementation of such a policy may well have the effect that a fugitive criminal is sent to a country where he is required to face charges just as he would have been had he been extradited to that country, but this does not render the policy an improper deportation policy. A particular deportation policy adopted by the authorities which can have the same effect as extradition is not an unlawful deportation policy simply because it can have that effect in certain circumstances. Compare *Soblen*'s case at page 663I-664E (per LORD DONOVAN) and at 666I-667D (per LORD PEARSON), and see *Schmidt and Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904, at 908B-F. The effect of the judgment of the Court *a quo* is to hold that the policy of the first appellant is impermissible when-



ever its implementation results in a prohibited person being deported to his home country where he is wanted on serious criminal charges. This overlooked, with respect, clear *dicta* in *Soblen*'s case indicating that such a policy is perfectly permissible as a deportation policy.

The respondent established no more than that, pursuant to this policy he was detained with a view to deporting him to his home country where he was required to face criminal charges. This does not establish that the first appellant had not genuinely considered the respondent to be an undesirable inhabitant and that he did not consider it to be to the good of this country that the respondent should be deported to his home country to face criminal charges. In any event, even if the return of the respondent was requested by the British, this does not mean that the purpose of the deportation was to satisfy this request rather than to give effect to the

**Copyright Juta & Co Ltd**

deportation policy referred to above.

*C. W Jordaan,* for the respondent. There was no evidence that the first appellant had genuinely considered respondent to be an undesirable inhabitant and that he considered it to be to the good of this country that respondent should be deported. Even if first appellant had considered this aspect, it is abundantly clear from the Assistant Secretary's affidavit that the main reason for respondent's detention was first appellant's desire that respondent be "brought to justice in the country having jurisdiction over him in respect of such charges" This reason clearly played the dominant or main or at least substantial part in influencing first appellant's decision, and is sufficient to render that decision bad. See *Patel v Witbank Town Council,* 1931 TPD 284, *Administrator, Cape v Associated Buildings Ltd.,* 1957 (2) SA 317 (AD) at 325E and 329H; *The Firs Investments (Pty.) Ltd v Johannesburg City Council,* 1967 (3) SA 549 (W) at 552B, *Port Elizabeth Local Road Transportation Board and Anor v Liesing,* 1968 (3) SA 243 (E) at 245H, *Pieters v Administrateur van Suidwes-Afrika and Anor.,* 1972 (4) SA 127 (SWA) at 142E-F; De Smith, *Constitutional and Administrative Law,* 3rd edition, page 419.

## Judgment

**MacDonald CJ:** The respondent on the 30th day of October was granted a rule *nisi* calling upon the appellants to show cause why the respondent should not forthwith be released from detention. The rule was confirmed on the 21st November, 1979,*(3) and the appellants noted an appeal on the following grounds:



MACDONALD CJ

"1. That the trial court erred in holding that the forwarding of the passport of the Respondent by the Criminal Investigation Department to the Metropolitan Police, New Scotland Yard, London, to establish its authenticity was an unconvincing explanation.

2. That the trial court erred in accepting the assertion of 'the Respondent in his answering affidavit that he had been told by Mr B R Glanville that 'this had been done at the request of the British Authorities'.

3. That the trial court erred in failing to find as a matter of probability that the Respondent would not voluntarily leave Zimbabwe Rhodesia and that, therefore, it was reasonable and lawful to arrest and detain him pending his removal from Zimbabwe Rhodesia.

4. That the trial court erred in failing to have regard to the fact that the passport of the Respondent had been endorsed by the British Authorities in such a manner as to allow him one journey only, namely to the United Kingdom, in consequence of which endorsement there was only one country to which the Respondent could be removed, namely the United Kingdom.

5. That the trial court erred in holding that it was unlawful to remove a prohibited person, such as the Respondent, to the country where he was facing criminal charges to ensure that he was brought to justice in circumstances where no extradition treaty existed between Zimbabwe Rhodesia and the country where the prohibited person was facing such criminal charges."

The salient facts are set out in the judgment delivered in the Court *a quo:*

"The material facts leading up to these proceedings are substantially undisputed. The petitioner is a citizen of the

Copyright Juta & Co Ltd

United Kingdom and until late 1977 resided in England. During that year, dissension arose with two business associates over substantial losses sustained by two finance companies managed by him. The disharmony was exacerbated by an action instituted by the petitioner for the recovery of moneys claimed to be due to him and culminated in his being threatened with death. At first the threats were disregarded, but an assault upon the petitioner perpetrated at the instigation of one of his former associates, convinced him that his life would be in jeopardy were he to remain living in England. He therefore left that country. After spending two months in hiding somewhere in Europe, the petitioner lawfully entered Zimbabwe Rhodesia in January, 1978, at a time when, as far as he was aware, no criminal charges, resulting from his activities in the United Kingdom, were pending against him.

The petitioner obtained employment in Salisbury, initially as a research assistant and then as a school teacher. In August, 1978, he commenced to trade as a dealer in antiques. Save for a minor statutory contravention for which he paid a deposit fine, his record in this country is blameless. On 21 May, 1979, the petitioner was advised by Superintendent Hughes of the Criminal Investigation Department, that allegations of fraud had been made against him by the British police and that after further investigation of the matter, there was a possibility he would be declared a prohibited person. In response



MACDONALD CJ

to a request and as a gesture of good faith, the petitioner surrendered his passport. The following day he and his attorney interviewed Hughes and were informed that in the interim the passport would be retained, but that if the petitioner were declared a prohibited person it would be returned to him. There was no mention by Hughes of an intention to remit the passport to the United Kingdom.

On 13 June, 1979, the petitioner was deemed by the first respondent to be a prohibited person. Thereafter, on 15 June, 1979, he was detained in Salisbury Prison by an immigration officer, pending removal from the country. On the same day, and without seeking the petitioner's permission, his passport was dispatched by registered post to the Metropolitan Police, New Scotland Yard, London. The petitioner learned of this four days later, but only in consequence of the grant of a spoliation order against the Commissioner of Police and Hughes.

On 28 June, 1979, the petitioner's attorney was advised of a communication received from the British Foreign and Commonwealth Office to the effect that the passport was to be endorsed to permit of a single journey to the United Kingdom. Such endorsement was duly made.

On 24 July, 1979, the petitioner was driven, in custody, to Salisbury Airport, to be placed on an aircraft to Johannesburg, where it was intended he would board a British Airways' aircraft bound for London. Immediately the petitioner alighted from the motor - vehicle, which had stopped at the steps of the aircraft, he sat down on the tarmacadam apron and refused to stand up. It became necessary for four persons to carry him bodily into the aircraft. At the commencement of the flight, his behaviour was offensive. On arrival at Johannesburg, the petitioner was detained by the South African Police. By reason of his refusal to board the British Airways' aircraft peacefully - again he sat down on the apron and resisting fiercely was forced into the aeroplane where a fracas developed - the captain refused to accept him as a passenger. He was lodged in prison in Johannesburg, but on 4 August, 1979, was delivered to an immigration officer at the Beitbridge border.

Since 5 August, 1979, the petitioner has been detained at Khami Prison, Bulawayo. No further attempt to remove him physically from the country has been made, but officials of the first respondent's department have endeavoured, without success, to obtain the active co-operation of the United King dom Government for the petitioner's removal to that country, even to the extent of his being transported by ship. It seems that only in the event of recognition of legality being accorded to this country by the United King dom Government, will the authorities materially assist in the petitioner's removal. An approach to South African Airways to convey the petitioner to London was rejected because a firm undertaking could not be given that he would behave himself in an aircraft.

It is apparent, therefore, that the first respondent's efforts have been directed solely at effecting the removal of the petitioner to the United Kingdom. No inquiries have been undertaken as to the feasibility of removing him

Copyright Juta & Co Ltd

elsewhere, and a cancellation Of the restrictive endorsement on his passport has not been sought.



MACDONALD CJ

The petitioner's attitude is, and has been, that he does not object to being removed to anywhere other than the United Kingdom. He believes that the insistence upon removing him to that country is because he is required there to face charges of fraud."

None of these facts is challenged in this appeal.

In argument on the return day of the rule, counsel for the respondent informed the Court that the respondent was not challenging the validity of the Minister's decision to "deem" him to be "an undesirable inhabit tent of . . . Rhodesia" in terms of section 14 (1) (h) of the Immigration Act, 1979 (No. 18 of 1979). His contention was that despite the validity of the Minister's decision it is unlawful for the Rhodesian authorities to attempt to send him hack to his country of origin and that to detain him preparatory to doing so is also unlawful.

It is understandable that the respondent's counsel should have decided not to challenge the validity of the Minister's decision in the light of the very limited right of appeal available to a person deemed to be an undesirable inhabitant under the provisions of section 14 (1) (h) of the Act. Section 14 (1) (h) provides that:

"Subject to the provisions of this Act, the following persons are prohibited persons -

.....

(h) any person who, from information received from any source, is deemed by the Minister to be an undesirable inhabitant of or undesirable visitor to Rhodesia."

Under section 21 of the Act a person who has been given notice that he or she is a prohibited person may appeal "to the nearest magistrates court " and section 22 (1) (a) provides that:

"No appeal shall he against a decision made in terms of -

(a) paragraph (a) or (h) of subsection (1) or subsection hi) of section *fourteen,* unless such appeal is directed solely to the identity of the person affected by the decision; or

(b) ...."

Section 22 (2) provides that:

". . . no Court may question the adequacy of the grounds for any such decision."

By "decision" is meant a decision in terms of section 14.

Once a valid decision has been made by the Minister under section 14 (1) (h) deeming a person to be an undesirable inhabitant and thus, by definition, to be a prohibited person the provisions of section 8 (2) of the Act come into effect. This subsection provided *(4) that: .



Copyright Juta & Co Ltd

> ". . . an immigration officer may -
>
> (a) remove or cause to be removed from Rhodesia any prohibited person; and
>
> (b) pending the completion of arrangements for the removal of a person in terms of paragraph (a) and such removal, subject to Me provisions of section *nine,* detain that person."

While the existence of the power to detain in terms of section 8 (2) is not and could not be challenged by the respondent, it is submitted that the power was lost so far as the respondent is concerned because the Rhodesian immigration authorities were motivated not only by a desire to deport him from Rhodesia but also by a desire that he should stand trial on the allegation of fraud made against him in Britain, his country of origin.

The questions which arise for decision are whether the Minister, having made a valid decision deeming the respondent to be an undesirable inhabitant, an immigration officer became entitled to arrange for his deportation to his country of origin and, if so, whether this latter right was lost because of the attitude to the respondent's detention evinced by the following statement of the Assistant Secretary to the Minister:

> "The *main* reason for his detention is that he is due to face charges of fraud in the United Kingdom and it is the policy of my Ministry to ensure that such a person is brought to justice in the country having jurisdiction over him in respect of such charges. Failure to comply with this policy would also result in fugitives from justice using this country as a refuge and could create a precedent for similar behaviour on the part of other prohibited persons."

Once a valid decision to deport has been made as a result of a decision by the Minister that a person is an undesirable inhabitant, there can be no doubt that an immigration officer becomes entitled to arrange for that person's deportation to his country of origin. For obvious reasons, this is an appropriate place to send a person who is being deported and it can make no difference that this happens to be the place where he is likely to be charged and tried for an alleged crime. Not surpassingly, there is abundant authority for this proposition. See, for example, *R v Brixton Prison Governor ex parse Soblen* [1962] 3 All ER 641.

Despite protestations to the contrary, there can be no doubt that counsel for the respondent seeks to bring into question the Minister's decision. It is argued in effect that his decision was taken with the ulterior motive of extraditing the respondent for trial on a criminal charge and





that that, on the authority of decisions such as that in ache *Brixton Prison* case *(supra),* was invalid. There is no evidence that the immigration officer responsible for the detention of the respondent had any intention other than to give effect to the decision of the Minister, and it is impermissible in those circumstances for the respondent's counsel to accept the validity of the Minister's decision deeming the respondent to be an undesirable inhabitant and at the same time to challenge the validity of the immigration officer's decision to act upon it. If there was no basis on which the former decision could be challenged, there was no basis on which the latter

Copyright Juta & Co Ltd

could be, and the restrictions placed on an appeal against the Minister's decision by the Act may not be circumvented by the simple expedient of purporting to appeal against the resulting detention. In substance the respondent's complaint is against the Minister's decision. The decision to detain considered in isolation is unimpeachable. In the result, counsel for the respondent in arguing the appeal was obliged to reveal the true nature of the proceedings and to challenge the validity of the Minister's decision. Thus he submitted in his Heads of Argument: "That there was no evidence that the Minister had genuinely considered the respondent to be an undesirable inhabitant." Such a decision by the Minister cannot be attacked under the guise of attacking the detention which follows upon it, and this is what is happening in the present case.

If the Minister's decision under section 14 (1) (h) is to be attacked, the proceedings must take the form of the very limited appeal allowed under sections 21 and 22 of the Act or, alternatively, they must be proceedings on review. On review no less than on appeal it is not permissible for a Court to "question the adequacy of the grounds for any such decision". These proceedings did not purport to be review proceedings. This was a petition for an order *de homine libero exhibendo.*

The position therefore is that once the respondent decided not to challenge the validity of the Minister's decision that he was an undesirable inhabitant and in consequence a prohibited person who could be deported as is usual and permissible to his country of origin, he rendered impossible an attack on the immigration officer's decision to detain him preparatory to his deportation.

The only other ground on which the detention of the respondent is attacked is that the first appellant in "confining his efforts to return the respondent to the United Kingdom" unreasonably prolonged the period of the respondent's detention. There can be no doubt that the respondent's further detention was a direct result of his refusal to take advantage



MACDONALD CJ

of the arrangements which had been made to return him to his country of origin, and in my view, he has no just ground of complaint on this score.

In regard to costs, Mr *Jordan* submitted that since the appellants had not specifically relied on the point on which they have now succeeded there should be no order as to costs. It seems to me, however, that the point is implicit in appellants' argument, moreover, there is no indication that had the matter been raised specifically the respondent would have accepted the validity of the point and abandoned the proceedings. In the circumstances, I am satisfied costs should follow the event.

I would allow the appeal with costs and alter the order of the Court *a quo* to read: "The rule is discharged with costs."

**Lewis JP:** I agree.

Copyright Juta & Co Ltd

**Davies JA:** I agree.

*Webb, Law & Barry,* attorneys for the appellants.

*Calderwood, Bryce Hendrie & Partners*, attorneys for the respondent.



## REGINA v CHITENGU 1980 ZLR 84

**Court** **General Division, Salisbury**

Criminal Review

Smith, J

5th March, 1980

### Flynote

Sentence - suspended sentence - date from which period of suspension begins.

### Headnote

A suspended sentence cannot be brought into operation as a result of an offence committed by the convicted person while he was serving any effective period of imprisonment imposed upon him at the same time as the suspended sentence.

Case cited:

*R v John,* 1968 (2) RLR 28 (AD).

### Judgment

**Smith J:** The accused, who was serving a sentence of seven years' imprisonment with labour of which one year had been suspended on condition, *inter alia,* that he was not convicted of an offence involving



SMITH J

assault, was convicted in the magistrates Court of escaping from custody and of assault. The assault occurred while the accused was fleeing from a a. warder in that the accused threw a stone at the warder, striking him on the hand. The magistrate treated both counts as one for the purpose of sentence and sentenced the accused to 12 months' imprisonment with labour and also brought into operation the suspended sentence of one year. That suspended sentence had been imposed by the General Division of the High Court.

As he subsequently realized, the magistrate overlooked the fact that it was not competent for

Copyright Juta & Co Ltd

him to bring into operation a suspended sentence imposed by the General Division. See section 60 of the Magistrates Court Act [*Chapter 18*] and section 337 (2a) of the Criminal Procedure and Evidence Act [*Chapter 59*].

In any event, it would not be competent for the General Division to bring this suspended sentence into effect because the period during which a sentence is suspended only commences to run after the accused has served any period of imprisonment which was imposed upon him at the time. See *R v John,* 1968 (2) RLR 28 (AD) and cases there cited.

Accordingly, the convictions and the sentence of 12 months' imprisonment with labour imposed by the magistrate in respect of those convictions are confirmed. The order bringing into effect the suspended sentence of one year imposed by the High Court on the 30th March, 1979, is set aside.

**Waddington J:** agrees.



## REGINA v ZINDOGA 1980 ZLR 86

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Macdonald, CJ, Lewis, JP, and Davies, JA

28th February and 7th and 18th March, 1980

### Flynote

Sentence - crimes against property - desirability of making provision for restitution in sentence.

### Headnote

In crimes such as theft, restitution is always a mitigating factor. Its exact weight in any particular case will depend on the surrounding circumstances, such as whether or not the accused is a first offender, and must be carefully balanced against the need in the public interest for deterrent sentences.

Court does not have to be satisfied of the ability of an accused person to make restitution before making appropriate provision in its sentence for such an eventuality.

Courts should encourage restitution by making appropriate orders whenever there is the possibility that arrangements for it may conceivably be made.

*T Ziyambi,* for the appellant.

*J B Colegrave,* for the respondent. The money seems lost to the appellant's employers. Whatever he may say in his notice of appeal, it seems clear from what he said in mitigation of sentence that his only hope of repaying this money is by securing other employment. Unhappily

Copyright Juta & Co Ltd

the stolen money has all been dissipated. Bearing in mind the ever-increasing need to deter others from committing this type of offence the following cases should be followed: *R v Luke Deny,* AD 51/67; *R v Jabangwe,* AD 143/68; *R v Low,* AD 184/66; *S v Makwiramiti,* AD 87/77 (all unreported).

The case of *S v Tichana,* AD 68/79 (unreported) is the clearest possible authority for the fact that our courts recognize that restitution is in



itself a mitigating factor, snore particularly in the case of a first offender. Depending on the circumstances it may be a mitigating factor of very considerable weight: see *S v Louw,* AD 19/78 (unreported). Not only is it a mitigatory factor in itself but it does of course provide compelling evidence of contrition.

The principle of restitution is enshrined in section 337 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. It also finds recognition in section 301 of the South African Criminal Code. In an article contained in *Crime and Punishment in South Africa* by Midgeley, Steyn and Grasner, Judge HIEMSTRA expresses regret that compensation or restitution to the victim of a crime, does not play a greater part in the : sentencing of offenders in South Africa. He says (at page 146): "Punishment must lose some of its retributive character and lean towards letting the criminal make good the damage he has done." Although not specifically dealing with the aspect of restitution, it seems likely that current English practice is tending to the same end. Sir Rupert Cross in his book *The English Sentencing System,* 2nd edition, page 56 *et seq* notes that imprisonment as a punishment is on the decline, largely as a result of the system of suspended sentences which were brought into operation by the Criminal Justice Act, 1967. Restitution orders under section 28 of the (English) Theft Act, 1968, are quite common (see page 58).

The difficulty about accepting the offer made on behalf of the appellant is that it is difficult to reconcile it with the attitude of the Appellate sign the order which was made in *S v Seedat,* 1977 (1) RLR 102 Add.). In that case, the offer of repatriation of money could not be accepted so as to reduce the sentence because that was a fact which was not in existence at the time the magistrate passed sentence. This seems to be a duplication of the position in our case. It is only in exceptional circumstances that the Court will take cognizance of facts which arose ; since trial: see *S v Watungwa,* 1976 (2) RLR 158 (AD), *S v Drummond,* 1978 R R 422 (AD). Having regard to *Seedat*'s case, it does not appear that the facts in this case constitute exceptional circumstances although the compelling and unusual circumstances of *Tichana*'s case certainly did.

## Judgment

**MacDonald CJ:** The appellant was convicted of theft by conversion. He had pleaded guilty and was sentenced to two years' imprisonment with labour, nine months of which were conditionally suspended. He now appeals against sentence.



MACDONALD CJ

Copyright Juta & Co Ltd

The appellant, while employed as a cashier, stole $1 686,05 from his employer over a period of five months. The appellant converted money to his own use on 29 occasions and the thefts only ceased when they were discovered in the course of an audit. This was the appellant's first conviction. He is married man with two children and was earning $350 per month.

The thefts involved a large sum of money and a breach of trust and the magistrate very properly imposed a severe sentence.

At the trial the appellant expressed a wish to repay his employer, but was obliged to admit in answer to questions put by the magistrate that he was not in a position to do so. Since the trial, relatives have offered to help and the possibility now exists that all or some of the money can be repaid.

In crimes such as theft, restitution is always a mitigating factor. Its exact weight will, of course, depend upon the surrounding circumstances. Generally speaking, it will be given considerable weight where the accused is a first offender. The weight to be given to it, however, must be carefully balanced against the need in the public interest for deterrent sentences. If too much weight were to be given to the fact of restitution and in the result very light or wholly suspended sentences were to be habitually imposed, crimes against property would almost certainly increase sharply.

There can be no doubt that the magistrate would have suspended an even greater part of the prison sentence had he been satisfied that the appellant was in a position to make restitution. Restitution would, of course, have been made a condition of such suspension. A court, however, does not have to be satisfied of the ability of an accused person to make restitution before making appropriate provision in its sentence for such an eventuality. Nothing is lost by making appropriate provision for the possibility of restitution, even where the prospects of this appear to be remote. Thus, for example, courts not infrequently suspend a portion of a prison sentence on condition that restitution is made where there is a suspicion that the accused person is still in possession of all or part of his ill gotten gains and even where in such a case the accused expresses an actual intention not to make restitution.

The courts rightly attach greater weight to restitution now than in the past, and this being so it is to be hoped that criminal courts will encourage restitution by making appropriate orders whenever there is the possibility that arrangements for it may conceivably be made.

---

**1980 ZLR p89**

MACDONALD CJ

In the absence of restitution, the sentence imposed by the magistrate in the present case was wholly appropriate and all that is required is to make provision for the possibility of restitution in whole or in part of the money stolen. The sentence imposed by the magistrate is confirmed, but the following addition is made:

> "and a further period of eight months is suspended on the same condition and on the further condition that the appellant repays to his former employer the sum of $1 686,05 on or before the 31st May, 1980."

**Lewis JP:** I agree.

---

**Copyright Juta & Co Ltd**

**Davies JA:** I agree.

*Sawyer & Mkushi*, attorneys for the appellant.



## REGINA v COLLEY 1980 ZLR 89

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Macdonald, CJ, Lewis, JP, and Davies, JA

19th and 20th March, 1980

### Flynote

Sentence - exporting dagga in contravention of section 19 (1) (a) of Dangerous Drugs Act [Chapter 319] - seriousness of offence - influence of quantity of dagga on sentence.

### Headnote

Our courts must take a very serious view of drug smuggling into a country in which the unlawful supply of dangerous drugs is prevalent and where the courts impose heavy penalties for the importation of such drugs. The quantity of drugs involved in an offence has a bearing on sentence, particularly in cases of large-scale drug smuggling.

The appellant, a young woman of 28, had been sentenced to three years' imprisonment of which half was suspended for attempting to smuggle five and a quarter kilos (eleven and a half pounds) of dagga into Britain in contravention of section 19 (1) (a) of the Dangerous Drugs Act [*Chapter 319*]. She had



LEWIS JP

attempted to involve an innocent person in the conveying of the dagga to Britain.

*Held* that though the sentence was a severe one, there were no grounds for holding it to be manifestly excessive.

Cases cited:

*Ismail v S* AD 85/71 (unreported);

*Clarke v R* AD 15/80 (unreported);

*R v Hancock and Holdgate,* 1978 Criminal Law Review, pages 1705;

Copyright Juta & Co Ltd

*R v Faulkner and Thomas* (1976) 63 Cr. App. R 295;

*R v Baldock,* 1977 Criminal Law Review, page 47;

*R v Mehagian and Fenwick* (1973) 57 Cr. App. R 488;

*S v Mutize,* 1978 RLR 148 (AD); 1978 (2) SA 911 (RAD)

*A P de Bourbon,* for the appellant, cited *R v Harvey,* 1967 RLR 203 (AD), in addition to the cases cited in the judgment.

*J H C Friedman,* for the respondent, cited the following cases, in addition to those cited in the judgment: *Zengenene v S,* AD 122/79 (unreported); *Ketero v S,* AD 53/78 (unreported); *S v Maja,* G-S-141-79 (unreported); *S v Nyawasha,* G-S-140-79 (unreported); *S v Nicholas,* G-S-83-78 (unreported); *R v Rees,* 1978 Criminal Law Review, page 298.

## Judgment

**Lewis JP:** The appellant in this case was convicted in the Regional Court of the crime of attempting to export from Rhodesia five and a quarter kilos of prepared Indian hemp, otherwise known as dagga, in contravention of section 8, as read with section 19 (1) (a) of the Dangerous Drugs Act [*Chapter 319*]. She was sentenced to three years' imprisonment with labour, 18 months of which were conditionally suspended for five years. She is a first offender. She has appealed to this Court against the sentence imposed upon her.

The appellant pleaded guilty and the case proceeded on the basis of an agreed statement of facts. That statement reads as follows:

> "At the beginning of February, 1980, the accused was approached by a friend and asked if she would transport a quantity of dagga for him to the United Kingdom. The accused, planning to return to London during the latter part of February, 1980, agreed to do this
>
> On the 3rd or 4th of February the accused handed a cardboard box to her friend, which contained a quantity of crockery and a soapstone carving.
>
> On the 3rd or 4th of February the accused handed a cardboard box to her friend, which contained a quantity of crockery and a soapstone carving.
>
> On the 7th February, the cardboard box, packed with the crockery and soapstone carving, as well as a quantity of dagga, was returned to the accused. She knew that the box contained dagga.



LEWIS JP

> The accused in turn handed this box to a third party who was to arrange for the box to travel by air to the United Kingdom, believing the box only to contain personal effects. The plan was for the accused to collect the box in due course when she arrived in the United Kingdom. She would then contact the owner of the dagga in Rhodesia, and receive instructions as to its disposal.
>
> The plan was thwarted when the party responsible for arranging for the box to travel to the United Kingdom earned out a routine security inspection and discovered the true contents.
>
> The accused was arrested in Johannesburg on the 11/2/80, and agreed to return to Rhodesia that same day,

Copyright Juta & Co Ltd

where on her arrival she was detained.

The accused has been co-operative with the Investigating Officer and has been responsible for the identification and arrest of the owner of the dagga, who has also been arrested.?'

That last sentence, to the effect that the appellant had been co-operative with the Investigating Officer and had been responsible for the identification and arrest of the owner of the dagga, was not correct. We are now informed, and Counsel so admits, that she has not been prepared to give evidence incriminating the alleged owner of the dagga. She has in fact given evidence against another male person who played a minor part in assisting in the packing up of the dagga in the cardboard box.

Having convicted her, the Regional Magistrate very properly asked her a number of questions relating to her personal circumstances and as to the reason why she became involved in this serious crime, before deciding on the sentence. The appellant is a young woman of 28 years of age who is divorced with no children. Although she was unaware of the exact amount of the dagga involved, she admitted that she was aware that it was intended for sale when it reached England and the amount would, therefore, be considerable. She thought it would be about eight pounds in weight - in fact it was 117 pounds. She was to receive instructions as to the place where she was to deliver the dagga in England when she arrived there. She said she was not told before she left Rhodesia in case she was caught and revealed to the authorities the destination of the dagga in England. All the circumstances suggest, therefore, that she was involving herself in a well - organized drug smuggling ring.

When asked why she became involved, she replied: "I just did it. I did think it was wrong, but I went ahead with it, and realized the enormity of it." She said the owner of the dagga was someone she had met at a party at the beginning of last year, who was merely an acquaintance. She was not promised any money but thought she might receive a reward of "a few hundred pounds". It is difficult to understand why she was



prepared to involve herself in what she knew to be a very serious offence in the circumstances stated by her, and these answers lead one to suspect that she was not candid with the Court, particularly in the light of her refusal to co-operate with the police in bringing to justice the principal offender mentioned by her as the owner of the dagga. This reflects seriously on the genuineness of her contrition.

There is no doubt in this case that an effective prison sentence was called for, notwithstanding that the appellant is a woman and is a first offender. In the case of *Ismail v The Sate,* Appellate Division Judgment No. 85/71 (not reported), one of the counts on which the appellant was convicted was conspiring to export 35 ounces - that is about 21/4 pounds - of dagga, to London. In the course of the judgment on appeal the following appears:

"I need hardly say that the offence of conspiring to export dagga to a foreign country is an extremely serious one. It is extremely serious not only because it involves the supply of dagga, but also because it could seriously damage the reputation of this country abroad. Clearly, it would be highly prejudicial to Rhodesia if Rhodesia came to be regarded as a source of supply of drugs to the International market and any offence of supplying the

Copyright Juta & Co Ltd

International market with drugs should, in my view, always be treated as being extremely serious."

This view of the matter was reiterated in the recent case of *Clarke v Reginam,* Appellate Division Judgment No. 15/80 (unreported), dated the 5th February last.

There it was stated:

"Although this Court is unaware of the degree of seriousness with which the possession or sale of dagga is viewed in Britain, it remains an offence in that country to deal in dagga, and there can be little doubt that in the circumstances the exploit of dagga from this country to Britain would clearly tend to damage seriously the reputation of this country abroad, and, as pointed out in *Ismail's* case (*supra*,), it would be highly prejudicial if this country came to be regarded as a source of supply to the international market."

This view receives support from the Act itself, when one has regard to section 19 (1) (d) of the Act which reads as follows:

"Subject to the provisions of this section, any person -

.....

(d) who in Rhodesia aids, abets, counsels or procures the commission in a place outside Rhodesia of an offence punishable under the provisions of a corresponding law in force in that place, or does an act preparatory to or in furtherance of an act which, if committed in Rhodesia, would constitute an offence against this Act;

shall be guilty of an offence . . ."

---



LEWIS JP

This clearly shows that the Legislature is concerned with combating the traffic in dangerous drugs in other countries as well as our own, since the problem of drug smuggling is one of international concern. Since *Clarke's* case, this Court has now been informed of the seriousness with which the courts in Britain regard the peddling of dangerous drugs. The Court of Criminal Appeal in Britain has upheld sentences of between three and five years' imprisonment, even on first offenders, depending on the extent of their involvement and quantities of cannabis or dagga being dealt with. See, for example, *R v Hancock & Holdgate.* referred to in 1978 Criminal Law Review at pages 174 to 175, *R v Thomas,* referred to in 1977 CLR page 47 *(5), *R v Baldock,* 1977 CLR page 47, and *R v Mehagian & Fenwick* (1973) 57 Cr. App. R 488. In the case of *Thomas,* the appellant was a young woman of 24 and a first offender whose prison sentence of four years was upheld for importing cannabis on a large scale into Denmark. She was apparently convicted and sentenced in terms of a statutory provision similar to our section 19 (1) (d) referred to above. In *Baldock's* case, the appellant's sentence of three years was upheld, as a first offender, for importing 20 pounds of cannabis into Britain as a mere courier. *Mehagian & Fenwick's* case involved two young women who similarly acted as couriers in the import on a large scale of cannabis resin, the amount being 512 pounds weight, and there a two-year sentence was upheld. It was said by the Court of Appeal to be below the usual line of sentences imposed for that sort of offence.

---

**Copyright Juta & Co Ltd**

There can be no doubt that drug smuggling is far more prevalent in Britain. Our courts are not bound to apply the same standard of severity, and in any event smuggling is not so prevalent in this country. Nevertheless, for reasons already referred to, the courts are bound to take a very serious view of drug smuggling into a country in which the unlawful supply of dangerous drugs is prevalent and where the courts of that country impose heavy penalties for the importation of such drugs.

It has been argued by Mr *de Bourbon* that by comparison with *Clarke's* case, the sentence in this case was manifestly excessive. Clarke was sentenced to three years' imprisonment with labour, with one suspended, that is an effective two years, for attempting to export 1 929 grams of dagga, that is to say, considerably less than in the instant case. This Court altered the sentence on appeal by suspending two years instead of one, leaving an effective sentence of one year. Although admittedly he was the originator of his own scheme to export this dagga to London for sale, there were special circumstances in his case which



LEWIS JP

induced this Court to reduce the period of the effective sentence. Briefly, the facts in *Clarke's* case were that when he was in England, he was planing to emigrate to Australia where he had hopes of obtaining employment" in his particular field. He had been in touch with the Australian Embassy in London and was expecting to arrange through them for an interview and for arrangements to be made for this employment to be offered to him in Australia. While over in England he received news that his mother in Rhodesia was very seriously ill, which obliged him to abandon on his plans and to come out here in order to be with her. In doing so, he had to pay for his air fare, and it exhausted to some extent the funds which he had been saving up for the Australian enterprise. He then received notification while in this country that he was required for the interview at the Australian Embassy in London, which made it imperative for him to return to London for that purpose. He needed funds to tide him over in London while he was waiting, for the result of his interview there, and to pay for half his air fare from London to Australia, so he devised this scheme of taking this quantity of dagga with him for sale in London to provide the necessary finance. That was a case, therefore, where there were special circumstances. Had he not been summoned back to Rhodesia through the unexpected illness of his mother, he would not have become involved at all in drug smuggling.

In this case, however, the reason why the appellant involved herself in drug smuggling is not readily apparent. As I say, she has not been can did with the Court and certainly no question of need on her part seems to have arisen in this case. Apart from that, in this case the quantity was far in excess of that involved in *Clarke's* case, and although it was said in *S v Mutize,* 1978 RLR 14$ (AD) at 153C; 1978 (2) SA 911 (RAD) at page 914D that too much importance should not be attached to quantity, it does have a bearing on sentence, particularly when one gets into large-scale drug smuggling: the larger the quantities involved, the greater will be the numbers of young people who will be exposed to the dangers of drug addiction. It is pertinent to note that the English Courts apparently do attach importance to the quantity involved in drug smuggling. In a commentary on some of the English cases to which I have referred, it is said at page 175 of the 1978 Criminal Law Review:

Copyright Juta & Co Ltd

"In the majority of cases of importing cannabis which have been before the court in recent years, the court has upheld sentences within the bracket of three to five years, inside that bracket the sentence upheld depends on the quantity of cannabis Imported, the degree of sophistication and organization involved in the attempt, and the role of the individual offender."



LEWIS JP

There is the factor, too, that Clarke made a clean breast of the whole thing and showed contrition, whereas in the instant case, as I have already mentioned, the aspect of contrition is largely negatived by her attitude now in her failing to co-operate with the police.

Finally, and most important, one has here the very serious aggravating factor that on the agreed statement of facts, the appellant involved an entirely innocent person in this smuggling. She handed this box containing what was supposed to be her personal effects but which in addition contained this large quantity of dagga, to the innocent third party, who was to take it over for her. Luckily for him he took the precaution of checking the contents as a security measure before taking them with him, and on discovering that the contents contained dagga he reported the matter to the police. But for that, there would have been a very serious risk of his being arrested in possession of the dagga on arrival in England, and he would have found it very difficult to explain away his possession of this dagga and to convince the authorities there of his innocence. The circumstantial evidence against him would have been very strong. She was, therefore, responsible for exposing him to prosecution, conviction and a severe sentence, which was a wicked thing to do.

The sentence is a severe one, but it was one which was within the competence of the magistrate and was within his discretion. Although I would not have quarrelled with a slightly lesser sentence, there are no grounds on which this Court would be justified in holding that the magistrate's sentence was manifestly excessive.

In the result, the appeal must be dismissed.

**Macdonald CJ:** I agree.

**Davies JA:** I agree.

*Byron Venturas & Travlos*, attorneys for the appellant.



## REGINA v NDHLOVU (1) 1980 ZLR 96

**Court** **General Division, Bulawayo**

Criminal Review

Gubbay, J

Copyright Juta & Co Ltd

21st March, 1980

## Flynote

Criminal procedure - forfeiture of articles in terms of section 571(1) of Criminal Procedure and Evidence Act [Chapter 59] - whether vehicles and containers may be forfeited in terms of section 571(1) (a) - nature of discretion conferred by section - when decision to make order in absence of owner of article and decision to order forfeiture may be made.

Review - section 64 (4) of Magistrates Court Act [Chapter 18] - whether permits review of forfeiture order in terms of section 571 of Criminal Procedure and Evidence Act [Chapter 59] against third party.

Interpretation of statutes - expressio unius est exclusio alterius - nature and application of maxim.

## Headnote

It is permissible to declare vehicles and containers forfeited to the State in terms of section 57I (1) (a) of the Criminal Procedure and Evidence Act [*Chapter 59*] notwithstanding their express mention in section 57I (1) (b).

An order of forfeiture in terms of section 57I (1) of the Act may be made in the absence of the owner of the article concerned only in exceptional circumstances, and the greater the potential financial loss to the owner the more exceptional the circumstances must be.

The discretion whether or not to order the forfeiture of an Particle in terms of section 571 (1) of the Act must be exercised judicially, taking into account the following factors:

(a) the nature of the article;

(b) the role played by it in the commission of the offence;

(c) the possibility that it will be used again in the commission of the offence;

(d) the effect of the forfeiture on the person or persons affected thereby;

(e) whether, by virtue of its value, the forfeiture would be disproportionate to the gravity of the offence;



GUBBAY J

(f) in the case of an article of considerable value, such as a motor-vehicle, whether or not it has been used on any other occasion for a similar criminal purpose.

If the owner of an article elects to attend a hearing into the question of its forfeiture, it is desirable to invoke the procedure laid down in section 57I (6), which is not accusatorial in nature, and to pass sentence on the accused before the hearing.

Section 64 (4) of the Magistrates Court Act [*Chapter 18*] permits of a review of a forfeiture order in terms of section 57I of the Criminal Procedure Evidence Act [*Chapter 59*], even though made against a person other than the accused.

Copyright Juta & Co Ltd

The maxim *expressio unius est exclusio alterius* does not describe a rule of interpretation but merely an aid which must be applied with extreme caution.

Cases cited:

*S v Apostolides,* 1963 (4) SA 34 (O);

*S v Hove; S v Shumba,* 1979 RLR 374 (AD); 1979 (4) SA 648 (ZRAD);

*S v Cocklin en 'n Ander,* 1971 (3) SA 776 (AD);

*S v Masamvu,* AD 143/79 (unreported);

*R v Makhubu,* 1957 (4) SA 256 (C);

*Bhubezi Boerdery (Edms.) Bpk. v Minister of Justice and Anor.,* 1965 (1) SA 218 (T);

*S v Nkepane,* 1973 (1) SA 331 (O);

*S v Noosi,* 1975 (3) SA 521 (O);

*Colquhoun v Brooks* (1888) 21 QBD 52;

*Dean v Wiesengrund* [1955] 2 All ER 432 (CA);

*S v Matsane en 'n Ander,* 1978 (3) SA 821 (T);

*S v Hlangothe en 'n Ander,* 1979 (4) SA 199 (BH);

*S v Steenkamp,* 1955 (4) SA 375 (T);

*S v Mongale en 'n Antler,* 1979 (3) SA 669 (BH);

*R v Elliott,* 1946 (2) PH H197;

*R v Dawood,* 1947 (2) SA 1097 (T).

## Judgment

**Gubbay J:** On the 9th October, 1979, the accused left Bulawayo in a Bedford five-tonne lorry, number 148-586, hired for reward from the owner, Enock Moyo. He was bound for his kraal in the Mahongola area of the Gwanda Tribal Trust Land, in order to collect animals and transport them to Bulawayo for the purpose of sale. He was aware that the Gwanda district had been declared a foot-and-mouth area and that without a permit, the movement of animals therefrom was prohibited On the morning of the 11th October, 1979, the accused loaded 69 goats and 10 sheep into the lorry and departed from the Mahongola area for Bulawayo. When driving through the Tuli-Makwe area of the Gwanda Tribal Trust Land, he was stopped by a police patrol and arrested. The lorry was seized and the animals impounded.

The accused was convicted, on a plea of guilty, of contravening section 4 (1) (c) of the Animal Health (Foot and Mouth) Regulations, 1971. In his judgment, the trial magistrate commented

**Copyright Juta & Co Ltd**

upon the prevalence with



GUBBAY J

which animals are being moved unlawfully, both from one place to another within a designated foot-and-mouth area and from such areas, and stressed that a spread of foot -and-mouth disease to Bulawayo would seriously affect not only local ranchers but the earning of foreign exchange through the exportation of beef. He referred to the Court's recent warning to the public that if the common practice of moving animals by means of a motor-vehicle were to continue, consideration would be given to ordering its forfeiture. He sentenced the accused, who was a first offender, to a fine of $100 or, in default of payment, 50 days' imprisonment with labour and, acting upon the latter's unsworn and uncorroborated assertion that the owner was aware of the unlawful use to which the lorry was to be put, declared it forfeited to the State in terms of section 57I (1) (a) of the Criminal Procedure and Evidence Act [*Chapter 59*]. Nothing turns on the conviction and sentence, which are in order.

The regional magistrate before whom the proceedings were laid for scrutiny, forwarded them on review as he considered that the provisions of section 57I (1) (a) do not allow of the forfeiture of a vehicle. On the assumption the power is available, he submitted that in the particular circumstances its application caused manifest injustice, in that the principal offender received a punishment of a fine of $100, whereas the owner of the lorry, who was not even charged as a *socius criminis,* was penalized in its value, estimated to be $1500. Being satisfied that section 64 (4) of the Magistrates Court Act [*Chapter 18*] permits of a review of a forfeiture order, even though made against a person other than an accused (as to which, see *S v Apostolides,* 1963 (4) SA 34 (O), I sought the assistance of the Director of Public Prosecutions on the points raised by the regional magistrate. He duly advised me in a detailed memorandum that he did not support the order. I am indebted to him for his industry. As his view confirmed my own and that of my brother NEWHAM with whom I had consulted, I set aside the order, intimating that I would give my reasons for so doing at a later date. These reasons now follow.

At the outset it is as well to quote section 57I (1) in its entirety. It reads:

> "(1) A Court convicting any person of any offence may, without notice to any other person, declare forfeited to the State -
>
> (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or



GUBBAY J

> (b) if the conviction is in respect of an offence specified in the Seventh Schedule, any vehicle, container or other article which was used for the purpose of or in connexion with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property;
>
> and which was seized in terms of this Part:

Copyright Juta & Co Ltd

Provided that such forfeiture shall not affect any right referred to in para graph (a) or (b) of subsection (4) if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connexion with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be."

Broadly, the offences listed in the Seventh Schedule are those involving habit-forming drugs or harmful liquids, precious metals or precious stones, theft, and breaking and entering with intent to commit an offence. Obviously paragraph (b) is of no application to the accused's offence.

In *S v Hove; S v Shumba,* 1979 (4) SA 648 (ZRAD),*(6) it was held that the phrase "or other article", occurring in paragraph (a), was not to be construed *eiusdem generis* with the preceding words "any vehicle, container", and was wide enough to include banknotes used for the purpose of or in connection with the commission of a Seventh Schedule offence. In support of this view, LEWIS, ACJ, quoted with approval passages from the judgment of VAN BLERK, JA, in *S v Cocklin en 'n Ander,* 1971 (3) SA 776 (AD) at 781 and 782, dealing with the substantially similar provision in the South-West African Criminal Procedure Ordinance. Shortly thereafter, in *S v Masamvu,* AD 143/79 (not reported), MACDONALD, CJ, remarked that there is no reason why the word "article" in paragraph (b) should be given a different meaning where it occurs in paragraph (a). Accordingly, an amount of $6 used by the appellant in the commission of the offence of bribery was properly declared forfeited to the State. In the light of these three decisions, such cases as *R v Makhubu,* 1957 (4) SA 256 (A at 257H-258A, *Bhubezi Boerdery (Edms.) Minister of Justice and Another,* 1965 (1) SA 218 (T) and *S v Nkepane,* 1973 (1) SA 331 (O), which held that the word "article" in section 360 (2) of the former South African Criminal Procedure Act, 56 of 1955 - materially similar in its provisions to paragraph (a) - was to be read *eiusdem generis* with the words "weapon" and "instrument" and so did not comprehend a motor-vehicle, must be



GUBBAY J

regarded as wrongly decided. (See also, *S v Noosi,* 1975 (3) SA 521 (O).)

The essential question, therefore, is whether the specific mention of "any vehicle" in paragraph (b) justifies the conclusion that the Legislature did not intend a vehicle to be included in the phrase "or other article" in paragraph (a). This involves the applicability of the maxim *expressio unius est exclusio alterius*. That maxim, aptly described as "a valuable servant but a dangerous master" (per LOPES, LJ, in *Colquhoun v Brooks* (1888) 21 QBD 52 at 65), is not a rule of interpretation. It serves merely as an aid and, depending on the words to be construed and the context in which they appear, may be of assistance. As a method of reasoning it is to be applied with extreme caution, and has little, if any, weight where it is possible to account for the *expressio unius* on grounds other than an intention to effect the *exclusio alterius*. (See *Dean v Wiesengrund* [1955] 2 All E . 432 (CA) at 438H-I.) The primary rule of interpretation remains: the words are to be given their ordinary meaning, and any maxim which operates so as to restrict such meaning or to deviate from it, may only be invoked where it is consistent with the clear intention of the lawmaker.

Copyright Juta & Co Ltd

In the *Bhubezi Boerdery* case , *supra*, at 219F, DE WET JP., sought to fortify his interpretation of the word "article" in section 360 (2) of Act 56 of 1955, on the additional ground that section 360 (3), which equates in its terms to paragraph (b):

> " . . . deals specifically with the forfeiture of motor and other vehicles and where forfeiture is provided for only in the case of certain specified offences and where only the rights of the accused can be forfeited unless the owner was in effect a *particeps criminis*. It seems to me that if the Legislature had intended to include vehicles in sub-sec. (2) it would have said so in unambiguous language and then sub-sec. (3) would not only be superfluous but would be a restriction on the provisions of sub-sec. (2)."

I am in respectful disagreement with this dictum. As observed in *S v* Hove; *S v Shumba, supra*, at 652 *fin* - 653A, paragraphs (a) and (it) deal with two different situations. Paragraph (b) has a wider ambit than paragraph (a), but has no operation outside the Seventh Schedule offences. I am not able to discern any logical basis for limiting the ordinary meaning or "article" in paragraph (a) so as to exclude a vehicle. The arbitrariness of such an exclusion is underlined by considering the word "container" in paragraph (b). If a vehicle is not to be included in paragraph (a) by virtue of the *expressio unius* maxim, then by parity of reasoning a container likewise cannot be included in paragraph (a). It is inconceivable



that the Legislature should wish to exclude a commonplace article such as a box or tin (which are containers) from the scope of paragraph (a). To suggest otherwise would be to invite startling consequences. I shall illustrate what I mean. Public violence and attempted murder are not Offences within the Seventh Schedule. Can it be contended that a Court is not empowered to order the forfeiture of a motor-vehicle utilized to transport a gang of thugs from one scene of devastation to the next, or deliberately driven by an escaping offender at a police officer with the intention of running him down? I think not. I appreciate that on this interpretation a Court convicting a motorist of exceeding the speed-limit may declare his motor-car to be forfeited. See the *Bhubezi Boerdery* case, *supra*, at 219E. But the protection exists in the grant of the discretion. An application of the power to such a trivial offence would be the clearest indication of a failure to exercise the discretion properly.

There is a further way of testing the matter. If the ordinary meaning of "article" in paragraph (a) is to be limited by paragraph (b), then the converse must hold good, that is to say, weapons and instruments specified in paragraph (a), would have to be excluded from the phrase "or other article" in paragraph (b). This would lead to very strange and illogical results. For instance, it would mean that an instrument such as a jemmy which was used in the commission of a housebreaking venture, and thus a Seventh Schedule offence, could not be deemed an article and declared forfeited.

It seems to me that the words "vehicle" and "container" were expressly mentioned in paragraph (b) merely for the purpose of emphasis. Vehicles and containers have particular relevance to the concluding part of that paragraph, which lays stress on the "conveyance or removal of" stolen property.

It follows that it is clearly possible to account for the *expressio unius* on grounds other than an

Copyright Juta & Co Ltd

intention to effect the *exclusio alterius*. It was thus competent to declare the Bedford lorry forfeited to the State.

That, however, is not an end to the problem. Section 57I (1) of the Act does not oblige the Court to order forfeiture. Nor is it obligatory to proceed without notice to any other person who has a right of ownership in the article. What is conferred is a double discretion.

Firstly, the Court must decide whether if will proceed to consider the making of an order without affording the third party-owner an oppor-



GUBBAY J

tunity to be heard in connection with the forfeiture of the article. Only exceptional circumstances will justify that course being adopted, for so to act is contrary to the principles of natural justice. See *S v Matsane en 'n Ander,* 1978 (3) SA 821 (T) at 828B, *S v Hlangothe en 'n Ander* 1979 (4) A 199 (BH) at 202B. The greater the potential financial loss to the third party, the more exceptional the circumstances must be. Any attempt to exhaustively define such circumstances is inadvisable, but some of the situations which come to mind are where it is shown conclusively that the third party has used the article frequently in the past for a similar criminal purpose, where his whereabouts are unknown; where he is resident in a foreign country and the intrinsic value of the article is so insignificant as to make it unlikely that its loss would be a cause for complaint.

The trial magistrate decided to proceed without notice so as not to create what he believed would be the anomaly of Enock Moyo appearing at the trial of the accused and being cross-examined as if charged with the offence. He considered that the power vested in a Court by section 57I (4) of the Act to refer to the record of the criminal proceedings in which an order of forfeiture was made, when determining an application by a third party for rescission of that order, evidences an intention on the part of the lawmaker to avert such an occurrence. I am unable to agree with him. I do not think there is anything whatsoever anomalous in a court which has convicted an offender, giving a third party-owner notice of its intention to consider declaring the article concerned to be forfeited. The third party may not wish to make any representations and decline to attend the proposed hearing. If he does attend, then in my view, the procedure laid down in section 57I (6) of the Act should be invoked. The court would have regard to the record of the criminal proceedings and give the third party the opportunity of adducing evidence, whether by affidavit or orally, whichever it deemed the more appropriate. The State, too, would have the right to place additional evidence before the Court. But this does not mean that the hearing would be accusatorial in nature. It would simply be an inquiry to establish all the relevant facts and so enable the Court to exercise a judicial discretion. There would appear to be no advantage in delaying the passing of sentence upon the accused until the issue of the forfeiture of the article owned by the third party had been determined. In fact it seems to me preferable not to do so, for the nature of punishment would then be known to the third party and the State and, depending on its measure, favour one or the other in the presentation of their respective contentions.

Copyright Juta & Co Ltd

I gain the distinct impression that the trial magistrate attached too



GUBBAY J

little importance to the giving of notice because he considered that by virtue of the provisions of section 57I (4) it did not necessarily follow that the forfeiture order would be given effect to. It could be rescinded at a later hearing. However, the availability of this safeguard must not be regarded as justifying any less careful an approach to the exercise of the discretion. Why should a third party be involved in court proceedings with consequent inconvenience and perhaps expense, which could have been avoided by a proper exercise of the discretion in the first instance?

But quite apart from the misdirection in the trial magistrate's approach, in my opinion there were no exceptional circumstances which warranted his proceeding to consider a forfeiture of the lorry without notice to its owner. It is apparent from the record that the whereabouts of Moyo were known to both the accused and the police. No difficulty would have been involved, and only the slightest inconvenience, in affording him an opportunity to be heard. Moreover, the trial magistrate ought to have been put on his guard by the failure to prosecute Moyo, who on the accused's assertion was clearly a *socius* to the offence. Although the failure to take proceedings against him may be explicable on a ground other than his innocence, at the very least the trial magistrate should have inquired into the matter. If he were to be prosecuted, then as the lorry was under seizure, the issue of its forfeiture would be determinable more appropriately and fairly at that trial. If there were to be no prosecution because the police were convinced of his innocence, the question of forfeiture would have fallen away. Further, the value of the lorry was very considerable.

The second discretion is whether to make a declaration of forfeiture or not, and I shall consider its exercise by the trial magistrate on the assumption (contrary to the view expressed above) that he was justified in proceeding without notice to the owner of the lorry.

The discretion given is a wide one and is not to be lightly interfered with. Nonetheless it must be exercised reasonably and judicially. See *R v Steenkamp*, 1955 (4) SA 375 (1) at 377D. In *Matsane*'s case, *supra*, at 828D, VAN REENEN J, lists some of the more important factors to be borne in mind. These were approved of in *S v Mongale en 'n Ander,* 1979 (3) S 669 (BH)) at 675, and are as follows -

(i) the nature of the article;

(ii) the role played by it in the commission of the offence,

(iii) the possibility that it will be used again in the commission of the offence,



GUBBAY J

Copyright Juta & Co Ltd

(iv) the effect of the forfeiture on the person or persons affected thereby.

I venture, with due deference, to add two further factors -

(v) whether, by virtue of its value, the forfeiture of the article would be disproportionate to the gravity of the offence. See *S v Hlangothe*, *supra*, at 201H- 202A,

(vi) in the case of an article of considerable value, such as a motor vehicle, whether it has been used on any other occasion for a similar criminal purpose. See *R v Elliott,* 1946 (2) PH H197; *R v Dawood,* 1947 (2) SA 1097 (T). at 1101.

What immediately disturbs me, just as it did the regional magistrate, is that the accused, the principal offender, suffered a fine of $100, whereas Moyo - assuming he was a *socius* - received a financial punishment which is incomparably greater. It seems to me that as the maximum sentence for a first offender is a fine of $100 or, in default of payment, three months' imprisonment, the trial magistrate took an exaggerated view of the gravity of the offence which gave rise to the prosecution. One cannot escape the fact that the loss of a lorry is an extremely heavy penalty to pay for an offence which is not regarded by the Legislature as particularly serious. In that regard, too, there is no indication that any thought was given to the effect of the forfeiture upon the financial position of the owner.

In addition, it was not proved that the lorry had been used on other occasions in contravention of the Animal Health (Foot and Mouth) Regulations or indeed, in the commission of any other offence, and the possibility of it being so used in the future was never investigated.

A close perusal of the trial magistrate's judgment reveals that in making the order of forfeiture, he was influenced almost entirely by the *general* consideration that motor- vehicles are being utilized with increasing frequency to move large numbers of animals out of foot-and mouth areas. An example had to made. That was not a proper approach to the exercise of the discretion. It obscured in his mind the weight to be accorded to the *particular* and more relevant factors I have referred to.

In the circumstances I am satisfied there was a failure to exercise the second discretion reasonably and judicially.

**Newham J:** has read this judgment and agrees with it.



## REGINA v NDHLOVU (2) 1980 ZLR 105

**Court** **General Division, Bulawayo**

Criminal Review

Gubbay, J

11th April, 1980

Copyright Juta & Co Ltd

## Flynote

Criminal procedure - court must return verdict on all charges brought against accused.

## Headnote

The accused was charged in the magistrates Court with three counts of robbery and one of assault, all the offences being alleged to have been committed on the same day. Despite the complainants' unsatisfactory evidence the magistrate was satisfied that one or other of them had been robbed of two dollars, so he convicted the accused of robbery of two dollars from a person unknown and did not return a specific verdict on any of the four charges. None of the charges was amended before verdict. On review.

*Held* that the accused was entitled to a verdict of guilty or not guilty on each of the four charges, and it was not permissible for the magistrate to formulate a new charge, convict him of it, and leave the others in abeyance.

Cases cited:

*S v Collett* (2), 1978 RLR 288 (GD); 1978 (4) SA 324 (R);

*S v Moyo* (2), 1978 RLR 469 (GD); 1979 (1) SA 1024 (R)

## Judgment

**Gubbay J:** This is an unusual case. The accused was charged in the Court of the regional magistrate with three counts of robbery and one count of assault, it being averred that the offences had been perpetrated on the same day. In pleading to the first count of robbery, the accused said:

> "I deny committing this offence myself. It was committed by others in my presence. I took money from the complainant and handed it over to Mzizi. We were not acting in concert. We only went to drink beer in the shebeen."

For the rest, he denied any knowledge of the allegations contained in the charges and refused to outline his defence.

---



GUBBAY J

The Crown adduced the evidence of the four complainants, and a warned-and-cautioned statement recorded from the accused was produced by consent. It reads:

> "I admit being at the shebeen house. I was directed to the shebeen house by Abe Mlotshwa. We entered the shebeen house being three of us. We were myself, Abe and Jack Mzizi. Abe bought two quarts of beer. We drank the beer being three of us. The one who stole the money was Jack Mzizi. I did not steal that money. When we went outside the house, I was given the sum of $2 by Jack Mzizi and there I also gave the sum of $1 to Abe Mlotshwa. I did not at any time mention that I was a terrorist, that was said by Jack Mzizi at the time we were inside the house."

The regional magistrate, with ample justification, was unfavourably impressed with the

---

Copyright Juta & Co Ltd

testimony of each complainant, although he was apparently satisfied that one or other of the complainants had been robbed of an amount of $2. Accordingly he convicted the accused of "one count of robbery ($2) from a person unknown", and imposed a sentence of 12 months' imprisonment with labour, of which nine months was conditionally suspended. He did not return a verdict in respect of any of the four charges.

That the procedure adopted by the regional magistrate was demonstrably wrong, is clear upon a reading of section 163 (5) of the Criminal Procedure and Evidence Act [*Chapter 59*]. Having been charged with four counts, the accused was entitled as of right to four verdicts, either of guilty or of not guilty. It was not permissible to leave any of the charges in a state of animated suspension, as it were, and at the same time to formulate a new charge out of the charges of robbery and convict the accused of it. As I stressed in the recent cases of *S v Collett* (2), 1978 RLR 288 (GD); 1978 (4) SA 324 (R), and *S v Moyo* (2), 1978 RLR 469 (GD); 1979 (1) SA 1024 (R), once an accused has pleaded to a charge a verdict must be pronounced on that charge, with any amendment which may have been made thereto. In the present case, no amendment to any of the robbery charges was effected.

The regional magistrate based his conviction upon the accused's extra curial statement and the explanation which accompanied the plea. I entertain no doubt, however, that the extra-curial statement was not a confession to robbery. At best it was a confession to theft. The brief utterance which the accused made upon pleading is ambiguous and certainly does not amount to an unequivocal admission of robbery. In the circumstances, the most the Crown could possibly establish from either or both these brief statements was the commission of a rather trivial theft of $2.



GUBBAY J

Bearing in mind that theft is a competent verdict on a charge of robbery, it would be competent for me, in terms of section 191 (1) of the Criminal Code as read with section 64 (2) (c) of the Magistrates Court Act [*Chapter 18*], to amend one of the robbery charges so as to make proper the conviction for theft of the sum of $2 from a person unknown. I have discussed the justification of that course with the Attorney-General. In his view such an amendment would be somewhat contrived. The offence was petty and the accused has had his just deserts in the form of a short period of incarceration. In the result, he suggested that I do no more than quash the purported conviction and sentence, and record a verdict of not guilty on each of the four counts.

On the 24th March, 1980, and with the concurrence of my brother NEWHAM, I issued an order in accordance with the Attorney-General's recommendation. This judgment serves to confirm that order.



**REGINA v BRADLEY 1980 ZLR 107**

Copyright Juta & Co Ltd

**Court** **General Division, Salisbury**

Criminal Review

Smith, J

16th April, 1980

## Flynote

Road Traffic Act, 1976 - section 48 (1) (a) - unlawfully getting on to, interfering with or damaging vehicle - whether bicycle a vehicle.

## Headnote

A bicycle is a vehicle for the purposes of section 48 (1) (a) and (3) of the Road Traffic Act, 1976.

The accused had been convicted in a magistrates Court of the theft of a bicycle, but his intention to steal the bicycle had not been established.

*Held* that in terms of section 48 (3) of the Road Traffic Act, 1976, the conviction should be altered to one of getting on to or interfering with a vehicle in contravention of section 48 (1) (a) of the Act.

Case cited:

*R v Wilson,* 1955 RLR 550 (GD)

## Judgment

**Smith J:** The accused was found guilty of the theft of a delivery cycle and was sentenced to six months' imprisonment with labour, the whole of which was suspended for five years on the usual conditions. The



SMITH J

record has been submitted by the Regional Magistrate who scrutinized it, because he was of the opinion that the intention to steal had not been established and that the accused's explanation that he intended to go for a joy-ride on the bicycle might reasonably be true.

The presiding magistrate has set out the facts that are common cause, in his minute. At about 2.30 a.m. the complainant was sitting outside Herald House in Salisbury with about ten colleagues, waiting to be issued with newspapers. Their bicycles, including that of the complainant, were parked about 10 metres away from the group. The accused, who had been drinking but who knew what he was doing, approached alone on foot. He then took hold of the complainant's delivery cycle and started to walk off with it. Before he had gone more than five metres, the complainant and his colleagues noticed this and they shouted "thief" in Shona. The accused then ran along, pushing the cycle. He was chased by the complainant and the over newspaper vendors, and he then dropped the cycle. The accused continued to run but was

Copyright Juta & Co Ltd

apprehended and handed over to the Police. The accused said that he wanted to "go for a joy ride" on this bicycle. At one stage he said "round the block" and at another "to the Cathedral and back".

Certain features which weighed with the magistrate in disbelieving the accused's explanation were, in addition, why he did not ask permission if he simply wanted to go for a joy-ride and why he had persisted in running away pushing the bicycle after he had been discovered. As to that, the accused's explanation was that he feared that he would be beaten up because he heard shouting which he could not understand and so panicked and ran. Furthermore, according to the complainant's evidence, the accused did not then give the explanation which he gave to the Court. On the other hand, there is the feature that accused's approach was entirely open, that the bicycle was standing only 10 metres away from the group of persons and that there was no real possibility of his taking it without being detected. It should also be borne in mind that the accused had been drinking and it is not clear to what extent he was under the influence of alcohol. In view of the fact that it was 2.30 a.m., however, it is not unreasonable to suppose that he had spent a considerable time drinking. While there are-as the presiding magistrate has noted - flaws in the explanation of the accused, it seems to me that the other features which I have mentioned must leave one with the conviction that the intention to steal was not proved beyond reasonable doubt, that is to say, that there is a reasonable possibility that the accused's explanation is true.

---

**1980 ZLR p109**

SMITH J

Section 48 (1) (a) of the Road Traffic Act, 1976, provides that a person who without reasonable excuse gets on to a vehicle or interferes with or wilfully damages a vehicle or its accessories, is guilty of an offence. It is also provided in subsection (3) of that section that a person charged with the theft of a vehicle may be found guilty of an offence in terms of subsection (1). A bicycle falls within the ordinary meaning of "vehicle", and there is authority for the proposition that riding a cycle negligently is a contravention of section 43 (1) (a), which refers to a "vehicle". *R v Wilson,* 1965 RLR 550 (AD). Furthermore, section 46 of the Act, which makes it an offence to drive a vehicle while under the influence of alcohol or a drug to such extent as to be incapable of having proper control of it, differentiates with regard to penalties between "vehicle" and "motor vehicle". Subsection (4) of the section provides that where the conviction involves the driving of a motor-vehicle while under the influence of alcohol, certain penalties relating to prohibition from driving and to the cancellation of licences shall apply. These penalties do not apply where the offence involves a vehicle other than a motor-vehicle This section indicates that the word "vehicle" has a wide meaning.

I am therefore satisfied that a verdict of guilty of a contravention of section 48 (1) (a) Is competent and is warranted by the facts. Accordingly, the conviction of theft is set aside and a conviction of contravening section 48 (1) (a) of the Road Traffic Act, 1976, as substituted. The sentence remains appropriate and Is confirmed.

**Waddington J:** agrees.

---

**Copyright Juta & Co Ltd**

## THE STATE v SEDA 1980 ZLR 109

**Court** **General Division, Salisbury**

Criminal Review

Squires, J

2nd May, 1980

### Flynote

Criminal procedure - outline of State case given by prosecutor in magistrates Court - need for outline to be recorded.

### Headnote

As a matter of practice the outline of the *State* case which a prosecutor in a magistrates Court is required to give by section 163 (4a) of the Criminal Procedure and Evidence Act [*Chapter 59*], must be recorded in all cases.



SQUIRES J

### Judgment

**Squires J:** The accused in this case, who was an auxiliary constable carrying out duties on farms in the surrounding district, was charged before the Court of the magistrate at Rusape with assault with intent to commit grievous bodily harm.

[The learned Judge set out the facts and continued:]

The Regional Magistrate before whom the matter came for scrutiny, queried two aspects of the case; first, that the outline of the State case had not been recorded by the trial magistrate . . . [the second query is not relevant to this report. - *Editor*.]

Following the magistrate's reply to these queries, the matter has now been referred to this Court in terms of section 63A (3) (b) of the Magistrates Court Act [*Chapter 18*], with the Regional Magistrate's observations that it is essential that the *State* case outline be recorded, and that the accused should have been found guilty of the more serious charge and sentenced accordingly.

In reply to the first inquiry referred to above, the trial magistrate said that he did not, as a general rule, record the outline of the prosecution case, but contented himself with ensuring that a detailed outline was given verbally at the appropriate stage in the proceedings. This had been done in the present case.

Copyright Juta & Co Ltd

Now, although the amendment to the Criminal Procedure and Evidence Act [*Chapter 59*]*(7) which introduced the requirement for an outline of the *State* case to be given is in fact silent on the point of whether or not this outline should be reduced to writing, I have no doubt that it is highly desirable, if not absolutely necessary, to do so. Since the object of such outline is to advise the accused of the case he has to meet as deposed to by the State witnesses, it is in the first place important that it be stated in permanent form so that, following the evidence as it is given, the Court can judge at least its consistency, and therefore, to some extent, its reliability. Secondly, if at any stage the evidence adduced by an accused departs from his outline of case, and the extent or seriousness of this departure depends in any way on comparing it to the case he was advised he had to meet, it would be difficult even for the trial Court to investigate properly if there were no record of the State outline, and quite impossible for any higher Court. In fact, the importance of the part played by the respective outlines of case in a criminal trial cannot be overstated. They perform a similar function to the pleadings in a civil trial, and serve not only to identify





what may be in issue between the State and accused, but to advise each of the substance of the matters that are in issue, with the obvious advantages this affords of avoiding delay in completing the trial. In addition, it must always be appreciated that just as any significant and unexplained departure by the accused in his evidence from the outline of the defence which he makes, may be a matter for comment or even adverse conclusions, so does such a consequence affect what is said by the State witnesses.

I have consulted all the Judges of the General Division and they share the conclusion stated above. As matter of practice, therefore, if not of law, the State outline must be recorded in all cases. It would, of course, help greatly, and save the time of the Court, if this was prepared before hand by the prosecutor, as is done the General vision, and read out either before or after being handed in to the Court. But whether it is done by the prosecutor beforehand or recorded by the Court as recited by the prosecutor, it should be done in all cases.

[The remainder of the judgment is not material to this report. - *Editor*.]



## FLOOD v COWPER AND ANOTHER 1980 ZLR 111

**Court** **General Division, Salisbury**

Civil Application

Pittman, J

3rd April and 14th May, 1980

Copyright Juta & Co Ltd

## Flynote

Arbitration - assessment of market value of property which is not regularly bought and sold - meaning of "market value" - when arbitrator's exercise of discretion may be set aside.

## Headnote

The phrase "market value", when used in relation to a block of shares not quoted on a stock exchange, means the price the block would fetch on the open market, assuming *inter alia* that the shares would be put on the market, that neither seller nor buyer would be under pressure to enter Into the sale nor motivated by subjective or personal considerations in fixing a price, that they would be reasonably well-informed on all facts affecting the value of the shares, and that the method of payment would be one normally used in such transactions.

The basic purpose in any assessment of the market value of property which is not regularly sold and the regular price of which is thus not readily ascertainable, is to fix a price which is fair to both the seller and the purchaser.

---

**1980 ZLR p112**

PITTMAN J

Where an arbitrator has a discretion in assessing the value of property, an exercise of that discretion can be objected to only if it was not made in accordance with the submission.

Cases cited:

*Novick & Anor v Comair Holdings Ltd & Ors* 1979 (2) SA 116 (W);

*Salisbury Portland Cement Co. Ltd & Anor v Edwards Timber & Lime Industries (Pvt) Ltd & Anor.,* 1962 R and N 30; 1962 (2) SA 167 (SR);

*Scott and Anor v Poupard and Anor.,* 1971 (2) SA 373 (AD);

*Heymann's Estate v Featherstone,* 1930 EDL 105.

*C C Milton,* for the applicant.

*R Jagger*, for the first respondent.

*N M R Gardener*, for the second respondent.

## Judgment

**Pittman J:** This is an application by Mrs. Maureen Flood for the setting aside of the award in an arbitration conducted by the first respondent, Mr Cowper, as arbitrator, between the applicant and the second respondent, Mr Humphreys. It will be convenient to refer to Mrs. Flood and Mr Humphreys by name, and to the first respondent as "the arbitrator".

The purpose of the arbitration was to determine the value on the 31st January, 1979, of Mr Humphreys' minority shareholding in a company named Umtali Clothing Industries (Private) Limited. By 1977 16260 shares had been issued and fully paid up in the company, of which 8

**Copyright Juta & Co Ltd**

755 were held by Mrs. Flood's husband, and the balance of 7 505 by Mr Humphreys, being 46,5 per cent. of the total. At that time, many disputes had arisen between Mr Flood and Mr Humphreys. Several legal proceedings were launched between them, culminating in Case No. GD 1519/77, in which Mr Humphreys, as the petitioner, applied for an order that the company be placed under judicial management. At that time the two directorships the company had been transferred to Mrs. Flood and Mrs. Humphreys from their respective husbands.

Case No. GD 1519/77 and an action for damages for defamation instituted by Mr Flood against Mrs. Humphreys, Case No. GD 1142/78, were settled on the 31st January, 1979, by an agreement between the two couples which contained, amongst others, the following terms:

> "(2) Mrs. Maureen Flood (hereinafter referred to as 'Mrs. Flood'), under takes and agrees to purchase from the Petitioner his shares in the Company.
>
> (3) The purchase price of the shares shall be determined by an arbitrator appointed by the President of the Society of Chartered Accountants of Rhodesia, provided that the President shall be directed to appoint a person who has not had any previous dealings with the parties.



PITTMAN J

> (4) (a) The Arbitrator shall, in determining the market value of the Petitioner's shares, base his assessment on the value of the assets of the Company less the amount of its liabilities and shall take into account all other factors which in his opinion are relevant, including -
>
> (i) In determining the values of all physical assets, they shall be valued at their current market value, provided that stocks shall be valued according to normal business usage.
>
> (ii) The value of the Company's shares in Elastics & Tapes (Private) Limited shall be determined in the same manner.
>
> (iii) The assets of the Company and of Elastics & Tapes (Private) Limited shall include all payments made by them to Export Sales & Investments (Private) Limited less the proper expenses of that Company, and shall further include all monies expended by the Company on a pension scheme for Flood.
>
> (b) Each party shall pay his own costs of appearing before the Arbitrator save for the costs of the Arbitrator himself, which costs shall be borne in equal shares by the parties.
>
> (c) The Arbitrator shall have all powers conferred by the Arbitration Act [*Chapter 12*]."

Mr Cowper was appointed as the arbitrator, and in February, 1979, he began investigating the value of Mr Humphreys' 7 505 shares as at the 31st January, 1979. He later agreed with the attorneys of the two couples that after making a provisional assessment of the value, he would give each couple an opportunity to present argument and evidence to him if either wished to persuade him to alter the assessment.

He compiled his valuation, which I shall refer to as "the first award", on the 10th September, 1979. However, by that time he had decided that it would be wrong for him to follow the agreed procedure, and, after explaining the method of valuation he had adopted, he presented that award in the following form:

> "Having given due consideration to the foregoing matters I have determined the value of the 16 260 fully paid

Copyright Juta & Co Ltd

shares in Umtali Clothing Industries (Private) Limited in the sum of $240 829 and the 7 505 shares owned by Mr J A Humphreys in the sum of $111 158."

Neither of the two couples was willing to accept this award without being allowed to appear before the arbitrator to present argument on it. Mr and Mrs. Flood also rejected it on the ground that the arbitrator had misconstrued the terms of the submission, but they took no active steps, either to have the award set aside, or to be given an opportunity to present argument. Because of their inaction, Mr Humphreys, citing the arbitrator and Mr and Mrs. Flood as the respondents, made an application in Case No. GD 2026/79 for an order that the arbitrator hear argument



PITTMAN J

before making his award final, alternatively, that the award be declared to be final and binding upon the four parties to the submission dated the 31st January, 1979.

Case No. GD 2026/79 was settled by agreement between the parties and the arbitrator on the 22nd November, 1979, when by consent the Court ordered that the award be set aside and that the matter be referred back to the arbitrator for the purpose of hearing evidence and argument from the four parties to the submission. Such evidence and argument were duly heard on the 13th December, 1979, and the arbitrator made his second and final award on the 6th February, 1980, in a report which ended:

"Having considered the valuation of the shares in Umtali Clothing Industries arising out of the judicial hearing held in Salisbury on December 13, 1979, I have now determined the value of the shares of that company in the sum of $232406 and those owned by Mr J A Humphreys in the sum of $107 270."

On the 5th March, 1980, Mrs. Flood instituted the present application, Case No. GD 438/80, in which she now seeks orders (1) that the award be set aside in terms of section 12 (2) of the Arbitration Act [*Chapter 12*] on the ground that the arbitrator misconducted the proceedings, (2) that the submission of the 30th January, 1979, be redetermined by another arbitrator, appointed according to its terms, and (3) that the arbitrator and Mr Humphreys pay the costs of the application jointly and severally. Both the arbitrator and Mr Humphreys filed opposing affidavits, denying that the proceedings were misconducted. In addition, Mr Humphreys seeks an order for the recognition and enforcement of the award, with costs on the attorney and client scale.

In making the first award, the arbitrator discussed in paragraph 2.2 of his first report the method of valuation he had to adopt. He said:

"2.2 The terms of reference appear to be both directive and restrictive in that certain conditions are set on which to base the share value.

Although the Arbitrator 'shall take into account all other factors which in his opinion are relevant' he is required in sub-clause (i) to value physical assets at current market value with the exception of stock which is to be valued according to normal usage. The share in the associated company is to be valued on the same basis while sub-clause (iii) requires all payments to Export Sales and Investments (Private) Limited less the proper expenses of that company and pension payments to Mr Flood to be incorporated in the valuation. It therefore seems apparent that the reference to the 'other factors' constitutes a consideration only of an introduction of an element of goodwill over and above the valuations of the net physical assets. I do not believe that the recognition of such other factors as may be relevant is inten-

Copyright Juta & Co Ltd

PITTMAN J

> ded to extend as far as a valuation calculated on an earnings basis. However I believe it incumbent upon me to analyse such an alternative, and my considerations of this aspect are dealt with elsewhere in this report."

I understand by this paragraph that because of the directive and restrictive nature of the instructions in the submission, the arbitrator considered that the only "other factor" he could take into account in valuing the shares beyond those listed in the submission was the goodwill attaching to them.

The arbitrator then discussed in paragraph 3 of the first report various judgments and articles which dealt with the proper method of valuing shares not listed on a stock exchange. In particular, he mentioned a dictum of COLMAN J, in *Novick & Anor v Comair Holdings Ltd & Ors* then reported in digest form at 1978 (4) SA 672-3, and now in full at 1979 (2) SA 116 (W) at 145F. In deciding how to apply section 228 of the Companies Act of South Africa, which forbids the directors of a company to dispose of the whole or greater part of its assets without the approval of a general meeting of the company, COLMAN, J, raised the question of how the assets sought to be disposed of should be identified as constituting the greater part of the assets of the company, and he then said:

> "It seems to me that the only test which can reasonably be applied in the application of the section is the test of value. And by that I mean market value, in the sense of the price which the assets under consideration would fetch in a *bona fide* sale between a willing buyer and a willing seller, both of whom are reasonably well informed about the transaction, and neither of whom is under extraordinary pressure to buy or to sell, as the case may be.
>
> Without reference to authority I think I am entitled to say that that is the approach to the term 'value' which our Courts accept in commercial contexts."

The arbitrator commented:

> "The judge concluded that the only test of value was the market value which was that which would be paid in a bona fide sale between a willing buyer and a willing seller. With respect, I believe that to determine what would constitute a fair market value, reference must be made to the fundamental guidelines of earnings and net asset value."

He then contrasted with the judgment of COLMAN J, the following remarks of MAISELS, J, in *Salisbury Portland Cement Co Ltd & Anor v Edwards Timber & Lime Industries (Pvt) Ltd & Anor* 1962 R & N 30 at 35E; 1962 (2) SA 167 (SR) at 173H:

> "As Mr *Welsh* has submitted, the argument for the applicants rests on a misconception, it seems to me, of the function of the arbitrator, which is to



PITTMAN J

> determine what the first respondent's shares are worth, and, having determined that, to assess the compensation which should fairly and reasonably be paid to the first respondent. It is obvious that, in order to do so, he must

Copyright Juta & Co Ltd

assess the value of the second respondent and the potentials of those assets, the profits those assets may yield in the future. I think it is idle to contend that the documents which the applicants are persisting in withholding are not relevant to this question. It is perfectly true that the Courts have said time and again that questions of compensation must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser, cf. *Raja's* case [1939] AC 302; *Illovo Sugar Estates Ltd v SAR & H,* 1947 (1) SA 58 (N). Nevertheless the correct approach of the arbitrator, it seems to me, is to try and fix a price for the property which, objectively regarded, is fair and reasonable to both parties. In doing so he must have regard to all the potentials of the property. He must obviously in a case such as the present act on a purely hypothetical basis. He has no market with which to determine the value of these shares, such as would be the case if they were the shares of a public company quoted on the Stock Exchange, and he must endeavour to obtain the material on which to base his judgment from other sources. In order to do so it seems to me to be obvious that he has to know not only what the property is but what its potentials are."

The arbitrator summarised the judgment of MAISELS J, as holding that "an arbitrator should endeavour to fix a price for the property being valued which, objectively regarded, is fair and reasonable to both parties".

He then proceeded to assess the net value of the company's assets, and arrived at a figure of $303 660, of which total he credited $140 169 proportionately to the shareholding of Fir. Humphreys. In paragraph 5 he said that "earnings and their resultant dividends are of fundamental importance in investment considerations", and he proceeded to value the shares of the company on an earnings basis, in order to compare such a valuation with the valuation of the company's net assets. On that basis he valued the total shareholding at $94 260, with Mr Humphreys' shares worth $43 510. His comparisons and conclusions were embodied in para graph 6 as follows:

"6. COMPARISONS AND CONCLUSIONS

6.1. The very material difference in the alternative valuations arises mainly from the following causes:

6.1.1. The restriction in dividend payments leading to an excessive accumulation of net current assets. Ed 6.1.2. The inflationary effect of fixed asset values.

6.1.2. The inflationary effect of fixed asset values.

6.1.3. A substantial decline in profits due to the circumstances prevailing both within the trade and the area - Schedule 11.

6.2. The main objective in the valuation is to arrive at a fair valuation to both parties, following the decision in the Salisbury Portland



PITTMAN J

Cement case. Difficulty however is encountered in this respect as two opposing factors are present - assets of genuine value yielding poor returns.

6.3. It must be recognized that no prudent businessman would invest his capital in a venture showing abnormally low yields particularly if at the time the future of that undertaking was unpredictable and he could not be assured of a reasonably rapid improvement in the situation. The political situation in Zimbabwe Rhodesia, the war situation and the general economic outlook in the trade were all factors conducive to caution and conservatism.

6.4. The alternative share valuations based on net assets at $303 660 and earnings at $94 260 produce

**Copyright Juta & Co Ltd**

such divergent results that one must look to other means of arriving at an acceptable conclusion."

In paragraph 7 he decided that a dividend yield basis for valuing the shares would be unsatisfactory for the same reasons that made an earnings basis unsatisfactory, because dividends are merely "the end product of earnings".

Having decided to "discard" the three methods of valuing the shares already discussed, that is, the net asset value, the earnings basis and the dividend yield basis, the arbitrator proceeded to elaborate a further alternative method, which he called "the discounted net asset value".

He explained it as follows:

"8.3. In Umtali (clothing Industries the adjusted return of $23656 (*vide* para. 5.3) on the adjusted capital employed of $303 660 (*vide* para. 4) is 7,8 per cent. which from a risk and marketability point of view is quite inadequate when measured against alternative investments. A price earnings ratio of 12,8 is too high when considering the shares which are for sale. On March 2, 1979, the price earnings ratios of some Zimbabwe Rhodesian market leaders were as follows (vice Rhodesian Financial Gazette - Schedule 12):

| | |
|---|---|
| Afdis | 11,6 |
| CAPS | 11,0 |
| Delta | 12,9 |
| Rhobank | 10,5 |
| D. Whitehead | 5,1 |
| Gatooma Textiles | 6,3 |

8.4. My view is that as the normal trading yield at valuation date is too low, a different, although possibly unorthodox approach, should be made whereby the assets themselves rather than their productive capacity are turned to account to give an investor the return he requires. In other words a prospective purchaser who cannot see a satisfactory trading return on current results would look to a disposal of the net assets for a fair and reasonable profit. The resultant price paid for the shares would allay his fears that his trading return was inadequate in the event of the company deciding to continue operations but at the same time he would be provided with security of capital in the event of liquidation."



PITTMAN J

The force of the word "discounted" is partly explained in paragraph 8.5, reading:

"8.5. In order to wind up the company in an orderly and profitable manner certain expenses would of necessity be incurred particularly the retention of the services of the managing directors so as to obtain the best possible terms of realization. I would assume that the stock and debtors of both companies could be disposed of or collected within three months whereas the fixed assets would probably take longer and for the purpose of this exercise a period of six months is considered reasonable."

He then assessed the discounted net asset value by reducing the net asset value of $303 660, firstly, by the costs of running down the company, and, secondly, by accepting that certain assets and stock would be sold at 10 per cent. below their book value. See paragraph 8.7, and compare the corresponding items in, for example, Schedule 2 of the first report. He thus determined the net asset value of the company on winding up at the revised figure of $288 995, instead of the original value of $303 660. He then took into account the fact that a purchaser of the shares would have expected a return of approximately 10 per cent. after taxation on his

**Copyright Juta & Co Ltd**

investment, over the period of six months that it would take to wind up the company. He decided that such a return could be calculated by further discounting the discounted net asset value of $288 995, by 20 per cent., because that further discount, after company tax at the rate of 48,375 per cent., would yield a return of approximately 10 per cent. (actually 10,3 per cent.) to the purchaser after six months. The final figure for the discounted net asset value of all the 16 260 shares in the company thus became $240 829, with Mr Humphreys' 7 505 shares, valued proportionately at $111158. I confess that I do not understand the mathematics of this last discounting step, but as it is not in dispute I have not persisted in seeking clarification of it.

During the hearing on the 13th December, 1979, the arbitrator mentioned that he had made a mistaken assessment of the value of stock in paragraph 8.7 of the first report, and that the value of the shares should have been $107 233, instead of $111 158. Mr and Mrs. Flood, in giving evidence, stressed that Mr Humphreys had only a minority shareholding. An accountant, Mr Smit, called as a witness for Mrs. Flood, discussed the valuation of the company's industrial buildings used by the arbitrator, the tax liability they would attract on a winding-up sale, and the discount figure of 20 per cent. used for the return of 10,3 per cent. after tax, which the purchaser would obtain from his investment after six months. In argument Mr *Milton,* for Mrs. Flood, urged that in assessing the market value of the shares, the arbitrator had had no



PITTMAN J

limitation placed upon him by the submission, in particular as regards an earnings basis for the valuation. He also claimed that there was no possibility of the company being wound up, and that "the generally accepted basis for a valuation is that of earnings". He also asked the arbitrator to reconsider the value of the company's immovable property, and the points discussed by Mr Smut.

Mr *Gardener,* for Mr Humphreys, argued that the submission did limit the manner in which the arbitrator could value the shares, by requiring the basis to be the value of the assets less the amount of the liabilities. However, the arbitrator was entitled to take other factors into consideration, such as the earnings potential of the shares. He said that flee question of what a willing buyer and a willing seller would agree as the price, was not relevant, because Mrs. Flood had to buy the shares and was not a willing purchaser. He also submitted that the fact that Mr Humphreys had a minority holding was irrelevant, because the value of his shares should be determined simply as a proportion of the value of the entire shareholding of the company.

In his report explaining his second award of $107270, which was again based on the discounted net asset value of the company, the arbitrator began by discussing Mr Flood's contention that a minority shareholding should be valued by reference solely to dividends. He rejected this, on the ground that if a company ceased to earn dividends, but retained valuable assets, its shares would still be of value. He continued:

> "My report was based on a situation such as that suggested above, whereby a certain type of investor would foresee a profit in a company being wound up for the reason that profits had almost run out and management had decided that in order to preserve the assets, operations should terminate and the assets be sold. In reply to my question as to what he would do in the event of the company running into losses, Mr Flood said he would consider

Copyright Juta & Co Ltd

three courses of action, i.e., try and remedy the situation, suspend operations or close down. My conclusions in my first report resulted from anticipating this very approach. Although I considered cessation rather than suspension, the effect would be much the same except that in the latter case the fixed property and possibly the plant would be retained. I also left the option open in case the remedial alternative was adopted by affording the investor a low but acceptable return until business improved. I should point out that to achieve these objectives, the attitude and voting strength of the minority shareholder would be of great importance as his concurrence would be necessary to pass the appropriate Special Resolution to implement the winding up scheme. The notion that a minority shareholder, or at least one holding in excess of 25 per cent. of the equity, has very little influence in company affairs, is not in my view entirely correct.



PITTMAN J

It should be noted that when referring to market value generally a purchaser of shares will always take into account the subsequent saleability of those shares and it is unlikely that successors in title would be bound by the terms of the agreement relating to the payments to Export Sales and Mr Flood's pension scheme. These conditions are obligatory in this particular valuation but as they would not be accepted in perpetuity the concept of market value in this instance is nebulous.

In concluding my remarks on the method of valuation, I would point out that despite the restrictive conditions imposed by the terms of the agreement, 1 considered all appropriate alternatives and in arriving at the discounted net asset value basis embodied both the net asset method as required by the agreement and the earnings method which constitutes the underlying basis of the divided yield method."

He then proceeded to justify his retention of the valuation of the company's buildings he had used in the first award and said that he had decided that the pre-taxation return required by a purchaser, who anticipated that the company would be wound up, should be 22,5 per cent. and not 20 per cent. He expressed his belief that the dominating consideration in the mind of the intending investor would be the benefits to him of a winding up. He then said:

"5. ARGUMENT LED BY COUNSEL FOR MR HUMPHREYS- ADVOCATE R GARDENER

Advocate Gardener submitted that I was bound by the terms of the agreement and although I was empowered to take other matters into account was nonetheless committed to approach the valuation in the manner laid down. He considered that the question of a willing buyer never came into it as Mrs. Flood was bound to buy in terms of an agreement which had been made an Order of Court. He likened the transaction to an expropriation of property and also drew attention to the deletion of the underlining of the word 'market' in clause 4 (a) (i) in order to remove the emphasis from the accepted sense of the word and whatever influence it may have had in my deliberations. He insisted that the approach to the valuation should be objective rather than subjective. He contended that the original cost of the shares, which had been the subject of some discussion during the hearing, had nothing to do with their valuation at January 31, 1979, and that if Mr Humphreys struck a successful bargain then that was his good fortune. He also stressed the point that Mr Flood's own witness, Mr J J Smit, agreed with my approach. I found nothing in Advocate Gardeners argument with which I disagreed.

6. CONCLUSIONS

My conclusions on the hearing are as follows:

6.1. The basis of valuation, i.e., the Discounted Net Asset method, is the correct one in these circumstances.

6.2. That the terms of reference set out in clause 4 (a) of the agreement place great emphasis on the value of the net assets. If comprehensive reference to net assets was not an influencing factor in the compilation



Copyright Juta & Co Ltd

of the agreement, why was it referred to in such detail? If the 'market value' was to be determined by reference to other factors, why were net assets mentioned at all?

6.3. Mr Flood in evidence said than' he would not have signed the agreement were it to be based on the asset value only. I find this difficult to comprehend as clause 4 (a) (iii) of the agreement even creates notional assets in the form of the payments made to Export Sales, less expenses, as well as the pension scheme for Mr Flood.

6.4. An error of calculation appearing in clause 8.7 (b) (i) of the original report will be adjusted in arriving at the final award.

6.5. Taxation adjustments will be considered and if thought fit will be made in the light of Mr Smit's evidence.

6.6. Note should be taken of the substantial discount which arises on assets of genuine value by application of this method of valuation:

| | |
|---|---|
| Net asset value of the company per clause | |
| 4 of the report . . . . . | 303 660 |
| Discounted net asset value of the company - | |
| per schedule 2 . . . . . | 232 406 |
| Discount on value of net assets - 23,5% | $71254 |

6.7. Notwithstanding the causes giving rise to the restriction on dividend distribution it must be borne in mind than' had normal declarations and payments been made over the past years the valuation of the shares would have been proportionately reduced."

After making certain minor adjustments to the figures used in the first report, he then finally fixed the purchase price of Mr Humphreys' shares at $107 720.

In her founding affidavit (paragraph 9.04), Mrs. Flood quoted paragraph 2.2 of the first report, and alleged that in it the arbitrator "shows a preconceived limitation of the factors he may consider and that, bearing in mind the objective of reaching a market value, he erred in imposing a limitation on the facts he was entitled to take into account". She observed (paragraph 9.06) that nowhere in the first award did the arbitrator find the market value of the shares, and she claimed (paragraph 9.07) that when the arbitrator said in paragraph 6.2 that "the main objective in the valuation is to arrive at a fair valuation to both parties", this was not in accordance with the submission, which was to determine the market value. She also complained (paragraph 9.09) that in paragraph 6.3 of the second award the arbitrator claimed that Mr Flood must have known that the submission (meaning the valuation?) would be based on the asset value only, whereas his valuation was based on a discounted net value basis, and not on the market value of the minority shareholding. Further to this complaint (paragraph 9.10), she said that if the agreement had been one to deter-



PITTMAN J

Copyright Juta & Co Ltd

mine the net asset value of the company and its associates, an arbitration would have been superfluous, and any competent book-keeper could have calculated the net asset value. She alleged that the arbitrator confused a "valuation" with the determination of the market value. Then in paragraph 9.11 she alleged that in paragraph 5 of the second award the arbitrator had misdirected himself by accepting that the question of a willing buyer never came into the matter, because she was bound to buy the shares. She said she was a willing buyer and that is why she signed the agreement. Finally, in paragraph 9.12 she dealt with certain assurances which she had obtained from her counsel before signing the submission, apparently in order to substantiate her claim that the arbitrator had to take into account not only the company's assets and liabilities, but also all other factors.

In his replying affidavit, paragraph 3, the arbitrator pointed out that the submission required him to determine the purchase price to be paid for the shares. He went on:

> "That purchase price would necessarily be the price that a willing buyer would pay to a willing seller of the shares or, in other words, the market value. My whole aim and approach throughout was to arrive at the price that such a buyer would be prepared to pay for the particular shares concerned. The final award which I made was my genuine and honest valuation Of the market value of the said shares arrived at after deep consideration of all aspects."

In paragraph 6 he said:

> "An intelligent examination of the provisional award shoves that I had studied the valuation from four different viewpoint but at all times had borne in mind the 'prospective purchaser' Who might contemplate an investment in this company. For instance, in para. 8.4 the words 'prospective purchaser' can only refer to the willing buyer mentioned in paragraph 3 this Affidavit. Such a person is a fundamental characteristic of a market valued."

In denying in paragraph 9 that there was a preconceived limitation of the factors available to him in arriving at the valuation, he said:

> "I point out that in paragraph 4 of the provisional award I arrived fit valuation on the net asset basis; in paragraph 5 I arrived at a valuation on the earnings basis taking into account the notional assets introduced into paragraph 4 of the Agreement (Annexure 1); in paragraph 6 I compared the results of these alternative methods and, having found a wide divergence between them, discarded both and looked for a further alternative; in paragraph 7 I considered the dividend yield basis which I rejected because of the close association between earnings and dividends; in paragraph 8 I considered an alternative method which, for the sake of a heading or name I called the 'discounted net asset value' method.

---



PITTMAN J

> 10. This valuation embraces both the net asset and earnings methods and arrives at a figure which affords prospective purchaser (the willing buyer) a satisfactory yield on an investment which is based on the disposal of the company's assets. The yield would be attractive to a certain type of investor who would in addition know that the option existed for the company to continue operations should such a decision be taken. The situation envisaged is in [act what pertained at January 30, 1979; i.e., net assets worth $303 660 yielding a minimal and unsatisfactory return. A prospective purchaser would be in the position off obtaining a quick return on valuable assets of between 22 per cent. and 23 per cent. with the knowledge that should a decision be taken in the light of anticipated events to continue the company's operations he would receive a yield, albeit small, during the bridging period until restoration of normal profitable activity."

---

**Copyright Juta & Co Ltd**

In her answering affidavit Mrs. Flood claimed that the arbitrator's affidavit was inconsistent with his reports. For example, she referred to his agreement in paragraph 5 of the second report with the argument that "the question of a willing buyer never came into it as Mrs. Flood was bound to buy in terms of an agreement which had been made an order of Court ". Also, she referred to his allegedly mistaken belief that there was a limitation of the factors he might consider, because he had said In paragraph 2.2 of the first report that he considered "the other factors" to "constitute a consideration only of an introduction to an element of goodwill over and above the valuation of the net physical assets". Finally, she said:

> "14. *Ad Paragraph 16.*
>
> I admit I am disputing the amount of the final award but say it is incorrect as the amount was not determined in terms of the submission but was based On a hypothetical winding up of both Umtali Clothing Industries (Private) Limited and Elastics and Tapes (Private) Limited, whereas the Second Respondent was not in a position to cause a winding up, and the majority shareholder has no intention of causing a winding up.
>
> 15. In replying generally to the First Respondent's Affidavit I state there is no mention in the submission that the shares must be valued on the basis of a winding - up and the First Respondent erred in so valuing the shares and disregarding the evidence that a winding-up was not contemplated."

In his replying affidavit, Mr Humphreys disagreed that Mrs. Flood would purchase his shares at their "market value". He said that the submission provided specifically that the "purchase price" of the shares would be determined by an arbitrator, but he denied that the arbitrator's function was "to determine the market value of the shares as such". He claimed that the arbitration had been conducted in accordance with the submission, and that he was entitled to an order enforcing the award and ancillary relief arising out of the submission. Mrs. Flood's reply was



that the arbitration had not been so conducted, and that part of the ancillary relief claimed by Mr Humphreys is to be rendered by her husband, and not by herself.

In my opinion, the Court's task is to decide, first, how the submission should have been interpreted by the arbitrator; secondly, whether in fact he conducted the arbitration in accordance with that interpretation; thirdly, whether Mrs. Flood's criticisms of his conduct are nevertheless valid, and, if so, whether they justify the setting aside of the award; and finally, whether the relief sought by Mr Humphreys should be ordered.

In my opinion, the prescribed duty of the arbitrator was set out with indisputable clarity in the submission. He had to fix a purchase price for Mr Humphreys' shares to be paid by Mrs. Flood. That purchase price was to determined by the arbitrator (1) by assessing the market value of the shares on the 31st January, 1979 (2) by basing that assessment on the value of the assets of the company less the amount of its liabilities, and (3) by taking into account all other factors which in his opinion were relevant. The effect of the remaining instructions, set out in subparagraphs (i), (ii) and (iii) of the submission are quite explicit, are not in dispute, and therefore do not require discussion.

The first point to be determined is the meaning in the present context of the phrase "market

Copyright Juta & Co Ltd

value". This phrase, when used in relation to a block of shares not quoted on a stock exchange, must mean the price that that block would fetch if bought on an open market. However, it is not enough to say that the phrase therefore means simply the price that Mr Humphreys' shares would or could have brought, if he had merely offered them to the public at large. To assess the market value. in this context, it must be assumed not only that the shares would be put on the open market. It must also be assumed, first, that neither the seller nor the buyer would be under any pressure to enter into the sale on such a market. Secondly, it must be assumed that neither party would be motivated in agreeing on the price by some subjective or personal consideration such as a desire to be associated in business with the other shareholder. Thirdly, it must be assumed that both the buyer and the seller would be reasonably well-informed about all facts affecting the value of the shares. Other assumptions are also required, for example, that the method of payment would be one normally used in such transactions. I think that these observations are too trite to require authority to be cited in support of them. But if it were necessary to cite such authority, I would think it enough to refer as examples to the judgments



PITTMAN J

of COLMAN J, and MAISELS J, already mentioned, and that of MILLER A J.A., in *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (AD) at 381F.

My purpose in making these observations is to stress that the basic purpose in any assessment of the market value of property which is not regularly sold and the regular price of which is thus not immediately ascertainable, is to fix a price which is fair to both the seller and the purchaser. In my view, when a judge enlarges upon that basic purpose, he is not altering it, he is merely emphasizing one or more aspects of it relevant to the case before him. For example, when a judge holds that the market value of a property means what a willing purchaser would pay to a willing seller on the open market, he is only emphasizing, by the repeated use of the world "willing", that neither party must be under any compulsion to enter into the sale, and, by the use of the phrase "on the open market", that the property must be assumed to have been purchasable by any one of the entire group of persons, who are normally interested in buying such property. I have not attempted to find a reported case in which all possible aspects of the basic purpose have been listed, because it is most unlikely that such a listing has eves been attempted, and I certainly do not intend to make such an attempt now.

I have discussed this matter in detail, because I think it is of crucial importance in this case to appreciate that the basic task of the arbitrator was to determine a price for the shares fair to both the notional seller and the notional purchaser, because he would be justified in assuming that such a price would be acceptable to both of them, would therefore be the one agreed to by them, and would thus be a fair determination of their market value. Of course, in this particular submission, certain instructions were given to the arbitrator which he had to follow. The cardinal one is that he had to base his assessment on the value of the assets of the company, less the amount of its liabilities. This instruction was absolute, in the sense that he was completely barred from using any material other than the net asset value as the basis or foundation or starting point of the assessment. However, because of the second instruction that he take into account all other factors which in his opinion were relevant, he was not merely entitled but also

Copyright Juta & Co Ltd

obliged to consider to what extent such other factors should affect the net asset value.

In my view, therefore, the arbitrator must be held to have conducted the arbitration in accordance with the submission, if he used the net asset value of the company as the basis of his assessment of a price for



PITTMAN J

the shares fair to both the seller and the purchaser, provided that that net asset value was calculated as prescribed, and provided that he took into account all other factors which in his opinion were relevant in assessing that price. I repeat that the instruction upon which this last mentioned proviso was based did not entitle the arbitrator to ignore at any stage the difference between the value of the assets of the company less the amount of its liabilities. That difference had to continue to form the basis of his final assessment, although it could be an acted or modified by any other factor he considered relevant.

In his replying affidavit, paragraph 3, the arbitrator said:

> "My whole aim and approach throughout was to arrive at the price that (a willing buyer) would be prepared to pay for the particular shares concerned. The final award which I made was my genuine and honest valuation of the market value of the said shares arrived at after deep consideration of all aspects."

When this passage is read with paragraph 6.2 of the first report, and with the explanation of the discounted net asset value in paragraph 8 I think it has to be accepted that the arbitrator did properly understand what the submission obliged him to do, and did make his award accordingly.

The major allegations in Mrs. Flood's two affidavits are, I believe, only elaborations of aspects of her two basic complaints: first, that the arbitrator was not entitled to hold that the main objective in the valuation was to arrive at a fair valuation to both parties and, secondly, that he erred in imposing a limitation on the facts he was entitled to take into account.

In my judgment, the first complaint is of no substance, because it is based on the incorrect assumption that a valuation fair to both parties is not an assessment of the market value of the shares. The second complaint is also of no substance because it cannot be maintained that in fact the arbitrator imposed the alleged limitation. He did make three different valuations of the shares, based: (1) on the simple difference between the value of the assets and the amount of the liabilities; (2) on the earnings of the company; and (3) on the dividends yielded by the company, but then he discarded all these three valuations. If he had proceeded to make a Fourth valuation which did not have as its basis the difference between the value of the assets and the amount of the liabilities, Mrs. Flood would have been justified in claiming that he had failed to follow the submission. But his fourth valuation, on the discounted net asset value basis, was based upon that difference, and hence followed the submission.



PITTMAN J

Copyright Juta & Co Ltd

I am aware that there are certain passages in the two reports which viewed in isolation give some support for Mrs. Flood's second complaint. But I consider that a study of the steps actually taken by the arbitrator in making his final valuation shows clearly that he did in fact make it without wrongly limiting himself in his approach. In other words, I accept the explanation of his approach set out in paragraphs 6 to 10 of his replying affidavit. In this regard I wish to point out that when the arbitrator said in paragraph 2.2 of the first report that the only other factor he would take into account beyond those listed in the submission was the goodwill attaching to them, I think he must have meant the totality of all the various factors which would influence their market value. In effect, he said this in paragraph 7 of his replying affidavit, and I see no reason to disbelieve that statement. I therefore reject paragraph 9.04 of Mrs. Flood's founding affidavit. There is no substance in paragraphs 9.05 to 9.09, because they are based on an incorrect assumption of the meaning of "market value".

Paragraph 9.10 reads:

> "9.10. Further to paragraph 9.09 hereof I state that had the agreement been one to determine the net asset value of the two companies, an arbitration would have been superfluous, and any competent book keeper could have calculated the net asset value. The [First Respondent has confused a 'valuation' with the determination of the market value."

In argument, the case of *Heymann's Estate v Featherstone,* 1930 EDL 105 was referred to in support of this complaint. As I understand it, the point sought to be made was that instead of adopting the judicial approach required of an arbitrator, with proper consideration of all relevant factors, the arbitrator here merely indulged in a mathematical exercise of addition and subtraction, without taking into account mathematical imponderables such as the fact that Umtali was a district suffering economically through the war, and that Mr Humphreys' shares were a minority holding. This complaint is really only the complaint already dealt with, and in my view Is also answered by paragraphs 6 to 10 of the arbitrator's affidavit. The case of *Heymann's Estate* quoted in support, merely decided that a particular agreement to obtain a valuation of immovable property in a deceased estate from two valuers was not a submission, within the meaning of the Arbitrations Act of South Africa, and that therefore the Court had no power to appoint an umpire when the two valuers failed to reach agreement. That case has no relevance to the present dispute.

In paragraph 9.11 Mrs. Flood again complained of the passage in paragraph 5 of the second report, in which the arbitrator expressed his





agreement with the argument that the question of a willing buyer did not come into the matter because she was bound to buy. The arbitrator has nowhere dealt directly with this complaint, although he stressed in paragraph 3 of his affidavit the concept of a willing buyer was necessarily involved in his assessment. I have accepted paragraph 3, and I consider that his professed agreement with the passage in paragraph 5 of the second report was simply an inadvertent inaccuracy.

In paragraph 9.12 Mrs. Flood put on record an assurance received by her from her counsel

**Copyright Juta & Co Ltd**

prior to her signing the submission. Neither such assurance nor her description of how the words "and shall take into account" came to be inserted in the submission, has any evidential value, and must be ignored.

Finally, in paragraph 9.13 she said:

> "9.13 In paragraph 7 of the second award, the Arbitrator determined the value of the shares of the whole company and on that figure based the value of the 7 505 shares owned by Mr Humphreys. This is not a determination of the market value of the shares I agreed to buy."

Opinions may differ as to whether the arbitrator should have assessed the market value of the minority shareholding by treating it as simply proportionate to the market value of the entire shareholding. But his assessment was a matter of discretion which could only be objected to if it was not made in accordance with the submission. Mrs. Flood says that it was not a determination of the market value of the shares, by which I understand her to mean that this approach is yet another example of the arbitrator's wrong interpretation of the submission. I reject this submission, again on the ground that she has misunderstood the meaning Of "market value" in the submission. For the same reasons, I reject her complaint, stressed in argument, that the arbitrator had no right to assume that the company would not be a going concern. See also paragraph 10 of the arbitrator's replying affidavit..

It follows that I must dismiss the application with costs. The arbitrator and Mr Humphreys have both asked for attorney and client costs on the ground that the application was frivolous and vexatious, and Mr Humphreys adds that it was brought simply for purposes of delay. I am not satisfied that any of these allegations is correct. The case in my view has not been an easy one to decide, as can be judged from the inconsistencies between the two replying affidavits, and I have no reason to think that Mrs. Flood brought it in bad faith, or with an ulterior motive.

---

**1980 ZLR p129**

PITTMAN J

As regards Mr Humphreys' counterclaim for enforcement of the award, Mrs. Flood has objected to paragraphs 1, 2 and 4 only on the ground that her application should be granted. As she has failed on that ground, the application will be granted in respect of those paragraphs, with certain minor alterations of phrasing, but with costs awarded on the ordinary scale. As regards paragraph 3, this must be altered so that effect is given only to the undertaking in paragraph 9 (b) of the submission.

I therefore order as follows:

1. The application of the Applicant against the First and Second Respondents is dismissed, with costs.

2. The counter-application of the Second Respondent against the Applicant is granted as follows:

   (1) The award dated the 6th February, 1980, made by the First Respondent as arbitrator in terms of an Order of this Honourable Court in Case No. GD 1519/77 is

**Copyright Juta & Co Ltd**

hereby declared to be a judgment of this Honourable Court.

(2) The Applicant is hereby ordered to pay to the Second Respondent the sum of $55 973,73, with interest thereon at the rate of 10 per centum per annum from the 6th February, 1980:

Provided that the said sum of $55973,73 and the said interest shall be payable in accordance with paragraph 6 (b) of the Agreement referred to in the said Order of this Honourable Court.

(3) The Applicant shall pledge her shareholding in Umtali Clothing Industries (Private) Limited to the Second Respondent in accordance with paragraph 9 (b) of the said Agreement

(4) The Applicant shall pay the costs of the Second Respondent.

*Higham, Clift & Co*., Umtali, and *Honey & Blanckenberg*, Salisbury attorneys for the applicant.

*Coghlan, Welsh & Guest,* attorneys for the first respondent.

*Gargan Bros & Chadder*, Umtali, and *Bowles Brighton & Cole Bowen*, attorneys for the second respondent.



## LMS ELECTRICAL ENGINEERS (PRIVATE) LIMITED v TASSBURG SCREW INDUSTRIES (PRIVATE) LIMITED 1980 ZLR 130

**Court** **General Division, Salisbury**

Civil Action

Beck, J

29th May and 2nd June, 1980

### Flynote

Estoppel - party seeking to rely on its own act to ground estoppel - whether defence of estoppel available.

### Headnote

A party to a contract who, by overcharging for goods supplied and work done, induces the other party to overpay him for those goods and services, cannot rely on the fact that the payments were made voluntarily to estop the other party from recovering the overpayment through the *condictio indebiti* even if the other party had a contractual duty to ensure that all payments were in fact due before making them.

Cases cited:

Copyright Juta & Co Ltd

*Durban Corporation Superannuation Fund v Campbell,* 1949 (3) SA 1057 (D.);

*Barclays Bank International Ltd v African Diamond Exporters (Pty.) Ltd.* 1977 (1) SA 298 (W).

*M T O'Meara*, for the applicant (defendant in the main action).

*C L Mercer*, for the respondent (plaintiff in the main action).

## Judgment

**Beck J:** In May, 1976, the plaintiff issued and caused to be served on the defendant a summons claiming an amount of $5711,26 "being the balance due in respect of work done and materials supplied by plaintiff during 1975 at defendant's special instance and request".

In February, 1977, the plaintiff furnished further particulars to its claim, from which it emerged that the plaintiff relied on a written memorial (dated February, 1974, and annexed to the further particulars) of a contract between the parties to effect certain electrical installations for the defendant at a quoted price of $21 687,70; as well as on an oral agreement to effect certain extra electrical installations which are specified in the pleadings, with an implied undertaking to pay a fair and reasonable remuneration therefor, which reasonable remuneration amounted to $26 560,40, making a final contract sum of $48 248,10, of which total amount the defendant had paid only $42536,84.



BECK J

In January, 1979, the defendant pleaded to the claim as particularized, admitting the agreement as recorded in the writing annexed to the plaintiff's pleadings, and admitting the further oral agreement with its implied term to pay a fair and reasonable remuneration for the additional work as specified, but alleging that a fair and reasonable remuneration for the extra work did not exceed the amount of $20 849,41 which, together with the agreed amount of $21687,70 for the initial contract, made up the total sum of $42 536,84 that the defendant had paid the plaintiff.

As matters then stood, almost three years after the summons was served, the only issue between the parties was whether a fair and reasonable remuneration for the extra work admittedly done by the plaintiff was $26 560,40, as contended by plaintiff, or only $20 849,14, as contended by defendant. The terms of the agreements, the nature and extent of the extra work done, and the competence with which all the work was done, were not in dispute. In November, 1979, however, the defendant filed a claim in reconvention in which it sought from the plaintiff repayment of an amount of $12 702,89. The claim in reconvention was pleaded as follows:

> "1. The parties are referred to as before.
>
> 2. In terms of the original agreement between the parties, Plaintiff performed certain electrical work and provided certain electrical goods in the construction of the said extension to Defendant's factory.
>
> 3. It was an express term of the said agreement that Defendant would pay Plaintiff a fair and reasonable remuneration in respect of such work and the invoice price of the said goods. Alternatively: It was an

Copyright Juta & Co Ltd

implied term of the said agreement that Defendant would pay Plaintiff a fair and reasonable remuneration for such work and goods.

4. A fair and reasonable remuneration for the said work and the invoice price of the Said goods, alternatively, a fair and reasonable remuneration for both to Plaintiff is $29 832,75.

5. Plaintiff charged Defendant for the said work and goods an amount of $48 247,90 of which amount Defendant has paid to Plaintiff the sum of $42536,84.

6. Defendant only ascertained after the 26th June, 1979, that a fair and reasonable charge for the said work plus the invoice prices of the said goods, alternatively, a fair and reasonable charge for both was $29 832,75.

7. Accordingly, Defendant has overpaid Plaintiff an amount of $12702,89 in the reasonable and *bona fide* belief that it was due to Plaintiff."



BECK J

It is apparent from these allegations that the defendant no longer admitted that the original contract was for an agreed amount of $21687,70, and that only the supplementary contract for extras carried an implied term that the work that was done thereunder would be fairly and reasonably remunerated. It was now the defendant's case that all the work that was done, was done in accordance with an express term of the original agreement to the effect that the plaintiff would be paid the invoice price of the goods supplied, and in addition a fair and reasonable remuneration for the work done. In the alternative, the defendant alleged that fit was an implied term that a fair and reasonable remuneration would be paid both for the goods provided and for the work done. On either basis, defendant claimed that the plaintiff was only entitled to be paid a total sum of $29 832,75, whereas the plaintiff had in fact mistakenly been paid an amount of $42 536,84, and refund of the alleged overpayment of $12 702,89 was sought. In further particulars to its claim in reconvention the defendant alleged that the conduct of the plaintiff in submitting to the defendant accounts and statements totalling $48 247,90 for the work done and the materials supplied, but without disclosing to the defendant any invoices or other documents in support of the charges raised, caused or contributed to the defendant's reasonable mistake in overpaying the plaintiff.

In its plea to this counterclaim the plaintiff admitted paragraphs 2 and 3 of that counterclaim, thereby admitting *(inter alia)* that it was an express term of the agreement "hereunder all the work was done and all the goods supplied that the plaintiff would be paid the invoice price of the goods. The plaintiff went on to deny that the total remuneration to which it was entitled amounted to $29 832,75 only, and denied that it had been benefited and unjustly enriched by any overpayment whatsoever. In addition, the plaintiff pleaded that:

"4. Further, and in any event, Defendant is estopped from averring that it has overpaid plaintiff in that Defendant delivered the said moneys to plaintiff voluntarily in terms of the aforesaid express or implied agreement and thereby misled Plaintiff to believe that the said sum would not be disputed.

5. Plaintiff was thereby induced to act to its detriment in that it:

(a) Continued to expend time and moneys in pursuance of the said agreement;

**Copyright Juta & Co Ltd**

(b) Used the said moneys in the course of its business; and

(c) Took no steps to protect its position in respect of justifying the reasonableness of its charges."

This plea was filed in March, 1980, and in April of this year the defendant filed an application to strike out paragraphs 4 and 5 of plain-



BECK J

tiff's plea in reconvention as being contradictory, bad in law and disclosing no defence in that:

"1. No facts are alleged by Plaintiff upon which a defence of estoppel may be based.

2. Plaintiff admits that it charged Defendant an amount of $48 247,90 in respect of the work performed by it.

3. Such admission contradicts Plaintiff's averment that Defendant paid the said sum voluntarily.

4. Defendant's conduct, as alleged by Plaintiff, and Plaintiff's alleged detriment stem from Plaintiff's own admitted act in raising the said charge. Accordingly Plaintiff is not entitled to rely upon its own act as grounding an estoppel.

5. There is not in law, and Plaintiff does not allege, any duty upon Defendant to dispute the reasonableness of the said charge, either at the time it was raised or at any other time.

6. In the absence of any such duty upon Defendant an omission to dispute the said charge did not amount to a misleading of Plaintiff, or to an inducement to Plaintiff to act to its detriment."

This application has now been argued before me, four years after action was instituted, and more than four years after defendant had paid the plaintiff in total the amount of $42 536,84. I do not know why the parties have been so extraordinarily lethargic in getting this matter ripe for trial, but I have mentioned the snail's pace at which they have been content to crawl with some degree of irritation at the thought that this Court will in all probability have to make do in consequence with evidence as to what were fair and reasonable charges five years ago, that is inferior to the evidence that could have been made available to the Court had they proceeded with reasonable expedition.

I turn to the application to strike out paragraphs 4 and 5 of the plea in reconvention. The first complaint is that the plaintiff's averment that the defendant paid a total amount of $42 536,84 voluntarily is contradicted by the plaintiff's admission that it charged the defendant an amount of $48 247,90. I do not consider that there is any substance in this complaint. The allegation, in paragraph 4 of the plea, that "the defendant delivered the said moneys to plaintiff voluntarily" means no more, in my view than that the payment in question was made without any reservations about the validity of the liability that the payment was, *pro tanto*, intended to discharge. That assertion in no way contradicts the admission that the plaintiff "charged the defendant an amount of $48 247,90".

The main complaint is that the plaintiff seeks, in the final analysis, to rely on its own act (in raising the said charge) to ground an estoppel,



Copyright Juta & Co Ltd

which it cannot do. It is my view that this complaint is well founded. One must assume for the purposes of this argument that there was in fact an overpayment that was made in *justus error* which the defendant seeks to recover by the *condictio indebiti.* On that hypothesis the Plaintiff must be taken to have known, actually or constructively, that the charge it raised against the defendant was not in accordance with the terms of their contract - in particular that it was not supported by the invoice prices for the goods supplied, which invoice prices were allegedly not disclosed to the defendant until long after the alleged overpayment was made. Under these circumstances it would obviously be unconscionable for the plaintiff to seek to raise an estoppel against the defendant; and it would indeed be impossible for the plaintiff to prove that, in the light of its own actual or presumed knowledge of the defendant's error in making the overpayment, it (the plaintiff) was induced by the defendant's conduct to act to its detriment. I agree, with respect, with the observation of DE WET, J, at page 1066 of *Durban Corporation Superannuation Fund v Campbell*, 1949 (3) SA 1057 (D) that:

> ". . . normally . . . the defence (of estoppel) would not avail against a claim for a *condictio indebiti* where the mistaken payment was made to a person who knew or ought to have known that the money was not owing to him."

It was contended by Mr *Mercer,* who appears for the plaintiff, that it it is arguable, if regard is had to the terms of the written memorial of the original contract between the parties, that there was a duty on the defendant to ensure that all payments were in fact due before making them. If this submission is correct (as to which I express no opinion) it might deprive the defendant of the relief it seeks under the *condictio indebiti,* for if the overpayment was made *supina aut affectata* the degree of the defendant's negligence in the conduct of its own affairs may serve to prevent it from establishing that the overpayment was a *justus error* (Barclays Bank *International Ltd v African Diamond Exporters (Pty.) Ltd.,* 1977 (1) SA 298 1.) at 304-308). That is a consideration that goes to the onus that the defendant must discharge in order to succeed on the *condictio indebiti* that it relies on. It is not a consideration that goes to support a defence of estoppel sought to be raised by a party who knew, or ought to have known, of the mistaken belief under which his adversary laboured, and who, in addition, may even have contributed to that mistake by his own conduct.

Accordingly the application succeeds with costs and paragraphs 4 and 5 of the Plaintiff's plea to the defendant's claim in reconvention are struck out as being bad in law and disclosing no defence.

*H. Shaw,* attorney for the plaintiff.

*Scanlen & Holderness,* attorneys for the defendant.



## AFRICAN DISTILLERS LIMITED v ZIETKIEWICZ AND OTHERS 1980 ZLR 135

**Court** **General Division, Salisbury**

Copyright Juta & Co Ltd

Civil Action

Beck, J

29th May and 4th June, 1980

## Flynote

Court - jurisdiction of General Division- grounds for assuming jurisdiction over peregrini - eject of section 40 of High Court Act [Chapter 14].

## Headnote

Section 40 of the High Court Act [*Chapter 14*] does not confer jurisdiction on the General Division to entertain a suit against a *peregrinus* where neither the *peregrinus* nor any of his property is within the territorial jurisdiction of the Court.

Cases cited:

*Foord v Foord,* 1924 WLD 81;

*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (AD);

*Mackay v Hepker* 1941 SR 33;

*Risely v Watt* 1965 RLR 82 (GD); 1965 (2) SA 664 (SR);

*McGuire v Fourie* 1962 R & N 421;

*Acutt Blaine & Co v Colonial Marine Assurance Co* (1882) 1 SC 402;

*Mendelssohn v Mendelssohn's Executor* 1908 TH 190;

*Borough of Finsbury Permanent Investment Building Society v Vogel* (1910) 31 NLR 402;

*Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670;

*Ex parse Sletcher* 1947 SR 6;

*Ex parte Heald & Anor* NNO 1952 SR 105;

*Ex parse Mor-Tal Construction Co (Pvt) Ltd* 1962 R & N 248 1962 (2) SA 664 (SR);

*Ex parte Mercer* 1969 (1) RLR 117 (GD); 1969 (2) SA 207 (R);

*Central African Airways Corporation v Vickers-Armstrong Ltd* 1956 R & N 4; 1956 (2) SA 492 (FSC);

*Ex parte Coote & Ors* 1962 R & N 423;

*X & Y (Pvt) Ltd v Z & Anor* 1973 (2) RLR 178 (G.D.); 1974 (1) SA 195 (R)

*W J Millar SC,* for the plaintiff.

**Copyright Juta & Co Ltd**

*R Hill,* for the first and second defendants.



BECK J

## Judgment

**Beck J:** The defendants, all of whom are residents of the Republic of South Africa and thus *peregrini* as far as Zimbabwe is concerned, have been sued in this Court for damages arising from their alleged breaches of a contract with the plaintiff that was entered into and performed in this country. *Ratione contractus,* therefore, a jurisdictional ground exists for this Court to entertain the suit of the plaintiff, who is an *incola* of Zimbabwe.

All three defendants were served with the summons and declaration in the Republic of South Africa but thus far only the first two defendants have pleaded thereto. These two defendants have filed a special plea objecting to the jurisdiction of this Court. The special plea avers that they are resident in the Republic of South Africa, that no order has been sought by the plaintiff to attach their persons or their property, that neither of them is possessed of any property in Zimbabwe, and that neither of them submits to the jurisdiction of this Court. In its replication-to this special plea the plaintiff has not denied any of these averments, but has averred that both defendants possess property in the Republic Of South Africa. This last-mentioned averment, while not formally conceded by the defendants, is not specifically challenged and, by consent, documentary evidence has been put before the Court from which it may properly be inferred that they do indeed possess property in the Republic of South Africa. The issue raised by the special plea has been set down and heard, and I must now determine whether or not this Court has jurisdiction to entertain the plaintiff's action against the first two defendants.

The well settled common law, for which there is no dearth of judicial authority, is that for claims that sound in money brought by an *incola* or a *peregrinus* against a *peregrinus,* there must be an arrest of the person of the defendant *peregrinus* or an attachment his property within the territorial jurisdiction of the Court in order to found jurisdiction, or to confirm jurisdiction in those cases where some other jurisdictional ground exists in relation to the claim - such as, for example, that it arises from a contract concluded or a delict committed within the Court's territorial limits of jurisdiction. Such arrests or attachments are necessary in order to satisfy, albeit only partially and imperfectly in some cases, the doctrine of effectiveness, for the Court will not concern itself with suits in which the resulting judgment will be no more than a *brutum fulmen.* (*Foord v Foord,* 1924 WLD 81 at 87; *Thermo Radiant Oven Sales (Pty.) Ltd. v Nelspruit Bakeries (Pty.) Ltd.* 1969 (2) SA 295 (AD) at 300D and 307A-311E.)



BECK J

In accordance with these principles and practice the plaintiff's suit in the instant case could not be entertained against the first two peregrine defendants who have resisted submission to this Court's jurisdiction, whose persons have not been arrested, and who have no property in Zimbabwe capable of attachment, even though they have allegedly breached a contract concluded by them with the plaintiff in this country. Reliance however, is placed by the plaintiff

Copyright Juta & Co Ltd

on the provisions of section 40 of the High Court Act [*Chapter 14*], which, it is submitted, has so altered the common law as to entitle the plaintiff to have its claim tried in this Court without the need for any such attachment or arrest to fortify and confirm the jurisdictional ground *(ratione contractus)* that exists.

The predecessor of section 40 of the High Court Act was first enacted in 1933 and appeared as section 17 of the then High Court Act [*Chapter 8 of 1939*] in the following terms:

> "17. The power exercised prior to the 21st day of April, 1933, by the High Court of founding jurisdiction by attachment or arrest may after such date be exercised by the issue of an edictal citation with or without an order for attachment or arrest as to the said Court seems fit."

As far as I am aware the first reported case in which this section fell for consideration was that of *Mackay v Hepker,* 1941 SR 33. That decision supports the special plea that the defendants have filed in the present matter. At pages 35-36 HUDSON, J (as he then was), said:

> "It is contended on behalf of the applicant that this section empowers the Court to issue an edictal citation in those cases in which it has jurisdiction to hear the proposed action, for instance *ratione domicilii,* or *ratione rei sitae,* irrespective of whether or not the defendant is himself within the jurisdiction or has property here which can be attached.
>
> Now it is clear that the section deals only with the exercise of a power already possessed by the Court; there is nothing in the section to indicate that the legislature intended to confer on the Court any extension of the power itself. It is necessary therefore to inquire first what the power referred to is. The Court is given, by section 2 of the Act, jurisdiction over all persons and over all matters within the Colony. In accordance with decisions in the Courts of the Union this section has been held to include jurisdiction in those cases where, though the defendant is a *peregrinus*, the action is founded on a contract either entered into or to be performed within the Colony or the subject matter of the action was situated within the Colony or, as here, where a tort had been committed within the Colony. In all such cases the process of the Court is served on the defendant by means of edictal citation. The Court however cannot issue such a citation unless accompanied by either the arrest of the attachment, of any of his goods, within the Colony. The Court therefore had no power to order the issue of an edictal citation unless either the defendant himself were, or had goods capable of attachment, within the Colony. In my opinion section 17 cannot be inter-



> preted as extending that power. It must be interpreted in accordance with the primary meaning of the words used merely as conferring on the Court a discretion in regard to ordering arrest or attachment where either the person or the goods of the defendant are capable of attachment. That this is the meaning of the section is clear from the concluding words 'with or without an order for attachment as to the said Court seems fit.' Obviously the Court cannot have a discretion as to ordering attachment or arrest unless there is something in respect of which that order can be made. No doubt it was contemplated that there may be cases where arrest or attachment would cause unnecessary inconvenience or expense and it was considered desirable to give the Court power to dispense with arrest or attachment in such cases." (The underlining is mine.)

Section 40 of the current High Court Act [*Chapter 14*] was enacted in 1963. It reads:

> "40. The General Division may exercise the jurisdiction founded on or confirmed by attachment or arrest by the issue of process for service outside the jurisdiction of the Court, with or without an order for attachment or arrest as to that Court seems fit."

**Copyright Juta & Co Ltd**

In *Risely v Watt,* 1965 RLR 82 (G.D.); 1965 (a) SA 664 (SR), DAVIES J (as he then was), had to consider whether the section in its altered form affected the validity of the decision in *Mackay v Hepker (supra)*. He held that it did not, and adhered to the view that the section, although broadened, "in no way extends the common-law limits of jurisdiction" but "still deals only with the discretion of the Court to order attachment or arrest and does not broaden the jurisdiction of the Court. (Page 88E page 668H of the South African report.) Accordingly he held that this Court had no jurisdiction to entertain an *incola's* claim for monetary relief arising from a contract that the peregrine defendant had concluded in this country, where the defendant had not been personally attached here and had no property in Zimbabwe that was capable of attachment.

The broadening of the section appears to have been the result of the decision in *McGuire v Fourie,* 1962 R & N 421, in which it was held that section 17 of the former High Court Act conferred on the Court a discretion to ameliorate the common-law prerequisite for jurisdictional purposes of arrest or attachment in relation to the issue of an edictal citation only, and not also in relation to the issue of a summons to be served outside the jurisdiction of the Court. The altered wording of the new section eliminated that anomalous limitation, but it made no attempt to disturb the decision in *Mackay v Hepker, supra*. Nor is there any reason why the decision in *Mackay's* case should be thought to be undesirable. It is one thing to confer a discretion to dispense with the need for the arrest of a *peregrinus* or for the attachment of his property where such



BECK J

arrest or attachment can be made, but where the Court has reason to conclude that the oppression inherent in such arrest or attachment is not, in all the circumstances, reasonably necessary for the purpose of rendering effective a judgment unfavourable to the *peregrinus.* It is quite another thing to give to the Court a jurisdiction it would not otherwise possess under the common law over a *peregrinus* whose person and whose property are both beyond the territorial limits of the Court's powers, and thus not subject to arrest or attachment, and who refuses to submit to the Court's jurisdiction. It was submitted that the doctrine of effectiveness is nevertheless capable of being satisfied in such a case because, to take the instant case as an example, provisional sentence could be sought in the Republic of South Africa (where the defendants do have property) on a judgment given in this Court against them. That contention however, begs the question: a South African Court would not enforce, by whatever procedure, a judgment of a foreign Court which at foreign Court had no jurisdiction to issue. See: *Acutt Blaine & Co v Colonial Marine Assurance Co.* (1882) 1 SC 402; *Mendelssohn v Mendelssohn's Executor,* 1908 TH 190, *Borough of Finsbury Permanent Investment Building Society v Vogel* (1910) 31 NLR 402 (which applied the decision in *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670).

As might be expected, there is no reported case (nor any unreported case of which I am aware) in which this Court has considered that it could exercise jurisdiction in circumstances such as the present by virtue of section 17 of the old Act, or section 40 of the current Act. In *ex parte Sletcher,* 1947 SR 6, the judgment of TREDGOLD J, as he then was, contains (at page 8) the following sentence: "It seems to me, whatever may have been the previous practice, since the

Copyright Juta & Co Ltd

passing of the amendment which is now incorporated in the High Court Act, section 17, it can never be said that attachment is necessary." This utterance however, is not to be divorced from the context of the facts of that case, which were that specific performance was sought against a peregrine defendant of a contract for the sale of land that was situated within this country, and, in the exercise of its discretion, the Court ordered the attachment of that land.

In *ex parte Heald & Another* N N.O., 1952 SR 105, an *incola* was given leave to issue an edictal citation on a monetary claim against a peregrine defendant who had property within the country and, in its discretion, the Court ordered the attachment of that property. The same judge (BEADLE, J, as he then was) gave similar relief in similar circumstances in the case of *ex parte Mor - Tab Construction Co (Pvt)*

---



BECK J

*Ltd.,* 1962 R & N 248, 1962 (2) SA 664 (SR). At 249H (665G of the South African report) the learned Judge, dealing with the information that the Court will require for the proper exercise by it of the judicial discretion conferred by the Act, said:

> "The Court will want to know the value of the property which is sought to be attached, because, *while the value of the property might be a quite irrelevant consideration in deciding whether or not the Court has jurisdiction*, it Is a most important consideration in deciding whether the Court in the exercise of its discretion can equitably order an attachment of the property to be made."

Mr *Millar,* who appears for the plaintiff, relying on the words that I have italicised in this passage, has submitted that, if the value of the property is irrelevant for the purpose of jurisdiction, then the complete non-existence of property in this country capable of attachment should be equally irrelevant. I disagree. The important consideration is that there must be property of *some* value within the jurisdiction that is capable, if need be, of attachment in order to give recognition to the doctrine of effectiveness, even though its value may be woefully insufficient to "satisfy" the judgment sought. At page 309G-H of the *Thermo Radiant Oven Soles case, supra*, POTGIETER JA, said:

> "It has never been disputed that in our law, as in English and American law, a Court has jurisdiction in respect of a resident *incola* on the principle of effectiveness; and the reason why the Court can give an effective judgment is because it is considered that usually a person's possessions are where his home is, and that execution can be levied against those possessions. Yet it may happen that the amount of the judgment may to some considerable extent exceed the value of his possessions and that execution thereon will, therefore, not satisfy the judgment. It has never been suggested that a Court can exercise jurisdiction in respect of a resident *incola* only if he has sufficient assets in the Court's territorial jurisdiction which will, on execution, completely satisfy the debt. That is the reason why I indicated earlier in this judgment that the word 'satisfy' used by INNES CJ, in *Rothschild*'s case. *supra*, and SMITH J, in *Zakowski's* case, *supra*, is inappropriate."

That BEADLE, J, by no means contemplated that the very existence within the country of attachable property might be irrelevant for jurisdictional purposes clearly emerges from his later judgment in *ex parte Mercer,* 1969 (1) RLR 117 (G.D.); 1969 (2) SA 207 (R). At page 117 (page 207G-H of the South African report) the CHIEF JUSTICE said:

> "The cause of the action therefore, arises in the territory and, *as the respondent has property within the jurisdiction of this Court,* this Court has jurisdiction to hear the suit; but, were it not for the provisions of section 34

---

**Copyright Juta & Co Ltd**

of the High Court Act, No. 22 of 1964, this would be a case where it would be necessary to attach the respondent's property in the territory in order to confirm jurisdiction." (My italics.)



BECK J

Again, at page 119B (page 208H of the South African report) he said:

"In cases where it is necessary for the defendant either to be in the jurisdiction himself or to have property within the jurisdiction before the Court can assume jurisdiction, the proper practice therefore is to proceed by way of edictal citation . . ."

and to set out the information the Court will require for the proper exercise of its discretion if an attachment order is sought in addition to the leave to issue an edictal citation.

The only other reported cases that I have discovered in which either the old section 17 or the new section 40 has received attention are: *Central Africa Airways Corporation v Vickers - Armstrong Ltd* 1956 R & N 4; 1956 (2) SA 492 (FC); *Ex parte Coote & Others* 1962 R & N 423; and *X & Y (Pvt) Ltd v Z & Anor* 1973 (2) RLR 178 (G.D.); 1974 (1) SA 195 (R); none of which supports the plaintiff's case.

Accordingly I find that this Court has no jurisdiction to entertain the plaintiff's claim against the first two defendants and the special plea is therefore upheld with costs.

*Gill, Godlonton & Gerrans,* attorneys for the plaintiff.

*Scanlen & Holderness,* attorneys for the first and second defendants.

1980 ZLR p141

## DAINES v DAINES AND ANOTHER 1980 ZLR 141

**Court** **General Division, Salisbury**

Civil Action

Squires, J

5th and 6th June, 1980

### Flynote

Husband and wife - maintenance after divorce - assessment - distinction between such maintenance and maintenance pendente lite or maintenance after judicial separation.

### Headnote

Unlike maintenance granted to an applicant who is still married to the respondent and who is entitled to be maintained as his wife, the *quantum* of maintenance granted to a wife on divorce need not necessarily be such as to enable her to live at the same standard as she enjoyed

Copyright Juta & Co Ltd

during the marriage; indeed if an ex-wife can support herself adequately she may be awarded no maintenance at all.



SQUIRES J

Section 9 (1) of the Matrimonial Causes Act [*Chapter 39*] requires that maintenance after divorce be assessed according to a value judgment weighing the respective means of the parties against any needs or meets shown to exist on one side or the other.

Cases cited:

*Stone v Stone,* 1966 (4) SA 98 (C);

*Louis v Louis,* 1973 (2) SA 597 (T);

*Dawe v Dawe,* 1979 RLR 395 (GD);

*van der Walt v van der Walt,* 1961 (4) SA 854 (O).

*R Hill,* for the plaintiff.

*I A Donovan,* for the defendant.

## Judgment

**Squires J:** The plaintiff in this action instituted proceedings against the first defendant for a decree of divorce on the grounds of his adultery with the second defendant, alternatively on the grounds of cruelty, for custody of the remaining minor child of the marriage - the other now being a major - and for maintenance for herself in the sum of $300 per month. She also claimed damages against the second respondent in the sum of $4 000 for her adultery with the first defendant.

There is no dispute that the first defendant committed adultery with the second defendant and the first defendant accepts that the plaintiff is entitled to a decree of divorce on this basis. No issue, furthermore, arises about custody of the daughter of the parties and a claim for maintenance for her was not persisted with. Similarly a sum of $250 was paid into Court in respect of the claim against the second defendant and this issue was resolved by the plaintiff deciding to accept that amount. The only matter in dispute was the amount of maintenance which the plaintiff could claim as her support after divorce.

[The learned Judge then dealt with the evidence concerning the financial situation of the parties and continued:]

Against that background what is the proper approach and the eventual result? I think that it must be borne in mind that this is a claim for alimony after divorce in terms of the Matrimonial Causes Act and the basis for an award is not the same as it is in an application for maintenance, *pendente lite,* or in separation proceedings. In those two latter cases the applicant is still the wife of the defendant and is entitled to maintenance in a sum, if it can be afforded, to

Copyright Juta & Co Ltd

enable her to live at a standard as near as possible to that enjoyed while the parties lived together. In a case where the matrimonial status terminates the duty to support ceases. The granting of alimony in a claim such as the present one and the right to such alimony is not determined on the same



SQUIRES J

criteria as apply to the case of the applicant who is still married to the defendant and who is, therefore, entitled to be maintained as his wife. Even though she may qualify for a divorce and an award of maintenance after divorce, it by no means follows that the *quantum* of this should be such as to enable her to live to the same standard as she enjoyed during the subsistence of the marriage. Indeed, it has been held before that if an ex-wife can support herself adequately she will be awarded no maintenance since she cannot expect to enjoy after divorce the same standard of living as she had before. This distinction has been carefully considered in a number of decisions in South Africa, notably a full bench Court in *Stone v Stone,* 1966 (4) SA 98 (C), and in those referred to in *Louis v Louis,* 1973 (2) SA 597 (T.).

I mention this particularly since the plaintiff's claim, as already stated, seemed to be assessed on a basis that would enable her to live at a standard comparable to that enjoyed before the parties separated and to that extent it conflicts with the authorities I have referred to on this subject and it appears to me to be misconceived. The decision of *Dawe v Dawe,* 1979 RLR 395 (G.D.), referred to by Mr *Hill,* does not seem to me to assist because it was concerned with the justifiability of varying an existing Court order and, moreover, one which the ex-husband had voluntarily undertaken to pay and then wished to decrease because of his changed circumstances. *Van der Walt*'s case*(8) is, similarly, one that stemmed from different circumstances.

Now the requirement provided in section 9 (1) of the Act is that the Court must be satisfied in all the circumstances of the case that it is just and equitable that the defendant be compelled to contribute to her support. Within the limits of the present situation, namely that the duty to support will cease on divorce, the language of the Act still seems to import a value judgment based on the respective means of the parties as opposed to any needs or merits that may be shown to exist on one side or the other. I have given this the most careful and conscientious consideration I can in the light of the circumstances of the parties, particularly the plaintiff's age and the fact that competition for employment far her at a higher remuneration may be difficult now, and in the light of the other circumstances I have referred to above, and I have come to the conclusion that the plaintiff has shown that she does need some maintenance to support herself adequately, but she has claimed more than I think is equitable for this purpose. On the other hand, having regard to the means of the first defendant and the circumstances of the case as they bear on such responsibility as he may equitably have



SQUIRES J

towards the plaintiff, think the $50 per month he has offered so far is less than she requires or

Copyright Juta & Co Ltd

deserves.

Bearing in mind that the plaintiff is not entitled to demand to live at the expense of the first defendant at the same standard as she enjoyed prior to this divorce and that there are items in her claim which were based on that erroneous premise, even the lesser sum of $204 shown as the shortfall of income over expenditure revealed in Exhibit 3 can, my view, be reduced.

Without putting a precise figure on the amount, I think at least the sums claimed for rent, entertainment, holidays and savings are more than an equitable payment requires. Balancing that against what I think the defendant can afford out of the list of his earnings and expenditure I think it will be just and equitable, as far as the plaintiff's needs are concerned, if the first defendant pays to the plaintiff the sum of $140 per month as maintenance after the divorce.

[The remainder of the judgment is not material to this report. - *Editor.*]

*Atherstone & Cook,* attorneys for plaintiff..

*Cognac, Welsh and Guest,* attorneys for defendants.



## MACHEKE RURAL COUNCIL v CILLIERS 1980 ZLR 145

**Court** **General Division, Salisbury**

Civil Application

Pittman, J

6th March and 11th June, 1980

### Flynote

Rural councils - taxes and rates levied by councils - whether council may be estopped from recovering tax or rate.

### Headnote

Once a rural council has, in terms of the Rural Councils Act [*Chapter 211*], levied a tax it is its duty to enforce it, and it cannot be estopped from recovering it.

Authorities cited:

*City Council of Salisbury v Donner and Anor* 1958 R & N 132; 1958 (2) SA 368 (SR);



PITTMAN J

Halsbury, *Laws of England,* 4th edition, volume 16, paragraph 1596; 1980 South African Law Journal, page 1;

Copyright Juta & Co Ltd

*Grindlays Bank Ltd v Louw and Anor* 1979 RLR 189 (G.D.);

*Trotman and Anor v Edwick,* 1950 (1) SA 376 (C)

*C C Milton,* for the applicant

*R Jagger,* for the respondent.

## Judgment

**Pittman J:** On the 10th December, 1979, the applicant issued summons against the respondent for payment of $431,48, interest thereon at six *per centum* per annum from the 31st May, 1979, and costs. The respondent entered appearance, and the applicant then applied for summary judgment on an amended claim for $486,74, interest thereon at the rate of 11 *per centum* per annum from the 1st July, 1979, to date of payment, and costs.

[The learned Judge then set out the opposing affidavits, which disclosed the following facts. The respondent had owned a farm in the applicant council's area, which he sold in 1978. In the course of arranging transfer his attorney asked the applicant how much respondent owed it by way of arrear unit tax, and was told that $134 was owing. He duly paid this sum on respondent's behalf and received a "clearance certificate" from the applicant council certifying that no further rates or taxes were owed it by respondent. In fact the sum of $486,74 was still outstanding in arrear unit tax and interest. The respondent set up two defences to the applicant's claim for this amount. Firstly, he maintained that the applicant was estopped from claiming it after having issued its "clearance certificate", secondly, that the issue of the certificate had amounted to a negligent misstatement of fact. As to both defences, the respondent maintained that had he known at the time how much was owing, he would have been able to recover the amount from the then occupier of the farm.

[The learned Judge then continued:]

The defence based on estoppel clearly has no merit. As Mr *Milton* painted out, in *Salisbury City Council v Donner & Anor.,* 1958 R & N 132 at 137H; 1958 (2) SA 368 (SR) at 372B, MURRAY CJ, stated that "estoppel cannot be raised in matters concerned with the exercise of a statutory public duty". One of the authorities cited by MURRAY CJ, was *Halsbury*, 3rd edition (1956), volume 15, paragraph 427, in which it was said:

> "A party cannot by representation, any more than by other means, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating. Thus, a corporate or statutory body cannot be





> estoppel from denying that it has entered into a contract which it was *ultra vires* for it to make. No corporate body can be bound by estoppel to do something beyond its powers, or to refrain from doing what it is its duty to do; and the same principle applies to individuals. No person can by his conduct, or otherwise, waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so."

This passage is repeated in identical terms in *Halsbury,* 4th edition (1976), volume 16,

Copyright Juta & Co Ltd

paragraph 1596.

Section 88 of the Rural Councils Act entitles a council to levy a tax not more than once in each financial year upon an owner of land in its non - designated area. It is common cause that the respondent is such an owner, and Mr *Jagger* conceded that were it not for the defences raised for the respondent, the amount claimed by the applicant would be payable by the respondent.

The important point is that once a council has levied a tax, it is its duty to enforce it because it has no power to allow the taxpayer to be excused from paying that tax, except in terms of section 106 of the Act, which authorizes it to write off any charges which have been in arrear for a period of not less than five years and which are deemed by it to be irrecoverable. It is clear that the estoppel raised in paragraph 14 of Mr Gollop's affidavit is one by which it is sought to make the applicant refrain from doing what it is presently its duty to do. Such an estoppel is not enforceable by the Court, and will only become so if and when section 106 becomes applicable in three or four years' time. It follows that the defence raised in paragraph 14 is invalid.

In my opinion, paragraphs 15 and 16 of Mr Gollop's affidavit really embody only a single defence to the applicant's claim for summary judgment. In these two paragraphs, it is in effect averred that, having made a negligent misstatement of fact which has caused the respondent pecuniary loss, the applicant is liable to compensate the respondent for such loss. The existence of such a cause of action is well-established in Roman-Dutch law. See *South African Law Journal,* volume 97, Part 1 (February, 1980), page 1. It is also well-established that an unliquidated claim in reconvention can be raised successfully as a reply to an application for summary judgment. See, for example, *Grindlays Bank Ltd v Reon Louw,* 1979 RLR 189 (GD). However, as was emphasized in *Trotman & Anor v Edwick,* 1950 (1) SA 376 (C), the amount of such a claim must exceed the amount of the applicant's claim. The amount of the respondent's claim has not been quantified in Mr Gollop's affidavit, and it was not debated in argument. But I think it is impossible to





hold that it is as great or greater than the applicant's admitted claim, because it must be at least $134 less than the latter.

I therefore conclude that the averments in Mr Gollop's affidavit, even if established, will not found any valid defence to the applicant's claim, and accordingly it is ordered:

That summary judgment with costs be and is hereby entered against the respondent in the sum of $486,74, together with interest on such sum at the rate of 11 *per centum* per annum from 1st July, 1979, to date of payment.

*Coghlan, Welsh & Guest,* attorneys for the applicant.

*Gollop & Blank,* attorneys for the respondent.



Copyright Juta & Co Ltd

## THE STATE v CHIKAZHE 1980 ZLR 147

**Court** **General Division, Salisbury**

Criminal Review

Beadle, A J.

11th June 1980

### Flynote

Criminal procedure - competent verdict - whether competent to convict accused of contravening section 3 (a) cd Criminal Low Amendment Act [Chapter 58] on charge of housebreaking with intent to commit rape.

### Headnote

The offence of having sexual relations with a girl under the age of 16 in contravention of section 3 (a) of the Criminal Law Amendment Act [*Chapter 58*] is not a competent verdict on a charge of housebreaking with intent to commit rape.

Case cited:

*R v Moosa and Ors* 1960 (3) SA 517 (AD).

### Judgment

**Beadle AJ:** The accused in this case was charged with housebreaking with intent to commit rape and was convicted of contravening section 3 (a) of the Criminal Law Amendment Act [*Chapter 58*], that is, having relations with a girl under the statutory age of 16. It does not appear to me that this is a competent verdict on the charge of housebreaking with intent to commit rape. Neither sections 199 (2) or (3) nor 210 of the Criminal Procedure and Evidence Act [*Chapter 59*] are





applicable to the charge in this case. The offence with which the accused was charged does not embrace the offence of which he was convicted.

See *R v Moosa & Ors* 1960 (3) SA 517 (AD) at 532.

The magistrate admits that he erred, and the Attorney-General does not support the conviction. The conviction and sentence are accordingly set aside.

My brother Beck agrees with these conclusions.



Copyright Juta & Co Ltd

## THE STATE v MLAUZI 1980 ZLR 148

**Court** **General Division, Bulawayo**

Criminal Review

Newham J

13th June 1980

### Flynote

Criminal Procedure arid Evidence Act [Chapter 59] - section 48 (1) - escape from custody after arrest but before detention in prison need for custody to be effective.

### Headnote

The accused had been arrested and taken to a police station. He was told to wait in the charge office but no one was given the duty of ensuring that he did not leave. After a time he was found to be no longer there. He was convicted of escaping from lawful custody in contravention of section 48 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. On review.

*Held,* setting aside the conviction, that lawful custody for the purposes of the section must comprise de facto and effective control, and the accused was not under effective control at the time he left the police station.

Cases cited:

*R v Connias,* G-S-101-1966 (unreported);

*R v Dube,* 1969 (2) RLR 117 (GD).

### Judgment

**Newham J:** The accused was convicted firstly of contravening section 5 (1) of the Firearms Act [*Chapter 308*] for having in his possession ammunition (that is, a hand grenade) without holding a current firearm certificate in respect thereof. The accused was sentenced to a fine Of $100 or, in default of payment, three months' imprisonment with labour, and in addition three months' imprisonment with labour, the whole of which was conditionally suspended for three years. Secondly the accused was convicted of contravening section 48 (1) of the Criminal Procedure



NEWHAM J

and Evidence Act [*Chapter 59*], it being alleged that having been arrested and being in lawful custody, but not yet having been lodged in any prison, he wrongfully and unlawfully escaped from such custody. He was sentenced to a fine of $20 or, in default of payment, two weeks' imprisonment with labour.

Copyright Juta & Co Ltd

The regional magistrate to whom the case was sent for scrutiny considered that the accused should not have been convicted on the second count. He referred the matter back to the trial magistrate, who agreed. The regional magistrate has sent the papers to me with the request that the conviction and sentence on the second count be set aside.

The facts are that the accused, having been arrested by two police details in connection with his possession of the hand grenade, was escorted by them to the charge office at the Mzilikazi police station, and handed over to the section officer in charge. Because of pressure of work at the charge office the accused was told to sit down and wait. No one was specifically charged with the duty of ensuring that the accused did not leave. It is common cause both that the accused is a member of the armed forces and that while he was at the charge office the military police were summoned. It is not in issue that a member or members of that unit arrived, interviewed the accused and then departed. Later police details at the charge office found that the accused was no longer in the office.

In the outline of his defence and in his evidence the accused said that the military policemen asked him for certain particulars, including his residential address. After that he had remained at the charge office until a policeman had told him that the military police were handling the matter and that he could leave. Thereupon the accused returned to his house. Though the accused could not say specifically which policeman at the charge office gave him permission to leave, the State led no adequate evidence to rebut the accused's defence. Once the accused had raised this defence the onus was on the State to prove beyond reasonable doubt that the accused had not been permitted to leave. This it did not do. Quite apart from that aspect, however, it is evident on the facts that the State failed to establish an essential element of the offence, which is that the accused was in lawful custody at the time he escaped. There is authority, including *R v Connias,* GD (Sby.) 101/66 and *R v Dube,* 1969 (2) RLR 117 (G.D.), that lawful custody must comprise de facto and effective control. In the present case such control, if any, as did exist at the time that the accused took his leave did not amount to effective control and accordingly the accused was not in lawful custody.



NEWHAM J

I referred the matter to the Attorney-General and, for the reasons which I have mentioned, he does not support the conviction on the second count.

The conviction and sentence on the first count, that of contravening section 5 (1) of the Firearms Act [*Chapter 308*], are confirmed. The conviction and sentence on the second count, that of contravening section 48 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*], are set aside.

My brother Gubbay agrees.

1980 ZLR p150

Copyright Juta & Co Ltd

## PRETORIUS v MINISTER OF DEFENCE (1) 1980 ZLR 150

**Court** **General Division, Salisbury**

Civil Application

Waddington, J

6th and 18th June, 1980

### Flynote

Statutes interpretation of when wording plain and unambiguous.

Pensions am Other Benefits Act, 1979 - section 37 (1) - rights conferred by section - whether regulation providing that persons who retire must repay sums owed by them to the State is inconsistent with section 37 (1) - validity of such regulation - whether such regulation inconsistent with Declaration of Rights.

### Headnote

The applicant had attested into the Army in terms of regulations "hereunder the State would pay him an annual salary during his training as a medical doctor and he would serve in the defence forces for four years after completing his horsemanship year. In terms of the Defence (Regular Force) (Officers) Regulations, 1976, he was to repay the State a specified sum if he resigned before serving for four years. Before he completed this service the applicant retired in terms of paragraph 37 (1) of the Third Schedule to the Constitution of Zimbabwe Rhodesia, 1979 (now the Pensions and Other Benefits Act, 1979), and claimed to be able to do so without repaying anything to the State. The respondent disputed this, relying on section 2A of the above regulations which provided in effect that officers who retired as the applicant had done would be subject to the same liability to repay as officers who resigned in terms of the regulations.

*Held* that section 2A of the Defence (Regular Force) (Officers) Regulations, 1976, obliged the applicant to repay the specified sum to the State because-



WADDINGTON J

(a) its enactment was squarely within the powers given to the Defence Forces Commission by the enabling legislation, namely section 107 (1) (a) and (b) of the Constitution of Zimbabwe Rhodesia, 1979, which was unambiguous;

(b) section 37 (1) of the Pensions and Other Benefits Act, 1979, clearly and unambiguously conferred nothing more than a right to retire and did not evince an intention to abolish pre-existing contractual liabilities; the Defence Forces Service Commission could therefore deal in teens of section 107 of the Constitution of Zimbabwe Rhodesia, 1979, with matters incidental to such retirements;

(c) section 2A did not amount to an unlawful amendment of section 37 (1) of the Pensions and Other Benefits Act, 1979, since it did not modify or qualify the right to retire conferred by section 37 (1); it merely perpetuated pre-existing obligations;

Copyright Juta & Co Ltd

(d) section 2A did not amount to an unlawful acquisition of property in contravention of section 16 of the Constitution of Zimbabwe, 1980 - assuming it was amenable to the provisions of section 16 - since it did not extinguish members' pension rights and, furthermore, could be described as providing for the acquisition of property as an incident of a contract for the purposes of section 16 (7) (d) of the Constitution.

Cases cited:

*van Heerden NO & Ors v Queens Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (A.D.); 1973 (2) SA 14 (RAD);

*Schierhout v Minister of Justice,* 1926 AD 99.

*I A Donovan,* for the applicant.

*BC Brown,* for the respondent.

## Judgment

**Waddington J:** The applicant is a medical doctor. On the 27th January, 1972, he states in his affidavit, he was attested into the Rhodesian Army as a medical officer cadet pursuant to a contract of service a copy of which has been annexed to the affidavit. In terms of that contract which, under clause 2 thereof, was subject "to the Defence Act and the various regulations made thereunder", the State undertook to pay applicant a generous salary out of which he was required to support himself and meet the costs of undergoing a course of university training as a medical doctor. On completing his course, applicant was required to serve a period of housemanship during which he would again be paid a salary. Thereafter, following his registration as a medical practitioner, the State undertook to promote him to the rank of a first-year captain or flight lieutenant in the Regular Force. As a *quid pro quo* f or the afore mentioned financial assistance in qualifying, the applicant would then be required to serve as a medical officer in the Regular Force for a period of not less than four years. Applicant was successful as a medical student and was eventually registered as a medical practitioner on the 3rd January, 1978. Thereupon the State honoured its obligation under the



original contract of service and applicant was promoted to the rank of captain in the Medical Corps after which he was posted to an air base with the rank of Flight Lieutenant in the Rhodesian Air Force. It then became incumbent upon the applicant to serve in the Regular Force for the period of four years referred to above.

Regulations which governed the contract in terms of clause 2 thereof included the Defence (Regular Force) (Officers) Regulations, 1976 (Rhodesia Government Notice 99 of 1976. The effect on applicant Of section 7 (11) of these regulations as amended by the Defence (Regular Force) (Officers) (Amendment) Regulations, 1976 (No. 2) (Rhodesia Government Notice 387 of 1976), as read with the definition of "cadet" contained in section 2 of the Defence (Regular Force) (Medical and Dental Officer Cadets) Regulations, 1976 (Rhodesia Government Notice

Copyright Juta & Co Ltd

388 of 1976), was that were he to have terminated his service by resignation or retirement before the expiry of four years from the date of his registration as a medical practitioner on the 3rd January, 1978, he would have become liable to pay to the State certain sums of money the amounts of which would have become progressively smaller the longer he served. If, for example, termination had taken place within one year of the 3rd January, 1978, applicant would have been liable to repay to the State a sum equal to the full amount of his pay and allowances received by him since attestation. Similarly, if termination had taken place after the expiry of three years but before the expiry of four years from the 3rd January, 1978, only fifty *per centum* of that amount would have been repayable. If termination had occurred more than four years after the 3rd January, 1978, applicant would have been under no obligation to repay any amount. The bargain must have been a good one as far as applicant was concerned; in effect he received free medical training and personal maintenance covering the period of his university education and housemanship in exchange for four years' paid service as a doctor the Regular Force. Doubtless, others would be prepared to pay more for such a prize.

Contemporaneously with the events outlined above, political events in Rhodesia (as Zimbabwe then was) resulted in the Legislature enacting the Constitution of Zimbabwe Rhodesia, 1979 (Act No. 12 of 1979), which, together with incidental legislation, was designed to permit the introduction of, if I may use phrase common in political circles for a number of years, "majority rule government" in this country. Among a number of other devices contained in that Constitution calculated, according to Mr *Brown* who appeared on behalf of the respondent, to induce servants of the State fearful of "majority rule government" to





continue rendering service to the State after "majority rule", was that contained in paragraph 37 (1) of the Third Schedule to Act 12 of 1979.

That provision reads:

> "37.(1) A member who, at the date of his retirement, will have completed not less than two years' service as a contributor since his last appointment as such may, at any time after he has completed a period of service of not less than one year after the effective date, retire from the Uniformed Force of which he is a member:
>
> Provided that a member who wishes to retire in terms of this paragraph shall give not less than three calendar months, notice of his intention to retire, which shall expire not earlier than the 30th April, 1980."

The effective date was the 30th April, 1979 (see paragraph 34 (1) of the Third Schedule to Act 12 of 1979). Just as a right to early retirement was in this manner conferred upon members of the different Uniformed Forces defined in paragraph 34 (1) *(supra)*, so was the right to a pension conferred on those members electing to retire in terms of paragraph 37 (1). The inducement to members to serve the State for longer rather than shorter periods after the 30th April, 1979, is to be found in paragraph 38 (1) of the Third Schedule. A glance at this provision discloses that the longer the service rendered, the more favourable would be the rate of pension. Finally in this regard, paragraph 41 of the Third Schedule goes even further and confers on members retiring in terms of paragraph 37 (1) the right to commute a portion of any pension payable in terms of paragraph 38 (1). The operation of the above-mentioned provisions

Copyright Juta & Co Ltd

was continued under the recent interregnum of the British Crown and now, also, under the provisions of the Constitution of Zimbabwe, 1980 (see section 4 (5) (d) of the Constitution (Interim Provisions) Ordinance 1979 (Ordinance No. 1 of 1979) and section 112 as read with paragraph 1 (1) of Schedule 6 to the Constitution of Zimbabwe, 1980, contained in the Zimbabwe Constitution Order 1979 (Statutory Instrument 1979/ 1600) as read with section 4 (1) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980, published on the 20th March, 1980). Part III and Part IV of the Third Schedule to Act 12 of 1979 may, now, in terms of section 4 (5) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions Order, 1980, be cited as the Pensions and Other Benefits Act, 1979, but for convenience sake I shall continue in this judgment to use the citation previously employed.

In January, 1980, the applicant was promoted to the rank of Squadron Leader. Shortly before the end of the same month, he gave notice of his intention to retire on the 30th April, 1980, in terms of paragraph 37 (1) of the Third Schedule to Act 12 of 1979, at the same time requesting that



he be permitted to commute portion of his pension in terms of paragraph 41. Upon his retirement on the 30th April, he was entitled to payments, he states, covering his salary and professional allowance in respect of the month of April, 1980, the annual bonus in respect of 1980, cash in lieu of vacation leave and the appropriate sum in respect of the commutation of his pension.

Respondent has failed to pay any of the sums in question and seeks to justify his failure firstly on the basis that applicant, having failed to serve the full period of four years referred to in section 7 (11) of the Defence (Regular Force) (Officers) Regulations, 1976, is liable to repay, in terms of paragraph (c) of subsection (11), the sum of $12 493,74 which figure, if payable at all, is now not disputed. Respondent also maintains that the sum of the moneys due to applicant exceeds the figure of $12 493,74 by $2 602,79 and that the only reason this excess has not been paid is that the Government agency responsible for making payments of this description has been under such pressure of work recently that it has not been possible to pro less applicant's entitlements. There is no intention on his part to withhold the sum of $2 602,79 from applicant but he maintains that he is entitled to set off applicant's alleged indebtedness of $12 493,74 to the State against the State's indebtedness to applicant. As I understand Mr Donovan who appears for the applicant, the right of set-off claimed by the respondent is not disputed. The point in dispute is whether the applicant is liable in the first place to repay any sum to the State.

This matter commenced as an application for an order directing the respondent to pay certain sums to applicant. Now that the parties have had the opportunity of considering each other's positions as the result apparently of a commendably frank exchange of information and views, counsel have agreed that it is really a declaratory order which they wish me to make as to whether or not the sum of $12 493,74 is repayable by applicant. This I am prepared to do in order to assist the parties as there is a real dispute.

Copyright Juta & Co Ltd

Before the 11th April, 1980, the Defence (Regular Force) (Officers) Regulations 1976, nowhere referred to the consequences which would Dow from the retirement of a member in terms of paragraph 37 (1) of Act 12 of 1979. On that date, however, the regulations in question were amended by the Defence (Regular Force) (Officers) (Amendment) Regulations, 1980 (No. 11), published in Statutory Instrument 213 of 1980, by the insertion of section 2A which reads:

> "2A. Where an officer retires in terms of paragraph 37 of the Third Schedule to the Constitution, the provision of these regulations which provide



> for the liabilities or entitlements of an officer on resignation or retirement in terms of these regulations shall apply, mutatis mutandis, in respect of his retirement in terms of the said paragraph 37 as if it were a resignation or retirement, as may be appropriate in his case, in terms of the appropriate provision of these regulations:
>
> Provided that, for the purposes of sections 40 and 42, such officer shall be regarded as having retired in terms of these regulations whether or not he could have so retired on the said date."

This amendment purports to have been made by the Defence Forces Service Commission in the exercise of the enabling powers contained in section 107 of Act 12 of 1979 and is a law saved in terms of section 4 (1) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980. Mr Donovan argued, however, that the amendment in question is ultra vires the enabling provisions contained in section 107 of Act 12 of 1979 while Mr Brawn argued that the opposite is the case. If Mr Brown's argument is correct, *cadit quaestio*; it would follow that section 7 (11) (c) of the Defence (Regular Force) (Officers) Regulations, 1976, applies to the applicant and that he would in consequence be liable to repay the sum of $12 493,74 as contended for by the respondent. I shall now address myself to the question of the validity of section 2A contained in Statutory Instrument 213 of 1980.

Section 107 (1) of Act 12 of 1979 (which Mr Brown relied on as constituting the only enabling provision applicable in this case) reads as follows:

> "107. (1) Subject to the provisions of this section, the Defence Forces Service Commission may make such regulations as it considers to be necessary or expedient -
>
> (a) for the general well being and good administration of the Defence Forces and the maintenance thereof in a high state of efficiency;
>
> (b) providing for the conditions of service of members of the Defence Forces."

Mr *Donovan's* attack on the validity of Statutory Instrument 213 of 1980 is that as the effect of the extension of section 7 (11) of the Defence (Regular Force) (Officers) Regulations, 1976, to retirements in terms of paragraph 37 (1) of Act 12 of 1979 is to penalize a person in the position of the applicant seeking to exercise his right to retire, section 2A must properly be regarded as repugnant to the Act and grossly unreasonable. He argued also that it was beyond the powers of the Defence Forces Service Commission to qualify or to penalize the right to early retirement conferred by paragraph 37 (1) and that section 2A contains an unlawful amendment of that statutory provision. But the real issue is not whether section 2A is unreasonable in its effect: the question is whether section

Copyright Juta & Co Ltd

WADDINGTON J

107 of Act 12 of 1979 gave the Defence Forces Service Commission the power to make the regulation in question. This subject was succinctly dealt with as follows by BEADLE CJ, (as he then was), in *van Heerden NO, & Ors v Queens Hotel (Pvt) Ltd & Ors* 1972 (2) RLR 472 (AD) at 481F-482G, 1973 (2) SA 14 at page 16D *et seq.*:

> "I repeat what CHASE CJ, said many years ago in *Shortridge v Mason* (U.S. Circuit Court of Appeal, N Carolina):
>
> > 'Courts have no policy. They only declare the law.'
>
> The issue before the Court is a crisp one. Did sec. 3 of the Act give the Minister the power to make the Regulations? If it did, *cadit quaestio*. In some of the affidavits supporting the application it is suggested that the Regulations are *'ultra vires* on the grounds of unreasonableness', and in this Court there was argument advanced on the unreasonableness of the Regulations. This case, however, concerns the powers given to the Minister under sec. 3 of the Act to make the Regulations, and this is a question of interpreting an Act of Parliament and not of interpreting the Regulations. While there is always a presumption that Parliament never intended an unreasonable result, if from the language of the statute it is plain what the intention of the legislature is, the Court must give effect to it, no matter how unreasonable the result may be. This Court has no power to adjudicate on the reasonableness or unreasonableness of an Act of Parliament. See the remarks of LEWIS, J (as he then was), in *Chingachura Exploration Co. (Pvt) Ltd v Hatty, NO,* 1963 (1) SA 46 (SR) at 55, and cases there cited. The desirability or otherwise of these particular Regulations is a matter for Parliament, not for the Courts. In determining whether or not sec. 3 did give the Minister the right to make these Regulations, the Court must look to the intention of the legislature as expressed in the language of the Act as a whole. In *S v Takaendesa,* 1972 (4) SA 72 (RAD) I referred to the elementary rules applying to the interpretation of statutory instruments as set out in Maxwell, *Interpretation of Statutes* (12th edition) at page 8, and I might usefully repeat these here:
>
> > 'The rule of construction is to intend the Legislature to have meant what they have actually expressed". The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used", for "it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law".
> >
> > Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. "The decision in this case", said LORD MORRIS OF BORTH-Y-GEST in a revenue case, "calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision". Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient: words are not to be construed, contrary to



WADDINGTON J

> their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it stands, and to "leave the remedy (if one be resolved upon) to others".'

See also *Craies on Statute Law* (6th edition) at page 70:

> 'The Judges may not wrest the language of Parliament even to avoid an obvious mischief.".

Section 107 (1) (a) and (b) enabled the Defence Forces Service Commission to make

Copyright Juta & Co Ltd

regulations for the well-being of the Force, its good administration, its maintenance in a high state of efficiency and for the conditions of service of its members. It clearly redounds to the well-being of the Force to discourage doctors from resigning or retiring therefrom; the permanent availability of doctors to tend to the health of members of the Force is calculated to maintain it in a high state of efficiency; finally, provisions such as are contained in section 7 (11) of the principal regulations obviously form part of the conditions of service of members who contract, as the applicant did, on their appointment to serve the State in accordance with the Defence Act and regulations framed thereunder from time to time (cf *Schierhout v Minister of Justice,* 1926 AD 99 at 108). It might be observed en passant that when the applicant attested into the Force in 1972 the liability to pay similar but not identical refunds of the type provided for in section 7 (11) of the principal regulations was already in existence - see section 7 of the Defence (Regular Force) (European Members) Regulations, 1971. The effect of section 2A as read with section 7 (11) is consonant with most, if not all, of the matters referred to in section 107 (1) of the Act. The meaning of section 107 (1) in my view is plain and unambiguous and it is the duty of the Court to give effect to it.

I turn now to deal with Mr *Donovan's* argument that section 2A contains provisions repugnant to paragraph 37 (1) of Act 12 of 1979 and that its effect is to amend paragraph 37 (1). Counsel agreed that before the enactment of paragraph 37 (1) the limited circumstances in which a member might resign or retire were specified in the previously existing legislation and that not all members enjoyed such rights.

Paragraph 37 (1) by contrast conferred on all members who had completed not less than two years' service as contributors to the Consolidated Revenue Fund for pension purposes the right to retire when a period of not less than one year's service after the 30th April, 1979, had been completed. Only this right was apparently conferred and nothing more. Paragraphs 38 to 42 conferred or adverted to pensions payable to members retiring in terms of paragraph 37 (1). Nowhere in these provisions is there any suggestion, either express or implied, that in enacting them it



WADDINGTON J

was the intention of the Legislature to abolish all pre-existing contractual or other liabilities either actual or contingent. I agree with Mr *Brown* that such a provision would have constituted a startlingly generous waiver of the State's rights and duties and a benignity in dealing with debts and contingent debts wholly inconsistent with a desire to confer a mere right to retire early. The wording of paragraph 37 (1) is clear and unambiguous. It would consequently be wrong for the Court in these circumstances to construe section 107 (1) of the same Act in which paragraph 37 (1) appears as not going far enough in its terms to enable the Defence Forces Service Commission to deal by regulation with matters incidental to retirements under paragraph 37 (1) in the same way as regulations dealt with retirements before the enactment of paragraph 37 (1). The Legislature, when it enacted paragraph 37 (1), must be credited with the knowledge of what was contained in its own enactments and regulations. Had it intended in enacting that provision to relieve persons in the applicant's position from the possibility of meeting the liabilities they would have incurred had they retired or resigned prematurely under the previously existing

Copyright Juta & Co Ltd

legislation, it would have been a simple matter to circumscribe the wide powers to make regulations contained in section 107 of the Act. Viewed correctly, in my opinion, the effect of section 2A is not to penalize a member who wishes to retire but is to protect the State's interests in exactly the same way that those interests were protected before the promulgation of the section in question. Paragraph 37 (1) contains no ambiguity that could lead to the view that it was the intention of the Legislature to preclude the protection of the State's interests by the making of appropriate regulations in terms of section 107 (1) of the Act.

From what I have said above it is equally clear that the promulgation of section 2A does not amount to an unlawful amendment of paragraph 37 (1). The effect of paragraph 37 (1) is simply and plainly to confer on a class of members the right to retire. It is no narrower or wider than that and nothing more nor less than that is implied. Section 2A does not detract from the right to retire conferred by paragraph 37 (1) or from the right to receive the pensions specified in paragraph 38. Those rights are left intact. Section 2A does not modify or qualify the right to retire itself nor does it alter the conditions precedent to the exercise of that right. By applying the provisions of section 7 (11) of the principal regulations to retirements under paragraph 37 (1) it does no more than perpetuate the *quid pro quo* originally demanded of a member who in the first place freely agreed to give it in consideration of the financial assistance received from the State to qualify as a doctor. While it may



discourage a member from retiring prematurely, I fail to see how it can be said that it has the effect of amending paragraph 37 (1).

Mr *Donovan* raised another argument relating to section 2A albeit, seemingly, without much confidence. Pointing to the provisions of section 124 (1) and (4) of Act 12 of 1979 and the identical provisions contained in subsections (1) and (3) of section 16 of the Constitution of Zimbabwe, 1980, he advances the argument that section 2A was inconsistent with the right to protection from deprivation of property contained in section 16 (1). Subsection (1) of section 16 provides:

> "(1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that . . ."

Subsection (4) of section 124 and subsection (3) of section 16 are also identical and read:

> "Where any person by virtue of a law, contract or scheme relating to the payment of pensions benefits, has a right, whether vested or contingent, to the payment of pensions benefits or any commutation thereof or a refund of contributions, with or without interest, payable in terms of such law, contract or scheme, any law which thereafter provides for the extinction of or a diminution in such a right shall be regarded for the purposes of subsection (1) as a law providing for the acquisition of a right in property."

Section 2A, having been promulgated before the Constitution of Zimbabwe, 1980, came into operation, is an existing law for the purposes of section 4 (1) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order 1980, which, *inter alia*, continues in force and effect laws existing on and after Independence Day. However, that provision must be read subject to the provisions of the Constitution of Zimbabwe, 1980.

Copyright Juta & Co Ltd

(Section 4 (1) commences with the words ' Subject to the provisions of the Constitution . . .".) Section 26 (2) of that Constitution provides that:

> ". . . nothing contained in or done under the authority of any written law shall be held to be in contravention of the Declaration of Rights to the extent that the law in question -
>
> (a) ....;
>
> (b) is a law . . . that had effect as a law immediately before the appointed day and has continued to have effect as law since that day . . ."

Section 26 (3) of the same Constitution provides:

> "The provisions of subsection (2) (b), (c) and (d) -
>
> (a) shall not apply in respect of any law relating to the compulsory acquisition of property of any description or of any interest or right therein; . . ."

---



WADDINGTON J

Section 26 (5) also provides:

> "In relation to any person who is a member of a disciplined force of Zimbabwe, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be in contravention of any of the provisions of the Declaration of Rights, other than sections 12, 14, 15, 16 and 23."

I understood Mr *Donovan* to argue that in consequence of these provisions, section 2A is amenable to the Declaration of Rights contained in the 1980 Constitution. He did not, however, in terms of section 24 (2) of the 1980 Constitution request me to refer the matter to the Appellate Division of the High Court. Neither did he suggest that I should, in terms of subsection (5) of section 24, issue a rule *nisi* calling upon the responsible Minister to show cause why section 2A should not be declared to be in contravention of section 16 (1) of the Declaration of Rights.

In view of the conclusion to which I have come, however, I do not propose exercising my discretion in terms of section 24 (2) by referring the matter in question to the Appellate Division. Although counsel did not advert specifically during their arguments to the question, I shall assume for the purposes of this judgment that section 2A is amenable to the Declaration of Rights.

I have already indicated in this judgment that in my view the effect of section 2A is not to modify or qualify the right to retire conferred by paragraph 37 (1) of Act 12 of 1979. Similarly, its effect is not to modify or qualify the right to receive a pension conferred by paragraph 38. The right to that pension, despite the provisions contained in section 2A, remains intact. Any refund payable by virtue of the operation of section 2A as read with section 7 (11) of the principal regulations is a refund of salary and allowances earned and not of a pension earned. In addition, the object of section 2A is to vary one of the conditions of service of a member by perpetuating, as I have said, the *quid pro quo* originally demanded of the member who agreed to give it in consideration of the financial assistance received from the State to qualify as a doctor. Section 16 (7) (d) of the 1980 Constitution provides that nothing contained in or done under the authority of any law

**Copyright Juta & Co Ltd**

shall be held to be in contravention of the right to protection from deprivation of property to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein-

> "as an incident of a contract, including a lease or mortgage, which has been agreed between the parties to the contract . . .;"

Section 2A was promulgated, *inter alia*, in my view, not for the purpose of reducing the pension of a member who retires in terms of paragraph 37 (1), but for the purpose of ensuring the perpetuation of the State's





right to receive refunds in question. When a member who is a cadet subject to the provisions of the Defence (Regular Force) (Medical and Dental Officer Cadets) Regulations, 1976, attested, he agreed, as did the applicant in this case when he originally entered into the contract of service, to be bound by the Defence Act and regulations framed thereunder. He must, therefore, have appreciated that the State's interest in providing financial assistance was in obtaining his services as a trained doctor for a minimum period of four years and was not eleemosynary in nature. It was, therefore, to be expected that the State would take whatever additional steps were necessary to ensure the repayment of the sums mentioned in section 7 (11) of the principal regulations should that ever become necessary. That is precisely what has happened in this case. The nature of section 2A may, in my view, fairly be described as the making of provision for the acquisition of property as an incident of a contract therefore. There is no question of the respondent in this case denying the State's liability to pay applicant a pension in terms of paragraph 38 of Act 12 of 1979. A member retiring in terms of paragraph 37 (1) may choose to pay the appropriate refund out of the proceeds of the commutation of that pension, but this does not mean that the effect of section 2A is to provide for the extinction of or diminution of the right to that pension. Nor would that be the position if the member concerned possessed no funds other than his commutation with which to pay the refund.

I conclude, therefore, that there is no reason to suppose that section 2A is either *ultra vires* or inconsistent with the Declaration of Rights currently in force or which, for that matter, was in force at the time Statutory Instrument 213 of 1980 was promulgated. Having reached that conclusion it is unnecessary for me to consider the additional legal arguments advanced by counsel in this case. I accordingly declare that the applicant is liable to refund the sum of $12493,74 to the State in terms of section 2A as read with section 7 (11) (c) of the Defence (Regular Force) (Officers) Regulations, 1976.

The applicant will pay the costs of these proceedings.

*Winterton, Holmes and Hill,* attorneys for the applicant.

*The State Attorney,* for the respondent.



Copyright Juta & Co Ltd

## THE STATE v SIMON 1980 ZLR 162

**Court** **General Division, Salisbury**

Criminal Review

Dumbutshena J

25th June, 1980

### Flynote

Criminal procedure - splitting of charges - tests for - accused impersonating policeman in order to commit robbery - whether may be charged with both impersonation and robbery.

### Headnote

The accused, pretending to be a policeman, had purported to arrest two women and, while they were in his custody, he had used his ostensible authority to rob them of certain property. He was convicted in a magistrates Court of two counts of robbery and one of impersonating a policeman in contravention of section 70 (1) (a) of the Police Act [*Chapter 98*]. On review.

*Held,* setting aside the conviction for impersonation, that there had been an unlawful splitting of charges, since the robberies and the impersonation had been committed with one criminal intent and constituted one continuous criminal transaction, and the evidence necessary to establish the robberies involved proving the impersonation.

Cases cited:

*R v Tarewa,* 1949 SR 158; 1949 (4) SA 347 (SR);

*R v Malako,* 1959 (1) SA 569 (O);

*Attorney-General v Jakubec,* 1979 RLR 267 (AD); 1980 (2) SA 884 (RAD);

*S v Brereton,* 1970 (2) RLR 272 (AD);

*R v Peterson and Ors* 1970 (1) RLR 49 (AD); 1971 (2) SA 130 (R).

### Judgment

**Dumbutshena J:** The accused was charged with two counts of robbery and one count of contravening section 70 (1) (a) of the Police Act [*Chapter 98*] as follows:

Firstly, Robbery in that upon the 2nd day of May, 1980, and on the dust road near Mucheke River in the Mucheke Township, Fort Victoria, in the said Province, the said accused did wrongfully and unlawfully assault one Filomina Chagonda, a person there being, with open hands upon the face and with booted feet upon her body, and did then and there with force and violence take from the said Filomina Chagonda a certain head-dress and a blanket, the property

Copyright Juta & Co Ltd

DUMBUTSHENA J

of and in the lawful possession of the said Filomina Chagonda, and thus the said accused did rob the said Filomina Chagonda of the same.

Secondly, Charged with the crime of robbery in that upon the 2nd May, 1980, and on the dust road near Mucheke River in the Mucheke Township, Fort Victoria, in the said Province, the said accused did wrongfully and unlawfully assault Kerina Moyo, a person there being, and did forcibly grab her, and did then and there with force, violence and threats of violence take from the said Kerina Moyo the sum of two dollars, the property and in the lawful possession of the said Kerina Moyo and thus the said accused did rob the said Kerina Moyo of the same.

Thirdly, Charged with the crime of contravening section 70 (1) (a) of the Police Act [*Chapter 98*] in that upon the 2nd May, 1980, and at the Bus Terminus in Mucheke Township, Fort Victoria, in the said Province, the said accused, not being a member of the British South Africa Police, did wrongfully and unlawfully pretend by words and conduct that he was a member of the British South Africa Police.

He pleaded not guilty and was found guilty on all three counts. He was sentenced to nine months' imprisonment with labour on each of the two counts of robbery. Of the total of 18 months' imprisonment with labour for the two counts of robbery, six months were suspended for five years on condition that accused "does not commit within that period any offence involving dishonesty or assault for which he is sentenced to imprisonment without the option of a fine". On count 3 he was sentenced to three months' imprisonment with labour "the whole of which is to run concurrently with the sentences imposed on Courts 1 and 2".

Briefly, the facts are that on the night in question the accused pretended to be a policeman. He went to a bus terminus accompanied by one Mutsena. The complainants were at the bus terminus. The accused held himself out as a policeman. He kicked the feet of the complainants and ordered them to stand up. He then accused them of being thieves and implied that he had arrested other thieves in that area. He ordered them off to the cells. When the complainants seemed to doubt the accused's role as a policeman, he produced a book from his pocket and implied that the book was his police identity document. The complainants went with accused into the bush, along the road. It appears from the evidence that accused demanded money whilst marching the complainants along the road. He sent the second complainant ahead with Mutsena. He himself demanded money from the first complainant, who



DUMBUTSHENA J

told him she had none. He slapped her and threatened to take her to the cells and injure her. He then forcibly removed from her, her blanket and her jersey. She finally escaped. The accused hid the blanket. Accused went to the second complainant who was with Mutsena. He threatened to beat her in the manner he had beaten up the first complainant unless she produced some money. The second complainant produced $2 from her bra. The accused took it

Copyright Juta & Co Ltd

from her.

On the evidence as disclosed in the record it is clear that accused held himself out as a policeman in order to induce the complainants to part with their property or money. The criminal acts thus separately charged, that is, the two counts of robbery on the one hand and the contravention of section 70 (1) (a) of the Police Act on the other hand, were done with one criminal intent and constituted one continuous criminal transaction, and the evidence necessary to establish the two counts of robbery involved proving the impersonation. See *R v Tarewa,* 1949 SR 158; 1949 (4) SA 347 (SR) at 348; *R v Malako,* 1959 (1) SA 569 (O.).

The rule against the splitting of charges and the basic tests as to whether or not there has or there has not been a splitting of charges, were laid down by LEWIS, JP., in the recent case of *Attorney-General v Jakubec,* 1979 RLR 267 (AD) at 270G; 1980 (2) SA 884 (ZRAD) at 886F, where he says:

> "The rule against splitting of charges and the tests as to whether or not there has been a splitting of charges were considered at length in the leading case of *S v Grobler and Another,* 1966 (1) SA 507 (AD), which was followed in the General Division of this Court by the former Chief Justice, BEADLE CJ, and GREENFIELD J, in the case of *R v Peterson and Others,* 1970 (1) RLR 49 (GD) at 51; 1971 (2) SA 130 (R) at 131. In the last-quoted case, BEADLE CJ, at page 51G (page 131D of the South African report), after quoting with approval a passage in the judgment of WESSELS, JA, in *Grobler*'s case *supra*, said this:
>
> > 'In the earlier cases to which the learned Judge referred with approval, two basic tests are set out. One is that where a man commits two acts of which each standing alone would be criminal but does so with a single intent, and both acts are necessary to carry out that intent, then he should only be convicted of one criminal offence. Another commonly applied test, which is a useful one in certain circumstances, is that the same evidence which is essential to prove one criminal act should not be used again as essential evidence to prove another. Where the essential evidence in such cases proves two criminal acts, only one should be charged'
> >
> > There are thus two tests which may be applied and, as was pointed out in *Grobler*'s case at 523E, the test to be applied is that which, according to the circumstances and on a common sense basis, is best calculated to achieve the object of the rule."



DUMBUTSHENA J

I invited comments from the Attorney-General on the improper or otherwise splitting of charges in the present case. I am indebted to the Director of Public Prosecutions for his comments that appear below:

> "It would appear from the record that the accused's actions in holding him self out to be a policeman were designed to instil fear in the complainants with a view to the perpetration of further crimes upon them, namely robbery. As a result those actions, which would normally found a charge of contravening the Police Act are in this matter part and parcel of the subsequent crimes.
>
> The approach to be used in such cases was laid down by the Appellate Division in the case of *S v Brereton,* 1970 (2) RLR 272 (AD) where it was said at page 277A:
>
> > 'In such cases, where the accused, in pursuance of the dominant intention, commits a number of offences, the proper thing to do is to charge him only with that offence which was his dominant purpose.'
> >
> > In the circumstances, it is conceded that the conviction and sentence on count three, that of contravening

**Copyright Juta & Co Ltd**

section 70 (1) (a) of the Police Act [*Chapter 98*] should be set aside."

I agree with those views.

A splitting of charges resulting in a duplication of convictions also results in prejudice to the accused when next he is convicted of a relevant offence and his previous convictions are taken into consideration for purposes of assessing sentence. See *R v Peterson & Others,* 1970 (1) RLR 49 (GD) at 51A-E, 1971 (2) SA 130 (R) at 131A-C.

In this case the learned magistrate improperly convicted the accused on all the three counts. As the offence of robbery is more serious than the statutory offence of impersonating a policeman, the conviction and sentence on count three should be set aside. The convictions and sentences on counts 1 and 2 are confirmed but the conviction and sentence or count 3 are set aside.

My brother Waddington agrees with this judgment.

---



## GENERAL FINANCE COMPANY (PRIVATE) LIMITED v ROBERTSON 1980 ZLR 166

**Court** **Appellate Division, Salisbury**

Civil Appeal

Lewis, A C.J., Baron, JA, and Goldin, JA

30th May and 30th June, 1980

### Flynote

Cession - meaning of cession - whether includes transfer of obligations - rights of debtor against cessionary.

Sale - essentials of whether sale can exist without obligation to receive and transfer merx - rights arid duties of parties to sale.

### Headnote

Even where rights only have been ceded, the debtor can raise any defence against the cessionary which was available to him against the cedent, notwithstanding that the defence arises out of a breach by the cedent of his obligations under the principal contract.

Depending on its context the word "cession" may describe a contract whereby obligations as well as rights are transferred.

No agreement of sale is constituted where the purchaser has no right to obtain possession and the seller no duty to transfer the thing sold; such a contract is a donation.

If a seller fails to shield the buyer against eviction by a person with a better title to the property, he must restore the purchase price and pay any damages suffered by the buyer as a result of the eviction.

---

Copyright Juta & Co Ltd

The respondent had purchased a motor-car under a hire-purchase agreement from one F, who gave out that he owned the car; F immediately ceded the agreement and his purported ownership of the car to the appellant. Neither the hire-purchase agreement nor the cession expressly obliged the appellant to transfer ownership to respondent. Before the full purchase price had been paid the car was claimed by its real owner, and with the agreement of the appellant the respondent paid the real owner the price it demanded. The respondent thereupon refused to pay appellant any further instalments under the hire- purchase agreement and claimed damages from the appellant. On appeal from a judgment of a magistrate dismissing the appellant's claim for the balance of the instalments outstanding and ordering it to pay respondent damages.

---



*Held* that if there were no obligation to pass transfer of the motorcar under the hire- purchase agreement there would be no sale, and the respondent would be entitled to repayment of any sum he paid under the agreement and would certainly be released from making further payments.

*Held,* therefore, that the magistrate had rightly dismissed the appellant's claim for outstanding instalments.

*Held,* further, that it would make nonsense of transactions relating to the cession of hire purchase agreements if the cessionary were to acquire ownership of the thing sold without any obligation to pass transfer of it.

*Held,* therefore, that the appellant had accepted cession of F 's obligations as well as his rights, and was liable to respondent in damages for failing to protect him against eviction.

Authorities cited:

*de Bruyn v Centenary Finance Co. (Pty.) Ltd.,* 1977 (3) SA 37 (T);

*Kleynhans Bros. v Wessels Trustee,* 1927 AD 271;

*Fryes (Pty.) Ad. v Ries,* 1957 (3) SA 575 (AD);

*Lammers & Lammers v Giovannoni,* 1955 (3) SA 385 (AD);

*Helby v Matthews & Ors* [1895] AC 471;

*Western Credit Bank Ltd v van der Merwe,* 1970 (3) SA 461 (C); Voet 21.2.31;

Norman, *Purchase and Sale in South Africa,* 4th edition;

*van der Westhuizen v Yskor Werknemers se Onderlinge Bystandsvereniging,* 1960 (4) SA 803 (T);

Mackeurtan, *Sale of Goods in South Africa,* 4th edition;

*Milner v Union Dominions Corporation (SA) Ltd & Anor.,* 1959 (3) SA 674 (C);

---

**Copyright Juta & Co Ltd**

*Green v Griffiths* (1886) 4 SC 346;

*Rolfes, Nebel & Co. v Zweigenhaft,* 1903 TS 185;

*Calyvas v Standard Bank,* 1926 AD 56.

*R.R. Horn, SC,* for the appellant: The terms of the cession on the front of the agreement make it clear that appellant and respondent both envisaged that Flood would cede his rights to appellant and the "acknowledgment of cession by purchaser" immediately under the cession similarly emphasizes that it is rights, not obligations, that are to be ceded. Furthermore it is inappropriate to speak of a "cession" of obligations: Trust Back of *Africa Ltd v Imperial Garage and Filling Station,* 1963 (1) SA 123 (AD), Wille and Millin's Mercantile Law of South Africa (17th edition), 65-66. Under the common law a cession of rights by one party to a hire-purchase contract does not bring the cessionary into the contractual relationship which exists and continues to exist between the original seller and the purchaser: Diemont, *Law of Hire Purchase in South Africa*, 4th edition, pages 178-9, *Milner v Union Dominions Corporation (SA) Ltd & Anor.,* 1959 (3) SA 674 (AD); *van Zyl v. Credit Corporation of SA Ltd.,* 1960 (4) SA 582 (AD) at 589A, and see, for a summary of this case, 1960 Annual Survey at pages 119-20. As far as respondent's counterclaim is concerned, it is to Flood, not appellant, that respondent must look.



*A. P de Bourbon*, for the respondent: Under the common law the seller is obliged to protect a purchaser against eviction: *Lammers & Lammers v Giovannoni,* 1955 (3) SA 385 (AD) at 390A-B, *Alpha Trust (Edms.) van der Watt,* 1975 (3) SA 734 (AD). If the seller fails to protect the possession of the purchaser and fails to shield the purchaser against eviction, then the purchaser has a right of action *in rem* against the seller. This right applies not only to a refusal to continue making payments under the contract of sale but extends to the right to re claim that which has already been paid: Pothier, Sale, Part II, paragraph 69, quoted in *de Bruyn v Centenary Finance Co. (Pty.) Ltd.,* 1977 (3) SA 37 (T) at 49-50. Subject to any valid estoppel, a debtor may avail himself of any defences - not merely personal to the cedent - of which he might have availed himself against the cadent at the time of the notice of cession in an action against a cessionary: *Walker v Syfret, NO,* 1911 AD 141 at 162; *Scottish Rhodesian Finance Ltd v Olivier,* 1965 RLR 128 (AD) at 134E-F, 136E-G. If it is correct that the appellant succeeded only to the rights under the contract, the respondent is entitled in law to refuse to pay any further instalments of money due under the contract. The case of *de Bruyn v Centenary Finance Co.,* 1977 (3) SA 37 (T) is correctly decided. Accordingly, render common law the respondent was excused from paying any further sums to the appellant.

The section of the agreement on the standard form of the appellant headed "The Cession" is more than simply a cession of rights. It involves a delegation of certain duties. These duties are the ones connected with ownership. The whole purpose of the agreement is to allow the appellant to become the owner in the full sense and, when payment in full has been made, to pass on to the respondent the full ownership of the vehicle. This can only mean that the obligations attendant upon ownership are intended to pass between Flood and the appellant and subsequently between the appellant and the respondent.

The only way in which the respondent was required to mitigate his loss was to pay the sum

Copyright Juta & Co Ltd

claimed by UDT as soon as possible to avoid further interest being levied. The events thereafter do not assist the appellant. The respondent was entitled, once having obtained title, to improve the motor-vehicle and sell it at a profit. Any profit does not affect his damages.

In the alternative, if the case of *de Bruyn v Centenary Finance Co* is correctly decided and the respondent is entitled to resist the claim for the remaining instalments on the basis that it is an action *in rem* that he would be entitled to raise against the seller and the cessionary, then on a similar principle the right of the purchaser to claim back that which has



GOLDIN JA

already been paid to the seller is an action *in rem*. The right of the purchaser to claim back what has already been paid when there is a breach of the warranty against eviction is well established, and is based on the *actio empti*: Alpha *Trust (Edms.) van der Watt,* 1975 (3) SA 734 (AD) per BOTHA, JA, at 748F. In these circumstances the respondent is entitled to be repaid by the appellant that which he has paid to the appellant.

In the further alternative, the respondent paid the sum of $3 200,16 to the appellant in the bona tide but mistaken belief that the amount was due to the appellant. In fact the amount was not so due because the appellant was unable to protect the possession of the respondent and prevent his eviction, and was unable to pass title. The contract was thus voidable. This was at the time of payment unknown to the respondent. Compare *Nkosi v Totalizator Agency Board (Transvaal),* 1980 (1) SA 122 (T).

## Judgment

**Goldin JA:** This appeal against a judgment in the magistrates Court concerns the rights and obligations of the parties under a hire-purchase agreement. Mr Flood and the respondent entered into a hire-purchase agreement on the 22nd November, 1977, whereby the former, as seller, sold to the respondent a second-hand Jaguar motor-car on hire- purchase for the sum of $6 900. After adding the usual charges and deducting the initial cash payment, the balance due by the purchaser was $6 350,88 payable by two instalments of $1250 and 22 instalments in the sum of $175,04. On the same day on which Flood and the respondent entered into the hire-purchase agreement, they recorded, in the same document, that the appellant and Flood entered into an agreement of cession. A dispute exists whether Flood ceded or transferred his rights only under the hire-purchase agreement or whether he also transferred his obligations to the appellant, in particular the obligation to transfer the vehicle to the respondent.

In March, 1978, it became known that Flood was not the owner of the vehicle and that a finance company, UDT Limited, was entitled to repossess. the vehicle as owner. The vehicle was in fact under hire-purchase with UDT Limited in England with an amount outstanding and due for payment of the balance of the purchase price of $3 846,96. The respondent paid this sum to UDT Limited and thereafter refused to pay the balance of the outstanding instalments. By this time, Flood had disappeared and it is not known where he is.

The appellant commenced an action against the respondent for the payment of the balance of the purchase price of $3150,72. The respondent denied liability to pay on the ground that the

Copyright Juta & Co Ltd

appellant was unable



GOLDIN JA

to give transfer of the vehicle against payment. The respondent further counter-claimed for the payment by the appellant of damages in the amount paid by the respondent to UDT Limited in order to vindicate ownership of the vehicle. A variety of alternative grounds upon which the respondent resisted payment to the appellant and claimed payment from the appellant do not have to be canvassed, as these aspects are no longer in dispute.

The magistrate dismissed the appellant's claim and awarded damages in the said sum of $3 846,96 to the respondent with costs of suit.

The main dispute is whether the respondent can defeat the appellant's claim for payment by relying on the appellant's inability to give transfer of the vehicle. It is common cause that the appellant is not able to give transfer, having denied liability to do so and consented to the respondent's vindication of the vehicle from its true owner at his own expense as his own vehicle.

Mr *Horn* for the appellant contended that Flood as seller only ceded his rights under the agreement and accordingly there was no obligation upon the appellant to transfer the vehicle, which obligation remained enforceable only against Flood. I will deal with the cession and existence of an obligation to transfer the vehicle at a later stage. I assume for the purpose of this submission that there was an obligation on the part of the seller to give transfer but that rights were ceded to the appellant.

A cessionary of rights steps into the shoes of the cedent and acquires no greater rights against a debtor than those which the cedent himself possessed. A debtor can raise any defence against a cessionary which was available to him as against the cadent. Such a defence would usually arise from the breach of an obligation under the contract with the cedent, but in doing so the debtor does not hold the cessionary liable for obligations under the contract but merely relies on the principle that no person can transfer a better right than he himself possesses (*de Bruyn v Centenary Finance Company (Pty) Ltd* 1977 (3) SA 37 (T) at page 42). Mr *Horn's* contention, therefore, that the respondent cannot raise Flood's obligation to give transfer as a defence against the cessionary is wrong in law.

In the alternative, Mr *Horn* submitted that even if the cedent's inability to give transfer could be raised as a defence against the cessionary's claim for the balance of the purchase price, the debtor, namely the respondent, is estopped from relying on this obligation.

[The learned Judge then dealt with the question of estoppel, which was based on an undertaking allegedly given by the respondent and, having



GOLDIN JA

Copyright Juta & Co Ltd

found that no such undertaking had been given, the learned Judge continued:]

A further question raised on appeal is whether or not there was in fact an obligation to give transfer or possession of the vehicle under the hire purchase agreement. The relevant condition in the agreement reads:

> "5. The Purchaser shall take the goods in the condition in which the same are at the time of delivery and the Seller shall be under no obligation to ascertain whether the goods are fit or suitable for the Purchaser's intended use thereof. All conditions and warranties as to fitness, description, state or suitability or which might otherwise be attached to the goods either at Common Law or under any Statute are expressly excluded during the currency and on completion of this Agreement, save and except for the warranties stipulated by Section 12 of the Act. The Purchaser acknowledges that no representation by the Seller or his authorized agent has induced the Purchaser to enter into this Agreement."

Section 12 of the Act has been replaced in identical terms by section 11 of the Hire - Purchase Act [*Chapter 284*], subsections (1) and (2) of which read as follows:

> "11. (1) In every agreement there shall be -
>
> (a) an implied warranty that the purchaser shall have and enjoy quiet possession of the goods;
>
> (b) an implied condition on the part of the seller that he is not and will not be precluded from passing the ownership of the goods to the purchaser at the time when the ownership is to pass;
>
> (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the owner ship is to pass;
>
> and such warranties and conditions shall be implied notwithstanding any agreement on the contrary.
>
> (2) Every agreement shall be deemed to contain any warranties or conditions implied in a contract for the sale of goods under any law."

Section 11, however, does not apply to an agreement under which the purchase price exceeds the sum of $3 000 and therefore does not apply to this hire-purchase agreement. (See section 3 of the Act.)

Mr *Horn* in his Heads of Argument points out that the provisions of section 3 of the Act were overlooked by both parties and by the magistrate in the Court below. He submitted that on a proper construction of condition 5, and since warranties set out in section 12 (now section 11) do not apply, there was no obligation on the part of the seller to ensure that the respondent enjoyed quiet possession of the goods or to pass transfer of the vehicle to him. In my view, condition 5 as read in the context of the agreement as a whole relates to conditions and warranties



GOLDIN JA

as to state or suitability and the words: "or which might otherwise be attached to the goods either at Common Law or under any Statute are expressly excluded" mean and are intended to refer to the conditions and warranties expressly mentioned or similar to them, that is to say *ejusdem generic.* I do not think that it can be rightly said that after referring to "fitness, description, state or suitability", the obligation to give transfer or quiet enjoyment of the property

**Copyright Juta & Co Ltd**

is excluded by the use of the words "or which might otherwise be attached to the goods".

Under the common law, a seller does not guarantee that he is the owner of the subject- matter of the sale because the sale of another's property is not void merely because the seller is not the owner of the property sold. But he undertakes to give *vacua possessio* to the purchaser (see *Kleynhans Bros v Wessels' Trustee,* 1927 AD 271 at 290 and *Frye's (Pty) Ltd v Ries,* 1957 (3) SA 575 (AD) at 581). If, however, a seller fails to shield the buyer against an eviction by a person with a better title to the property, he must restore the price and pay any damages suffered by the buyer as a result of the eviction (*Lammers and Lammers v Giovannoni,* 1955 (3) SA 385 (AD) at 390). A seller is under obligation to transfer to the purchaser all his proprietary rights in the thing sold. From the very nature of an agreement of purchase and sale it is clear that if there is no legal obligation to buy flowing from a contract it cannot properly be said to constitute an agreement of purchase and sale (see dictum of LORD HERSCHELL in *Helby v Matthews and Others* [1895] AC 471, which has been widely followed in South African Courts as set out in Western Credit *Bank Ltd v van der Merwe,* 1970 (3) SA 461 (C) at 464).

Similarly, no agreement of sale is constituted where a purchaser's right to obtain possession or the seller's duty to transfer the things sold do not exist. It is perhaps relevant to mention that even where the purchaser knows at the time of the sale that the subject- matter thereof is not the property of the seller or that it is the property of a third party the purchaser is still entitled to recover the price paid and obviously to refuse to pay any unpaid portion thereof (Voet 21.2.31; Norman's Purchase and Sale in South Africa, 4th edition at 291; *van der Westhuizen v Yskor Werknemers se Onderlinge Bystandsvereniging,* 1960 (4) SA 803 (T.)).An alleged contract of sale in which there is no obligation to give possession or transfer the subject-matter is not a sale, but a donation. There can be no sale if it is agreed that the property shall not pass to the purchaser (see McKeurtan, *Sale of Goods in South Africa,* 4th edition at page 4). Accordingly, if there was no obligation to pass transfer of the vehicle under this hire-purchase agreement, there would be no valid



GOLDIN JA

contract of sale and the purchaser would become entitled to repayment of any sum paid under the purported agreement and certainly would be released from making further payment. On this view, even if Mr *Horn's* contention is right, the appellant would still not be entitled to his claim for payment of outstanding instalments.

For these reasons, the magistrate rightly dismissed the appellant's claim for outstanding instalments.

The respondent successfully counter-claimed for damages in the sum of $3 846,96, being the amount he paid to UDT Limited in order to vindicate and acquire ownership of the vehicle. When the matter went on appeal the magistrate, in further reasons for his judgment and in reply to the ground of appeal, stated that he awarded damages on a wrong basis because he should have deducted from the amount the respondent paid to the English finance house the amount he avoided paying to the appellant, and that his judgment in favour of the respondent should be reduced in this manner. The effect of this would be to deduct the sum of $3 150,72 from the

Copyright Juta & Co Ltd

sum of $3 846,96 leaving a balance of $696,24. Counsel for both parties conceded that if the respondent became entitled to damages this was a correct amount to be awarded. The question that therefore remains is whether or not the appellant was liable to pay damages.

It has already been said that where there has been a cession of rights only, a debtor may rise any defence *in rem* against the cessionary which he would have possessed against the cedent. Where, however, there has been a transfer of obligations as well as rights it obviously follows that the debtor can enforce any obligation under the contract against the cessionary. On the first page of the hire-purchase agreement under the heading "Cession" the following is signed by the seller:

> "I/We do hereby tender Cession of this Agreement and the ownership of the goods referred to General Finance Company Private) Limited and warrant as an essential term that the information contained in the said Agreement is correct; and on our behalf and on behalf of the said Company do hereby give notice to the Purchaser that we are about to sell and cede our rights under the foregoing Agreement including that of ownership of the goods referred to therein to General Finance Company (Private) Limited, or their assignees, and that from now and henceforth you will have possession of the goods as bailee/s on behalf of the new owner thereof."

This is followed by "An Acknowledgment of Cession" by the purchaser and signed by him.

Before considering whether the appellant did not assume the seller's obligation to transfer the vehicle to the purchaser, I will deal with a sub-



GOLDIN JA

mission by Mr *Horn* which he particularly emphasised. He contended that it is inappropriate to speak of a cession of obligations and there fore where parties speak of a cession they are dealing with the transfer of rights and not of obligations. For this view he relied on the case of *Milner v Union Dominions Corporation (SA) Ltd & Anor,* 1959 (3) SA 674 (C), where WATERMEYER J, dealing with counsel s submissions said at 676H:

> "He referred to the somewhat common, but strictly speaking inaccurate, use of the word 'cession' in relation to a lease as meaning a transference by the tenant of all his *rights and obligations* under the lease to another person, as opposed to a sub-letting which involves merely a transference of *rights,* . . ."

The learned judge went on to say at page 677A:

> "Giving to these words their ordinary meaning, and having regard to the fact that the word 'cede' is the appropriate word to use in relation to rights and an inappropriate word to use in relation to obligations, I have come to the conclusion that all that is alleged . . . is a cession of rights and not a delegation of obligations."

The use and meaning of the terms "assignment" and "cession" has been the subject of several earlier decisions. Thus in *Green v Griffiths* (1886) 4 SC 346, DE VILLIERS CJ, says at 351:

> "In regard to assignees, however, by our law, agreeing in this respect with that of Scotland, but not with that of England, an assignment is not complete as such unless it has the effect of substituting the assignee as tenant in lieu of the original lessee-in other words, of transferring the lessee's contractual obligations towards the lessor from the lessee to the assignee."

In *Rolfes*, *Nebel & Co v Zweigenhaft,* 1903 TS 185, WESSELS J, says at page 189:

Copyright Juta & Co Ltd

"I have used the word 'assignment' because it is used in the plea, though no such term with respect to leases is known to the Roman or Roman-Dutch law. It belongs purely to the terminology of English and Scotch law."

In the case of *Colyvas v Standard Bank,* 1926 AD 56, a transfer of rights and obligations was described as an "out and out cession".INNES CJ, says at page 58:

"Certainly the obligation was not transferred by the operation of the cession itself. It was not an out and out cession by which, with the assent of the company, one insured was substituted for another, the second succeeding to all the rights and undertaking all the obligations of his predecessor."

However, whatever the inference or effect which arises from the use of the word "cession" it is necessary to determine whether, in fact, the appellant assumed the seller's obligation to give transfer and thereby rendered itself liable for any damages sustained by virtue of a breach of this con-



GOLDIN JA

tractual obligation. The Court must have regard to the substance and the real meaning and nature of a contract and not the form or any description given or employed by the parties.

As will be seen from what appears above, the seller refers to tendering "cession of this agreement". Thereafter reference is made to a "cession of rights", obligations not being mentioned. An examination of the agreement itself clearly establishes, however, that the seller transferred and the appellant acquired the seller's obligations as, well as his right to transfer the vehicle to the respondent. Under "Terms and Conditions" contained in the agreement, paragraph 1 reads as follows:

"1. In these terms and conditions-

The words 'the Seller' shall mean and include any cessionary of the original seller;"

The reference to "any cessionary" could relate to either one who acquired rights or assumed obligations or both. The real question is whether this agreement properly construed imposes, the obligation on the appellant to give transfer. As has already been mentioned the seller, in the agreement described as a "cession", tendered "cession of this Agreement and the ownership of the goods referred to" to the appellant. The purchaser contemporaneously in an "acknowledgment of cession" "recognises the new ownership" and agrees that he shall "forthwith hold possession of the said goods as bailee on behalf of the new owners, subject to the terms and conditions of the said agreement", the agreement referred to being the hire-purchase agreement. It would make nonsense of transactions of this kind and would be contrary to the provisions of the agreement of cession and the hire-purchase agreement entered into by the parties in the same document and at the same time, if the appellant as cessionary, having acquired the ownership of this vehicle, did not at the same time assume the obligation to pass transfer.

I now turn to the question of costs. The appellant has failed in its appeal against the decision of the magistrate dismissing its claim for unpaid instalments, but has succeeded in the reduction of damages from $3 846,96 to $696,24 as mentioned above. If the respondent had agreed to the reduced award of damages at the outset, or at least after the magistrate had agreed that his

Copyright Juta & Co Ltd

award should be reduced in the manner in which it has now been done, the appellant would have failed on the counter-claim as well. It is not possible to speculate concerning whether the appellant would have proceeded with its appeal against the dismissal of its claim if the respondent had abandoned the portion of damages by which it has been reduced in this Court. The issues involved in the appeal by the appellant may be of sufficient importance to it in the conduct of its





business to proceed with this appeal regardless of the *quantum* of damages involved. The appellant could also have substantially shortened the proceedings by confining itself to an appeal against *quantum* of damages.

In the course of argument, Mr *de Bourbon* for the respondent agreed that the proper amount of damages to have been awarded was the sum of $696,24. Similarly, Mr *Horn* also agreed to this and in the result no time was wasted in canvassing the *quantum* of damages to be awarded if the respondent became entitled to damages. The hearing of the appeal lasted all day, and the time was almost entirely taken up with argument and submissions on which the appellant failed. In the first place, the appellant failed in the appeal on the claim for unpaid instalments. Secondly, it failed in its contention that it was not liable to pay damages. In view of the fact, however, that the reduction in the *quantum* of damages was only agreed during the hearing in reply to questions from the Court and that the appellant had to come to this Court to obtain a reduction in damages, I am of the view that the appellant should not be made to pay all the taxed costs incurred by the respondent. In all the circumstances, the proper order is to deprive the respondent of a portion of his costs to which he would have been entitled if he had abandoned that portion of the judgment in his favour which was reduced on appeal. In the circumstances, the appellant should be ordered to pay two-thirds of the respondent's costs of appeal.

The order of costs by the magistrate must stand. In that Court the respondent succeeded on the appellant's claim and obtained an award of damages, the appellant having denied any liability for damages.

Accordingly, the judgment by the magistrate is altered to the following extent:

"Plaintiff is ordered to pay the defendant damages in the sum of $696,24 and costs of suit." The appellant is ordered to pay two-thirds of the respondent's taxed costs on appeal.

**Lewis ACJ:** I agree.

**Baron JA:** I agree.

*Atherstone & Cook,* attorneys for the appellant.

*Condy, Chadwick & Elliott,* attorneys for the respondent.



Copyright Juta & Co Ltd

## THE STATE v BEYERS AND ANOTHER 1980 ZLR 177

**Court** **Appellate Division, Bulawayo**

Criminal Appeal

Lewis, A C.J., Baron, JA, and Goldin, JA

18th and 30th June, 1980

### Flynote

Customs and Excise Act [Chapter 177] - section 165 - smuggling - whether overlaps with oxeyes specified in section 157 of Act.

### Headnote

The offence of smuggling in contravention of section 165 of the Customs and Excise Act [*Chapter 177*] is very wide and all-embracing and includes the elements of the offences specified in paragraphs (a), (b), (d) and (e) of subsection (1) of section 157 of the Act.

The appellants, having imported two motor-cars, embarked on an elaborate subterfuge involving forged documents and invoices in an attempt to persuade customs officers that the value of the vehicles for duty purposes was half the real value. They were convicted of smuggling in contravention of section 165 of the Customs and Excise Act [*Chapter 177*].

*Held* that the charge was properly laid notwithstanding that the appellants could have been charged with contravening section 157 (1) (a), (b), (d) or (e) of the Act.

*H. I Bisset,* for the appellants. The cars in question were imported openly and without any concealment of their qualities and attributes. There was nothing fraudulent about the importation itself; only the false declarations as to value were ever contemplated, The meaning of "importation . . . with intent to defraud the State or to evade any prohibition . . . restriction . . . or regulation . . ." in the definition of "smuggling" in section 2 of the Act is plainly that the importation itself, not anything antecedent or subsequent to the importation, is what the Legislature was aiming at. On the face of it this contention seems facile, but the very existence of section 157 of the Act, which creates several offences connected with just such antecedent or subsequent acts connected with importation (but not actually part of it), would seem conclusive. In other words, smuggling must be held to be an act of importation which itself amounts to an attempt to defraud. Consideration of analogous situations is instructive. The man who conceals a case of whisky in the boot of his car and fails to declare it is smuggling, as is the



LEWIS ACJ

man who, filling a petrol-can with twenty-five-year old Chivas Regal, declares it as petrol. But what of the man who, declaring openly that his bottle of Chivas Regal whisky is what it is, simply

Copyright Juta & Co Ltd

under-declares what he has paid for it? He, it is suggested, is guilty only of contravening section 157 (1) (a) of the Act.

*C R Barlow,* for the respondent.

## Judgment

**Lewis ACJ:** The two appellants were jointly convicted in the regional Court of the crime of smuggling or attempting to smuggle two motor-vehicles into Zimbabwe, in contravention of section 165 of the Customs and Excise Act [*Chapter 177*], as amended. Each was sentenced to six months' imprisonment with labour totally suspended for five years on conditions. In terms of section 190 (1) (a) of the Act, summary judgment was given against the appellants jointly and severally for the amount of the duty which should have been paid. It was ordered that both vehicles be declared forfeited to the State. A plea of guilty of contravening section 157 (1) (a) of the Act was tendered by the defence at the trial, but this was rejected by the State. An appeal was noted against the conviction on the ground that the appellants should only have been convicted of a contravention of section 157 (1) (d) of the Act, and against the sentence, including the forfeiture order.

After the rejection of the plea by the State, the following statement of agreed facts was put in by consent:

> "The first accused is aged 20. He entered Rhodesia during May, 1979, and has since then been resident in Bulawayo. At the time of the alleged offences he was unemployed.
>
> The second accused is also aged 20, and was at the time of the alleged offences residing in Pretoria, where he was employed by the Department of Agriculture, Economics and Marketing.
>
> Prior to 9th February, 1980, the accused decided to import into Rhodesia two motor - vehicles, which the second accused would drive through the Customs Post at Beitbridge. They decided also to undervalue these vehicles. Their intention was, having imported the vehicles, to sell them in this country at a profit. The accused were acting together in this venture.
>
> On the 9th February, 1980, the second accused drove an Audi sedan registration No. CWD 051T into Rhodesia through the Customs Post at Beitbridge, where he declared on his Temporary Import Permit application that the purchase price of the Audi had been R500 (in fact the purchase price had been R1 000). A temporary import permit was issued, expiring on 15th February, 1980.
>
> On Monday, 11th February, both accused visited Customs House, Bulawayo, where they saw Customs Officer Miss Robbins. Both accused were present throughout the remainder of the interview. The second accused produced the temporary import permit in respect of the Audi, and told Miss





> Robbins that he intended to live in this country. He said further that he had another vehicle which he wished to import, and disclosed that it was bits intention to sell both vehicles in this country.
>
> Miss Robbins told the second accused that he would only be able to clear one vehicle under the Immigrants' Rebate scheme, but neither accused fully understood the purport of what was said in this respect.

Copyright Juta & Co Ltd

Miss Robbins said further that she would require invoices from the suppliers of the vehicles, evidence as to the source of the funds used to purchase the vehicles, and evidence proving that the second accused was employed in this country.

The first accused then told Miss Robbins that BEURAIN eras employed by him at the Granada Spanish Restaurant, and offered then and there to write a letter to that effect. Miss Robbins said that this was unsatisfactory and that she would require a letter on an official letterhead.

On the 18th February, the second accused again approached Miss Robbins at Customs House and produced the following documents to clear the vehicles.

(a) Beitbridge Report Order BB.9980 relating to Mercedes - Benz vehicle registration No. TAH. 322, showing the declared value of this vehicle to be R500.

(b) Headed letter purporting to be from Granada Spanish Restaurant, stating that the second accused was employed there as Assistant Manager at a salary of $250 per month.

(c) An invoice from Alderson and Flitton City, Pretoria, reflecting a purchase price of R420 for the Audi vehicle.

(d) An invoice from Pre Rand Finance, Pretoria, reflecting a purchase price of R551,25 for the Mercedes-Benz which had in fact cost R1 450.

(e) A copy of a bank statement from Barclays National Bank, Arcadia.

At all relevant and material times, neither accused owned or was employed at the Granada Spanish Restaurant.

On the 11th February, 1980, at the request of the first accused, ABU GARNIE, a printer employed by Speedy print, Bulawayo, printed 100 letter heads, headed GRANADA SPANISH RESTAURANT K E BEYERS, Grey Street, Bulawayo' and gave these to the first accused.

On the 18th February, 1980, at the request of the first accused, GARNER printed copies in blank of an invoice headed 'ALDERSON AND FLITTON CITY' from a copy supplied by the first accused, and copies of a similar blank invoice headed 'PRE RAND FINANCE EDMS BPK, Schoemann Street, Pretoria', which copies were later collected by both accused.

On the same day, Miss CAROLINE GOODLIFE WELLS, a typist also employed by Speedy print, typed what now appears on these documents, which are produced by consent.

Before leaving the premises of Speedy print with these forged documents, the first accused told Miss Wells not to mention the work the firm had done for him, as it was 'heavy illegal'. She reported this matter to her employer, who then called the Police.

---



LEWIS ACJ

The correct amount of duty payable on the Audi and Mercedes vehicles is $1 057,45 and, if the values given by the accused in respect of the vehicles had been accepted, the duty payable would have been $412,23; accordingly, the prejudice to the State is in the sum of $645,22. At the time when the above mentioned deception was conceived and when it was practised and persisted in, both accused were fully aware of the prejudice which would result to the fiscus, by their evasion of portions of the tax and duty payable."

Warned and cautioned statements to the police by each appellant were also produced by consent. The record in this regard reads as follows:

---

**Copyright Juta & Co Ltd**

*"PROSECUTOR PRODUCES*:

EXHIBIT 2 - WARNED AND CAUTIONED STATEMENT BY ACCUSED 1:

*PROSECUTOR READS ACCUSED l's REPLY ON EXHIBIT 2: BY COURT* (To Accused 1)

Do you agree that that is the statement you made freely and voluntarily to the police? . . Yes.

PROSECUTOR PRODUCES AND READS:

EXHIBIT 3 - WARNED AND CAUTIONED STATEMENT BY ACCUSED 2:

*BY PROSECUTOR:* (To Accused 2)

Is that your statement? - Yes.

Did you make that statement freely and voluntarily? - Yes."

The first appellant's statement reads as follows -

> "I owed Beurain two thousand rend and I told him to forget about the money and I gave him three thousand rend to bring up cars to Rhodesia and we will work a deal together. I then told him that it would be better if we give the values of the cars to customs as being less than what we purchased them for to avoid paying more duty and tax on these two vehicles."

The second appellant's statement reads as follows:

> "At this stage I am still employed by the Department of Agriculture, Economics and Marketing, Pretoria, a few months ago my friend Karel Eduard Beyers, who at that time owed me two thousand rand approached me and asked me to go into partnership with him in Rhodesia using money from his own inheritance. I agreed and we forgot about the two thousand rand he owed me. At this time Karel was resident in Rhodesia and he suggested that one way of bringing part of the money we had invested together was for me to bring in cars from South Africa to Rhodesia to later cell and divide the profits. I was to bring the vehicles in because Karel was already resident in Rhodesia. Karel then gave me access to three thousand rand in South Africa to buy cars and accordingly on the 9th February I brought in to Rhodesia an Audi saloon car Reg. No. CWD 051T. This car I bought in Pretoria for R1 000. On 16th February, 1980, I brought in a second with Karel's



> money a Mercedes 280S Reg. No. TAH 322 for which I paid R1 450. After bringing in the Audi Karel and I decided that we would under declare this vehicle to the Customs to avoid extra duty and tax. Accordingly we later, declared the Audi to Customs as purchase price of rand 400 and the Mercedes for rand 525.
>
> I later saw that Customs were not going to accept the price I had stated and I later told them to make their own price for duty and tax and I would accept their verdict."

Notwithstanding the agreed statement of facts and the admissions by each appellant as to their extra-curial statements referred to above, evidence was given by both appellants in an endeavour to show:

(1) That the elaborate subterfuges and forgeries involved in the importation of these motor-cars were only resorted to in order to cover up the source of the funds in South Africa used to purchase the motorcars, i.e., the first appellant's legacy which, although not yet due to

**Copyright Juta & Co Ltd**

him, had been released to him by his guardian.

(2) That their extra-curial statements had been obtained by undue influence.

The magistrate rightly rejected their evidence. It is obvious that the object of the exercise was to avoid the payment of the full duty on the vehicles so as to increase the anticipated profits on their resale. The less customs duty they had to pay the greater would be their profit

Mr *Bisset* understandably found himself in some difficulty in attempting to argue the case on the facts and properly conceded as much. The magistrate's finding on the facts was unassailable. Mr *Bisset* rested his argument against conviction on the submission that the proper verdict should have been one of guilty of contravening section 157 (1) (a) or of some other paragraph of that subsection.

Section 165 of the Act under which the appellants were convicted, as substituted by section 25 of Act 30 of 1976, reads simply:

> "165. Any person who smuggles any goods shall be guilty of an offence."
>
> "Smuggling" is defined in section 2 of the Act as:
>
> ". . . any importation, introduction or exportation, or attempted importation, introduction or exportation of goods with intent to defraud the State or to evade any prohibition of, restriction on or regulation as to, the importation, introduction or exportation of any goods required to be accounted for under this Act, and 'smuggle' and 'smuggled goods' have corresponding meanings;"

It will be seen that the offence is very wide and all-embracing and includes the elements of paragraphs (a), (b), (d) and (e) of section 157 (1), which read:



LEWIS ACJ

> "157. (1) any person who -
>
> (a) produces any false invoice or an invoice framed so as to deceive or maces any false representation in regard to the nature, the quantity or the value of any goods or the country in which such goods are grown, produced or manufactured; or
>
> (b) forges any document required under this Act or any law relating to customs or excise; or . . .
>
> (d) being required to make or render any report, statement, document, bill of entry, declaration or return or to supply any information demanded or asked for or to answer any question, neglects or refuses to do so or makes or renders any untrue or false report, statement, document, bill of entry, representation, declaration, return or answer or conceals or makes away with any goods required to be accounted for by this Act or any law relating to customs or excise; or
>
> (e) imports or attempts to import or assists in or is accessory to or connives at the importation or attempted importation of any goods illegally or without payment of the duty thereon; or . . .
>
> shall be guilty of an offence . . ."

The cases show that the Courts have accepted that there Is a great deal of overlapping of

Copyright Juta & Co Ltd

offences under the Act. In *S v Mahomed,* 1977 (2) R R 207 (G.D.), the accused had been convicted of contravening section 157 (1) (d). He had imported a diamond ring and had come through the "green route" at the customs harrier at the airport; by doing so, he was deemed, by regulation, to have made a declaration to the effect that he did not have in his possession or custody any article which was liable for duty. In the course of his judgment, PITTMAN J, said at page 208F;

> "It is worth noting that there are several other offences created by the Act of which the accused could have been found guilty, instead of section 157 (1) (d); for example, section 156 (1) (false statement by person arriving in Rhodesia); section 157 (1) (e) (attempting to import goods without payment of the duty thereon); and section 165 (smuggling). The Act gives the Court the same wide discretion as regards punishment in respect of all these offences."

In the last 10 years or so, numerous cases have come before the Courts involving Rhodesian residents who have imported or attempted to import motor-cars into this country by persuading new immigrants to bring them in as their own cars, in order to obtain the benefit of the immigrants' rebate on motor-cars to which Rhodesian residents are not entitled. On similar facts, the charges have taken the following different forms in cases where convictions have been upheld by this Court:



LEWIS ACJ

| | |
|---|---|
| *S v Miller* AD 161/71 (unreported) | common-law fraud. |
| *S v McGorian,* 1971 (1) RLR 282 | smuggling in contravention of |
| *S v Stouyannides,* 1974 (1) RLR 338 | section 164 (a) of the Federal |
| *S v Coetzee,* AD 185/76 (unreported) | Act of 1955. (The present section 165.) |
| *S v Lennon,* 1972 (2) RLR 259 | contravening section 156 (1) (e) of the 1955 Act (the present 157 (1) (e) as quoted above). |

Since the same penalties are applicable whether the charge is laid under section 165 or under section 157, including forfeiture, it seems to me that the argument in this case is largely academic. It certainly cannot be said that the charge was wrongly framed as smuggling. It contained the elements of false statements as to value with the intention of securing the evasion of a substantial amount of customs duty in the same way as the false statements as to the ownership of the vehicles in *McGorian*'s case and the other cases referred to above were made with the intention of evading a substantial amount of customs duty upon importation of those vehicles. The appeal against conviction must, therefore, fail.

As far as sentence goes, Mr *Bisset's* argument was confined to an attack on the order of forfeiture of the Audi. As I understood his argument he submitted that if the appellants had appreciated that they would have to pay the full customs duty on the Audi, they would not have gone through with that part of the transaction because they would not have realized a worth-while profit on resale of the Audi in Zimbabwe, and they would accordingly have taken the

Copyright Juta & Co Ltd

Audi back to South Africa. This is not an argument which commends itself to me. The intention at the time of the offence was to make a worth - while profit by means of the fraud perpetrated upon the customs authorities.

The moral blameworthiness of these young men was quite substantial. They went to elaborate lengths to achieve their purpose, even to the extent of having false invoices specially printed. They received a totally suspended prison sentence and no fine. The order of summary judgment was not a punishment because the money was owed by the appellants to the customs authorities in any event. The only remaining way of punishing these two, and the most appropriate way in the circumstances having regard to their impecunious situation, was by the forfeiture order. I am unable to say that the order of forfeiture of the Audi as well as the Mercedes amounted to a wrong exercise of the magistrate's discretion.

In the result, the appeal must be dismissed.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Ben Baron & Partners,* attorneys for the appellants.

---



## THE STATE v DE SOUZA 1980 ZLR 184

**Court** **Appellate Division, Bulawayo**

Criminal Appeal

Lewis, ACJ, Baron, JA, and Goldin, JA

18th June, 1980

### Flynote

Miscellaneous Offences Act [Chapter 68] - section 14 (2) - relations ship between section and crime of receiving stolen property knowing it to have been stolen - approach to sentence for contraventions of section.

### Headnote

The offence of acquiring stolen property in contravention of section 14 (2) of the Miscellaneous Offences Act [*Chapter 68*] embraces the common-law offence of receiving stolen property knowing it to have been stolen.

Where the facts on which a person has been convicted of contravening section 14 (2) of the Miscellaneous Offences Act raise the presumption that he received the goods concerned dishonestly, it is for him to persuade the Court that he was honest; and if he fails to do so he is bound to be sentenced on the basis that he was dishonest, as it he had been convicted of common-law receiving.

---

Copyright Juta & Co Ltd

Case cited:

*S v Kaplin and Ors* 1964 (4) SA 355 (T).

*H I Bisset,* for the appellant.

*C R Barlow*, for the respondent.

## Judgment

**Baron JA:** The appellant was charged with contravening section 14 (2) of the Miscellaneous Offences Act [*Chapter 68*]; he pleaded guilty, was duly convicted and was sentenced to six months' imprisonment with labour, of which two months were suspended for five years on the usual conditions. This is an appeal against sentence only. The relevant portions of the Statement of Agreed Facts read:

> "During February, 1980, the accused purchased from a coloured man, who claimed to come from Botswana, who visited him at his shop in Bulawayo, 11 cameras, of which 10 had previously been stolen in (certain recent) breakins. The 10 stolen cameras are valued at $2 394.
>
> . . .
>
> On the same day as the accused purchased the cameras, he also purchased 300 Pula front the same man. The accused paid this man $1200 for both the cameras and the Pula."



BARON JA

Section 14 (2) of the Miscellaneous Offences Act reads:

> "Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods of any description without having reasonable cause, proof of which shall be on such first mentioned person, for believing at the time of such acquisition or receipt that the goods are the property of such other person or that such other person has been duly authorised by the owner thereof to deal with-or to dispose of the goods shall be guilty of an offence and liable to the penalties which may be imposed on a conviction for receiving stolen property knowing it to have been stolen."

Mr *Bisset* submits that this section was intended to broaden the common law, not to replace it, and that it applies only to cases where the State does not allege the actual knowledge necessary for a conviction for common law receiving; he submits that dishonesty is not an ingredient of the statutory offence, that where dishonesty is alleged the legislature intended that common law receiving should be charged and the statutory offence be charged in the alternative lest dishonesty could not be proved, and that by charging only the statutory offence the State accepts the bona tides of the accused. It follows, so the argument runs, that the statutory offence is less serious than the common -law offence, and that the learned magistrate therefore erred in sentencing the appellant as if for receiving.

Whatever may have been the original intention of the legislature, this and corresponding sections have received judicial interpretation both here and in South Africa. *S v Kaplin and Ors* 1964 (4) SA 355 (T.), held that the section casts Upon an accused person the onus of showing (1) that he did in fact believe that the goods were the property of the person from whom he

Copyright Juta & Co Ltd

received them or that that person was authorised to sell or dispose of them, and (2) that he held such belief for reasonable cause. This case has been followed in relation to a similar provision here, section 5 of the Stock Theft Act. Thus the effect of these provisions is to create a presumption, once the factual circumstances have been established the law presumes that the accused did not believe and had no reasonable cause for believing that the person from whom he received the property was the owner or was authorised by the owner, and in the absence of proof by the accused on a balance of probabilities that he had both the belief and reasonable cause therefor he must be convicted. The result is that the statutory offence, as construed by the Courts, does indeed embrace the common law offence, which need never now be charged.



BARON JA

The sentence will, of course, vary according to the existence of both legs of the offence, as *Kaplin*'s case *(supra)* makes clear, if the accused satisfies the Court as to his *bona fides* but fails to establish reasonable cause he will be treated more leniently than if he fails to prove his bona tides as well. But an accused cannot be heard to say In argument, without giving evidence, "I agree I had no reasonable cause, but the State has not proved I was dishonest." Once the facts, as in the present case, are so strong as to raise the presumption that the accused was dishonest it is axiomatic that he cannot remain silent; if he wishes to persuade the Court that he was honest he must say so in evidence. This the appellant has not done, and it seems to me that he was bound to be sentenced on the basis that he was dishonest. It follows that he was properly sentenced as if for common law receiving; the legislature has chosen to express the penalty not in terms of a number of years but specifically by reference to the penalty for receiving.

As to the submission that the sentence is in any event manifestly excessive, four months' imprisonment with labour on these facts seems to me to be entirely appropriate, and I would not interfere and I would dismiss the appeal.

**Lewis ACJ:** I agree.

**Goldin JA:** I agree.

*Lazarus and Sarif,* attorneys for the appellant.



## THE STATE v RICHARD AND OTHERS 1980 ZLR 186

**Court** **General Division, Salisbury**

Criminal Review

Dumbutshena, J

Copyright Juta & Co Ltd

2nd July, 1980

## Flynote

Criminal law - public violence - elements of crime private quarrel - insufficiently serious dimensions.

## Headnote

The accused were charged with public violence. They had gathered at a store seeking to assault Security Force Auxiliaries and mistook a passing plain clothes policeman for one of the latter. Three stones were thrown at the policeman, who ran off to report. The incident was of brief duration.

---

1980 ZLR p187

DUMBUTSHENA J

*Held* that as the complainant was assaulted during the course of a private and restricted quarrel, it could not be said that the incident was of sufficiently serious dimensions to take it out of the category of an assault.

Cases and authorities cited:

*Hunt, South African Criminal Law and Procedure*, Vol. II at 74;

*R v Nxumalo and Ors,* 1960 (2) SA 422 (T);

*R v Clarke and Ferreira,* 1961 R & N 652;

*R v Cele,* 1958 (1) SA 144 (N);

*R v Segopotsi,* 1960 (2) SA 430 (T).

## Judgment

**Dumbutshena J:** The accused were charged with the crime of public violence. The charge sheet alleged that "upon or about the 31st day of March, 1980, and at or near Chitsaka Store, Chivu Township, Enkeldoorn, in the said province, the said accuseds did all and each or one or more of them, act In concert and did wrongfully, unlawfully and riotously assemble with divers or (sic) persons, numbering, an unknown number, but at least seven with intent to disturb the public peace and security, or to interfere with the rights of others, or people there being and to assail or set at defiance the authority of the Police and other persons in public authority there established for the maintenance of law and order and to make a riot and affray, and did then and there make a riot and affray and did gather in a body, outside Chitsaka Store in the said township and did then and there, throw stones, causing certain wounds, bruises, injuries and hurts, to Constable Nyanzira, a person there being."

They pleaded guilty and were found guilty. The case was stood down in order to obtain accuseds' records of previous convictions, if any. Upon re-reading the facts, the learned trial magistrate entertained some doubts about the conviction. He wrote to the Registrar of the High

---

Copyright Juta & Co Ltd

Court and said, among other things:

> ". . . I have come to the conclusion that they have been charged on the basis of their intentions. This did not manifest itself when file act was committed. The unlawful conduct complained of was one single act of throwing stones at a police constable who was off duty. There were no other incidents."

He forwarded the record to the High Court in terms of section 58 (1) of the Magistrates Court Act [*Chapter 18*].

The facts of the case are that on the 31st March, 1980, the accused were part of a mob that gathered outside a store at Chivu Township. They gathered there in order to assault Security Force Auxiliaries.

---



DUMBUTSHENA J

The complainant, an off-duty policeman in clothes, walked past near the accused. Upon seeing him, they mistook him for one of them. They threw three stones at him. He received cuts to his right jaw and elbow. He ran away and made a report to police details on night-shift duty.

Now the question is whether these facts disclosed the essential elements of the crime of public violence. The crime of public violence is defined by Hunt in *South African Criminal Law & Procedure,* Volume II p. 74 as:

> "Public violence consists in the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others."

The essential elements of the crime of public violence are summarised by the learned author as follows:

> "(a) Unlawfulness. (b) Intention. (c) A number of people acting in concert. (d) Acts of sufficiently serious dimensions. (e) Which are intended forcibly to disturb the public peace or security or to invade the rights of others."

It can be seen from the facts that in the instant case the unlawful conduct complained of was, as the magistrate put it in his letter, "one single act of throwing stones at a police constable who was off duty. There were no other incidents."

I invited the Attorney-General's views on this case as it seemed to me a borderline case. After referring to the facts and the definition of public violence, the Attorney-General expressed his views as follows:

> "Three stones were flung at him, which caused cuts to his jaw and elbow. The complainant ran off and reported to police details who were on duty. That appears to have been the sum total of the incident. No other complainants were involved and the entire incident could not have lasted for more than half a minute at the most. In making a value judgment, it seems to me that this was an incident of small dimensions. See *R v Nxumalo and Ors,* 1960 (2) SA 422 (T.). The fact that the complainant must have felt himself to have been gravely threatened, does not, I think, make the matter one of public violence. Had more than one person attracted the attention of the crowd, one could have probably supported a conviction for public violence. Similarly, if the crowd had stoned vehicles or property in the area. (See *R v Clarke and Ferreira,* 1961 R & N 652.) As it was, this brief incident was directed at one person only and hardly justifies the appellation of public violence. All that took place was a single act of

---

**Copyright Juta & Co Ltd**

assault (compare *R v Cele* 1958 (1) SA 144 (N.). Although the matter is very much a border-line affair between public violence and assault (compare *R v Segopotsi,* 1960 (2) SA 430 (T.)), it would be wrong, in my view, to describe this incident as public violence. Although it may well have blossomed into something more serious it was more in the nature of an assault.',



DUMBUTSHENA J

From the facts and surrounding circumstances it appears some of the accused had a private quarrel, and a restricted one at that, with the Security Force Auxiliaries. In fact, accused two, when replying to a question, said something to this effect:"Before this accused one wanted to harass the party. I stopped him. When more people left, he picked up an argument-he wanted to assault . . ."

BEADLE CJ, as he then was, said in *Ferreira*'s case at page 653H:

" . . . if two or three people in the course of a private and restricted quarrel assault someone against whom they have a private quarrel, it is stretching the law somewhat to find them guilty of public violence."

The intention of the accused, so it seems from the facts, was to assault members of the Security Force Auxiliaries. The complainant was mistaken for an auxiliary constable and was stoned during a very limited duration of time by a limited number of people. Besides, the incident was not of sufficiently serious dimensions to take it out of the category of assault into one of public violence.

I therefore invoke section 210 of the Criminal Procedure & Evidence Act [*Chapter 59*], which reads as follows:

"210. In other cases not hereinbefore specified, if the commission of the offence with which the accused is charged as defined in the enactment creating the offence, or as set forth in the indictment, summons or charge, includes the commission of any other offence, the accused person may be convicted of any offence so Included which is proved, although the whole offence charged Is not proved."

Accordingly, the conviction is set aside and there is substituted a verdict of guilty of common assault.

The case is referred back to the magistrate for sentence.

My brother Squires agrees with this judgment.



## THE STATE v JACKSON 1980 ZLR 190

**Court** **General Division, Salisbury**

Criminal Review

Waddington, J

Copyright Juta & Co Ltd

2nd July, 1980

## Flynote

Criminal Procedure - sentence - possession of dagga - inability to pay substantial Me - quantity small - imprisonment inappropriate

Criminal Procedure - superfluous wording in charge - common fault in framing charges under Dangerous Drugs Act [Chapter 319].

## Headnote

In mitigation the accused, who had been convicted of possessing four grams of dagga, stated that he possessed $15. The magistrate considered that imprisonment was warranted because the accused could not pay a substantial fine and because the quantity of dagga was large. The sentence imposed was five months' imprisonment with labour of which two months was suspended.

The charge was framed as a contravention of section 9 (b) of the Dangerous Drugs Act [*Chapter 319*] alleging that the accused was a person not "duly licensed or authorised" to possess dagger

*Held* that a small fine should have been imposed although suspended prison sentences are valuable as a personal deterrent.

*Held,* further, that the words "duly licensed or authorised" are not part of the offence created by section 9 (b) of the Dangerous Drugs Act [*Chapter 319*]. The confusion arises from the similar provision in section 4 of the Dangerous Drugs Regulations, 1975. The error is prevalent and prosecutors should take greater care in framing charges relating to possession of dagga.

*Held,* further, that the deletion of the superfluous wording would cause the accused no prejudice in his defence and the charge would be amended accordingly.

Case cited:

*S v Mutize,* 1978 RLR 148 (AD).

## Judgment

**Waddington J:** The accused pleaded guilty to and was properly convicted of unlawfully possessing 21 twists of Indian Hemp (dagga). The trial magistrate, after enquiring into the accused's ability to pay a fine stated, in passing sentence, that "The accused is not in a position to pay a substantial fine, and because of the large quantity, imprisonment is warranted." The scrutinizing regional magistrate who felt that the





sentence passed of five months' imprisonment with labour, two months' imprisonment with labour of which was suspended for five years on the usual conditions was excessive, has

Copyright Juta & Co Ltd

forwarded the case for review in terms of section 63A of the Magistrates Court Act [*Chapter 18*].

The trial magistrate appreciated the desirability of avoiding sending the accused who was a first offender to prison, but apparently considered that because the accused could not pay a substantial fine, imprisonment was warranted particularly "because of the large quantity". The accused, however, was convicted of Assessing 21 twists which is only a little more than four grams. This amount is not so excessive as to give rise to the inference that the accused planned to sell the drug for profit. Indeed, the amount of dagga possessed by the accused was relatively small. In mitigation, furthermore, the accused stated that he possessed $15. I agree with the scrutinizing magistrate that the sentence imposed was in all the circumstances excessive although regard must be had to the remarks of DAVIES, JA, in *S v Mutize,* 1978 RLR p. 148 at p. 153 that "for first offenders suspended prison sentences are an essential part of whatever other punishment may be imposed because of their value as a personal deterrent.". This was a case in which a small fine should have been imposed in my view.

One other matter deserves comment in this case. The accused was charged with the "crime of contravening section 9 (b) of the Dangerous Drugs Act [*Chapter 319*], in that upon or about the 18th day of April, 1980, and at or near Chinhoyi Shopping centre, Sinoia, in the said province, the said accused not being a person duly licensed or authorized, did wrongfully and unlawfully acquire or possess a Part I drug, that is to say, twenty-one twists of Indian hemp.". A perusal of section 9 (is) of Chapter 319 reveals no references to licensed or authorized persons or

Part I drugs. The section simply reads:

> "No person shall . . . have in his possession any prepared opium or prepared Indian hemp.".

Section 19 (1) (a) of Chapter 319 provides that any person who contravenes any provision of "this Act" shall be guilty of an offence. It is quite plain that the prosecutor in this case when framing the charge has confused section 9 (b) of the Act with the similar provision contained in section 4 of the Dangerous Drugs Regulations, 1975 (R.G.N. 1111/75) which reads:

> "No person who is not an authorized or licensed person shall-
>
> (a) acquire or possess a Part I drug".

(Part I drugs include Indian hemp).

---



WADDINGTON J

In terms of section 19 (1) (a) of Chapter 319 as read with the definition of "this Act" contained in section 3 (1) of the Interpretation Act [*Chapter 1*], it is an offence to contravene section 4 of the regulations in question. ("This Act" is defined in section 3 (1) of Chapter 1 as including any statutory instrument made and in force under the enabling Act). The error in the charge put to the accused in this case is an extremely prevalent one and greater care should be exercised by prosecutors when framing charges relating to the possession of dagga. No prejudice has been caused, however, to the accused in his defence and I have accordingly amended the charge in terms of section 191 of the Criminal Procedure and Evidence Act [*Chapter 59*] by deleting the

---

**Copyright Juta & Co Ltd**

superfluous words.

While the conviction is confirmed, the sentence passed by the trial magistrate is set aside and the following is substituted:

> "$15 or in default of payment two weeks 'I.W.L.; in addition two months' IWL suspended for five years on condition the accused is not convicted of any offence under the Dangerous Drugs Act [*Chapter 319*] or regulations framed thereunder committed during the period of suspension.".

As the accused will already have served a period of imprisonment greater than two weeks, the fine of $15 will not be levied. As the accused was sentenced on 22nd April, 1980, it is probable that with normal remission he will already have been released. In case this is not the position, I have ordered the accused's immediate release.

**Beck J** agrees.



## ATTORNEY-GENERAL v TOBIWA AND OTHERS 1980 ZLR 192

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Lewis, AJ, Baron, JA, and Goldin, JA

24th June and 2nd July, 1980

### Flynote

Criminal Law - assault - provocation as mitigating feature - spontaneity vital - usurping functions of Court and police.

Criminal Procedure - inadequate sentence - when may be increased on appeal - procedure for variation of agreed statement of facts.

### Headnote

The respondents had been convicted of assault following pleas of guilty. Six of the respondents were sentenced to a fine of $50 or 50 days' imprisonment and to



BARON JA

three months' imprisonment suspended for five years on conditions. The Attorney-General appealed against the inadequacy of these sentences. The respondents were part of a group of approximately 30 youths who went to the complainant's farm seeking revenge for abuse directed at them by the complainant the previous day. At the farm the respondents assaulted the 59 year-old complainant with fists and booted feet. The complainant's 71-year old sister discharged a fire-arm into the air in an endeavour to stop the assault. She too was attacked,

Copyright Juta & Co Ltd

after the fire-arm had been forcibly removed from her possession. She was left lying unconscious on the ground, while the group abducted the complainant, intending to hand him over to ZNLA forces in the area. The District Commissioner at Goromonzi recovered both the complainant and the fire-arm on the same day.

*Held* that for provocation to be pleaded in mitigation of sentence it must give rise to loss of self control. Spontaneity of reaction is vital if the defence is to succeed.

*Held,* further, that the most serious aggravating factor was the attempt to hand the complainant over to ZANLA forces. Any attempt to usurp the functions of the police or Courts is a challenge to constituted authority which could lead to the collapse of constitutional government.

*Held,* further, that just as an appeal Court will not reduce a sentence unless it is manifestly excessive, equally it will not increase a sentence unless it is manifestly inadequate.

*Held,* further, that where an agreed statement of facts is varied during the trial, the statement itself should be formally amended or the variation clearly shown on the face of the record to have been agreed.

Case cited:

*George Tsiga v S,* AD 77/76.

*J H C Friedman* for the appellant: The magistrate's judgment was overbore by the nature of the insults to the respondents. The greater the delay in the reaction to provocation, the less the mitigatory effect thereof. Political parties taking the law into their own hands require to be discouraged *(c.f. S v Ngwasha,* AD 26/80*).*

*W R Sandura* for the respondents: The complainant's insults were arrogant, callous and deeply insulting. The provocation was still acutely felt the following morning. The magistrate was correct to distinguish between ordinary provocation and provocation of a racial nature. The assault on Miss Willoughby was totally unpremeditated. The injuries indicate that no more than moderate force was used. The punishments imposed were adequate.

## Judgment

**Baron JA:** The eight respondents together with a ninth accused were charged with assault. They all pleaded guilty and were duly convicted. The fourth and fifth respondents, Mtombo and Saidi, whose ages were given as 18, and the ninth accused whose age was given as 16,





were sentenced to a moderate correction of six cuts with a light cane, the remaining six respondents were each sentenced to a fine of $50 or 50 days' imprisonment with labour in default, and in addition to three months' imprisonment with labour the whole suspended for five years on the usual conditions.

Originally, the Attorney-General appealed against the sentence imposed on all eight

Copyright Juta & Co Ltd

respondents (there was no appeal against the sentence imposed upon the 16-year-old youth); however, the Attorney-General has now withdrawn the appeal against the fourth and fifth respondents because it transpires that they have already received their sentences of six cuts. There remain, therefore, appeals against the sentences imposed on the six adults, on the ground that having regard to the facts and the nature of the charge the sentences were inadequate.

Section 70 of the Magistrates Court Act [*Chapter 18*] reads, so far as is relevant:

> "(1) If the Attorney-General considers that the sentence imposed by a Court in any criminal case is -
>
> (a) . . .
>
> (b) having regard to the facts and the nature of the charge, inadequate, he may, with the leave of a judge of the Appellate Division, appeal to the Appellate Division against that sentence.
>
> (2) In any appeal by the Attorney-General to the Appellate Division in terms of subsection (1), the Appellate Division shall, if it considers a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law in substitution thereof as it thinks ought to have been passed."

Notwithstanding that section 70 (1) (b) refers to the sentence being "inadequate", an appeal Court, just as it will not reduce a sentence imposed by a trial Court unless it was manifestly excessive, equally will not increase a sentence unless it was manifestly inadequate. Although one does not normally use the expression "sense of shock" when referring to a lenient sentence, in practice the test when considering either a decrease or an increase in sentence is substantially the same.

As to the sentence to be substituted by this Court if it is satisfied that the foregoing test has been met, it is to be observed that the words of the section are mandatory and that this Court is enjoined to impose such sentence "as it thinks ought to have been passed" by the trial Court.

The Statement of Agreed Facts reads as follows:

> "1. All of the accused are members of the youth wing of ZANU (PF) at Ceylon Mine, Goromonzi.



BARON JA

2. On the night of 21st March, 1980, a ZANU (PF) meeting was held at Rainbow End Farm, Goromonzi, In the compound. During the course of this meeting Mr Willoughby, the owner of the farm, came out and scolded the meeting, telling the participants to be quiet. He then fired one shot into the air in order to get the youths to keep quiet. Shortly after this the meeting ended and the ZANU (PF) youths returned to Ceylon Mine.

3. On their way to Ceylon Mine the youths arranged to return to Mr Willoughby's farm the following morning and assault him because of what he had said to them.

4. On Saturday, 22nd March, 1980, a group of approximately 30 ZANU (PF) youth gathered at Ceylon Mine. The group then left the mine on foot and proceeded to Mr Willoughby's farm. All of the accused were in the group.

Copyright Juta & Co Ltd

5. On arrival at the farm the accused all entered the gate. On hearing the arrival of the accused Mr Willoughby left his house and went outside to see what the accused wanted. Mr Willoughby is 59 years of age.

6. Mr Willoughby was then approached by accused Jervas (1) who asked him why he had scolded them on the previous night. He was advised that he was going to be assaulted and then taken to the Z A.N.L.A. Forces.

7. Accused Jervas then assaulted Mr Willoughby and the remainder of the accused joined in. He was assaulted with clenched fists and booted feet.

8. At this stage Miss Willoughby, a 71-year-old lady, came out of the house in possession of a fire-arm. She discharged this weapon in order to chase the accused away and stop them from assaulting her brother, Mr Willoughby.

9. Miss Willoughby was then attacked by members of this group and the weapon was forcibly removed from her possession. She was assaulted by members of this group who used clenched fists and booted feet.

10. Miss Willoughby was left unconscious on the ground. The group then left the farm taking Mr Willoughby with them. It was the intention to take him to Grazley Farm where he would be handed over to the Z A.N.L.A. Forces.

11. When the group arrived at the entrance gate to Grazley Farm, the Goromonzi District Commissioner arrived. The District Commissioner then took Mr Willoughby away from the group of ZANU (PP) youth, the accused were in this group.

12. As a result of the assaults on Mr Willoughby and Miss Willoughby they both received numerous injuries, all over their bodies. Miss Willoughby was detained in the Andrew Fleming Hospital, Salisbury, where she received treatment. She was released from this hospital on Wednesday, 26th March, 1980.



BARON JA

13. The accused had no lawful right whatsoever to assault these two persons in this manner.

14. When the accused and their group arrived at Grazley Farm, they were in possession of the fire-arm which they had taken away from Miss Willoughby. This fire-arm was handed to one of the Z A.N.L.A. Force members. On the arrival of the District Commissioner, and at his request, this fire-arm was handed to him by the Z A.N.L.A. Force member."

Having found the respondents guilty, the learned magistrate inquired as to precisely what had been said by the first complainant at the meeting on his farm on the evening of the 21st March, it seems clear that the inquiry was addressed to the prosecutor because the latter replied: "I have no idea, your Worship, perhaps the accused can enlighten the Court." Two of the respondents proceeded to do so, saying that the first complainant had referred to them as "kaffirs" and that he said that his donkeys were better than they. The prosecutor appears to have accepted this - certainly there is nothing on the record to suggest that he challenged what the respondents said - and Mr Friedman concedes that for the purposes of this appeal we must proceed on that basis. Magistrates should, however, bear in mind that where a statement of facts is varied in any way either by alteration, deletion or addition, the statement itself should be formally amended accordingly or the variation clearly shown on the face of the record to have been agreed by both the prosecutor and the accused.

The learned magistrate in his reasons for sentence referred to the factors which, as he put it,

**Copyright Juta & Co Ltd**

would In normal circumstances be considered as grossly aggravating. He pointed out that the respondents acted as a group, that the first complainant was not a young man, that the second complainant was a woman of advanced age, that both assaults were fairly severe and that the second complainant spent some four days in hospital; he made the point that the first complainant was entitled to go and break up the respondents' meeting. He then continued:

> "The further points that are against you are as follows: that you went away and planned the action which you took the next day. Your action in assaulting the complainant cannot be classified as a spontaneous or impulsive reaction to provocation. Your action was a well considered act of revenge to the provocation. The result was that the following day you went as a group and assaulted the complainant. The other fact that is against you is the assault on Miss Willoughby. You see, this was quite unnecessary. She is an old woman and you had disarmed her of the fire-arm and that was all that was really necessary. There was no reason at all to proceed to assault her until she was Unconscious."



BARON JA

Save that the learned magistrate failed to refer to one serious aggravating feature with which I will deal presently, he can hardly be faulted in the foregoing analysis.

The learned magistrate then proceeded to consider the question of provocation. He stressed the racial nature of the insults and the hurt and frustration the respondents must have felt, and in his reply to the Notice of Appeal he commented that "this type of wound is rarely cured by the passage of time, certainly not by a period of one night." Mr *Sandura* on behalf of the respondents in the main adopted the learned magistrate's reasons. However, he makes two further submissions; he says that by discharging the firearm the second complainant associated herself with her brother and her brother's abusive insults, and he submits that if this Court were to impose more severe sentences this would amount to condonation of the complainant's behaviour.

Let me deal at once with that suggestion. Assuming - as we must for the purposes of this appeal - that the first complainant used the kind of language alleged, then far from condoning his behaviour, it must, in my view, be condemned in the strongest possible terms. He fired a shot In the air and used highly insulting and abusive language. His behaviour was arrogant and contemptuous. To behave in this way at the present delicate and critical stage in the history of our country, when everyone should do his utmost to exercise restraint and refrain from provocative conduct calculated to exacerbate the feelings of others, is not only reprehensible but tragic for the country.

But much as one sympathises with the respondents - and Mr *Friedman* conceded that the learned magistrate was right to approach the case sympathetically - the law simply does not allow retaliation of the kind resorted to by the respondents. Provocation - and severe provocation - there clearly was; but the learned magistrate overlooked that for provocation to be pleaded in mitigation of sentence it must in fact give rise to loss of self-control; anger or resentment, however understandable, is not sufficient. This is why the spontaneity of the reaction is vital for the defence to succeed. In *George Tsiga v The State,* Appellate Division Judgment No. 77/76, LEWIS, JA, as he then was, said:

> "It is of the essence of a defence of provocation that has the effect of reducing the crime from assault with intent to

Copyright Juta & Co Ltd

commit grievous bodily harm to common assault or murder to culpable homicide, that the reaction to the provocation must be sudden, in the sense that the person provoked acts on the spur of the moment and in circumstances where he has temporarily lost his power of self-control and does not appreciate what he is doing."

The same principles apply before the defence of provocation can succeed in mitigating sentence.



BARON JA

There can, of course, be situations in which an earlier provocation is revived by a subsequent act, and Mr *Sandura* argued that this happened on the morning of the assaults when the first complainant continued to scold the respondents; however, this submission relies on assumptions which are contrary to what is stated in the Agreed Statement of Facts, and in my view the defence of provocation must fail even as against the first complainant. As the learned magistrate himself expressed it, this can.

not be classified as a spontaneous or impulsive reaction to provocation, but was a well considered act of revenge to the provocation.

As for the assault on the second complainant, it is difficult to see how provocation can even be put forward. Mr *Sandura's* submission that by discharging her fire-arm she associated herself with her brother and her brother's abusive insults is quite untenable. She was acting lawfully, and certainly not in an excessive manner, the defence of her brother who was being assaulted and abducted, and there is not a word in the record to suggest that any of the respondents regarded her conduct as provocation. The assault on her was particularly aggravated; once again to use the words of the magistrate, she was an old woman who had been disarmed of her fire-arm and "there was no reason at all to proceed to assault her until she was unconscious."

I turn finally to the feature not dealt with by the learned magistrate, and which in the final analysis is perhaps the most serious of all the aggravating factors. The statement of facts discloses that the respondents intended to take the first complainant and hand him over to the Z A.N.L.A. forces. The maintenance of law and order and the administration of justice are the function of the Government, and the Government alone, through its constitutionally established institutions. We wish to make it quite clear that law and order in Zimbabwe will be maintained by the police and justice will be administered by the Courts; any attempt by any groups or bodies to usurp either of these functions is a challenge to constituted authority which, unless checked, will lead to the collapse of constitutional government and the destruction of the whole fabric of our society.

I am satisfied that in all the circumstances of this case, and in particular because the nature and severity of the assault on the second complainant and the motive for the abduction of the first complainant, a fine and a suspended term of imprisonment was a manifestly inadequate sentence; I am satisfied that the trial Court should have imposed an effective sentence of imprisonment. We have given earnest thought to the length of the term, and are satisfied that an effective term of six months is the very least the trial Court should have imposed. The

Copyright Juta & Co Ltd

BARON JA

sentences on the six adult respondents will therefore be set aside and in place thereof there will be substituted sentences of one year's imprisonment with labour, of which six months will be suspended for a period of five years on condition that the respondent in question is not within that time convicted of any offence involving violence and respect of which there is imposed a sentence of imprisonment without the option of a fine.

**Lewis ACJ:** I agree.

**Goldin JA:** I agree.

*Pro deo.*

1980 ZLR p199

## THE STATE v BESWICK 1980 ZLR 199

**Court** **Appellate Division, Salisbury**

Application for Leave to Appeal

Lewis, JP.

3rd July, 1980

### Flynote

Criminal procedure - sentence - magistrate taking into account his own knowledge of appellant's drinking problem - duty to inform appellant that he is taking this into account to allow appellant to deal with paint.

### Headnote

The appellant was convicted of drunken driving in contravention of section 46 (1) of the Road Traffic Act, 1976. He was liable to the mandatory period of six months prohibition from driving. Instead the magistrate imposed a 12-month prohibition. The appellant had sought guidance from the magistrate a few weeks earlier when it appeared to the magistrate that the appellant had a drinking problem.

*Held* that natural justice required that the magistrate should inform the appellant that he intended to take this into account for the purposes of sentence. The appellant should have been granted an opportunity of dealing with the point.

Case cited:

*S v H* 1977 (2) SA 954 (AD).

### Judgment

Copyright Juta & Co Ltd

**Lewis JP:** in Chambers in terms of section 68 (5) of the Magistrates Court Act [*Chapter 18*].

The appellant was convicted in the magistrate's Court at Shabani of drunken driving in contravention of section 46 (1) of the Road Traffic Act, No. 48 of 1976. He was sentenced to a fine of $250 or, in default of payment, to undergo 25 days' imprisonment with labour, and it was





ordered that he be prohibited from driving for a period of 12 months from the date of his conviction. His driver's licence was cancelled.

A letter was written after his conviction indicating that he wished to appeal against the length of prohibition from driving, and I regard this as act application for a certificate for leave to prosecute an appeal in person in terms of section 68 of the Magistrates Court Act.

The appellant pleaded guilty and the facts, which were agreed, were that after drinking at mid-day and again later in the afternoon he thereafter drove his car at about 6.30 p.m. from his own house to his neighbour's house "two doors away." On arrival at his neighbour's house, he collided with the gate post. sample of his blood was subsequently taken and this revealed that he had a concentration of not less than 325 mg ethyl alcohol per 100 ml of blood.

The appellant was a first offender. The order cancelling his licence was mandatory, and it was also a mandatory requirement under section 46 (4) (a) (ii) that he be prohibited from driving for a minimum period of six months. In justifying the period of 12 months prohibition instead of the mandatory six months for a first offender, the magistrate said in his reasons for sentence:

> "I feel that in his present state the accused would be a menace to the motoring public and is not a fit person to be entrusted with a motor vehicle."

The matter originally came before SQUIRES J, in the General Division, on review, and he inquired from the magistrate what he meant by the words "in his present state". The magistrate replied:

> "Although not part of the record, the accused and his wife sought guidance from myself in my official capacity a few weeks prior to this incident. It appears that he has a drinking problem. The accused had no objections at the time of the hearing, to me presiding over the trial.

The matter now comes before me by way of appeal and by way of an application for a certificate for leave to prosecute that appeal in person. I have referred the matter to the Attorney-General for his views and I am indebted to the Director of Public Prosecutions for a very thorough and helpful minute on the case, submitted on behalf of the Attorney-General. The Director of Public Prosecutions feels that in all the circumstances the mandatory six months prohibition from driving was sufficient. The Director of Public Prosecutions points out that natural justice required that the magistrate should inform the appellant that he intended to take into account, for the purpose of sentence, his own



Copyright Juta & Co Ltd

LEWIS JP

knowledge of the appellant's previous history in relation to alcohol, and that the appellant should have been granted an opportunity of dealing with the point. (See *S v H,* 1977 (2) SA 954 (AD) at p. 960 H per WESSELS, JA) Had such a step been taken by the magistrate, the appellant might perhaps have been able to satisfy the magistrate that he no longer had any problem in regard to alcohol. He was, as I have said, a first offender.

It appears that the appellant's wife is unable to drive, and the prohibition from driving will result in hardship to the wife and the children from the point of view of their being without transport. Although this is not a special circumstance warranting the deletion of the prohibition from driving in terms of the proviso to section 46 (4) of the Act, it is a factor which warrants a reduction of the period of prohibition from 12 months to the minimum of six months.

Accordingly, in the exercise of my powers of review in terms of section 68 (5) of the Magistrates Court Act, I propose to delete that part of the magistrate's order prohibiting the appellant from driving for a period of 12 months, and to substitute an order prohibiting the appellant from driving for a period of six months from the date of his conviction. The proceedings are otherwise confirmed.

Since the appellant would have no prospect of obtaining any other relief on appeal, a certificate must be refused.

**Goldin JA** agrees with this alteration.



## REID-DALY v HICKMAN AND OTHERS (1) 1980 ZLR 201

**Court** **General Division, Salisbury**

Special Plea

Waddington, J

19th, 20th and 23rd June, 3rd July, 1980

### Flynote

Statutes - Defence Act [Chapter 9] - Defence Forces (Discipline) Regulations, 1978 - redress procedure - whether Court's jurisdiction ousted by statutory provisions as a necessary implication - Plaintiff not challenging redress procedure - consideration of English decisions - actions brought by Army officers covering



purely military matters not cognizable by Court of law - reviewable only if military authorities exceeded. jurisdiction - Legislature intended Army Hers to be respected to redress procedures.

State Liabilities Act [Chapter 54] - Minister's liability vicarious - no action if Court precluded from inquiring info other defendants' liability.

Copyright Juta & Co Ltd

## Headnote

The plaintiff served summons on the defendants in eight separate suits, alleging in every case an invasion of his *dignitas* and privacy *animo injuriandi*. In each suit the Minister of Combined Operations and defence was cited as the second defendant. Save for the Minister, the plaintiff and the defendants were Army officers.. The gravamen of the plaintiff's action in each case was that the defendants had tapped his telephone, removed military and personal documents from his office and kept him constantly under surveillance. The trial was consolidated when it was learnt that the defendants' special pleas were identical.

Defendants contended that the plaintiff was totally precluded from seeking relief in the civil Courts because of the existence of the redress procedure laid down in the Defence Forces (Discipline) Regulations, 1978. The plaintiff followed the redress procedure through to finality, his final application being considered by the Governor and rejected. In terms of the regulations it is stated that the decision of the President (or Governor in this instance) "shall be final". In the Defence Act [*Chapter 94*] and the Defence Forces (Discipline) Regulations there was no express ouster of the Court's jurisdiction and it had to be sought by necessary implication in the legislation. It was not argued that the decisions of the Army officers and the Governor during the redress procedure were tainted by an excess of jurisdiction and consequently subject to review. The main action concerned solely the commission of alleged delicts. It was accepted that the conduct complained of directly concerned military matters.

The Court examined a number of English decisions which concluded, in essence, that in actions brought by Army officers against other officers concerning purely military matters the civil Courts have no jurisdiction, unless the military authorities have acted without, or in excess of, their jurisdiction.

*Held* that , although the English decisions were not binding on the Court, they were of considerable assistance in determining the intention of the laws maker, because the 12th Article of War bore a remarkable similarity to Part IV of the Defence Forces (Discipline) Regulations, 1978. In providing the special redress procedure, the Legislature must have intended Army officers to be restricted to that procedure. It would be disastrous for Army discipline if officers were to be at the forensic mercy of other disgruntled officers.

*Held,* further that as section 55 of the Defence Act [*Chapter 94*] expressly conferred criminal jurisdiction on civil Courts to try military offences, it could be regarded as further confirmation that the Legislature intended to exclude from the jurisdiction of civil Courts actions which could form the subject of the redress procedure.

*Held,* further, that the second defendant's liability was entirely dependent on the first defendant's liability. By section 2 of the State Liabilities Act [*Chapter 54*], the Court is not a "competent" Court to entertain an action against the Minister.

---

**1980 ZLR p203**

WADDINGTON J

Cases cited:

---

**Copyright Juta & Co Ltd**

*Self v Union Government,* 1918 CPD 32;

*Welkom Village Management Board v Leteno,* 1958 (1) SA 490 (AD);

*Moyo v Ndhlovu,* 1971 (2) SA 252 (R);

*Dawkins v Lord Paulet* [1869] LR 5 QB 94;

*Dawkins v Lord Rokeby,* 176 ER at 800;

*Dawkins v Lord Rokeby* [1872-73] LR 8 QB 255;

*Heddon v Evans* (1919) 35 TLR 642;

*Fraser v Hamilton* (1917) 33 TLR 431;

*In re Mansergh,* 121 ER 764;

*Grant v Sir Charles Gould,* 126 ER 434;

*Warden v Bailey,* 128 ER 253;

*Queen v Smith,* 17 SC 561;

*R v Mayers,* 1958 (3) SA 793 (SR).

*R R Horn SC* and *R Jagger* for the defendants in the special plea.

*K H Andrew* and *AP de Bourbon* for the Plaintiff in the special plea.

## Judgment

**Waddington J:** The plaintiff, until his retirement on the 31st January, 1980, was an officer in the Army. Between the 20th and 23rd August, 1979, he caused to be served on the several defendants whose names are listed in the citation to this judgment summonses commencing action in eight separate suits. The first defendant cited in each action is a member of the Army and each is an officer.. In all the actions damages are claimed jointly and severally from the defendants arising out of an alleged wrongful attack on Plaintiffs *dignitas* and privacy *animo injuriandi.* The cause of action in each instance is identical, it being averred that between August, 1978, and January, 1980, plaintiff's office telephone was tapped, that during the same period military and personal documents belonging to him were surreptitiously removed from his office and copied and that his movements and activities were kept under surveillance. Varying roles are attributed to each defendant in the perpetration of the abovementioned alleged wrongs. The defendants have not yet pleaded over to the allegations but have pleaded in bar that plaintiff is precluded from approaching this Court for the relief sought by him in his summonses as amplified in his declaration. Since the special pleas are based on similar grounds, the trial of each was consolidated by consent at the pre-trial conference held on the 8th



Copyright Juta & Co Ltd

WADDINGTON J

February, 1980, in Chambers in terms of Rule 182 of the High Court (General Division) Rules, 1971. This judgment is concerned only with the determination of defendants' special pleas.

Defendants' pleas in bar may be paraphrased as follows. As serving officers in the Army, plaintiff and first defendants upon contractually attesting into the Army or upon being commissioned as officers therein had agreed to subject themselves to the provisions of the Defence Act [*Chapter 94*] and regulations made thereunder. More particularly they had agreed thereby to subject themselves to the procedures laid down for the disciplining or court martialling of members of the Army alleged to be guilty of breaches of discipline or military offences. In terms of the Defence Forces (Discipline) Regulations, 1978 (R.G.N. 259/1978) (hereinafter called the Discipline Regulations), it was the right and duty of plaintiff to seek ultimately from the Head of State, whose decision in that event would be final, a redress of the wrongs in respect of the first defendant's alleged unlawful conduct set out in plaintiff's declarations. The special pleas originally seemed to be dilatory, the allegation being that plaintiff had deliberately refrained from seeking such redress. During the course of the trial counsel agreed, however, that the essential nature of the special pleas was in fact declinatory. It was plain on the evidence adduced that plaintiff in fact had unsuccessfully sought such redress. Defendants' contention, therefore, is that plaintiff is totally precluded from seeking damages in this Court because the existence of the redress procedure provided for in the Discipline Regulations ousts the normal jurisdiction of this Court to entertain plaintiff's actions. Alternatively to the above, defendants specially pleaded that plaintiff, while serving as an officer, knew of a convention (and accepted its terms) observed by Army officers "that if an officer considers that he has been wronged by another serving member of the Army, and such complaint is competent to be dealt with through established and accepted military channels, such complaint will be dealt with through such channels and not in the Civil Courts.". In attesting into the Army and accepting a commission therein, plaintiff, it is averred, undertook to be bound by the convention; the alleged unlawful conduct of defendants constitutes "a complaint competent to be dealt with through the established and accepted military channels" and, finally, defendants never consented to plaintiff's release from his undertaking to be bound by the convention. Defendants therefore pray for judgment in their favour with costs of suit.

During the course of the trial it was agreed by counsel that there are certain facts relevant to the issues which are not in dispute. Those facts



WADDINGTON J

were listed in a document produced by consent. The document reads as follows:

"1. At all relevant and material times, Plaintiff was a serving officer Zimbabwe Rhodesia army and each of the First Defendants were serving officers or serving other ranks in the Zimbabwe Rhodesia army (plea in bar, paragraph 1: reply to plea in bar, paragraph 1).

2. In their capacities as such, Plaintiff and all the First Defendants were subject to regulations made under the Defence Act [*Chapter 94*] providing for the conditions of engagement and service of members of the Defence Forces and generally to the provisions of the Defence Act [*Chapter 94*], including standing orders and procedures laid down for the disciplining or Court martialling of members of the army alleged to be

Copyright Juta & Co Ltd

guilty of breaches of discipline or military offences. (Plea in bar, paragraph 2; reply to plea in bar, paragraph 1.)

3. The alleged unlawful conduct of each of the First Defendants set out in Plaintiff's declarations constitutes complaints competent to be dealt with through the established and accepted military Channels. (Pleas in bar, paragraphs 5 (c), 7 (c), 6 (c), 7 (c), 7 (c), 7 (c), 7 (c), 7 (c) in cases Nos. 1603-1610/1979 respectively: Plaintiff's replies to Defendants' request for further particulars dated 25th January, 1980, on 7th February, l 980, paragraph 2.)

4. In terms of the aforesaid regulations and/or standing orders and/or procedures, it was the right and duty of Plaintiff to seek from the President, whose decision in that event would have been final, a redress of wrongs in terms of the Defence Forces (Discipline) Regulations, 1978 (R.G.N. 259/1978) in respect of the alleged unlawful conduct of each of the First Defendants set out in each of the plaintiff's declarations. (Plea in bar, paragraph 3, reply to plea in bar, paragraph 1.)

5. In May, 1979, Plaintiff took steps to have the Defendants Redfern, Des Fountain, Reith, Adams and Croukamp disciplined in respect of the conduct alleged by Plaintiff in the declarations relating to those Defendants and in June, 1979, on being advised that it was not the intention of the Commander of the Army to institute disciplinary proceedings against any of these Defendants Plaintiff sought redress in respect of the refusal of the Commander of the Army to institute disciplinary proceedings against any of the above named Defendants in substantial compliance with section 28 of the Discipline Regulations.

6. In January, 1980, Plaintiff sought redress from the Governor in terms of the Discipline Regulations seeking the institution of disciplinary proceedings against the following Defendants in respect of the conduct complained of in the relevant declarations: Hickman, Redfern, Reith, Des Fountain, Adams, Croukamp, Thomas.

7. On 9th February, 1980, the Plaintiff was advised that his application for redress submitted in January, 1980, had been considered by the Governor who was unable to accede to Plaintiff's request for redress and that the Governor did not propose to take any other action in the case.



WADDINGTON J

8. It is common cause that prior to writing a letter in May, 1979, requesting that disciplinary proceedings be against the persons referred to in paragraph 5 above, the Plaintiff had sought have disciplinary proceedings instituted against the Defendant Hickman, who was purportedly retired from the Army by the President in terms of the Defence Act on the 9th March, 1979, and who in fact ceased to be a member Of the Army in March, 1980.

9. None of the First Defendants have consented to Plaintiff being released from the undertaking (if established) alleged in paragraph (b) of the paragraphs in the plea in bar alleging the alternative defence.".

There are, therefore, two main questions which fall for decision in determining the correct answer to defendants' special pleas.

They are:

(1) Is the effect of the Discipline Regulations to bar the Plaintiff from bringing an action in this Court for the recovery of damages arising from defendants' alleged wrongful actions; and alternatively;

(2) Did Plaintiff agree to be bound by a convention, which precludes Army officers from seeking redress against other Army officers in respect of matters capable of being

**Copyright Juta & Co Ltd**

dealt with through the established and accepted military channels.

Mr *Horn*, who appeared for the defendants, accepted that the onus of proof in establishing the alternative defence rests upon him and that, in so far as the first defence is concerned, there must be the clearest evidence that it was the intention of the Legislature to limit an Army officer seeking redress in respect of wrongs committed against him by another officer to the procedures contained in the Discipline Regulations. While Courts should obviously be slow to deprive a subject of his normal right Of access to the civil Courts in the determination of his ordinary civil remedies, a statutory ouster of the Courts' jurisdiction need not be in express terms but may be inferred from the construction of the statute and regulations framed thereunder by having regard to their aims and scope. See the judgment of SEARLE, J, in *Self v Union Government* 1918 TPD, 32 at 42 et seq. The correct approach which ought to be adopted by Courts to questions of this sort was also discussed by OGILVIE THOMPSON, AJA, in *Welkom Village Management Board v Leteno,* 1958 (1) SA 490 at p. 502C-503C in the following terms:

> "It is not a general rule of law-
>
> 'that a person who considers that he has suffered a wrong is precluded from having recourse to a Court of law while there is hope of extrajudicial redress'

(*per* VAN DEN HEEVER, JA in the *Bindura* case, *supra*, at page 362).

---



WADDINGTON J

> Whenever domestic remedies are provided by the terms of a Statute, regulation, or conventional association, it is necessary to examine the relevant provisions in order to ascertain in how far, if at all, the ordinary jurisdiction of the Courts is thereby excluded or deferred. In *Shames v South African Railways and Harbours,* 1922 AD 228, much relied upon by Mr Miller, a dismissed railway servant - who, because he was a servant of the Crown, would at common law have been dismissible at will - had certain remedies available to him by Statute; and it was held that he was not entitled to have recourse to the Courts except on the ground of some illegality or irregularity in the proceedings, and then only when such irregularity or illegality had been persisted in until the final stage and he had exhausted his statutory remedies. For, as SOLOMON, JA, put it at page 236 of the report -
>
> > *'non constat* that, if he had appealed to the various tribunals which under the Act are open to him, the irregularity complained of may not have been set right and Justice done to him'.

The conclusion thus reached was, however, found to be a necessary implication from the terms of the relevant Statute (see *Jockey Club of South Africa and Others v Feldman,* 1942 AD 340 at pp. 35112). The rule of *Shames'* case, as interpreted by the majority of this Court in *Feldman*'s case, accordingly is that the Courts' jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication (see also the *Bindura* case , *supra*, at pp. 362/3). In *Dumah v Blom, NO and the Klerksdorp Municipality,* 1950 (1) SA 274 (T) and *Semena v de Wet and Another,* 1951 (2) SA 444 (T) - which were both concerned with location regulations - it was hell that, on the particular facts, the rule of *Shames'* case had no application. In *Golube v Oosthuizen and Another,* 1955 (3) SA 1 (T), certain location regulations provided that a person refused a site permit by the superintendent might 'appeal to the Council, whose decision shall

**Copyright Juta & Co Ltd**

be final, DE WET J, after stating- with respect, correctly stating - the effect of the relevant authorities, held that he could find no reason to imply an intention in the particular regulations before him that the Courts' jurisdiction should be limited in the sense that the Court should only be entitled to entertain review proceedings after the aggrieved person had exhausted his remedies under the regulations. In the course of his judgment the learned Judge expressed the view that:

> 'The mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply an intention that recourse to a Court of Law should be barred until the aggrieved person has exhausted his statutory remedies.'.

It is, I think, clear from the context in which this statement appears that what the learned Judge intended to convey was that the mere existence of a domestic remedy did not conclude the question, since it is in each case necessary to consider all the circumstances in order to determine whether a necessary implication arises that the Courts' jurisdiction is either wholly excluded or, at least, deferred until the domestic remedies have been exhausted.".

(See also the remarks of GREENFIELD J, in *Moyo v Ndhlovu,* 1971 (2) SA 252 at 255.)

---



WADDINGTON J

It is necessary to state at this point that I agree with the comment of OGILVIE THOMPSON A J.A., at p. 503 of his judgment in the *Welkom Village Management Board* case that ". . . the necessary implication . . . can seldom, if indeed ever, arise when the aggrieved person's very complaint is the illegality or fundamental irregularity of the decision which he seeks to challenge in the Courts.". In the instant case, the Plaintiff's main action does not concern the manner in which his application for redress under the Discipline Regulations was considered by the Governor who in January, 1980, exercised the powers of President or by the Commander of the Army, his main action which will be tried in this Court if the special pleas fail is solely concerned with the commission of alleged delicts. The special pleas and the main action are not in the nature of proceedings to review the decision of the Governor. This Court would doubtless have the inherent right to review those decisions were they to have been reached in a manner contrary to the fundamental principles of our law having been tainted by the exercise of excess jurisdiction, lack of good faith or the failure to afford Plaintiff the right of a fair hearing.

The question to which I shall now address myself is whether the Discipline Regulations or Defence Act [*Chapter 94*] give rise to the necessary implication that the Plaintiff's ordinary right to approach this Court has been ousted. At the outset I should state that neither Chapter 94 nor the Discipline Regulations contain any express statement ousting this Court's jurisdiction to entertain Plaintiff's main claim. Section 15 of Chapter 94 reads:

> "15. Subject to the provisions of this Act, the Minister may, in terms of subsection (1) of section *one hundred and twenty-one*, make regulations providing for the conditions of engagement and service of members.".

Section 121 (1) of the Act reads:

> "(1) The Minister may make such regulations as, in his opinion, are necessary or convenient for securing the discipline and good government of the Defence Forces and generally for the better carrying out of the objects and purposes of this Act.".

---

**Copyright Juta & Co Ltd**

In providing for the conditions of engagement and service of members therefore, the Minister may make regulations which, in his opinion, are calculated to promote discipline and the good government of the Defence Forces. The Discipline Regulations were made in terms of section 15 and 121 (1) of the Act and it was to these regulations and their precursors that Plaintiff subjected himself when he originally attested into the Army.

Part III of the Discipline Regulations sets out the procedure by which the military offences specified in the First Schedule to Chapter 94 may be



summarily disposed of after the prescribed investigation. The nature of military offences covers a wide spectrum of conduct ranging from aiding the enemy (pare. 2 of the First Schedule) to the general offence created by para. 38, i.e., that of causing by any act, conduct or omission, prejudice to good order and military discipline.

Part IV of the Discipline Regulations is entitled "Redress of Wrongs and Petitions on Review" and contains, *inter alia*, a procedure which enables an "aggrieved member" (defined in section 28 as meaning a member "who considers himself wronged in any matter by a superior officer") to address a complaint in writing to his "redressing officer" (defined in section 28 in effect as the aggrieved member's superior officer other than the superior officer about whom the complaint is made) set tiny out the grounds of his complaint and the redress sought. Section 28 (4) provides that where the redressing officer does not grant the redress sought or resolve the complaint to the satisfaction of the aggrieved member, he shall forward the complaint with his comments thereon to one of a number of superior officers. Similarly, if such superior officer does "not grant the redress sought" or if he fails to "resolve the matter to the satisfaction of the aggrieved member", he in turn is required to refer the complaint to a superior authority or if the complaint is that of a superior authority, to the Commander. (See section 28 (5) and (6).) Where the aggrieved member is an officer, if the Commander does not resolve the matter to the satisfaction of the aggrieved member, he is required to refer the matter to the President (in the case of Plaintiff, the Governor) "whose decision shall be final". (See section 28 (8).) That this procedure was in fact unsuccessfully followed by the Plaintiff in this case, it will be recollected, is not in dispute. Indeed, the original complaint in writing made in terms of section 28 (2) to the Governor, together with its accompanying enclosures, was produced as an exhibit by Mr *Horn* during the course of this trial.

The Discipline Regulations nowhere confer on any of the above mentioned authorities the jurisdiction to make orders or award financial compensation or damages in respect of soundly based complaints. Doubtless, if the redress sought were capable of being granted administratively the aggrieved member might obtain satisfaction in this way. An aggrieved member might also be able to enjoy the satisfaction of witnessing retribution being visited upon the offender in the form of disciplinary proceedings instituted in respect of a military offence in the ordinary way under the provisions of Chapter 94 or the Discipline Regulations. He might also be satisfied with an apology exacted from the offender by traditional military methods.

Copyright Juta & Co Ltd

WADDINGTON J

Mr *Horn* argued that in the context of a disciplined force where the maintenance of the authority of officers over their subordinates constitutes the essential fabric of the good government of the force, these forms of redress would ordinarily be sufficient. would prejudice discipline and the good government of the force if officers were able, in respect of conduct in which a military offence is involved, to sue their superiors in the civil Courts thereby at the same time exposing domestic military problems to public scrutiny The very fact that a method of settling such grievances "within the family" is provided in the Discipline Regulations is, he maintained, eloquent testimony of the lawgiver's intention that aggrieved members should look to that procedure, to the exclusion of all others, for redress. In the present case he argues, incidentally, that Plaintiff must have known that the reason defendants engaged in the conduct they did was to investigate an allegation that Plaintiff and the unit of which he was the commanding officer were engaged in smuggling ivory and arms and ammunition; in other words, there was a suggestion that Plaintiff might be guilty of the military offence of engaging in conduct prejudicial to good order and military discipline. (In support of this contention Mr *Horn* pointed to the Plaintiff's own written complaint made in terms of section 28 (2) of the Discipline Regulations and in particular to paragraphs 3, 5, 6, 7, 8, 9, 10, 16 and 20 thereof. In addition, he drew attention to paragraphs 4, 9, 10, 11, 17, 20, 21, 22, 24 and 28 of Enclosure 1. Those references indicate that 1: Plaintiff was well aware of the reason for the various forms of surveil lance over him which had been mounted by defendants). If the effect of the Discipline Regulations is, as Mr *Horn* argued, to preclude an officer from seeking redress in the civil Courts involving matters of a pre eminently military character, Plaintiff's complaint would consequently fall fairly and squarely within the prohibition. I should add that Mr *Horn,* in his fair and well presented argument, did not maintain that, giving the Discipline Regulations the meaning he contended for, it would never be possible for an officer to sue another officer in the civil Courts. This would be possible, he argued, in cases where grievances arose out of circumstances entirely divorced from a military context and from the relationship existing between the members concerned by virtue of their respective positions in the Army.

In support of his argument that by necessary implication the Discipline Regulations must be construed as ousting the jurisdiction of this Court in matters touching military discipline, Mr *Horn* relied on a number of English decisions. Neither counsel nor I have been able to discover any other decisions more helpful than these. The first of the decisions was the



WADDINGTON J

case of *Dawkins v Lord Paulet* (1869) LR 5 QB p. 94 in which COCKBURN CJ, MELLOR and LUSH JJ, had to consider on demurrer whether an action for libel by one Army officer against another was maintainable. The facts of the case were that the defendant was the superior military officer of the Plaintiff and it was his duty to forward to the adjutant-general of the Army certain letters written to him by Plaintiff in relation to their military conduct and duties and to make reports for the information of the commander-in-chief on the subject of those letters. Defendant had received the documents from Plaintiff in relation to his military duties and as an

Copyright Juta & Co Ltd

act of military duty had forwarded them to the adjutant-general together with his own reports. Plaintiff claimed that the reports contained libels of him and in his replication on a demurrer maintained that defendant had been actuated by actual malice in making certain comments therein. It was held by MELLOR and LUSH JJ, that the replication was bad because no action would he against a military officer for an act done in the ordinary course of his duty as such officer even if done maliciously without reasonable or probable cause. COCKBURN CJ, dissenting, held that an action would he. The reasons for the decision of MELLOR and LUSH JJ, are significant. In his judgment MELLOR J, at page 114 *et. seq.,* of the report stated:

> "The Attorney-General, however, did not rest the case on the effect of the admissions in the pleadings, but contended broadly that no action would he at law against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case of the defendant to that of the judges of Courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it. He claimed the immunity for the defendant for acts done in the course of his duty on the highest grounds of policy and convenience. No judge, nor juryman, nor witness, he said, could discharge his duty freely, if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him, and to all officers in the same position; and there is, I think, little doubt that the reasons which justify the immunity in the one case, do in great measure extend to the other. How can a commander freely communicate his real opinions to the adjutant general as to the conduct, qualifications, or fitness for particular duty of any officer under his command, if his opinion be prejudicial to such officer, under the dread of an action for libel, or other action, which, if he were not protected, might be brought against him by any dissatisfied subordinate officer who might consider himself aggrieved? To this it may be answered that no action would he, as his communication would be privileged, if made bona fide and without malice. On the other hand, it must be observed that, although his communication might be privileged under such circumstances, still cases might frequently occur in which the judge on a trial at law would have to



> submit to a jury the most difficult questions of military discipline, such as whether orders disobeyed were proper orders for a commander to give, or given maliciously and not *bona fide,* or whether the opinion expressed as to the competence of a subordinate officer for particular duties was justifiable or not. The promotion of an incompetent man may cause the greatest disaster, and yet, if the person who has to make his report as to the fitness or unfitness of such officer is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely? The Attorney-General relied not only upon the analogy he drew from the case of a judge, juryman, or witness, but he cited in support of his argument, the opinion of Lord Mansfield and Lord Loughborough, in the case of *Sutton v Johnstone* (1); and there is no doubt that those eminent judges did, in the Court of error, express an opinion in the analogous case of an action for a malicious prosecution of a naval officer by the commander in chief of a naval squadron before a naval Court-martial that no such action could he, and in the course of their observations they said (2), "If this action be admitted, every acquittal before a court-martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them." And, again, "If every trial that is by court-martial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be." These considerations appear to me to apply a fortiori to a case like the present, in which the letters and reports complained of were written by the defendant in the performance of a positive duty, and for the purpose of obtaining an investigation of the matters therein alleged by a competent military tribunal.".

Commenting on the opinions expressed by Lords Mansfield and Loughborough in the case of *Sutton v Johnstone* 1 TR 544, the learned judge stated at page 116:

**Copyright Juta & Co Ltd**

"It was evidently given after great consideration, and derives additional weight from the fact that it was delivered in a Court of error, and after an argument displaying the greatest ability and research. It proceeds upon the principle that "the law will rather suffer a private mischief than a public inconvenience." It was observed by Eyre B, in delivering the opinion of the Court of Exchequer (1), that the ground upon which the immunity from actions, enjoyed by judges and jurymen proceeds, is, that "the Law gives faith and credence to what they do, and therefore there must always, in what they do, be cause for it, and there never can be any malice in what they do." Crompton J, in *Fray v Blackburn* (2), stated that the immunity of judges of the superior Courts was established to secure their independence, and to prevent them being harassed by vexatious actions. It is manifest that the administration of justice would be paralysed if those who are engaged in it were to be liable to actions upon the imputation that they had acted maliciously and not bona fide; and it is to be observed that this absolute privilege is not confined to the administration of justice in the superior Courts, but it has been also applied in its fullest extent to judges of the county Courts: *Scott v Stansfield (3);* nor is it indeed confined to the administration of justice; for it is well established that members of parliament cannot be called in question out of parliament for anything they may say in parliament in the course of any proceedings in parliament, and, in like manner, ministers of the



WADDINGTON J

Crown cannot, from reasons of the highest policy and convenience, be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals.

Do not these reasons of public policy and convenience strongly apply to the present case? Can the administrative duties discharged by officers of the army in the position of the defendant be liable to be reviewed by a jury in an action at law without producing the greatest mischief and public inconvenience? I shall presently see what a special mode of redress for all officers in the army who consider themselves wronged by their superior officers in relation to the discipline and government of the army is expressly provided by the articles of war, and in that view how inconsistent it would be that the judgment of a military tribunal, familiar with the question, should be liable to be reversed, and a different result obtained by the verdict of a jury in an action at law upon the very same facts? It is true that a standing army was unknown to the common law, and was always looked upon with great jealousy by our ancestors, but it is now, and has been for many years, regulated by acts of parliament, and by articles of war framed under them which provide appropriate Courts and suitable machinery, and there is now a secretary of state for war, expressly appointed by the Crown, with a series of officers charged with particular duties and functions, all tending to the regulation and government of Her Majesty's forces, and I cannot but think that the analogies referred to do in principle apply to such a state of things.

Upon these considerations, and supported by the opinion of Lords Mansfield and Loughborough and that of other judges, I come to the conclusion that the present action will not he.".

The next ground on which MELLOR J, found for the defendant concerned the 12th section of the Articles of War which provides:

"That if any officer shall think himself wronged by his commanding officer, and shall upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint and either by himself or by our secretary of state of war, to make his report to us thereupon in order to receive our further directions."

Dealing with this his Lordship went on to say at page 118:

"It would seem to follow from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the articles of war, and that in respect of any grievances or complaint arising out of

**Copyright Juta & Co Ltd**

such administration, he can have no redress in any other way. Certainly this view of the law is supported by the opinions of Lords Mansfield and Lough borough, expressed in the case of *Sutton v Johnstone* (1), above referred to, in which it is said:



WADDINGTON J

> 'Commanders in the day of battle must act upon delicate suspicion, upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience; in case of a general misbehaviour they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience; but what condition will a commander be in, if upon the exercising of his authority he is liable to be tried by the common law judicature?'

I think that these considerations tend strongly to show that the legislature, in providing special means of redress for officers feeling themselves aggrieved by any exercise of ordinary military authority or duty, by establishing special tribunals for the purpose by the articles of war, did intend to preclude such officers from appealing to the ordinary tribunals in respect of such matters. This view is confirmed by the opinion WILLES J, in *Dawkins v Lord Rokeby* (1), upon which he non-suited the plaintiff in an analogous action, and which, so far as I am aware, was not afterwards questioned, he is reported to have said as follows:

> 'With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves, anything more fatal to the discipline or subordination of the army, if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is law, and that it is that which is most beneficial to the community'.".

MELLOR J, therefore came to the conclusion that upon the ground that the defendant and the Plaintiff were both officers in the army, the defendant being the superior officer, and both being bound by the Articles of War, it was the duty of the plaintiff to adopt the remedy thereby provided and that he had no remedy at common law.

In the judgment of LUSH J, it was pouted out at page 120 of the report that the letters complained of reflected on the plaintiff ". . . in his capacity of military officer, and in that capacity only. They affect his character, not as a citizen, but as a soldier, and they were written, not for circulation amongst the public, nor to a private individual, but to the proper military authority and for the purpose of originating an enquiry into the competence of the plaintiff, and the propriety of an order which the defendant, as his superior officer, had made." It is not without significance to compare this statement with the facts in the present case. plaintiff avers that his *dignitas* and privacy as a soldier have been invaded in circumstances which disclose that he must have appreciated that the reason for the activities of the first defendants was to comply with their



WADDINGTON J

duties and orders to investigate a possible military offence. Dealing with the meaning of the 12th Article of War LUSH J, at page 121 stated:

> "Can it be reasonably shall any other mode or measure of redress was intended by the Act than that which is subsided in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation

Copyright Juta & Co Ltd

is given to the injured party. That defect, if it be one, is a defeat in the code itself, which we cannot remedy. The plaintiff has no reason to complain for he has all which the law military, to which he engaged to submit when he entered the seduce, entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or to the other.."

The next case Mr *Horn* relied on was that of *Dawkins v Lord Rokeby,* 176 ER at page 800. This was a decision of the Court of Common Pleas, the judgment being delivered by WALES, J It was an action by a military officer (the same officer referred to in the case cited above) against his commander for false imprisonment and a number of other causes of action. The facts were that the defendant, plaintiff's commander, had decided against plaintiff on some dispute with brother officers. Thereafter plaintiff had been placed under arrest by defendant, for some supposed slight, kept in custody more than eight days and not brought to a Court martial. Ultimately, following plaintiff's complaints against the defendant, a Court of enquiry sat before which defendant and others gave evidence Ed against plaintiff of "want of temper and proper respect" for which the court of enquiry reported him unfit for command. plaintiff was ultimately compelled to retire. In his judgment WITCHES J, held that there was no cause of action on any of the counts as the matters were purely military. At page 811 of the judgment WALES J, said:

"But, with respect to persons who enter into military state, who take Her "Majesty's pay, and who are content to act under her commission, although they do not cease to be citizens in respect of responsibility, yet they do, by a compact which is intelligible, and which requires only the statement of it to recommend it to the consideration of any one of common sense, becomes subject to military rule and military discipline.

It is only necessary to refer to one or two authorities for the purpose of making this clear. In the first place, the reading of the oath of the Court at Court - martial, out [832] of Article 102, which has been referred to in the course of the case, is abundant, to show, with respect to all matters which come under the cognizance of the military tribunals, they are subject to a test of law which is different from that administered in civil Courts; it is to be according to military usage and their approval, whereas here we have a test according to law and the custom of England, that is to say, the law and custom which regulate ordinary transactions out of the army. That in itself is sufficient. I may mention, that in the case of *Johnstone v Sutton,* which was sufficiently cited in the course of the argument, a case decided by the highest authority in



WADDINGTON J

this country, namely, the House of Lords, upon the advice of one of the greatest lawyers who ever sat in our Courts, Lord Mansfield, assisted by a man of very considerable weight and authority, Lord Loughborough - not only, in the case of *Johnstone v Sutton,* was it shown that military matters, properly brought within the true limits of military jurisdiction, are not to be called in question in civil Courts; but also in a subsequent case, in the last century, of *Grant v Gould* (2 Hen. Blackstone's Rep. 69), it was laid down, upon an application for a prohibition, that a man, by becoming a soldier, and receiving the Queen's pay, does agree and consent that he shall be subject to military discipline, and he cannot appeal to civil Courts to rescue him from his own compact. This will suffice to show that, with respect to all these matters which have been laid before the Court (with the exception of the arrest in the year 1860, which I must deal with separately), it is not competent for this Court to consider them. It is not competent for this Court to undo that which Her Majesty has done, upon the advice of the proper authorities in these matters. Accordingly, I will lay it down, perhaps more broadly than even the defendant's counsel would desire, that even if it had been made out that [833] Lord Rokeby had maliciously, and without reasonable and probable cause, given the evidence he did before the Courts of Enquiry in 1864 and in 1865, and if it had been proved that he was the prime mover in the dismissal of Colonel Dawkins from the army, that that

Copyright Juta & Co Ltd

gentleman could not have obtained redress in these Courts. It was so decided in the House of Lords, in the case of *Johnstone v Sutton,* and it was so decided for the reasons I have already mentioned. Nor are the Articles of War without a provision for redress in such a case, because the 12th Article of those at present in force provides that, if any officer shall think himself wronged by his Commanding officer, and upon due application shall not receive the redress which he is entitled to, he is to make his complaint in the manner there pointed out, and he is to seek redress in that manner. I cannot entertain a doubt that this is the law; whatever responsibility may attach to me for pronouncing it, I must pronounce it, as I am satisfied that it exists. Nor ought I to allow any feeling of sympathy for Colonel Dawkins, even if I felt it, to interfere with the discharge of my plain duty - that is, to abstain from matters with which I have no concern."

Concluding his judgment WILLES J, went on to say at page 815:

"Upon the whole case, I am bound to say, that no cause of action in civil Court has been shown. That is what I believe to be the law; and I am satisfied that at least that portion of the community who are not soldiers will desire that soldiers shall settle their disputes among themselves, and that they should keep themselves to their own jurisdiction, at least with respect to all matters which are properly military. With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves - anything more fatal to the discipline or the subordination of the army - if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is the law, and I have no doubt that it is that which is most beneficial to the community."

---



WADDINGTON J

The third case to which the attention of the Court was directed was yet another matter in which the litigious Hawkins was Plaintiff. This case is that of *Dawkins v Lord Rokeby,* 1872-73 LR 8 GB 255 and arose from the same facts which were the subject of the decision of WALES J, in *Dawkins v Lord Rokeby (supra).* The judgment of the Court was delivered by Chief Baron Kelly, the Court consisting of no less than ten judges. Reflecting the decision in the earlier case KELLY CB, at page 270 of the judgment stated:

"But there is another and a higher ground upon which we are of the opinion that the defendant is entitled to the judgment of the Court. The whole question involved in this case is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a Court of law."

The learned judge went on to deal with the facts and then continued at page 271 of the report:

"With reference, therefore, to such questions, which are purely a military character, the reasons of Lord Mansfield and the other judges in *Johnstone v Sutton* (1), and the cases *In re Mansergh* (2) and *Grant v Gould* (3), *Barwis v Keppel* (4), *Keighly v Bell* (5), *Dawkins v Lord Rokeby* (6), and *Dawkins v Lord F Paulet* (7) are all authorities to shew that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a Court of law.

On the other hand, the case for the plaintiff, when attentively considered, is really destitute of all authority support the action. No one decision is to be found that an action for libel or slander is maintainable upon evidence given before any tribunal constituted, sanctioned, or recognized by or according to law. There is, indeed, in the eloquent and powerful reasoning of Lord Chief Justice Cockburn in *Dawkins v Lord F Paulet* (7), much which is opposed to the view we take of the incompetence of a Court of law to deal with purely military questions arising before a military tribunal. But the opinion thus delivered, though resting upon high authority, is no decision upon the question before us, or upon any cognate question."

Mr *Andrew,* who appeared for the plaintiff, sought to argue that certain other English decisions

---

**Copyright Juta & Co Ltd**

represent the true state of the law in the United Kingdom and that the real position, despite the clear conclusions reached in the three *Dawkins'* cases, is that one officer may sue another civilly where the cause of action involves a military matter notwithstanding the existence of the redress procedure contained in the 12th Article of War. (I might add that that procedure was enshrined in the United Kingdom Army Act of 1955 (see section 180) and also appears in section 134 of the First Schedule to the South African Defence Act, 19573. The essence of his argument, as I understand it, is that because in each of the cases to which he particularly referred claims by members of the Army were actually maintained in the civil Courts, it follows that a



right of action must exist in all civil cases involving military matters. *Heddon v Evans,* 1918-19, TL 35 p. 642 was one such case. But this was a case in which McCARDIE J, felt "free to enquire whether the defendant in the present case acted without jurisdiction and whether he falsely imprisoned the plaintiff". (See p. 645 of the report). It was that question which the learned judge considered; a question which of course was similar to instances which, as I have indicated earlier in this judgment, our own Courts would doubtless review on the ground that the decision was contrary to the fundamental principles of our law. McCARDIE J, at the same reference said:

> "Upon the decisions, as they stand, my conclusions on the matter are these: First. A military tribunal or officer will be liable to an action for damages if when acting in excess of or without jurisdiction, it or he does, or directs to be done, to a military man, whether officer or private, an act which amounts to assault, false imprisonment, or other common law wrong, even though the injury purports to be done in the course of actual military discipline.
>
> Secondly, if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline no action will he upon the ground only that such act has been done maliciously and without reasonable and probable cause.
>
> The first conclusion seems, I think, to be reasonably clear from the authorities as well as upon principle.
>
> The second conclusion seems to be fully established by *Dawkins v Paulet (supra), Dawkins v Lord Rokeby (supra), Marks v Frogley (supra), Fraser v Hamilton (supra),* and *Fraser v Balfour (supra).*
>
> These five decisions represent a vast weight of judicial authority."

(The underlining is mine.)

These conclusions are not in my view inconsistent with any of the decisions in the three *Dawkins'* cases which the learned judge seems to have approved. Near the conclusion of his judgment at p. 652, McCARDIE J, finally stated that "I am unable to find that the defendant acted beyond his jurisdiction . . .". Heddon's action was maintained because it was necessary to enquire into the question whether defendant had exceeded his jurisdiction.

Mr *Andrew* also relied on *Fraser v Hamilton,* 33 TLR 431 in support of his argument. This was a case in the Court of Appeal heard before LORD COZENS-HARDY MR, and SCRUTTON LJ, in 1917 in which it was held that an action will not he against a superior official of the Army or Navy for maliciously causing the plaintiff to be retired from the service. An extract from the short

Copyright Juta & Co Ltd

narrative report of the judgment of the Master of the Rolls reads:



WADDINGTON J

> "The Master of the Rolls, in the course of his Judgment, said that in his opinion the plaintiff, who had argued his case extremely well, had no cause of action in a civil Court. He had contended that when a superior official acted maliciously towards him in the exercise of his duty an action would he against such an official, but in his (his Lordship's) opinion, the allegation of acting maliciously did not give the Court jurisdiction. Since the cases of *Dawkins v Lord Rokeby* (L.R., 7 HL, 744) and *Marks v Frogley* (14) *The Times* LR 393; [1898] 1 QB 888), it was doubtful whether the House of Lords had jurisdiction to entertain an appeal in an action of this kind, but whether that was so or not, the Court of Appeal certainly had not. It was not open to a civil Court to entertain the action.
>
> When a man became a member of the Navy or the Army he subjected himself to a code of law which ousted the jurisdiction of the ordinary Courts and provided redress for any grievance. The King's Regulations provided for a redress of grievances, but the plaintiff complained that he could not get damages by such a remedy. That might be so, but the Court had nothing to do with that. In the same way that it was in the public interest that no action could be brought against his Majesty's Judges for anything said or done in the course of their duties, the analogy of the cases decided on naval and military questions showed clearly that the order of the learned Judge was right, and the appeal therefore failed and must be dismissed, with costs."

(The underlining is mine.)

In my view this decision does not support Mr *Andrew's* contention but merely serves as further confirmation of the decisions in the *Dawkins*' cases. The point is brought out again in the case of *In re Mansergh* 121 ER p. 765 at p. 767 where COCKBURN CJ, said in his judgment (WIGHTMAN, CROMPTON and BLACKBURN JJ concurring):

> "The result of the discussion which has taken place on the present application is that I, for my part, entertain no doubt that we ought not to interfere. I say "discussion"; for, although only one side has been heard, we have all expressed our opinions during the argument of Mr Lush, in order to elicit from him whatever could be said on the matter, which is one of considerable importance, and on which no one is better capable of throwing light than himself.
>
> I quite agree that where the civil rights of a person in military service are selected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction this Court ought to interfere to protect those civil rights: e.g. where the rights of life, liberty or property are involved, although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was [407] the military status of the applicant - a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the Sovereign."

(The underlining is mine.)



WADDINGTON J

And in *Grant v Sir Charles Gould* 126 ER p 434, a case which arose on a motion for a prohibition to prevent the execution of a sentence passed against the plaintiff by a general Court martial and in which the Rule was discharged, LORD LOUGHBOROUGH at p. 451 of the report

Copyright Juta & Co Ltd

stated:

> "I have stated the observations generally, upon the nature of an application for a prohibition. The foundation of it must be that the inferior Court is acting without jurisdiction. It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the Court had acted erroneously. That may be a matter of appeal where there is an appeal, or a matter of review: though the sentence of a Court-martial is not subject to a review, there are instances, no doubt, where, upon application to the crown, there have been orders to review the proceedings of Court-martial."

(The underlining is mine.)

*Warden v Bailey,* 128 ER p. 253 contained another such decision. An order was made by a colonel that sergeants and corporals should attend night school for the purpose of learning to read and write. The sergeant-major (who presumably could read and write) was to be the schoolmaster and his pupils were each to pay eight pence per week to defray his salary and the expense of fire and candles. The plaintiff in the case had been imprisoned, having been court-martialled, in a damp and unwholesome cell for playing truant and became ill in consequence. He thereupon sued his colonel. In his judgment at p. 261 of the report, LORD MANSFIELD CJ said that:

> " . . . it might indeed be very convenient that a military officer might be enabled to make the men under his command learn to read and write, it might be very useful, but is not a part of military discipline. Then, further, there is a tax of 8d. per week for learning to read and write. Now if the House of Lords had inserted in an act of parliament, that serjeants and corporals should pay ad. per week for learning to read and write, the bill, on coming down to the Lower House, would certainly have been thrown out; and clearly a commanding officer of a regiment cannot impose that tax. We think then that the order to attend the school most probably was bad, and an excess of authority but the order of taxation was certainly so; and that order was , , never rescinded. The subject cannot be taxed, even in the most indirect way, unless it originates in the lower house of parliament. We therefore think the rule must be absolute for a new trial, but T must express the strongest wish that the cause will not be again tried; for all disputes respecting the extent of military discipline are greatly to be deprecated, especially in time of war: they are of the worst consequence, and such as no good subject will wish to see discussed in a civil action: they ought only to be the subject of arrangement among military men."

(The underlining is mine.)

That the action was maintained by the Court was evidently due to the fact that the defendant had acted in excess of his jurisdiction.

---



WADDINGTON J

As I have said, Mr *Andrew* that none of these cases were what in our law would be regarded as common law review cases and that they constituted actions for damages. They are therefore, he continued, authority for the proposition that in the English Courts actions for damages between Army officers are maintainable in respect of military matters. I disagree. The cases concerned were all, in my view, maintained because the Courts were investigating whether defendants had acted outside the scope of their respective jurisdictions. This is a factor our own Courts would normally regard as sufficient reason for reviewing decisions of military tribunals and officers enjoying *quasi-judicia*l powers. I am satisfied therefore that under English law at least a military tribunal or officer will be liable in an action for damages in the civil Courts if he commits an unlawful act when acting in excess of or without jurisdiction. I also consider

**Copyright Juta & Co Ltd**

that in English law if the act causing injury were to be committed within the jurisdiction of the actor and in the course of military discipline no action will he even if the act was performed maliciously. I furthermore regard the three *Dawkins*' cases as definitive of the effect of the 12th Article of War (and, *a fortiori*, of section 180 of the Army Act, 1955) in relation to the right of an officer to institute a civil action against another in respect of military matters. None of the decisions I have canvassed are of course binding on me in construing the effect of Part IV of the Discipline Regulations. However, Part IV bears a remarkable similarity to the 12th Article of War and it would be rash to disregard the reasoning of the eminent judges in the *Dawkins*' cases in deciding what the meaning of our own legislation is. These decisions are of considerable assistance in deciding whether the necessary implication exists in our legislation that it was not intended that an officer may have recourse to the civil Courts in determining questions involving matters military particularly where those matters concern the commission of military offences specified in the First Schedule to Chapter 94. Reading the provisions of Chapter 94 and the Discipline Regulations as a whole it is plain that the relevant portions thereof have been based on the equivalent English provisions. In the view I take of the matter, for the reasons given by MELLOR and LUSH JJ., in *Dawkins v Paulet (supra),* it is an almost inescapable conclusion that in providing the special redress procedures contained in Part IV of the Discipline Regulations, the Legislature must have intended Army officers to be restricted to that procedure in respect of complaints which, by virtue of their touching upon military offences and other military matters, could be dealt with by means of that procedure. I agree that the fact that the procedure fails to provide for compensation or damages is a fault of the procedure itself and may be a matter for legislative action. I am satisfied



WADDINGTON J

that the effect upon Army discipline, the maintenance of which is essential if the Army is to fulfil its functions properly, would be disastrous if officers were to be at the forensic mercy of other disgruntled members of the Army. It would place officers in invidious positions if before issuing orders at the height of battle or during dangerous military exercises they were obliged to consider whether, in the interests of their own self protection they ought first to take legal advice. The dilemma of junior officers acting under the orders of their superiors would be even greater in these circumstances. The point is quite well illustrated by the facts of the present case. Should the defendants who were junior officers acting on orders to investigate a suspected military offence by plaintiff have delayed the execution of those orders by first seeking clarification of the legal right of their superiors to give those orders? Obviously, to my mind, that course would have been inimical to the maintenance of good order and military discipline in the Army and if such licence were permitted generally it would inevitably lead to chaotic conditions in an organization where instant obedience to authority a *sine qua non*. By these remarks I should not be taken as suggesting that the criminal liability of a soldier for complying with the orders of his superior is any different from the position stated by SOLOMON JP, in the leading case of *Queen v Smith,* 17 SC 561 at 568 approved by MURRAY CJ, in *R v Mayers,* 1958 (3) SA 793 at p 795 (SR). A soldier is immune from criminal responsibility for acts done in obedience to the orders of a superior officer if the orders were not so manifestly illegal that the soldier must or ought to have known them to be so and if he honestly believed he was doing his duty in obeying them. In cases where the orders of a superior officer are not

**Copyright Juta & Co Ltd**

manifestly illegal, his inferior is bound to comply with them if good order and military discipline is not to suffer.

In considering this case, it is not without significance to note that plaintiff in effect mounted two separate courses of action against defendants. He instituted proceedings in terms of Part IV of the Discipline Regulations in addition to his main action. Section 28 (8) of the regulations provides that the decision "of the President . . . shall be final" in a complaint referred to him in terms of those regulations. Neither the regulations nor Chapter 94 provides for an appeal on the merits to this or any other Court from the President's decision. In a sense these proceedings, had they been instituted after the Governor had declined to grant plaintiff redress, could have been regarded as being in the nature of an appeal and therefore without statutory authority. plaintiff himself in his written complaint dated the 19th January, 1980, and submitted in terms of section 28 (8) of the Discipline Regulations states in paragraph 17



WADDINGTON J

(f): -

> "The current situation is that failing to secure military or criminal prosecutions, I have had to institute, at my expense, Civil Proceedings in the Civil Courts as a last resort."

This document, which was not challenged by Mr *Andrew,* was produced as an exhibit. The extract quoted above discloses that Plaintiff regards his main action as an appeal. According to paragraph 5 of Exhibit 1, the list of facts not in dispute, it was in May, 1979, that plaintiff commenced proceedings under the Discipline Regulations to obtain redress for his grievances. In August, 1979, he issued summonses in the main actions before he had exhausted his domestic remedies. The position that would have obtained had he succeeded in the first course and failed in the second would indeed have been paradoxical and to my mind this suggests strongly that the Legislature could not have intended that an officer who takes advantage of the regulatory redress proceedings may bring an action in the civil Courts.

Section 55 (1) of Chapter 94 reads:

> "(1) Notwithstanding the jurisidiction conferred upon a military Court by Willis Act, a civil Court shall, subject to the provisions of motion ninety-five, have jurisdiction to try a person for any offence, whether in terms of this Act or otherwise, within its jurisdiction:
>
> Provided that, if a person has been sentenced by a military Court for an offence and is convicted of the same or a similar offence by a civil Court, the civil Court shall take into account in imposing sentence for that offence any punishment awarded that person by a military Court."

(Section 95 of the Act is not relevant to these proceedings.)

Mr *Horn* argued that this provision expressly confers jurisdiction on the civil Courts as opposed to the defence authorities to try members of the Army and other branches of the Defence Forces for military offences specified in the First Schedule to Chapter 94 and for other criminal offences. He submitted that had it not been the intention of the Legislature to oust the jurisdiction of the civil Courts in all cases falling within the military milieu save those expressly referred to in section 55 it would have been unnecessary for the Legislature to have provided in

Copyright Juta & Co Ltd

that section that the civil Courts are empowered to exercise the jurisdiction in question. It is not an easy question whether the intention of the Legislature in an act of Parliament may be discovered by reference to provisions of regulations framed in terms of such an act. However, in the case of Chapter 94, section 122 (1) of the Act provides, *inter alia,* that:

> "The regulations and rules specified in the Third 'Schedule and any amendments thereto which are not inconsistent with the provisions of this Act and which were in force immediately before the appointed day-



WADDINGTON J

> (a) shall continue in force *mutatis mutandis*, and shall be deemed to be regulations . . . made in terms of this Act . . .".

Among the. regulations specified in the Third "Schedule are the Defence Forces (Discipline) Regulations, 1956 (FGN 83 of 1956). Section 37 of those regulations reads:

> "(1) If an officer thinks himself wronged in any matter by a superior officer and, on application to his commanding officer, does not obtain the redress to which he thinks he is entitled, he may make a complaint in writing with respect thereto to the President. Such complaint shall be forwarded by the officer concerned through his commanding officer to the commander for onward transmission to the President.
>
> (2) On receiving any such complaint the President shall grant any redress which appears to him to be necessary.".

Because section 122 of Chapter 94 specifically adverts to the continuation in operation of FGN 83 of 1956 after the date on which Chapter 94 came into operation it can be assumed that for the purpose of interpreting section 55, the provisions of section 37 of FGN 83 of 1956 may be taken into account in deciding the purpose for which section 55 was designed. As the provisions of section 37 of the 1956 regulations are in effect identical to the provisions of section 28 of the Discipline Regulations which in turn bear a marked similarity to the Articles of War which were the subject of interpretation in *Dawkins v Paroles (supra),* the point made by Mr *Horn* has merit. Assuming that section 28 of the Discipline Regulations ousts this Court's jurisdiction, it is understandable that the Legislature, desirous of ensuring that the civil Courts should have the jurisdiction to try members of the Defence Forces for committing military offences and other offences, would have been at pains to make specific provision conferring that jurisdiction on civil Courts in the terms adopted in section 55 of Chapter 94. Without that provision, doubt would have existed whether the civil Courts could have exercised criminal jurisdiction over members of the Defence Forces particularly in regard to military offences. Consequently in my view section 55 may be regarded as confirmation of the fact that it was the intention of the Legislature that the effect of section 37 of FGN 83 of 1956 was to exclude from the jurisdiction of the civil Courts actions brought by officers in the Defence Forces against other officers touching matters which could legitimately form the subject of an application for redress in terms of section 37.

For all these reasons, therefore, I conclude that in respect of the first defendants' special pleas, the proper construction to be placed on section 28 of the Discipline Regulations is that it was not the intention of the lawgiver that officers should be entitled to bring civil actions for damages



Copyright Juta & Co Ltd

in this Court which concern matters which constitute any of the military offences specified in the First Schedule to Chapter 94. Nor do I consider that this Court has the jurisdiction to maintain such actions if they concern matters which arise out of or directly depend on the relationship which exists between the parties by virtue of their respective positions in the defence forces. In the instant case it is not in dispute that the "alleged unlawful conduct of each of the first defendants set out in plaintiff's declaration" in the several main actions "constitute complaints competent to be dealt with through the established and accepted military channels". (See Exhibit 1 - Facts not in dispute *(supra)*. Also, in this connexion, a document, Exhibit 3, was produced in which it was recorded, in effect as a concession, that in plaintiffs declaration it was not intended to deny "that the acts of the several defendants were undertaken with a view to investigating whether plaintiff and/or other members of the Selous Scouts were involved in the commission of military offences involving the poaching and/or smuggling of ivory and the smuggling of arms and ammunition". This concession, therefore, places it beyond question that the defendants' conduct complained of by plaintiff directly concerned a military matter. The redress procedure created by the Discipline Regulations is clearly not intended to encompass the hearing of complaints which fall completely outside the ambit of military matters generally. For example, it could not have been intended that one officer should be able to complain in terms of that procedure that another officer had negligently caused injury to his property while both were jointly engaged on some private frolic outside the scope of their military activities. It follows, in my view therefore, that as defendants' actions are admittedly amenable to the redress procedures, this court has no jurisdiction to hear plaintiff's main action against first defendants.

The second defendant in each case is the Minister of Combined Operations and Defence. He is not a member of the Army. What then of his position? This Court cannot decline jurisdiction on the aforementioned grounds in his case. It seems to me, however, that the answer to this question may be disposed of shortly. The Minister's liability is a vicarious one. If this Court does not possess the jurisdiction to maintain plaintiff's action against the first defendants and thus adjudicate upon their liability in the main actions, how can this Court possibly determine the Minister's liability which must depend entirely on the result of an enquiry by this Court into the first defendants liability? In my view, because, as I have found, this Court does not have the jurisdiction to entertain the plaintiff's main actions against first defendants, section 2 of the State Liabilities Act [*Chapter 54*] deprives this Court of the jurisdiction to entertain the main actions against the second defendant.





Section 2 of Chapter 54 reads:

> "2. Any claim against the Mate which would, that claim had arisen against a subject, be the ground of an action in any competent Court, shall be cognizable joy any such Court, whether the claim Aries or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant:
>
> Provided that nothing in this section contained shall be construed as affecting the provisions of any law which

**Copyright Juta & Co Ltd**

limits the liability the State or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action."

This Court is not a "competent" Court to entertain the plaintiff's actions against the first defendants who are "subjects" for the purposes of section 2. That being the case, this Court is not "competent" to entertain the same actions against the Minister as second defendant who of course represents the State.

Having reached these conclusions it is not necessary for me to consider the alternative ground contained in the pleas in bar. I only wish to observe that nothing in the demeanour of the witnesses from whom evidence was adduced led me to believe that any of them was deliberately trying to mislead the Court.

For the above reasons, the special pleas succeed. plaintiff is ordered to pay the costs of these proceedings.

*Messrs Coghlan, Welsh arid Guest,* attorneys for the plaintiff.

*Messrs Surgey, Pittman and Kerswell*, attorneys for the defendants.

---



## THE STATE v MILLS 1980 ZLR 227

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Lewis, A C.J., Baron, JA, and Goldin, JA

18th June and 7th July, 1980

### Flynote

Exchange control Act [Chapter 170] - sections 5 (1) (a) (ii) and 5 (1) (b) - directive to pay proceeds of sale into blocked account - whether cashing cheque contravenes directive - forfeiture in terms of section 7 (1) - special reasons - absence of prejudice - cash obtained by cashing cheque liable to forfeiture - valid cheque equivalent to money.

### Headnote

The appellant had been convicted in the regional magistrates Court of two counts of contravening section 5 of the Exchange control Act [*Chapter 170*]. The appellant emigrated from Rhodesia in March, 1977. He was issued a directive by the Reserve Bank which read in part-fin the event of the sale of Mr Mills' property, the net proceeds must be held to the order of your branch and may not be dealt with in any way without the prior permission of the Exchange Control".

"In the event of the sale of Mr Mills' property, the net proceeds must be held to the order of your branch and may

---

Copyright Juta & Co Ltd

not be dealt with in any way without the prior permission of the Exchange Control."

The appellant's immovable property was sold and in January, 1979, while visiting Bulawayo, the appellant was handed a cheque by his attorney for $6404,54. He cashed this cheque at one bank and, at another, applied for Exchange control authority to remit educational fees to his sons. In making this application he falsely declared that he was living in Bulawayo. The amount he sought to remit was $2757,12, including bank charges, which he handed over to the bank in cash. On his return the following day to collect the draft he was arrested. The "balance of the cash was paid into his blocked account later the same day.

It was argued that the appellant had contravened the directive only in so far as he sought to remit $2757,12 for his sons' education and not in respect of the balance of the cash.

*Held* that his cashing of the cheque was not merely a means of depositing the money to his "frozen" account and that the only reasonable inference that could be drawn was that he did not intend to pay the balance of the proceeds into his "frozen" account.

*Held,* further, that there was no substance In the contention that because the amount was banked, the State suffered no prejudice. The appellant was caught in the act, payment was inevitable and could not constitute a special reason.

---

**1980 ZLR p228**

GOLDIN JA

*Held,* further, that the subject matter of the contravention can be forfeited (in terms of section 7 (1) of the Exchange control Act [*Chapter 170*] and the conversion of a cheque into currency by banking does not alter the subject matter of the offence. A valid cheque represents or is equivalent to money. *(Rhodes Motors (Pvt) Ltd v Pringle-Wood NO,* 1965 (4) SA 50 (SRAD) and *Froman v Robertson,* 1971 (1) SA 115 AD followed) *S v Black and Ors* (GD Salisbury August, 1977, unreported) was wrongly decided on that aspect.

Cases cited:

*Rhodes Motors (Pvt) Ltd v Pringle-Wood NO (supra);*

*Froman v Robertson (supra),*

*S v Black (supra).*

*CW Jordaan*, for the appellant.

*CR Barlow*, for the respondent.

## Judgment

**Goldin JA:** The appellant was charged before a regional magistrate firstly, with contravening section 5 (1) (b) of the Exchange control Act [*Chapter 170*] and, secondly, with contravening section S (1) (a) (ii) of the same Act. He pleaded guilty to the first count and tendered "a limited plea" to the second count, but was convicted as charged on both counts.

---

**Copyright Juta & Co Ltd**

The Act provides that upon a contravention of these provisions an accused is liable to a mandatory fine of not less than the amount of currency involved In each count and for an order of forfeiture of the subject-matter of the offence "unless the convicted person satisfies it that there are special reasons in that particular case why forfeiture to the State should not take place. (See section 7 (1) of Chapter 170 as amended by section 3 of Act 42 of 1977.)

Section 5 (1) of the Act reads:

> "(1) Subject to the provisions Of subsection (2), a person who, either within or outside Rhodesia-
>
> (a) contravenes or fails to comply with-
>
> (i) any provision of this Act other than section eight; or
>
> (ii) the terms or conditions of any permit, authority, permission, direction, notice, order or other instrument made or issued under or by virtue of this Act;
>
> or
>
> (b) for He purposes of this Act, makes any statement or produces any document which is false in any material particular;
>
> shall be guilty of an offence."

The appellant was convicted on both counts, but the magistrate rightly treated them as one for the purposes of sentence and imposed the mandatory fine and ordered forfeiture of the sums found to be involved.

---



GOLDIN JA

No evidence was adduced as the parties handed an Agreed Statement of Facts. From this it appears that the appellant was formerly a bank manager at Bulawayo who emigrated from Rhodesia (as it was then) on the 22nd of March, 1977. At that time the appellant was cleared by the Reserve Bank in the normal fashion and a directive was issued concerning the amount of money the appellant was entitled to take out of the country, and how he was to possess and use money or assets which he was not entitled to take out upon his departure. The relevant directive by the Reserve Bank concerning this case reads as follows:

> "In the event of the sale of Mr Mills's property, the net proceeds must be held to the order of your branch and may not be dealt with in any way without the poor permission of the Exchange Control."

The appellant's immovable property referred to above was eventually sold, the net proceeds of the sale being the sum of $6 404,54.

On 22nd January, 1979, the appellant while on a visit to Bulawayo was handed a cheque for this amount drawn on his attorney's account in his favour. On the same day, he proceeded to the Fifth Street branch of Rhobank Ltd., and cashed the cheque. He then went to the Standard Bank at 11.15 a.m. where he applied for Exchange control authority for the remission of educational fees in respect of his two sons who were studying at the University of Natal.

The appellant appreciated that if he declared that he had been granted emigrant status, his

Copyright Juta & Co Ltd

application would have to be considered by the Reserve Bank and may not have been granted. It is for this reason that he made a false declaration in the application form in respect of the education fees, "in that he gave a Bulawayo address for himself".

Upon making his application, the appellant was advised that he would be allowed to remit by draft the sum of $2 743,12, and he handed over the sum of $2 757,12, which included the bank's commission. This sum was part of the proceeds of the cheque cashed by him as above. He was told to return the following morning to collect the draft. On his arrival on the 23rd of January, he was arrested by the CID Later the same day he handed the balance of the proceeds of the cheque cashed by him to his attorney for payment into his blocked account and this was done on the same day.

The first count arose from his assertion that his address was in Bulawayo "when in fact to the knowledge of the accused his address was in Johannesburg". As I have said, he pleaded guilty to this count.

---



GOLDIN JA

The second count reads as follows:

> "Contravening section 5 (1) (a) (if) of the Exchange control Act [*Chapter 170*], in that upon the 22nd January, 1980, and at Bulawayo in the said Division, the accused did wrongfully and unlawfully fail to comply with the terms or conditions of a direction issued under or by virtue of the Act, that is, whereas upon or about the 23rd March, 1979, the Minister, through the Reserve Bank of Rhodesia, issued a directive under and by virtue of the said Act, in terms of which directive the net proceeds of the sale of the accused's immovable property may not be dealt with in any way without the prior approval of the Exchange Control, the accused did wrongfully and unlawfully, upon receipt of a cheque in the sum of $6 404 54, being the net proceeds of the sale of his said property, present such cheque for payment at Rhobank Limited, Fifth Street, Bulawayo, and did receive from the said bank the sum of $6 404,54 in respect of the said cheque, without the permission of the Exchange control being first obtained."

The appellant appealed against the conviction on the second count and against sentence and the order of forfeiture in respect of both counts. In particular and in the alternative it was stressed on his behalf that in respect of the second count he should have been ordered to forfeit only the sum of $2757,12, namely, the amount for which he attempted to procure a draft for payment of educational fees.

In the appeal against conviction on the second count, Mr *Jordan* for the appellant submitted that the appellant was not charged with dealing with the proceeds by purchasing a bank draft, the charge being confined to the mere cashing of a cheque. The basis of his contention was that cashing a cheque did not constitute dealing with it contrary to the directive from the Reserve Bank. I agree that by not depositing the cheque with the bank holding his frozen assets, but first converting it into cash and depositing the cash in terms of the directive he would not necessarily have committed an offence. However, that is not the situation in this case. It is clear that he was not merely charged on the basis of presenting the cheque for payment but doing so in contravention of the directive.

At the trial his legal representative said on his behalf:

---

**Copyright Juta & Co Ltd**

"On the second count, we tender a plea of guilty to a lesser sum of $2 757,12."

This was not accepted by the State. In the Agreed Statement of Facts, the last paragraph reads:

"It is a matter of dispute whether the offence, charged in count 2 was committed in respect of the total sum of $6404,54 or only the lesser sum of $2 757,12."

In other words, the issue before the magistrate was clearly and correctly whether by cashing the cheque he contravened the directive in respect of

---



GOLDIN JA

the total amount of the cheque or only in respect of the amount with which he sought to purchase the bank draft for transmission to the University of Natal.

As set out above, on the day he cashed the cheque he proceeded to apply for a draft. He did so at 11.15 a.m. He returned the next day to collect the draft when he was arrested by the CID He handed over the balance of the proceeds after he was so arrested. On these facts, his cashing of the cheque was not merely a means done in the course of depositing the money into his "frozen" account. After cashing the cheque he proceeded to use a portion of the funds to procure the draft. By 11.15 a.m. on the 22nd January, after he had handed over the sum of $2 757,12 to the Standard Bank for his bank draft plus commission, he knew the amount of cash left over from the proceeds of the cheque which had to be deposited in his frozen account but no steps were apparently taken to attempt to deposit that sum. It appears that he didn't even have it on him when he went to collect the draft the next day and was arrested. Of course, there was no legal onus on him so far as conviction was concerned (although the onus is on him to set up "special reasons"); but on the Agreed Statement of Facts the only reasonable inference is that the appellant did not intend to pay the balance of the proceeds of the sale of his house into his frozen account, and in the absence of any attempt to displace this inference the appellant was rightly convicted.

Section 5 (3) of the Exchange control Act as amended imposes a mandatory fine of not less than the value of currency concerned, unless the convicted person satisfies the Court that there are "special reasons" as mentioned above. The same provision applies to forfeiture.

For the reasons stated above, the magistrate rightly found that the appellant failed to satisfy the Court of the existence of special circumstances. Firstly, because there was no evidence of any intention to pay in the balance into his frozen account, secondly there is no substance in the contention that the State suffered no prejudice because the amount was, in fact, paid in. This only occurred after he was apprehended by the police. The mere absence of prejudice in such circumstances cannot constitute a special reason for the purpose of the relevant provisions. The appellant was in no better position than one who can be described as having been caught in the act. After his arrest, the payment of the balance was inevitable, and reflects no credit on him.

Mr *Barlow*, who appeared for the State, referred the Court to a decision of *S v Black and Others* (G.D., Salisbury, August, 1977, unreported). In that case, the accused had unlawfully attempted to export

---

Copyright Juta & Co Ltd

GOLDIN JA

four cheques. The cheques were banked by the police pending trial and it was sought by the State to have the cash proceeds held by the police forfeited. Section 7 (1) of the Exchange control Act [*Chapter 170*], (which has since been amended, but remains the same in so far as the question for decision by WHITAKER, J arose) provided:

> "7 (1) where a person is convicted of an offence in terms of section *five* which was committed by means of or in respect of any gold, currency, security, goods or other property whatsoever, the Court shall, . . . declare such property or the rights of the convicted person thereto to be forfeited to the State."

WHITTAKER J, held that by the cheques being cashed, the identity of the currency or other property had been altered and, in fact, ceased to exist and therefore an order for forfeiture of the currency could not be made. In other words, if cheques were the subject-matter in respect of which the contravention occurred, only the cheques could be the subject of forfeiture and not the proceeds of banking the cheques. In my view, the learned judge wrongly interpreted the provisions of the section. It is clear that the subject-matter of the contravention can be forfeited and the conversion of a cheque into currency by banking it does not alter the subject-matter of the offence. A valid cheque represents or is equivalent to money. (See Rhodes Motors (Private) *Limited v Pringle-Wood NO,* 1965 (4) SA 40 (SRAD) and *Froman v Robertson,* 1971 (1) SA 115 at 121 (AD).

The words in the section "or the right of the convicted person thereto" also cover the situation where currency or security has been converted into cash. agree with Mr *Barlow's* contention that on the decision in *Black*'s case it would have to be held that if the nature or identity of the currency which is the subject-matter of the charge were changed, as for example bank notes were converted into smaller denominations or into coins, then it would not be competent to order such currency to be forfeited to the State. This was certainly never the intention of the Legislature as expressed in the relevant provision.

Mr *Jordaan* for the appellant did not rely on this decision, and in my view rightly so. The case was wrongly decided on that aspect.

Accordingly, I would dismiss the appeal against conviction and sentence.

**Lewis ACJ**: I agree.

**Baron JA**: I agree.

*Gus Rabinovitch*, attorney for the appellant.



## SACREST (PVT) LTD v MASVAURE 1980 ZLR 233

**Court** **General Division, Salisbury**

Copyright Juta & Co Ltd

Civil Application

Waddington, J

9th July, 1980

## Flynote

Practice and Procedure - summons - failure to claim interest a tempore morae and costs - application to amend summons - not normally granted where omission through mere oversight.

## Headnote

The summons did not contain the usual claim for interest a *tempore morae* and costs. Counsel applied to amend the summons, candidly conceding that the omission was through oversight.

*Held* that it is undesirable that in every case where, through oversight, claims for interest and costs have not been included in the summons an amendment should be granted virtually as a matter of course.

Cases cited:

*Sportswear Specials (Pvt) Ltd v Edmay's Ballet centre,* 1969 (2) RR 452.

*Burger en Kie (Bpk) v de Kock,* 1956 (4) SA 802 (C);

*National Implement Co v Bouwer,* 1955 (3) SA 414 (T).

*M T O'Meara,* for the plaintiff.

Defendant in default.

## Judgment

**Waddington J:** In this matter plaintiff caused summons to be served claiming the sum of $4 960 from defendant, which sum plaintiff alleges was wrongfully and unlawfully stolen from him between March, 1979, and June, 1980, by the defendant. The capital sum claimed was reduced to $2 960 the defendant having already repaid the sum of $2 000.

The summons does not contain the usual claims for interest a tempers morae and costs. When this matter was called this morning, Mr *O'Meara* applied to the Court to amend the summons to make these two claims. In doing so, he relied on the decision of DAVIES J, in *Sportswear Specials (Pvt) Ltd v Edmay's Ballet centre,* 1969 (2) RLR p. 452. In that case it was held by the learned judge that there was clear authority for amending a summons so as to include a claim for costs, and while there was a difference of authority over including a claim for





interest, it was unlikely the defendant would be prejudiced. DAVIES J, stated that these Courts are more inclined to follow the Cape Courts in matters of practice. Accordingly he was prepared

Copyright Juta & Co Ltd

to follow the decision of WATERMEYER J, in *Burger en Kie (Bpk.) v de Kock,* 1956 (4) SA 802 (C) rather than the contrary decision of the Transvaal Court in *National Implement Co. v Bouwer,* 1955 (3) SA 414 (T.). In the result, the summons in the *Sportswear* case was amended by the numbering of the first claim as Claim 1 and by the insertion of Claim 2 for interest a *tempore morae,* and the insertion of Claim 3 for costs of suit.

The difficulty I have with the judgment in the *Sportswear* case - which with respect, correctly decided that a summons is capable of amendment in these circumstances - is that the learned judge did not specify the circumstances in which the Courts in future would grant the indulgence of amending summonses which, through mere oversight, do not include claims for interest a *tempore morae* and costs. In addition, the judgment does not deal with the question that in many cases that come before these Courts, even if the defendants were to be allowed time within which to move the Court to set aside the amendment on the grounds of prejudice (as was the position in the *Sportswear* case) defendants would, in many instances, be unable to judge for themselves on execution whether such prejudice exists or not. When a summons is served, the meaning and exigencies of the summons including claims for interest a *temporae morae* and costs are explained to the debtor by the Deputy Sheriff. When execution occurs, however, this consideration is not habitually accorded to the debtor.

It seems to me that it is most undesirable to regard the *Sportswear* decision as authority for the proposition that in every case where, through oversight, claims for interest and costs have not been included in the summons the Court should virtually be expected as a matter of course to grant applications for the amendment of the summons.

For the reasons which I have given I consider that such a practice should not be allowed to develop. In this case Mr *O'Meara* states quite candidly that the omission was due to oversight and that there is no other explanation.

Not being satisfied in this case that there are any compelling circumstances which would justify the granting of such an amendment, Mr *O'Meara's* application must fail.

*Messrs Gargan Brothers and Chadder,* for the plaintiff.

Defendant in default.

---



## McKELVEY v COWAN NO 1980 ZLR 235

**Court** **General Division, Salisbury**

Civil Exception

Beadle, A J.

10th July, 1980

**Flynote**

---

**Copyright Juta & Co Ltd**

Practice and Procedure - exception - whether evidence cart be led on the pleadings which discloses a cause of action

Costs - exceptions encouraged when they may have the result of reducing costs.

## Headnote

The defendant excepted to the claim by the plaintiff that he was entitled to damages caused by the death of his wife.

*Held* that it is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action on the facts as alleged in the pleading, that particular pleading is not excipiable.

*Held,* further, that the law does not discourage parties from taking exceptions when the exceptions may have the effect of reducing costs and shortening proceedings.

Cases cited:

*Plotkin v Western Assurance Co. Ltd.* 1955 (2) SA 38 (W).

*De Harde v Protea Assurance Co. Ltd.* 1974 (2) SA 109 (E).

*JC Andersen SC,* for the plaintiff.

*AP de Bourbon,* for the defendant.

## Judgment

**Beadle AJ:** In this matter, the plaintiff's late wife was killed by one George Keays, and the same George Keays also shot the plaintiff and injured him very severely. The plaintiff now sues the estate of the late George Keays for damages which he alleges he suffered as a result of Keays killing his wife, and also for personal damages which he alleges he himself suffered as a result of the wounds he received from being shot by Keays.

The defendant originally sought to strike out certain paragraphs of the plaintiff's declaration, but at the onset of the case it was conceded that this was not, in effect, an application to strike out passages of the pleading, but was an exception to the claim made by the plaintiff that he was entitled to any damages caused by the death of his wife.

The plaintiff worked for and was employed by what might be called his own one - man company. There is no suggestion that his wife was an actual





employee of the company or was paid any remuneration by the company. The relevant sections of the pleadings which are excepted to are the new amended paragraphs 5.1 and 5.2 of the pleading, as read with the final claim for damages made by the plaintiff against the defendant for the death of his wife.

Copyright Juta & Co Ltd

It seems to me that this case, despite the fact that it has been argued extensively, and I have been referred to a great number of authorities, falls within an extremely short and simple compass. It is a first principle in dealing with matters of exception that if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action. That is the manner in which I approach this case. The relevant paragraphs in the declaration read as follows:

> "5.1 During her lifetime, Hazel McKelvey assisted the plaintiff in his farming business as a housekeeper, bookkeeper, and livestock expert, which assistance was essential to the upkeep and maintenance of the joint house hold."

There is no suggestion that this assistance was essential to the upkeep or maintenance of the farming business in which the plaintiff was engaged.

The second paragraph states:

> "5.2 In the premises, the plaintiff was owed a legal duty by his said wife to assist him in the carrying on of his said business."

It is trite law that there is a reciprocal duty of support and maintenance as between a husband and wife. It is hardly necessary to refer to authorities, but I have been referred to a great number and I might perhaps usefully refer to two. One is *Plotkin v Western Assurance Co. Ltd.,* 1955 (2) SA 38 (W) and the other is *De Harde v Protea Assurance Co. Ltd*. 1974 (2) SA 109 (E.).

Whether or not the plaintiff can prove all these allegations as set out in paragraphs 5.1 and 5.2 is not a matter for me to decide now. I must examine these two paragraphs on the assumption that he could prove every fact which he has alleged. One of the most important facts which he has alleged is that the plaintiff was owed a legal duty by his wife to assist him in the carrying on of his said business. I must assume that the Plaintiff can prove that that legal duty was owed to him. The second most important feature of the pleading is that the assistance which was rendered to the plaintiff by his wife was "essential" for the purpose of maintaining the joint household. It does not seem to me to be relevant as to what form that assistance may take. If a wife has an obligation to maintain a joint household, the way she discharges that obligation is a matter of detail. She





may discharge that obligation in a large number of different ways. Here it was alleged that it was essential to the up keeping and maintenance of the joint household for her to carry out the duties which she did carry out, and be it noted that the duties which she carried out were not duties rendered to the company, they were duties rendered to the Plaintiff himself in the course of his work for the company.

It may often arise that a wife, although not in any way employed by her husband's employer, may nevertheless assist her husband in carrying out his duties for his employer. If it is essential for the upkeep and maintenance of the joint household for her to have to render her husband

**Copyright Juta & Co Ltd**

this service, then I would consider that the plaintiff is entitled to that form of assistance.

In all events, it seems to me this case turns entirely on fact. The plaintiff has assumed the burden of proving what he has alleged in paragraphs 5.1 and 5.2, but if he can prove every fact as set out in the paragraphs, I cannot see how it can be said that paragraphs 5.1 and 5.2 do not disclose a cause of action. That being so, I think the exception must fail.

I turn now to the question of costs. It does seem to me that this was a matter in which the defendant was justified in raising the matter by way of exception. This has been an extremely arguable matter, and the defendant may have succeeded on his exception, which would have greatly reduced the costs of the action. It is trite law that if a defendant does not raise matter by way of exception, and the case goes to trial and the defendant succeeds at the trial, but it is pointed out that the trial was a wasted expense as he would have succeeded had he raised the matter by way of exception and not gone to trial, in these circumstances the successful defendant is often deprived of his costs of the trial and his costs are limited simply to those of an exception. This is an encouragement to parties to raise matters by exception where there is a good chance of the exception succeeding.

The law does not discourage parties from taking exceptions when the exceptions may have the result of reducing costs and shortening the proceedings, and this is one of those cases where I consider the defendant was justified in raising the matter by exception, even though in the result he has proved to be unsuccessful.

The order of the Court will be that the application is dismissed and the question of costs is reserved.

*Atherstone & Cook*, attorneys for plaintiff.

*Scanlen & Holderness,* attorneys for the defendant.



## CSD ENTERPRISES (PVT) LTD v S & T IMPORT AND EXPORT (PVT) LTD AND OTHERS 1980 ZLR 238

**Court** **General Division, Salisbury**

Provisional Sentence

Waddington, J

10th and 16th July, 1980

### Flynote

Practice and procedure - provisional sentence - agreement of cession - whether a liquid document - extrinsic evidence.

Copyright Juta & Co Ltd

## Headnote

In an agreement of cession the first defendant undertook to pay to the plaintiff (cedent) the sum of $ 14 568,49 by fixed monthly amounts.

*Held* that a clear, unequivocal and unambiguous written promise to pay fixed monthly amounts constitutes a liquid document.

*Held,* further, that while it is true that a document will be illiquid if extrinsic evidence is needed to prove a contingency giving rise to the indebtedness, the position is different if that evidence is needed to prove a contingency upon which payment only is dependent. The happening of an event which has not been put in issue and which constitutes the contingency is proved by the simple allegation In the summons.

Cases cited:

*Oostelike Transvaal Ko-Operasie Bpk. v Kruger,* 1958 (2) SA 329 (T).

*UAL Leasing Corporation Ltd v Frew,* 1977 (4) SA 249 (W).

*Inglestone v Pereira,* 1939 WLD 55.

*C L Mercer*, for the Plaintiff.

*R Hill,* for the defendants.

## Judgment

**Waddington J:** This is an application for provisional sentence on an agreement of cession entered into by plaintiff and first and second defendants and on separate deeds of suretyship relating thereto entered into by second and third defendants. Defendants, through their attorney, advised the Registrar of the General Division on 1st July, 1980, in writing, that the "matter will be opposed but it is not intended to file Affidavits". The basis of the opposition to the claim only became apparent when Mr Hill who began and who appeared for the defendants stated at the commencement of his argument that his contention was that the three documents read together do not constitute a liquid document



WADDINGTON J

and even if they do, they do not disclose liability on the part of the defendants for the sum claimed. It would have been helpful had this information been made available to the Court at an earlier stage, counsel for the defendants indicated, however, that he had attempted to ensure that counsel for the plaintiff was advised of defendants' attitude through their attorney at an early stage. His attempts were unsuccessful.

The claim for provisional sentence arises in this way. On 24th July, 1979, plaintiff as cedent entered into an agreement of cession with first defendant as cessionary and second defendant as debtor (third defendant representing second defendant). The agreement records *inter alia,*

Copyright Juta & Co Ltd

that:

> "WHEREAS the Cedent is owed certain moneys by the Debtor and wishes to cede and assign its rights of recovery thereof to the Cessionary, upon certain terms and conditions;
>
> IT IS HEREBY AGREED as follows:
>
> 1. It is acknowledged that the Debtor is indebted to the Cedent in the amounts reflected hereunder, which amounts are herein collectively referred to as 'the Debt';".

The debt is specified as the sum of $41658,94 together with further interest on the outstanding capital balance at the rate of 6 per cent. *per annum* from 6th January, 1979, to date of payment. Clause 2 of the agreement reads:

> "2. The Cedent hereby cedes the Debt to the Cessionary, in return for which the Cessionary shall pay to the Cedent the total amount of $14 568,49 (fourteen thousand five hundred and sixty-eight dollars and forty-nine cents) by means of the following instalments:

| | $ |
|---|---|
| 31/8/1979 | 1 500,00 |
| 30/9/1979 | 1 500,00 |
| 31/10/1979 | 1 500,00 |
| 30/11/1979 | 1 500,00 |
| 31/12/1979 | 1 500,00 |
| 31/1/1980 | 1 500,00 |
| 29/2/1980 | 1 500,00 |
| 31/3/1980 | 1 500,00 |
| 30/4/1980 | 1 068,49 |
| | $14 568,49" |

Clause 3 is not relevant to the question whether the agreement constitutes a liquid document.

Clause 4 of the agreement reads:

> "4. In the event of default in payment of any one instalment, the Cedent shall be entitled to require remedy of such default within seven (7) days



of the posting of a registered notice to that effect to the offices of the Cessionary's attorneys, Messrs. Surgey,

Copyright Juta & Co Ltd

> Pittman & Kerswell, at Central Africa House, First Street, Salisbury. Failing such payment, the Cedent shall be entitled without further notice to recover the full outstanding balance of the Debt."

The final sentence of Clause 4 clearly confers on the cedent the right to recover from the cessionary.

On the 24th July, 1979, second and third defendants signed deeds of suretyship in respect of the due fulfilment of all the obligations of first defendant in terms of the agreement of cession entered into on the 24th July, 1979, in terms of which first defendant obtained from Plaintiff the right to collect the indebtedness of second defendant which was the subject of the agreement of cession. The agreement and the deeds were annexed to the provisional sentence summons as annexures A, A1 and A2.

The provisional sentence summons as amended (there was no objection to an application to amend) follows Form 5 contained in the First Schedule to the High Court (General Division) Rules, 1971. (RGN 1047/71). The summons alleges, *inter alia,* that the balance of the sums owed on the agreement of cession concerned is $32 658,94. Of this, only $9 000 had been paid by the 30th April, 1980, whereas first defendant ought to have paid the sum of $14 568,49 by that date in terms of Clause 2 of the agreement of cession. The notice referred to in Clause 4 having been given and first defendant remaining in default of payment, it is further alleged that the full debt of $32 658,94 is now due. It was not put in issue by Mr *Hill* who appeared for the defendants that a shortfall in the agreed instalment payments has occurred or that, in terms of Clause 4 of the agreement, payment of the full outstanding balance is now due as alleged.

Mr *Hill* contended that as Clause 1 of the agreement of cession contains an acknowledgment that second defendant only is indebted to the plaintiff, it follows that there is no acknowledgment that first defendant is so indebted and consequently the document is not a liquid document so far as the debtor is concerned. He also argues that the deeds of suretyship carry the matter no further forward because they refer to first defendant's obligations which are not unequivocally acknowledged. The agreement, Mr *Hill* continued, does not indicate that first defendant is liable to plaintiff for the full amount of second defendant's debt as acknowledged in Clause 1 of the agreement of cession. This argument does not, however, take into account the true effect of Clause 2 in which first defendant undertook to "pay to the Cedent (the plaintiff) the total amount of $14 568,49 . . . by means of (the number of instalments specified in Clause



WADDINGTON J

2 and totalling $14 568,49)." There is authority that a clear and unambiguous written promise to pay fixed monthly amounts constitutes a liquid document. In *Oostelike Transvaal Ko-Operasie Bpk v Kruger,* 1958 (2) SA 329 (T) which was an appeal from a decision of a magistrate heard by BEKKER J, and STEYN AJ, the question which fell for decision was whether the following letter constituted a liquid document:

> "With reference to our discussion in connexion with the above amount (the sum of £185. 13. 9.), I wish to confirm that I will pay to you a minimum of £5 per month with interest at 6 per cent. Enclosed please find a cheque for an amount of £5 being payment for July, 1952."

In considering whether this constituted a liquid document, BEKKER J, is reported at p. 330 *et.*

Copyright Juta & Co Ltd

*seq.* as saying:

> "The only question is whether the letter, properly construed, is a 'liquid document', or not. To the extent that it contains 'a promise to pay £5 per month as from July, 1952, it embodies in my view, 'a clear, unequivocal and unambiguous' undertaking, binding defendant to make payment, until the amount of the indebtedness, whatever it might be, has been liquidated. Assuming for the moment that the amount of the total indebtedness of defendant is unknown, the promise to pay £5 per month in itself creates a debt of £5 for every completed month as from the date of the promise. It is not to be presumed chart defendant was bound to make or would continue making similar payments after his debt has been discharged. The promise is binding on him until his debt is discharged. plaintiff has claimed £185 13s. 9d. alleging it to be due 'in terms' of the acknowledgement of debt. This represents an amount which is less than the total of an amount taken at £5 per month as from the date of the promise, to the date of issue of summons. In these circumstances it seems to me that to this extent at least the document embodied a 'clear and unambiguous' promise to pay the fixed monthly amount, until-by necessary implication-the debt is discharged. If any reason exists why the plaintiff is not entitled to payment of, or defendant is not obliged to make payment in the amount of £185 13s. 9d. he should plead it as a defence. The conclusion I have come to is supported, I think, by the decision in *Pugh v Pugh,* 1910 TS 392, in which it was held that a notarial deed of separation evidencing an undertaking by a husband to pay his wife '£7 per month for her life time', constituted a 'liquid document', and 'so long as nothing has occurred to deprive plaintiff of her rights, she is entitled to enforce them. If anything has occurred it is for the defendant to set it up' (*per* BRISTOWE J, at p. 807.)".

In my view the learned judge was correct in reaching the conclusion he did. There is also, I think, no difference between the undertaking given in that case and the undertaking to pay contained in Clause 2 of the agreement of cession in the present case. Here there was a "clear unequivocal and unambiguous" undertaking binding first defendant to liquidate a definite indebtedness which came into existence when the agreement of cession was signed in July, 1979. Furthermore, it was the obligation to do

---



WADDINGTON J

so which formed the subject of the two deeds of suretyship entered into by second and third defendants. Other things being equal, the combination of the three documents could form a proper basis for provisional sentence. (See *UAL Leasing Corporation Ltd v Frew,* 1977 (4) SA 249 (W) at 251).

Mr *Hill* also argued, however, that the agreement of cession does not speak for itself and that as extrinsic evidence is needed to prove defendants' indebtedness, it is not a liquid document. The extrinsic evidence to which he referred was that relating to the non-payment of the full instalments on due dates as specified in Clause 2 of the agreement of cession and the consequence that the full amount of the outstanding debt has fallen due for payment due notice having been given. While it is true that a document will be illiquid if extrinsic evidence is needed to prove a contingency giving rise to the *indebtedness*, the position is different if that evidence is needed to prove a contingency upon which *payment* only is dependent. The position was expressed in the following terms by RAMSBOTTOM J, in *Inglestone v Pereira* 1939 WLD 55 at 62:

> "Where, however, the document shows else existence of an obligation by the debtor but payment is claimable on the happening of some simple event e.g., that notice demanding payment has been given or that the debtor has made default, the happening of that event can be proved by extrinsic evidence, if put in issue, but unless put in issue, is proved by simple allegation in the summons ".

---

**Copyright Juta & Co Ltd**

In my view, that is the position in the instant case. Clause 2 of the agreement evidences an existing obligation; Mr *Hill* did not deny first defendant's signature in the agreement of cession; there is a clear, unequivocal and unambiguous undertaking on the part of first defendant to pay the total debt which has become payable by reason of the kind of simple event referred to by RAMSBOTTOM J, in the *Inglestone* case and finally, the happening of that event, not having been put in issue, is proved by the simple allegation in the summons. The liquidity of the agreement has not therefore been destroyed in my view by the need for extrinsic evidence.

Provisional sentence is accordingly granted as prayed with costs.

Even before the echoes of counsels' pejorative protestations had died away and which were directed to the Court at the conclusion of argument regarding each other's conduct of this case, counsel in quick succession applied for leave to appeal against the future decision of the Court in the event of that decision not favouring individual counsel's clients. Neither application was supported by argument of any description which is perhaps not surprising in the circumstances. Had considered argument

---



WADDINGTON J

in support of an application for leave to appeal made after judgment been presented to the Court, it would have been more helpful. However, that may be, by a simple process of elimination I must now consider Mr *Hill's* application. Bearing in mind what I consider to be the sound reasons for granting provisional sentence in this case, I cannot say that there are reasonable prospect of a finding in favour of the plaintiff on appeal. Neither can I say that granting leave to appeal would lead to a just and reasonable prospect of a finding in favour of the plaintiff on appeal.

The application for leave to appeal is accordingly refused.

*Messrs Byron Venturas and Travlos*, attorneys for the plaintiff.

*Messrs G Seirlis and Associates,* attorneys for the defendants.

---



## TUCKER v BEAZLEY NO AND ANOTHER 1980 ZLR 243

**Court** **General Division, Salisbury**

Civil Application

Beck, J

2nd and 16th July, 1980

### Flynote

Company - "costs of judicial management to rank part passu with costs of liquidation" - meaning of.

---

Copyright Juta & Co Ltd

## Headnote

Following a period of judicial management application was made for the winding up of Rhodesian Tarmac (Pvt) Ltd. When the rule nisi was confirmed it was expressly ordered that the "costs of the judicial management rank part passe with the costs of liquidation" The first respondent in framing his second interim Liquidation and Distribution account gave the same preference to three creditors, who gave business credit during the period of judicial management, as he gave to the fees of the judicial manager (applicant).

An objection by the applicant to the second respondent in terms of section 255 of the Companies Act [*Chapter 190*] was not sustained, therefore application was made for an order directing the second respondent to sustain the objection and directing the first respondent to redraw the account, giving the applicant preference over the three business creditors.

Section 276 (3) of the Companies Act [*Chapter 190*] distinguishes between "the costs of the judicial management" and "liabilities incurred by the judicial manager in the conduct of the company's business". The fees of the applicant as judicial manager are part of "the costs of the judicial management" whereas the claims of the other three creditors are not. When the Court confirmed the rule nisi it gave the applicant's claim for his fees the same preference that costs of liquidation are entitled to.

---

1980 ZLR p244

BECK J

Cases cited:

*Ex Parte Tasmer NO In re Angra Enterprises (Pty) Ltd* 1957 (1) SA 635 (W);

*In re Idstein (Pty) Ltd* 1957 (1) SA 640 (W);

*Wallace NO and Anor v Walters and Co (Pty) Ltd* 1957 (2) SA 171 (O) (not followed);

*Klopper and Anor v The Master and Ors NNO* 1977 (2) SA 477 (T);

*Ex Parte Simon* 1964 (3) SA 157 (R).

*C C Milton,* for the applicants.

No appearance for the respondents.

## Judgment

**Beck J:** In September, 1975, Rhodesian Tarmac (Pvt) Ltd., was placed under judicial management and the applicant in the present proceedings was appointed judicial manager. Some two and a half years later it was apparent to creditors and members of the company that there was no hope of redeeming the company's financial position and it was resolved to apply for a winding-up order. That application was duly brought and in July, 1978, this Court issued a rule nisi in the following terms:

---

Copyright Juta & Co Ltd

"It is ordered:

That a rule *nisi* do issue returnable to this Honourable Court sitting at Salisbury on the 2nd day of August, 1978, calling upon all parties interested to shew cause, if any, why-

(a) the respondent company should not be wound up in terms of the Companies Act [*Chapter 190*],

(b) the costs of these proceedings should not be costs of the liquidation;

(c) the costs of the judicial management should not rank *pari passu* with the costs of liquidation;

(d) the order dated the 4th day of September, 1975, placing the respondent under Judicial Management should not be discharged."

The rule *nisi* went on to make provision for service and publication thereof, and for the appointment of the first respondent in the present proceedings as the provisional liquidator.

On the return day of the rule there was no appearance other than for the petitioner and the rule was accordingly confirmed. In conformity with the rule *nisi*, the learned Judge who confirmed it expressly ordered "that the costs of the judicial management rank *pari passu* with the costs of liquidation".

In framing a second interim Liquidation and Distribution Account, the first respondent has accorded the same preference to the claims of three creditors who gave business credit to the company during the period



BECK J

of the judicial management as he has accorded to the claim of the applicant for his fees as judicial manager. The applicant and each of these three creditors are all awarded in that account a dividend of just over 14 cents In the dollar on their respective claims.

During the period that this account lay for inspection the applicant objected to it in terms of section 255 of the Companies Act on the grounds that the account failed, according to the applicant, to comply with the liquidation order in that it did not rank *pari passu* with the costs of liquidation the "costs of judicial management", which latter phrase, so the applicant contends, includes his fees as judicial manager but does *not* include the claims of the three creditors whose claims arose from business dealings they had with the company during the period of the judicial management.

This objection was not sustained by the second respondent, and in consequence this application has been brought for an order directing the second respondent to sustain the applicant's objection and directing the first respondent to redraw the account in such a way as to afford to the applicant's claim a preference over the claims of the three trade or business creditors referred to.

The practical effect of the relief sought would be that instead of all four claimants each receiving a dividend of just over 14 cents in the dollar on their claims, the applicant's claim will be paid in full while the other three creditors will each have to make a contribution of about 41 cents in the dollar on their claims. The second respondent has submitted, in a written report, that this would

Copyright Juta & Co Ltd

be an inequitable situation, and that the claims of the three creditors who gave credit to the company during the period of the judicial management should be held to be included within the meaning of the phrase "the costs of the judicial management" which this Court ordered to rank *pari passu* with the costs of the liquidation. On the other hand, the first respondent, in an affidavit filed in response to the application, has now conceded the correctness of the applicant's contention and does not oppose the application but abides the Court's decision. When the application was called therefore, I was not presented with any argument contrary to the applicant's contention on the papers. There being no urgency attaching to the matter, I withheld my decision so as to give fuller consideration to the rival contentions of the applicant and the first respondent on the one hand and that of the second respondent on the other hand.

The wording of section 276 (3) of the Companies Act distinguishes between "the costs of the judicial management" and "liabilities incurred

---



BECK J

by the judicial manager in the conduct of the company's business". This distinction is found in the corresponding section of the South African Companies Act and is recognized in the cases. See: *Ex Parte Tasmer, NO: In re Angra Enterprises (Pty) Ltd* 1957 (1) SA 635 (W) , *In re Idstein (Pty) Ltd* 1957 (1) SA 640 (W); *Wallace NO and Anor v Walters and Co (Pty) Ltd* 1957 (2) SA 171 (O); *Klopper and Anor NNO v The Laster and Ors NNO* 1977 (2) SA 477 (T), at 489A-B. The fees of the applicant as judicial manager are part of "the costs of the judicial management" whereas the claims of the other three creditors are not; they are "liabilities incurred by the judicial manager in the conduct of the company's business."

Accordingly when this Court, by way of a rule *nisi* that was confirmed without opposition by creditors, ordered that the costs of the judicial management rank *pari passu* with the costs of liquidation, it gave to the applicant's claim for his fees as judicial manager the same preference that costs of liquidation are entitled to. It did not give a preference of any kind to the claims of the other three creditors. Indeed, the Court was not even aware of the existence of their claims.

The Orange Free State Provincial Division, per DE VIEWERS J, as he then was, disapproved, in *Wallace*'s case *(supra),* of the decision in *Idstein*'s case (*supra)* that the Court has the power, when a judicial management order is superseded by a winding-up order, to accord to the costs of the judicial management the same preference to which the costs of liquidation are entitled. *Idstein*'s case was, however, approved and followed by RAMSBOTTOM J, as he then was, in the *Tasmer* case (*supra)*, and also by FIELDSEND J, as he then was, in this Court in *Ex Parte Simon,* 1964 (3) SA 157 (SR). I propose to follow it as well.

Accordingly, the application succeeds and there will be an order in terms of the draft order filed.

*Gill, Godlonton and Gerrans,* attorneys for the applicant.

---



Copyright Juta & Co Ltd

## CINAMON v INDEPENDENCE MINING (PRIVATE) LIMITED 1980 ZLR 247

**Court** **Appellate Division, Salisbury**

Civil Appeal

Lewis JP, Baron JA and Goldin JA

1st, 2nd, 24th July, 1980

### Flynote

Statutes - Mines and Minerals Act [Chapter 165] - conversion of blocks from base metal to precious metal claims in terms of section 162 (3) does not entitle the holder to claim extra ground - nature of summary hearing under section 378 - not governed by section 390 - when Mining Commissioner functus officio - presence of both parties a prerequisite of summary hearing under section 378 - construction of section 59 (1) - does not preclude investigation to discover true position of beacons of blocks registered years previously.

### Headnote

In 1935, four blocks of precious metal claims called Penhalonga were depicted on a map with the two northernmost beacons of the claims situated to the north of the confluence of two streams, In 1957 the appellant registered two precious metal blocks, in the same name, which almost corresponded to the original four blocks save that the northern boundary line was to the south of the confluence. This situation persisted in 1959 when the claims were converted to base mineral blocks. In 1976 the appellant registered a number of other precious metal blocks named Penhalonga, adjoining the already registered blocks. For the first time the registration plan showed the northern beacons of the appellant's first two blocks to be north of the stream confluence. In 1978 the appellant was obliged to reconvert the blocks to precious metal blocks in terms of section 162 (3) of the Mines and Minerals Act [*Chapter 165*]. The northernmost beacons, after the appellant had relocated and re- pegged them, remaining to the north of the confluence of the streams.

The respondent pegged a claim in 1979 which the appellant contended was within the boundaries of his Penhalonga block. A provisional plan filed at the Mining Commissioner's hearing showed the northern beacons of the appellant's claims to be even further north of the confluence. The Mining Commissioner found that there had been an over-pegging by the respondent. Thereafter an inspection *in loco* was held on a related issue. At the second hearing, five hours later, reference was made to the 1957 plan showing the beacons south of the confluence. The Mining Commissioner left the boundary dispute in abeyance. At a later hearing the Mining (commissioner decided that the appellant had illegally relocated his northern beacons about 100 metres north of their true position. Consequently he held that the respondent had pegged its claims on ground open to prospecting.



On appeal it was contended that section 162 (3) entitled appellant to claim extra ground when relocating his beacons; secondly that the Mining Commissioner was *functus officio* when he gave his subsequent decision in favour calf the respondent and finally that section 59 (1)

Copyright Juta & Co Ltd

precluded the impeachment of the appellant's title to the Penhalonga blocks.

*Held* that section 162 (3) did not permit a block to be enlarged by taking in extra ground even if that ground was open to prospecting. A holder of a mining location carrying out instructions under section 162 (3) must go through the ordinary pegging procedures if he wished to take in extra ground adjacent to his block. Section 405 contains a strict prohibition against altering beacons. Nor can a block be pegged in an irregular shape.

*Held,* further, that when a mining commissioner holds a summary hearing under section 378 he is not holding a Court to which the provisions of section 390 apply. The proceedings are informal. The Mining Commissioner was not *fuctus officio* because he had not given a final and definite decision.

*Held,* further, that section 59 (1) limits the bounds of impeachment to those expressly stated. It does not preclude an investigation of the true position on the ground of beacons of blocks of claims.

*Held,* further, that it is a condition precedent to the holding of a summary hearing in terms of section 378 that both parties are present.

Cases cited:

*Naested v Dick-Cleland,* 1934 SR 11:

*Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Limited,* 1950 (3) SA 598 (T);

*Van Breda v Scott and Naisbitt,* 1938 SR 196;

*Nolan v Povall NO and Others,* 1952 SR 267.

*W J Millar SC,* for the appellant: Having rejected the respondent's application for registration the Mining Commissioner had thereby determined the dispute summarily for the purposes of section 378 of the Act and had become *functus officio.*

In terms of section 390 of the Act the Mining Commissioner was enjoined to observe the procedure in civil cases in magistrates Courts. This requirement applies equally to summary hearings. See *Naested v Dick-Cleland,* 1934 SR 11, at 16.

The fact that section 376 (1) of the Act requires that the Mining Commissioner should hear and determine a dispute in the simplest, speediest and cheapest manner possible does not authorize him to determine and re-determine the dispute or to give a decision "to stimulate counter argument". See *Naested v Dick-Cleland, supra*

The Mining Commissioner erred in holding that the appellant had included additional ground in relocating the B and A beacons of 12213



and 12212. Any such additional ground must have been included in the claims well before the

Copyright Juta & Co Ltd

relocation of the B and A beacons of 12213 and 12212.

Having regard to the provisions of section 162 (3), it would be possible for a holder to peg additional ground when complying with the provisions of that subsection.

The Mining Commissioner ought to have held that the mining location, including the additional ground, had been registered in the name of the appellant since the 3rd March, 1971, and the title of the appellant in respect thereof could not be challenged by the respondent by virtue of the provisions of section 59 (1) of the Act. See generally *Robinson v Trojan Nickel Mine Ltd.* 1970 (4) SA 555.

*R R Horn SC*, with him *N J McNally*, for the respondent: While the general rule of law is that a Court or Tribunal is *functus officio* once it has decided a dispute referred to it for decision (see *Mining Commissioner of Johannesburg v Getz,* 1915 TPD 323) it must be clear that the Court or Tribunal in fact gave and intended to give a final or definite decision in the matter before it can be said as a matter of fact that a decision was given. *Bronkhorstspruit Liquor Licensing Board v Rayton,* 1950 (3) SA 598, 601F-G; *Thompson v Chief Constable, Durban,* 1965 (4) SA 662, 667F.

The Mining Commissioner did not intend to give a final decision and it is submitted that the Appeal Court ought not to be astute to apply to the proceedings of such a Tribunal the procedural niceties of a Court of law. *Jeewa v Donges, NO,* 1950 (3) SA 414 at 423A; *Fernandez v South African Railways,* 1926 AD 60, at 59, *Meyer v Law Society of the Transvaal,* 1978 (2) SA 209, 213A.

The provisions of section 405 (2) of the Act make it clear that if the position of any one or more of the beacons of a mining location has been altered by the holder of the location so as to make it appear that any fresh ground is added to such location no fresh ground so added shall in any case be deemed to have become a portion of such location.

This provision, or one in similar terms, has been in the mining laws of this country since 1903 (see section 142 of Ordinance 19 of 1903) and numerous decided cases have recognized that neither incorrect placing of beacons nor incorrect representation of the situation of a location will preclude the Court from determining the true boundaries of a mining location. *van Breda v Scott and Naisbitt,* 1938 SR 196, *Naested v Dick-Cleland*, 1934 SR 11, at 12-13; *Victoria Central Gold Mining*

---



LEWIS JP

*Company Ltd v Hewlett,* 1934 SR 157, at 158-159; *Nolan v Povall NO and Ors,* 1953 (2) SA 202 (SR) at 207E-F; *Sandawana Mines (Pvt) Ltd v Chingachura Exploration Co (Pvt) Ltd* 1964 RLR 21; *Robinson v Trojan Nickel Mine Ltd* 1970 (4) SA 555 at 559C-D.

Section 59 (1) of the Act protects the *title* of the holder of a mining location which has been registered for two years or more. The title of the appellant in respect of Penhalonga and Penhalonga 2 is not in dispute; what is in dispute is simply the situation of their northern

---

**Copyright Juta & Co Ltd**

boundaries.

Whether an appellant seeks to lead fresh evidence at the hearing of the appeal or to have the matter remitted for such fresh evidence to be led he must establish that the evidence is such as would probably have an important influence on the result of the case although it need not be decisive. *Farmers Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 at 29 B-F.

The fresh evidence sought to be led does not assist in determining the true northern boundaries of Penhalonga and Penhalonga 2.

## Judgment

**Lewis JP:** This is an appeal against a decision of a Mining Commissioner given at a summary hearing in terms of section 378 of the Mines and Minerals Act [*Chapter 165*].

Two disputes arose between the parties, who then signed a consent to a summary hearing by the Mining Commissioner, which commenced on the 15th of February, 1979. Only the first of these disputes is the subject of this appeal.

The history of the dispute is briefly as follows: In February, 1935, four blocks of precious metal claims called Penhalonga 684, 812, 1844 and 1845 were situated as shown on a map which was produced as Exhibit 5 (a). That map showed chart the beacons B of Penhalonga 1844 and A of Penhalonga 1845 (i.e. the northern common beacons of those two blocks) were situated to the north of the confluence of a stream running down from a dank to the south of the four blocks and a stream running roughly east to west. The map also shows that the beacon F of Penhalonga 1844 and E of Penhalonga 1845, i.e. the centre line beacons of those two blocks, were situated to the south of that confluence.

In July, 1957, the appellant registered two precious metal blocks named Penhalonga and Penhalonga 2. He submitted a sketch plan in his application for registration, which was produced as Exhibit 6 (a), which showed that the boundaries of the two blocks Penhalonga and Penhalonga are superimposed on the old blocks 812, 684, 1844 and 1845 in such a way that the centre line E-F of each block corresponds





with the nothern boundary lines of Penhalonga 684 and Penhalonga 812 respectively, and the southern boundary lines of 1845 and 1844 respectively. Moreover, the northern boundary line A to B of each block is shown on the appellant's sketch plan as situated south of the confluence of the two rivers to which I have referred.

In May, 1959, as appears from Exhibit 7, Penhalonga and Penhalonga 2 were converted to base mineral blocks, and a sketch submitted by the appellant, Exhibit 7a, of the converted blocks, still shows the beacons "B" of Penhalonga 2 and "A" of Pengalonga as being south of the confluence of the streams. This conversion was effected in terms of what is now section 162 (1) of the Act.

On the 21st December, 1976, the appellant registered a number of other precious metal blocks

Copyright Juta & Co Ltd

named Penhalonga 6, 7, 8, 9, 10, 11, 12, 13 and 14 both to the north and south of the existing Penhalonga and Penhalonga 2, and to the west and north-west of those two blocks. The registration plan, Exhibit 2, submitted by the appellant shows the southern boundaries of the new Penhalonga 7 and 9 as common to the northern boundaries of Penhalonga and Penhalonga 2 respectively, and these boundaries are shown on the plan for the first time as being situated *north* of the confluence of the streams to which I have referred.

In March, 1978, the appellant was obliged by the Mining Commissioner in terms of s. 162, (3) of the Act to reconvert these blocks from base mineral blocks to precious metal blocks, which involved an obligation on the appellant's part to relocate and re-peg Penhalonga and Penhalonga as precious metal Cocks. This was done and the sketch plan, Exhibit 8 (c), accompanying the registration of the reconverted blocks also shows the northern boundaries of Penhalonga and Penhalonga 2 and the common boundaries, the southern boundaries of Penhalonga 7 and Penhalonga 9 running east to west *north* of the confluence of the streams. This plan, however, still shows the boundaries of the two blocks as being of a regular shape, that is to say the shape of a parallelogram with the northern boundaries A-B and A-B in a straight line. The significance of this point will appear later.

At the hearing on the 15th of February, 1979, the Mining Commissioner had before him a plan entitled "Provisional Plan of Penhalonga" which now appears at p. 27 of the appeal record. The first issue concerned an application by the respondent for registration of a block of claims pegged in pursuance of a prospecting notice posted at point 4 on that plan. The appellant contended that this was within the boundaries of his block Penhalonga 2 and that the application should therefore be



rejected. The respondent's contention was that the ground had been open to prospecting at the time of such posting. The Mining Commissioner noted, as appears from the record of proceedings on the 15th of February, that from the plan the appellant's two blocks, Penhalonga and Penhalonga 2, were not of a regular parallelogram shape immediately adjoining and to the south of Penhalonga 7 as had been depicted by the appellant's registration plans to which I have referred. The provisional plan at p. 27 of the record in fact shows the common beacon "B" of Penhalonga 2 and "A" of Penhalonga to be pushed up well north of the confluence of the rivers so that the northern boundaries of the two blocks instead of forming a straight line met at an angle of about 150 degrees. The Mining Commissioner's report on the proceedings then continues: "The Mining Commissioner further commented that the pegging of a block on the ground by a prospector and his representation of its shape and position was often at variance with the information revealed by a survey. From the plan it appeared obvious that the pegging under licence 37357H (referring to the pegging done under the notice posted at point 4 on the plan) was an over-pegging of Penhalonga and Penhalonga 2, and he would have to reject Independence's relevant application for registration."

He then turned to deal with the second issue, which involved the posting of rival prospecting notices by the parties in an area immediately to the south of Penhalonga 2. Evidence was given on that issue and an Inspection *in loco* was then held. It appears that in the course of the

**Copyright Juta & Co Ltd**

inspection, one of the representatives of the respondent company drew attention to certain features in the area relevant to the first issue and casting doubt on the accuracy of the Provisional Plan, at p. 27 of the record.

After the inspection *in loco*, the hearing was resumed and the second issue was decided against the respondent. The Mining Commissioner then reverted to the first issue, which it is common cause, was at a stage about five hours after the Mining Commissioner's original decision to reject the respondent's application for registration, on the basis of the plan at p. 27. Reference was then made in the course of the resumed hearing to the appellant's original registration plan showing the northern A to B boundaries of his two blocks as being south of the confluence of the rivers. This indicated *prima facie* that the northern common A-B beacons of the blocks as shown on the provisional plan at p. 27, on which the Mining Commissioner had rejected the respondent's application, must have been moved a considerable distance to the north of the confluence of the rivers. The Mining Commissioner then stated



LEWIS JP

that the resolution of this aspect of the dispute as to the boundaries of Penhalonga and Penhalonga 2 would have to be left in abeyance and he would contact the parties at a later date concerning the matter. No protest was apparently made at that time by the appellant and the hearing concluded.

At the end of February, the Mining Commissioner telephoned the appellant regarding the resumed hearing, and the appellant after apparently taking into account his security commitments agreed to the resumption of the hearing being fixed for the 19th of March. However, on the 1st of March, his attorneys wrote a letter to the Mining Commissioner, on his behalf saying *inter alia*: "Mr Cinamon has advised us that at the close of the hearing you gave your decision in our client's favour, and our client accordingly presumed that that was the end of the matter.... It is our client's contention that having given your decision at the close of the hearing you may not now reopen the matter for further hearing." As appears from what I have said earlier it was not correct to say that the decision in the appellant's favour had been given "at the close of the hearing". Moreover, the matter had already been reopened and more evidence led on it, apparently without protest from the appellant, before the close of the hearing. The letter concluded by saying that in the circumstances the appellant did not intend to attend any further hearing on this issue.

The Mining Commissioner replied to this letter on the 8th of March in which he stated, *inter alia*, after saying that a copy of his report of the proceedings on the 15th and 16th of February had been sent to the appellant, "As is apparent from the report, Mr Cinamon is mistaken in thinking that the hearing was concluded on the 16th February, 1979, and I do not comprehend from what transpired at the hearing, how he could possibly have arrived at this conclusion". The letter concluded by informing the appellant's attorneys that the resumed hearing would take place as scheduled on the 19th of March "whether Mr Cinamon elects to attend or not to attend". On that same day the appellant was advised in writing (by way of confirmation) that "the hearing would be resumed at 10.30 a.m. on the 19th of March as previously arranged and agreed by

Copyright Juta & Co Ltd

telephone".

On the appointed day, the 19th of March, the appellant was in default.

The Commissioner heard further evidence which finally satisfied him that the appellant had failed to relocate the B and A beacons of Penhalonga and Penhalonga 2 prior to the registration of the latter blocks on 31st March, 1978, and that he had illegally included additional ground in



LEWIS JP

relocating the B and A beacons of the blocks about 100 metres north of their correct position Since on his findings the respondent's notice at point 4 on the plan at p. 27 was on ground open to prospecting, he decided that the respondent's application for registration was in order and should now be granted provided that any beacon affected by the connect realignment of the appellant's boundaries were relocated as might be necessary. The appellant was instructed to relocate his common B and A and common F and E beacons of the two blocks in their correct positions.

The appellant now appeals to this Court against that decision. Mr *Millar*, for the appellant, took a number of points in appeal. These are as follows:

(a) Even assuming that the appellant were shown to have included extra ground when relocating the A and B beacons of Penhalonga and Penhalonga 2, he was entitled to do so on a proper construction of section 162 (3) of the Act because this extra ground was open to prospecting:

(b) The Mining Commissioner was *functus officio* when he gave a decision on the issue in favour of the appellant, and his subsequent reversal of that decision in favour of the respondent was incompetent:

(c) Even if the Mining Commissioner was not *functus officio*, the appellant's title to the blocks Penhalonga and Penhalonga 2 cannot now be impeached because of the provisions of section 59 (1) of the Act.

*Alternatively* - this Court should allow the appellant to lead evidence for the purposes of section 59 (1) to establish that any taking in of additional ground by moving the A and B beacons of the two blocks must have occurred while the original claim had been transferred to one Begley between 1964 and 1971, and when they were re-transferred to the appellant in March, 1971, the appellant simply took them over in that form and has held them in that form ever since.

Further in the alternative, if this Court were not disposed to hear such evidence itself, the matter should be remitted for hearing de nova before a different Mining Commissioner.

As far as the first point is concerned, I am unable to accept Mr *Millar's* submission that the reconversion of the blocks from precious metal to base mineral in accordance with the Mining Commissioner's instructions under section 162 (3) of the Act entitled the appellant to take

Copyright Juta & Co Ltd

LEWIS JP

in the extra ground in question. It seems to me to be implicit in section 162 (3), when read with section 163 (1), that a block may not be enlarged by taking in extra ground even if such ground is open to prospecting at the time In question. Section 163 (1) provides that:

> "(1) Where the holder of a registered block of claims has -
>
> (a) ....
>
> (b) relocated and re-pegged the whole or portion of the block under the provisions of subsection (3) of section one hundred and sixty two;
>
> the mining commissioner shall report the matter to the Board."

From the reference to the words "the whole or portion" it is to be inferred that the holder of the block when converting to precious metal either retains the whole of the existing block or a portion of it, but can not take in any more than the whole of the existing block. The normal way of obtaining title to fresh ground open to prospecting is that laid down in sections 42 to 46 inclusive of the Act, i.e. by the posting of me prospecting notice, the discovery peg, the physical pegging of the block of claims, the posting of the registration notice and the application to the Mining Commissioner for registration. One would expect clear language in section 162 (3) to that effect if the Legislature intended the subsection to afford a special means of obtaining title to fresh ground while complying with instructions to convert an existing block of base mineral claims to a block of precious metal claims, particularly in view of the strict prohibition against altering existing beacons and pegs to include fresh ground, except where expressly authorized by law, contained in section 405 of the Act. It seems to me that if the holder of a mining location who is carrying out an instruction under section 162 (3) wishes to avail himself of extra ground adjacent to his existing block which is open to prospecting, he is obliged to go through the ordinary procedures prescribed in sections 42 to 46 inclusive in pegging that ground as an extra adjacent block, and this imposes no undue hardship upon him.

At all events, I am satisfied that section 162 (3) cannot be construed as entitling the holder of a mining location to contravene the provisions of sections 44 (1) and (2) relating to the requirements of the pegging of a precious metal block. Section 44 (1) provides that such a block must be pegged in regular form and may only be pegged in irregular form if it is not possible to peg it in regular form. Subsection (2) provides that a regular block shall be a parallelogram with a maximum length of 500 metres and a maximum breadth of 200 metres and it requires that there be a centre line in the block established by pegs marked E and F respectively.



LEWIS JP

As already pointed out above, the appellant's blocks Penhalonga and Penhalonga 2 as shown on the plan at p. 27 of the record, are of an irregular shape and are not a parallelogram. It would not he in the mouth of the appellant to plead impossibility in regard to the shape of the blocks because, as is shown in his own initial registration plan (Exhibit 6A), he managed to peg it

Copyright Juta & Co Ltd

originally as a regular parallelogram in 1957.

Apart from this, the further complaint is that the A and B beacons have been pushed 100 metres north of their original position so that the maximum permissible breadth of the blocks (200 metres) has been exceeded.

I am therefore of the opinion that this point is without substance.

As regards the argument that the Mining Commissioner was *functus officio* after he had originally rejected the respondent's application for registration, the facts surrounding this aspect of the appeal have already been fully set out above. Section 378 of the Act under which the hearing was conducted reads as follows:

> "Notwithstanding the provisions and requirements of sections *three hundred and seventy- five* and *three hundred and seventy six,* the mining commissioner may, if the parties concerned consent thereto in writing and are both present at the hearing, hear and determine any such complaint as above mentioned, summarily, and without any formal proceedings taken before him."

With this provision, one must contrast sections 376 and 377. These sections make provision for a Mining Commissioner to hold a proper Court in the ordinary sense of the word, known as a "mining commissioner's Court ", by requiring proceedings to be commenced by the issue of a summons, and the taking of evidence from witnesses on oath in the ordinary way. It seems to be plain that when the Mining Commissioner, with the consent of the parties, holds a summary hearing under section 378, he is not holding a "mining commissioner's Court " under sections 376 and 377. Mr *Millar* relied upon the provisions of section 390 which reads:

> "Save as otherwise provided this Act, the procedure to be observed by a mining commissioner's Court and the fees chargeable In respect of any proceedings therein shall, so far as practicable, be in accordance with the law and rules governing procedure and fees in civil cases in magistrates Courts."

That section, however, does not necessarily apply to a summary hearing under section 378. These provisions have always existed in our mining law since Ordinance No. 19 of 1903. Sections 160 and 161 of that Ordinance were the equivalent of sections 376 and 377 of the present Act. Section 162 was the equivalent of the present section 378 and section





175 was the equivalent of the present 390. Mr *Millar's* submission that the provisions of section 390 apply equally to a summary hearing is not borne out by the authority which he cites in support of it, i.e. *Naested v Dick-Cleland,* 1934 SR 11. That case involved an appeal to the High Court from a decision given in a mining commissioner's Court held in terms of sections 160 and 161 of the 1903 Ordinance (now 376 and 377 of the present Act). At p. 16 of the report, HUDSON, J said:

> "I would point out, however, that though Mining Commissioners are enjoined to try matters coming before them in a summary manner they are, under s. 175, compelled to observe the procedure in magistrates Courts."

He then describes how the evidence in the case should have been recorded by the Mining

Copyright Juta & Co Ltd

Commissioner and continues:

> "These observations do not necessarily apply to a summary trial in terms of s. 162. The application now under appeal was not heard in terms of this section, however, and so a fuller record of the proceedings should have been kept ."

**Mcilwaine J:** in his judgment at p. 20 expressed the view that even in a case involving an ordinary hearing in a mining commissioner's Court, it was the appeal Court's duty "not to give undue weight to technicalities in so far as they might hamper the securing of real and substantial justice".

Bearing in mind the informal nature of the proceedings and the need to do substantial justice between the parties, I am of the opinion that the argument that the Mining Commissioner was *functus officio* cannot avail the appellant in seeking to have the original decision in his favour based on the Provisional Plan at p. 27 of the record reinstated on appeal. The fact that the plan is described as "provisional" taken together with all he other facts referred to in the outline mentioned above convinces me that the Milling Commissioner never intended the first decision given at an early stage in the proceedings on what evidence was then available to be final and irrevocable. Had he given the decision at the conclusion of the whole hearing, as the appellant's attorney erroneously assumed, there might perhaps have been more substance in the argument. In the case of *Bronkhorstspruit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd* 1950 (3) SA 598 (T) MURRAY J, (as he then was), when speaking of a Liquor Licensing Board, said at p. 601 of the report that except in the case of fraud or perjury, a Board is *functus officio* "once it has definitely given its decision for or against a grant or refusal of a licence". That cannot be said on the facts of this case, indeed on the record before us, it does not seem to me that the Mining Commissioner could even be said to have reasonably given the impression



MCILWAINE J

to the appellant that the decision in the appellant's favour was final and definite, but even if he had, that would not assist the appellant if, in fact, this was not the intention of the Mining Commissioner. There can be no estoppel against him in his quasi-judicial capacity. If the appellant was reasonably misled this would only entitle him to a remittal to enable him to put further evidence before the Mining Commissioner because he mistakenly thought that the further hearing on the 19th of March was incompetent and that he need not attend.

I turn then to consider the argument based on section 59 (1) of the Act. This can be quickly disposed of because it seems to me that it is based on a misinterpretation of the subsection, which reads:

> "59. (1) When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall not be competent for any person to dispute the little in respect of such location or reef on the ground that the pegging of such location or reef was invalid or illegal or that any of the provisions of this Act were not complied with prior to the issue of the certificate of registration."

In order to construe the subsection sensibly one must hold that the concluding words "prior to the issue of the certificate of registration" govern all the preceding words, starting with the words

Copyright Juta & Co Ltd

"on the ground that . . ."; otherwise if one were left with the words "the pegging of such location or reef was invalid or illegal" in isolation, they would be meaningless. There would be no answer to the question "*was* when?"

Mr *Millar* submitted that the section rendered the appellant's title unimpeachable after two years. But even assuming in the appellant's favour that a dispute as to boundaries could, apart from the section, fall within the general ambit of an unimpeachment of title, in fact the section limits the bounds of impeachment to those expressly stated, which clearly do not include a dispute as to the correct boundaries.

In my opinion, the section was clearly not intended to render unimpeachable the moving of beacons of a registered block after its initial registration in breach of section 405 of the Act. The object was to prescribe the right to question the validity of the various steps taken prior to the registration in order to obtain registration, for example the right to assert, two years after the registration, that the registration was invalid because someone else had already posted a prior prospecting notice or discovery peg in the area before the pegger of the block in question had posted his. Unless therefore the moving of beacons after the initial registration in 1957 was in some way authorized by law in the course of the subsequent re-registration of the original blocks from time to time (which does not



appear to be the position in the instant case) I am of the opinion that the respondent is not precluded by section 59 (1) from establishing what are the true beacons of the blocks as originally pegged by the appellant in 1957, and the Court, or the mining commissioner, is not precluded from making a decision on that issue relevant to disputed rights in the area.

The provisions of the present section 59 (1) of the Act have been on the statute book since at least 1935; see section 41 of Cap. 195 of the 1939 Revised Edition, which later became section 51 of Act 18 of 1951. Despite that, it appears that our Courts have never regarded this provision as precluding them from investigating and determining the true position on the ground of beacons of blocks of claims originally registered many years previously in order to resolve disputes as to mining rights in the areas in question. See, for example, *Van Breda v Scott and Naisbitt,* 1938 SR 196, and *Nolan v Povall NO and Others,* 1952 SR 267.

There remains the question of the leading of further evidence by the appellant. It would clearly be inappropriate for this Court to hear the evidence itself as suggested on behalf of the appellant. The right of this Court to do so is only exercised on rare occasions in exceptional circumstances. This Court as a Court of Appeal could not attempt to conduct the sort of summary hearing envisaged by section 378 of the Act, and in any event a further inspection *in loco* at Penhalonga might become necessary. Any further evidence would have to be led by way of remittal to the Mining Commissioner for this purpose.

The further evidence sought to be led by the appellant Is contained in an affidavit from him which is before us. The effect of it is that if the B and A beacons of Penhalonga and Penhalonga 2 as shown on the plan at p. 27 of the record are incorrect, the blame for this lies with Begley

Copyright Juta & Co Ltd

for incorrectly locating them in that position after the blocks were transferred to him in 1964, and that when the appellant took them back again in 1971 he simply assumed that they were correct.

Mr *Horn* has submitted that such evidence would not assist the appellant in any event, but it seems to me that it would not be appropriate at this stage to express an opinion on the merits or demerits of the proposed further evidence because I am satisfied, for reasons which follow, that the matter will have to be remitted to the Mining Commissioner in any event; since the parties are not bound by any form of pleadings in a summary hearing of their disputes, the appellant would be free to raise these and any other relevant matters at the resumed hearing. Mr *Millar* suggested that it might transpire at the resumed hearing that the southern boundaries of the block Penhalonga 7, which, *ex facie* the



registration plan, Ex. 2, was pegged as adjacent to and to the north of Penhalonga and Penhalonga 2, might also be shown to be wrongly placed too far to the north. In other words, he suggested that it is possible that there was no gap in between open to prospecting when the respondent pegged its disputed block, and the respondent's application for registration might have to be rejected in any event.

In my view there are two reasons why remittal is necessary. Firstly, in refusing eventually to attend the resumed hearing on the 19th of March, 1979, the appellant was apparently misled by legal advice into thinking that the Mining Commissioner was *functus officio* and that he therefore need not attend the hearing. Secondly, and in any event, it seems to be a condition precedent to the holding of a summary hearing by the Mining Commissioner, in terms of section 378 of the Act quoted above, that the parties have not only consented in writing to such a course, but also that they are "both present at the hearing." One must contrast this position with that which pertains when the Mining Commissioner exercises his ordinary judicial functions and holds a mining commissioner's court under the provisions of sections 376 and 377. Section 377 (3) allows him to conduct the hearing . . . "in the presence of the parties interested . . . Or in the absence of any of the parties interested who, having been duly served with such summons, do not appear . . ." In other words, under section 377 (3) a party who has been properly served with a summons and has had notice of the hearing then absents himself at his peril. This does not seem to be so under section 378. The written consent does not cover a hearing in the absence of one of the parties, even after notice to him of the hearing, because the written consent and the presence at the hearing of troth parties are conjunctive requirements before this special jurisdiction is exercised. The situation might perhaps be different where one of the parties not only consents in writing to a summary hearing, but also waives in writing his right to be present and consents to the matter being heard *ex parte*, but I express no opinion on that because that is not the situation here. Where both parties are not present at the hearing, it seems to me all the Mining Commissioner can do is to notify the party who is present that his only remedy is to resort to the ordinary procedure in a mining commissioner's Court in terms of section 376 and 377 and to apply to him for the issue of a summons in the ordinary way in terms of sections 377 (1) and (2) of the Act. In terms of section 376 (1) the Mining Commissioner is empowered to

Copyright Juta & Co Ltd

"make such orders as to costs as he may deem just". In such a case where a party, having consented in writing to a summary hearing is then in wilful default on the appointed day, thus compelling his opponent to resort to the more costly and elaborate pro-



LEWIS JP

cedure in a mining commissioner's Court, the Mining Commissioner would no doubt mark his disapproval of such conduct by an award of attorney and client costs.

Mr *Millar* urged that, in setting aside the decision, this Court should order that the matter should be reheard *de novo* before a different Mining Commissioner. However, I am unable to agree with the submission that the appellant might not receive a fair hearing if the matter were remitted to the same Mining Commissioner for further evidence. On the record before us, it does not seem to me that there is any basis for suggesting that the Mining Commissioner who heard the matter at first instance has entertained any bias or prejudice against the appellant.

In the result, the decision of the Mining Commissioner to accept for registration the block pegged by the respondent under licence No. 37357H is set aside together with all ancillary orders relating thereto. The matter is remitted to the Mining Commissioner for the rehearing in the presence of the appellant of the evidence heard by him on the 19th of March, 1979, and of such further evidence as he himself may discover in the presence of the parties or which the appellant or the respondent may see fit to place before him relevant to the dispute.

To that extent the appeal is allowed.

As regards costs, counsel on both sides agreed that the Court might make a provisional order as to costs of the appeal with leave to either side to have such order varied within a stared period. The preponderance of success in the appeal lies with the respondent, and although it is true that the appellant had to come to this Court to obtain the limited relief which he has obtained, this would not have been necessary if he had not acted on wrong advice in refusing to attend the resumed hearing on the 19th of March. In the circumstances, it seems to me that the appellant should pay one half of the respondent's costs of appeal and a provisional order to this effect is accordingly made. Either party will have leave to set the matter down again for further argument on costs, on notice to the Registrar within 14 days of the date hereof, failing which the order as to costs will become final.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Coghlan, Welsh and Guest,* attorneys for the appellant.

*Atherstone and Cook,* attorneys for the respondent.



Copyright Juta & Co Ltd

## UDC LIMITED v FIELD NO 1980 ZLR 262

**Court** **General Division, Salisbury**

Argument on Special Case

Beadle, AJ

31st July, 1980

### Flynote

Company - Section 276 (3) of Companies Act [Chapter 190] meaning of liabilities - object to enable company to re - establish itself as a solvent concern - liability would benefit both pre - and post - judicial management creditors - test is whether the time the judicial manager incurred the liability he bona fide believed it to be for company benefit.

### Headnote

The plaintiff loaned Rhoprops $120 000 to purchase a company, the total shareholding in which was pledged to plaintiff as security. Another company, M & V, acquired a 50 per cent. shareholding, becoming indebted to Rhoprops in the sum of $60 000. Rhoprops came under a provisional order of judicial management on the 14th May, 1975. On the 26th May, 1975, M & V assumed responsibility to the plaintiff for $60 000 of the original debt owed to plaintiff by Rhoprops, the latter guaranteeing repayment by M & V . The pre-judicial management creditors of Rhoprops thereafter resolved that all liabilities incurred by the judicial manager should be preferential liabilities. M & V defaulted in its payment. The plaintiff claimed preference by virtue of the guarantee signed by the provisional judicial manager. The defendant argued that the defendant's claim was merely a revival of an old liability.

*Held* that when M & V assumed responsibility for Rhoprops' indebtedness the creditors obtained a real benefit, because if M & V did not default, the settlement of that debt could have a vital bearing on Rhoprops' survival.

*Held,* further, that the object of section 276 (3) of the Companies Act [*Chapter 190*] is to give the company under judicial management the opportunity to survive so as to be able to pay all its creditors, which may mean the incurring of future liabilities. The guarantee the judicial manager accepted from Rhoprops was a new liability, creating a chance of the settlement of a large part of Rhoprops' pre-judicial management debts.

*Held,* further, that the test in incurring the liability was whether at the time it was incurred the judicial manager *bona fide* believed it was for the benefit of the company. (*General Leasing Corporation Ltd v Thorne, NO,* 1975 (4) SA 157 (C) distinguished.)

---



BEADLE AJ

Cases cited:

*Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd,* 1972 (2) SA 270 (AD);

---

Copyright Juta & Co Ltd

*General Leasing Corporation Ltd v Thorne, NO* (*supra)*.

*W J Millar SC,* with him AP de Bourbon, for the plaintiff.

*GR J Hackwill,* for the defendant.

## Judgment

**Beadle AJ:** This is a special case heard under the provisions of Order 29 of the High Court Rules.

The facts as appear from the case stated are as follows:

The plaintiff is a limited company and the defendant the liquidator of a company, Rhoprops Ltd (hereinafter referred to as "Rhoprops"), now in liquidation.

In 1974 the plaintiff loaned Rhoprops $120 000 to purchase the total shareholding of a company, referred to throughout the proceedings as "M.R.M." Rhoprops and one Jack were the sole shareholders of the MRM company, and the total shareholding in MRM was pledged to the plaintiff as security for this sum of $120 000.

Subsequently, by agreement with the plaintiff and at Rhoprops' request, Jack was allowed to dispose of his shareholding, which was acquired by a company referred to in the proceedings as "M & V"

It transpired that M & V had acquired from Rhoprops 50 per cent.

of the total issued share capital of MRM for $20 000 and remained indebted to Rhoprops for a further sum of $60 000 in respect of these shares.

Certain negotiations between the parties took place which resulted a formal written agreement entered into on the 26th May, 1975, between the plaintiff and the defendant.

In the interim period Rhoprops was placed under a provisional order of judicial management on the 14th May, 1975, which order was confirmed on the 24th July, 1975.

The agreement of the 26th May, was therefore made by the plaintiff with the provisional judicial manager of Rhoprops as representing that company.

The effect of this agreement was that M & V assumed responsibility for $60 000 of the original debt of $120 000 owed by Rhoprops to the plaintiff.



BEADLE AJ

The plaintiff agreed to release Rhoprops from liability for this debt of $60 000, and accept M & V as its debtor for this amount on condition that Rhoprops guaranteed the due repayment of the principal debt (i.e., $60 000) by M & V to the plaintiff.

Paragraph 9 of the special case describes this transaction as follows:

Copyright Juta & Co Ltd

"9. Accordingly, on the 26th May, 1975, the provisional judicial manager, in conducting the business of Rhoprops, guaranteed in writing the indebtedness of M & V to the plaintiff in the sum of $60 000 (hereinafter referred to as 'the principal debt'). A copy of the guarantee is annexed marked 'A'. The reasons for the signing of Annexure 'A', *inter alia,* were:

(a) If M & V had fulfilled their obligations the indebtedness of Rhoprops to plaintiff would have been reduced by $60 000;"

It is common cause that in acting as he did the judicial manager was acting bona tide in the conduct of the company's (i.e. Rhoprops') business.

On the 17th October, 1975, the creditors of Rhoprops duly passed a resolution in terms of section 276 (3) of the Companies Act [*Chapter 190*] as follows:

"*Resolved* that we the creditors of Rhoprops Limited (under judicial management) whose claims arose before the date of judicial management, namely 14th May, 1975, hereby agree that all liabilities incurred or to be incurred by the judicial manager in the conduct of the Company's business, shall be paid in preference to all other liabilities exclusive of the costs of the judicial management."

M & V defaulted in paying the debt of $60 000 it owed to the judicial manager, and in fact was placed in liquidation in April, 1978.

Plaintiff, in terms of the guarantee agreement signed by the provisional judicial manager on the 26th May, 1975, now became entitled to claim from Rhoprops the principal debt originally owed by M & V of $60 000.

Rhoprops itself was placed under liquidation in December, 1975, but this does not affect the principal issue.

The plaintiff proved its claims against the defendant, claiming it was entitled to a preference by virtue of the agreement entered into under the provisions of section 276 (3) in October, 1975. The defendant refuses to recognise this claim for preference, contending that the liability for which the plaintiff claims its preference is not a liability within the meaning of section 276 (3) of the Companies Act.

The question of law to be determined is whether or not this claim of the plaintiff is preferred under the October, 1975, agreement as read with section 276 (3).



BEADLE AJ

Section 276 (3) reads:

"(3) The creditors of the company whose claims arose before the date of the judicial management order may at a meeting convened by the judicial manager for the purposes of this subsection resolve that all liabilities incurred or to be incurred by the judicial manager in the conduct of the company's business shall be paid in preference to all other liabilities exclusive of the costs of the Judicial management; and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the company except claims arising out of the costs of the judicial management."

The world "liabilities" is capable of many meanings (see *Fairlands (Pty) Ltd v Inter -Continental Motors (Pty) Ltd,* 1972 (2) SA 270 (AD)). It is to be noted that the word "liability" is used in

**Copyright Juta & Co Ltd**

section 276 (3) without; any limitation being placed on its meaning.

It is argued by the defendant that the claim by the plaintiff is little different from the resuscitation of an old liability which existed before Rhoprops was placed under judicial management, and is not therefore a liability incurred after the company was placed under judicial management.

Whether or not this is so involves a detailed examination of the agreement of the 26th May, 1975.

That the claim arose from a liability created after the company was placed under judicial management is beyond doubt. To this extent therefore it is covered by section 276 (3). The real issue, however, is whether it is simply the resuscitation of an old liability, or a new liability incurred for a new consideration and for the purpose of enabling Rhoprops to recover from its financial difficulties and survive.

If Rhoprops had simply repeated its previous guarantee for no consideration at all, the defendant's case would be unanswerable.

But that is not so. Rhoprops and its creditors, at the time the May, 1975, agreement was signed, obtained on the face of it a very real benefit. (Note here that it cannot now be assumed that at that date when the parties to the May, 1975, agreement made the agreement they had the hindsight of memory that ultimately M & V would prove to be financially unstable, and that in the end result the agreement would reflect to the disadvantage of later creditors. There is no suggestion of this in the Special Case).

What the May, 1975, agreement achieved was to substitute a new debtor who must assume liability for $60 000 of Rhoprops' liabilities. If this new debtor did not default, the advantage to all the creditors of



BEADLE AJ

Rhoprops is obvious, and this includes both the creditors existing before the order of judical management was made and those coming into existence after it, because it was in the interests of all creditors that the company should survive, and the settlement of a substantial portion of debts incurred before the judicial management order was made could have a vital bearing on Rhoprops' survival.

The whole object of section 276 (3) seems to me to give the company which is in financial difficulties an opportunity of surviving those difficulties and an opportunity to re-establish itself as a solvent concern. Put simply, the object is to enable the company to survive so as to be able to pay all its creditors and continue operating. One of the recognized ways of doing this is to enable the judicial manage to continue carrying on the company's business so as to profitability, and to do this he may well have to incur future liabilities, the incurring of which future liabilities may be of critical importance to the question of the company's survival, but *non constat* that in this context the liabilities incurred by the company before it was placed under judicial management can be said to be of no significance. It is, after all, these earlier liabilities which were the cause of the company's original financial problems, and their ultimate solution

Copyright Juta & Co Ltd

must always remain a vital consideration if the company is to survive and the judicial management order is to succeed in achieving its object. It seems to me that it is within the spirit of the section that the judicial manager should have the power to negotiate with the pre-judicial management creditors because if he can negotiate satisfactory agreements with them which will ensure the company's survival, this must be for the benefit of creditors of all classes, including the post judicial management creditors. A *bona-fide* liability incurred by the judicial manager with pre-judicial management creditors with the object of achieving this result, seems to me to fall within the meaning of the word "liability" in the section.

As I have pointed out, the May, 1975, agreement which created the liability now amender discussion was in my view just such a liability. The guarantee which the judicial manager accepted from Rhoprops was not in respect of its old debt but in respect of the new debt taken over by M & V . If the judicial manager had not incurred this liability with Rhoprops, the deal with M & V would have fallen through and a chance would have been lost of getting a substantial portion of Rhoprops' pre-judicial management debts settled by a third party. It seems to me that at the time the judicial manager signed the agreement he considered he was acting the best interests of everyone. He was acting in the



conduct of the business of the company and he incurred a liability which, if M & V had honoured its obligations, which he was entitled to assume it would do, would have substantially reduced Rhoprops' debts and would have been to the benefit of both the pre- and post-judicial management creditors and have played a fundamental part in the survival of the company, and would be a type of liability incurred with the objective of the provisions of section 276 (3). This being so, it would appear to me that on the face of it this was the type of liability contemplated by the provisions of that section, as if it had succeeded in its objectives it would have contributed to the rehabilitation of the company.

This would appear to be the simple answer to the problem were it not for the decision of VAN WINSEN A J.P., in the case of *General Leasing Corporation Ltd v Thorne NO*, 1975 (4) SA 157 (C). There are dicta in that case which certainly appear to support a conclusion different from the one at which I have arrived. Coming as they do from a distinguished judge, they must be treated with the greatest respect. *Thorne*'s case is, however, clearly distinguishable on its facts from the instant case.

The headnote to that case which accurately summarizes most of the pertinent facts of that case reads as follows:

> "The creditors of a company under judicial management had by resolution resolved that the judicial manager should carry on the business of the company and that 'all liabilities incurred be paid in preference to all other liabilities.' The judicial manager having decided to close down a branch of the business repudiated the lease of certain fixtures and requested the lessor to remove them which it did. The lessor claimed damages representing the rental of the unexpired portion of the lease. When the company was placed under liquidation the lessor claimed that, as the judicial manager had incurred a liability in the conduct of the business, such liability represented a preference in terms of the resolution. In a special case stated in teens of Rule of Court 33.
>
> *Held* that the 'liabilities' referred to in section 197B (1) *ter (a)* of Act 46 of 1926, as amended, were not intended to

Copyright Juta & Co Ltd

include one which arose in the circumstances of the present case by reason of the repudiation by the judicial manager of the lease."

That case, however, contained a very pertinent proviso which entirely distinguishes it from the instant case. The pre-judicial management creditors, in passing the relevant resolution under the provisions of the South African section comparable to our section 276 (3), added this proviso to the resolution:

". . . provided that this resolution shall not confer any additional preference of security for rent or any preference for damages claims for breach



BEADLE AJ

of lease unless the provisional judicial managers or judicial managers have in writing agreed to preference in terms of this resolution being extended to such claims."

It is true the learned judge, although he adverted to it, did not rely on it In any way in his judgment, though the effect of it may well have been decisive in determining the issue before the Court.

The fact which basically distinguishes *Thorne*'s case from the instant case is that the original contract made by the company with the landlord which the judicial manager subsequently breached, had been made before the company was placed under judicial management, and therefore no claim by the landlord based on that contract would have received any preference under the resolution passed by the pre-judical management creditors. It is at least arguable that as no claim based on the original contract was entitled to receive any preference, no claim based on any breach of it could receive any such preference, as this would be to elevate a claim based on the breach of the original contract above a claim based on the original contract itself. It would seem that the liability arising from the original contract and that arising from a breach stand in much the same footing, as in both cases the liability flows from failure to carry out the contract. This would justify the view that the liability resulting from the breach was not the sort of liability contemplated by the section.

It is, however, the learned judge's dicta in *Thorne*'s case which raises the problem, but in construing any dicta in a judgment, sight must never be lost of the fact that those *dicta* must be construed against the back ground of the facts to which they relate, and so far as they deal with any propositions outside the scope of the facts to which they relate they are very largely *obiter*.

I propose now to deal with that passage in *Thorne's* judgment which gives me the greatest difficulty.

The relevant passage reads:

"*Prima facie* it would seem, therefore, that the liabilities upon which the subsection in question wished to confer a preference were those which resulted from contracts entered into by the judicial manager in the course of borrowing moneys or acquiring goods or services on credit in the course of conducting the company's business. The liability for which preference is sought in the instant case is clearly not one which arose in such circumstances. The contract from the breach of which the liability arose was not entered into by the judicial

Copyright Juta & Co Ltd

manager. It was the work of the previous management concluded without regard to the factors to which the judicial manager is required to advert, viz. the securing of the interests of creditors and shareholders of the



BEADLE AJ

company under judicial management. The mere fact that the liability was incurred as a result of action taken by the judicial manager to promote the profitability of the company's business by closing down one of the company's "branches cannot, in itself, be regarded as sufficient to constitute it a liability falling within the ambit of sec. 197B (1) *ter (a)*. To accord a preference to such a claim may, depending on the circumstances, so far from advancing the aim of reinstating the profitability of the company have the very opposite effect. Such a result would, in my view, not serve the purpose and object of the Legislature in enacting the relevant provisions of the statute in question."

The liability in this case certainly does not fall within any of the categories outlined by the learned judge in this passage, and if this passage was read as an exhaustive description of all the liabilities covered by the section, then the liability in the instant case would certainly not be covered by the section.

I attach significance, however, to the fact that the learned judge prefaced that passage by the use of the words, *"prima facie".* The use of those words indicates to me that the learned judge never intended that unless a liability fell strictly within the class of liability described in the passage, it would not be a liability for the purposes of the section. The learned judge seemed to infer, by the use of the words *"prima facie"*, that there was always the possibility of another type of liability with which he had not dealt, which might equally be covered by the section.

It is to be noted that one of the reasons the learned judge gives for holding that the liability in *Thorne*'s case was not covered by the section was:

"To accord a preference to such a claim may, depending on the circumstances, so far from advancing the aim of reinstating the profitability of the company have the very opposite effect. Such a result would, in my view, not serve the purpose and object of the Legislature in enacting the relevant provisions of the statute in question."

With the greatest respect to the learned judge this would seem to be an unrealistic approach. The test to me would appear to be not whether the incurring of the liability was in the "ultimate result" to the benefit of the company but whether or not at the time he incurred it the judicial manager *bona fide* believed it was for the benefit of the company and incurred it in conducting the business of the company. The fact that his judgment may have been at fault and in the result the incurring of the further liability may have been nothing more than throwing good money after bad, does not seem to me to be the decisive test. In passing the resolution giving the judicial manager powers to incur this additional liability, the creditors passing the resolution took that risk. Unhappily (the instant case is an example) the history of the judicial management



BEADLE AJ

of companies in Zimbabwe is an unfortunate one. In many of such cases the company ends up in liquidation, and the incurring of the additional liabilities by the judicial management in terms of

Copyright Juta & Co Ltd

resolutions passed under section 276 (3), instead of "reinstating the profitability of the company" as often as not results in the company being in a worse financial position that it was before the resolution under section 276 (3) was passed and the liabilities were incurred. The harsh truth in this country, therefore, is that section 276 (3) very often fails to achieve its objective. It is for this reason I say that the test of whether or not a liability falls within the ambit of section 276 (3) is whether or not it succeeds in "advancing the aim of reinstating the profitability of the company" is not a realistic one, as if this were the test many liabilities genuinely incurred under the provisions of section 276 (3) in the hope of achieving this aim would not be entitled to any preference, simply because they failed in their objective.

I conclude, therefore, that *Thorne*'s case (*supra)* can be distinguished on its facts, and does not preclude me from holding that the liability incurred in this case falls under the provisions of section 276 (3).

I order therefore that the Plaintiff's claim is a preferent one. The defendant will pay the costs of the proceedings.

*Byron, Venturas and Travlos,* attorneys for the plaintiff.

*Surgey, Pittman and Kerswell*, attorneys for the defendant

---



## PICKERING v STANDARD GENERAL INSURANCE COMPANY LIMITED 1980 ZLR 270

**Court** **Appellate Division, Salisbury**

Civil Appeal

Fieldsend CJ, Lewis JP and Baron JA

25th July and 4th August, 1980

### Flynote

Motor vehicle insurance - answers to proposal form - declaration creating warranty that answers true, correct and complete, and all information disclosed - duty to disclose all information, including

---



LEWIS JP

suspected health condition - nature questions on proposal form may limit or enlarge duty of disclosure - declaration at end of proposal form not limiting duty to disclose.

### Headnote

In an insurance proposal forth the appellant failed to disclose that he was suspected to be suffering from mild epilepsy, even though it later transpired that his condition was one of severe migraine.

*Held* that the declaration signed by the appellant contained two warranties; that the particulars

---

Copyright Juta & Co Ltd

and statements in the proposal were true, correct and complete; and that they contained all the information known to the appellant affecting the risk to be insured.

*Held,* further, that the fact that the appellant suffered only migraine attacks was immaterial. At the time of filling in the proposal it was the appellant's duty to disclose any information he had on his state of health, to enable the insurers to exercise their own judgment on it.

*Held,* further, that whether or not the questions in a proposal form enlarge or limit the duty of disclosure depends on the circumstances. In this instance the declaration did not limit the duty of disclosure.

Cases and authorities cited:

*Kelly v Pickering and Anor (2),* 1980 (2) SA 758 (R);

*Yorkshire Insurance Co Ltd v Ismail,* 1957 (1) SA 353 (T);

MacGillivray and Parkinson, *Insurance Law,* 6th Edition, paragraphs 734 36, 759;

Halsbury's *Laws of England,* 4th Edition, Vol. 25, paragraph 226;

*James v British General Insurance Co Ltd* [1927] 27 L1. Rep. 328.

*A P de Bourbon,* for the appellant: Regard must be had to the actual condition of the appellant, rather than what he might, or might not, believe his condition to be.

In question 7 the appellant was asked:

> "Do you, or any other person who to your knowledge frill drive, suffer from defective vision or hearing or from any physical or mental infirmity?"

The appellant was obliged to answer this question correctly according to the facts as they existed at the time when he answered the question. *James v British General Insurance Co Ltd* (*supra)* at 331. It is apparent from James' case that in answering the question the matter is purely one of fact. If the question is framed, as the present question is, to ascertain an existing state of affairs, the appellant was correct in answering as his condition existed at the time the answer was given.

The decision of KUPER J, in *Yorkshire Insurance Co Ltd v Ismail* (*supra)* at 356-7 is correct. This case falls to be determined on what is considered by KUPER J, to be the further warranty, namely that the proposal form contains all information known to the insured affecting the risk to be insured. What an insurer wishes to know is the



LEWIS JP

physical condition of the insured in so far as it affects his capabilities as a driver. *MacGillivray and Parkinson* (*supra)* paragraph 768.

It is trite law that an insurance company can, by its method of framing questions, seek to

**Copyright Juta & Co Ltd**

reduce the areas in which it wishes information from the proposed insured. *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 878. This statement has been accepted by the South African Appellate Division as being so framed that no objection can be taken to it. See *Colonial Industries Ltd v Provincial insurance Co* 1922 A D. 33 at 41*; Littlejohn v Norwich Union Insurance Society,* 1905 TH 374 at 383, *Schoolman v Hall* [1951] 1 L1. Rep. 139 at 143; and *Steyn v Malmesbury Board of Executors,* 1921 CPD 96 at 106.

The obligation, in terms of the Declaration, to ensure that the proposal form contains all information known to the proposed insured affecting the risk to be insured has been fulfilled. If the insurer wished details of the past medical history of the proposed insured, it was incumbent upon it to seek that information.

*1 A Donovan,* for the respondent: The proposal form completed by the appellant included a declaration which contained two warranties-

(a) that the particulars and statements made in the proposal by the appellant were true, correct and complete;

(b) that these particulars and statements contained all information known to him affecting the risk to be insured.

*Yorkshire Insurance Co Ltd v Ismail* (*supra)* at 356H. Both of these warranties had been breached by the appellant's unqualified negative answer to question 7 of the proposal form. The evidence clearly established that in June, 1976 (when the proposal form was completed) and in January, 1977 (when the policy was renewed) the appellant had not been pronounced free of a suspected tendency to mild epilepsy. It was the appellant's duty to disclose rumours, opinions or information as to facts which were themselves material and within his knowledge, notwithstanding that they turn out to be false or illfounded. *MacGillivray* and Parkinson (*supra*) at 759.

## Judgment

**Lewis JP:** This is an appeal against an order in the General Division of this Court declaring that the respondent is not liable to indemnify the appellant, as his insurer, for the amount of $18 876 claimed as damages against the appellant by one Kelly as a result of the appellant's negligent driving of a motor-car. The judgment in which the order is made is now reported in the South African Law Reports *subnomine Kelly v Pickering and Another* (2) 1980 (2) SA 758 (R), and when referring to the judgment I shall do so by reference to that report.* (9)



LEWIS JP

The proposal form for the insurance policy in question was completed by the appellant in January, 1976. Question 7 in that proposal form was as follows: "Do you, or any other person who to your knowledge will drive, suffer from defective vision or hearing or from any physical or mental infirmity?" To that question, the appellant's answer was a bare unqualified "No', He signed the declaration at the foot of the proposal form in the following terms:

Copyright Juta & Co Ltd

"I hereby declare that the above particulars and statements are true, correct and complete and contain all information known to me affecting the risk to be insured, and that this and any other written statement made by me or on my behalf for the purposes of the proposed insurance shall be the basis of and incorporated in, the contract between me and the company, and shall be promissory. I further agree to accept insurance on the terms and conditions set forth in the company's policy."

The policy which was issued on the basis of the proposal form set out that the proposal and declaration should be the basis of the contract and should be deemed to be incorporated therein. It also contained the usual condition (condition 9 in this policy that " . . . the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy". The appellant renewed the policy the following year in January, 1977. The accident giving rise to the claim occurred in April, 1977

The facts of the case are fully and in my opinion accurately set out in the judgment of the learned judge in the Court a quo and it would be convenient simply to quote the following passage of that judgment at page 760 At†(10):

"The evidence has established that the defendant, in 1961 at the age of 13, became prone to recurrent severe migraine attacks associated with visual disturbance, nausea and paresthesia, notably of the left hand and arm. These attacks decreased in intensity and frequency as the defendant passed beyond adolescence, but, in April or May, 1974, during or shortly after strenuous exercise while on military training, the defendant had a fit with accompanying total unconsciousness and was taken to hospital, where he later had another episode in which he bit his lip. It was suspected by a military doctor that he had suffered an epileptic 'brand Mal' seizure and the defendant was referred to a neurological surgeon for examination. Electro- encephalogram tests were conducted which gave borderline results, and in June, 1974, the neurosurgeon expressed the view to the military doctor that the defendant should be categorized as a very mild epileptic and be exempted from further active military duties. Although it is not clear exactly what was then told to the defendant by the neurosurgeon concerning this diagnosis, it is apparent



LEWIS JP

that, before the proposal form was submitted, the defendant was made aware that it had been said that he was a mild epileptic and had on that account been returned by the military authorities to his civilian occupation. In June, 1974, he was advised by the neurosurgeon to return for a further E E.G . examination in six months' time, and in the meantime to continue take Epanutin tablets daily, a medication which the defendant knew to be a prophylactic prescribed to ward off possible future seizures. Although the defendant chose after a while to discontinue the use of Epanutin he did not experience any further seizures, but he did continue to experience occasional migraine attacks from which he found relief by using an analgesic at the time of such attacks. In April, 1975, after a protracted spell of dizziness, he underwent another EEG test. This was within normal limits, but daily use of Epanutin was again prescribed for him. In October, 1975, he was again seen by the neurosurgeon who found him very much more settled and having no further seizures, but who nevertheless advised the defendant that 'certainly for the next year he should continue with his medication (viz daily Epanutin) and return at that time for an EEG and review'. During the next 12-month period the defendant only infrequently experienced ill-health and he did not, in the result, return for the suggested EEG and review of his condition, which he says he assumed was a suggestion that had been made at the behest of the military authorities who wanted, so he thought, a periodic check on his condition. However, on 25 January, 1977, only days before the policy fell due for renewal, the defendant, having again been called up by the military authorities, certified the complete correctness of the under-mentioned answers to the following questions on the military medical examination form:

"Have you suffered from any of the following? Give dates: 1. Fits or convulsions? Answer: Yes, May, 1974. Severe or 'sick' headaches, migraine? Answer: Yes, continuous. At infrequent intervals (last on 3

Copyright Juta & Co Ltd

November, 1976."

(I would here interpose the fact that on the reverse of the medical examination form appears the following, apparently written by one of the Army medical officers: "Mild epileptic on Epanutin. See letter from Mr Auchterlonie")

"The defendant was forthwith categorized as unfit for any military duty (category 'E'), was not called up, and it was again explained to him that he had been categorized as a mild epileptic by his neurosurgeon.

The neurosurgeon has very recently examined the defendant again, and has found him to be quite fit, although the neurosurgeon was not told that in 1978 the defendant had again suffered three severe migraine attacks with associated visual disturbance and nausea, that had necessitated medical treatment for relief. The neurosurgeon is of the view that the defendant has never really been a victim of epilepsy, but merely of severe migrainous headaches that have lessened with the passage of time. It Is his opinion that the defendant's susceptibility to such headaches did not amount to a physical infirmity; nor, in his opinion, did it impair the defendant's ability to drive a motor vehicle, because the onset of such headaches is preceded by warning symptoms such as would cause the defendant to refrain from driving before finding himself in the throes of an attack when he would be quite incapable of controlling



LEWIS JP

a motor-car. It is the neurosurgeon's opinion therefore that the negative answer that was given in January, 1976, to the question in the proposal form that I have previously set out was, objectively speaking, true."

The learned judge, following the decision of KUPER J, in *Yorkshire Insurance Co Limited v Ismail,* 1957 (1) SA 353 (T.), found that the declaration quoted above contained two warranties. Firstly, that the particulars and statements in the proposal form were true, correct and complete, and secondly, that they contained all the information known to the appellant affecting the risk to be insured. The correctness of that finding is not challenged in this appeal.

As the learned judge pointed out, none of the information relating to the appellant's state of health was revealed to or known by the insurer either in 1976 when the policy was issued or in January, 1977, when the appellant renewed it. The appellant said in evidence that at the time the proposal form was completed he asked his agent. a Mrs. van den Berg, who was the broker through whom he negotiated the insurance, to confirm with his medical practitioner that he was fit to drive and that the condition from which he suffered, or thought he suffered, "would not Meet my insurance policy to that extent". What Mrs. van den Berg did about this, if she did anything at all, one does not know, but nothing was communicated to the respondent. Later on in his evidence under cross examination, the following passage occurs in relation to his conversation with a Mr Powell after the accident:-

"Q. In other words, at the time you spoke to Mr Powell you were unaware, specifically, of what your condition was, but you thought you might have been suffering from a mild form of epilepsy? A Yes.

Q. That was your state of mind when you spoke to Mr Powell? A Yes.

Q. Presumably that was your state of mind in January, 1976, when you had completed the proposal form? A That is correct, which Is why asked Mrs. van den Berg to refer to my medical practitioners for confirmation."

**Copyright Juta & Co Ltd**

It is clear, therefore, that this was also his state of mind when he renewed the policy in January, 1977.

The learned judge found that a breach of both warranties had been established, in that the answer to question 7 of the proposal form, though not untrue, was not a *complete* answer relating to the appellant's physical state at that time, and the particulars and statements in the proposal form did no contain all the information known to the appellant affecting the risk to be insured.

In attacking the judgment, Mr *de Bourbon for the appellant* submitted that the learned judge "misunderstood the evidence in believing that the



LEWIS JP

appellant suffered from mild epilepsy". In my view, it is not correct to say that the learned judge entertained any such belief. It seems to me to be clear from his judgment that the basis of his finding was this: Notwithstanding that the appellant was not, in fact, suffering from mild epilepsy but only from periodical severe migraine attacks there was at all material times a suspicion that this might have been his condition, and as appears from the passages from his evidence quoted above, the appellant himself believed, on what the Army doctor had told him, that he was classified as a mild epileptic.

The appellant's own expert witness, one Beckett from the Eagle Insurance Company, agreed that information indicating even a mere possibility that a proposer might have a mild epileptic condition, would certainly put any reasonable insurer on his guard and on his inquiry before deciding whether to accept the risk and if so on what terms. It was therefore a matter which was clearly material. The fact that the specialist neuro-surgeon was satisfied after the event that the appellant had never suffered from epilepsy but only migraine attacks is neither here not there, and Mr *de Bourbon*'s further submission that regard may be had only to the actual condition of the appellant and not to what he believed it might be is incorrect. *MacGillivray and Parkinson* in their work on Insurance Law, 6th Edition para. 759 have this to say:

> " 'Rumours and Opinions'. An applicant for insurance is required to disclose not only those facts of which he has actual knowledge himself, but also any rumours, opinions or information as to facts which are themselves material which he may have heard. The principle was established in a line of old cases on marine insurance which show that, even if the applicant may himself regard the rumour as false or the opinion as ill-founded, it is nonetheless his duty to disclose it, for what it is worth, so that the insurers may exercise their own judgment on it. If the rumour subsequently turns out to be false, or the opinion to be wrong, the insurance may still be avoided for non-disclosure. In *British Equitable Insurance Co v Great Western Ry,* 1869 20 LT 422 the assured, prior to the issue of a policy on his life, consulted a specialist concerning the swelling of his feet, and was told that he was in a dangerous state of health. His own doctor said that the specialist was wrong, and the assured did not disclose the matter to the insurance office. He died of a heart disease shortly after the policy was issued. The policy was avoided. The specialist's opinion, even if wrong, should have been disclosed to the insurers."

There is a similar passage in Halsbury's Laws of England, 4th Edition Vol. 25 para. 226 at p. 133. This is as follows:

> "The materiality of any particular circumstance is in no way determined or affected by events subsequent to the

Copyright Juta & Co Ltd

conclusion of the contract, and the



LEWIS JP

> insurance is therefore voidable although the information not disclosed turns out to be altogether untrue, or the loss to have arisen from a cause wholly different from and wholly unconnected with that referred to in the information or with any of the matters comprised in it. The only question is whether the circumstances or information not disclosed, whether by design or mistake, were such as would have influenced the judgment of a prudent underwriter. Thus, if in proposing an insurance on goods on board a certain ship, the assured, having received information that the ship has met with an accident, fails to communicate the information to the underwriter, the under writer will be discharged from responsibility, even if the omission is due to mere mistake or carelessness, and the information turns out in fact to have been wholly untrue, and even though the goods are lost by capture wholly unconnected with the perils of the sea."

It is true that this passage appears in the chapter dealing with marine and aviation insurance, but it would seem that it is equally applicable to all forms of insurance and the similar passage from MacGillivray and Parkinson, referred to above, is not in any way limited to marine insurance

Mr *de Bourbon* placed great reliance on the case of *James v British General Insurance Co Limited,* 1927, 27 L1. Rep. 328, for the proposition that it is only the facts as they exist which are relevant and not what the appellant believed them to be That case is no authority for suggesting that the passages from MacGillivray and Parkinson and Halsbury to which I have referred are wrong. In *James*'s case, the assured had had a past history of disability for which he had received a disability pension, but by the time he took out the insurance policy in question, to his knowledge he was completely cleared of that disability. There was no question, therefore, of his suspecting at the time he took out the insurance policy that he was suffering from some physical disability which should have been disclosed. The fact that he had no such belief or suspicion is emphasized by what was said at p. 331 in the judgment of ROCHE J, where the learned judge pointed out that all pension payments had ceased and the insured himself had never claimed any more payments because there was nothing to claim. In other words, he realized that he was completely cured and free from any physical disability. That case is clearly distinguishable, therefore, on the facts. It merely emphasized the fact that the state of health of the insured at the time of insurance must be looked to, and a part disability, which to the insured's knowledge has completely disappeared, need not be disclosed.

In the instant case the current situation which should have been disclosed was a suspected condition of mild epilepsy, even though the suspicion later turned out to be ill-founded.



LEWIS JP

A hypothetical example may serve to illustrate the point. A person experiences a severe attack of indigestion the symptoms of which he describes to his doctor in such terms as to lead the doctor to believe that he is suffering from a serious heart condition. Arrangements are made for the necessary specialist examination. In the interval the patient completes a proposal form for

Copyright Juta & Co Ltd

insurance, stating he suffers from no physical disability but not mentioning the forthcoming examination. Should the examination not disclose any heart defect he would have truthfully said that he suffered no physical disability but it could not be doubted that he should have disclosed the forthcoming examination

Finally, Mr *de Bourbon* argued that this was a case where the specific questions put in the proposal form relieved the insured from the obligation to reveal anything more than had been demanded in the proposal form. He relied upon various authorities for the proposition that in certain circumstances when questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information either on the same matters but outside the scope of the questions or on kindred matters to the subject matters of the questions. The subject is dealt with generally in MacGillivray and Parkinson in pares 734, 735 and 736 Whether or not the form of the questions asked enlarges or limits the insured's duty of disclosure depends upon the particular circumstances and on the particular type of proposal form

In the instant case, it is clear from the nature of the declaration which the insured was required to sign at the end of the proposal form that the questions asked did not limit the duty of disclosure as suggested by Mr *de Bourbon*. He was required, when answering the questions, to answer them completely and to disclose all information known to him affecting the risk to be insured. As I have already pointed out, the appellant's own expert witness, Mr Beckett, was in no doubt that the information was material to the risk in the instant case, and of course the appellant himself, by requesting Mrs. van den Berg to check up with his medical practitioner as to his fitness to drive because of his suspected condition, realized that this was something which should be disclosed to the insurer.

I am therefore of the option that the learned judge correctly found that there was a duty on the appellant to disclose that he was suspected of being a mild epileptic both at the time he completed the proposal form and at the time he renewed the policy, and that the respondent was accordingly entitled to avoid liability under the policy by reason of the non-disclosure of this suspected condition

---



LEWIS JP

In the result, the appeal must be dismissed with costs

**Fieldsend CJ:** I agree.

**Baron JA:** I agree.

*Granger and Archer,* attorneys for the applicant.

*Atherstone and Cook*, attorneys for the respondent.

---

1980 ZLR p279

**THE STATE v MAGOMANA 1980 ZLR 279**

---

Copyright Juta & Co Ltd

**Court** **General Division, Salisbury**

Criminal Review

Beck, J

6th August, 1980

## Flynote

Postal arid Telecommunication Services Act [Chapter 250] - meaning of "mail" and "postal article".

## Headnote

The terms "mail" and "postal article" in the Postal and Telecommunication Services Act [*Chapter 250*] embrace articles which, while they may have been delivered to the post box or premises reflected in the address, have not yet come into the hands of the addressee himself or of someone authorized by the addressee to appropriate the article on his behalf.

## Judgment

**Beck J:** The accused was found guilty on three counts of contravening the Postal and Telecommunication Services Act [*Chapter 250*]. The convictions arose out of the accused's action in stealing letters, containing cheques, which had been sent to people at the school where he was a teacher. He was sentenced to nine months' imprisonment with labour on each count, but 12 months of the total sentence was suspended for five years on appropriate conditions. In addition, the magistrate made a compensation order in the sum of $260,13 in favour of the Mining Benefit Fund, which appears to have been the drawer of the stolen cheques.

The accused was charged under section 48 (a) of the Act which refers to the theft of "mail", but the charges actually alleged theft of a "postal article". There can be no prejudice to the accused by amending the charges to substitute the word "mail" for the words "postal article". In terms of section 2 of the Act, "mail" means "any article . . . which is

---



BECK J

being conveyed by post", while "postal article" includes "any letter . . .in the course of transmission by post". It would seem that there is very little, if any, difference between the meaning of the phrases "being conveyed by post" and "in the course of transmission by post". In order that the fundamental purpose of the Legislature may be upheld in seeking to foster the safe and efficient delivery of mail into the hands of the addressee, it is, I think, necessary to hold that both the above-mentioned phrases embrace articles which, while they may have been delivered to the post box or premises reflected in the address, have not yet come into the hands of the addressee himself, or of someone authorized by the addressee to appropriate the article on his behalf. Accordingly, the amendment referred to above will be made to the charge on each count, and the convictions will stand.

---

Copyright Juta & Co Ltd

[The remainder of the judgment is not material to this report - *Editor*.]

**Waddington J:** agreed with the judgment.

---



## STATE v STOKIE 1980 ZLR 280

**Court** **General Division, Bulawayo**

Criminal Review

Gubbay, J

8th August, 1980

### Flynote

Review - proceedings not subject to automatic review - magistrate not doubting propriety of conviction - attorney's written submissions challenging conviction - free form of "appeal" not permitted.

Miscellaneous Offences Act [Chapter 68] - section 5 (2) barking dogs interfering with tranquillity - accused must be shown to have permitted barking - temporary and reasonable nuisance not actionable

### Headnote

Although the proceedings were not subject to review in terms of section 64 (1) or 63A of the Magistrates Court Act [*Chapter 18*], the magistrate forwarded the record to the High Court, together with a letter by the accused's attorney attacking the propriety of the conviction. The magistrate himself supported the conviction.

---



On the night in question the accused twice went outside to stop his dog barking.

On two other occasions that night, he shouted at his dog to keep quiet, with good effect.

*Held* that section 64 (4) of the Magistrate Court Act [*Chapter 18*] is intended to allow a magistrate who entertains doubt about a conviction to submit proceedings, not subject to automatic review, for review.

*Held,* further, that the making of submissions in writing, challenging the conviction, is not permitted on review. The ordinary procedure of appeal must be followed.

*Held,* further, that noise which causes a loss of sleep is not the sort of physical discomfort or personal inconvenience to be expected or tolerated. However, the State must prove not only a material interference with the complainant's comfort, but also that the accused had knowledge of the disturbance and permitted or acquiesced in it.

*Held,* further, that the Legislature could not have intended every dog owner to be liable to prosecution every time his charges barked. Annoyance or in convenience of considerable proportions will not be actionable if it is temporary and reasonable in the circumstances.

---

Copyright Juta & Co Ltd

Cases and authorities cited:

*R v van Greunen,* 1939 TPD 167 at 169;

*R v Ferguson,* 1942 SR 168;

*R v Santer*, 1945 SR 133;

*R v Pria and Anor,* 1967 RLR 106 (G.D.);

*S v Fintz,* 1975 (2) SA 475 (RAD) at 477;

*Vanderpant v Mayfair Hotel* [1929] All ER 296 (Ch.) at 309;

*Andreae v Selfridge and Co. Ltd* [1937] 3 All ER 255 (C.A.);

*S v Kritzinger en 'n Ander,* 1973 (1) SA 596 (C);

*S v Huizamen,* 1974 (3) SA 224 (NC);

South African Criminal Law and Procedure, Vol 3 at 34;

*Harrison v Southwark and Vauxhall Water Company* (1891) 2 Ch. 409 at 414;

*Winfield and Jolowicz on Tort*, 9th Ed. at 337.

## Judgment

**Gubbay J:** The accused was charged in a magistrate's Court with contravening section 5 (2) of the Miscellaneous Offences Act [*Chapter 68*], it being alleged that on a particular Sunday night and upon his property at No 118 Marimba Road, Bulawayo, he unlawfully permitted the yapping, whining or barking of his dog to disturb or interfere with the rest, peace or tranquillity, of the residents of No. 116 Marimba Road. He pleaded not guilty and was defended by an attorney. After a fairly pro longed trial, the magistrate convicted the accused and sentenced him to a fine of $30 or in default of payment, six day's imprisonment with labour, of which $20 or two days' imprisonment with labour was conditionally suspended for one year

In view of the provisions of sections 63 (1) and 63A of the Magistrates Court Act [*Chapter 18*], the proceedings were not subject to automatic review by this Court or to scrutiny by a regional magistrate. Nonetheless.



GUBBAY J

the magistrate arranged for the evidence, which had been recorded by mechanical means, to be transcribed in full. After allowing the accused's attorney access to such transcript, he submitted the record for review, accompanied by a two foolscap page letter from the attorney attacking the propriety of the conviction and his reply in support of the conviction. In so doing, the magistrate, presumably, purported to act in terms of section 64 (4) of the Act. That section allows a magistrate who entertains doubt as to the propriety of his conviction, which is not

Copyright Juta & Co Ltd

subject to automatic review or scrutiny, to submit the proceedings for review to this Court so that it may be decided whether he is right or wrong. See *R* v *van Greunen,* 1939 TPD 167 at 169. But that is not the situation here. The magistrate has expressed no doubt as to the validity of conviction. Quite the opposite, he strongly defends it. Furthermore, although sections 63 (2a) and 66 (1) of the Act provide procedures whereby an accused person may question the sentence imposed, the making of submissions challenging the conviction is not permitted. It was, therefore, improper for the attorney to have done so. See *R v Ferguson,* 1942 SR 168; *R v Sager*, 1945 SR 133; *R v Pria awed Another,* 1967 RLR 106 (GD) at 107H. In the absence of any explanation as to why this case was sent for review I can only assume that the magistrate was advised that the accused felt aggrieved by the conviction, and that because of the nominal amount of the fine he and the attorney desired to save the accused the expense of an appeal. I may say that there is no indication that the accused is in such impecunious circumstances as to be unable to afford the costs of an appeal. The engaging of an attorney to represent him at the trial on what was a fairly trivial charge- payment of a deposit fine of $4 had been offered-suggests the contrary. I have no hesitation in remarking that it is wrong to use section 64 (4) as a cover to get the benefit of an appeal in proceedings not subject to automatic review. The ordinary procedure of appeal must be followed. If the attitude of this Court were otherwise, it would be inundated with t complaints in the most trifling of cases. As it is, the time of a reviewing judge is sufficiently occupied with matters that properly come before him. In the light of the above, I was sorely tempted to refuse to consider the merits of this particular conviction, but the detailed argument of the attorney which I could not avoid reading, prompted me to peruse the record. Having done so I reached the conclusion that the interests of justice required my intervention. I emphasize, however, that my decision to exercise my power under section 64 (4) of the Act this instance must not be taken by practitioners as a precedent for obtaining for a client thought to be aggrieved, a cheap form of redress not provided By the Legislature, by slipping in by the back door.

---



GUBBAY J

In convicting the accused of the offence, the magistrate made no adverse comment in respect of his credibility as a witness. In my view, the evidence of the accused is of a high order. He gives the impression of having a clear recollection of the affair and at the same time endeavouring, as best he can, to be completely truthful. He betrays a pleasing frankness. The evidence of both the complainant and his wife, on the other hand, reads badly. They show themselves as argumentative and intolerant. The complainant in particular appears to be a thoroughly difficult, disagreeable and unco-operative neighbour, with an acute sensitivity to noise of any kind. In the main, the standard of peace he demands from persons living in the immediate vicinity of his property, is far too high. He objects bitterly, for example, to the mowing of a lawn on a Sunday afternoon, or to the laughter of young children as they happily splash about in a swimming pool. But, as cautioned in *S v Fintz,* 1975 (2) SA 475 (RAD) at 477D-E,*(11) because a person may have complained in the past about invasions of tranquillity which are part of the give and take of suburban living and therefore to be expected and accepted, a complaint made by him on a subsequent occasion, established by the evidence to be reasonable, must not be discounted.

---

**Copyright Juta & Co Ltd**

The magistrate was alive to the real possibility of the complainant having exaggerated the degree to which he had been disturbed. He claimed that the dog had barked intermittently all through the night and that he could not sleep at all because he was waiting for the next bark. In view of my preference for the accused as a witness, it seems to me that the propriety of the conviction must be considered substantially on his version of the dog's behaviour. It was this: At about 10.30 p.m. on the evening in question, and while in bed, he was disturbed by the very loud and continuous barking of his great cane dog, Pablo. die got up and went outside to investigate. Pablo was still firmly secured inside his kennel, which was positioned close to the bedroom window. It is a large timber structure with a latch gate opening inwards. The animal was frisky and uneasy and was clawing at the gate of the kennel. He calmed Pablo and retired to bed. Some hours later, he was awakened once again by Pablo's ferocious barking, and for the second time went out of the house. He discovered that the dog had broken out of the kennel, which had never occurred before, and was running loose within the confines of the property, barking incessantly. The animal was in a highly excited state. He instructed Pablo, whom apparently he is able to quieten at command, to strop barking and return to the kennel. He did not chain the animal inside the kennel because he believed, with some justification,



that there was probably a prowler in the locality. Thereafter, during the early hours of the morning, he was twice aroused by Pablo's barking. Each time he shouted to the dog from the bedroom window to keep quiet and go back to the kennel. Pablo obeyed and the barking terminated.

Viewed from the standpoint of the reasonable person, without any peculiar sensitivity to the barking of dogs, I am satisfied that overall the extent of Pablo's barking on the four occasions described by the accused, did materially interfere with the sleep of the complainant and his wife. Everyone must expect to endure some degree of noise from his neighbour, otherwise modern life would be impossible. But night is the time when man takes his rest, and I think that according to the plain and sober notions of ordinary people, noise which causes a loss of sleep, either late at night or in the early hours of morning, is not the sort of physical discomfort or personal inconvenience to be expected or tolerated. See *Fintz*'s case, *supra*, at 477D and F-G; *Vanderpant v Mayfair Hotel* [1929] All ER Rep. 296 (Ch.) at 309; *Andreae v Selfridge & Company, Limited* [1937] 3 All ER 255 (CA) at 261F-G.

That, however, is not an end to the matter, for it was incumbent upon the State to prove that the barking of the dog, which materially interfered with the nocturnal sleep of his neighbours, had been permitted by the accused. In *S v Kritzinger en n Ander,* 1973 (1) SA 596 (C), BAKER AJ, (as he then was), after expressing the opinion that the meaning attributed to the word "permit" in English law, corresponds to that in South African law, went on to say at 599C (at 142 of the translation volume):

> "As to our own law, there must be proof that the accused had fault, in the sense that he had actual or constructive knowledge of the alleged act, plus consent to or acquiescence in the doing or continuation of the act."

I respectfully associate myself with this dictum. See also *S v Huizamen,* 1974 (3) SA (NC) at

**Copyright Juta & Co Ltd**

225; South African Criminal Law and Procedure, Vol. 3 at 34. The absence of actual knowledge, then, will not avail a person who wilfully blinds himself to the offending state of affairs. He will be held to have permitted it.

Clearly the accused was blameless in respect of the first two incidents of barking. He did not "permit" Pablo to bark. Quite the contrary. On each occasion he heard the barking he went outside and quietened the animal. The real question is whether the accused must have foreseen the possibility of further raucous and continuous barking to the disturbance of his neighbours, and did nothing to prevent it? Undoubtedly he must have appreciated the possibility of more barking from the dog, which he had not brought into the house but allowed to wander at will



GUBBAY J

in the garden. The accused, however, genuinely believes himself to be a light sleeper. He expected any further barking to awaken him and that he would be able to stop it before it inconvenienced his neighbours, by ordering Pablo to keep quiet and return to the kennel. Had he been a heavy sleeper who knew in all probability he would sleep Trough any barking, and did so, the position might well have been different. As it happened the accused was awakened twice by the barking and on each occasion took successful measures to quieten the animal. He did not therefore acquiesce in the noise.

It follows that the accused was not shown to have permitted any of the incidents of barking which interfered with the sleep of the complainant or his wife.

The Attorney-General, to whom I referred the matter and for whose assistance I am indebted, has advanced an additional ground upon which he submits the conviction is unsound. I shall quote from his opinion:

> "It seems to me certain that some limit must be placed upon the scope of section 5 (2) of the Miscellaneous Offences Act in order to prevent absurdity. Every statutory provision must be read in the light of common sense and common sense dictates that it Is not every full throated bark of an agitated great cane which must render its owner liable to criminal prosecution. Every dog owner must appreciate the possibility, even the probability, of his dog barking if disturbed at night. It might be argued therefore that all dog owners have constructive knowledge that their charges will bark. It is, however, absurd to suggest that the provision, in its practical application automatically renders dog owners liable to prosecution whenever their charges bark. The Legislature could never have intended this. Common sense dictates that there must be some limitation. It is perhaps, more difficult to suggest what this limitation is but I suggest that the test must be based squarely on what is reason able in the circumstances. If an owner has good and sufficient cause for believing that prowlers are abroad at night, he is surely to be excused if he allows his dog more licence than usual even if the comfort of his neighbours is threatened by a certain amount of inevitable barking. One can, without too much difficulty, conjure up other examples which illustrate the point forcibly. Imagine if the accused had seen a housebreaker emerge from the complainant's house bearing the family jewels. Pablo might have been of great assistance and the noise he would have made in rendering a service to the community would neither be here nor there. To suggest in these circumstances that the accused was guilty of an offence is patently absurd.
>
> The accused, in my view, acted completely reasonably on the night in question. He suspected on excellent grounds that a prowler was at large. The obvious thing to do, surely, was to let his large dog act as a deterrent. He would not have been very popular if he had incarcerated Pablo in the kitchen and his neighbour's house had been broken into shortly thereafter. I cannot believe that the Legislature intended to penalize a course of action

Copyright Juta & Co Ltd

which was designed not only to safeguard the security of his own home but also that of his neighbours' homes."



GUBBAY J

This reasoning is cogent and I agree with it. It accords with the well established principle in the law of nuisance that annoyance or inconvenience of considerable proportion will not be actionable if temporary and reasonable in the circumstances, See *Harris v Southwark am Vauxhall Water Company* (1891) 2 Ch. 409 at 414; *Winfield and Jolowicz on Tort*, 9th Ed. at 337. The culpability, therefore, of the owner of a yapping, whining or barking dog must be judged in each case by what was reasonable in the particular circumstances.

The conviction and sentence are accordingly set aside.

**Newham J:** concurs.



## COHEN v COHEN 1980 ZLR 286

**Court** **Appellate Division, Salisbury**

Application in limine

Fieldsend CJ, Lewis JP and Goldin JA

21st July and 15th August, 1980

### Flynote

Appeal - peremption of appeal - differing views of authorities - finality of peremption - Court to be clearly satisfied that appellant has abandoned right to appeal - no special rules - approach is whether appellant debarred by express or implied agreement, waiver or estoppel.

### Headnote

In the Court *a quo* the appellant was found to have breached the terms of a consent paper and to be liable to repay certain maintenance instalments she had already received. On the 8th November, 1979, the appellant's attorney advised the respondent's attorney that the appellant was prepared to sell assets to realize the amount owing or to transfer the assets direct to the respondent. On the 13th November, 1979, the respondent replied seeking to take transfer of assets not mentioned by the appellant or to receive repayment by the 20th November, 1979. The appellant in turn indicated a willingness to have these assets valued, pointed out that no expert valuator was immediately available, but doubted whether the assets would be worth $50 000 which was the amount of maintenance required to be repaid. An appeal was noted on the 20th November, 1979, and the respondent contended that in view of the unequivocal acceptance of the judgment of the Court a quo the right to appeal had been perempted.

*Held* that since the case law, particularly *Bongers v Ekstein,* 1908 TS 910, *Clarke v Bethal Co-operative,* 1911 TPD 1152 and *Hlatshwayo v Mare and*

Copyright Juta & Co Ltd

*Deas*, 1912 AD 242, contained so many differing approaches as to when an appellant should be deprived of the right of appeal, a logical and workable basis for the doctrine of peremption should be sought.

*Held,* further, that although the word acquiescence Is frequently used in the judgments, it is not a concept with particular rules of its own. It is quiescence in such circumstance that assent may readily be inferred and is no more than an instance of estoppel by words or conduct.

*Held,* further, that no special rules are applicable to the peremption of an appeal. But since peremption entirely takes away the right of appeal, the Court must be clearly satisfied that the appellant has abandoned his right. The proper approach is to consider whether, applying the ordinary and well-recognized law governing agreement, express or implied, waiver or estoppel, a person is to be debarred from his right of appeal.

Cases and authorities cited:

*Bongers v Ekstein (supra*);

*Clarke v Bethal Co-operative Society* (*supra)*;

*Hlatshwayo v Mare and Deas* (*supra)*;

*Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Greenpoint) (Pty) Ltd,* 1974 (2) SA 125 at 136;

Halsbury's *Laws of England,* 4th Edition, Vol. 16 para. 1473;

*Meiklereid v Bank of South Africa,* 1905 TS 749,

*JC Andersen SC*, with him *IA Donovan*, for the appellant: The affidavits filed by appellant and her attorney in connexion with the application for the dismissal of the appeal on the grounds that appellant has perempted it establish that there was no intention on appellant's part to abandon her right. Appellant's attorneys accordingly had no authority to represent that appellant intended to acquiesce in the judgment. (*Powell v Troyeville Garage and Motor Works,* 1927 TPD 372.)

In any event the letters written on appellant's behalf were not consistent only with an intention to acquiesce in the judgment. They were equally consistent with an intention to ascertain the manner in which the judgment might be satisfied if appellant did not appeal in order to avoid execution. (*Hlatshwayo v Mare and Deas* (*supra)* and *Dabner v SAR & H* 1920 AD 583 at 584.)

*R J Goldstone SC*, with him *B W K Whaley*, for the respondent: If, with knowledge of the judgment against her, Plaintiff has subsequently acted in an unequivocal fashion wholly inconsistent with an intention on her part to appeal against that judgment, then she has perempted her right to appeal. (*Hlatswayo v Mare and Deas (supra)*.)

It is an established principle of our law that a person who has acquiesced a judgment cannot thereafter appeal against it; and when once the appeal has been perempted, that is an end of

Copyright Juta & Co Ltd

the matter.



> "If, therefore, the party against whom judgment has been given had once acquiesced in it, his right to re-open it is lost".

(Ibid, at pages 252-253 Solomon, J).

> "In my opinion the effect of the authorities on this subject is to show that when once a party to an enactment has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it. I do not think that in order to show acquiescence on the part of any person it is necessary to prove an agreement between the parties that the appeal should be abandoned; or that his conduct has been such as to estop him from denying that he has acquiesced in the judgment; or even that he has in fact abandoned any intention of appealing provided only that his conduct has been such as to lead to the clear conclusion that he does not intend to assail the judgment".

(Ibid. at pages 253 to 254 Solomon, J) (Our emphasis.)

The actions which are relied upon as constituting peremption, must be viewed in the light of all the circumstances which prevailed at the time the action was taken. Thus satisfaction of a judgment in whole or in part may or may not constitute peremption depending upon the circumstances. If the payment was made under a threat of a writ of execution, it may have been done for one of two reasons:

(a) With the object of avoiding the annoyance and expense of an execution, but without any intention of abandoning the right to appeal. In that event it cannot be said that the act is such an unequivocal one that the other party is justified in drawing the inference that there has been an acquiescence in the judgment See *MacLean v Haasbroek, NO & Ors,* 1956 (43 SA 677 AD at 686E.

(b) With the object of satisfying the judgment and so putting an end to the litigation. This would clearly constitute peremption. So, too, if before the judgment was satisfied, whether in whole or in part, execution upon such judgment had been stayed, then clearly the payment was such an unequivocal act that the only reasonable inference that could be drawn from it was that there was an intention to acquiesce in the judgment. In these circumstances also the action would amount to a peremption. (Ibid at pages 254 to 255, per Solomon J). See also *Middleburg Coal Agency v Solomon & Co*, 1914 AD 417.

If a person voluntarily chooses to do an act which is clearly inconsistent with his right of appeal, he is thereby presumed to have consented to the judgment. The Court must be satisfied that he has done an act



FIELDSEND CJ

Copyright Juta & Co Ltd

which is necessarily inconsistent with his continued intention to appeal.

This is a matter of [act to be decided in the circumstances of each particular case. Ibid., page 259, per J De Villiers JP.

In the present case it is submitted that appellant, with full knowledge of the terms and effect of the judgment against her, conducted herself in a manner which was necessarily inconsistent with an intention on her part to appeal against the judgment.

## Judgment

**Fieldsend CJ:** This is an application *in limine* for an order that the appeal noted by the appellant be dismissed on the grounds that it has been perempted.

The trial was concerned with whether the appellant had materially breached the terms of a consent paper settled by the parties and made an order of Court in earlier divorce proceedings between them on the 19th of January, 1979. The issues were detailed and personal and involved the relationship between the parties themselves and their separate relations with the minor children of the marriage. The action was bitterly contested. In the event, the appellant was found to have breached the agreement in certain particulars and to have forfeited her right to the outstanding balance of $200 payable by instalments in terms of the agreement, and to be liable to repay the instalments paid to her after the 9th of February, 1979.

Judgment in the present matter was given on 7th November, 1979, and on 8th November the appellant's attorney wrote to the respondent in the following terms:

> "According to our calculations, a sum of $43 750 is due for repayment to your client In terms of this order. Our client has instructed us to state that, in compliance with the Court's order, she will arrange to effect repayment to your client of this amount. This will entail her realizing assets to this value, which she is preparing to do, and she has made preliminary arrangements to this end. However, your client has on a number of occasions in the last few months sent messages to our client via Sharon and otherwise, to the effect that, in the event of his succeeding in the action, our client should not dispose of assets for the purpose of repaying him, but should transfer the assets them selves to him. In view of these statements, our client is prepared to offer him the following movables in satisfaction Of the debt at the valuations set out below, which are firm valuations received by her recently in respect of the items:

| | |
|---|---|
| Mercedes 450 motor car | $27 000 |
| Large Persian carpet | 6 500 |
| Emerald ring | 10 000 |
| | $43 500 |



FIELDSEND CJ

> Would you please let us know, at your early convenience, whether your client is prepared to accept these movables in satisfaction of the capital debt due under the judgment, whereupon our client will transfer them to him forthwith. If he is not prepared to do so and requires payment in cash, our client will make arrangements for the

Copyright Juta & Co Ltd

> sale of the movables, but this would obviously take time: she will defer any arrangements for their sale pending hearing from you."

On 13th November, respondent's attorney replied stating that the sum due was $50 000 and rejecting the over of the motor car. He suggested that his client "may be prepared to take certain Persian carpets to a value of $50 000, hut the value must be fixed by a reputable firm, which we submit would be a fair basis for both parties. If your client is not prepared to agree, then our client would like repayment by no later than the 20th instant."

On 19th November, appellant's attorney replied accepting that the sum due under the judgment was $50 000, continuing:

> "We note that your client is not prepared to accept the offer of the goods listed in our earlier letter. With regard to the proposal that your client would accept some Persian carpets up to the value of $50 000, our client understands that there is only one acceptable and reputable valuer of Persian carpets in Salisbury and that he is at present, out of the country until about the end of this month. Our client would be quite prepared to have the carpets in her possession valued by this person on his return, but she is in doubt as to whether these carpets would be worth the $50 000 or anything close to it. However, she suggests that your client should leave the offer open until after this valuer has returned to "Salisbury, when arrangements can be made for him to view and value the carpets."

When the appeal was noted on the 20th of November, the respondent's attorneys wrote that in view of the unequivocal acceptance of the judgment of the Court *a quo* as appeared from the letters, they considered that the right of appeal had been perempted, and this is now the respondent's contention. The doctrine of peremption of an appeal does not appear to have been discussed in any cases in this country and even modern South African authority is somewhat scanty. The earlier cases are collected and considered in two Transvaal decisions, *Bongers v Ekstein,* 1908 TS 910 and *Clarke v Bethal Co-operative Society,* 1911 TPD 1152. These in turn were referred to in *Hlatshwayo v Mare and Deas,* 1912 AD 242.

In *Bongers v Ekstein (supra*) WESSELS J, found the underlying principle in the Code (7.52.5) to be that the party who acquiesced in a judgment was debarred from an appeal since the principle of *res judicata* did not allow a judicial act when once determined to be revised. The



principle had been adopted by *Voet* (49.1.2) and the learned judge concluded that in the Transvaal a party litigant who did an act by which he indicated to the other party that he had acquiesced in the judgment was deprived of the right of appeal. There then followed a discussion of what might and what might not constitute acquiescence with reference to earlier decisions in the Cape, Natal and the Free State. The conclusion reached by the full Court, which included MASON and BRISTOWE JJ, was that the payment of the costs that the appellant had been ordered to pay in litigation in which he had been successful, precluded him from appealing against that order, though it was admitted in argument that the judgment for costs should have gone in his favour.

*Clarke v Bethal Co-operative Society (supra)* was a case in which it was contended that there had been peremption of an appeal by reason, first, of the conduct of the appellant's attorney in

**Copyright Juta & Co Ltd**

giving notice that he would bring in review the taxation of the hill of costs of the action on the ground that he had not had sufficient notice of the taxation, and secondly by reason of the appellant handing the messenger of Court a post-dated cheque for the amount of the judgment and costs when the messenger was seeking to effect execution. The Court had little difficulty in finding that the payment was not a voluntary payment but more difficulty in regard to the effect of the conduct of the attorney in giving notice of his intention to bring in review the taxation.

Both DE VILLIERS JP and BRISTOWE J, reviewed the authorities and gave some attention to the principles involved.

DE VILLIERS J P, at p. 1158 said:

> "The authorities are all agreed on one point, namely, that there must be either an express or an implied agreement between the parties not to pursue the appeal. If there is no express agreement, the appellant must have so conducted himself that his acts, when fairly construed, necessarily lead the Court to the conclusion that he has impliedly agreed with the other side not to prosecute his appeal. That is the law as it is laid down in the *Code* (7.52.5), and by *Voet* (49.1.2). *Voet's* actual words are: "A person cannot prosecute an appeal when he has approved *(comprobaverint)* of the sentence'. *Van der Linden,* on the other hand, uses the word *'homologatie',* which also means an agreement. *Merlin,* in his *Repertoire de Jurisprudence* (Vol. 1, p. 132, *sub voce 'acquiescement'*) defines acquiescence generally as the agreement which one or the other of the parties has come to in regard to a proposition, a clause, a condition, a judgment, or any other act whatever, and he goes on to say that no formal act is necessary to constitute acquiescence; it is sufficient if it results necessarily from the conduct of the parties."

BRISTOWE J, said at p. 1160:

> "The law with regard to peremption is stated by Baron Parke, in the case of *The Ship 'Clifton'* (12 Eng., Rep. 696), in this way: 'He' (the appellant)'has so

---



FIELDSEND CJ

> conducted himself as to induce the Court and the opposing party to believe that he had no intention of appealing, and to act upon that supposition; and by that conduct he must be bound.' That, I think, is a correct statement of the law, and it certainly is the way in which the law was put in the case of *Bongers vs Ekstein*. The question of the peremption of an appeal is part of the doctrine of election, which was dealt with by the Court in the cases of *Angehrn and Piel vs Federal Cold Storage Co Ltd* (1908, TS 761), and is simply this: that where a man has two courses open to him, and he unequivocally takes one, he cannot afterwards turn back and take the other. Where there has been no unequivocal act, then whether an election has taken place or not is a question of fact.",

and at p 1161:

> "I have been carefully through the cases on this subject, and I have not found any where a mere expression of intention, not carried out, has been held to perempt an appeal. I can quite understand that an expression of intension, if made under circumstances amounting to a contract, would have the same effect as an unequivocal act. But a mere statement of intention, unless and until acted upon, is not in my judgment an unequivocal act. It may be revoked; there is a *locus poenitentiae*; and it is not final. I agree with the Judge President in thinking that we ought not to carry this doctrine beyond the limits of the doctrine of election."

These two important decisions were considered in *Hlatshwayo v Mare and Deas,* 1912 AD 242. This case concerned the question whether by making two payments after the issue of a writ of

---

**Copyright Juta & Co Ltd**

execution, on account of a judgment by default the defendant lost his right to reopen the judgment on showing reasonable cause. It was held that the appellant's conduct in these circumstances did not preclude him from reopening the judgment. It will be seen therefore that the case does not deal directly with the peremption of an appeal although decisions relating to this topic were fully considered. Relying on the same passages from the *Code* and *Voet* as did WESSELS J, in *Bongers v Epstein* LORD DE VILLIERS said at p. 248:

> "The principle to be extracted from the passage in the *Code* appears to me to be this, that a person may, by reason of conduct which is wholly in consistent with any intention to attack it, be held to have acquiesced in it and waived his right of appealing against it."

In referring to *Clarke v Bethal Co-operative Society* (*supra)* he said:

> "I agree with the Judge President that a person can only be deprived of his right of appeal upon proof of his waiver of that right, and that acts which are consistent with a continued exercise of such right do not constitute such waiver."

SOLOMON J, dealt with the question at p. 253:

> " . . . in my opinion we are bound to hold that under our law by acquiescence in a judgment the right to appeal from it is perempted. And when once the appeal has been perempted, there is an end of the matter; there is no



> going back from that position. As was said by Dr. Lushington in delivering the judgment of the Privy Council in the case of '*The Hydroos*' (18 Engl. Rep., 847), 'We apprehend that the effect of perempting the appeal is entirely to take away the right of the appellants to appeal at all, and that nothing that is hereafter done can restore the appellants to the condition in which they were before the time when the act of peremption took place.' And that being so, it is of the utmost importance that the Court should be clearly satisfied that there has been acquiescence in a judgment before it decides to debar any party to an action from exercising a right which is conferred upon him by the law."

And he continued:

> " . . . the important question arises as to what is meant by a party to an action acquiescing in the judgment. In my opinion the effect of the authorities on this subject is to show that when once a party to an action has done an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it. I do not think that in order to show acquiescence on the part of any person it is necessary to prove an agreement between the parties that an appeal should be abandoned; or that his conduct has been such as to stop him from denying that he has acquiesced in the judgment or even that he has in fact abandoned any intention of appealing, provided only that his conduct has been such as to lead to the clear conclusion that he does not intend to assail the judgment. The only instance of acquiescence given in the *Code* is that of a person asking for time for payment. Nothing is there said about an agreement between the parties that time should be given, nor is it suggested that it is necessary that his request for time should have been acceded to. It is his act which is looked at, not that of the other party; it is his state of mind as to which an inference has to be drawn."

Finally the reasoning of DE VILLIERS JP, at p. 259 is as follows:

> "A person has the right to re-open the case or to appeal; he voluntarily chooses to do an act which is clearly inconsistent with this right, and he is therefore presumed to have consented to the judgment. Whether then we

Copyright Juta & Co Ltd

base the doctrine of acquiescence on the consent which is implied or the choice which is exercised, or call it waiver makes no difference. At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate. This being so there is no doubt of the actual minimum which is required by our law in order to constitute acquiescence. And that is: before a person can be said to have acquiesced in a judgment, and thereby to have lost the right of re opening a case or of appeal, a right which he clearly has or at all events had, the Court must be satisfied upon the evidence that he has done an act which is necessarily inconsistent with his continued intention to have the case re opened or to appeal."

To summarize the differing approaches -

(a) WESSELS J, in *Bongers v Ekstein* (*supra)*, at p. 913 said that if a party litigant does an act by which he communicates to the



FIELDSEND CJ

other party that he acquiesces in the judgment he is deprived of the right to appeal;

(b) MASON and BRISTOWE JJ, in the same case merely decided that to satisfy a judgment without any reservation of rights was inconsistent with an intention to appeal from it;

(c) DE VIEWERS JP, in *Clarke v Bethal Co-operative Society (supra),* at p. 1158 indicated that the authorities required either an express or an implied agreement between the parties:

(d) BRISTOWE J, in the same case at p. 1161 appeared to require either an expression of intention made under circumstances amounting to a contract, although he also referred to the doctrine of election. Election, he said, required an unequivocal choice of one of two alternative courses.

(e) SOLOMON J, in *Hlatshwayo v Mare and Deas* (*supra)*, at p 253 appeared to go very much further in that he rejected the idea that any agreement was necessary or that the conduct need amount to an estoppel. He considered that only the one party's act need be looked at, and if that led one to the conclusion that he did not intend to appeal that was sufficient.

In view of the very brief reference in the early authorities as to the underlying basis upon which peremption operates, and the differing views of those judges who have considered the authorities, I think one is entitled to look afresh at the question to seek a logical and workable basis for the doctrine.

The word "acquiescence" occurs in many of the judgments, but so far as I have been able to ascertain this is not a concept with particular rules of its own. The concept of acquiescence, as distinct from express or implied agreement, is not one that derives from the early Roman-Dutch law. It found its way into our system from English law where it is one of the equitable defences. *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Greenpoint) (Pty) Ltd,* 1974 (2) SA 125 at p. 136. Acquiescence in English law is dealt with succinctly in Halsbury's *Laws of England,* 4th Edition Vol. 16 para. 1473 where it is said that doctrine of acquiescence may be defined as

Copyright Juta & Co Ltd

quiescence in such circumstances that assent may readily be inferred and is no more than an instance of estoppel by words or conduct. It is, of course, an essential element of estoppel that the other party must expend money or do some act on the faith of the mistaken belief induced in him by the conduct of the person



FIELDSEND CJ

sought to be estopped. This is the approach applied in the English case relied upon by BRISTOWE J, in *Clarke v Bethal Co-operative Society,* (*supra)*, at p. 1160.

There is then no magic in the use of the word "acquiescence" in the judgments. As a matter of principle, I can see no reason for requiring special rules in regard to the peremption of an appeal, save that as SOLOMON J, said, since peremption entirely takes away an appellant's right of appeal it is of the utmost importance that the Court must be clearly satisfied that an appellant has abandoned his right. What is, I think, misleading in some of the judgments is the stress placed on the example in the *Code,* adopted by *Voet,* that a person who asks for time to pay a judgment has acquiesced in the judgment. I do not think that this example should be elevated to a principle: each case must be looked at on its merits.

It is worthy of note that the only reported cases in which a person has been deprived of his right of appeal by peremption have been those where the person seeking to appeal has either claimed and received the benefit of a judgment - *Meiklereid v Bank of South Africa,* 1905, TS 749 - or has paid either the judgment debt or costs - *Bongers v Ekstein (supra)*. The latter is a particularly clear case. A successful plaintiff who had obtained judgment for £10 had been ordered to pay the defendant's costs, against which order he would have had a good appeal. Nevertheless, he paid the defendant's costs, having set off against them the amount of the judgment in his favour.

A study of the cases as a whole does not lead me to the conclusion that we are bound to hold that there are any special rules by which a person may be deprived of his right of appeal by peremption. The proper approach is to consider whether, applying the ordinary and well-recognized law governing agreement, express or implied, waiver or estoppel, a person is to be debarred from his right of appeal.

Mr *Goldstone*, for the respondent, did not put his case upon agreement, waiver or estoppel, but relied firmly upon the special doctrine of peremption as discussed in *Hlatshwayo's* case, *(supra)*. The affidavits in support of the application *in limine* did not canvass the question of the respondent having acted to his prejudice on the faith of either of the appellant's attorney's letters, nor was it alleged that the respondent had accepted any undertaking by the appellant not to proceed with the appeal.

In the affidavits filed for the appellant there were clear statements that before the letter of 8th November was sent, the question of an appeal was



Copyright Juta & Co Ltd

under consideration and that the views of counsel were to be sought. There was therefore no question of the appellant intending to abandon her right of appeal. Had the offers made in either of the letters of 8th or 19th November been accepted different considerations would have applied.

As it is I do not think that, read with the affidavits, either of the letters or the two letters taken together show that there was either a waiver of the appellant's right of appeal or an agreement that the appellant would not proceed with the appeal. As I have said there was no reliance on estoppel.

In my judgment there has been no peremption of the appeal and the application *in limine* must be dismissed with costs.

[The remainder of the judgment is not material to this report. - *Editor*.]

**Lewis JP:** I agree.

**Goldin JA:** I agree.

*Atherstone and Cook,* attorneys for the appellant.

*Kantor and Immerman,* attorneys for the respondent.

---

1980 ZLR p296

## ROBERTS v BRIAN MURPHY MOTORS (PRIVATE) LIMITED 1980 ZLR 296

**Court** **General Division, Salisbury**

Civil Exception

Beck, J

4th July and 20th August, 1980

### Flynote

Contract - mere not according with description in contract - whether contract unequivocally deprives purchaser of cause of action - declaration that seller has made no warranty as to date of manufacture - contract to be interpreted as a whole - limitation to be read into warranty where it conflicts with agreed description - declaration might ground an estoppel.

### Headnote

The plaintiff purchased a motor car from the defendant and the terms of the agreement read that the car was assembled and first registered in 1974. At the foot of the agreement were two "declarations" each warranting the truth of the particulars contained in the agreement and signed by the purchaser and the motor trader respectively. The purchaser (plaintiff) signed a further "declaration" to the effect that the seller (defendant) had not made any

---

Copyright Juta & Co Ltd

BECK J

representations as to, among other things, the date of manufacture and first registration of the vehicle. Defendant excepted to plaintiff's declaration, relying on this acknowledgement as annulling plaintiff's right to claim that the car delivered to him did not conform with the *merx* described in the agreement. The plaintiff based his action on the claim that the car delivered was a 1972 - model car.

*Held* that it was doubtful whether the "warranties" contained in the "declarations" were intended to be terms of the contract. However, assuming that plaintiff's acknowledgement that the defendant had made no representations as to the year of assembly of the car, were a part of the contract, *non sequitur* that plaintiff deprived himself of his right to complain of breach of contract. A contract must be interpreted so as to give effect to all the terms if that is possible. plaintiff's acknowledgement therefore had to be construed as if it contained the limitation "except in so far as any such warranty is expressly incorporated elsewhere in this agreement".

*Held,* further, that the acknowledgement could, in the proper circumstances, ground an estoppel.

Cases cited:

*Grosvenor Motors (Border) Ltd v Hisser,* 1971 (3) SA 213 (E);

*Sprite KM (Pvt) Ltd v Tawurai,* 1961 (2) SA 724 (SR);

*Elderslie Steamship Co Ltd v Borthwick* [1905] AC 93;

*Lowe v Lombank Ltd* [1960] 1 All ER 611 (CA).

*C L Mercer,* for the excipient (defendant).

*1 A Cordovan,* for the respondent (Plaintiff).

## Judgment

**Beck J:** The plaintiffs declaration, to which the defendant has excepted, contains the following averments:

"3. On 8th February, 1979, at Salisbury and in terms of a written agreement of sale, a copy of which is annexed hereto, Plaintiff purchased a vehicle from Defendant.

4. In terms of that agreement Defendant expressly warranted, *inter alia,* that the vehicle was assembled (and first registered) in 1974.

5. The vehicle was assembled (and first registered) in 1972.

6. As a result of Defendant's breach of warranty as aforesaid, Plaintiff paid Defendant a price of $3 000 in excess of the market price of the vehicle, on which amount Plaintiff paid sales tax of $450 and finance charges of $1293,60.

7. In the premises and as a result of Defendant's breach of warranty, Plaintiff has suffered damages in the

Copyright Juta & Co Ltd

sum of $4 743,60."

The exception reads:

"Defendant excepts to Plaintiff's declaration in that paragraph 4 thereof is contradictory to the purchaser's acknowledgement in Annexure 'A', and in particular to the following words:



BECK J

'Neither the seller nor any servant or agent of the seller or other person acting on the seller's behalf has given or made any representation or warranty to me as to the condition, history, date of manufacture or first registration in Rhodesia . . . '.".

The agreement is contained in a printed form issued by a financial institution to which the agreement was ceded by the motor trader as seller after it had been concluded. The face of this document records as a preamble to the contract that it is an "agreement entered into under the Hire - Purchase Act [*Chapter 284*]" between the seller and the purchaser "whereby the Seller agrees to sell to the Purchaser who agrees to buy the goods set out in Part I of the Schedule below for the purchase price stated and in the manner set forth in Part II of the Schedule subject to the terms and conditions set forth on the back here of".

Part I of the Schedule describes the vehicle as a used BMW 2500, Automatic; it records the engine, chassis and registration numbers of the car, and it gives 1974 as the year of first registration and of assembly

Part II of the Schedule sets out in detail the total purchase price and terms of payment by way of an initial cash amount plus an agreed allowance for a 1973 Renault R12 traded in by the purchaser, to be followed by stated monthly instalments over the next five years

*Ex facie* the written contract, parts I and II of the Schedule reflect the agreement between the parties regarding the *merx* and the *pretium*. The agreed *merx* that the motor-trader as seller was oblige to deliver was stated in the contract to be a 1974 model automatic BMW 2500. The car in question however, being an older model, does not accord with that agreed description. If the purchaser can show that he has suffered any damages by reason of the seller's breach in delivering a 1972 model car he will have established a cause of action *(Grosvenor Motors (Border) Ltd v Visser,* 1971 (3) SA 213 (E)), unless the contract contains a term that unequivocally deprives the purchaser of that right

None of the other terms and conditions governing the contract and contained on the back of the printed form are inconsistent with this right. On the fact of the printed form however, beneath the Schedule, are two "Declarations", one by the purchaser, the other by the motor trader. Both declarations are clearly made primarily for the benefit of, or in the interests of, the financial institution as the cessionary of the seller's right under the agreement and do not expressly purport to be terms of the agreement itself between the motor-trader and the purchaser, which terms are, as I have said, contained in the Schedule and in the

Copyright Juta & Co Ltd

BECK J

further provisions set out on the reverse of the printed form. Both declarations warrant the truth and correctness of the particulars contained in the Schedule and contain affirmations concerning the ownership of the *merx* and of the goods traded in and of due compliance with the relevant provisions of the Hire-Purchase Act. The purchaser's declaration contains in addition an acknowledgement, printed in bolder type, that the purchaser's attention was drawn to a voetstoots clause contained among the conditions on the reverse of the form (this acknowledgement is obviously made with an eye to section 11 (3) of the Hire - Purchase Act - cf. *Sprite KM (Pvt) Ltd v Tawurai,* 1961 (2) SA 724 (SR), as well as further acknowledgements that: (a) the purchaser has satisfied himself that the *merx* is in good order and condition and fit for the purpose for which it is required, and (b) that "neither the seller nor any servant or agent of the seller or other person acting on the seller's behalf has given or made any representation or warranty to me as to the condition, history, date of manufacture or first registration in Rhodesia, state or quality of the goods resected in Part I of the Schedule or of their fitness for any purpose whatsoever".

It is this last-mentioned acknowledgment on which the excipient relies as annulling the purchaser's right to complain that the car delivered to him does not conform with the *merx* that is described in the contract.

The excipient's contention would be tenable if the plaintiff (purchaser) were relying on an antecedent innocent misrepresentation, that induced him to buy the car, to the effect that it was a 1974 model. Paragraph 4 of the plaintiff's declaration, however, alleges that *"in terms of the agreement* the defendant expressly warranted that the vehicle was assembled (and first registered) in 1974", and I understood Mr *Mercer,* who appears for the excipient, to accept that the express "warranty" that has thus been pleaded has been pleaded in the sense of it being an express term of the contract itself, and not merely an antecedent representation. It seems likely that the pleader, in using this phraseology, had in mind that portion of the "declaration" by the motor-trader, contained on the face of the contract and referred to above, in terms of which the motor-trader "warranted", *inter alia*, the correctness of the particulars contained in the Schedule, including therefore, the correctness of the statement in part I of the Schedule that the car was a 1974 model. It is doubtful, as I have already said, whether the "warranties,, contained in this "declaration" by the motor-trader were intended to be terms of the contract between the motor-trader and the purchaser, but, be that as it may, since the description of the car as a 1974 model appears in part I of the Schedule wherein the *merx* is described it may, *prima facie* at least, be assumed that it was



BECK J

intended to be a term of the contract that the car which the seller had to deliver was to be a 1974 model, just as much as it was a term of the contract that the car was to be an automatic BMW 2500.

Copyright Juta & Co Ltd

Just as it is doubtful whether the "warranties" contained in the motor trader's "declaration" were intended to be terms of the contract between the motor-trader and the purchaser, so it is doubtful whether the representations, warranties and acknowledgements contained in the purchaser's "declaration" were intended to be terms of that contract. The primary purpose of both "declarations" appears to be to govern the relationships between the motor-trader and the purchaser on the one hand and the financial institution as cessionary of the motor-trader's rights on the other hand. But even if it be assumed that that portion of the purchaser's acknowledgement on which the excipient relies is to be regarded as a term of the contract between the motor-trader and the purchaser, as Mr *Mercer* contends it should be regarded, it does not follow that the purchaser thereby deprived himself of his right to complain that the seller breached the contract by falling to deliver a 1974 model. The contract must be interpreted as a whole and every term of it must be interpreted in the light of other terms, whether they precede it or follow it. *"Incivile est. nisi tota lege perspecta, una aliqua particula eiders proposita, judicare vel respondere."* (D. 1.3.24). The maxim *"ex antecedentibus et conse quentibus est optima interpretatio"* requires that "One rule of construction which must prevail is that you must give effect to every part of a document if you can-you must read it as a whole . . . We must remember that this is one contract, and each of the parts of this contract must be read so as to give effect to the whole if you can." (Per Earl of Halsbury LC in *Elderslie Steamship Company Limited v Borthwick* [1905] AC 93 at 96.) Reconciling the portion In question of the purchaser's acknowledgment with the expressly agreed description of the *merx* requires the acknowledgment to be construed as if it contained the limitation "except in so far as any such warranty is expressly incorporated elsewhere in this agreement." Such a construction does not render the acknowledgment nugatory but limits its operation to such warranties as are not expressly reflected in the agreement as terms thereof.

Another view of the matter however is that such an acknowledgment is not a part of the agreement in the sense of it being a term thereof, and can be no more than a representation which could, if other requirements are satisfied, ground an estoppel. In *Lowe v Lombank Ltd* [1960] 1. All ER 611 (CA) at 615-616A, DIPLOCK J, said:

> "In so far as it was a representation, it could operate only as an estoppel preventing the plaintiff from asserting the contrary, but counsel for the defen-



> dants expressly disclaims reliance on it as an estoppel, no doubt for the very good reason that there was no evidence (and it is difficult to see how there could have been truthful evidence) that the defendants believed in the truth of the representation. To call it an agreement as well as an acknowledgement by the plaintiff cannot convert a statement as to past facts known by both parties to be untrue into a contractual obligation, which is essentially a promise by the promiser to the promises that acts will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that the hirer 'agrees' that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted on by the person to whom the representation is made, believed to be true by such person and acted on by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligation. Although contained in the same document as the contract, it is not a contractual promise."

**Copyright Juta & Co Ltd**

No such estoppel of course, arises for consideration in these proceedings and it is hardly likely that any such estoppel would be pleaded or, if pleaded, could be proved, in view of the agreed description of the car as a 1974 model, a description certified by the motor-trader in his "declaration" as correct.

For these reasons I conclude that the plaintiff's declaration, despite the acknowledgment contained in the annexed agreement, discloses a cause of action.

Accordingly the exception is dismissed with costs.

*Coghlan Welsh and Guest*, attorneys for the excipient (defendant)

*Atherstone and Cook*, attorneys for the respondent (plaintiff)



## MPANDE v FORBES AND THOMPSON (BULAWAYO) (PRIVATE) LIMITED AND ANOTHER 1980 ZLR 302

**Court** **General Division, Bulawayo**

Civil Petition

Gubbay, J

8th and 22nd August, 1980

### Flynote

Practice and procedure - return day - confirmation of rule opposed - whether fair prospect of success.

Statute - Workmen's Compensation Act [Chapter 269] - additional compensation in terms of section 9 - dependent on fault - meaning of "due to" considered - eject of workmen's negligence.

Law Reform (Contributory Negligence) Act [Chapter 45] - no application.

Negligence - considered In relation to working conditions - eject of mere inadvertence or momentary forgetfulness.

### Headnote

The petitioner sought leave to continue, *in forma pauperis,* an action instituted against the first respondent and the Workmen's Compensation Commissioner for additional compensation in terms of section 9 of the Workmen's Compensation Act [*Chapter 269*]. The respondents opposed the confirmation of the rule on the ground that there was no fair prospect of the action succeeding. (*Drysdale v Chester and Pane,* 1940 SR. 4; *Hendricks v Van Biljon,* 1940 SR 118).

The petitioner and another lasher were lowered by skip to level 20 of the Vubachikwe Gold Mine. From there they descended a ladderway to the bottom of the shaft. The ladderway was only a matter of 11 inches from the nearest skip rail. A canvas duct connected to a fan at level 20, hung in close proximity to the ladderway, obstructing a person climbing the ladderway, if

Copyright Juta & Co Ltd

inflated. After working at the bottom of the shaft for some time the petitioner ascended the ladderway unimpeded by the canvas ducting for about 60 feet. Thereupon the ducting caused an obstruction, at which point the petitioner, to get around the ducting, placed his left foot and portion of his body into the path of the descending skip. The petitioner was severely injured and sought to recover additional compensation, basing his claim on the negligence of a servant of the mine in failing to ensure that the ladderway was fenced and free from obstruction. The respondents submitted that an effective cause of the accident was the petitioner's own negligence.

In terms of section 8 of the Act no liability for compensation arises save under the provisions of the Act. There is the *ordinary* compensation payable regardless of fault and there is the *additional* compensation dependent on fault.

---



GUBBAY J

*Held* that the phrase "due to" in section 9 means "caused by" *(Fred Saber (Pty) Ltd v Franks,* 1949 (1) SA 388 (AD) referred). Negligence on the part of the workman which is causally connected to the accident debars an entitlement to additional compensation for in such case the accident was "due to" not only the negligence of the employer, but to the workman's negligence as well.

*Held,* further, that the Law Reform (Contributory Negligence) Act [*Chapter 45*] has no application to claims for additional compensation.

*Held,* further, that in considering whether the workman was negligent, as opposed to merely forgetful or inadvertent, it is proper to pay regard to the actual conditions under which the workman was working.

*Held,* further, that since the petitioner did not exercise that degree of care which an ordinary prudent workman would have shown, his prospects of success in the trial action were so remote as not to justify the respondents incurring the costs of a pauper trial.

Cases cited:

*Drysdale v Chester and Payne* (*supra)*;

*Hendricks v Van Biljon* (*supra)*;

*Fred Saber (Pty) Ltd v Franks* (*supra)*;

*South African Railways and Harbours v Stoltz* 1951 (2) SA 344 (AD);

*Grace v Workmen's Compensation Commissioners and Anor,* 1967 (4) SA 37 (T);

*Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1934] 2 KB, 132 (CA);

*Caswell v Powell Duffryn Associated Collieries* [1939] 3 All ER 722 (HC).

---

**Copyright Juta & Co Ltd**

*A D H Lloyd,* for the appellant.

*C W Jordaan,* for the respondents.

## Judgment

**Gubbay J:** This is the extended return day of a rule rust granted at the instance of the petitioner, calling upon the respondents, who are his former employer and the Workmen's Compensation Commissioner, respectively, to show cause why he should not be granted leave to continue, *in forma pauperis,* an action instituted against them in teens of section 9 (2) of the Workmen's Compensation Act [*Chapter 269*], for the payment of additional compensation in an amount of $15 000. While accepting that the petitioner lacks the requisite means, the respondents oppose the confirmation of the rule on the ground that there is no fair prospect of the action succeeding. See: *Drysdale v Chester and Payne,* 1940 SR 4 at 7; *Hendricks v Van Billjon,* 1940 SR 118 at 121. Fortunately the determination of whether the privilege of litigating as a pauper is to be extended to the petitioner, turns on facts which are substantially undisputed.

During the afternoon of 26th May, 1975, the petitioner and another lasher were lowered by means of a skip down an incline shaft of the Vubachikwe Gold Mine to 20 level. From there they descended a ladder-



way, without encountering any impediment, to the bottom of the shaft, which was 50 feet above 21 level. The ladderway, which was secured to the floor of the incline shaft and immediately adjacent to the southern wall, was only 12 inches wide and 11 inches from the nearest skip rail. It was not fenced so as to prevent the possibility of encroachment into what is termed the winding compartment of the shaft and there were no warning signs prohibiting its use while skips were in motion. At the top of the ladderway, at 20 level, a fan had been installed and a considerable length of flexible canvas ducting suspended therefrom. This ducting throughout its length, was in close proximity to the ladderway, and when inflated with air from the fan, swelled in diameter to 15 inches. Its purpose was to ventilate the chutes below 20 level, which were being repaired with the use of oxy- acetylene torches. When inflated, but not otherwise, the ducting obstructed the passage of a person either ascending or descending the ladderway, at about 15 feet below 20 level.

For several hours the petitioner lashed spillage into the wince at the bottom of the shaft. The fan was not operating and it became extremely hot. At about 6 p.m., and in response to a request by the other lasher, the fan was switched on. Shortly thereafter the petitioner needed to fetch a pinchbar from 20 level for loosening the spillage. He ascended the ladderway quite unhindered for the first 60 feet by the inflated ducting suspended alongside it. Having then reached the point at which the ducting caused an obstruction, he decided to move around it. He took his left foot off the ladderway and placed it in the narrow space next to the rail of the skip. Owing to total darkness he was unable to ascertain how far up the shaft the obstruction extended. At the very moment portion of his body encroached into the winding compartment he was struck by the

Copyright Juta & Co Ltd

descending southside skip, the approach of which had been rendered inaudible by noise from the fan and other mining activity.

The petitioner sustained a severe injury to his spine which has caused permanent paralysis from the waist down. As a workman suffering a disablement as a result of an accident arising out of and in the course of his employment, he receives monthly compensation at the ordinary rate in accordance with the provisions of the Workmen's Compensation Act.

On 22nd February, 1978, the petitioner instituted his aforementioned action. In the declaration as amplified by further particulars, it is alleged that the collision with the skip was due solely to the negligence of the mine captain, being a person described in section 9 (1) (a) (ii) of the Act, or alternatively, to a patent defect in the condition of the premises within the meaning of section 9 (1) (b). The negligence relied upon is firstly, the



GUBBAY J

omission of the mine captain to ensure that the ladderway was fenced and free from obstruction, and secondly, the creation of an obstruction in the form of the inflated ducting which, in the absence of any fencing or warning not to use the ladderway whilst skips were in motion, caused the climber to move into the winding compartment. The patent defect relied upon is the positioning of the ducting by the mine captain, which when inflated obstructed the safe passage of a user of the ladderway, which was narrow and sited close to the track of the skip. In their plea, the respondents admit that the ducting, when, inflated constituted a patent defect but deny negligence on the part of the mine captain. They aver that the accident was caused solely by the petitioner's own negligence, or alternatively, by a combination of his negligence with either that of the mine captain or the patent defect in the condition of the premises.

Section 9 of the Act, where relevant, reads:

> "(1) Notwithstanding anything to the contrary contained in this Act, if a workman meets with an accident which is due-
>
> (a) to the negligence-
>
> (i) of his employer; or
>
> (ii) of a person entrusted by his employer with the management or in charge of such employer's trade or business or any branch or department thereof; or
>
> (iii) . . .
>
> (b) to a patent defect in the condition of the premises, works, plant or machinery used in such trade or business, which defect his employer or any person referred to in paragraph (a) has knowingly or negligently failed to remedy or caused;
>
> the workman or, in the case of his death as a result of such accident, his representative may . . . proceed by action in a Court of law . . . for further compensation in addition to the compensation ordinarily payable under this Act.

Copyright Juta & Co Ltd

. . . .

(2) If the Court is satisfied that the accident was due to any such negligence or defect as is referred to in subsection (1), it shall award the applicant such additional compensation as it would deem equitable to award as damages in an action at common law.

(3) . . . .

(4) . . . .

(5) . . . .

(6) In any action brought under this section on behalf of the dependents of a deceased workman in respect of an accident of which negligence on the part of the workman was a contributory cause, such negligence shall be no defence to such action."

---



GUBBAY J

Mr *Lloyd*, who appeared for the petitioner, argued that the right to additional compensation was not dependent upon the accident being *solely* due to either the negligent conduct of the employer or a patent defect. It sufficed if the accident had been *partly* due to either such negligence or defect. In my opinion this argument is not well founded.

In terms of section 8 of the Act no action at common law by a workman lies against his employer to recover any damages in respect of an injury resulting in the disablement or death of such workman arising out of and in the course of his employment, and no liability for compensation on the part of the employer arises save under the provisions of the Act. If an accident to a workman arising out of and in the course of his employment results in his disablement or death, he or his dependents are entitled to compensation under section 43 regardless of fault on the part of the workman or the employer, subject to certain limitations. This is the compensation *ordinarily* payable under the Act. But fault is made the criterion for the payment to the workman of *additional* compensation (not exceeding the amount of his pecuniary loss), under section 9. The accident must have been "due to" the negligence of the employer or someone for whose actions he is responsible, or to a patent defect in the condition of the premises which the employer has knowingly or negligently failed to remedy or caused. The phrase "due to", as used in the corresponding provisions of the South African Workmen's Compensation Act 1941, was construed in *Fred Saber (Pty) Ltd v Franks,* 1949 (1) SA 388 (AD). CENTLIVRES JA, remarked at 403:

"In legal language these words mean 'caused by', and consequently the enquiry under s. 43 is directed to ascertaining the cause of the accident. See Mey v South African Railways & Harbours, 1937 CPD 359 at p. 363. If the accident was, notwithstanding the negligence of the appellant, caused by the respondent's own negligence or if it was caused by the combined negligence of the appellant and the respondent, the respondent is not entitled to recover increased compensation under s. 43."

I respectfully wish to associate myself with this dictum. See also South African *Railways and Harbours v Stoltz,* 1951 (2) SA 344 (AD) at 352F, *Grace v Workmen's Compensation Commissioner, and Another* 1967 (4) SA 137 (T) at 139G-H. Clearly any negligence on the part of the workman, however slight, which is causally connected to the accident, debars an

---

Copyright Juta & Co Ltd

entitlement to additional compensation for in such a case, the accident was "due to" not only the negligence of the employer or the patent defect, but to the workman's negligence as well. This interpretation finds support in the wording of section 9 (6), for which there is no counterpart in the South African Act. If the Legislature had not intended the contributory negligence of a workman to be a complete defence to



GUBBAY J

an action brought by him or his representative under section 9 (2), it would have been quite unnecessary to have provided that where an action is brought on behalf of the dependents of a deceased workman, his contributory negligence is to be no defence to it. Although not so contended by Mr *Lloyd,* it is as well to point out that section 4 (1) of the Law Reform (Contributory Negligence) Act [*Chapter 45*], has no application to claims for additional compensation. See: *Grace*'s case, *supra,* at 140.

On behalf of the respondents Mr *Jordan* conceded for the purpose of these proceedings (but not in respect of the main action) the presence of effective negligence for the accident on the part of the mine captain. He grounded the respondents' opposition entirely on the submission that the petitioner had failed to show a fair chance of being able to prove at the trial that there had been no negligent conduct by him causative of the accident. In the light of Mr *Jordan's* approach it becomes unnecessary to consider the matter in relation to the admitted patent defect in the condition of the mine.

Mr *Lloyd correctly* submitted that it was important to adapt the standard of what is negligence to the facts and give due regard to the actual conditions under which the petitioner was working - to the dulling of his sense of danger through familiarity, repetition, noise, strain and fatigue. See *Flower v Ebbw Vale Steel, Iron & Coal Company Limited* [1934] 2 KB 132 (CA) at 140, *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 All ER 722 (HL) at 731 A-C and 739G-H. He argued that against this prevailing atmosphere, the act of the petitioner in moving into the winding compartment so as to overcome the obstruction to his ascent, was of a character which falls within the general category of forgetfulness/thoughtlessness or inadvertence. Considerable reliance was placed by counsel on the *Fred Saber* case, *supra*, where the facts were these: The respondent, Franks, was employed by the appellant to operate various power-driven wood-cutting machines In operating a particular circular saw, which had been installed in the workshop for no longer than ten days, he sustained an injury which necessitated the amputation of his right hand. The saw was set in an adjustable working table, one half being above the table and the remainder below it. A wheel by which the height of the table could be adjusted, was situate behind the lower portion of the saw, in such a position that an operator wishing to turn it had to put his hand around He unguarded blade. There was no warning notice of the peril. The respondent was accustomed to using similar machines in the workshop, all of which had proper guards to the saws beneath their tables, and



GUBBAY J

Copyright Juta & Co Ltd

where the danger lay above and not below the table. Invariably he adjusted the height of the table by moving the underside wheel without first switching off the machine. He had been operating such a machine immediately before the one at which the accident occurred. While in the process of cutting a piece of wood, he put his hand below the table of the unguarded machine in order to adjust the height. He was preoccupied with what he was doing. He did not look where he was putting his hand because at that moment he was unconscious of the fact that the machine was different from the others. His hand came into contact with the revolving blade. CENTLIVRES JA, with whom the remaining august members of the Court concurred, had little difficulty in holding that Frank's momentary forgetfulness could not be regarded as *culpa*. He reasoned at 406- 407 as follows:

> Here the respondent, a skilled workman, who was accustomed to perform what may be regarded as automatic actions when working on a machine, was unconscious of the danger in that he momentarily forgot that the circular saw under the table was unguarded . . . (How) would the average, prudent man have acted in the circumstances in which the respondent was placed? The respondent was accustomed to work with circular saws which were properly guarded below the table: indeed the presence of a machine in the workshop which did not have the same safeguard device as the other machines may well, in the circumstances, be regarded as being in the nature of a trap which would cause injury to the average prudent workman who, through being engrossed in his work, momentarily forgets that the saw beneath the table is unguarded. To a large extent skill is an acquired habit. If a workman had to stop and ponder each next move he would not be efficient. The more skilful he becomes in the manipulation of his tools, the greater will be the number of co-ordinated motions which he performs as reflex actions. In normal circumstanced those motions will be safe. If, however, the employer introduces into his factory something which is abnormal, dangerous and in the nature of a trap, it would be unreasonable to impute negligence to the workman if by reflexively and automatically going through motions, which are normally characteristic of the competent workman, he receives an injury."

In my view, the action of the petitioner in moving into the winding compartment is far removed from that of Franks placing his hand beneath the table. There was nothing involuntary or mechanical in what the petitioner did. He climbed the ladderway to a height of 60 feet before meeting the obstruction and then, on his candid admission, decided to move around it. Two other courses were open to him. He could have shouted for the fan to be switched off (but may not have been heard above the noise) and waited for the ducting to become deflated. He could have descended the ladderway. The decision he took was a deliberate and conscious one. He was aware of the proximity of the track of the skip to the ladderway and that skips were in motion at the time. He was



unable to see or hear if a skip were approaching. Nonetheless, and without knowing how far up the ladderway the obstruction extended, he projected part of his body into the winding compartment - something he had never done before.

Mr *Jordan* contended that contrary to the petitioner's act being the consequence of momentary forgetfulness or inadvertence, the indication is that as he had not been lulled into an assumption of safety, he deliberately chose to run a risk. I am inclined to agree. It seems to me that the petitioner did not exercise that degree of care which an ordinary prudent workman would have shown in the circumstances. In my view his prospect of success at the trial is so remote that it would be inequitable to make the respondents incur the inevitable costs of a pauper action.

**Copyright Juta & Co Ltd**

It follows that the rule *nisi* must be discharged, but in accordance with Mr *Jordaan's* intimation of the respondents' attitude, I make no order as to costs.

*Joel Pincus, Konson and Wolhuter*, attorneys for the petitioner.

*Calderwood, Bryce Hendrie and Partners*, attorneys for the first respondent.

*Webb, Low and Barry*, attorneys for the second respondent.



## SCOTRHO FINANCE LIMITED v RIDGEWAY 1980 ZLR 309

**Court** **Appellate Division, Salisbury**

Civil Appeal

Lewis, JP., Baron, JA and Goldin, JA

9th July and 25th August, 1980

### Flynote

Contract - suretyship - discharge of surety by creditor's negligence - creditor's duty not to diminish or destroy security - whether passive inactivity breaches duty - existence of duty is real issue, determined from all surrounding circumstances.

### Headnote

The appellant sold to a company a horse float and Jaguar car. The respondent bound herself in writing as surety and co-principal debtor. The company was placed in liquidation and the liquidator sold both the horse float and the Jaguar for amounts less than the amounts owing to the appellant. The



BARON JA

appellant sued the respondent for the balance. The respondent denied liability on the basis that the appellant negligently permitted the liquidator to sell both the horse float and the Jaguar at prices far below other firm offers.

Where it is alleged by a surety that he has been discharged from liability to the creditor by reason of the creditor's negligence, the surety has to establish that the creditor failed to carry out a duty expressly or impliedly placed upon him by contract or by law. It was agreed that mere passive inactivity did not breach that duty, relying on *Miller v Trust Bank of South Africa,* 1965 (2) SA 447 (I.).

*Held* that pre-occupation with the nature of the plaintiff's alleged conduct obscures the real issue. The real and over-riding principle applicable to all cases is whether or not in the

Copyright Juta & Co Ltd

circumstances of the particular case a duty exists. If a duty exists to protect or preserve the security, whether arising from contract or at law, it is irrelevant whether the conduct constituting the breach is active or passive,

*Held,* further, that the relationship between a creditor and a surety stems the first instance from the contract of suretyship read with the original agreement between the creditor and the principal debtor in addition the court must take into consideration all the surrounding circumstances, including provisions of the common law or statute, which might give rights to or impose duties on either party.

Cases and authorities cited:

*Miller v Trust Bank of South Africa* (*supra)*; discussed;

Halsbury's *Laws of England,* 3rd Edition, Vol. 18, para. 947,

*Wessel's Law of Contract in South Africa,* 2nd Edition, Vol. 2, para. 4341;

Caney, *The Law of Suretyship,* 2nd Edition at 133;

*Business Buying and Investment Co Ltd v Linaae,* 1959 (3) SA 93. (T).

*R R Horn SC*, for the appellant cited *The Law of Hire Purchase in South Africa; Diemont , Marais and Aronstam,* 4th Edition, 234, *Mars' Law of Insolvency in South Africa,* 6th Edition, 158; *Colonial Government v Edenborough,* 4 SC 290; and *Miller v Trust Bank of South Africa* (*supra)*.

*N J McNally* for the respondent cited *Wassenaar v SA Scottish Finance Corp Ltd,* 1961 (4) SA 526 (T); *SA Scottish Finance Corp Ltd v Wassenaar,* 1966 (2) SA 723 (AD); *Barnard v Centenary Finance Co (Pty) Ltd,* 1970 (1) SA 107 (T); *De Beer v Sergeant,* 1976 ;(1) SA 246 (T) and *Business Buying and Investment Co Ltd v Linaae (supra).*

## Judgment

**Baron JA:** The appellant (to which I shall refer as the plaintiff) sued the respondent (the defendant) in two separate actions in the magistrate's court. The issues in the two cases were for all practical purposes the same and they were argued together both in the court below





and before us; the only difference - and it does not affect the merits - is that in the one case the plaintiff applied for summary judgment whereas in the other it excepted to the defendant's plea.

The facts so far as they are revealed by the pleadings are these. By two separate agreements to which the Hire - Purchase Act [*Chapter 284*] applied, the plaintiff sold to Central African Vehicle Agencies (Pvt) Limited (the company) a horse float and a Jaguar car; the first agreement was entered into on the 26th January, 1978, and the second on the 24th February, 1978. On the 17th of March, 1978, the defendant in writing bound herself as surety *in solidum*

Copyright Juta & Co Ltd

and co-principal debtor with the company, renouncing the benefits of division and excursion, for the due and punctual payment by the company of all and any amounts due by it in terms of the hire-purchase agreements. The company failed to maintain its payments and was placed in liquidation in September, 1978. In the course of the liquidation, the liquidator sold both the float and the car for amounts less than the respective amounts owing to the plaintiff under the agreement; the plaintiff thereafter sued the defendant for the balances.

The defendant denied liability on the ground, in the case of the float, that the plaintiff had "negligently failed to take advantage of an offer obtained by the defendant to extinguish the liability of (the company) in full', and in the case of the Jaguar car that the plaintiff had "negligently failed to take advantage of firm offers obtained by or on behalf of the defendant" in stated amounts. The negligence was alleged to arise from the plaintiffs totally ignoring "fair, reasonable and firm" offers for the horse float and car. And in her affidavit in opposition to the application for summary judgment in the case relating to the Jaguar car the defendant alleged that the plaintiff, notwithstanding firm offers by two buyers found by the defendant, the one for $10 500 and the other for $11 000, gave his consent to the liquidator for the sale of the car to a used car dealer for $6 687 to the prejudice of the defendant. (There are curious discrepancies between the figures contained in this affidavit and those contained in the plea, but for the purposes of this appeal nothing turns on the point.)

The learned magistrate dismissed the exception in the one case and the application for summary judgment in the other on the ground that the plaintiff could, had it so chosen, have exercised its right under section 23 of the Hire - Purchase Act and so "placed himself in a position where he could probably have accepted any offer made for the goods if he had wished to, on the assumption that the liquidator or Master would have



BARON JA

allowed him to accept any genuinely advantageous offer". He held that the plaintiff, because it did not elect to follow this course, gave at least tacit to the sale of the goods for the lesser price. The plaintiff appeals.

Mr *Horn* on behalf of the plaintiff based his argument on the following submissions: that where it is alleged by a surety that he has been discharged from liability to the creditor by reason of the latter's negligence the surety has to establish that the creditor failed to carry out a duty expressly or impliedly placed upon him by the agreement of suretyship or by statute; and that in the instant cases the averments on the pleadings did not establish any duty on the part of the plaintiff to take steps to prevent the sale of the goods by the liquidator of the debtor company for an unreasonably low price, and in particular to exercise its rights under section 23 of the Hire - Purchase Act. Mr *McNally* on behalf of the defendant submitted that in the circumstances of the instant cases the question whether there was a duty of care on the part of the plaintiff is a question of fact not capable of determination on the pleadings as a matter of law either by way of exception or by way of summary judgment.

With certain qualifications which I will elaborate presently I accept Mr *Horn's* main submission; it is trite that there can be no liability in negligence unless there are established a duty of care and

Copyright Juta & Co Ltd

a breach of that duty. But Mr *Horn* appears to go further, and to submit that notwithstanding the existence of a duty on the creditor not to diminish or destroy the security, he is not liable to the surety for mere passive inactivity which has that result, even if he is aware that the security is in danger, unless his conduct amounts to connivance or collusion with some other party; and he submits that the plaintiff's conduct of which complaint is made was mere passive inactivity. Mr *Horn* relied heavily on *Miller v Trust Bank of South Africa,* 1965 (2) SA 447 (T) where SNYMAN J, said at page 454H:

> "The rules which I extract from the authorities in regard to the liability of a creditor to a surety in respect of negligent acts are:
>
> (a) A creditor is liable to his surety if he fails to carry out a duty which is expressly or impliedly placed upon him by the agreement between himself and the surety, or between himself and the debtor. In considering whether a duty can be implied the surrounding circumstances must be taken into account. Generally speaking a duty on the creditor to preserve or protect the security will be more readily implied where the creditor is in actual physical possession of the security or is directly in control of it, than where he is not in possession or control of it.



BARON JA

> (b) A creditor ,is liable to his surety for his positive acts (that is to say acts of commission) in respect of the security, if such acts cause prejudice to the surety.
>
> (c) A creditor is not liable to his surety for mere passive inactivity (that is to say ants of omission) in the protection or preservation of the security, even if he is aware that the security is in danger, unless his conduct amounts to connivance or collusion with some other party to diminish or destroy the security."

A few lines earlier, at p. 454 F referring to a statement in *Halsbury's Laws of England*, 3rd Edition Vol. 18 p. 516 para. 947, the learned judge said:

> "It seems to me that the statement of the *English Law by Halsbury* is in accordance with our law. It postulates some positive act on the part of the creditor in cases where negligence is relied on."

Now negligence itself postulates a duty of care. It seems to me that when the learned judge speaks in the passages cited of "negligent acts" and "negligence" he does not do so loosely in the sense of carelessness or other conduct falling short of a particular standard, and irrespective of the existence of a duty, it is, I think, difficult to escape the conclusion that the learned judge does indeed postulate a duty, but holds that notwithstanding that the relationship casts upon the creditor a duty not to diminish or destroy the security mere passive inactivity which allows it to be diminished or destroyed does not render him liable.

I think this pre-occupation with the nature of the plaintiff's alleged conduct - whether it was a positive act or mere passive inactivity - is fallacious and obscures the real issue. It is true that there is generally a duty not to injure another by one's positive act, whereas there is generally no duty to go to another's assistance in order to prevent injury to him. But there are well-settled exceptions to these general propositions, and they serve to underline that the real and over-riding principle applicable to all cases is whether or not in the circumstances of the particular case a duty exists. If I see a man being assaulted and robbed I am under no duty to go to his assistance, but if I am aware of a fire on my land I am under a legal duty to try to prevent it spreading to my neighbour's land, and if I remain passively inactive I may render

**Copyright Juta & Co Ltd**

myself liable to my neighbour for damage caused by the fire. Again, if a creditor enters into an agreement with a surety for the principal debtor under which time is of the essence, failure to act timeously in terms of the agreement will discharge the surety. But the liability to my neighbour in the first example, and the discharge of the surety in the second, do not follow because the cases are exceptions to any alleged rule concerning non-liability for passive inactivity, the results follow because in each case there was a duty to be active - the one imposed by law and the other by contract - and a breach of that duty.



BARON JA

This approach receives direct support from certain extracts from *Wessels Law of Contract in South Africa*, 2nd Edition Vol. 2, cited by SNYMAN J, in *Miller*'s case (*supra)*:

> "Para. 4341: It is doubtful, however, whether a distinction ought to be drawn between *culpa in committendo and culpa in omittendo* (see Troplong, *Caut.,* 565, and authorities there cited). Where the person guaranteed does any act injurious to the surety or inconsistent with his right, or if he omits to do any at which his duty enjoins him to do, and the omission proves in jurious to the surety, the latter will be discharged.
>
> Para. 4357: Where there may be a moral obligation on the creditor to do an act, but no legal duty, his inactivity or omission will not discharge the surety. A mere request to the creditor on the part of the surety not to do certain things or to be vigilant in certain matters will not discharge the surety if the request is not carried out."

*Caney, The Law of Suretyship*, 2nd Edition, at p. 133 is to the same effect:

> "... to entitle the surety to relief there must be a duty on the part of the creditor towards him, the surety (irrespective of any duty the creditor may owe to the debtor), to protect or preserve the security. That duty may arise from contract, express or implied, or at law, independently of contract. If this exists and is breached by the creditor, whether by act of commission or omission, with the consequence that he is unable to cede the benefit of the security, whatever its form, to the surety from whom he claims payment, the surety is discharged from liability, whether or not the value of the security is the equal of the surety's liability or of the liability of the debtor."

It seems clear that if a duty exists to protect or preserve the security, whether that duty arises from contract or at law independently of contract, it is irrelevant to debate whether the conduct alleged to constitute the breach of duty is active or passive; and if *Miller*'s case (*supra)* suggests otherwise, I must with respect differ.

It seems to me therefore that the instant case reduces itself to two crisp issues: whether the papers assert a relationship between the parties which, if proved, casts upon the plaintiff a duty of care towards the defendant to protect or preserve the security; and whether the papers assert conduct on the part of the plaintiff which, if proved, constitutes a breach of that duty

I return then to Mr *Horn's* submission that the surety must establish that the creditor failed to carry out a duty "expressly or impliedly placed upon him by the agreement of suretyship or by statute". I think the proposition, as stated, is too narrow. The relationship between a creditor and a surety stems in the first instance from the contract of suretyship as read with the original agreement between the creditor and the principal



Copyright Juta & Co Ltd

debtor. But the relationship and the duties arising therefrom do not depend on these documents alone; the Court must take into consideration all the surrounding circumstances, including any provisions of the law, whether the common law or statute, which might give rights to or impose duties on either of the parties, and any communications, whether written or verbal, between the parties. All these could have a bearing on whether or not a duty on the part of the creditor towards the surety exists.

What then are the assertions made in the papers before the Court? In the case of the Jaguar the defendant in her plea asserts that the amount realized for the vehicle was "unduly and unreasonably low"; she says that the plaintiff negligently failed to take advantage of "firm offers" obtained by her or on her behalf; she says that "the aforesaid negligence arises from plaintiff totally disregarding a fair, reasonable and firm offer in respect of the said vehicle". In her affidavit in opposition to the application for summary judgment the defendant asserts that notwithstanding the firm offers referred to the plaintiff gave its consent to the sale of the vehicle for $6 687,15.

Mr *Horn,* although at first he argued that there was no information before the Court as to the nature of the offers, conceded that for the purposes of this appeal it must be assumed that they were for cash and sufficient to extinguish the debt. The offers were described as firm; the plaintiff chose not to ask for particulars and cannot therefore be heard to say in summary judgment or exception proceedings that they might merely have had the effect of substituting one debtor for another. Nonetheless, Mr *Horn* submitted that there is no duty in law to accept even a firm offer; it was the right and duty of the surety to pay and take cession of action. Nor, Mr *Horn* submitted, was there a duty arising from contract to accept a firm offer, but here Mr *Horn* conceded that he was in difficulty because of the failure to ask for particulars. I think this failure is conclusive in these proceedings. The plaintiff could and should have asked for particulars of the duty alleged and of the circumstances alleged to give rise to it; and it could and should have asked for particulars of the conduct alleged to constitute a breach of such duty. On the papers as they stand there are assertions which, if proved, establish a duty of care and a breach of that duty, I agree with Mr *McNally* that in the circumstances of these cases the questions whether there was a duty of care and whether there was a breach of that duty are questions of fact not capable of determination on the pleadings as a matter of law (see for instance *Business Buying and Investment Co Ltd v Linaae,* 1959 (3) SA 93 (T) at 96H).

---





'The pleadings in the case of the horse float are not identical, but the differences are not material; foregoing comments apply.

In the result, I would dismiss these appeals with costs.

**Lewis JP:** I agree.

**Goldin JA:** I agree.

---

**Copyright Juta & Co Ltd**

*Gill, Godlonton and Gerrans,* attorneys for the appellant.

*Byron Venturas and Travlos,* attorneys for the respondent.



## THE STATE v BVUMBI 1980 ZLR 316

**Court** **General Division, Salisbury**

Criminal Review

Dumbutshena, J

3rd September, 1980

### Flynote

Criminal Law - malicious injury to property - negligence insufficient to establish intent.

### Headnote

The accused entered a motor-vehicle carrying a lighted paraffin lamp in order to collect a bottle of paraffin which was on the back seat of the vehicle. He knocked the bottle over, spilling paraffin on his clothing which caught alight due to the proximity of the paraffin lamp. In his anxiety the accused dropped the lamp, which ignited the paraffin in the bottle, gutting the motor vehicle.

*Held* that an admission that the accused "should have foreseen that the lamp would cause the paraffin to ignite and burn the vehicle" was irrelevant. In a charge of malicious injury to property, negligence, however gross, is not sufficient to establish intent.

Cases cited:

*R v Kasoka and Anor,* 1945 SR 115;

*R v Ncetendaba and Anor,* 1952 (2) SA 647.

### Judgment

**Dumbutshena J:** The accused in this case was charged with malicious injury to property, it being alleged that he set fire to and burnt a Peugeot 404 belonging to the complainant.

When asked to plead the accused said:

> "This was an accident. I was wearing a pair of overalls. The overalls had been dumped into some paraffin. When I put the overalls on it was dark. I did not know they were damp. I had a lamp from my house at this time. I



Copyright Juta & Co Ltd

DUMBUTSHENA J

> had a paraffin tin lamp with me. The sleeves of my overalls accidentally caught fire. The position is that I am an apprentice at the Estates. I had left a bottle of paraffin in the back of this vehicle. I went back at 7 p.m. to collect it. I had a paraffin tin lamp with me so that I could see. I got into the vehicle with this lamp to get this bottle of paraffin. Accidentally knocked over the bottle of paraffin and some spilt on to my sleeve. This caught alight from the paraffin lamp I had with me. I then dropped the lamp in the vehicle which caught alight."

The Court entered a plea of not guilty.

I have set out what the accused said when the indictment was put to him because it constitutes the accused's evidence. When he elected to give evidence on oath he adhered to what he had said in his plea to the charge.

The State outline of the case is a summary of the accused's evidence except that there is added to it the fact that the accused "should have foreseen that the lamp would cause the paraffin to ignite and burn the vehicle". In the circumstances of this case this appears to be irrelevant.

It appears from the record that accused was asked to make some admissions. The admissions purported to have been made do not vary from the facts already outlined. The State did not call witnesses.

It also appears from the record that the accused was cross-examined on whether he knew that paraffin was an inflammable liquid and that the bottle did not have a top but a loose piece of paper over the top. The accused stated that he thought that some of the paraffin had spilt out of the bottle with the movement of the vehicle. He also said he knew that it was dangerous to take a light anywhere near a liquid such as paraffin. But he also said: "I used to go there before with this light and this had never happened before. It was an accident. I did not realize that this naked name would cause the paraffin to ignite."

In his judgment the magistrate stated the events that led to the setting alight of the vehicle as follows:

> "He opened the door of the vehicle and crouched into the vehicle - with his knees on the seat and holding the paraffin lamp in his right hand - with his left hand he pulled back the back seat to get the bottle of paraffin - using the lamp to light up the area - as his hand reached the bottle he knocked it over and some of the paraffin spilt over the sleeve of his overalls - he then brought his right hand down to where the bottle of paraffin was and the paraffin in the bottle caught alight and set the car on fire - he managed to get out of the vehicle uninjured - but the car was completely burnt out."

On these facts accused was convicted and sentenced to a fine of $200 or in default of payment two months' IWL and two months' IWL suspended on conditions.

---

**1980 ZLR p318**

DUMBUTSHENA J

It is clear from the facts of this case that the accused was negligent, but negligence however gross is not sufficient to establish intent.

---

**Copyright Juta & Co Ltd**

See *Rex v Kasoka & Another* 1945 SR 115 at 116.

In the instant case the accused took the lamp to the motor vehicle in order to fetch a bottle of paraffin he had left in the car earlier on. He did not intend to set the vehicle on fire. He had before, it appears from the evidence, fetched the paraffin in similar circumstances but on this occasion he had an accident and the motor vehicle caught fire in circumstances described in the judgment. Although the accused took the lamp with a naked name knowing there was a bottle of paraffin inside the vehicle which did not have a proper top, it does not follow that he in tended to burn the motor vehicle.

See *Rex v Kasoka & Another* (*supra)* at 117

The Director of Public Prosecutions, to whom I referred this case, is of the opinion that the State did not prove that the accused intended to injure the property, and remarked as follows:

> "It is highly unlikely that the accused foresaw the possibility of damage arising from his action. Had he done so he must surely also have foreseen the possibility of grave bodily harm resulting to himself (an eventuality which he happily escaped). It is almost inconceivable that, with that foresight, he would have persisted in his conduct in introducing the danger into the vehicle. In fact, the mere fact that he was physically at least partly inside the vehicle is highly consistent with the conclusion that he was not thinking of what he was doing - a situation which establishes negligence under these circumstances."

The circumstances of this case merely disclose negligence on the part of the accused. He did not possess the necessary intent either legal or actual.

See *R v Ncetendaba & Another* 1952 (2) SA 647.

The Director of Public Prosecutions has indicated he does not support the conviction and sentence.

Accordingly, both the conviction and sentence are set aside.

**Beck J:** agrees.

---



## DONNELLY v DONNELLY 1980 ZLR 319

**Court** **General Division, Salisbury**

Civil Application

Dumbutshena, J

15th and 18th August and 3rd September, 1980

### Flynote

> Husband and wife - custody of children - custodian parent's exercise of discretion to deny access - must not be contrary to child's interest - when Court will interfere.

---

**Copyright Juta & Co Ltd**

## Headnote

The applicant sought interim custody of four of the five minor children of his marriage to the respondent. A divorce action was pending. The family emigrated to Ireland in 1977, but the respondent had returned to Zimbabwe with four of the minor children. The applicant wished to take the four minor children (and the fifth who lived with him) on a ten day holiday in Zimbabwe during the August school holidays. The respondent opposed the application, alleging that the applicant had a bad influence on the children because of his immoral attitudes, sexual obsessions, failure to pay adequate maintenance and assaults upon the respondent.

It was argued that the Court should not interfere with the custodian parent's exercise of her discretion to refuse access to the non-custodian parent.

*Held* that , although the credibility of the parties was important to the application, the consideration of the factors upon which the respondent based her opposition to the application was more important. None of the factors was shown to have been directed against the children or to have adversely influenced them.

*Held,* further, that the children should not be estranged from either parent (*Kok v Clifton,* 1955 (2) SA 326 (W.)) and that the exercise of the custodian parent's discretion to refuse access, even if not capricious, must not be contrary to the interests of the children. The Court will interfere where the custodian parent's exercise of discretion is clouded by a fanatical belief in absolute religious morality.

Cases cited:

*Kok v Clifton (supra*);

*Segal v Segal,* 1971 (4) SA 317 (C);

*Niemeyer v De Villiers,* 1951 (4) SA 100 (T).

*K H Andrew*, for the applicant.

*N J McNally*, for the respondent.

[The names of the children of the parties have been deleted. - *Editor*.]

---



DUMBUTSHENA J

## Judgment

**Dumbutshena J:** This is an urgent application under Rule 237 of the High Court (General Division) Rules, 1971, in which the applicant seeks an interim custody order for the four minor children of the marriage between himself and the respondent. The respondent is a defendant in a divorce action instituted by the applicant.

The couple were married at Salisbury on the 5th September, 1960. There are five minor children

Copyright Juta & Co Ltd

of the marriage.

After hearing evidence and submissions of counsel, I granted the following order: -

It is hereby ordered that:

(a) The applicant be and is granted custody of the minor children for a period of 10 days from the 19th August, 1980 to the 29th August, 1980.

(b) The applicant surrenders his travel documents to the Registrar of the General Division of the High Court on or before the 19th August, 1980.

(c) The costs be and are reserved.

I stated I would give my reasons later.

Here are my reasons:

The application was opposed by the respondent. The respondent did not file a replying affidavit because, it was stated, there was not time, having changed her attorneys in mid - course. Mr *McNally*, who appeared for the respondent, applied for leave for his client to lead oral evidence. There being no opposition from counsel for the applicant, Mr *Andrew,* leave was granted.

It appears from the evidence that the parties were happily married until 1975 when their marriage ran into some trouble. In 1977 the family emigrated to Ireland where the applicant is managing a business in partnership with his father.

The respondent says that the family lived for one year in Ireland without any trouble. Then she felt her life threatened. She thought her life was in danger. In 1979 she left Ireland for Zimbabwe, without informing the applicant, where she settled with the four children who are the subject of this application. One of the sons remained in Ireland with his father in order to complete his school-leaving certificate.



DUMBUTSHENA J

Respondent and her four children live in a family house in Gun Hill.

The property was bought by the applicant and registered in the name of the respondent.

Her objection to applicant's application for access to the children is based on a number of reasons. In Ireland the applicant was threatening her and told her that he would see her in a mental home. I propose to narrate some of the reasons for her opposition to applicant having access to the children, briefly. She says her maintenance allowance is not sufficient. She had to sell her jewellery and to receive assistance in the form of food from her church. The average sum of money for maintenance the applicant sends per month is $400.

The husband tells petty lies. She supported her allegation by producing a letter, Exhibit 4, on which her signature was forged by the applicant. She alleged applicant assaulted her on several occasions. She denied having accused him of homosexuality as alleged in his petition. She said

Copyright Juta & Co Ltd

he admitted having sexual knowledge of two young girls aged 14 and 15 years respectively. He had obsessions over these girls. Besides he had sexual intercourse with their mother. In the end she said he had no intimate knowledge of the girls.

Applicant kept pornographic literature and when in Europe he watched pornographic films. She said he had advised her not to see one of the films, "The Exorcist". As a result of these pornographic films he asked her to perform unnatural acts. Because he possessed pornographic magazines she reported him to the police. Police collected the literature but applicant had kicked the worst magazines under a bed. She does not know whether he was prosecuted.

She says she is opposed to his having access to the children because they will learn from him things that are morally and ethically wrong.

She deposed to applicant writing to the children once a month and to her encouraging the children to write to their father.

When Mr *McNally* referred to a letter dated the 5th August, 1980, attached to a supplementary affidavit sworn by Clive Stephen Grossman, the first three paragraphs of which read as follows:

> "We have noted your telephone call to our offices to-day, in which your client requests access to the children during his coming visit to Zimbabwe. We have also noted his intention to take the children away for one week.



DUMBUTSHENA J

> We advise that our client declines to accede to your client's request on the grounds that your client's access to the children is not in their best interests.
>
> Your client may, however, see the children at our client's Gun Mill home in her presence."

She said the letter had been written without her authority. When she received a copy of the letter she telephoned her attorney and gave him instructions to retract the letter and write another. The other letter was indeed written on the 13th August, 1980 and is also attached to the aforementioned supplementary affidavit, and reads:

> "With reference to our letter of the 5th August, 1980, we regret to advise that our client, on reconsideration, is not prepared to let the children see your client at all, not even at her residence. The reason for this is *inter alia,* that your client has, in the past, levied threats to kill her and to do violence to her person. She would not feel safe if your client came to her house and, accordingly, the offer to let your client see the children at our client's home is hereby withdrawn."

She says because of the letter written on the 5th August, she decided to change her attorneys. The second letter reflects her attitude towards applicant's attempt to get access to the children.

When asked why applicant's access to the children was not in their best interest, she replied that he had a bad influence on the children. He sends them bank-notes and advises them to change them with his business colleagues in order to get more money. He also has a disrespect for law and the police and makes comments about police and tells obscene jokes and is

Copyright Juta & Co Ltd

scornful of women. He makes remarks about women's figures and the boys laugh.

She also said that applicant has lots of money and offers children presents and sends them pocket-money while she has little money to buy meat. She says giving the children money has a disruptive effect on them and that money should be spared for essentials instead of trips to Kariba.

Under cross-examination she said the applicant had been willing to give her money for fares to return to Zimbabwe but she sold household furniture in order to raise money for fares. She did this without the knowledge of the applicant. She said that contact between the applicant and the children was wholly undesirable.

She was only prepared to live with the applicant as a family if he changes his moral attitude. She agreed that on the 11th March, 1980, she had written a letter to her husband telling him she would be happy to have him home and that the family needed him, especially herself. During the same month she went to Ireland to convince him that the life he was



leading was wrong. He in turn told her he wanted the children to visit him in Ireland. She told him she would agree to that provided she accompanied the children.

She says she wants him to come and live with her and the children only on condition that he lives, prior to his joining them, a moral life. Before that she and the church counsellors would have to discuss with him to find out whether he is sincere.

In December, 1979, a consent paper was drawn up by her attorneys. She had discussed it with her attorney, Mr Travlos, who afterwards sent her a copy of the consent paper. She says it contained clauses that were unacceptable to her and she rejected it. In the meantime applicant had been made to understand that the consent paper had been accepted by both parties. He, therefore, signed it before leaving for Ireland.

She admitted that the applicant was a member of the Police Reserve for 15 years and was awarded a medal. She still insisted, however, that he had a disrespectful attitude towards the police his private life. She also said he bribes police.

When Mr *Andrew* asked her why she did not allow the children to speak to their father when he telephones them from Ireland, she said she does not allow them to speak to their father because he is unfit to speak to children. When shown a letter written to him by his youngest daughter expressing her love for him, she said the daughter was young and did not understand.

The applicant's attorneys filed a petition and a founding affidavit sworn by George Seirlis, the applicant's attorney. There are two annexures to the affidavit in the form of two testimonials from a Mr W O'Connell who has been associated with the applicant both in Zimbabwe and in Ireland, and another letter from Mrs. Bridget Woods, a social worker. Both documents speak to the good character of the applicant.

The applicant gave evidence on oath and was cross-examined. He supported the allegations

Copyright Juta & Co Ltd

made against the respondent in his petition. Those allegations read as follows:

"6 Since I shave been living apart from my children and the Defendant, I have been paying maintenance for them and they live rent-free in a house which belongs to me. I have written nearly every week to my minor children. I love them very dearly and it is my very earnest desire to see them and to stake them away with me for a holiday of about 10 days to Kariba.



DUMBUTSHENA J

7. In regard to what is mentioned in Mr Seirlis' affidavit regarding my alleged immoral behaviour I would bring the following facts to the Court's attention:

(a) 'My wife through the last few years of our marriage has frequently accused me of homosexuality, child molesting and the like. I assure this Honourable Court that there is not a shred of truth in any of these allegations.

(b) My wife made an application to have me barred from the matrimonial home in Ireland on the grounds that I had assaulted her and was a person of violent disposition. This application was heard in the District Court of Eire and her application was dismissed.

(c) Whilst living in Zimbabwe, my wife had me followed by a private detective for what reason I am not entirely certain, but certainly nothing improper on my part was ever discovered by this private detective.

(d) Whilst living in "Salisbury my wife made a false report to the Police that I was in possession off pornographic literature and as a result I had the humiliating experience of being taken to the Police Station, photographed and finger-printed before eventually they discovered that there was nothing to this charge and I was released.

8. It will be seen therefore that my wife has an unfortunate tendency to tell untruths in regard to my personal behaviour and habits.

9. In so far as she feels that I will be a corrupting influence on the children, I state that this is absolute nonsense and I want nothing more than merely to be with them for the short period whilst I am in Zimbabwe.

10. I annex hereto marked 'B' and 'C' copies of testimonials which I obtained in Ireland shortly before leaving.

11. I would add that had my wife seriously felt that I was a bad influence on the children, it is difficult to see why she permitted me to retain custody of one of my sons.

12. In order to dispel any fears (which I can assure the Court, would be groundless) that I may be here for the purpose of removing the children from Zimbabwe, I am prepared to surrender my passport to the Police or to the Defendant's Attorney and to accede to any other safeguards which this Honourable Court may think reasonable.

13. I arrived in Zimbabwe on the morning of Thursday, 14th August, and I wish to go back in about 10 days time. I have particularly chosen this period as it is the school holidays."



DUMBUTSHENA J

The respondent denied in her evidence-in-chief the allegation made in paragraph 7 (a) of the

Copyright Juta & Co Ltd

petition.

He admitted that he kept men's magazines such as "Playboy", but denied they were banned literature. He also denied having kicked the worst magazines under the bed in the presence of the police. He agreed that his wife had remonstrated with him because of his possession of those magazines. He did not encourage the children to read them and he kept them hidden from the reach of the children.

He said the two young girls referred to by his wife were daughters of a business associate in Umtali. They were beautiful and he had tried to arrange for a boy with whom the family was living to meet them because they were of the same age. He denied having had any intimate relationships with them or sexual intercourse with their mother.

He had agreed to consult a psychiatrist because his wife imagined he had a problem with young girls. She had an obsession about the desirability of his having treatment. He recalled seeing the psychiatrist by himself and then together with his wife. He denied having a biased attitude against the police and the law and pointed to his time as a police reservist.

He said in Ireland he had had difficulties with his wife concerning his access to the children. They had scuffles. He alleged that his wife assaulted him first.

He denied not giving sufficient maintenance to his wife. He said when his wife returned to Zimbabwe with four children, he arranged with the tenants at the Gun Hill property to pay rent to his wife. He had paid to his wife varying sums of money. At one time he paid her $500 and $350 a month. The $350 was increased to $400, which is, by arrangement with his business associates in Zimbabwe, paid to her on the 3rd of every month.

Because of his wife's imaginations she had arranged for a private detective to tail him. The Court was not told what the private detective found out.

However, in March, 1980, when respondent went to Ireland, they discussed his access to the children. He wanted the children to visit Ireland to see their grandparents. Respondent refused because she thought he would not allow the children to return to Zimbabwe. Respondent suggested that he visit Zimbabwe during his holiday. He said she wanted him to come back to Zimbabwe on her own terms.



DUMBUTSHENA J

He wrote to the children about their coming to Ireland but he did not press his wife on this. He suggested to her writing to each other about the children.

He says both his wife and the children are involved the Mormon Church. He thought it was good for the children. He is fond of his children and writes to them every fortnight and sends them money.

He said he bought the property in Gun Hill and registered it in his wife's name in order to give her security in the event of his death because of transfer costs.

**Copyright Juta & Co Ltd**

He denied exercising a bad influence on the children. He said since the rift in the family he had taken the two boys on a camping trip for a week and when he returned, he took his youngest daughter for an extended week's visit to Butlin's Holiday Camp. A mutual friend had arranged this. In return for this favour he had to pay fares for the respondent's visit to England.

Under cross-examination he admitted he had come on a visit to Zimbabwe with a Miss Wise who was referred to in the air-tickets as Mrs. Donnelly. He also admitted having signed his wife's signature on Exhibit 3 but said he thought there was nothing illegal about it. When shown a schedule of maintenance payments, Exhibit 2, he said it did not represent the payments made in the early months. Besides, he had instructed tenants to pay $250 a month to respondent. He believed that there was no maintenance paid in January, 1980, because he had assumed that the consent paper he had signed in December, 1979, was in operation as he had given instructions to his business associates to effect payments. He pays school fees for the two boys and the girl at private schools. Besides, his income in Zimbabwe is paid to his wife. In Ireland his income amounted to $7 000 a year.

He said for 15 years they had lived a happy married life with no history of scuffles, but during the later part of the marriage there were scuffles because of the question of access to the children. When asked why he expressed disrespectful attitudes towards police and fat women in the presence of the children, he said it was nothing more than Irish humour.

I listened with great care to the evidence of both the applicant and the respondent. I formed the impression that their difficulties, if any, were nothing worse than most families suffer in a normal married life.

Mr *McNally* submitted that the resolution of the question of access to the minor children now in the custody of the respondent hinges on



DUMBUTSHENA J

credibility. To some extent I agree with Mr *McNally.* There is, however, the important question whether what the respondent proffers as reasons for denying the applicant access to the children is, in the view of the Court, sufficient to warrant the Court forming an objective opinion on the proper exercise of her discretion as the custodian parent and, more importantly, whether the exercise of her discretion is in the interest of the children.

Mr *McNally* submitted that his client had a firm adherence to her religious beliefs. She has adopted a strict yardstick of morality. He said there were many indications that the applicant has not got the same attitude of sticking to the truth and he instanced, in support of his argument, applicant's forgery of respondent's signature and the fact that there was no mention of his adultery in his declaration filed in the High Court.

Having given much thought to the credibility of both the parties, I find it difficult to believe that the respondent is a person who has adopted a strict yardstick of morality when on the one hand she encourages her children to write to their father while on the other hand forbidding them to speak to him on the telephone when he phones from Ireland. I have found it difficult to appreciate the essence of her allegations of applicant's obsession and impropriety with the two

Copyright Juta & Co Ltd

young girls and their mother. It is difficult to believe that her attorney could have written the letter of the 5th August, 1980, and said the matters stated in it without receiving instructions from her.

I found the applicant ready and willing to admit when he was wrong or mistaken. He readily agreed he had forged Exhibit 3. He might not have told the truth when he said he did not think it was illegal. I formed the view that his evidence was preferable to that of the respondent.

While credibility is important in the determination of the question of the application for an interim order of custody, it is, in my opinion, less important than a consideration of those matters upon which respondent urges this Court not to grant access or custody for 10 days to the applicant.

These matters are that the applicant is a bad influence on the children because: (1) he has no respect for the law and the police; (2) makes disrespectful remarks about fat women in the presence of the children; (3) he has an obsession for two young girls with whose mother he had sexual intercourse, (4) that he reads pornographic literature and when in



DUMBUTSHENA J

Europe watches pornographic films and had films like "The Exorcist"; (5) that he assaults the respondent, and (6) does not give adequate maintenance to the respondent.

In none of these things has it been shown that the applicant did one or other of them with an intention to influence the children adversely. There has been no evidence that he gave pornographic literature to his children or failed to pay maintenance, school fees and to provide pocket-money for his children. Applicant arranged with the tenants of the property in Gun Hill to pay rent to respondent and paid and continues to pay maintenance money to the respondent. In January, 1980, he did not pay maintenance because he thought the consent paper he had signed in December was operative.

From the evidence I formed the impression that the applicant was fond of his children. He writes to them, sends them money and gifts and telephones them from Ireland.

It must be remembered that these children have lived with their father in happier times, a period of about 15 years. In my view it is cruel to them to deny their father access to them, especially when one bears in mind that even the youngest of them writes fond letters to her father.

I agree with Mr *Andrew's* submission that the assaults were not directed against the children. There was no evidence that those assaults affected the children. One formed the impression that the four children were fond of their father. The other problems between the applicant and the respondent, if there were any such problems, for instance, his alleged obsession with young girls, his attitude towards the police and fat women and his fondness for pornographic literature and films, have not been shown to have been directed against the children or to have exercised an adverse influence on the children.

The applicant has custody of one of his sons, who lives with him in Ireland. From the evidence

Copyright Juta & Co Ltd

before me he seems not to have suffered from his father's bad influence. If I am correct in the view I have taken with regard to him, it cannot be reasonably said that applicant's alleged bad manners will affect the other children were he to be allowed access to them for the short duration of 10 days.

Mr *McNally* referred me to a number of cases which touch on the rights of non-custodian and custodian parents. He submitted that the Court should not interfere with the custodian parent's exercise of her discretion to refuse access to the non-custodian parent.



DUMBUTSHENA J

The authorities cited by Mr *McNally* are not in point with the instant case because they are distinguished on the facts and they relate to circumstances where court orders exist. In the instant case the parents are separated. There is no order of the Court. The applicant has had some of the children on holiday without adverse effects. I would like to repeat what was said by ROPER, J, in *Kok v Clifton,* 1955 (2) SA 326 (W) at 330 B-D:

> "It is common-place that it is in the interests of the child of divorced parents that it should not be estranged from either parent; the child should not be placed in such a position as to lose affection for either of its parents, nor that either of the parents should lose affection for and interest in the child. It is of importance to this child, in my view, that the father should retain his affection for the child and his interest in him, and it seems to me that to retain such interest and affection, he should have the child on occasions for some longer period than 10 days. Alternate week-ends and two short holidays give a father very little opportunity of getting to know his child and keeping his interest and affection in the child. It seems to me that it is important that at some time or other the father should have the child regularly with him for a reasonably long period."

I believe the right approach to this question is amply summed up in the first paragraph to the headnote in *Segal v Segal,* 1971 (4) SA 317 (C):

> "Even where the exercise of the right by the custodian parent to decide what is or is not in the best interests of the child is not capricious or not carried out in an improper manner, or influenced by improper motives, the Court must still be satisfied that such decision is not, in fact, contrary to the interests of the child, and the Court is entitled to enquire into that, where such decision is challenged or disputed. It is not merely a question of substituting the Court's discretion for that of the custodian parent. The Court must have regard objectively to all the relevant factors and then decide whether the exercise by the custodian parent of his right of control is in fact contrary to the interests of the child. If it is, then the Court will, and should, interfere."

The respondent has a casual attitude towards the relationships between applicant and the children. She encourages them to write to him, does not allow them to speak to him on the telephone, and she has allowed some of them to go on holiday with him. Even if one may not say her decision not to allow access to the applicant is not capricious or not carried out in an improper manner, there is evidence to support the view that it is influenced by improper motives and her decision is contrary to the interests of the children.

The right of the custodian parent is therefore not an absolute one especially in cases where there are no court orders granting custody to the one parent. The Court will interfere where it feels that the custodian parent's exercise of her discretion is clouded by her fanatical belief in



Copyright Juta & Co Ltd

absolute religious morality which does not give room to the ordinary foibles the ordinary reasonable man. In such circumstances, the non-custodian parent has the right to call on the Court to interfere (see *Niemeyer v De Villiers,* 1951 (4) SA 100 (T) at 103H-104D).

In my opinion it is in the interests of the children that the applicant must succeed in his application. Sight must not be lost of the fact that the applicant in his declaration has asked for the custody of the son with whom he lives in Ireland and has left the custody of the other children in the hands of the respondent. He is, however, keen to share his love with his children and has applied to spend 10 days of their school holidays with them. Besides, he has, as a non-custodian parent, his common law right of access to his children.

In *Segal v Segal* at 324D-H, TEBBUTT AJ, had this to say:

> "The interests of the children and the non-custodian parent's rights of access to the children overlap to some extent. It is a truism that it is in the interests of the children, even of divorced parents, that they should not be estranged from either parent and that they should not lose affection for the non-custodian parent, or the non-custodian parent for them (see, e.g., *Kok v Clifton,* 1955 (2) SA 326 (W) at p. 330). There are instances, of course, where it is in the interests of the children that the non-custodian parent should not have access to them, but generally speaking it is important that the non-custodian parent should regularly see the children and have the children with him in order to nurture and maintain the affection which any parent obviously has for its child. In this regard I would again like to refer to the decision of DE VILLIERS AJ, in *Marais v Marais, supra,* where he so admirably sets out what is the underlying reason behind these considerations. At p. 847 the learned Judge said:
>
> > 'The above considerations indicate that what is aimed at is the preservation of some degree of parent-and-child relationship between the non-custodian parent and the child, for the benefit of both, but in a manner not incompatible in substance with the vesting of undivided control and regulation of the care and upbringing of the child in the custodian parent. On the one hand control and regulation are not in practical essence to be divided, under the cloak of definition of access, by an arrangement which places a large portion of the ordinary routine of the child's life at the disposal of the non-custodian parent. On the other hand access arrangements are, in the absence of good reason, not to be so confined as to stultify the nurturing of real affection and companionship between non-custodian parent and child.'"

Taking an objective view of all the circumstances of this case, I am of the opinion that it is in the best interests of the children to grant the applicant an interim order of custody.

*G Seirlis*, attorney for the applicant.

*Byron Venturas and Travlos*, attorneys for the respondent.



## THE STATE v KELDER 1980 ZLR 331

Editor's Note:(12)

**Court** **General Division, Bulawayo**

Criminal Review

Copyright Juta & Co Ltd

Newham, J

5th September, 1980

## Flynote

Criminal Law - Maintenance Act [Chapter 35] - arrear maintenance in breach of conditions of suspended sentence - summons to show cause why - obligation does not lapse - framing of charge in respect of further default - form of suspended sentence.

## Headnote

The accused was convicted, for the third time, of a contravention of section 23 (1) of the Maintenance Act [*Chapter 35*] in that he failed to make maintenance payments to his dependents. At his third trial the accused was charged with failing to pay the whole of the arrear maintenance dating back to the original court order. In respect of part of that arrear maintenance a suspended sentence was outstanding, the terms of which allowed the accused 21 months to pay that part of the arrears. It would have been more appropriate to charge the accused with failure to pay current maintenance *and* to show cause why the suspended sentence should not be brought into effect.

The obligations created by a maintenance order remain in existence until discharged, although the order may lapse in regard to the creation of further obligations. (*S v Deuss,* 1972 (1) RLR 121 discussed and not followed.) Where an accused has previously been prosecuted in connexion with the non payment of maintenance, in any subsequent prosecution relating to arrears the charge should allege that the default occurred *subsequent* to the last Court appearance. The prosecution can only relate to a further default. However, the obligation to pay is a continuing one and the total amount owing since the order was made should be charged.

Magistrates should not specify an amount by which the arrears is to be reduced each month when passing a suspended sentence. The Act requires arrear maintenance to be paid as soon as possible and the accused should be made very alive to the fact that he *must* liquidate the arrears at the fastest rate possible in the light of his changing financial circumstances.

Cases cited:

*S v Clark,* 1971 (1) RLR 113;

*S v Deuss (supra)*.

---



NEWHAM J

## Judgment

**Newham J:** The accused was convicted upon his plea of guilty of a contravention of section 23 (1) of the Maintenance Act [*Chapter 35*], it being alleged that between 30th June, 1979, and 31st January, 1980, the accused wrongfully and unlawfully failed to make maintenance payments amounting to the sum of $2 382,10 to his dependents in compliance with an order made in terms of section 6 of the Act by the Maintenance Court at Gwanda on 25th January,

Copyright Juta & Co Ltd

1978.

The maintenance order required the accused to pay an amount of $187,50 a month as maintenance for his wife and five children. The accused has two previous convictions for failing to pay maintenance in contravention of section 23 (1) of the Act. His first conviction was on 21st April, 1978. At that date the amount of maintenance unpaid was $582,10. In respect of that conviction the accused was sentenced to three months' imprisonment with labour, the whole of which was suspended for five years on condition that he -

(1) was not convicted within that period of contravening section 23 of the Act;

(2) complied with the Court order dated 25th January, 1978;

(3) repaid the arrears in an amount of $50 per month, commencing on the 1st day of May, 1978.

For eight months following that conviction the accused paid a sum of $237,50 a month in respect of current maintenance and arrear payments. The last of these payments was made for December, 1978. At that stage the accused had reduced the arrears to $182,10.

For the next five months the accused was in default and was convicted for the second time on 28th June, 1979. During this period the arrears of $182,10 increased by $887,50 to $1069,60. In respect of this second conviction the accused was sentenced to six months' imprisonment with labour and the suspended sentence of three months' imprisonment with labour from his first conviction was brought into effect. However, the overall sentence of nine months' imprisonment with labour was all suspended for five years on conditions which, as far as relevant, corresponded with those formulated in connection with the sentence imposed at the time of the accused's first conviction on 21st April, 1978.

In respect of June, 1979, the accused paid the sum of $237,50 thus reducing the amount of the arrears from $1069,60 to $1019,60. In respect of the seven months from July, 1979, to January, 1980, the accused made no payments, increasing the arrears by $1312,50 from



NEWHAM J

$1 019,60 to $2 382,10, which is the amount referred to in the summons. In fact, as I have explained, the amount of arrear maintenance which accumulated during the period charged, i.e. 30th June, 1979, to 31st January, 1980, is $1312,50. The accused's present conviction is in respect of his failure to pay the whole sum of $2382,10, which is the amount of the arrears stated in the certificate issued by the clerk of the Maintenance Court.

The obligation to pay arrear maintenance is a continuing one and in terms of section 23 (3) of the Act the accused is liable to be prosecuted again for his failure to pay appear maintenance, notwithstanding his previous convictions. I entertain some doubt, however, whether it is desirable to prosecute an accused for failure to pay arrear maintenance cases where there is outstanding a suspended sentence, one of the conditions of suspension of which is that the accused repays the arrear maintenance. At the time of the accused's present conviction that

Copyright Juta & Co Ltd

condition of the suspended sentence imposed on 28th June, 1979, related to arrears totalling $1019,60 payable in instalments of $50 a month. On this basis it would have taken the accused some 21 months to pay off the arrears. Consequently, it would seem that after 28th June, 1979, the accused was not under a legal obligation to pay the full amount of the arrears then outstanding in less than 21 months. In the present case the accused defaulted for seven months after the suspended sentence was imposed. It seems to me that it might have been more appropriate in such circumstances not to have charged the accused with failing to pay the arrears, but rather to have charged him with failing to pay current maintenance and have called upon him to show cause why the suspended sentence should not be brought into effect. In respect of the non-payment of arrears accumulated before 28th June, it is arguable that the accused could raise the defence that he was not obliged to pay the whole of the arrear maintenance in that seven months' period. However, it would appear that, in effect the magistrate treated the case as if the accused had been charged in the manner I have suggested.

As I had some doubt on the correctness of my observation in this last paragraph a provisional draft of this judgment was sent to the Attorney-General for his views. The Attorney-General has replied as follows:

> "It is abundantly clear, as pointed out in the draft judgment, that the obligation to pay maintenance is a continuing one. Section 23 (3) of the Maintenance Act indicates this in the provision that a person who has to pay maintenance by virtue of an order may be prosecuted again for failure to pay maintenance once a certain period has elapsed if the failure continues. In the case of *S v Clark,* 1971 (1) RLR 113 at 117. BEADLE CJ, examined the old provision,



> section 3 (3) of the Maintenance Orders (Miscellaneous Provisions) Act [*Chapter 176*], which provision was to all practical purposes the same as section 23 (3) of the Maintenance Act [*Chapter 35*]. He concluded as follows:
>
> > 'It is quite clear, from that subsection, that the obligation to pay arrear maintenance is a continuing obligation, and, so soon as the accused has the money in his possession with which to pay the arrear maintenance, he is under a duty to use that money to pay such arrears. As soon, therefore, as he has the funds from which to pay arrear maintenance and fails to use these funds to pay those arrears, he commits the offence.'
>
> I would take the opportunity here to state that, in my respectful view, the obligations created by the order remain as obligations until they are satisfied despite the fact that further obligations may no longer arise due to the lapsing of the order (as when a child attains the age, specified the order, at which maintenance shall no longer be payable).
>
> In holding this view I respectfully disagree with the Court in *S v Deuss,* 1972 (1) RLR 121. In that case, MACAULAY J, said:
>
> > 'It is difficult to see, therefore, how the accused can be held to have continued in default after the 17th April, when *prima facie* there was no order for maintenance in existence. The fact that he was in receipt of a salary in June and July, 1970, and again from July, 1971, to the date of the trial, can only be relevant if there was a continuing obligation under an existing order.'
>
> In adopting that approach, the Court lost sight of the fact that whilst an order may lapse in so far as it does not

**Copyright Juta & Co Ltd**

create any further obligations after a specific date it does not cease to exist in respect of obligations which have already arisen but not been satisfied. It does not follow from the fact that an order does not create any fresh obligations that the order has ceased to exist or that obligations which fell due under the order before it 'lapsed' which have not been discharged are automatically cancelled. The order remains in existence until the obligations which it created have been discharged.

To hold that they were so cancelled would be to defeat the entire purpose of the Act, which is to ensure that the person entitled to receive maintenance does receive the support derived therefrom. To hold thus would also mean that a person against whom a maintenance order is made would safely be able to disregard his final payment, or even perhaps the last two, in the knowledge that he probably could not be brought before the Courts before the order 'lapsed'. Such an absurd result is untenable, in my respectful submission.

It is respectfully submitted that the approach of the magistrate in *Deuss*'s case (*supra)* as set out at pp. 122G-123B was perfectly correct despite the criticism levelled against it. It is submitted that where an accused has previously appeared in Court in connection with his default in making payments due under an order the correct procedure in any subsequent prosecution relating to arrears is to charge that the default occurred subsequent to the last court appearance and that the amount of arrears is the total arrears which have accrued since the inception of the order.

---

**1980 ZLR p335**

NEWHAM J

It is not proper to allege that the period of default commenced prior to the last Court appearance. The court has already considered such default and either convicted or acquitted the accused in respect of such default. Section 23 (3) clearly requires further default on the part of the accused as a prerequisite to any subsequent prosecution and it is to that further default that the subsequent prosecution relates. 'Because, however, the obligation to pay maintenance is a continuing obligation, the obligation to pay arrears (i.e. payments which have become due under the order but which were not paid on due date) continues in existence until payment has been made. It follows, therefore, that the further default referred to above will be in respect of the total monies which have become due and payable at any time from the inception of the order.

The approach adopted by the magistrate in *Deuss's* case was, therefore, absolutely correct and the fact that the order had 'lapsed' made absolutely no difference.

Against this background, I have some doubts about the manner in which some magistrates word their orders suspending sentences of imprisonment when an accused has been convicted of failing to pay maintenance.

It seems that it is most common that two conditions, *inter alia*, are always set out. The first is that the accused should continue to pay the maintenance required by the order and (secondly) in addition that he should pay off the arrears at X dollars a month. It is also usually specified that the accused should not be convicted of contravening section 23 of the Act within the period of suspension.

My doubt is based on the fact that the magistrate, in saying that only X dollars a month need be paid as far as arrears are concerned, is purporting to change the liability created by the Act. That liability is that arrear maintenance shall be paid as soon as is possible. (See *Clark*'s *case* , *supra*). This the magistrate is not entitled to do. In addition, it creates the kind of practical difficulty envisaged in the passage of the draft judgment which is set out above.

To get round such unsatisfactory features it seems to me that the suspension order should read along these lines:

> 'X months' imprisonment with labour which is suspended for X years on condition that the accused is not convicted of committing within that period any contravention of section 23 of the Maintenance Act [*Chapter 35*].'

---

**Copyright Juta & Co Ltd**

That sole condition will obviously cover a failure to pay maintenance in the first instance, but will also cover the failure to pay arrears, because such failure is also an offence in terms of that section.

The magistrate, having investigated the matter of funds and commitments, should then tell the accused that he, the magistrate, feels that the accused can pay X dollars towards arrears and that the clerk of the court will be advised accordingly. But he should also make the accused very alive to the fact that if for any reason, be it windfall or promotion or better pay, he is able to liquidate the arrears at a faster rate, he must do so or his failure to



NEWHAM J

do so is *ipso facto* an offence under section 23. The accused should also be advised to contact the clerk of the court in the event of any inability to pay rather than to fail to submit his payment without explanation.

The procedure to be adopted in the case of subsequent defaults would then be to prosecute the accused as opposed to bringing him before the court to show cause why the suspended sentence should not be brought into effect. The difficulty set out in the quoted passage of the draft judgment would thus be circumvented.

For the purpose of breaches of conditions of suspension orders already made (thus employing the wording currently in practice), I would respectfully comment that it would be more desirable to charge them as suggested by the Learned Judge, i.e. not to have charged the accused with failing to pay the arrears, but rather to have charged him with failing to pay current maintenance and have called upon him to show cause why the suspended sentence should not be brought into effect. That procedure would circumvent the possible argument that certain monies, by virtue of any previous order, were not yet due."

My brothers GUBBAY J, and BEADLE AJ, and I entirely agree with the observations of the Attorney-General and magistrates will in future note the Attorney-General's remarks as to the appropriate wording of suspended sentences and the procedure to be followed.

**Gubbay J:** concurs In this judgment.



## STATE v TAKADZI 1980 ZLR 336

**Court** **General Division, Salisbury**

Criminal Review

Pittman, J

10th September, 1980

### Flynote

Statutes - Road Traffic Act, 1976 - endorsement of driving licence of prohibited driver in terms of section 57 (3) - commencement of prohibition - unnecessary for court to order endorsement following prohibition - desirability of explaining all consequences of prohibition to accused.

### Headnote

The accused was convicted of driving a motor vehicle whilst under the influence of alcohol, to

Copyright Juta & Co Ltd

such an extent as to be incapable of having proper control of it. The court prohibited the accused from driving for a period of six months and ordered the particulars of the conviction to be endorsed on the driving licence the accused held and on any driving licence he might acquire in the future.



*Held* that the legislation permits of the holding of only one driving licence, so only one endorsement is required.

*Held,* further, that except where a direction is given in terms of section 56 (5), it is unnecessary to specify the date from which prohibition commences because this is implicit in the Act. Furthermore, a specified date of either the commencement or termination of the prohibition order will become unworkable if an appeal is noted against it. Hence only the length of the prohibition period should be specified in the order.

*Held,* further, that the Act gives the Court no power to order the endorsement of a driving licence following prohibition. Endorsement is an automatic administrative action.

*Held,* further, obiter, it is desirable to explain to the accused the full consequences of a prohibition from driving.

Cases cited:

*S v Dos Santos,* G-S-57-78;

*R v Hatfield,* 1956 (1) SA 38 (SR).

## Judgment

**Pittman J:** The accused was convicted of driving a station-wagon whilst under the influence of alcohol, to such an extent as to be incapable of having proper control of it, in contravention of section 46 (1) of the Road Traffic Act, No. 48 of 1976. The driving licence held by the accused at the time of the offence was only in respect of class 5 vehicles, which is a general class, comprising those vehicles not included in classes 1 to 4. As the station-wagon was a class 4 vehicle, the accused was also convicted of driving without an appropriate licence, in contravention of section 6 (1) (a) of the same Act.

For the latter offence, he was sentenced to a fine $25 or five days' imprisonment with labour. No comment is called for on this sentence.

For the contravention of section 46 (1) he was sentenced in the following terms:

> "$75 or 15 days' imprisonment with labour. Prohibited from driving all classes of motor vehicles except class 5 for a period of six months. Accused's driving licence in respect of class 5 vehicles shall be endorsed with particulars of his conviction. Any future driving licence to be endorsed with particulars of this conviction."

When the case came before me on review, I was satisfied that the last part of the sentence had been wrongly ordered, in view of section 57 (3) of the Act, which reads as follows:

Copyright Juta & Co Ltd

"(3) If a person is convicted of an offence in respect of which he is prohibited from driving, any licence which is -

(a) held by him at the time of the conviction shall be endorsed with such particulars of such conviction and of such prohibition from driving in such manner as may be prescribed; or



PITTMAN J

(b) issued to him after his conviction and during the period that the prohibition from driving remains in force shall be endorsed with such particulars of such conviction and of such prohibition from driving in such manner as may be prescribed; or

(c) issued to him after the period of prohibition from driving and within five years of the expiration of that period shall be endorsed with such particulars of such conviction as may be prescribed."

It was clear that the magistrate was under the mistaken impression that a driver could hold more than one licence at a time, and that he should order endorsement not only of the accused's existing licence, but also of any future licences he might obtain. The true position is that the Act and the Road Traffic (Licensing of Drivers) Regulations (RGN 240 of 1977) are framed on the basis that a driver can hold only one licence at a time, apart from international driving permits and foreign licences, and that section 57 (3) must be read with that fact in mind. It will thus be seen that between them paragraphs (a), (b) and (c) of section 57 (3) cover all the ways in which a prohibited driver's existing or future licence can be endorsed, and that only one of those paragraphs can be applied to him at any given time. In the present case, only paragraph (a) was the appropriate paragraph to be given effect against the accused.

I accordingly referred the case to the Attorney-General to obtain his formal agreement that the order for the endorsement of any driving licence obtained by the accused in future should be deleted from the sentence. In doing so, I also mentioned that the magistrate had failed to comply with the High Court's ruling in cases such as *S v dos Santos* G-S-57-78, that it is desirable for the prohibition period to be defined in the sentence by mentioning the date of either its start or termination.

In his reply on behalf of the Attorney-General, the Director of Public Prosecutions made a very helpful and enlightening analysis of the relevant provisions of the Road Traffic Act. He also pointed out that since the Act came into force in 1977, there has been a bewildering series of inconsistent decisions on review about the manner in which a prohibition order should be phrased by the court imposing it. He submitted that the Act does not authorize a court to order endorsement of an accused's licence, save in the exceptional cases set out in section 57 (3a) (b), and that the sentence under review was incorrect for that reason also. What follows in this judgment is based upon the Director's analysis.

As regards the phrasing of a prohibition order, it must be borne in mind that when the Act authorizes a court to prohibit a person convicted of a driving offence from driving "for such period as such court thinks fit", there is nothing in the Act, save in section 56 (5), which allows



PITTMAN J

Copyright Juta & Co Ltd

that court to order that the prohibition period shall begin at some date later than the date upon which the order is made. Section 56 (5) reads:

> "56. (5) If two or more periods of prohibition from driving are imposed in respect of the same person, whether at the same time or at different times, such periods shall, unless the magistrate or court concerned otherwise directs, commence in the order in which they were imposed, the one commencing after the expiry or setting aside of the other."

It follows that the order will begin from the day it is made, unless an order is already in existence against the accused, in which event the later order will automatically begin after the earlier order has expired or been set aside, unless the court directs otherwise in terms of section 56 (5). It will thus be seen that unless the court is deliberately giving such a direction it is unnecessary for it to specify the date when the order is due to begin, because the starting date is implied by the Act, and it is also undesirable to do so, because the date may have to be postponed terms of section 56 (5).

It must also be borne in mind that there is always a possibility that the accused will lodge an appeal against the order. If he does so, its operation will be suspended from the time the appeal is lodged until it is abandoned or determined. Compare *R v Hatfield,* 1956 (1) SA 38 (SR). Because of this rule, and the complementary rule that a prohibition order must be observed by the accused until he has lodged an appeal against it, any order in which either the starting date or date of termination is specified may become unworkable. It must therefore be accepted that, subject to section 56 (5), the court making a prohibition order should simply state: "The accused is prohibited from driving X class or classes of motor vehicles for a period of Y months or years." The date when the prohibition period will end will then be calculated by taking into account not only the period ordered by the court, but also any period during which the order was suspended.

It will usually be desirable for the court to inform the accused of the effect of the order and of his noting an appeal against it, not to encourage him to note such an appeal, but simply to ensure that he is fully aware of those effects from the time he leaves the court-room.

The Director has also drawn attention to the lower court's order that the accused's licence be endorsed with the particulars of the conviction. He has pointed out that the present Road Traffic Act, unlike the preceding Act, Chapter 289 of 1963, does not contain any provision enabling a court, which prohibits a person from driving, to order the endorsement of his present or future licence. Instead, section 58 (1) prescribes that



PITTMAN J

all endorsements specified in the Act are to be made automatically by the Registrar of Road Traffic Licences through administrative action in terms of section 15 of the Regulations. The Director therefore submits that a court making a prohibition order should not order endorsement of the accused's existing or future licence, but instead should simply draw the accused's attention to the provisions of section 58 (1), to ensure that he will comply with them.

I believe that the Director has analysed the Act correctly, and consequently the references to

Copyright Juta & Co Ltd

endorsement in the sentence under review will be deleted from it.

It is important to note that these remarks about the court's lack of authority to order endorsement apply only to cases where the accused has been prohibited, either wholly or partly, from driving, or falls within the special provisions of section 57 (3a) (a). They do not apply to the case where an accused has been guilty of one of the kinds of driving offence specified in section 57 (3a) (b), but has nevertheless not been prohibited from driving. In such a case section 57 (3a) (b) requires a court which thinks an endorsement should be made, to make an order accordingly.

For these reasons, the accused's sentence for contravening section 46 (1) of the Act should have read only as follows:

> "A fine of $75 or in default of payment 15 days' imprisonment with labour. The accused is prohibited from driving all classes of motor vehicles, except class 5, for a period of six months."

It would have been desirable in these particular proceedings, but in no way essential to their validity, for the court to explain to the accused: (1) how the prohibition period would run, if no appeal were to be lodged, (2) the effect upon that period if an appeal were to be lodged, (3) the obligation imposed by section 58 (1) (a) of the Act upon him as the holder of an existing licence, and (4) the nature of the endorsement that would be made upon that licence in terms of the relevant section 57 (3) (a).

This judgment has been approved by all the other judges presently available in the General Division, and it is hoped that it will bring about a consistent method of dealing with similar cases in future in all courts. I conclude by expressing the gratitude felt by all such judges and myself for the Director's efforts towards that aim.

---



## THE STATE v SAIDI 1980 ZLR 341

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA and Goldin, JA

16th September, 1980

### Flynote

> Criminal Procedure - sentence - dealing in uncut emeralds in contravention of section 3 (1) of the Precious Stones Trade Act, 1978 - value of emeralds - prevalence - disparity in sentences imposed on participants in same offence - when Court will interfere.

### Headnote

The appellant had been convicted of contravening section 3 (1) of the Precious Stones Trade Act, 1978, in that he had dealt in or possessed twenty-one rough and uncut emeralds. The

Copyright Juta & Co Ltd

appellant was sentenced to eight months' imprisonment of which four months were suspended. His co-accused, namely his wife and sister-in-law, received wholly suspended sentences of imprisonment. Four other participants in the same offence tried in two different courts, were sentenced to fines coupled with suspended sentences of imprisonment. The appellant's appeal against sentence was based on the low value of the emeralds and the disparity between his sentence and the sentences of those who were fined.

*Held* that , although the value of the emeralds is a factor to be taken into account, most offenders have little knowledge of the true value, but usually believe the value to be considerable. The prevalence of the offence indicates a need for severe deterrent sentences.

*Held,* further, that a disparity in the sentences imposed on participants in an offence will not necessarily warrant interference on appeal. Only a disturbing disparity may justify interference where other considerations are more or less equal. (*S v Giannoulis,* 1975 (4) SA 867 (AD) followed.) It is easier for the court to interfere where the accused have been dealt with by the same magistrate in one trial. Where different magistrates have tried participants in the same offence there is always the possibility that the disparity in sentences is due to the disparity in facts placed before the different courts. (*S v Sambo*, 1979 (2) SA 1046 (R., A D.) cited with approval.)

Cases cited:

*S v Nkomo and Ors,* 1976 (4) SA 800 (RAD);

*Smith and Smith v S* AD 59/80;

*Louis McMaster v S* AD 84/78;

*Dube v S,* AD 67/79;

*Onias Shoko v S,* AD 121/79;

*Moses Hove v S,* AD 136/79;



LEWIS JP

*S v Giannoulis* (*supra)*;

*S v Shadaya,* 1977 (4) SA 108 (RAD);

*S v Sambo* (*supra)*.

*R Hill*, for the appellant.

*C R Barlow,* for the respondent.

## Judgment

**Lewis JP:** The appellant in this case was convicted jointly with his wife, Joice Saidi, and his

Copyright Juta & Co Ltd

wife's sister, Gloria Msenza, of wrongfully and unlawfully dealing in or possessing 21 rough uncut emeralds weighing approximately 56 carats, in contravention of section 3 (1) as read with section 3 (2) of the Precious Stones Trade Act No. 8 of 1978. He was a first offender. He was sentenced to eight months' imprisonment with labour of which four months were suspended for five years on conditions. His co-accused, that is to say his wife and his sister-in-law, were each sentenced to totally suspended prison sentences. He has appealed to this Court against the severity of the sentence.

The appellant and his wife and sister-in-law were originally charged jointly with four other persons who were also associated with the transaction, but because the appellant and his co-accused, that is his wife and his sister-in-law and one of the other accused named John Nyakusengwa, pleaded not guilty on arraignment, the trials were separated. The three accused who had pleaded guilty, that is to say Paul Harurapwi, Philip Mwachilolo and Eliah Mudumi were found guilty by a different magistrate on the basis that the first two named were in possession of 11 stones and the third of three stones and they were sentenced to fines plus suspended prison sentences. John Nyakusengwa was tried and convicted by yet another magistrate, after having changed his plea to guilty. When he came up eventually for trial he was found guilty of being in possession of 11 stones and was also sentenced to a fine plus a suspended sentence of imprisonment.

As appears from the affidavit of the expert valuer, Mr Mitchell, although the 21 stones together weighed as much as 56 carats, the percentage recovery of these stones, that is to say the percentage which could be recovered after cutting them into emeralds, was as low as two percent., and hence the rough value was only placed at $28, the wholesale value at $56 and the retail value at $111.

Mr *Hill,* who appears for the appellant, argues firstly that because the stones were of such low value a fine was a proper sentence in this case and a sentence of imprisonment on a first offender was manifestly excessive. Secondly, and in any event, he submits that there is a gross



LEWIS JP

disparity between the sentence imposed upon the appellant in this case and the sentences of fines plus suspended sentences of imprisonment imposed on the four other people tried by different magistrates to whom I have already referred.

Now, as far as the question of value is concerned, it is true that in the case of *The State v Nkomo and Others,* 1976 (4) SA p. 800, the former Chief Justice, BEADLE A C.J., in a judgment in which I concurred, did say that one of the factors which must be taken into account is the value of the stones being dealt in. Of course, it stands to reason that generally speaking if the person is a big operator in the business of legal trafficking in emeralds, then he will be more severely dealt with than the small operator. But one should guard against attaching too much importance to the question of value in all cases. As I have already mentioned in the instant case, the total weight of the stones was considerable, 56 carats, and yet because the percentage recovery was abnormally small, namely two per cent., the value of the stones was very low. By way of contrast, in the case of *Smith and Smith v The State,* recently dealt with by

Copyright Juta & Co Ltd

this Court in Bulawayo, Appellate Division Judgment No. 59/80, dated the 21st May, 14 uncut emeralds which weighed only 47 carats in their uncut state were valued at $470 in that state, the percentage recovery being much higher. In the case of *Louis McMaster v The State,* Appellate Division Judgment No. 84/78, only one emerald was involved. In its rough uncut state it weighed 9,75 carats, and after it was cut it weighed 5,42 carats, in other words the percentage recovery was about 60 per cent. in that case and the stone was sold eventually for $11 000. It seems to me, therefore, that unless one knows that the accused is a person who possesses expert knowledge on the value of stones in their rough uncut state and can assess what they are worth or are likely to be worth when they are cut, one can generally assume that people such as the appellant in this case who deal in these stones are largely doing so in the dark. They may be handling something extremely valuable, or they may be handling something which is virtually worth less, as in the instant case. This feature was recognized by the former CHIEF JUSTICE in *Nkomo's* case, *(supra),* where he said at p. 802 of the report:

> *"Per contra,* it by no means follows that, because the stones were worthless, the appellant should not receive a fairly severe sentence. Cases are quite common where the accused believes apatite, a worthless mineral, to be an emerald and sells it in the *bona fide* belief that it is an emerald. In such a case the accused is convicted of an attempt, but even such an attempt is a relatively serious offence because it shows a deliberate intention to contravene the Act, and the accused must have known that to contravene the Act is a serious offence."



LEWIS JP

Accordingly, the argument based on the value of the stones is not one which persuades me that the sentence in this case was manifestly excessive. The number of stones was considerable and their combined weight was considerable, and the probability is that the appellant thought their value was also considerable.

It has been stressed time and time again in the last year or so that this offence of illegal trafficking in emeralds is becoming increasingly prevalent, to the detriment of the national economy. I need do no more than refer to the following cases: *Dube v S,* Appellate Division Judgment No. 67/79, *Onias Shoko v S,* Appellate Division Judgment No. 121/79 and Moses *Hove v S,* Appellate Division Judgment No. 136/79. The last occasion was in the case *S v Smith and Smith,* to which I have already referred above. As has been pointed out these cases, because of the prevalence of these offences at the present time, the case with which great profits can be made out of this illegal trafficking in uncut emeralds and the threat to the national economy which they pose, there is a need for severe deterrent sentences, and even first offenders can expect to go to gaol unless there are special circumstances. I turn to deal with the other leg of Mr *Hill's* argument based on the disparity between this sentence and those imposed on the four co-accused who were dealt with by different magistrates. The general principle governing disparity is dealt with in the case of *S v Giannoulis,* 1975 (4) SA 867 (AD) which was referred to by this Court with approval in the case of *S v Shadaya* 1977 (4) SA 108 (RAD) at p 111 A to C In that case, HOLMES JA, set out the following principles:

> "1. In general, sentence is a matter for the discretion of the trial Court, Disparity in the sentences imposed on participants in an offence (whether tried together or in separate Courts) will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.

**Copyright Juta & Co Ltd**

2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are not personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted The ground of interference would be that the sentence is disturbingly inappropriate.

3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances."

*Shadaya*'s case, *(supra)*, was clearly one that cried out for interference by this Court. In that case two persons had been involved in the transaction,



LEWIS JP

a European named Stack and an African, the appellant Shadaya. Both were employed by the same company and it was at the instigation of the European, Stack, that Shadaya became involved in the dealing in emeralds. They were tried in different Courts. Stack was sentenced to a fine of $2000. Shadaya was sentenced to 12 months' imprisonment. Applying the principles enunciated by MR JUSTICE Holmes, this Court found that it was necessary to interfere in order that justice should be seen to be done as between these two people, the European, whose moral blameworthiness was the greater, having been given a fine and the African on the other hand having been sentenced to 12 months' gaol. The sentence was therefore set aside and this Court substituted a fine of $500 on Shadaya.

Generally speaking, it is easier for the Court to interfere and redress the sentences where the accused have been dealt with in one and the same trial by the same magistrate and the magistrate has treated the one far more harshly than he should have done by comparison with his accused. But where a number of different magistrates are involved trying people who were concerned generally in the same transaction, it is not so easy for this Court to interfere. I would refer in this respect to what was said by MACDONALD CJ, in the case of *S v Sambo,* 1979 (2) SA 1046 (RAD) at p. 1049,* (13)A, where the learned CHIEF JUSTICE said

"In saying as he did that courts in trying co-offenders can only have regard to that which is 'proved against each', the magistrate was making the pertinent and valid point that where two offenders are tried in different courts a magistrate cannot be held accountable for the possibility that the wool may be pulled over the eyes of the one court but not of the other. While, for example, an accused person in the position of Patel would almost certainly be anxious to avoid any suggestion that he was the instigator of the crime, a co offender in the position of the appellant would on the other hand be anxious to prove that he was. Where a disparity in sentences has its origin in a disparity in facts placed before different courts, it would only be in the most exceptional circumstances that an appeal Court would interfere with the heavier sentence passed. In such a case, the fact that justice has been done, notwithstanding the apparent disparity sentences, would emerge from a disclosure of the full circumstances in which the disparate sentences came to be passed. The fact that a co-offender is, as a result of placing false or misleading information or evidence before a court, given a sentence which is too lenient cannot redound to the benefit of a co-offender sentenced appropriately on a more serious version of the facts."

In the instant case dealing first of all with three of the co-accused who pleaded guilty and were tried by the one magistrate and received fines,



Copyright Juta & Co Ltd

LEWIS JP

that magistrate, in a very careful judgment in which he appreciated the seriousness of the offence generally and the need for a deterrent, nevertheless found in favour of all three accused that they had played a minor role in the general scheme of things, and that they were, to use his own description, "couriers" who were simply used to pass on the emeralds from their original source, whoever that may have been, to their ultimate destination which was the seller.

Furthermore, though it is not a matter of great significance, two of them were convicted only of possessing 11 emeralds, and the other only in respect of possessing three emeralds, which is a point of distinction. The appellant here was convicted of dealing in 21 stones.

In the instant case there can be no doubt that the appellant in association with his wife was on the end of the line in this illegal transaction. It was he in association with his wife who was responsible for finding a buyer and selling the emeralds on behalf of the person who originally supplied them.

The appellant in a statement in mitigation after being convicted on the basis of agreed facts which he had subscribed to to begin with, attempted to play down his part in the affair and, to give the impression that he came into the whole thing simply by chance and at the instigation of someone else. However, it was part of the agreed facts that three rough emeralds, part of the parcel of 21, were found hidden in the steering column of his motor-car, and he offered no explanation as to how that came about. The magistrate, therefore, rightly rejected this version. There can be no doubt that his moral blameworthiness as a dealer and ultimate seller was higher than those who were found to be mere conduit pipes.

As far as the remaining co-accused is concerned, John Nyakusengwa, who was dealt with by yet a different magistrate, although that magistrate did not in so many words say so, the facts outlined by the prosecutor after this accused had pleaded guilty also showed that he was no more than a conduit pipe who stood to gain nothing out of the transaction. It was the fact that he stood to gain nothing out of the transaction and the fact that he was in gainful employment and was otherwise a respectable person which influenced the magistrate in imposing a fine coupled with a suspended prison sentence.

The sentence in this case was clearly an appropriate one in the light of the numerous other cases to which I have referred in which sentences of imprisonment of comparable length have been confirmed by this Court in comparable circumstances.

---



LEWIS JP

Mr *Hill* has said everything that could be said for the appellant, but in my opinion there is no basis on which this Court would be justified in interfering with the sentence on the ground of disparity. In the result, the appeal must be dismissed.

**Baron JA:** I agree.

**Goldin JA:** I agree.

---

**Copyright Juta & Co Ltd**

*Morris, Beale & Collins,* attorneys for the appellant.



## CONE TEXTILES (PRIVATE) LIMITED v AYRES AND ANOTHER 1980 ZLR 347

**Court** **Appellate Division, Salisbury**

Civil Trial

Lewis JP, Baron JA and Goldin JA

4th, 5th, 6th, 7th and 8th August and 16th September, 1980

### Flynote

Arbitration - confined to limits of submission - enlargement of scope of dispute - eject on release of retention fund - necessary implication that amount payable be determined - determination of amount cannot be delegated - "misconduct" in terms of section 12 of the Arbitration Act [Chapter 12] - severability of award - remission considered.

### Headnote

The second respondent entered into an agreement with the appellant to erect a factory. The agreement contained a provision to refer any dispute to arbitration In March, 1976, the architect refused to issue an interim certificate for payment, alleging serious defects in the project. The refusal to issue a certificate led eventually to the selection of an arbitrator, the first respondent, by the President of the Institute of Architects. The parties were unable to determine the ambit of the dispute, with the result that the arbitrator himself determined the scope of his authority. The General Division confirmed the issue as formulated by the arbitrator, namely whether the architect was "entitled to withhold issue of a further architect's certificate under clause 22 of the contract".

In April, 1979, the arbitrator made his award which was immediately challenged in the General Division and ultimately in the Appellate Division. The arbitrator stated that the certificate in question was the penultimate certificate. He awarded the full amount which was due to the second respondent at the time the certificate was due. Secondly, he ordered the release of all moneys held in the retention fund that were due in terms of clause 22. From



the amount to which the second respondent would become entitled, the arbitrator ordered that there should be excluded the cost of carrying out the remedial works on the project, which amount should be determined by quantity surveyors or by the parties agreeing the amount on a *quantum meriut* basis.

*Held* that it was within the enlarged jurisdiction of the arbitrator to determine whether the architect could withhold a certificate, which, because it was a penultimate certificate, had the effect of releasing half of the retention fund. Upon occupation the contractor became entitled to

Copyright Juta & Co Ltd

the release of half of the retention fund. In the absence of *mala fides,* gross unreasonableness or failure to apply his mind to the question, his finding that there had been occupation entitling the release of the retention fund could not be assailed.

*Held,* further, that the order to remedy defects had no bearing on the release of the sum from the retention fund.

*Held,* further, that it is a necessary implication that an arbitrator called upon to determine whether a certificate should have been issued, is also empowered to determine the amount for which it should be issued.

*Held,* further, that the order of the arbitrator requiring a quantity surveyor to evaluate the cost of carrying out remedial work was outside his jurisdiction. The arbitrator should have applied his own judgment and not merely set out a formula for determining the amount. The alternative order that the value of the remedial work could be agreed on a *quantum meruit* basis was ineffective and meaningless.

*Held,* further, that there was no substance in the contention that the cumulative effect of alleged errors amounted to misconduct within the meaning of section 12 (2) of the Arbitration Act [*Chapter 12*] .

*Held,* further, that the valid portion of the award, being final and certain, was severable from the void part. *(Timber Shipping Co. SA v London and Overseas Freighters Ltd.,* [1972] AC 1 (applied.)

*Held,* further, that the case was not a proper one for remission to the arbitrator for determination of the amount. The valuation of remedial work had changed since the award was made, the defects liability period had commenced and the time had arrived for the determination of a final certificate.

*Held,* further, that the order for the release of one half of the retention fund be upheld, but that the order concerning payment for work done and the manner of its calculation be set aside.

Cases and authorities cited:

*Attorney-General for Manitoba v Kelly,* [1922] 1 AC 276;

*Harris v South African Aluminium Solder Co (Pty) Ltd,* 1954 (3) SA 388 (D); Voet (4.8.18);

McKenzie, *The Law of Building Contracts and Arbitration in South Africa,* 3rd Ed.;

Jacobs, *The Law of Arbitration in South Africa;*



*Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd,* 1956 (3) SA 480 (FSC);

*Bangtoo Brothers v National Transport Commission and Ors,* 1973 (4) SA 667 (N);

*Schoch NO and Ors, v Bhettay and Ors,* 1974 (4) SA 860 (AD),

**Copyright Juta & Co Ltd**

*Dickenson and Brown v Fisher's Executors,* 1915 AD 166;

*Brodie v Cardiff Corporation* [1919] AC 337;

*Prestige and Co Ltd v Brettel* [1938] 4 ER 346;

*Timber Shipping Co SA v London and Overseas Freighters Ltd* (*supra)*.

*R R Horn SC,* with him *R Hill*, for the appellant. Apart from any question of misconduct of the proceedings or the improper procurement of award, on which grounds the Court *a quo* has jurisdiction under the Act to set an award aside, an award may be set aside if an arbitrator purports to determine questions outside the submission without there having been any enlargement of the submission by agreement between the parties. *Harris v South Africa Aluminium Solder Co (Pty) Ltd* (*supra)*; *McKenzie NO v Basha,* 1951 (3) SA 783 (*Harlin Properties Ltd v Rush and Tomkins (SA) Ltd,* 1963 (1) SA 187 (D & CLD); *Russell on Arbitration* (18th edition), pages 344 345; *Davies v Price* (1862) 6 LT 713; *Halsbury's Laws* (4th edition) paragraph 610; and McKenzie, *The Law of Building Contracts and Arbitration in South Africa* (3rd edition) pages 162-163.

It was common cause at the arbitration and in the hearing before the Court *a quo* that the certificate referred to in the issue submitted to the arbitrator was in fact what is described as the "penultimate certificate" as opposed to an "interim certificate".

The distinction between a mere interim certificate and a penultimate certificate is one which is well recognized in building contracts. A penultimate certificate differs from a mere interim certificate in a number of important respects not the least of which is that its issue commences the "defects liability period" referred to in clause 13 of the building contract and in the appendix to the building contract and also releases to the contractor half of the retention fund built up in terms of clause 22 (c) of, and the appendix to, the building contract. *Hudson's Building d Engineering Contracts* (10th edition) pages 257 and 392, *Westminster City Council v J Jarvis and Sons, Ltd and Anor.* [1970] 1 All ER 943; and *Rabbich v Somerset East Municipality,* 13 EDC 107.

The purpose of the arbitration was to determine whether the defects referred to in the architect's letters dated 3rd March, 1976 and 2nd April, 1976, existed, and if so whether they were the responsibility of Pettigrew in terms of the building contract (in which case the architect was justified in refusing to issue the certificate sought) or whether they



were the responsibility of the person or persons who designed the building or of other contractors for whose work the contractor was not responsible in terms of the building contract (in which case the architect was not justified in withholding the certificate sought).

The dispute submitted to the arbitrator did not require or call for an award giving a ruling on the value of the certificate; all that was submitted was the question whether or not the architect was justified in withholding the certificate on any or all of the grounds stated in his letters.

The scope of the arbitration was not extended by agreement. In fact the arbitrator was well

Copyright Juta & Co Ltd

aware before making his award that as far as Cone was concerned the only issue on which a ruling was competent was whether the architect was justified in withholding the issue of the penultimate certificate on the grounds stated in his letters and that the question of the amount of the certificate would be beyond the scope of the arbitration.

The case of *Prestige and Co v Brettell* (*supra)* on which the learned Judge in the Court a quo relied in concluding that the issue submitted to the arbitrator called for him to rule on the value of the penultimate certificate is distinguishable both on the facts and in law.

It cannot be said that that part of the award which travels outside the ambit of the issue submitted to the arbitrator is clearly separable from the rest of the award and does not affect the "good" part because it is clear from the terms of the award itself that the finding that the architect was wrong in refusing to issue the certificate was linked to the terms and conditions upon which the certificate was stipulated by the arbitrator to be given and in particular that the value of the defective work should be deducted. If the value of the defective work could not be deducted, then clearly the penultimate certificate could not be issued until the defective work had been made good.

An arbitrator can be said to have misconducted the proceedings within the meaning of section 12 (2) of the Act if the arbitrator, in making the award, makes a mistake or mistakes whether of law or fact of such a nature that it can be said that such mistake or mistakes cannot have been made without some degree of misconduct or partiality on the part of the arbitrator or without gross carelessness leading to a wrong conclusion on a question of law or fact. *Landmark Construction (Pvt) Ltd* v *Tselentis,* 1972 (1) SA 435 (R): *Dickenson and Brown v Fisher's Executors* (*supra)*; *McKenzie NO v Basha (supra*); and Halsbury (op. cit.) para. 622 pages 330-331.



Accepting that it does not constitute misconduct of the proceedings by the arbitrator simply because the arbitrator can be shown to have come to a wrong or even an unreasonable conclusion, it is not quite accurate, as reference to the above authorities shows, to say that an error only constitutes misconduct if it can be said to evidence *mala fides* as is suggested in the judgment of the Court *a quo*.

The arbitrator, assuming he had power to direct the deduction of the value of remedial works which were the responsibility of Pettigrew, wrongly delegated his function of ascertaining the value of those remedial works to another person.

Assuming that the value of the remedial works was one of the matters which was referred to the arbitrator to decide it was he and he alone who had to decide the value of the remedial works. Compare Russell (op. cit.) pages 279-80; *Maladry v Dekoning,* 1905 TS 528 at 532, and *Harlin Properties* case (*supra)* at pages 195G-196E.

*W J Millar SC,* with him *B W K Whaley,* for the respondents. In order to determine the main issue relating to the correctness or otherwise of the withholding of the certificate it was necessary for the first respondent to determine the sub-issues raised.

For the first respondent to have simply ruled that the second respondent was entitled to a

Copyright Juta & Co Ltd

further certificate without any direction as to his findings on the sub-issue would have rendered the arbitration little better than ail expensive farce.

If an arbitrator decides that something ought to have been done by the architect (in the present case that a certificate should have been issued) which was not done, he may by that decision himself supply the deficiency, and do that which ought to have been done, and produce the result which ought to have been produced, if in his view what was done is the only reason why the result of doing what ought to have been done does not follow. See *Prestige and Co v Brettell* (*supra)*; and *Brodie v Cardiff Corporation* (*supra)*.

In the absence of adequate evidence on quantum, the first respondent did the next best thing, namely to put himself in the position of the architect and direct, in the light of his findings on the various sub-issues, what factors had to be taken into account in determining the value of the certificate to be issued. See *Rhodesia Electricity Supply Commission v Joelson Brothers and Bardone (Pvt) Ltd.,* 1977 (4) SA 639 (R).

It was common cause that when the disputed certificate was sought by the second respondent the appellant had taken occupation of the works.



GOLDIN JA

This was the reason why it was common cause that the certificate sought by the second respondent was the penultimate certificate.

The first respondents direction to include half the retention fund and accrued interest thereon, therefore, was a consequence which flowed automatically from the provisions of clause 22 (d) of the contract.

In any event the finding of the first respondent that certain minor remedial measures were the responsibility of the second respondent and that the "value" thereof should be deducted from the value of the penultimate certificate is nevertheless consistent with the stage of practical completion having been reached even if occupation of the works had not been taken. See *Hudson's Building and Engineering Contracts,* 10th edition, at 258.

The only reasonable inference to be drawn from the conduct of the appellant is that it has abandoned any possible appeal relating to misconduct based upon the direction of the first respondent to include the sum of $50000 and interest thereon in the valuation of the certificate. See in principle *Gcayiya v Minister of Police,* 1973 (1) SA 130 (AD): and *Hlatshwayo v Mare and Deas,* 1912 AD 242.

In the absence of any agreement between the parties as to the cost of the remedial work, a direction that the cost thereof be determined in the normal manner is not a direction which is beyond the jurisdiction of the arbitrator in the light of the issues raised in the arbitration.

Alternatively and in the event of it being held that the said direction constitutes an attempt to vary the agreement between the parties or an improper delegation of the function of the architect, it is clearly severable from the remainder of the award and in particular from

Copyright Juta & Co Ltd

paragraph 1 (d) (i) of the award.

## Judgment

**Goldin JA:** On the 29th today, 1974, the appellant as owner entered into an agreement with the second respondent, as the contractors, whereby the latter agreed to erect a factory and associated structures for the sum of $1 450 7 . The agreement was in the standard building contract form and provided for the appointment of an architect, a quantity surveyor, nominated subcontractors, certificates and payment and provision to refer any dispute to arbitration.

On the 3rd of March, 1976, the current architect, who replaced the original one who had been dismissed, refused to issue an interim certificate an the grounds that there were a number of defects in the work done. He said in his letter that he "cannot issue a further certificate for payment in view of the serious defects pertaining to the above project".

---



GOLDIN JA

He then set out what is described as "the areas requiring remedial attention or replacement" and concluded by saying: "When all these items are satisfactorily remedied, I shall then be in a position to review the matter."

The second respondent contended that the work had been satisfactorily fulfilled, but the architect disagreed with this view and said in a letter dated End April, 1976:

> "Under the circumstances, the proper completion of the Mill at Seki is a condition precedent to payment despite previous payments made, which are not a bar to the subsequent maintenance of an action for the remedying of such defects before full and final payment is made in accordance with Clause 25 the Contract. No further certificates will be issued until the defects lintel hereunder, are properly and effectively remedied to my satisfaction."

He then proceeded to set out in detail the alleged defective work. He concluded by saying:

> " . . . it should not be assumed that this is a complex list of defects but it certainly precludes me from issuing the certificate required."

Whether the use of the word "complex" was intended to be "complete" does not appear to be relevant.

The dispute concerning the issue of a certificate was referred to arbitration in terms of the agreement. In terms of clause 25 which relates to the determination of differences by an arbitrator such arbitrator, failing his appointment by mutual agreement, had to be chosen by the President of the Rhodesian Institute of Architects and the President of the National Federation of Building Trade Employers in Rhodesia. After considerable delay and a variety of disagreements between the appellant and the second respondent, an arbitrator was procured and selected by the President of the Rhodesian Institute of Architects who is the first respondent. By that time the appellant and the second respondent were "engaged" in several legal disputes arising from the contract which also involved the architect who had been dismissed and a firm of structural engineers who were concerned in the design of part of the factory. In these circumstances, the first respondent, namely, the arbitrator, sought to ascertain

Copyright Juta & Co Ltd

two main aspects. Firstly, how and by whom he would be paid, an aspect which was relevant to the proceedings in the Court *a quo*, but not to this appeal. Secondly, the arbitrator was understandably concerned to determine the subject matter or the question in respect of which he was required to make an award. In short, he wanted to know the ambit of the dispute which fell within his authority arbitrator. This could not be agreed upon by the appellant and the second respondent and resulted in the arbitrator himself defining



GOLDIN JA

the scope of his authority and thereafter this being confirmed and settled in proceedings in the General Division of this Court. In the notice of motion proceedings of the 7th of October, 1977, the appellant sought an order directing that all outstanding differences with the second respondent be dealt with at the arbitration. SMITH J, confirmed that the issue was as formulated by the arbitrator, but with only one change, namely, that instead of the word "certificates" the word "certificate" in the singular be substituted. In the result the issue for decision by the arbitrator was as follows:

> "Whether Harold O Baeck, as an architect duly appointed by the employer in terms of a building contract between Cone Textiles (Pvt) Ltd and C Pettigrew (Pvt) Iliad. dated 29th May, 1974, was on or about 3rd March, 1976, and still is, entitled to withhold issue of a further architect's certificate under Clause 22 of the contract, upon any of the grounds stated in his letter to C Pettigrew (Pvt) Ltd of the 3rd March, 1976, and to Gill, Godlonton and Gerrans on the 2nd April, 1976, respectively."

As SQUIRES J, in his judgment, which is now on appeal, summarized the position:

> "Eventually, the respective lines of battle were drawn and the arbitration commenced on the 16th October, 1978. Seven weeks and 22 volumes of evidence later, the arbitrator adjourned to consider his award; and on the 11th April, 1979, this was made."

On the 17th May, 1979, the appellant instituted proceedings seeking an order setting aside the award on a variety of grounds, but in particular that the arbitrator's award was outside the scope of his authority not within his jurisdiction.

I turn to deal with the question concerning whether or not the arbitrator's award is within his authority jurisdiction.

The arbitrator precedes the statement of his award by asserting *inter alia* that he had regard "that both the parties in their written submissions to the Reference and in their addresses prior to, during and at the conclusion of the hearing have stated and confirmed that it is common cause that the certificate (in the singular - being the comment of the Learned Judge in his judgment G-S-200-77) is the Penultimate Certificate". He then went on to declare that "the Architect forthwith issue this certificate, which is the Penultimate Certificate, for the full amount which was due to the Contractor C Pettigrew (Pvt) Ltd at that time that the certificate was due . . ." 'Secondly he awarded and ordered that the architect "shall include in the value of this penultimate certificate the release of all the moneys held in the Retention Fund that were due to the Contractor at the time the Contractor was entitled to such moneys due for release from the Retention Fund which, in accordance with and as stated in clause 22

Copyright Juta & Co Ltd

GOLDIN JA

of the Conditions of Contract . . .". He also awarded interest accruing on this sum as well as the inclusion in the value of the said penultimate certificate of $50000 to which the second respondent became entitled in terms of agreement for the payment of such sum for the speeding up and acceleration of the total contract works for beneficial occupation thereof. This amount, the arbitrator states, had been certified by the architect in two earlier certificates "and subsequently wrongfully cancelled or omitted or withdrawn in the 15th progress certificate dated 6.11.1975". The arbitrator then went on to order that the architect "shall also include in the value of the certificate he is to issue, the full value of the amounts due at the time the Penultimate Certificate was due to the Contractor, which was the date of the Practical Completion of the works and Beneficial Occupation having been given by the Contractor, without any deductions except direct payments made by the Employer to subcontractors and in accordance with those valuations prepared with the amounts stated at that time by the Quantity Surveyors . . .". The arbitrator then went on to order that from the amount, which he refers to as "the valuation to which the second respondent would thus become entitled there should be "excluded (d), . . the cost of the carrying out at that time of the Remedial Works of those items which are stated in the Appendix "A" hereunder which have as yet not been completed or carried out by the Contractor (who has stated at the Hearing his willingness to so do and so execute)" and he further directed that such valuation for remedial works should either be ascertained and determined by the quantity surveyors in accordance with the priced bills of quantity and in the normal manner or, alternatively, by the parties settling "the amount of the cost of the afore - mentioned remedial work" by agreeing upon "a lump sum of money on a *quantum meruit* basis".

In dealing with the attack on this award on the grounds that it falls outside the ambit of his jurisdiction, it can be conveniently stated now that the inclusion of $50 000 payable for speeding up the progress of the contract had in fact been paid and it should not have been included in determining the amount payable to the contractor. I may add that the mistaken inclusion of this sum which is relied upon as justifying a finding of misconduct on the part of the arbitrator, with which I will deal later, is in my view an understandable error. The evidence clearly discloses confusion and uncertainty as to whether this sum which was authorized for payment and which authority had been withdrawn was in fact ultimately paid.

An arbitrator can only act within the jurisdiction or the authority conferred upon him. Usually only particular defined disputes are submitted



GOLDIN JA

to the arbitrator and he is only authorized to determine the dispute referred to him for determination.

In *Attorney-General for Manitoba v Kelly* [1922] 1 AC the position is summarized at p. 276:

> "It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true

Copyright Juta & Co Ltd

construction of the submission, was not referred to him."

In *Harris v South African Aluminium Solder Co (Pty) Ltd* 1954 (3) SA 388, SHAW J's judgment is to the same; effect:

"It is clear that if the arbitrators have wrongly construed the submission to them and have decided a matter not submitted for their decision their award will be bad as being not in terms of the submission from which they derive their jurisdiction."

It is interesting to observe that this obvious position was perhaps most clearly summed up by *Voet* (4.8.18):

"So on the other hand an arbitrator should also take care not to exceed the the bounds of the submission nor to dispose of matters other than those which have been entrusted to his personal discretion, nor to do so in any other way than that indicated by the terms of the submission . . .".

It is perhaps necessary to observe that the use of the word ' submission" can lead to confusion. In the Arbitration Act [*Chapter 12*] "submission" is defined as meaning "written agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not." In the South African Arbitration Act [Act 42 of 1965] what is defined as an "arbitration agreement" is what is defined in our Act as "a submission". As pointed out by Mackenzie (The Law of Building Contracts and Arbitration in South Africa 3rd Ed. at p. 140) this change of terminology avoids confusion between the agreement to refer a matter to arbitration and the scope of the question referred to an arbitrator for determination under such an agreement. The learned author says:

"Firstly it stresses the contractual nature of an agreement to go to arbitration, and secondly it should avoid a certain confusion that sometimes existed where the term 'submission' was also used to signify what should more pro" perry have been termed 'a statement of matters in dispute.' "

We are concerned with what can be described as the statement of the matter in dispute. It is not necessary for this to be in writing as is required to constitute a valid "submission" under the Act. In practice it is usually in writing and understandably so. When matters referred to arbitration are reduced to writing, it constitutes an agreement between the parties as



to the subject matter for arbitration and has to be interpreted according to the rules governing the interpretation of any written contract. More over, the parties can by express or by a tacit agreement enlarge the ambit of the scope of the matters in dispute. (The Law of Arbitration in South Africa by Jacobs, 29.)

The crux or main burden of the submission that the award falls outside the arbitrator's jurisdiction is that on a proper construction of the issues referred to the arbitrator as set out above, he was only entitled to determine whether or not the architect was justified in withholding the certificate on any or all of the grounds stated in the architect's letter. In other words he was confined to deciding or determining whether the defects referred to in the architect's letters dated the 3rd of March, 1976, and the 2nd of April, 1976, still existed and, if so, whether they were the responsibility of the contractor in terms of the building contract or whether they were

Copyright Juta & Co Ltd

the responsibility of the person who desired the building or of other contractors for whose work the contractor was not responsible in terms of the building contract.

I do not consider it necessary to decide whether Mr *Horn's* submission is correct. Even assuming that his restrictive interpretation of the arbitrator's powers is correct, the written issue was enlarged by express agreement between the parties. As SQUIRES J, says in his judgment:

> ". . . the parties themselves also regarded the dispute, and therefore the arbitrator's function, as ranging further than the single question of whether or not a certificate should be issued...."

This enlarged issue is recorded and relied upon in the arbitrator's award which I quote again:

> "that . . . having regard that both the parties in their written submissions to the Reference and in their addresses prior to, during and at the conclusion of the hearing have stated and confirmed that it is common cause that the certificate" (in dispute) "is the Penultimate Certificate."

Mr *Horn* in his Heads of Argument states:

> "It was common cause at the arbitration and in the hearing before the Court *a quo* that the certificate referred to in the issue submitted to the arbitrator was in fact what is described as the 'penultimate certificate' as on posed to an 'interim certificate'."

It is, therefore, necessary to ascertain whether, and possibly to what extent, the arbitrator's award falls outside his jurisdiction by determining what is involved or embraced in the issue of a "penultimate certificate".

The term "penultimate certificate", is not contained in the building contract. It can be said that is is a final interim or progress certificate in which is included all such payments as may become due at that stage.

---



GOLDIN JA

In the case before us it is clear what the parties understood by this term, and the extent to which they enlarged the scope of the dispute referred for determination by the arbitrator.

The position is correctly summarize by Mr *Horn*, and I quote again from his Heads of Arguments:

> "The distinction between a mere interim certificate and a penultimate certificate is one which Is well recognized in building contracts. A penultimate certificate diners from a mere interim certificate in a number of important respects not the least of which is that its issue commences the 'defects liability period' referred to in clause 13 of the building contract and in the appendix to the building contract and also releases to the contractor half of the retention fund built up in terms of clause 22 (c) of, and the appendix to, the building contract."

It must therefore be accepted that it was within the jurisdiction of the arbitrator to determine whether the architect was entitled to withhold a certificate which, because it was a penultimate certificate, has the additional effect of releasing to the contractor half of the retention fund.

In terms of clause 22 (it) of the contract, it is provided:

---

**Copyright Juta & Co Ltd**

> "On practical completion of the Works the Contractor shall subject to Clause 18 of these Conditions be entitled to a certificate for one half of the Fund, including all interest accrued to date, the other half in the said joint names being held upon trust for the purpose aforesaid until the issue of the Architect's final certificate, whereupon the said half and further interest thereon shall be paid to the Contractor. 'Practical Completion' for the purpose of this Clause shall mean the occupation or completion ready for occupation of the Works."

Therefore upon "occupation" the contractor becomes entitled to the release of half the fund whether or not he does so subject to rectification of any patent defects. Mr *Horn* strongly stressed that it is not known whether there was occupation or to what extent there was occupation and submitted that if there had been partial occupation it would not constitute "occupation" as required in clause 22 (d). In my view, this contention cannot be upheld in the circumstances of this case. The arbitrator's award was taken on review. There is no doubt that the arbitrator applied his mind to the question of occupation as appears from his award quoted above. It is not even necessary to decide whether the evidence justified such a conclusion. In the absence of *mala fides* or gross unreasonableness or failure to apply his mind to the matter, his findings that there had been occupation so as to entitle the second respondent to the payment of half the retention fund cannot be assailed *(Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd,* 1956 (3) SA 480 (FSC). *Bangtoo Brothers v National Transport*

---



GOLDIN JA

*Commission and Others,* 1973 (4) SA 667 (N); *Schoch NO v Bhettay and Others,* 1974 (4) SA 860 (AD) and *Dickenson and Brown v Fisher's Executors,* 1915 AD 166 at 169.) It is interesting to note that the judge a quo in his judgment said:

> "In the present case, it is common cause Cat the owner had taken occupation."

But for the reasons stated, even if it cannot be held to be common cause the arbitrator's decision on this aspect cannot be interfered with in proceedings on review.

Mr *Horn* submitted that the arbitrator was never asked to determine whether there had in fact been occupation in terms of clause 22. I fail to understand this submission. The arbitrator had to determine in terms of the written issue whether the architect was entitled to withhold "a further architect's certificate under clause 22 of the contract". This clause inevitably involves the question of occupation. As has been mentioned earlier, it was also common cause that the certificate referred to was a penultimate certificate and that such certificate, as Mr *Horn* rightly conceded, included the release to the contractor of half of the retention fund.

It was further submitted that because the arbitrator found a certain number of defects had to be remedied, that in terms of the written submission he was not entitled or authorized to order the release of this sum from the retention fund. That overlooks the fact that involved in the penultimate certificate was also payment for work to date and the order to remedy defects did not relate to the release of this sum upon practical completion. Once occupation was taken, the contractor automatically becomes entitled to a certificate releasing one-hall of the fund.

In the Court *a quo* SQUIRES J, dealt with this aspect, and I respectfully agree with what he said:

---

**Copyright Juta & Co Ltd**

". . . by reason of clause 22 (d), the contractor was entitled to half the retention monies, plus such interest as had accrued thereon, on 'practical completion' of the contract. This latter stage could be achieved in one of two ways, namely either on occupation by the owner, or by completion ready for occupation. In the present case, it is common cause that the owner had taken occupation; and, if it did so before all defects had been remedied, it does not seem to me to be in any way contrary to the contract that such situation could be reflected in, and regulated by, the issue of the remaining certificates."

The arbitrator also awarded in the manner described above the amount due for work done less deduction of the cost of remedying any defects which, in his award, were the responsibility of the contractor.

---



GOLDIN JA

A great deal of argument was addressed concerning whether or not he was entitled to fix the amount payable to the contractor. For this aspect, reliance was placed on several authorities, and in particular *Brodie v Cardiff Corporation* [1919] AC 337, and *Pestige and Company Limited v Brettel* [1938] 4 All ER 346.

It was contended by Mr *Millar*, for the second respondent, that these cases support the view that when an arbitrator is asked to determine whether a certificate should be issued or whether a certificate had been wrongly withheld, he is also entitled, if he is of the opinion that such certificate should be issued, to fix the amount in which it should be granted. In my view, the judgment in the *Prestige* case (*supra)* is distinguishable because in that case the arbitrator was concerned with the issue of the certificate concerning a particular sum of money. Nevertheless, I am of the view on the facts of this case the arbitrator was entitled to determine an amount payable. Once it became common cause that the ' certificate" referred to in the written issues was in fact, what was described as the "penultimate certificate" involving the aspects mentioned above, the arbitrator became entitled to fix the amount payable if he held, as he did, that it was wrongly withheld.

It is a necessary implication that when an arbitrator is called upon to decide whether a certificate should have been issued that he is also empowered to determine, where the amount is uncertain or in dispute, the amount for which it should be issued. A mere finding that a certificate should be issued would generally be meaningless and ineffective because in the absence of agreement or determination concerning the amount involved the parties would be left in no better position than they were before the dispute was referred to arbitration. The result would still be no certificate.

This conclusion is justified in *Brodie*'s case (*supra)* and in the *Prestige* case (*supra)*.

It is interesting to observe that the attorney appearing for the appellant understood it in this way: Mr Attorney Venturas on behalf of the appellant, whilst disagreeing that the arbitrator was entitled to issue a final certificate, stated the position as follows:

"There is only one tissue in this case, and that is whether the architect wrongfully refused to issue the certificate in question. That certificate was the penultimate certificate, and that is all your function is to determine. You can go further and then determine the amount or sum of money on that particular certificate, either it should be paid or not be paid. That is all your function."

---

**Copyright Juta & Co Ltd**

GOLDIN JA

Notwithstanding this conclusion, however, I am of the view that the order by the arbitrator that the valuation of the costs of carrying out the remedial works should be ascertained and determined by the quantity surveyor clearly falls outside his jurisdiction. The arbitrator in determining the amount payable for work done less deductions of the value for defective work was not entitled to delegate this task to the quantity surveyor. This was a vital and complicated aspect requiring his own judgment and decision. Accordingly the arbitrator has not in edict fixed an amount due in respect of work done, but merely set out the formula how it should be arrived at and that depends on the ascertainment and the determination by the quantity surveyor of the amount to be deducted in respect of defective work. For this reason, paragraph 1 (d), and 1 (d) (i) of the award must be deleted. The arbitrator's award that as an alternative the value of the remedial work could be agreed upon by the parties on a *quantum meruit* basis is of no significance or value. It is always open to parties to agree upon such an amount irrespective of and in substitution of an amount awarded. They need not do it on a *quantum meruit* basis. and an order to that effect is ineffective or meaningless. It follows that paragraph 1 (d)(i) (a) is also to be deleted from the award.

The appellant also contended that the arbitrator's award was invalid and should have been set aside by the Court *a quo* by reason of the arbitrator having misconducted the proceedings within the meaning of section 12 (2) of the Act. It was not quite clear whether, in fact, this contention was abandoned. It is probably fair to say that while not abandoning it formally, Mr *Horn* simply left it without including it in his oral argument before us. It remained on display without any "sales talk".

The grounds upon which misconduct has been alleged consist of the alleged manner and extent to which his award was outside his jurisdiction. It was apparently contended that the cumulative effect of alleged errors were unreasonable or of a nature which indicated that the arbitrator failed to apply his mind to the matter and therefore constituted misconduct. There is no substance in this contention. It amounts to saying that if the appellant's contention that the arbitrator's award fell outside his authorities correct, then an arbitrator whose award falls outside his authority guilty of misconduct. When it was put to Mr *Horn* that the judge *a quo* agreed with what the arbitrator did and upheld his award, he was not prepared, understandably, to draw the same inference from such an alleged wrong decision.

In my view, the award in so far as it relates to the release of half of the money in the retention fund is concerned together with the payment of



GOLDIN JA

interest thereon is separable from or severable from the award concerning payment for work done to date less deduction. The amount involved does not require to be determined because by its very nature it is a fixed or a readily ascertainable amount.

In all the circumstances, notwithstanding that one portion of the award is clearly void, this part of

Copyright Juta & Co Ltd

the award consists of a final and certain determination of every question involved in it. Accordingly, this valid portion can be enforced while the void part is rejected. See *Timber Shipping Co SA v London Overseas Freighters Ltd,* [1972] AC 1, Russell on Arbitration, 19th ed. pp. 484/486.

It was submitted by Mr *Millar* that if it be held that the arbitrator was entitled to determine the *quantum*, but should have done so by himself without delegating the power to do so to the quantity surveyor, the matter should be remitted as it is permissible under section 12 of the Arbitration Act, to the arbitrator. In my view, this is not a proper case in which to exercise this power. Firstly, the award was made on the 11th of April, 1979. The valuation of defects upon remittal would not necessarily be the defects which were determinable or identifiable at the time the award was made or at the time the certificate was withheld. The building is subject to a variety of defects which may or may not have been patent at the relevant time and confusion can easily arise as to whether what are patent defects were so at the relevant time. Secondly, the defects liability period had also commenced and has expired after six months from the date of the award. The situation that now exists is that the time has arrived for the determination of a final certificate. Whether the parties can do so in a more orderly and practical manner compared with the litigation, disputes and delays surrounding their sub" missions to arbitration is for them to decide. Nevertheless, to remit the matter at this stage would not be practical or justified.

In the result, I would order that paragraphs, 1(d)i, 1(d) 1(a), and 1(d) 1(b) be deleted from the award. The effect of this is that the order for the release of one half of the retention fund including interest thereon is upheld, but the order concerning the payment for work done, and the manner in which it is to be arrived at, is set aside.

I turn to the question of costs. The appellant succeeded in setting aside the inclusion in the certificate of the payment for work done less deductions for defective work. It failed in respect of the payment of the retention money. On this basis the appellant had to come to this Court to succeed, to the extent to which it has done. If there was nothing else to be said, or considered, costs would follow the result.

---



GOLDIN JA

The appellant, however, failed on several issues which took up a considerable portion of the three days of argument before us. These issues included the lengthy argument concerning whether or not the arbitrator acted outside his jurisdiction, the allegation of misconduct on the part of the arbitrator, and whether or not the arbitrator was entitled to fix the amount due to the second respondent.

It is true that, in respect of the last item, while I have found he was entitled to fix such a sum, his manner of doing it fell outside his jurisdiction. In my view, the appellant's failure concerning the retention money and the time taken up concerning the matters to which I have referred, does not entitle the appellant to an order for costs enjoyed by a successful party.

In all the circumstances, it would be fair to order that each party pays its own costs. In other words, that there should be no order as to the costs incurred in the proceedings before us.

---

**Copyright Juta & Co Ltd**

In the Court below, the appellant was ordered to pay costs as an unsuccessful party, on the grounds that: "Respondent has been substantially successful". In those proceedings the appellant had to come to Court to obtain the setting aside of an award of $50 000, which, as explained above, had, in fact, been paid, although in the proceedings before the arbitrator there was confusion as to whether that had, in fact, taken place. The appellant has, of course, now also succeeded in setting aside payment for work done to date, less deductions as mentioned above.

The order concerning the costs in the Court *a quo* cannot therefore stand. In all the circumstances, I think it would be fair to make no order concerning the costs of those proceedings as well.

The costs of the arbitration proceedings should be borne equally by the appellant and the second respondent. Firstly, because of the extent to which the award has been set aside. Secondly, the proceedings in the Court *a quo* and in this Court were rendered complicated and gave rise to arguments resulting from the manner in which the arbitration proceedings were conducted over an unduly lengthy and wasteful period.

Accordingly, I would order as follows:

(a) That paragraphs 1 (c), 1 (d), 1 (d) i (a) and 1 (d) i (b) be deleted from the award.

(b) That there will be no order as to costs of this appeal and of the proceedings in the Court *a quo.*

(c) That the taxed costs of the arbitration proceedings be payable by both parties in equal shares.



GOLDIN JA

The order concerning costs is provisional, because the matter was not argued before us. Counsel agreed to postpone it until the result of the appeal became known. At the same time it was also agreed that an order of costs in the absence of argument, should be made, but leave given to the parties to apply for the order to be set aside or varied.

Accordingly, unless the parties set the question of costs down for argument within three weeks of the date hereof the above order as to costs will become final.

**Lewis JP:** I agree.

**Baron JA:** I agree.

*Byron Venturas and Travlos,* attorneys for the appellant.

*Gill, Godlonton and Gerrans,* attorneys for the second respondent.



Copyright Juta & Co Ltd

## THE STATE v STRYDOM AND OTHERS 1980 ZLR 364

Editor's Note:(14)

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend CJ, Lewis JP and Baron JA

17th and 18th September, 1980

### Flynote

Criminal Procedure - extra - curial statement - whether admissible against co - accused.

High Court Act [Chapter 14] - misdirection by Court a quo - approach of appeal Court in terms of section 19 (2).

### Headnote

The court *a quo* in finding the third appellant guilty, utilized the extra-curial statement of the first appellant as evidence against the third appellant.

*Held* that an extra-curial statement after arrest by one accused is not admissible against another accused. Where one of two conspirators has made an extra-curial statement after his arrest and after the conspiracy has ended, the statement is not evidence for or against the other conspirator.

*Held,* further, that if two persons conspire to make false statements in order to obstruct or defeat the course of justice the statement that each accused makes in furtherance of that conspiracy is admissible against the other. *(Mirza Akbar v King - Emperor* [1940] 3 All ER 585 applied: *R v Victor and Vincent,* 1964 RLR 364 distinguished and explained.)

---



FIELDSEND CJ

*Held,* further, where there has been a misdirection, the approach of the appeal Court, contained in section 19 (2) of the High Court Act [*Chapter 14*], is to decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reason able doubt. (*R v Tuge,* 1966 (4) SA 565 (AD) followed.)

Cases cited:

*R v Victor and Vincent* (*supra)*;

*R v Qwabe,* 1939 AD 246;

*Mirza Akbar v King-Emperor* (*supra)*;

*R v Blake* (1844) 6 QB 126;

---

Copyright Juta & Co Ltd

*S v Nyongano and Anor.,* 1974 (2) RLR 155;

*R v Owen,* 1942 AD 389;

*R v Tuge* (*supra)*

*J O Manyarara,* for the third appellant. The extra-curial statement of Dorothy Strydom, Exhibit 13, should not have been taken into account in assessing the part played by Finga Ngwenya as the statement is not admissible against him: Phipson on Evidence, 12th ed. paragraph 1578; *R v Rose* 1937 AD 467, *R v Dhlumayo,* 1948 (2) SA 677 (AD); *S v Bergh,* 1976 (4) SA 857 (AD), *S v Ndhlovu and Ors,* 1976 (1) RLR 230 at 231H. Cross-examination of Strydom on Exhibit 13 did not make the statement admissible in evidence: *R v Rose* , *supra*, Exhibit 13 was wrongly treated by the trial Court as corroborative of the evidence of Milton Chirwa, Petro Sequeira and John Ncube in such of its aspects as incriminated Ngwenya: *R v Rose , supra*. If Exhibit 13 should not have been taken into account in assessing the part played by Ngwenya, then the Appellate Court is in as good a position to judge the merits of Ngwenya's case as was the Court below and should reach a different conclusion and allow Ngwenya's appeal: *R v Tshelembe and Ors* 1933 AD 323, *S v Mujuru,* 1976 (2) SA 900 (R.A.D.); *S v Muzikayifani and Ors* 1979 (3) SA 661 (D.).

*E E Lacey,* for the respondent, cited: Phipson on Evidence 12th ed.

paragraph 261, *R v Victor and Vincent* (*supra)* at 367; *R v Cilliers* 1937 AD 278 at 285, *S v Nyongano and Anor* (*supra)* at 157B.

## Judgment

**Fieldsend CJ:** I turn now to the other appeal against conviction, that relating to accused No. 4. It is in regard to accused No. 4 and in particular as to whether or not he perpetrated the assault on the deceased that in an otherwise excellent judgment the learned judge fell into error. Relying on the case of *R v Victor and Vincent,* 1964 RLR 364, he considered that the warned and cautioned statement of the first accused



FIELDSEND CJ

was admissible in evidence against the fourth accused. Starting from first principles, an extra-curial statement by one accused is not admissible against another accused. This is trite law, but if authority is required for it, it is to be found in the South African Appellate Division case of *R v Qwabe,* 1939 AD 255 at 262. That the same rule pertains where one of two conspirators has made an extra-curial statement after his arrest and after the conspiracy has ended is clear from the Privy Council case of *Mirza Akbar v King-Emperor* [1940] 3 All ER 585, and I refer particularly to pp. 590 and 591. There LORD WRIGHT explicitly approved the leading English case of *R v Blake* (1844) 6, QB 126, where evidence of what one co-conspirator had written after the completion of the offence was held to be inadmissible, on the principle that a mere statement made by one conspirator to a third party or any act not done in pursuance of the conspiracy is not evidence for or against another conspirator. The case of *Mirza Akbar (supra)*, concerned the very point with which this case is concerned, namely the admissibility of

Copyright Juta & Co Ltd

an extra-curial statement to the police by one conspirator which was sought to be relied upon in evidence against another, and the Privy Council held on the principle that I have already indicated that such a statement was not admissible.

The case of *R v Victor and Vincent (supra)*, has apparently given rise to some slight confusion, because it was relied on in *S v Nyongano and Anor,* 1974 (2) RLR at p. 155 where the Court held that there was sufficient evidence before them to indicate that the accused were acting in concert with one another in committing a murder, so as to make the confession of each accused admissible not only against its particular author but also against the other accused as a co-conspirator. Such a conclusion can be drawn from the headnote of *Victor and Vincent (supra)*, but I think it is important to appreciate that that case in fact has no application to the circumstances with which we are dealing here.

All that it decides is that if two persons conspire to make false statements in order to obstruct or defeat the course of justice the statement that each accused makes in furtherance of that conspiracy is admissible against the other. Here, of course, there is no question of an allegation that the accused in making their warned and cautioned statements were acting in furtherance of the conspiracy that the State relied upon. On the contrary, those accused were making statements in order to exonerate themselves from the conspiracy or minimise their parts in it: in fact the first accused's statement was a denial of any conspiracy at all. It is clear therefore that in relying on the evidence in Exhibit 13 the Court was in error in taking that into account to assess whether accused No. 4 had any part to play.

---



FIELDSEND CJ

It is necessary therefore to consider the approach that this Court should adopt in the circumstances. As long ago as the case of *R v Owen,* 1942 AD p. 389, in an appeal from the High Court of Southern Rhodesia, the Appellate Division of South Africa, laid down the approach to be adopted on appeal in circumstances where a magistrate had misdirected himself on the question of corroboration. The Court held that because of the misdirection the duty of the Court was to re-hear the case and to determine for itself on the record before it whether the conviction was justified or not. That approach is now enshrined in section 19 (2) of the High Court Act [*Chapter 14*] which reads on this particular point:

> "Notwithstanding that the Appellate Division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be set aside or altered unless it appears to that Division that a substantial miscarriage of justice has in fact resulted. If such point raised is decided in favour of the appellant and it consists of a misdirection by the trail Court of itself on a question of law or a question of fact or a question of mixed law and fact, the Appellate Division shall dismiss the appeal if fit is satisfied that the evidence which has to be considered has not been substantially affected by the misdirection and that the conviction is justified having regard to the evidence."

The South African equivalent of this section was considered in the case of *R v Tuge,* 1966 (4) SA 565 and at p. 568, HOLMES JA, deals with this question. He says that a Court of Appeal has to decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or the defect, there is proof of guilt beyond reasonable doubt.

So the approach which this Court now has to adopt is to consider the evidence on the record

**Copyright Juta & Co Ltd**

before it, assisted by the findings of credibility of the trial Court and to decide whether, if no reliance is placed on the fact which the trial Court wrongly relied on, it is satisfied beyond a reasonable doubt that the fourth accused not only took part in this murder but also, as the trial Court found, was the person who struck the blows.

**Lewis JP:** I agree.

**Baron JA:** I agree.

*Pro Deo.*

---



## THE STATE v FRANCIS 1980 ZLR 368

**Court** **Appellate Division, Bulawayo**

**Annotations** **Link to Case Annotations**

Criminal

Fieldsend CJ, Baron JA and Goldin JA

24th September, 1980

### Flynote

Criminal law - attempt - to commit fraud - competed charge and competent verdict on a charge of fraud.

Attempt - dividing line - conduct sufficiently proximate to commission of offence to have gone beyond preparation.

### Headnote

The appellant buried a quantity of jewellery in a garden and then tinctured the jewellery against theft to the value of $21 177. He immediately reported its theft from his car and informed the insurance company that he was going to make a claim. The insurers told him to report the loss to the police, who examined his car. The appellant returned to the insurance company to collect claim forms, where he was told that the insurance covered only forcible entry. With the aid of a screwdriver, the appellant simulated a forced entry and asked the police to further examine the car. It was apparent to the police that the damage had been caused after their earlier examination.

On these facts the Court *a quo* convicted the appellant of fraud. On appeal, it was argued that the appellant should not have been convicted as he had merely carried out acts preparatory to a fraud.

*Held,* applying *R v Heyne and Ors,* 1956 (3) SA 604 (AD), that an attempt to commit fraud is a competent charge and a verdict of attempt to commit fraud is a competent verdict on a charge

---

Copyright Juta & Co Ltd

of fraud. (*R v John,* 1943 SR 29, overruled.)

*Held,* further, in considering whether the conduct of the appellant had reached the stage of an attempt, that the most useful criterion to apply was whether the appellant's conduct regarded as a whole was sufficiently proximate to the commission of the offence to have gone beyond the stage of mere preparation. (*R v Katz,* 1959 (3) SA 408 (C) applied.)

*Held,* further, that, once the appellant had asked for a claim form, had been told that he would have to show forcible entry, had simulated forced entry and reported to the police, he had advanced beyond mere preparation and was guilty of attempting to commit fraud.

Cases cited:

*R v Nay* 1934 TPD 52;

*R v John* (*supra)*;

*R v Heyne and Ors* (*supra)*;

---



FIELDSEND CJ

*R v Yenson,* 1933 TPD 510;

*R v Hoare,* 1927 EDL 327;

*R v Cohen,* 1934 CPD 29;

*R v Bangani,* 1936 EDL 30;

*S v Roux,* 1963 (1) SA 377 (GWLD);

*R v Katz* (*supra)*;

*R v Robinson* [1915] KB 342;

*Director of Public Prosecutions v Stonehouse* [1977] 2 All ER 909;

*Comer v Bloomfield* (1970) 55 Cr. App. 305;

*R v Schoombie,* 1945 AD 541.

*S A Wilmot*, for the appellant.

*B J Turner*, for the respondent.

## Judgment

**Fieldsend CJ:** The appellant was convicted of fraud and sentenced to imprisonment for three and half years of which two years were suspended for five years on condition that during that period he committed no offence of which dishonesty formed an element.

---

**Copyright Juta & Co Ltd**

The appellant who was not legally represented pleaded guilty and was found guilty on the basis of an agreed statement of facts. On appeal, however, he sought leave to argue that he should not have been convicted as the agreed facts showed that he had not committed fraud, but had merely done certain acts preparatory to that offence. The State not opposing, leave was given to amend the grounds of appeal and the appeal was argued on that basis.

At the end of the hearing, the Court altered the conviction to one of an attempt to commit fraud and reduced the sentence to 18 months' imprisonment with labour of which 14 months were suspended for five years on condition that during that period the appellant committed no other offence of which dishonesty formed an element for which he was sentenced to imprisonment without the option of a fine. These are the reasons for the alteration of the conviction and sentence.

So far as concerns the conviction, the agreed facts were as follows:

(1) Prior to 14th July, the appellant concealed a quantity of jewellery by burying it in the garden of a Friend.

(2) On 14th July, he took out an insurance policy with the Old Mutual Fire and General Insurance Company to cover jewellery to a value of $21177 against theft, paying a premium of $427.

(3) Within minutes he returned to the insurers and reported that the insured jewellery which had been wrapped in a jersey under the seat of his car had gone missing, and that he was going to make a claim.

1980 (4) ZLR p370

FIELDSEND CJ

(4) On the advice of the insurers he reported the loss to the police who examined the vehicle.

(5) He returned to the insurers and asked for claim forms and was told that for his claim to be accepted he would have to prove that the vehicle from which the jewellery had been taken had been forced.

(6) The appellant then with the aid of a screw-driver forcibly lifted the lock out of the door of his car to simulate a forced entry and returned to the police station to report this and to ask that the car be further examined.

(7) This further examination showed that the lock had been damaged after the earlier police examination and the appellant then admitted to the police that he had faked the whole incident in order to obtain the insurance money.

Fraud in Roman-Dutch law does not require for its commission any actual prejudice to the person sought to be defrauded. The offence consists of a wilful perversion of the truth made with intent to deceive and resulting in actual or potential prejudice to another. It is because the offence can be committed where there is only potential prejudice, that is where no loss is actually suffered, that it has been said that there is no such offence as attempted fraud.

Copyright Juta & Co Ltd

Unfortunately, this approach led to the acceptance of a general principle that in no circumstances could there be a charge or conviction of attempt to commit fraud. *R v Nay,* 1934 TPD 52; *R v John,* 1943 SR 29. In the latter case the accused had procured a false work ticket authorizing payment of wages to a non-existent employee of a mine which he handed to an agent to present for payment for him. The agent was intercepted before he could present the ticket and the accused was charged with fraud, it being alleged that with intent to defraud, he had endeavoured to pretend that the work ticket was a valid ticket. It was held that to constitute the crime of fraud a misrepresentation had to be actually communicated to the person to be defrauded, that the charge amounted to a charge of attempted fraud and that such an offence was unknown to the law.

This whole question has now been fully considered in the judgment of SCHREINER JA, in *R v Heyne and Others,* 1956 (3) SA 604 (AD) at pp. 620 622. He first dealt shortly with the historical development. The question whether there can be an attempt to commit fraud was first clearly raised but not decided in *R v Yenson,* 1933 TPD 510 at 513. However, in *R v Hoare,* 1927 EDL 327, *R v Cohen,* 1934

---



FIELDSEND CJ

CPD 29 it had been assumed that there could be a criminal attempt to commit fraud. In *R v Bangani,* 1936 EDL 30, despite *Nay*'s case (*supra)*, GANE J, made some cautionary remarks on whether there might not be cases of attempted fraud. At p. 34 he said:

> "It may be one thing to say that because a representation, made with an intent to defraud or prejudice, does not result in that fraud or prejudice, in such case, although there has merely been an attempt to defraud or to prejudice, the crime or fraud has been committed in the full sense. It may be quite another thing to say that there may not be an attempt to make a representation with the intent to defraud or prejudice, which attempt may for some reason be frustrated. It is perhaps possible that in the latter case there may be an attempt to commit the crime of fraud."

SCHREINER JA, concluded his examination of the law in *Heyne's* case (*supra)*, at p. 622 as follows:

> "Although the balance of authority may be said to favour the view that there is no crime of attempted fraud in our law, a large part of it is explainable, I think, on the basis that what was under consideration when the view was expressed by Judge or writer was the factor of prejudice, the idea being that even if the wrongdoer failed to bring about actual prejudice he was never the less guilty of the completed crime of fraud, once he had made the representation. That would not, I think, explain *van Deinse's* view, which apparently rests on the basis that there cannot be a criminal attempt in the form of an endeavour to communicate. That basis seems to me to be unsound; I can see no reason why a man who posts a letter which is not delivered should not be guilty of attempting to commit the crime, be it defamation, Bribery, blackmail, fraud or any other crime, which would be constituted if the letter were received by the addressee . . .
>
> In the result it seems to me that the distinction suggested by GANE J, rests on principle and represents the true legal position. In the present case, assuming that there was no completed representation, in the sense of a communication to the mind of the persons addressed, nevertheless when the false entries had been intentionally made in the books and the actual, Illegal, transactions had been intentionally omitted from them fraud was criminally attempted, assuming that the other requisites were present."

This case was followed in *S v Roux,* 1963 (1) SA 377 (GWLD) where on facts very similar to

---

**Copyright Juta & Co Ltd**

those in *R v John* (*supra)*, a conviction for attempted fraud was upheld. In passing I should say that the point of the decision which is reflected in the headnote- namely that fraud must be limited to cases where actual prejudice has been proved- seems to fly in the face of long-established authority, and, with respect, not to re present the present law. See the authorities collected in Hunt's South African Criminal Law and Procedure volume II page 734.

On the authority of *Heyne*'s case *(supra)*, it is now clear that a charge of an attempt to commit fraud is a competent charge, and a verdict of



FIELDSEND CJ

attempt to commit fraud is a competent verdict on a charge of fraud. *R v John (supra)*, must be regarded as no longer good law. What the proper verdict should be does not depend on whether there was actual prejudice or only potential prejudice as *Roux's* case *(supra)*, would lead one to think. A conviction for fraud is competent once a misrepresentation is made with the requisite intent, regardless of whether there has been actual prejudice, provided there was potential prejudice. A conviction for attempt to commit fraud is competent where a misrepresentation, which would cause actual or potential prejudice were it made, is prevented from being made, provided always the facts established that there was an attempt to make the misrepresentation with the requisite intent.

Turning to the facts of the present appeal, nothing could be clearer than that the appellant intended to defraud the insurers. He told them he was going to make a claim when he first reported the alleged loss, after the first police examination of his motor car he returned to his insurers and asked for claim forms, on being told he would have to establish the forcing of his car he fabricated evidence of this and drew the attention of the police to what he hoped would be taken as an indication of the forcing of the door. It was only when it was pointed out to him that the damage must have been done after the first police examination that he admitted that he had stage-managed the whole incident. Although he had falsely informed the insurers that the jewellery had in effect been stolen, that misrepresentation at that stage could not have caused potential prejudice to them. They would not have considered paying out on the insurance contract until a properly completed claim form had been completed. On the authority of *R v Yenson,* 1933 TPD 510, therefore the appellant had not committed the offence of fraud.

It remains to consider whether his conduct had gone sufficiently far to warrant a conviction for an attempt to commit fraud. There have been many judgments directed to the dividing line between conduct which constitutes an attempt and conduct which, despite the intention to commit an offence, is not penalized. The remarks of DE VILLIERS AJ, in *R v Katz,* 1959 (3) SA 408 (TPD) at pp. 419 to 423 show that there is no hard and fast test which will fit all situations. To quote but two passages of this excellent analysis of the problems:

> "A distinction is sought to be drawn between acts of preparation and acts of execution or consummation of the crime, the former being regarded as too remote from completed perpetration, and the latter as sufficiently proximate thereto, to constitute an indictable attempt. The difficulty of drawing a dividing line between the termination of preparation and the commencement of

Copyright Juta & Co Ltd

> consummation has frequently been stressed. No exact scientific test or criterion to cover all cases has as yet been devised. As I have pointed out above, this difficulty exists not only in our law but in all systems in which the same or a similar distinction is sought to be applied.
>
> After full consideration of the authorities one is left with the conclusion that a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration-a judgment similar to what is called for in other spheres of law governed by notions of proximity and remoteness, as for example the determination of the limits to which damages caused by delict or breach of contract are legally recoverable, or of the 'real' cause of injury or loss in a case of contributory negligence, or of the 'proximate' cause of a transaction in respect of which agent's commission is claimed, even of a question whether an errant servant was or was not acting within the scope of his employment. In all these cases the human mind grapples in vain with an endeavour to find a formula, test or criterion readily applicable to every case that arises; and those that are devised are continually grafted with exceptions and qualifications or completely revised. The 'uncertain and wavering line' is drawn 'as best we can' (*Feldman (Pty) Ltd v Mall,* 1945 AD 733 at p. 750). In the guiding considerations one finds the same kind of conceptions and even of expressions: The natural course of events' 'proximate in time' is not necessarily 'proximate in law' etc. And experience in all these spheres appears to dictate caution as to the over-ready, rule-of-thumb application of any single expression or consideration. The overriding endeavour must needs be to assign to every constituent part of a particular situation such weight as common sense dictates, and then to decide whether the whole thereof can in a fair and practical sense be said to be too remote to fall within the requisite realm of legal cognizance."

The cases indicate the differing conclusions which can be drawn in very similar cases, the most striking being that the conduct in *R v John,* (*supra)*, was held to be no more than preparation to commit the crime, whilst that in *S v Roux* (*supra)*, was held to be an attempt.

There are also the two somewhat similar English cases where on rather differing facts the question of attempt or no attempt was considered. The first - *R v Robinson* [1915] 2 KB 342 - concerned a jeweller who hid some jewellery under his safe, tied himself up and then attracted the attention of a passing policeman to whom he made a false report of having been robbed. The police were suspicious of his story and when they found the hidden jewellery he confessed his intention to make a false claim on his insurers, though he had not had time to communicate with them. This case has been criticized on occasions, most recently by LORD EDMUND-DAVIES in *Director of Public Prosecutions v Stonehouse* [1977] 2 All ER, 909 (HL) where at page 932 he said:

> "In my respectful judgment, the ruling that there cannot be a conviction for an attempt to obtain by false pretences (or, now, of obtaining by deception)



> unless the pretence or the deception has come to the knowledge of the intended victim should not be followed, and the Court was wrong in treating all preceding acts as mere preparation and therefore as not amounting to perpetration of an attempt to commit the full offence."

Copyright Juta & Co Ltd

The second case - *Comer v Bloomfield* (1970) 55 Cr. App. R 305 concerned a person whose van, insured against third party risks, was damaged in an accident. He pushed it into the woods, falsely represented to the police that it had been stolen and wrote to his insurers asking whether he could make a claim for a stolen van and if so whether they would let him "know and particulars" He admitted that he "thought there might be a few bob I could get back off the insurance". The Justices considered that the letter written to the insurers amounted only to an inquiry and was not therefore sufficiently proximate to the offence of obtaining money by deception to amount to an attempt. On appeal to the Divisional Court by Case Stated, the Court held that as each case of this kind depended on its own facts and was a question of degree, the magistrates were entitled to come to the conclusion they did. It seems that the Court may well have been influenced by the fact that the policy in question did not cover loss by theft.

None of these cases is directly in point and it is necessary to decide, with what guidance one can derive from them, what the position is in the present appeal. It Is true that the appellant had not done the last act that he had to do before he committed the offence. There was certainly no evidence that he had an opportunity even to complete the required claim form. But he had, to adopt the words of WATERMEYER CJ, in *R v Schoombie,* 1945 AD 541 at 547, finally made up his mind to commit the offence and had taken steps to carry out his resolution. The only issue is whether he had gone sufficiently far along the line towards commission of the offence.

In the circumstances of this case I find that the most useful criterion to apply is whether the appellant's conduct regarded as a whole was sufficiently proximate to the commission of the offence to have gone beyond the stage of mere preparation. This, as was so clearly stated by DE VILLIERS AJ, in *R v Katz (supra)*, is a matter for a value judgement of a practical nature and not one to be determined by the application of any hard and fast rule.

Looking at the various stages through which the appellant went one can say with fair certainty that the burying of the jewellery and the taking out of the insurance policy were acts of preparation only. The same may be said of the first report to the insurers though with less certainty. But once the appellant, having asked for a claim form and having been told



FIELDSEND CJ

he would have to show the forcing of his car, had damaged the lock and reported this to the police, there can be no doubt in my mind, that he had advanced beyond mere preparation. He had also on the test of WATERMEYER CJ, in *Schoombies* case (*supra)*, reached the stage of "commencement of the consummation",

As it is common cause that the appellant had the requisite mental element, he is guilty of attempting to commit fraud.

I come now to the question of sentence.

The appellant is a young man of 24 and this is his first conviction. His father committed suicide in 1978 and his mother was murdered in 1979. He himself has a wooden leg. For some time he had been very worried by a Revenue Department's claim for $6 000 in respect of arrear sales tax due from his father's estate of which he was executor, as well as by other estate express.

**Copyright Juta & Co Ltd**

He was in employment earning $510 a month, a good deal of which had to be spent on maintaining a small-holding just out of town where he was living and which he was hoping to develop. The Revenue had threatened to sell this to satisfy the sales tax debt. Once the appellant was arrested he was frank and co-operative with the police and he seems to have expressed genuine contrition in Court. He has certainly learnt a lesson.

The offence planned was a serious one involving a substantial sum of money, but its mode of execution was naive in the extreme. The chance that the insurers would ever have been taken in by the scheme was very low indeed, and the whole conduct of the appellant seems to show that he was in a somewhat unstable emotional state.

The magistrate has indicated in his additional reasons that he feels his sentence may have been unduly harsh. Unfortunately, having regard to the nature of the offence and the appellant's financial position, this is not an appropriate case for the imposition of a substantial fine. Nevertheless I feel, particularly in the light of the magistrate's revised view, that the effective period of imprisonment that the appellant should undergo need not be great.

I think that the justice of the case is met by a sentence of 18 months' imprisonment with labour, with 14 months suspended for five years on condition that he commits no further offence during that period of which dishonesty forms an element and for which he is sentenced to imprisonment without the option of a fine.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*J G Venter,* attorney for the appellant.

---



## THE STATE v CHABATA AND ANOTHER 1980 ZLR 376

**Court** **Appellate Division, Salisbury**

Application for leave to appeal

Baron, JA

25th September, 1980

### Flynote

Criminal procedure - Attorney-General's authority prosecute under Law and Order (Maintenance) Act [Chapter 65] - certificate citing incorrect section - precludes prosecution under some other section.

### Headnote

The Attorney-General issued a certificate authorizing a prosecution under section 27 (d) of the Law and Order (Maintenance) Act [*Chapter 65*]. This was either a typographical or some other error and the prosecution should have been under section 27 (c). The prosecutor framed the

---

Copyright Juta & Co Ltd

charge under section 27 (c) and proceeded to trial.

*Held,* that the court had no jurisdiction to deal with the charge and the proper course was for the prosecutor to have applied to the Attorney-General for a certificate under the correct section.

Case cited:

*S v Guter,* 1979 RLR 358.

## Judgment

**Baron JA** in Cambers in terms of section 67 (2) of the Magistrates Court Act [*Chapter 18*].

The appellants had been charged in the magistrates Court with a contravention of section 27 (c) of the Law and Order (Maintenance) Act [*Chapter 65*]. They were convicted and sentenced to 12 months' imprisonment with labour of which nine months was suspended on the usual conditions. Both appellants applied for certificates enabling them to prosecute their appeals in person, these applications were granted by me on the 23rd July, 1980.

The Attorney-General has now indicated that he does not support the convictions, he points out that he gave no authority for a prosecution under section 27 (c) of the Act but authorized a prosecution under section 27 (d), and that consequently the magistrate had no jurisdiction to deal with the main count (there were alternative charges of common assault), which effectively disposed of the convictions of both accused on the main count.



BARON JA

The Attorney-General's letter continues:

> "I may say that I have considered the possibility of an amendment of the charge so as to reflect a contravention of section 27 (d), which was the section authorized by the Attorney-General. I am satisfied that no such amendment could properly be granted. The two sections refer to two completely different offences. Section 27 (c) is concerned with intimidation by inducing a sense of apprehension in another. Section 27 (d) is concerned with forcing someone to do something that such person was not legally obliged to do. The particulars of the charge in no way suggest that the complainant was compelled to do something which she did not have to do. Thus the two charges are completely different and one cannot seek an amendment so as to frame a new charge and then convict an accused of it (See *State v Guter,* 1979 RLR 358."

I agree with the foregoing comments and on that score I have nothing I would wish to add.

It is, however, relevant to consider how this curious situation arose. As the Attorney-General pointed out, the particulars of the charge did not suggest that the complainant was compelled to do something which she did not have to do and it would seem when the Attorney-General authorized a prosecution under section 27 (d) this must have been a typographical error or some other inadvertent slip. It seems likely that the person who framed the charge realized that the certificate was given for a prosecution under a section which the evidence would not support and that he decided to charge the appellants under the correct section. This was an unfortunate decision. If my suspicions are well - founded the proper course, and the only valid course, was for the Attorney-General's attention to have been drawn to the error and a

Copyright Juta & Co Ltd

certificate requested for a prosecution under the correct section.

The Attorney-General indicates also that he does not support a conviction under the alternative count of common assault. I do not propose to deal in detail with his reasons; suffice it to say that he does not regard the evidence for the prosecution sufficient to support such a conviction, end I agree.

In the result, pursuant to section 67 (2) of the Magistrates Court Act [*Chapter 18*] I hereby allow these appeals in Chambers and quash the convictions without hearing the appellants or Counsel for the State.

I should perhaps draw attention also to a most unfortunate aspect of this case. As have indicated, the certificates were granted as long ago as the 23rd July, and unless the appellants have lost their normal entitlement to remission they will already have served their effective sentences appreciate that the vacation has intervened but nonetheless it is to be hoped that delays of this kind can be avoided.

The Learned JUDGE PRESIDENT agrees with this judgment.



## FLAME LILY INVESTMENT COMPANY (PRIVATE) LIMITED v ZIMBABWE SALVAGE (PRIVATE) LIMITED AND ANOTHER 1980 ZLR 378

**Court** **General Division, Salisbury**

Civil Application

Waddington, J

18th September and 1st October, 1980

### Flynote

Practice and procedure - temporary interdict pendente lite - requisites for - consideration of balance of convenience between the parties.

Contract - failure to pay instalment - election to cancel binding.

### Headnote

In an application for a temporary interdict *pendente lite,* the applicant must show: (i) a clear right on his part; (ii) actual or reasonably apprehended injury; and :(iii) no other ordinary remedy by which he can be protected with the same result. (*Setlogelo v Setlogelo,* 1914 AD 221; *Olympic Passenger Service (Pty.) Ltd. v Ramlagan,* 1957 (2) SA 382 (N) followed,)

If the applicant's rights are not clear, the requisites are different. The applicant must show: (i) a right which, "though *prima facie* established is open to some doubt"; (ii) a well grounded apprehension of irreparable injury; and (iii) the absence of ordinary remedy. *(Setlogelo v*

Copyright Juta & Co Ltd

*Setlogelo (supra)* followed.)

In considering the application the Court will consider the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted. This is called the balance of convenience. *(Eriksen Motors (Welkom) Ltd v Protea Motors and Anor,* 1973 (3) SA 685 (AD) followed.) If there is any clear balance of convenience in the respondent's favour, it should form part of the pleadings.

Where a buyer is In breach of contract because of failure to pay an instalment and the seller is given the option to cancel by reason of such failure, once he exercises the option he is bound by it. (*Schuurman v Davey,* 1908 TS 664; *Custom Credit Corporation (Pty) Ltd v Shembe,* 1972 (3) SA 462 (AD) followed.)

Cases cited:

*Setlogelo v Setlogelo* (*supra)*;

*Olympic Passenger Service (Pty) Ltd v Ramlagan* (*supra)*;

*Beecham Group Ltd v G-M Group (Pty) Ltd,* 1977 (1) SA 50 (T.);

*Eriksen Motors (Welkom) Ltd v Protea Motors and Anor. (supra)*;

*Gideon v Ngumo,* 1973 (2) RLR 197;

*Schuurman v Davey* (*supra)*;

---



WADDINGTON J

*Custom Credit Corporation (Pty) Ltd v Shembe (supra);*

*Angehrn and Piel v Federal Storage Co Ltd,* 1908 TS 761;

*Johannesburg Consolidated Investments v Elfruci Investments (Pty) Ltd and Ors,* 1973 (1) SA 498 (W).

*A P de Bourbon,* for the applicant.

*R Jagger,* for the respondents.

## Judgment

**Waddington J:** These proceedings commenced as an application for an order confirming the cancellation by applicant of an agreement alternatively for a temporary interdict against respondents. Counsel for the parties indicated to the Court at the beginning of argument, how ever, that as the main application could not possibly be resolved in view of the existence of many conflicts of fact and the inadequacy of the affidavits, the only issue to be determined at this stage was the alter native application for a temporary interdict *pendente lite.* Counsel were agreed that the main application will have to be decided by action after the exchange of full

---

**Copyright Juta & Co Ltd**

pleadings.

The background to the dispute is as follows. On the 21st February, 1980, applicant by written agreement sold certain mining claims to first respondent for the sum of $25 000. First respondent agreed to pay the purchase price by means of an initial payment of $10 000. That sum was duly paid. The balance, it was agreed, was to be paid by three equal instalments of $5 000 each on the 21st June and the 21st October, 1980, and on the 21st February, 1981, respectively. Clause 5 of the agreement provided that:

> ". . . should the purchaser fail to pay any installment (sic) of the purchase price by due date, the Company (i.e., applicant) may make immediate demand upon the purchaser to effect such payment within seven days, and should the purchaser fail to effect such payment within that period the Company shall have the right to terminate this agreement forthwith by giving notice in writing to that effect to the purchaser and such action shall in no way affect any claim for damages sustained by the Company in respect of such breach by the purchaser, nor shall the Company be required to repay any instalments already paid by the purchaser."

When the instalment due on the 21st June, 1980, was not paid, applicant wrote and sent to first respondent a letter dated 24th June, 1980 (Annexure "B" to applicant's founding affidavit) demanding payment in terms of Clause 5 and issuing a warning of the consequences which would flow from any failure to comply with the demand. After certain negotiations to which I shall refer later, first respondent gave a cheque to applicant to cover payment of the unpaid instalment but the cheque was dishonoured on presentation. I will also return to this subject later in this judgment. Applicant then, on 31st July, 1980, gave written



notice to first respondent cancelling the agreement (Annexure "C" applicant's founding affidavit) and calling on first respondent to vacate the claims and release them to applicant. To this, first respondent replied on the 8th August, 1980, refusing to vacate the claims unless ordered to do so by a competent Court rejecting, in effect, applicant's cancellation of the contract. First respondent's main grounds for this attitude (which are disputed) may be summarized briefly in this way: The sole object of the sale was to "cyanide" a mine dump on the claims to extract its gold content. Before the written agreement was entered into, applicant had warranted in writing that the dump had not previously been cyanided. First respondent's operations subsequent to the sale revealed that the dump must, prior to the sale, have been cyanided. The gold extracted from the dump was much less than applicant had originally represented would be the case. First respondent therefore concluded that applicant had falsely and fraudulently misrepresented the gold content of the dump to it, that samples taken from the dump by applicant "for assaying for the dump's gold content" had been fraudulently salted; that applicant had misrepresented that the dump had not previously been cyanided and that the tonnage of the dump' was either fraudulently or recklessly inflated by applicant. First respondent in the same letter elected to abide by the contract despite the alleged fraudulent misrepresentations but stated that it was now only prepared to pay $10 000 for the claims which sum has already been paid, as I have already indicated. First respondent therefore refused to pay the instalment which had fallen due on the 21st June, 1980.

Applicant denies fraud or recklessness on its part and attributes any lack of success in

Copyright Juta & Co Ltd

extracting gold to inefficiency and inexperience in first respondent's operations assisted by second respondent. Applicant further more avers that present operations on the dump are centered at points where applicant's sampling showed the highest values and that this practice is wasteful and is resulting in a rapid diminution of the value and viability of the claims which are comparatively small. Applicant also avers that gold extracted from the claims is being removed to another mine which is a fact that will severely prejudice the claims and any relief which at a later stage ought to be granted to applicant. Finally, it is pointed out, if a temporary interdict is not granted at this stage, applicant, if ultimately successful in its claim to cancel the agreement, would be unable to assess accurately the damages it will have suffered by reason of the factors mentioned above.

For its part, first respondent denies the allegations relating to the alleged inefficient extraction methods and deals with this question at length in its answering affidavit. Similarly, first respondent denies any improper motive



in removing gold to another mine stating that this was only done on two days in August, 1980, when sludge was removed to a mine belonging to second respondent for smelting as the claims in question have no smelting plant. The gold recovered is still in the possession of first respondent as it could not be sold because applicant had informed the Mines Department that the contract had been cancelled and the Mines Department in turn, acting on the incorrect information, withdrew first respondent's authority dispose of gold.

First respondent also avers that it has expended $37 170,05 (including the first instalment of $10 000) on the claims. Admitting that the cheque for $5 000 by which it originally intended to effect payment of the instalment due on the 21st June, 1980, was dishonoured, first respondent states in its answering affidavit that the cheque was given to applicant after receipt of applicant's letter dated 24th June, 1980, in which demand for the second instalment (the first $5 000 instalment) was made. First respondent alleges that one Kinsey, acting for and on behalf of applicant had been informed that tests revealed that no gold was present in certain "zinc boxes" and that Kinsey was adamant that gold should have been present. It was then agreed that a "clean-up" should be conducted and that payment of the cheque in question would depend on the recovery of sufficient gold from this operation. The "clean-up" should have realized an estimated $12 093 by value of gold recovered whereas in fact gold to the value of only $133 was recovered. When Kinsey was informed of the poor yield of the "clean-up" he insisted that there must have been a mistake and it was agreed that an independent person be appointed by mutual agreement to take samples for the purpose of assay by the Mines Depart meet. Kinsey failed on two occasions to attend meetings to discuss the appointment, but finally first respondent agreed to his request that a second "clean - up" be conducted. This "clean-up" yielded gold valued at $1 662,83. Despite Kinsey having been informed of the poor yield following the first clean-up, the cheque was presented and "naturally was dishonoured". This suggested to applicant that first respondent was not possessed of funds independent of its gold recoveries from the claims sufficient to meet a relatively small cheque. This factor was urged upon the Court as an additional reason why it is now imperative for an interim interdict to be

Copyright Juta & Co Ltd

granted to applicant. It was this turn of events which in the main has prompted first respondents present attitude to the agreement.

Apart from the terms of the written agreement and the fact that the cheque was dishonoured, it is apparent that practically every aspect of any



WADDINGTON J

importance in this matter is disputed. I agree with counsel that it would in consequence not be feasible to resolve the main issue at this stage. Mr *de Bourbon*, who appeared for the applicant, applied for a temporary interdict restraining first respondent alone from conducting mining operations of any sort on the claims concerned pending the determination of the main dispute between the parties which concerns applicant's right to cancel the contract. In view of Mr *de Bourbon*'s attitude, no order will be made as against the second respondent.

In a proper case the Court may, *pendente lite*, restrain a respondent from consuming, using or alienating the thing claimed. The question is whether this is a proper case for such relief. It is now settled law that the three essential requisites for the issue of an absolute interdict are -

1. a clear right on the part of the applicant.

2. actual or reasonably apprehended injury, and

3. no other ordinary remedy by which the applicant can be protected with the same result.

The *locus classicus* of the cases which sets out these requisites is *Setlogelo v Setlogelo,* 1914 AD 221 per INNES JA, at p. 227. The judgment of HOLMES J, in *Olympic Passenger Service (Pty) Ltd v Ramlagan,* 1957 (2) SA 382 (N) at 383A is authority for the proposition that the same requisites are necessary if an application for a temporary interdict is to succeed. See also *Beecham Group Ltd v BM Group (Pty) Ltd,* 1977 (1) SA 50 (T) at 54H. Where the applicant's right is not clear in an application for a temporary interdict, the requisites are somewhat different. Once again, however, the judgment of INNES JA, (as he then was) in *Setlogelo*'s case at p. 227 specifies the requisites. In general they are -

(a) a right which, "though *prima facie* established is open to some doubt";

(b) a well-grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

This approach (adopted by DAVIES J, in *Gideon v Ngumo,* 1973 (2) RLR 197) was followed by HOLMES J, in *Eriksen Motors (Welkom) Ltd v Protea Motors and Anor,* 1973 (3) SA 685 (AD) at 691. The learned judge there stated that an interim interdict *pendente lite* is an extraordinary remedy within the discretion of the Court and that in exercising its discretion the Court:

> " . . . weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience."

Copyright Juta & Co Ltd

WADDINGTON J

In the present case, in my view, the applicant has established a clear right, that is, not an incontrovertible but a definite right. The undisputed facts disclose that applicant was entitled to cancel the agreement it respondent defaulted in any of the three instalments of $5 000. When the instalment, due on 21st June, 1980, was not paid, he demanded payment in writing giving notice of his intention to cancel in the event of respondent not complying with the demand. In the event, payment was not effected and it is clear on the papers that first respondent had no intention of paying. First respondent admits these simple facts. The grounds for respondent's failure to meet the cheque as deposed to in his answering affidavit constitute matters which applicant apparently disputes to some extent both in his founding affidavit and in his affidavit of urgency. I cannot therefore evaluate the possible effect those grounds may have on the overall contractual obligations as between the two parties. What is clear in my view is that respondent, in terms of the written agreement, had no right to withhold payment of the instalment. Had respondent, under protest, effected payment such payment would not have prejudiced those rights which the law accords an aggrieved party in the position of the respondent i.e., the right to abide by the contract, or to have the contract set aside or to claim *quanti minoris* relief and consequential damages appropriate cases. Respondent's answering affidavit contains no express averment that Kinsey at any stage relieved respondent from the obligation to pay any instalment and there certainly is no suggestion by respondent that Kinsey agreed that a purchase price lower than $25 000 would be payable in the event of the clean-up" yielding unsatisfactory results. The allegation in the answering affidavit is simply that "payment *of the cheque*" in question would be "'dependent" on the results of the "clean-up". (The emphasis is mine.) This language is equivocal and I therefore conclude in all the circumstances that applicant has established, on the undisputed facts at least, the better title to the claims by a clear margin. Applicant has therefore established a clear right in my view.

If the above conclusion is correct, I am satisfied that applicant has also established a well -founded apprehension that his right will be interfered with by first respondent. Indeed, the act of interference is already being committed as first respondent does not dispute that the extraction of gold is continuing. The second requisite to the issue of a temporary interdict is therefore present.

What of the third requisite, i.e., the absence of an ordinary remedy available to applicant? Payment of the first instalment should have been



WADDINGTON J

effected on First June, 1980. On 24th June, applicant sent its letter of demand for payment to first respondent. The short delay is immaterial. (See the judgment of INNES CJ, in *Schuurman v Davey,* 1908 TS 664 at 671 . The letter effecting the ultimate cancellation was dated 31st July 1980, and according to the papers this was after the dishonoring of the cheque. This delay is also immaterial in my view. (*Schuurman's* case *supra,)*. Neither party gives the exact date when the cheque was dishonoured, but it must have been after the first "clean-up" which was

Copyright Juta & Co Ltd

conducted on the 6th and 7th July, 1980.

I have already said that first respondent does not allege that Kinsey relieved it of the obligation to pay the instalment which was due on 21st June or agreed to a lower purchase price. That being the case, applicant was entitled to elect to exercise the right to cancel in terms of Clause 5 of the agreement. That was done, and so far as applicant was concerned at the time, cancellation became a *fait accompli.* The effect of the election was to bind applicant to it and his right to claim specific performance alternatively damages ceased.

In parenthesis it should be said that first respondent avers in its answering affidavit that applicant had suffered no damages and that applicant's proper remedy, if it has any, is to proceed to claim the balance of the purchase price. Applicant originally claimed neither damages nor specific performance, but elected to claim cancellation alternatively a temporary interdict restraining first respondent from carrying on operations. It would seem therefore that applicant agrees that no damages had been suffered by him at the time of cancellation and considered that it would be worthless claiming specific performance, i.e., payment of the purchase price.

In *Schuurman's* case *(supra)* at p. 671 INNES CJ, said:

> "When the day of payment, in a pact of this kind (i.e., payment to be by instalments, the seller being given the option to cancel on failure by the purchaser to pay an instalment on due date) is fixed, the seller's right to cancel accrues by reason of the buyers default on that day, and the seller must then elect whether or not he will avail himself of it. Having once made this election, he must abide by it; the cancellation fakes effect as soon as the seller notifies his intention to avail himself of the right to cancel. He ought to make his election immediately and he cannot exercise his right if he has once waived it.".

And in Custom Credit *Corporation (Pty) Ltd v Shembe,* 1972 (3) SA 462 (AD) at 469 F-G, VAN WINSEN AJA, (with whom OGILVIE THOMPSON C, WESSELS JA, JANSEN JA and RABIE JA, concurred) said:

> "Since it was not in dispute that defendant was in breach of the terms of the agreement, Plaintiff had the right in terms of that clause to demand from



WADDINGTON J

> defendant that he implement the agreement by paying the unpaid balance due thereunder. Alternatively plaintiff could sue for cancellation of the agreement. In the latter event clause 9 of the agreement accorded plaintiff the right to retain past payments made to it by defendant, recover possession of the vehicle sold as well as all lawful expenses in connection with the recovery of possession and in addition to claim damages from defendant. These alter native rights reserved to plaintiff are clearly inconsistent; the first aims at the enforcement of the agreement, the second at its dissolution. plaintiff is placed before the choice of electing which of the two rights it will pursue.
>
> Once made, the election binds it . . .".

The same principle was applied in a case involving a master's election to dismiss or retain a servant when facts justifying dismissal of his servant come to the knowledge of the master. See the judgment of BRISTOWE J, in *Angehrn and Piel v Federal Storage Co Ltd,* 1908 TS 761 at

Copyright Juta & Co Ltd

786. These principles apply equally in my view in a case where an aggrieved party to a contract elects to cancel when he believes that he possesses a clear right following a breach of a condition in the contract.

Having found that applicant has established a clear right and injury, I also am not satisfied that another ordinary remedy having the same result as an interim interdict is open to the applicant. Having made his election applicant cannot keep changing his mind. In the result, applicant is entitled to the relief sought. I must say that I arrive at this conclusion with a little regret because of the possible effect it will have on first respondent's operations. However, the order I shall make will be calculated at least to enable first respondent to safeguard any installations on the claims pending the outcome of the action. It should be added in this connexion, however, that nowhere in first respondent's answering affidavit is it stated that the issue of an interim interdict would result in any inconvenience to him. Had the question of balance of convenience arisen in this case this omission would have assumed greater importance than it has. See the judgment of MARGO J, in *Johannesburg Consolidated Investments v Elfruci Investments (Pty) Ltd, and Others,* 1973 (1) SA p. 494 (W) at 498 A-B where the learned judge stated:

> "There remains for consideration Mr *Weinstock's* argument that the balance of convenience favours the refusal of an interim interdict. Mr *King Horn*, for the applicant, has contended that the applicant has established a clear right, and that the question of balance of convenience therefore does not arise. It is not necessary for me to deal with this aspect in any detail, because the applicant has made out a *prima facie* case of prejudice if interim relief should be refused, whereas the respondents have not attempted to set up any counter-considerations of prejudice on their side if an interim interdict should be granted.

---



WADDINGTON J

> Mr *Weinstock* has asked me to recognize, a necessary implication from the respondent's affidavits, that the holding up of building operations would be severely prejudicial to the respondents. That may well be the ordinary result in most cases, where building costs would be increased by delay in the erection of a building, but I cannot assume that it would be the inevitable result in all cases. The first respondent may have safeguarded itself against the contingency of not being allowed to continue in what is *prima facie* a contravention of conditions 1 and 3, and likewise the third respondent may be ready to transfer its building operations to another site. If there is any clear balance of convenience in the respondents' favour, I would have expected them to say so in their affidavits and to provide some particularization thereof."

Mr *Jagger* who appeared for the respondents urged the Court during argument to have regard to the inevitable prejudice the issue of an interim interdict would cause the first respondent but, like MARGO J, I would have expected first respondent, had the balance of convenience clearly favoured it, to have said so. Had applicant established merely a *prima facie* right open to some doubt, I may well not have been satisfied that the balance of convenience favoured first respondent. In this regard I would also have had regard *inter alia* to first respondent's averment that it is now unable to dispose of the gold it extracts from the dump.

It is accordingly ordered that -

1. first respondent be interdicted *pendente lite* from recovering gold, minerals and other precious metals on the mining claims known as Kia Ora No. 12290 in the district of

---

**Copyright Juta & Co Ltd**

Salisbury provided that this temporary interdict shall not preclude first respondent from taking such measures as may be reasonably necessary to safeguard any buildings, installations or machinery ordinarily used for the purposes of conducting mining operations on or the recovery of gold, minerals and other precious metals from the said claims,

2. the temporary interdict referred to in paragraph 1 shall remain in force for a period of ten days calculated from the day following delivery of judgment in this matter unless within that period applicant has caused to be served on first respondent summons commencing action claiming confirmation of the cancellation of the agreement entered into between applicant and first respondent on the List February, 1980, in which event the said temporary interdict shall remain in force until the final determination of the action;

3. there will be no order as against the second respondent.

The question of costs will be reserved for consideration at the trial.

*Messrs Condy, Chadwick and Elliott,* attorneys for the applicant.

*Messrs John May* and company, attorneys for the respondents.



## ROSA v ROSA 1980 ZLR 387

Editor's Note:(15)

**Court** **General Division, Salisbury**

Civil Trial

Dumbutshena, J

15th and 16th September, 1st October, 1980

### Flynote

Husband and wife - custody of children of tender years - no fixed rule that mother be awarded custody - factors to be considered - right of access should foster affection between non - custodian parent and child.

### Headnote

The wife (defendant) was awarded a decree of divorce. The matrimonial home was such that the plaintiff shared a bedroom with his daughter, while the defendant shared a bedroom with her son. A welfare officer, investigating the question of custody, felt that the father would be the better custodian of both children. Counsel for the defendant argued that because of the ages of the children it was in their interest for custody to be awarded to the mother.

*Held* that there is no settled rule that in every case custody of a child of tender years should be

Copyright Juta & Co Ltd

awarded to the mother. (*In re B*. (an infant) [1962] 1 All ER 872 and *Mohaud v Mohaud,* 1964 (4) SA 348 (TPD) followed.) The interests of the children are paramount. An emotionally unstable mother, taking little interest in the education of her children, is not in the best interests of the children.

*Held,* further, that an effective balance must be sought between the rights of access of the custodian and the non-custodian parent. Children should not lose their affection and love for the non-custodian parent. (*Marais v Marais,* 1960 (1) SA 844 (CPD) referred.) Rights of access should cultivate an affinity between parent and child.

Cases cited:

*Bailey v Bailey,* 1979 (3) SA 128 (AD);

*In re B* (an infant) *(supra);*

*Mohaud v Mohaud* (*supra*);

*W v W and C* [1968] 3 All ER 408;

*Marais v Marais (supra);*

*M T O'Meara,* for the Plaintiff.

*K H Andrew*, for the defendant.

## Judgment

**Dumbutshena J:** Now I come to the question of the custody of the minor children of the marriage. I have had anxious and worrying



DUMBUTSHENA J

moments because of the circumstances under which the parents presently live in the same matrimonial home. As stated before, the plaintiff shares one bedroom with his daughter, H aged 12. He spent 20 months with her in Zimbabwe when her mother was in Portugal. H is fond of her father. Equally, the defendant shares another bedroom with her son, P

aged six. She also spent 20 months with him in Portugal when the Plaintiff and H were in Zimbabwe. He is said to be fond of his mother.

I hold the opinion that as much as possible Courts must avoid making custody orders that divide the minor children of the marriage between the father and the mother.

In this case there are no serious matrimonial offences that have been committed by or alleged against either the plaintiff or the defendant, so I have to look at the personal circumstances and idiosyncrasies of the parties in order to arrive at a decision that is in the best interest of the minor children.

Copyright Juta & Co Ltd

The plaintiff said, without defining the methods, that there were many methods of looking after children. He was proud to inform the Court without blinking that during his wife's absence in Portugal he looked after H without putting her under the care of an African nanny. He said she was kept at the home of white friends where she was surrounded by Europeans. He said that could not be said of his wife, who employed African nannies to look after the children. There are still some environments and surroundings that accommodate the plaintiff's brand Of bringing up children. There are many distinguished Zimbabweans in every walk of life that were nursed and cared for by African nannies.

For her part, the defendant says she can look after the children better than the plaintiff or as well as he does. She admitted freely that the plaintiff was a good father.

A report on the children prepared for the Juvenile Court in terms of section 4 (3) (b) of the Guardianship of Minors Act [*Chapter 34*], in respect of H and P was, by consent of the parties, produced and marked "Exhibit 5". The report was prepared by Mrs. J Heistein, a Welfare Officer who was called by the Court. She gave evidence on oath and adhered to her report.

Mrs. Heistein, with the assistance of her colleagues, interviewed the father, the mother, H, P and other interested persons. They prepared a well-documented and reasoned report. I would like to adopt what was said in that report and the recommendations made by Mrs. Heistein:

> "There appears to be no doubt that both children get on better with their father than mother. He is more even tempered with them and also takes a





keener interest in them personally as well as in their general well being. Consequently the relationship is happier than the one they have with mother.

It also appears likely that Mrs. Rosa is jealous of her husband's relationship with the children, with H In particular, and that she tends to 'take it out' on the child with the result that they do not get on well together.

H. has expressed the desire to remain with her father after the divorce but at the same time does not want to hurt her mother. She thinks that P would also prefer to be with his father.

Mrs. Rosa is aware that, if given the choice, the children would in all probability opt to go with their father but feels that children should be with their mother.

It is impossible to assess to what extent she is responsible for the above situation and whether she is the victim of circumstances.

She says that her husband is a good father who would be able to care for the children but is worried about what arrangements would be made when he has to travel on business.

I consider that this divorce could have been prevented if marriage guidance had been sought in the early stages of the breakdown; as it is now Mr Rosa is completely disinterested in a reconciliation.

Copyright Juta & Co Ltd

He has already proved his ability to care for his daughter over a period of twenty months and would obviously be a suitable custodian. He has more to give them on the personal as well as financial level. I do not know Mrs. Rosa well enough to concur with his allegation that she is unfit to take custody of the children and assess that, if given sufficient financial assistance, she would be an adequate mother."

I tried to ascertain the children's preference, as was recommended by Mrs. Heistein. Both counsel for the plaintiff and the defendant were helpful. They arranged for the children to be brought to my chambers. Both Mr *O'Meara* , who appeared for the plaintiff, and Mr *Andrew,* who appeared for the defendant, were present. The children were or appeared to be free and intelligent. When asked casually which parent each of them liked or loved, both the children said they preferred their mother. I was surprised that P who is aged six years, gave his reply in a straightforward and unhesitating manner. When afterwards counsel informed me that some people had instructed the children to reply in the manner they did, I recalled the children to my chambers. I asked them whether somebody had influenced their attitude to their parents. H told me that some people had spoken to them and influenced them. She further said she did not want her parents to have a divorce. Having read Mrs. Heistein's report, I formed the impression that the children loved both their parents. H said her mother smacked her only when she becomes silly. Because some people tried to influence the children in their attitude towards their



parents, I have decided to rely more on the Welfare Officer's report rather than on the personal preferences of the children. However, meeting the children was very enlightening to me because I formed a favourable impression of them. And in the exercise of my discretion that impression has weighed heavily on my mind.

The one thing that has given me a nagging worry is the fact that the parents are still living in the same house and the defendant has not made any future plans. She is presently unemployed. If the plaintiff drives her away from the matrimonial home, she will be without accommodation at least for the immediate future. She said in reply to Mr *O'Meara's* question that were custody of the children to be granted to her she would stay in the matrimonial home or look for another house, and if she fails to maintain the house she could go to Portugal where she would have better prospects of obtaining employment as a typist.

No serious thought or indication was given to the circumstances under which her parents live in Portugal. No evidence was led on the type of accommodation, jobs, if any, and/or their personal wealth or otherwise. What would happen to these children were the mother to be granted custody and remove the children from the jurisdiction of this Court to Portugal? I am not satisfied that the defendant, if she went to 'Portugal as a custodian parent, would establish a good home in which they would live and enjoy a better life.

This is not a case where children are removed by the custodian parent to a foreign country where they are better provided for and where they have any relatives with whom they will establish wider, beneficial and intimate family relationships. And a country in which the custodian parent has substantial property. The instant case is distinguished on the facts from

Copyright Juta & Co Ltd

*Bailey v Bailey,* 1979 (3) SA 128 (A.D).

Mr *Andrew*, who appeared for the defendant, in urging the Court to grant custody to the defendant, submitted that the mother must first be shown to be a bad mother in order to be deprived of custody of the minor children. He said that P was a child of tender years who needs the mother's care. At this stage he does not yet need the father's care. Of H he submitted that a girl of 12 years old needs the mother's care because of problems she will soon face. He said where children are still young it was in their interest for custody to be granted to the mother.

There is no well-settled rule which says that in every case custody of children of tender years should be granted to the mother. In *Re B (an infant)* [1962] 1 AD ER 872 at 873A, LORD EVERSHED MR said:

---



DUMBUTSHENA J

> "The learned judge, PENNYCUICK J, based himself on the proposition that there was or is a rule, which was to be found in the language which he cited from the judgment of ROXBURGH J, in *Re 5. (an infant)* (1) that children of a tender age should remain with their mother. It was the view of the learned judge that the magistrates should be taken as having erred in law because there was no ground established on the evidence for departing from that so-called rule.

For my part I do not believe that in these cases there is any such thing as a rule. Every case must plainly be determined on the particular circumstances affecting that case; though it is, of course, true to say that as a matter of human sense a young child is better with its mother and needs a mother's care."

At 874A-B, HARMAN LJ, said when he delivered his judgment in the same case:

> "There is no such rule, either well settled or otherwise, in a matter of this sort in my judgment. True it is that the Chancery judges, and, I think, those in the Divorce Division also, have in past years rather taken the view that so long as a child is young enough to need the day-to-day care of his or her mother, it is better to leave the third with the mother unless the mother is an entirely unsuitable person. That, however, does not mean that one starts with the mother being 'one up'; one must look at the facts of each case, the parents having equal rights . . ."

This case is, of course, only of persuasive force. I have, however, been persuaded in the views that I hold on the instant case, to follow the same line of reasoning. It is for the same reason that I do not believe that in every case custody of a child of tender years should be given to the mother.

In *Mohaud v Mohaud* 1964 (4) SA 348 (TPD) at 352B, VIEYRA J, said:

> "But that general principle is not to be considered immutable, for despite the children's need of their mother there may be other considerations which are of such a nature as to lead the Court to a different view."

Mr *O'Meara* submitted that the defendant should not be granted custody because her character was unstable. Her unstable attitude might be carried on in future and influence the children. He said the plaintiff had been shown to be a good parent. The Welfare Officer's report had also

---

**Copyright Juta & Co Ltd**

shown that he was interested in the children. He visited them at school, whereas the defendant never bothered to visit them or attend school functions. He said P should be in the custody of the father because he is a boy.

There is no doubt that as between the two parents the plaintiff has shown a greater interest in the children than the defendant has. Both children get on well with the father. I formed the impression that the mother when in fits of anger tends to beat the children for no reason at



DUMBUTSHENA J

all. She is emotionally unstable, perhaps through no fault of her own, but in considering the welfare, care and upbringing of the children, the interests of the children are paramount. The parents' vagaries are only of importance when the Court decides to or not to grant custody to a parent whose character is not in the best interests of the children.

The sore point which makes a decision to grant custody to one or other of the parents more difficult, is the fact that P has spent most of his time with his mother and H has spent most of her time with the father. P is attracted towards his mother, while H is attracted towards her father. They have each developed an attachment for one or other of the parents. Under very exceptional circumstances I would have granted the custody of P to the defendant and that of H to the plaintiff. But there are no special circumstances in this case and generally it is not in the interests of the children that their custody be, as it were, divided between the two parents.

Although P is a child of tender years and cannot be said to have reached the age when it is normally best for a son to be with his father, he is now six years old and in two years time he will have reached the age of eight years, an age at which the companionship and guidance of his father become necessary. In the circumstances of this case it would be wrong to condemn him to the custody of his emotionally unstable mother just because he has lived with her for 20 months in Portugal in the absence of his father. I am of the opinion that he will be better off with his father as he will soon be nearing the age when a son is best with his father. See *W v W and C* (1968) 3 All ER 408. Besides, he needs someone to assist him with his school homework. His father is interested in his education. He visits him at school and attends school functions. He is best able to encourage and to assist him with his school work. The mother is not, so it appears, interested in attending school functions.

For the reasons I have stated have come to the conclusion that it is in the best interests of the children for custody to be granted to the father, who, on the evidence before me, has been shown to be a good parent. In coming to this conclusion, I have not lost sight of the fact that his conduct was substantially to blame for the breakdown of the marriage.

Because there is no agreement between the parties on custody, I have to consider the question of access by the non-custodian parent, in this case the defendant.

As things are now the parties may continue to live under the same roof. If they do there will be no need to define the limits of access of the non-custodian parent.

Copyright Juta & Co Ltd

DUMBUTSHENA J

However, the probabilities are that the parties may live apart. It is therefore the duty of the Court to draw some guidelines on the question of access if only because the parents have failed to come to some agreement. In this exercise I must attempt to strike an effective balance between the rights of the custodian parent and the rights of access of the non- custodian parent. In this regard I am guided by what DE VILLIERS AJ, said in *Marais v Marais,* 1960 (1) SA 844 (TPD) at 847C-F:

> "The above considerations indicate that what is aimed at is the preservation of some degree of parent-and-child relationship between the non-custodian parent and the child, for the benefit of both, but in a manner not incompatible in substance with the vesting of undivided control and regulation of the care and upbringing of the child in the custodian parent. On the one hand control and regulation are not in practical essence to be divided, under the cloak of definition of access, by an arrangement which places a large portion of the ordinary routine of the child's life at the disposal of the non-custodian parent. On the other hand access arrangements are, in the absence of good reason, not to be so confined as to stultify the nurturing of real affection and companionship between non- custodian parent and child. Within these broad limits access arrangements are matters of degree, due regard being paid to each corner of the triangle. The interests of the child would naturally be para mount, where their dictates are clear; but the human needs and feelings of either parent are not to be overridden unnecessarily, particularly where, as so often happens, the capacity of custodian or non custodian has resulted from little or nothing more than chivalry or being Plaintiff or defendant in a marriage which really broke down through incompatibility."

This passage was cited with approval by VIEYRA J, in *Mohaud v Mohaud* at 354D- G

Because access was not canvassed during the trial or in arguments by counsel, it becomes more difficult to lay down definitive rules of thumb as to when and on what occasions the non-custodian parent should see the children without infringing the rights of the custodian parent to control and regulate the lives of the children.

The defendant will have reasonable access as long as she remains and lives in Zimbabwe during two alternate week-ends a month from Saturday morning to Sunday afternoon. I believe that it is in the interests of the children that they should see their mother in order that they should not be estranged from her. In arriving at this decision I am influenced by the realization that the children should not lose their affection and love for their mother. The mother will, I believe, during these alternate week-ends cultivate that affinity between parent and child without which a child feels lost and deprived of parental love.

Should the mother decide to leave Zimbabwe in order to settle in another country, I hope that some arrangements can be made in order to keep contact between the mother and her children. Because of this pos-



DUMBUTSHENA J

sible future eventuality, the parties will have liberty to apply for the variation of this order.

The parents evinced some degree of animosity between them. It is important for them to bear in

Copyright Juta & Co Ltd

mind what was said by VIENNA, J in *Mohaud v Mohaud* at 355A-B:

> "In defining the right of access in this way I am mindful of contingencies that may arise and for which no provision has been made. Children become ill, they hurt themselves or the parent who has rights of access finds that circumstances are such as to make it difficult for her to exercise the rights in the way given. I hope I can trust the parties to behave in this respect as responsible human beings and to demean themselves in charity towards each other if only for the sake of the children. No provision as to access can in any form or shape be a substitute for a happy united home and the parents must bear this in mind."

Both counsel are agreed that the defendant is entitled to maintenance. Mr *O'Meara,* however, submitted that any amount of money awarded to the defendant by way of maintenance should be reduced by $150 should the defendant find gainful employment. When the defendant was employed by Meikles Stores she used to receive a salary of $150 per month. I do not, however, propose to reduce the amount the defendant will receive by way of maintenance as suggested by Mr *O'Meara.*

The Plaintiff is employed and receives $950 per month and with overtime he receives $1 250 per month.

The defendant is not working. I propose to award her such maintenance as will enable her to live the kind of life she was used to during the subsentence of the marriage. Should she find employment which pays her $150 per month, that amount should be used to improve the quality of her life. She presented a reasonable list of her requirements after divorce and estimated her monthly monetary requirements at the sum of $397. I propose to award her the sum of $250 per month. $250 will not be an undue burden on the plaintiff, if one considers his monthly salary without or with overtime pay.

In the result, I grant a decree of divorce to the defendant. The custody of the minor children of the marriage is granted to the plaintiff. The defendant is to have reasonable access by having the children with her on two alternative week-ends of each month from Saturday morning to Sunday afternoon. The plaintiff is to pay maintenance to the defendant in the sum of $250 per month until her death or remarriage. There will be liberty for each party to apply for the variation of the above conditions on good cause shown. There will be no order as to costs.

*Gollop and Blank,* attorneys for the plaintiff.

*Atherstone and Cook,* attorneys for the defendant.

---



## PRETORIUS v MINISTER OF DEFENCE 1980 ZLR 395

**Court** **Appellate Division, Salisbury**

Civil Appeal

Fieldsend CJ, Lewis JP and Goldin JA

22nd September and 7th October, 1980

---

**Copyright Juta & Co Ltd**

## Flynote

Statutes - Pensions and Other Benefits Act, 1979 - paragraph 37 (1) - whether it confers separate right of retirement to that contained in the Defence (Regular Force) (Officers) Regulations - whether regulations can remove existing rights created by statute.

Constitution - whether regulations made thereunder requiring persons who retire to repay moneys to the State are inconsistent with para graph 37 (1).

## Headnote

The appellant joined the Army as a medical officer cadet under regulations which provided that on completion of his training he would serve in the Army for four years. The Defence (Regular Force) (Officers) Regulations, 1976, required him to repay a proportion of his pay and allowances during cadetship if he retired or resigned before completing his obligatory four years' service. The appellant retired in terms of paragraph 37 of the Pensions and Other Benefits Act, 1979, before completing his service. The appellant claimed that retirement under the Act relieved him of the obligation to repay the State $12493,74 owed in terms of the regulations. The regulations were amended, after the appellant had given notice but before he retired, by providing in section 2A that officers who retired in terms of the Act would be subject to F the same liability to repay as, if they had retired in terms of the regulations.

*Held* that retirement in terms of the regulations could not be equated with retirement in stuns of paragraph 37 (1) of the Act, which gives an entirely separate right of retirement without any of the Obligations contained in the regulations.

*Held,* further, that the introduction of section HA to the regulations did not deprive G the appellant of the right to retire free of the obligation to repay. Subsidiary legislation cannot take away existing rights created by statute, unless the statute gives the power to legislate retrospectively.

*Held,* further, that the right to retire in terms of paragraph 37 (1) without making repayment cannot be removed by regulation under the enabling provision of section 107 (1) of the Constitution because that would be inconsistent with the enabling Act.

Cases and authorities cited:

*The Colonial Sugar Refinery Co. Ltd v Irving* [1905] AC 369;

*R v Bird and Ors ex parse Needes* [1898] 2 QB 340;

*Halsbury's Laws of England,* 3rd ed. vol. 36 page 491.

---



*R R Horn SC*, for the appellant. The terms "resignation" and "retirement" in section 7 (11) of the Officers Regulations mean only resignation or retirement in terms of the Officers Regulations and not in terms of any other statutory provision.

The enactment of paragraph 37 conferred on the appellant a right to terminate his service with the Regular Force of the Army in terms of that paragraph in addition to the right to do so

---

**Copyright Juta & Co Ltd**

conferred by sections 7 and 8 of the Officers Regulations, and in so doing removed the disability or restriction which had up to that point in time been operative against the appellant.

The right conferred upon the appellant and other officers in his position to terminate their service in terms of paragraph 37 was and is a statutory and constitutional right. Compare *van Heerden & Ors v Queens Hotel (Pty) Ltd and Anor* 1973 (2) SA 14 (RAD) at 32E.

That the effect of paragraph 37 was to remove the disability or restriction was recognized by the Defence Forces Service Commission, as appears from the promulgation of section 2A of the Officers Regulations promulgated on 11th April, 1980, some two and a half months after the appellant exercised his rights to terminate his service in terms of paragraph 37. Their effect is to deem a retirement in terms of paragraph 37 to be a retirement in terms of the Officers Regulations and to reimpose on the appellant and other officers in his position the obligations set out in section 7 (11) of the Officers Regulations.

The crisp point which arises is whether section 107 of Act 12/79 gave the Defence Forces Service Commission the power to make the Amending Regulation. It is a well recognized principle that *prima facie,* subordinate legislation which purports, without express power, to alter or modify existing statutory rights is *ultra vires*. *Queens Hotel* case *(supra)* at page 28A-E; *Halsbury's Laws (supra)* paragraph 743 at pp. 91/2;

*The Queen v Bird and Ors ex parse Needes (supra)*; *Mackey v James Henry Monks (Preston) Ltd,* [1918] AC 59.

The effect of the judgment in the Court *a quo* is to hold that it was the intention of the Legislature in enacting section 107 of Act 12/79 to confer upon the Defence Forces Service Commission the power to do away with the right which was conferred by paragraph 37 on the appellant to terminate his service prematurely without incurring the obligations set out in section 7 (11) of the Officers Regulations.

It is submitted that the effect of paragraph 37, as recognized by the Defence Forces Service Commission is to confer on a class of members



FIELDSEND CJ

the right to retire without incurring the obligations specified in section 7 (11) of the Officers Regulations.

*B C Brown,* for the respondent. It is accepted that the appellant given the right to retire on pension but not that the right included the suggested immunity from the obligation set out in section 7 (11) of the Officers Regulations.

It is submitted that the appellant's argument should be rejected because to accept it would require the Court to attribute to paragraph 37 of the Act consequences so absurd that the Legislature could not possibly have intended such consequences to flow from the enactment of the Act.

Secondly, it is submitted that section 2A of the Officers Regulations (as enacted by the

Copyright Juta & Co Ltd

Amending Regulations in April, 1980) was a legitimate exercise of the regulation - making power consistent with the only rights granted by paragraph 37 of the Act.

## Judgment

**Fieldsend CJ:** The appellant joined the Rhodesian Forces in January, 1972, as a medical officer cadet under a scheme in terms of which he was paid a salary while he trained as a doctor at his own expense. The offer which was made to him and which he accepted was subject to the Defence Act and the regulations thereunder which provided among other conditions that on completion of his training he was obliged to serve the forces for not less than four years. The appellant completed his training and was promoted to the appropriate rank in January, 1978. It then became his duty to serve for at least four years.

Under section 7 (11) of the Defence (Regular Force) (Officers) Regulations (R.G.N. 99 of 1976) it is provided that a person in the appellant's position who "terminates his service by resignation or retirement shall be liable to pay to the State" a certain proportion of the pay and allowances paid to him during his cadetship. The proportion depends upon the period he still has to serve to complete his obligatory four years.

On 1st June, 1979, the Constitution of Zimbabwe Rhodesia came into force. Paragraph 37 (1) the Third Schedule to this Constitution provides:

> "A member who, at the date of his retirement, will have completed not less than two years' service as a contributor since his last appointment as such may, at any time after he has completed a period of service of not less than one year after the effective date, retire from the Uniformed Force of which he is a member:



FIELDSEND CJ

> Provided that a member who wishes to retire in terms of this paragraph shall give not less than three calendar months' notice of his intention to retire, which shall expire not earlier than the 30th April, 1980.
>
> (2) Notwithstanding the provisions of the proviso to subparagraph (1), the Commanding Officer may accept a period notice to retire In terms of subparagraph (1) which amounts to less than three calendar months but does not expire before the 30th April, 1980."

Paragraph 38 (1) of the Schedule gives to a person who retires in terms of paragraph 37 and who would not in terms of the Pension Regulations be entitled to a pension, a right to a pension calculated at a rate which increases depending upon the number of years after 30th April, 1979.

This part of the Third Schedule - Part IV - remained in force by virtue of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980, as part of the Pensions and Other Benefits Act, 1979.

In January, 1980, the appellant gave the requisite three months' notice of his intention to retire on 30th April, 1980, in terms of paragraph 37 (1) of the Pensions and Other Benefits Act.

On 11th April, 1980, the Regulations were amended by the addition of a section 2A in the

Copyright Juta & Co Ltd

following terms:

> "2A. Where an pincer retires an terms of paragraph 37 of the Third Schedule to the Constitution, the provisions of these regulations which provide for the liabilities or entitlements of an officer on resignation or retirement in terms of these regulations shall apply, *mutatis mutandis*, in respect of his retirement in terms of the said paragraph 37 as if it were a resignation or retirement, as may be appropriate in his case, in terms of the appropriate provision of these regulations:
>
> Provided that, for the purposes of sections 40 and 42, such officer shall be regarded as having retired terms of these regulations whether or not he could have so retired on the said date."

The point at issue in this appeal is whether the appellant is obliged to pay to the State the sum of $12493,74, which it is common cause he would have to repay if he were bound by section 7 (11) (c) of the Regulations. This issue depends on answers to the following questions:

(1) Did paragraph 37 (1) of the Pensions and Other Benefits Act confer a right on the appellant to retire without being subject to the obligation to repay contained in section 7 (11) (c) of the Regulations"

(2) If paragraph 37 (1) did confer such a right, did section 2A of the Regulations introduced by SI 213 of 1980 effectively deprive the appellant of the right to retire without repayment?

---



FIELDSEND CJ

It is basic to the appellant's case that paragraph 37 (1) of the Pensions and Other Benefits Act conferred on him the right to retire without being obliged to repay any money in terms of section 7 (l l) of the Regulations. Indeed in this Court the contrary proposition was the cornerstone of the respondent's argument.

Before paragraph 37 (1) came into effect there were only two ways in which an officer could terminate his service-resignation as provided by section 7 of the Regulations and retirement as provided by section 8 - this being specifically provided by section 6. Under section 8 an officer could retire on giving three months' notice in writing only after 10 years service, but could resign at any time under section 7 on giving the same period of notice. The financial consequences of retirement and resignation are, of course, very different. It is only on retirement that an officer would be entitled to a benefit under section 5 (2) and (3) of the State Service (Pensions) (Uniformed Forces) Regulations RGN 313 of 1976. In addition there are obligations to make certain repayments to the State under subsections (3), (4) and (8) of section 7 imposed upon an officer who resigns which are not imposed on one who retires.

In certain instances there is an obligation to make repayments whether an officer resigns or retires. Subsections (6) and (7) of section 7 makes provision for certain repayments by an officer, who at the expense of the State has attended a course of instruction outside the country or who has attended a flying or officer's training course and who "resigns in terms of subsection (2) of section 7, or retires in terms of subsection (1) of section 8.

Finally, subsection (11) with which this appeal is directly concerned imposes an obligation to make certain repayments upon a person who has received medical Gaining as the appellant

Copyright Juta & Co Ltd

has and who "terminates his service by resignation or retirement." The crisp point for decision is whether section 37 (1) has provided a form of retirement outside the Regulations which has conferred on the appellant a right to retire which does not carry with it the consequences which would flow from the retirement referred to in section 7 (11) of the Regulations.

During argument I thought that perhaps the difference in wording between the various subsections and the fact that prior to 14th May, 1976, subsection (11) had referred to a person who "terminates his employment by resignation or retirement in terms of these regulations" might be an indication that the words in the amended subsection (11) referred



FIELDSEND CJ

not only to retirement in terms of the Regulations but also to retirement outside the Regulations. On further consideration it seems that this cannot be so. The inference cannot be drawn from these facts that the retirement referred to in subsection 7 (11) is anything more or less than retirement in terms of section 8 of the Regulations, particularly as "retirement" is defined in section 2 as meaning retirement in terms of section 8. It certainly cannot be construed as meaning retirement in terms of paragraph 37 (1) of the Pensions and Other Benefits Act, which was neither in existence nor contemplated when the Regulations were made.

As in my view the retirement referred to in section 7 (11) is limited to retirement in terms of section 8 of the Regulations, it must follow that paragraph 37 (1) gives an entirely separate right of retirement which does not carry with it any of the obligations which are contained in the Regulations.

It was argued, although not with great conviction, for the respondent that such a result could not have been intended as it would create an unequal position between persons in the appellant's position and those under an obligation to make repayments under section 6 of the Extended Service Gratuity Regulations. This regulation provides for certain sums to be repaid to the State in the event of premature resignation or retirement, neither term being defined.

The main contention, and that relied upon by the Court below*(16), was that paragraphs 37 and 38 of the Act were concerned solely with the provision of pensions to persons who would not otherwise be entitled to them (and of increased pensions) to servicemen who served a year or more after 30th April, 1979, and that it could not also have been intended to grant relief from obligations to make repayments. If there was ambiguity in the effect of the Act and the Regulations read together, these considerations may have had some weight. But as in my view the edict of the two provisions having regard to the words used is clear, one cannot use these considerations to alter that conclusion.

I am not even sure that one can mount a very persuasive argument on the result that must have been intended, though not achieved by the Act and the Regulations read together. It is true that paragraph 38 of the Act is concerned with pension rights only, but paragraph 37 stands separately and is not linked only to pension rights.

In the situation then prevailing when African majority rule was about to be introduced and the country was still in the throes of a serious and continuing fight against African nationalist

Copyright Juta & Co Ltd

movements, it may well have



FIELDSEND CJ

been thought advantageous to offer the added inducement to qualified persons such as the appellant to remain for a year or two after 30th April, 1979, of not having to repay what might otherwise have been due.

That the Legislature was not unaware of the question of the effect of granting an additional type of retirement on the duty to serve for a particular period under comparable regulations in certain circumstances appears from paragraph 28 (2) (c) of Part III of the Act, which deals with benefits to members of the Public Service. Paragraph 25 makes provision for early retirement, paragraph 26 makes provision for pensions on early retirement and for increased pensions and paragraph 28 (2) denies a right to retire in terms of paragraph 25 to an officer if:

> "(c) having been granted. special leave for training or study purposes subject to the condition that he serves Government for a specified period after the expiration of such leave, the notice of intention to retire in terms of paragraph 25 is given or would expire before he has completed his service for that specified period."

It would have been very easy to have made, in Part IV of the Act under which the appellant fell, an equivalent provision or a provision reserving his obligation to make repayment in terms of the Regulations.

In short, I am satisfied that paragraph 37 of the Act gave the appellant the right to retire free of any obligation to repay the sum now in issue, and that he exercised that right in January, 1980.

In this Court the respondent did not contend that, if it were found that the appellant had a vested right to retire free of an obligation to repay before section 2A was made, the section effectively deprived him of that right. This was clearly a very proper approach, for the contrary contention would fly in the face of the well recognized principle relied upon in *The Colonial Sugar Refinery Co Ltd v Irving* [1905] AC 369 at 372 that statutes will not be heal to take away existing rights retrospectively unless they so provide expressly or by necessary intendment. Such a principle applies with increased force where, as here, a right is created by a statute, and is purported to be taken away by subsidiary legislation made under that statute which gives no specific power to legislate retrospectively.

This would be sufficient to dispose of this appeal, but in view of the nature of the case and the fact that the point was argued, it may be helpful if I were to express a view upon whether section 2A would have been effective to deny the appellant the right to retire without making repayment if he had not exercised his right to retire before it was made.

This question, too, is covered by authority. It is an accepted principle that subordinate legislation cannot, without express power in the



FIELDSEND CJ

Copyright Juta & Co Ltd

empowering legislation, alter or amend a right conferred by that legislation. *Halsbury's Laws of England,* 3rd ed. vol. 36 p. 491; *R v Bird & Ors Ex parse Needes* [1898] 2 QB 340.

The only possible enabling power on which reliance can be placed is that in section 107 (1) of the Constitution, which reads:

> "107. Subject to the provisions this section, the Defence Forces Service Commission may make such regulations as it considers to be necessary or expedient -
>
> (a) for the general well-being and good administration of the Defence Forces and the maintenance thereof in a high state of efficiency;
>
> (b) providing for the conditions of service of members of the Defence Forces."

Again if it is correct that paragraph 37 of the Act confers a right to retire without making the repayments required under section 7 (11) of the Regulations, that right cannot be removed by a regulation passed under the general enabling provisions of section 107 (1), for that would be inconsistent with the enabling Act.

In my view the appeal must be allowed, and there must be a declaration that the appellant is not obliged to refund the sum in issue of $12493,74 to the State. The respondent must pay the costs, both in this Court and in the Court below.

**Lewis JP:** I agree.

**Goldin JA:** I agree.

*Winterton, Holmes and Hill*, attorneys for the appellant.

*State Attorney,* attorney for the respondent.

---



## ZUVARADOKA v FRANCK 1980 ZLR 402

**Court** **Appellate Division, Salisbury**

Civil Appeal

Lewis JP, Baron JA and Goldin JA

23rd September and 9th October, 1980

### Flynote

Contract - illegality - recovery of money paid under illegal contract - par delictum rule - when departure from general rule justified.

---



### Headnote

The parties entered into a written agreement in terms of which the appellant agreed to purchase

Copyright Juta & Co Ltd

the respondent's house. The appellant being an African, the agreement was illegal in terms of the Land Tenure Act 1 Chapter 1481. Prior to signing the agreement the appellant paid a deposit of $1500 to an estate agent; on the signing of the agreement the agent retained $587,50 as his commission and paid over the balance to the respondent. The respondent repudiated the agreement for reasons quite unconnected with me fact that the appellant was an African and (allegedly *ex gratia*) refunded to the appellant the sum paid over to him by the estate agent. The appellant instituted proceedings against the respondent for the recovery of the amount retained by the agent as commission; the Court a quo gave judgment for the respondent on the ground that the estate agent was not the respondent's agent for the purpose of the receipt of the deposit.

It was clear from the terms of the agreement that the estate agent was intended to collect all the moneys payable under the contract, including the deposit, and that the estate agent was the respondent's agent for this purpose. However, it was submitted that the contract, being illegal, was void and therefore the Court could pay no regard to it. This being so, the argument went on, no contract was concluded and the estate agent never became the respondent's agent.

*Held* that the maxim *in pari delicto potior est conditio defendentis* is does not operate to defeat every claim made by a plaintiff under the illegal contract. The test is whether public policy is best served by granting or refusing the claim. Public policy should take into account the doing of simple justice between man and man. (*Jajbhay v Cassim,* 1939 AD 537 applied.)

*Held,* further, that in order to decide whether or not to grant relief the Court can and should look at the agreement.

*Held,* further, that since the estate agent was the respondent's agent for the purpose of the receipt of the deposit, and since in terms of the agreement it was the responder t's obligation to pay the agent's commission, in the circumstances of this case "simple justice between man and man" entitled the appellant to recover the whole of the deposit from the respondent even though the latter had not received the whole of it, and that it was for the respondent to look to the agent for the recovery of the sum retained as commission.

Cases and authorities cited:

*Sorrell and Anor v Finch* [1976] 2 All ER 371;

*Earlie Homes Estates v Miller,* 1977 (4) SA 288 (C);

*Jajbhay v Cassim (supra)*;

*Petersen v Jajbhay,* 1940 TPD 182;

De Villiers and Macintosh, *The Law of Agency in South Africa,* 2nd edition, page 254.

*P Sullivan* for the appellant cited the following cases: *Shepherd v Farrel's Estate Agency,* 1921 TPD 62; *Bhikhagee v Southern Aviation (Pty) Ltd,* 1949 (4) SA 105 (E); *Sorrell and Anor v Finch (supra); Earlie Homes Estates v Miller (supra)*; *Albertyn v Kumalo and Ors,* 1946 WLD 529; *Nkosi v Totaliser Agency Board (Transvaal),* 1980 (1) SA 122 (T)

**Copyright Juta & Co Ltd**

BARON JA

*R Hill* for the respondent cited *Sorrell and Anor v Finch (supra), Earlie Homes Estates v Miller (supra).*

## Judgment

**Baron JA:** The appellant (the plaintiff below and to whom I will continue to refer to as the Plaintiff) sued the Respondent (the Defendant) in the magistrate's Court for payment of the sum of $587,50, being part of a deposit paid by the plaintiff to one Weinman, an estate agent trading as Seltrust Estates & Investments, in respect of the proposed purchase of the Defendant's house in Southerton.

In February, 1978, the parties entered into a written agreement in terms of which the plaintiff agreed to purchase the Defendants house for the sum of $13 500; prior to the actual signature of this document the plaintiff paid to Weinman a deposit of $1500 in contemplation of an agreement being concluded. In the agreement the plaintiff was described as "Ted Zuvaradoka (Coloured)". The plaintiff said in evidence that he did not know that he had been so described; the Defendant said that when he signed the document he did not know the proposing purchaser was an African. The evidence of both parties is confused and somewhat improbable on this issue, but nothing turns on it; it was common cause that the agreement was, in fact, illegal because it was in contravention of the Land Tenure Act [*Chapter 148*] under which the plaintiff as an African was not permitted to reside in Southerton.

Almost a month after the signature of the agreement the Defendant repudiated it. A great deal of evidence was directed to ascertaining precisely when the Defendant discovered that the plaintiff was an African, but quite apart from the fact that the evidence of the Defendant and to a somewhat lesser extent that of his wife reads very badly on this score, the point is hardly material since in his letter the matter is put on a completely different basis. The first paragraph reads:

> "This news may come as a shock to you, because I am now withdrawing the sale of my house because I just carrot see any settlement of this sale."

There is not a word in the letter concerning the fact that the Plaintiff was an African although certainly by that time, as the evidence makes abundantly clear, the Defendant must have known that this was so.

In the same letter the Defendant informed the plaintiff that he had received from Weinman the sum of $912,50, the rest having been retained as commission, and that he would return this sum to the plaintiff "as soon as I sort out the legal part of all this." In the pleadings it was asserted that the Defendant was under no obligation to refund this sum and that he did so *ex gratia*. The plaintiff, at the Defendant's sugges-



BARON J

Copyright Juta & Co Ltd

tion, approached Weinman in an effort to recover the remainder of the deposit and on the latter's refusal to refund this money the plaintiff instituted proceedings against the Defendant. The magistrate having given judgment for the Defendant on the ground that Weinman was not the Defendant's agent, the plaintiff appeals to this Court.

The relevant clauses of the agreement read as follows:

"PURCHASE PRICE

(a) The purchase price, deposit and monthly instalments are recorded in the schedule.

(b) The deposit shall be paid by the Purchaser on the date he signs the Agreement.

(c) The balance of the purchase price outstanding from time to time shall bear interest at 8 per cent. per annum reckoned from the date of possession as shown in the schedule or if possession is earlier obtained, from such date as actual possession. The seller shall be entitled to vary the rate of interest charged by members of the Building Society's Association for first mortgage bonds on residential property, upon giving the Purchaser THREE (3) months written notice of his intention to do so.

(d) The Purchaser shall pay minimum monthly instalments as shown in the schedule, the first of which shall be paid on or before the first day of the month March the date of possession and thereafter on or before the first day of each succeeding month, each instalment shall be applied first in satisfaction of the interest accrued to the date of payment and any other amounts which may be due to the Seller in terms hereof, and the balance in reduction of the purchase price.

(e) In addition to the said monthly instalments and without affecting his liability to pay the monthly instalments, the purchaser shall have the right to make payments in reduction of the purchase price.

(f) All payments shall be made to SELTRUST ESTATES AND INVESTMENTS, PO Box 8566, Causeway, Salisbury, free of Bank Charge or other deductions or in such other manner as the Seller may direct. A collection fee of 5 per cent. will be deducted from all payments made to SELTRUST ESTATES AND INVESTMENTS.

3. COSTS

The Seller shall pay the Agent's Commission on signature of this Agreement. But the Purchaser shall pay all costs of Transfer, including stamp duty and conveyancing fees, and the costs of his Bond. The Seller agrees to release the Agent's commission in the amount of $587,50 from any funds available paid by the Purchaser towards the purchase of this property, or from the deposit, when the Terms of this Agreement have been fulfilled in principle."

Mr *Hill,* on behalf of the Defendant, conceded that clause (f) above clearly constitutes Weinman as the Defendant's agent for the purpose of



the receipt of the moneys referred to therein; as I understood him, he conceded also that had there been a concluded contract this would still have been the position notwithstanding that the deposit had been paid to Weinman some two weeks previously. Mr *Hill* submitted, however, that the contract, being illegal, is void and the Court can have no regard to it whatsoever, hence, so the argument runs, it cannot be said that a contract between the parties was concluded and that consequently notwithstanding the physical signature of the document purporting to be the agreement between the parties, the estate agent, on the authority of cases like *Sorrell & Anor v*

Copyright Juta & Co Ltd

*Finch* [1976] 2 All ER, 371 and *Sarlie Homes Estates v Miller,* 1977 (4) SA 288 (C) never became the Defendant's agent and that the Plaintiff must consequently look to Weinman and not the Defendant for the refund of the moneys now claimed.

In the leading case of *Jajbhay v Cassim,* 1939 AD 537 STRATFORD CJ, after discussing the relationship between the two maxims *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendentis,* said at p. 543:

> ". . . the second maxim *in pari delicto potior conditio defendentis* . . . is the only maxim which, ill my judgment, concerns us in the present case, for the appellant is not seeking enforcement of the illegal contract but seeks release from its operation."

Later at p. 543 he said:

> ". . . the right of recovery of something delivered under an illegal contract *(a restitutio in integrum)* has never been denied in all cases. In other words the maxim has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under such a contract."

The test applied by STRATFORD CJ, was whether public policy was best served by granting or refusing the Plaintiff's claim, and he stressed that public policy should properly take into account the doing of simple justice between man and man.

The present case seems to me to fall squarely within the foregoing principle. The plaintiff is not seeking to enforce the illegal contract; in" deed he does not even seek release from its operation. The Defendant repudiated the contract for reasons which, had the contract been a legal one, would clearly have been in breach thereof; the plaintiff is simply seeking to recover what he had paid thereunder. This he can do if it is established that Weinman was the Defendant's agent for the purpose of the receipt of the deposit; to cite De Villiers and MacIntosh, *The Law of Agency in South Africa* 2nd Edn. at p. 254:



BARON JA

> "Money paid to an agent, if authorized to receive it, is recoverable by the payer, in the event of a failure of consideration, from the principal even if he has not received it (*van der Merwe v SANLAM,* 1928 O P.D 21)."

The justice of the present case is clearly on the side of the plaintiff. Generally the learned magistrate accepted the evidence of the plaintiff and his wife, and on the particular point of the illegality of the contract the plaintiff said that he knew that some years ago Africans could not buy houses in Southerton but that by 1978 many Africans were living there, and he thought that it was legal at that time. I see no basis for rejecting this evidence of the plaintiff. On the other hand the Defendant repudiated the contract, not because the plaintiff was an African (as the Defendant tried to suggest in evidence and in direct conflict with the letters he had written at the time) but because no progress was being made; "simple justice between man and man" therefore demands that the plaintiff recover what he has paid. The fact that the Defendant did not receive from Weinman the moneys the subject of this action does not assist him, since it was the Defendant and not the plaintiff who undertook to pay the agent's commission; in this regard it is relevant to point out that the Seller agreed to release the agent's commission "when

**Copyright Juta & Co Ltd**

the Terms of this Agreement have been fulfilled in principle" and, whatever that rather curious expression may mean, the terms of the present agreement leave certainly not been fulfilled at all, and furthermore, as I have said, the repudiation was by the Defendant himself. It is therefore for the Defendant to look to the agent for the recovery of the sum retained as commission.

It remains therefore to deal with Mr *Hill's* submission that the Court is not entitled to look at the agreement for any purpose and that consequently it has not been established that Weinman was the Defendant's agent. This point also arose in *Jajbhay v Cassim (supra)* and in *Petersen v Jajbhay,* 1940 TPD 182. In the former case STRATFORD CJ, said at p. 545:

> "I think I should add that in my view, if either party had terminated the contract and the tenants refused to vacate, the Court would probably assist the appellant to recover his property."

GREENBERG JP. In *Petersen v Jajbhay (supra)*, having referred to this passage, said at p. 189:

> ". . . it is clear that (STRATFORD CJ), was referring to a termination that would have been valid by the terrors of the contract, had it been legal and binding."

Quite obviously it was assumed by STRATFORD CJ, that the Court could look at the agreement and GREENBERG JP, made the point in terms in *Petersen*'s case *(supra)* when he said at p. 191:

---



BARON J

> "In order that the Court may decide whether or not to grant relief, it may clearly look at the agreement. If all the terms of a current lease are being complied with and there are no considerations of public policy present, the Court will not assist the lessor; but if the lessee is not performing his obligations, the rule may in a proper case be relaxed."

Finally, the short judgment of CENTLIVRES JA, in *Jajbhay v Cassim (supra)* is worthy of note. He referred to an old case in the Scotch Appeal Court, *Cuthbertson v Lowes,* (1870) 7 Sc LR 706 and cited the following from the judgment in that case:

> "It is true enough that in *turpi causa* the maxim held true *melior est conditio possidentis;* but this was a pact not so illicit that the Court could not look at it. What the Court could not do was, it could not enforce the contract. But to refrain from taking any notice of it, so as to let the defenders retain the potatoes without paying for them, would amount to a gross injustice. The Court could, therefore, entertain the alternative plea of the pursuer and decern against the pursuer (sic? - defenders) for the market value of the potatoes. The 'Lord Ordinary's interlocutor was right and should be adhered to."

As I have indicated, Mr *Hill* conceded that if this Court is permitted to look at the agreement the conclusion is inescapable that Weinman was the Defendant's agent for the purpose of the receipt of the deposit. The authorities make it clear that the Court can and should look at the agreement. I would allow this appeal and give judgment for the plaintiff in the amount claimed, with costs both here and below.

---

**Copyright Juta & Co Ltd**

**Lewis JP:** I agree.

**Goldin JA:** I agree.

*Sawyer and Mkushi,* attorneys for the appellant.

*Honey and Blanckenberg,* attorneys for the respondent.

---



## THE STATE v MUYAMBO AND ANOTHER 1980 ZLR 408

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend CJ, Baron JA and Goldin JA

9th and 13th October, 1980

### Flynote

Criminal Procedure - sentence - lawlessness following end of war - importance of both deterrence and rehabilitation in assessing sentence.

---



FIELDSEND CJ

### Headnote

The appellants, were convicted of public violence which was inspired by political rivalry. At the end of the war they were both members of the ZANL forces. The appellants appealed against their sentences.

*Held* that in sentencing offenders involved in the wave of lawlessness following the end of the war, there are two main problems. The short term problem is to put a stop to, the wave of lawlessness and it is for the Courts to express their displeasure at this type of conduct by imposing severe sentences to deter offenders and like minded persons. The long term problem is one of rehabilitation of persons, especially younger men and women, who have returned after years of war. Long prison terms are unlikely to make them constructive citizens.

*Held,* further, that sentences that will be effectively deterrent must be imposed, but more importantly, sentences should aim to produce a responsible body of citizens from those who now regard themselves as heroes of their country.

*B H Christie,* for the appellants.

*J H C Friedman*, for the respondent.

### Judgment

Copyright Juta & Co Ltd

**Fieldsend CJ:** The two appellants were convicted on their pleas Of guilty of public violence. It was admitted that on the 6th July, 1980, in a group of some 20 others, they moved through the public thorough fares of Mufakose Township with the intention of taking revenge on PF supporters who had at an earlier meeting assaulted several supporters of the appellants' own party, ZANU (PF). It was also common cause that six persons, including five women, were assaulted by the group with fists and sticks but that the two appellants were personally involved only in removing a skirt and a T-shirt from one woman and T-shirts from one man and two women. It was accepted that none of the assaults was particularly serious.

The first appellant was a man of 25 years of age who had been with the ZANLA forces since 1973. He was a first offender and had indicated in Court some contrition for his conduct. He was injured during the war and he was then living on a farm at Goromonzi. He was sentenced to three years' imprisonment, of which one year was suspended for five years on condition that he was not convicted of public violence or of the contravention of any provision of Part III of the Law and Order (Maintenance) Act committed within that period.

The second appellant was a young woman of about 18 or 19 years of age, on the magistrate's finding, and she too was a first offender, and she had been with the Z A.N.L.A. forces since about 1975. She was living at that time in a camp at Enkeldoorn. She was sentenced to three years' imprisonment, of which 18 months were suspended on the same conditions as above.

---

**1980 ZLR p410**

FIELDSEND CJ

The two appellants now appeal against their sentences.

It is common knowledge, and the Courts are all too aware of the fact, that the country is still disturbed by a good deal of lawlessness and violence, much of it inspired by political rivalry.

In these circumstances there are two main problems arise when it comes to assessing sentence in these cases, one the short term problem and the other long term.

The short term problem is how to put a stop to the wave of lawlessness that has followed the end of the war and the establishment of a new government. This is not an unusual situation in a country that has been through the difficulties that this country has been through in recent years, and it is aggravated by the presence in large numbers of those who until recently have been living in rough conditions, and who have had to be tough and ruthless to survive. It is proving difficult to find occupations and constructive and rewarding work for those people, and the frustrations, boredom and political enthusiasm-especially of the younger and more hot-headed of them-combines to lead them to lawless, and on occasions to violent, conduct.

The country as a whole cannot progress as it should until this wave of lawlessness is curbed, and it is for the people as a whole to exercise restraint on themselves and others and to see that this is curbed; and it is for the Courts to throw their weight behind the people. They can only do this by expressing the displeasure that everybody must feel at this type of conduct by imposing severe sentences to deter offenders and others of the same mind from committing offences of this nature. The Court does not act in the name of any one section of the population, or in the name of any one political party. It acts to protect the people as a whole and to enforce

**Copyright Juta & Co Ltd**

peace and the law on their behalf. In that function it must take a firm line as any sign of weakness may well be misinterpreted.

The long term problem to which I referred, is I think of equal importance, and that is the problem of the rehabilitation of those who have returned after long years away, especially the younger men and women. They must be made to feel part of the community-not as autocratic and undisputed leaders-but as useful and constructive citizens.

This will not be achieved by making offenders serve long prison sentences with the contamination and humiliation that goes with that form of punishment. On release they are as likely to be embittered and



corrupted as they are to be useful members of society. But despite these factors there are three main reasons why the Courts have to take a very firm line in cases of this nature.

First, the public must be protected from unlawful violence and they must feel that they are being given protection.

Secondly, the police, who have a very difficult task, must be shown that they have the support of the Courts.

Thirdly, those who have returned must be made to realize that with the end of the war there are laws which they must observe for the good of all, and that they have an obligation to set a good example to others.

For all these reasons, sentences that will be effectively deterrent must be imposed in appropriate circumstances. But still the primary purposes of sentences to be imposed must, I think, be directed to the longer-term and more important aim of producing a responsible body of citizens from those who now regard themselves as having been the heroes of their country.

These are the principles which I am convinced we must bear in mind in assessing cases of this nature, all of which in the final event turn upon their own particular facts.

Turning now to the case before us, this is undoubtedly a serious case, not so much because of what was actually done to any of those assaulted, but because it was openly and admittedly in retaliation for past conduct by another political group and was likely in itself to lead to a very much more serious public disorder. To condone this type of retaliation is to condone any private revenge, and this in turn can only lead to further incidents of possibly increasing violence.

In addition, there is the further aggravating feature that people were picked upon merely because they were supporters of another faction, who in all likelihood were innocent members of the public who had done nothing wrong.

In the case of the first appellant, the mitigating factors are that he is a young man who now has to adapt himself to a changed way of life, and a first offender who has shown some contrition. I am afraid nevertheless that his conduct calls for a substantial prison sentence, a major portion

Copyright Juta & Co Ltd

of which should be suspended to induce him not to repeat an offence of this nature. An appropriate sentence in his case, in my view, is two years' imprisonment with labour with 18 months suspended for five years on the conditions imposed by the magistrate, and to that extent I think his appeal should be allowed.



FIELDSEND CJ

The case of the second appellant is rather different. As there was some doubt about her age, I asked for a probation officer's report. At very short notice an excellent report was put before us by Mr Rwasaka of the High-field office of the Department of Social Services. This shows that the appellant is 19 years of age and now some seven or eight months' pregnant. He found her to be co-operative, calm and respectful, and of good behaviour in prison since her conviction. She hopes to marry the father of the child she is carrying, and he visits her in prison. Unfortunately, these facts were not before the magistrate, who seems to have regarded her as rather aggressive, making mention of her wearing trousers in Court.

Mr *Friedman*, for the State, very properly took the view that we should now deal with the case on the basis of the facts disclosed in the probation officer's report.

Despite the seriousness of the circumstances of the offence, there are important factors which go to determining an appropriate sentence for the second appellant. They are her youth, the fact that she has been away from any family influence for some seven years, and that she is pregnant and intending to form a permanent relationship with the father of her child. She has been in prison since her conviction on the 15th July, and according to the probation officer, she appears to have learnt a lesson from that.

Looking at the case in the light of all these considerations-many of which through no fault of his were not before the magistrate-and especially at the fact that she has been in prison now for three months, I think that her appeal should be allowed to the extent that her sentence is altered to 18 months' imprisonment with labour of which 15 months is suspended for five years on the conditions imposed by the magistrate.

It is hoped that with the inducement of the hope of married life ahead, she will quickly adjust herself to the new conditions in this country.

Accordingly, the appeals should be allowed to the extent that I have stated.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Chirunda, Chihambakwe & Partners,* attorneys for the appellants.



Copyright Juta & Co Ltd

## THE STATE v SIBANDA (1) 1980 ZLR 413

**Court** **General Division, Bulawayo**

Criminal Review

Gubbay, J

17th October, 1980

### Flynote

Criminal Procedure - bail - accused in default - summary fine not competent - accused to be given opportunity to show cause why forfeiture bail should dot be ordered - default to be wilful or deliberate.

### Headnote

The accused was released on bail, pending sentence. On the day when he was due to appear for sentence the accused was in default. The Court issued a warrant for his arrest, ordered forfeiture of the bail and imposed summarily a fine of $40 or, in default of payment, 40 days. Subsequently, the accused appeared before the Court and explained that his default was due to his endeavours to borrow money and that he had arrived at Court thirty minutes after the Court had arisen. The magistrate cancelled the warrant and confirmed the summary fine.

*Held* that there is no provision in the Criminal "Procedure and Evidence Act [*Chapter 59*] which authorizes the imposition of a summary fine when an accused, who is on bail, is in default. To order forfeiture of bail and a summary fine is unjust and unreasonable in that it amounts to punishing the accused twice for the same default.

*Held,* further, that the correct procedure, when an accused on bail is In default, is merely to issue a warrant for his apprehension. The Court should only order forfeiture when, after hearing the accused's explanation, it is satisfied that the default was wilful or deliberate.

Cases cited:

*S v Sibuya,* 1979 (3) SA 192 (T);

*S v Zibula,* 1968 (2) SA 596 (E);

Swift's *Law of Criminal Procedure,* 2nd ed.;

*Knight, NO v van Tonder and Ors,* 1962 (3) SA 719 (SR).

### Judgment

**Gubbay J:** This case was forwarded on review by the regional magistrate before whom it came for scrutiny. The accused was arrested and charged in a magistrate's Court with one count of malicious injury to property and two counts of common assault. He was released on bail consisting of a deposit of $20 in cash. The trial commenced on 8th



Copyright Juta & Co Ltd

GUBBAY J

August, 1980. The accused pleaded guilty to the charges and was convicted. The proceedings were then adjourned to 18th August and the bail extended. At 10.10 a.m. on that day, the accused was in default of appearance. The magistrate thereupon issued a warrant for his arrest. He decreed forfeiture of the bail deposit and in addition summarily imposed a fine of $40 or, in default of payment, 40 days' imprisonment with labour. The trial was resumed on 25th August in the presence of the accused. The prosecutor advised that on the prior occasion the accused had arrived 30 minutes after the Court had risen. The accused explained that he had been delayed by his endeavours to borrow money from his employer with which to pay the anticipated fine and so had not been able to board a sufficiently early bus to make the journey timeously. The magistrate cancelled the warrant and confirmed the summary penalty. He sentenced the accused for the three offences taken together, to six months' imprisonment with labour, but suspended the total period for five years on appropriate conditions. Nothing turns on those convictions or that sentence, and the proceedings in respect of them are confirmed.

Unquestionably the magistrate was empowered to order the forfeiture of the bail moneys in terms of section 121 of the Criminal Procedure and Evidence Act [*Chapter 59*]. But was it competent to fine the accused as well? The magistrate states that he imposed this penalty under section 128 (3) as read in conjunction with section 153 (2) of the Act. The former section, however, deals with the failure of an accused to appear in answer to a *summons,* which is an entirely different procedure from that relating to recognisances entered into by an accused in terms of section 120 (1) of the Act. Nor does section 153 '(2) take the matter further, for it is of no application where an accused has been admitted to bail. I am satisfied that there is no provision in the Act which specifically authorizes the imposition of a fine upon an accused admitted to bail, for his failure to appear in Court at the appointed time. If the intention were to punish such an accused in addition to the forfeiture of the bail, I would certainly expect the Legislature to say so in clear language, or at least to refer to section 128 (3) in section 121. The point is made focibly in *S v Sibuya,* 1979 (3) SA 192 (T) at 193G, that the lawmaker is presumed not to intend an unfair, unjust or unreasonable result. To declare an accused's bail forfeited and additionally to impose a fine, would be to bring about such a result, for it would be tantamount to punishing him twice in respect of the same default.

It follows that in my opinion the magistrate acted beyond his power. He was restricted to ordering the estreatment of the accused's bail.

---



GUBBAY J

The sentence of $40 or 40 days' imprisonment with labour is set aside, the latter period being in any event, in excess of the one month prescribed by section 128 (3) of the Act.

There is a further aspect of the default proceedings to which I must refer. In the light of the explanation tendered by the accused on 25th August, his previous failure to appear at the stipulated hour and place for sentence to be passed, was certainly wilful or deliberate. It was not due to circumstances either beyond his control or so compelling as to materially interfere with his freedom of choice. The procuring of money from his employer-which was left to the last

---

**Copyright Juta & Co Ltd**

moment anyway-was simply priority over his obligation to appear in Court on time. The reason, of course, was not known to the magistrate when he ordered the bail moneys to be forfeited. I consider, therefore, that he acted precipitately and contrary to the *audi alteram partem* principle. The correct procedure was merely to have issued a warrant for the apprehension of the accused and to have stood over, until he was brought before the Court on the warrant, the question of whether his default on 18th August was justifiable.. The onus would then have been upon the accused to show cause why forfeiture should not be decreed. See *S v Zibula,* 1968 (2) SA 596 (E) at 597H, *Swift's Law of Criminal Procedure*, 2nd Ed. at 172. However, no prejudice has been caused by the approach adopted by the magistrate, for as it transpired the default was indeed wilful or deliberate, and so the magistrate would have had no option on 25th August but to make the order he did. See *Knight, NO v van Tender and Anor,* 1962 (3) SA 719 (SR) at 721C-H. But it does seem to me that as the accused did not abscond, and in fact arrived at Court on 18th August, albeit too late, the Attorney-General should give serious consideration, In terms of section 122 of the Act, to remitting the whole or portion of the amount forfeited.

### Judgment

**Newham J:** has read this judgment and agrees with it.



## ANSELL v ANSELL 1980 ZLR 416

**Court** **General Division, Salisbury**

Civil Application

Dumbutshena, J

16th and 22nd October, 1980

### Flynote

Husband and Wife - application for maintenance pendente life - documentary proof of income desirable - contribution to costs - sale of movables possible by applicant - applicant also to show reasonable prospect of success.

### Headnote

Where parties are applying for maintenance *pendente lite* or a contribution to costs, or opposing the same, they should at least produce documentary evidence of their incomes. A mere assertion of income is insufficient. Where an applicant has movable property which she might reasonably be expected to sell, she will not normally be entitled to a contribution to costs *(Landry v Landry,* 1970 (1) RLR 134 followed).

The applicant must also show that she has a reasonable prospect of success. If she is the Plaintiff she must show a *prima facie* case.

Copyright Juta & Co Ltd

Cases and authorities cited:

*Treger v Treger,* GS 1/77;

*Landry v Landry (supra)*;

*Hahlo, South African Law of Husband and Wife,* 4th edition at 5;18.

*C C Milton,* for the applicant.

*M T O'Meara*, for the respondent.

## Judgment

**Dumbutshena J:** The applicant applies by notice of motion to this Court for an order of maintenance *pendente lite* at the rate of $200 per month, and for contribution to her costs of bringing divorce proceedings on the ground of cruelty. The respondent opposes this application. He has also counter-claimed for divorce on the ground of cruelty.

On the papers before me the means of the parties appear to be as follows: The applicant in her founding affidavit reveals that she is in receipt of approximately $350 per month. She also possesses jewellery. According to the respondent's answering affidavit, the value of applicant's jewellery is between $2000 and $3000. She says in her answering affidavit that the insurance valuation of her jewellery is "very much



higher than its true saleable value as insurance value is based on what it would cost to replace the items insured". She does say, however, the most valuable item of her jewellery, a pendant, "is worth only a few hundred dollars". She does not wish to dispose of her portable assets nor sell her golf clubs because golf is her hobby.

It is clear from this summary that the applicant is possessed of assets she can easily dispose of should she want to do so.

The respondent is in receipt of a net salary of $814,38 per month, and owns a house which has been described by the applicant as "commodious and expensive". He uses a company car. There is no other property belonging to the respondent which has been mentioned by the applicant. The applicant has, however, some other movable property, a Datsun 140Y motor vehicle, an elephant foot, 15 cu. ft. fridge, blue carpet, sewing- basket, ceramic curry set, fine china tea set, Tempest Super 100 stereo, deep-freeze, Philips television set, orange carpet, 3 rolls of wallpaper and a battery clock. The respondent has demanded the return of all this valuable movable property. The applicant maintains that these items of property belong to her. She has refused to return them. There is no doubt that the dispute over these items of property will be resolved by the trial Court. They are therefore of no assistance to the Court in the determination of the issues of a contribution to costs and maintenance *pendency lite*.

It is useful to go back to the question of the applicant's salary. The respondent says in his

Copyright Juta & Co Ltd

answering affidavit that she was in receipt of a salary of $325 per month plus commission for working a three-day week. The applicant says she used, at that time, to receive $240 per month. She says that now her net salary before commission is $309 per month and in order to earn commission she has to gross $1000 which she has lately been unable to do.

Both the applicant and the respondent have submitted lists of estimates of their monthly expenditure. In the case of the applicant her expenditure totals $571 per month, that is, $221 in excess of her average monthly Income of $350. She has therefore asked for $200 maintenance *pendente lite.*

On her papers she has not shown the reduced amounts of commission she now receives because of the "worsening political conditions and increasing instability" in the country. It seems to me that she has unduly inflated her budget in order to qualify for a high award of maintenance.

For his part, the respondent's estimate of expenditure per month is $813,24, leaving a balance from his monthly salary of only $1,14. It



DUMBUTSHENA J

must be appreciated that the respondent lives with two minor children of a former marriage. Neither party produced documentary evidence of their incomes.

I hold the view that where parties are applying for maintenance for themselves or for the children of the marriage and contributions to costs or opposing the same, they should at least produce documentary evidence of their incomes. Such documentary evidence can be in the form of salary slips or commission payments and /or any other payments made to the parties. To be of assistance to the Court, pay slips for the last three consecutive months would be most helpful. The mere assertion that a party is in receipt of X dollars per month is, in my opinion, not enough. There is always the temptation to reduce one's actual income in order to qualify for a bigger award or to pay less to the applicant, just as there is a tendency to exaggerate estimates of expenditure in order to gain more or pay less maintenance. Parties should be encouraged to prove their incomes by the production of documentary evidence in order that the Courts may be better able to determine as nearly as is humanly possible an award or a contribution which falls reasonably within the income bracket of the respondent.

Having said that, let me now try to assess what amount of maintenance *pendente lite* the applicant is entitled to, if any. In making that assessment it is important to bear in mind that the respondent has two children in his custody. The respondent has an obligation to look after them. He also has an obligation to look after his wife, but the position of the wife is different. She is working. She receives a good salary. She has movable property.

The parties were married to each other in 1975. It appears, however, that they had lived together as man and wife for about 5 years before deciding to marry. When they were living together, their means must have been reasonably sufficient for their daily needs. But whether their joint income when living under one roof with two minor children was sufficiently adequate to have qualified the family for a high standard Of living, is questionable. Mr *Milton*, who

Copyright Juta & Co Ltd

appeared for the applicant, sub misted that the respondent was a man of considerable means. There was nothing on the papers to support that submission. He receives a gross salary of $1 100 and a net salary of $814,38.

Assuming the applicant's income is $350, what would she be entitled to by way of maintenance *pendente lite*, taking into consideration the fact that she lives in a flat by herself and does not require a full-time servant for whom she has made provision for wages at the rate of $30 and



she does not require to put aside $50 per month provision for holidays, a point which her counsel conceded. I believe she would be entitled, on their joint income, to more than $300 per month.

She purports to spend $571 per month, an amount which is less by only $242,24 to the $813,24 spent by respondent and his two children. Since I have, on the papers before me, formed the impression that the applicant has not revealed all her income to the Court, coupled with the fact that her estimated expenditure of $571 per month, when she is only receiving on an average $350, is far above her monthly income, I can only make a minimal award of maintenance *pendente lite*. I do that because the respondent is obliged to support his wife. She is still his wife but a wife in better financial circumstances. I therefore make an award of $80 per month. I hope that the trial Court, after hearing evidence, will be in a better position to make a value judgment on the question of maintenance. Since this is only a temporary award, the applicant will not be worse off than she was before.

Now I come to the somewhat thorny question of the contribution to the costs of the applicant to enable her to prosecute pending divorce proceedings. Mr *Milton* submitted that the respondent is a man of considerable means and can afford to make a contribution to the applicant's costs. He said the applicant should not be made to sell her jewellery because it has sentimental value to her. Mr *O'Meara,* who appeared for the respondent, submitted that the question of making a contribution to applicant's costs revolves around her jewellery and golf clubs which she could easily sell. He said she did not query the insurance value of her jewellery put at between $2 000 and $3 000. She can therefore cover her costs by selling some item of jewellery.

In *Treger v Treger,* G-S-1-77, SMITH, J had this to say at page 7:

> "The Court must look at the means of both parties and try to determine what is reasonable and just. In the cases cited this was what was done and where the application for a contribution was refused, to have ordered other wise would not have been reasonable as far as the husband was concerned. The present case is an exceptional one and the respondent can obviously pay any amount within the scope of the claim. The amount claimed relative to his means, is a very modest one and, in my view, it would not in these circumstances be reasonable to expect the applicant to sell, or raise money on, her jewellery."

The *Treger* case concerned a very wealthy husband. The wife's assets, when compared to those of the husband, were very meagre. The respondent was ordered to contribute towards the applicant's costs for the following reasons:

Copyright Juta & Co Ltd

DUMBUTSHENA J

> "The applicant is entitled to litigate on a scale commensurate with her husband's means. In this application the respondent has appeared through senior and junior counsel and the applicant is entitled to litigate on a similar scale. Large sums are at stake and the parties have made the most allegations against each other. It will be an extremely hard-fought and acrimonious action."

This is not the case here. Undoubtedly the respondent's income is far superior to that of the applicant, but he has responsibilities towards his two children. She, on her part, receives an adequate salary which, as stated before, appears not to have been fully disclosed. She has jewellery of considerable value and other movable property she can sell in order to raise money to prosecute her divorce proceedings.

See *Landry v Landry,* 1970 (1) RLR 134 at 137D-H:

> "It seems to me that the general trend of cases shews that an applicant is not normally entitled to a contribution to costs if she has movable property which she might reasonably be expected to sell. See *Hahlo on Husband and Wife*, 3rd Edn., p. 508; *Davis v Davis,* 1939 WLD 108, at p. 114, and *Butterworth v Butterworth,* 1943 WLD 127, at p. 130. *Glazer's* case (*supra)* was exceptional, in that the respondent was an extremely wealthy man. It was distinguished on that basis in *Jorje v Jorje,* 1967 (1) PH B 11. In the present case, it would appear that, while the defendant's income, after payment of tax and living expenses, is superior to the plaintiff's income, when it comes to movable assets the plaintiff is in a superior position. While it is entirely appropriate that the defendant should contribute an additional amount out of his superior income towards the maintenance of his children, when it comes to a contribution to the plaintiff's costs I think that, as the plaintiff has valuable assets, she should be expected to meet her costs by disposing of some of her jewellery or one or other of the musical instruments, and, failing this, by pledging one or more of these items for a loan of $20). Although she claims that she uses the musical instruments in her work, I think that one or more of them could be disposed of or pledged to raise the not very considerable sum she requires for her limited defence. In the circumstances, I do not think that she has discharged the onus on her to shew that she is entitled to a contribution to costs, and her application in this respect fails."

Besides, the applicant has not shown that she has a reasonable prospect of success.

*Hahlo. The South African Law of Husband and Wife,* 4th Edn., 518-519:

> "The wife must show that she has a reasonable prospect of success. It is not necessary for her to convince the Court that there is a balance of probabilities in her favour, but she must at least make out such a case that if her allegations are true she is entitled to judgment. If she is the Plaintiff she must show that she has a *prima facie* case. If she is the defendant it is sufficient for her to show that she has a bona fide defence. In accordance with principle good faith is presumed. Generally speaking, the Court will scrutinize her story



DUMBUTSHENA J

> less strictly if she is the defendant than if she is the plaintiff. No contribution order will be made if her chances of succeeding are remote or negligible."

The respondent has a counter-claim against the applicant. On the papers he has made up a

Copyright Juta & Co Ltd

case which, if his allegations are true, is more likely to entitle him to judgment. He has established a *prima facie* case in his counter-claim and has otherwise a *bona fide* defence.

I agree with Mr *O'Meara* that the applicant has not established a need. She can sell one piece of her jewellery to raise money for the costs of her action. Besides, there is a counter -claim. Each party is suing for divorce and a settlement can easily be arranged so as to eliminate the many issues raised in the applicant's prayer. In a matter like this one there is no stigma attaching to a party who abandons his prayer for a decree of divorce.

On the probabilities the applicant has not shown that she does not have the necessary means to raise money for the costs of her divorce proceedings. She has, therefore, failed to discharge that onus on a balance of probabilities. Her claim for a contribution towards her costs therefore fails.

The applicant has partially succeeded in her application. I think in fairness to the parties the costs must be reserved for decision by the trial Court.

The order of the Court will therefore be as follows:

1. The applicant is awarded maintenance *pendente lite* in the sum of $80 per month.
2. There will be no order of contribution towards the applicant's costs.
3. The costs of this application are reserved.

*D W Aitken and Co*, attorneys for the applicant.

*Byron Venturas and Travlos,* attorneys for the respondent.

---



## HAYES v BALDACHIN AND OTHERS 1980 ZLR 422

**Court** **Appellate Division, Salisbury**

Civil Appeal

Fieldsend CJ, Baron JA and Squires AJA

1st and 28th October, 1980

### Flynote

Statutes - promulgation of laws - delegation of powers by the Governor - administrative direction not requiring publication.

Practice and Procedure - issue of in camera certificate under Emergency Powers (Judicial d Other Proceedings) Regulations, 1975 - inroad into normal rules of procedure - strict compliance with formalities necessary - certificate improperly produced and ultra vires in part - effect of irregularities - test to be applied.

---

Copyright Juta & Co Ltd

## Headnote

The appellant sued the respondents for damages for defamation arising out of a confidential staff report made by his superiors while he was employed by the Posts and Telecommunications Corporation. On the first day of the trial the appellant was informed by the trial judge that the "Registrar had handed into Court a certificate from the Secretary for Justice in terms of section 4 (2) of the Emergency Powers (Judicial and Other Proceedings) Regulations, 1975. The effect of the certificate was that the proceedings were to be held *in camera* and that no documents requested by the appellant should be made available unless a judge had certified their necessity for the determination of the case. The appellant applied for an adjournment, but was persuaded by the Court to continue with his case, which continued *in camera*. On the second day the appellant sought a further adjournment in order to make an application to the Governor for the lifting of the in camera requirement. This was granted but on the following day the trial judge refused to grant any further postponement The appellant advised the Court that he was not prepared to continue if the trial was *in camera* and withdrew from the proceedings. Evidence was then led for the respondents and judgment given for them.

The appellant appealed, seeking to set the judgment aside on the basis that the Governor's delegation of functions to the Secretary for Justice had not been published and was therefore ineffective. Secondly it was contended that the certificate was not properly produced and was, in any event, in part *ultra sires.*

In terms of the Constitution (Interim Provisions) Ordinance 1779 the Governor could delegate any of his functions to any public officer. The powers formerly exercised by the Minister were delegated to the Secretary for Justice on the 3rd January, 1980, by instrument under the hand of the Governor. Notice of the delegation was published on the 25th January, 1980, after the conclusion of the trial.

---

**1980 ZLR p423**

FIELDSEND CJ

*Held* that the general principle that no law becomes effective until published in the *Gazette* is subject to the qualification that "law" must not be given too wide a connotation. The Governor's delegation of powers was clearly an administrative direction and its delayed publication did not nullify the Secretary's issue of the certificate.

*Held,* further, that where inroads are made into the normal rules of procedure, there should be strict compliance with every formality required by the legislation. Neither the parties to the proceedings nor the Attorney-General produced the certificate and the proceedings were wrongly held *in camera.*

*Held,* further, that great importance attaches to the public administration of justice. (*dicta* of the Law Lords in *Scott v Scott* [1913] AC 417 cited with approval.)

*Held,* further, that the regulations did not authorize the direction withholding documents from the appellant.

*Held,* further, that the holding of the trial ire camera and the unlawful direction to withhold

---

**Copyright Juta & Co Ltd**

documents from the appellant constituted serious Irregularities calculated to prejudice the appellant and causing him prejudice. (*Jockey Club of South Africa and Others v Feldman,* 1942 AD 340 followed.) Prejudice exists in that witnesses whose evidence is open to public scrutiny are likely to be more meticulous and truthful than If what they say is examined by only one or two people in a closed Court.

Cases cited:

*Byers v Chinn and Another,* 1928 Add. 322;

*R v Ramsammy,* 1933 TPD 294;

*McPherson v McPherson* [1936] AC 177;

*Scott v Scott* (*supra)*;

*Duncan and Another v Camell, Laird and Company* [1942] AC 624;

*Conway v Rimmer and Another* [1968] AC 910;

*Jockey Club of South Africa and Ors v Feldman (supra)*.

*C W Jordaan,* for the appellant, also cited *Financial Mail (Pty) Ltd v Registrar of insurance,* 1966 (2) SA 219 (WLD), *Dadoo Ltd and Others v Krugersdorp Municipal Council,* 1920 AD 530; *R v Becorny and Others*, 1953 (2) SA 681 (SR).

*B H Christie,* for the respondents.

## Judgment

**Fieldsend CJ:** The appellant, a former telephone operator with the Posts and Telecommunications Corporation, sued the respondents, also employees of the Corporation and his superiors, for damages for defamation. The cause of action was founded on passages adverse to the appellant in a confidential staff report prepared in May, 1978, primarily by the first respondent. In the pleadings reliance was placed on all the adverse comments. But the real substance of the appellant's complaint related to the following parts of the report:



FIELDSEND CJ

> *"Reliability:* Is evasive, in he has always got an excuse or he endeavours to pass the blame to others, sometimes suggesting victimization.
>
> *Judgment:* Overlooks important considerations. Lets his personal feelings influence his judgment.
>
> *Personality:* Poor in both respects, namely, in relation to getting on well with his colleagues and effectively influencing his colleagues.
>
> *Summing up:* Extremely rude and abrupt with his colleagues. His manner to the public is

Copyright Juta & Co Ltd

> often also abrupt. Adopts a vindictive attitude towards his controlling officers, and constantly threatens them and his colleagues with disciplinary action with higher authority or legal action. He is a disturbing influence in the Exchange."

The respondents admitted publishing the statement, but to their superior officer only and said that they did so without malice, in the *bona fide* belief that the statements were true and in fulfilment of their duty to report to their superior officer on the appellant. In short, they alleged that the occasion was privileged and that they acted within the privilege.

At the trial, the *onus* was therefore on the appellant to establish the express malice of the respondents and his damages. Express malice he sought to establish by showing that the statements were untrue and could not therefore have been reasonably believed to have been true and that his continued criticism of many of the practices in the Salisbury International Telephone Exchange had so antagonized his immediate superiors that they falsely and maliciously published the adverse comments upon him in the confidential report in order to have him removed from the Exchange, if not dismissed from the Corporation.

The appellant appeared in person in the Court below and on the first day (14th January) he was informed by the trial judge that the Registrar had handed to the Court a certificate from the Secretary for Justice in the following terms:

> "Whereas I am satisfied that it would not be in the public interest that the proceedings in the case of L T Hayes vs. D T Baldachin, G V de Bon and A Pavlou should be publicly disclosed, I hereby issue this certificate in terms of subsection (2) of section 4 of the Emergency Powers (Judical and Other Proceedings) Regulations, 1975; and I direct, in terms of subsection (3) of section 4 of the aforesaid Regulations, that no document requested or subpoenaed by L T Hayes shall be made available or transmitted to him unless a judge of the General Division shall first have examined the document and is satisfied that it is reasonably necessary for the determination of the case that it should be made available or transmitted to him;



FIELDSEND CJ

> and I further direct, in terms of subsection (4) of section 4 of the aforesaid Regulations that no copy of any such document shall be made, and that all documents shall be returned to the Posts and Telecommunications, Corporation.

Section 4 (2) of the Regulations (RGN 163/75) provides:

> "If, in any civil proceedings before a Court or in any proceedings before a board, a certificate in writing relating to those proceedings is produced, signed by the Minister, that it would not be in the public interest for any proceedings or matter referred to in the certificate to be publicly disclosed, the Court or board, as the case may be, shall make arrangements for those proceedings or for evidence relating to that matter, as may be specified in the certificate, to be heard *in camera,* and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter or those proceedings, as the case may be."

And section 4 (3) of the Regulations (RGN 311 of 79) provides:

> "(3) Where the Minister has issued a certificate referred to in subsection (1) or (2), he may direct, by notice in writing, that any document or class of documents relating to the proceedings shall only be made available or transmitted by one party to another party to those proceedings subject to such conditions as the Minister may

Copyright Juta & Co Ltd

> consider to be necessary or expedient to ensure that any matter contained in such document or class of documents is disclosed to as few people as is possible in the circumstances."

The appellant's immediate reaction was to ask for an adjournment *sine die* to approach what he referred to as "the new government when it comes into power to allow the case to be heard in public", adding:

> "The reason for that is that the evidence which is going to be led is of very considerable public importance and the public ought to know what has been going on-what the evidence will in fact prove has been going on in the Telephone Exchange."

He was pressed by the Court to continue with his case, and he withdrew his application for an adjournment and proceeded to call his first two witnesses, then giving evidence himself. The hearing was *in camera.*

On the morning of the second day the appellant applied for an adjournment as he had been in touch with the Governors legal secretary in regard to the possibility of making an application to the Governor for the lifting of the requirement that the trial be held *in camera.* An adjournment was granted until 16th January.

On 16th January, the appellant renewed his application for an adjournment *sine die* as he had been told by the legal secretary that the Governor would not be able to deal with his application immediately. After argument, the trial judge refused to grant any further postponement.

---



FIELDSEND CJ

The appellant resumed his place in the witness-box for further cross-examination, but declined to answer any further questions or to take any further part in a trial held *in camera.* There was then a short adjournment and he was told by the Court on the resumption that there was no way that the Governor or any other person could under any existing law direct the Court to stop the trial. The appellant again made it clear that he was not prepared to continue with his case if the trial was held *in camera,* and finally withdrew from the Court.

Evidence then led for the respondents and judgment was given for them with costs against the appellant on the attorney and client scale.

The appellant now appeals and seeks an order setting the judgment aside and remitting the case to the Court *a quo* to be tried *de novo* in open Court, the respondents to pay the costs in the court below and on appeal; alternatively he claims an order setting aside the judgment and substituting an order for absolution from the instance, and in the event of neither of these claims succeeding he asks for an order setting aside the award of costs on the attorney and client scale.

The appellant's case in support of his first contention is based on two main grounds-

(1) That at the time of the issue of the certificate by the Secretary of Justice (10th January, 1980) the Governor's delegation of functions to the Secretary had not been notified in the Gazette and was therefore ineffective; and

---

**Copyright Juta & Co Ltd**

(2) the certificate was not produced as it should have been by one of the parties or the Attorney-General and was therefore not properly before the Court.

A subsidiary point taken is that the Secretary's direction in relation to documents was *ultra vires* the regulations.

The power to issue the certificate in question in this case was in terms of the regulations vested in the Minister of Justice. These regulations had, however, been overtaken by the Constitution (Interim Provisions) Ordinance 1979, section 4 (2) (d) of which provided that a reference to any minister in any law should be construed as a reference to the Governor appointed under section 3 (1) of the SR Constitution (Interim Provisions) Order (SI 1979/1571). Section 6 (1) of the Constitution (Interim Provisions) Ordinance 1979 reads:

> "6 (1) The Governor may, by instrument under his hand, delegate to any public officer, authority or other person any function which is vested in



> him or is exercisable him by or under or by virtue of any law for the time being in force, including any function which is so vested in him or is so exercisable by him by virtue of section 4 (2)."

Acting under this subsection, the Governor on 3rd January delegated to the Secretary of Justice by instrument under his hand the powers formerly exercised by the Minister (with one exception not here relevant). Notice of this delegation of powers was published on 25th January (SI 35/80).

The appellant contends that since in subsection (5) of section 6 it was provided that "the making, variation or revocation of any instrument under this section shall be notified in the *Gazette"* the delegation was not effective until there had been such notification.

It is a recognized principle in this country that no law becomes effective until it has been published in the *Gazette*. But the general rule that before a law or any regulation or by- law having the force of law can become operative it must be duly promulgated, must read subject to the qualifications that the word "law" in the rule must not be given too wide a connotation and that the enabling enactment must be looked to in order to see whether the necessity for promulgation is or is not excluded. (*Byers v Chinn and Another,* 1928 AD 322.) This principle was applied in *Rex v Ramsommy,* 1933 TPD 294. In that case it was held that:

> "Regulations prohibiting the removal of stock in certain areas, framed by the Minister under section 16 (a) of Act 14 of loll, are administrative directions, and it is not necessary that they should be promulgated in the *Gazette.* It is sufficient in order to convict a person of contravening such regulations to prove that they had been brought to his knowledge."

The delegation of powers by the Governor is clearly in the nature of an administrative direction rather than legislation and, of course, in itself does not create any criminal liability or other rights and duties. In principle, therefore, it would seem that the exercise of the Governor's powers

Copyright Juta & Co Ltd

under section 6 (1) need not be published in the *Gazette* to be effective. But it was contended that the peremptory requirement of publication in section 6 (5) had the effect that until there was publication the delegation was not effective.

I have reached the conclusion that publication was not necessary. The delegation of powers did not necessarily affect the rights and liabilities of the public, and certainly did not create any criminal offence. It was an excellent example of an administrative act or direction. The requirement of publication was in my view added so that the public would know who was in fact exercising powers under delegation from the Governor. It



FIELDSEND CJ

must be remembered, too, that events were occurring with great rapidity in the country at the time with the establishment of rule under a British Governor. It was unfortunate, perhaps, that there was a delay of over three weeks between the making of the instrument of delegation under the hand of the Governor and its publication in the *Gazette* on 25th January. But I do not think everything done by the Secretary between 2nd January and 25th January is to be treated as a nullity.

The appellant's contention that the Secretary for Justice had no power to make an order under section 4 of the Regulations is not sound.

The appellant's second ground has more substance. Where inroads are made by Emergency Regulations, and orders made under them, into the normal rules of procedure, which under our system are considered basic to the administration of justice, it is of the greatest importance that the Courts should be vigilant to ensure that the wishes of the Executive are acceded to only when there has been compliance with every formality required by the legislation. The public administration of justice is not only an accepted rule of procedure, it is enshrined in section 53 of the High Court Act.

Section 11 (b) of the Regulations provides that in the case of civil proceedings a certificate such as that issued by the Secretary may be produced by the parties to the proceedings or by the Attorney-General or his duly appointed representative who may appear in such proceedings for that purpose. The respondents seem to have taken a somewhat equivocal stance in this matter. The note of the pre-trial conference dated 9th November, 1979, concludes with the words:

> "Defendant wished it to be recorded that in the event of allegations being made concerning the question of telephone tapping relevant to this case, it might be necessary for the defendant to apply for the matter to be held *in camera.*"

It was alleged during argument that they had been parties to the request for the certificates, and yet all that their counsel was able to say in reply was that he had no instructions as to whether they ever made such an application. But whatever may be the true position, they did not produce the certificate; nor did the Attorney-General appear in the proceedings to do so.

It is clear from the record that the Secretary's certificate came to the notice of the Court because it was handed to the judge by the registrar. It follows that the appellant is correct in his

Copyright Juta & Co Ltd

contention that the Court should not have accepted the certificate produced in this way, and certainly should not have acted upon it. It was not for the appellant-



FIELDSEND CJ

particularly as he was appearing in person and had been taken by surprise by the production of the certificate at the very last moment- to have taken the point now raised. He did all that could be expected of him by asking for an adjournment to consider the matter, a course which he was persuaded by the Court not to persist in.

The importance that the authorities attach to the public administration of justice is apparent from such cases as *McPherson v McPherson* [1936] AC 177 and *Scott v Scott* [1913] AC 417.

In *McPherson's* case *(supra)* stress was laid on the need for matrimonial cases to be held in public, but in *Scott's* case *(supra)*, another matrimonial case, the Law Lords dwelt on the wider aspects. See particularly LORD SHAW's speech at p. 477 where quoting Bentham he says:

> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

and EARL LOREBURN's speech at p. 449 where he says:

> "There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that judges can be trusted, though I believe entirely that they can be trusted."

*McPherson's* case *(supra)* established that where a trial was wrongly held *in camera*, the proceedings were not void, but only voidable and that as the time for appealing had expired and persons had acquired new status on marriage following a decree of divorce granted, it was too late to have the proceedings declared void. The reasons there for not granting an application to have the proceedings declared void do not pertain here. Indeed the bringing of such an application as part of the proceedings on appeal as has been done in this case seems to be the most convenient procedure.

It was argued for the respondents that the irregularity in this matter was the veriest technicality, namely, that the certificate was produced by the wrong person. But I cannot view the matter in that way; the irregularity was hearing the case *in camera* and subject to conditions in the second paragraph of the certificate when there was no proper warrant for this. The respondents were apparently reluctant to accept any responsibility for the making of the certificate under section 4 of the Regulations and one likes to think that if the Attorney-General had appeared to pro duce the certificate, he might have advised that at least the second para graph of it was *ultra vires* the Regulations.



FIELDSEND CJ

This second paragraph directed that no document requested or subpoenaed by the appellant should be made available to him unless a judge was satisfied after examination of it that it was

Copyright Juta & Co Ltd

reasonably necessary for the determination of the case that it should be made available. Section 4 (3) of the regulations under which this direction purported to be made refers only to directions as to the conditions upon which a document or class of documents is made available by one party to another, so as to ensure that any matter contained in the document or class of documents is disclosed to as few people as possible: it does not authorize a direction to withhold a document from a party. The only way in which a Government department can deny a document to a party is by relying on State privilege. *Duncan & Another v Camell, Laird Company* [1942] AC 624 and *Conway v Rimmer & Another* [1968] AC 910, and even then the objection to disclosure of a document cannot be taken in the wide terms in which it was taken here. The direction in the second paragraph of the certificate was clearly *ultra vires* and placed an unjustifiable limitation on the documents that could be made available to the appellant.

In my view both the hearing of the case *in camera* when this was not warranted and the hearing of it subject to the condition purported to be imposed by the second paragraph of the certificate constitute irregularities of a serious nature.

The test to be applied in regard to the effect of an irregularity in civil proceedings was enunciated in the *Jockey Club of South Africa & Ors v Feldman,* 1942 AD 340 at 359 in the following terms:

> "In respect of civil cases a test has been formulated in various decisions in Provincial Courts, for instance, *Stemmer v Sabina* (1910, TS 479) and *Ablansky v Bulman* (1915, TPD 71), where it was held that if the irregularity complained of is calculated to prejudice a party he is entitled to have the proceedings set aside unless the Court is satisfied that the irregularity did not prejudice him. This, in my judgment, is the correct test . . ."

*Ablansky's* case *(supra)* is helpful: the irregularity relied on was a magistrate's refusal to allow a plaintiffs attorney to argue in reply on the facts. DE VILLIERS JP, said at page 75:

> "The irregularity must be of so gross a nature that it is calculated to prejudice the party and if it is calculated to prejudice the party then, unless the Court is quite clear in the particular case, that it did not prejudice him, the proceedings must be set aside. In this case to me it is quite clear that the refusal of the magistrate to hear the arguments of the plaintiff's attorney in reply, on the facts, was an irregularity of such a nature that it was calculated to prejudice the plaintiff. We must assume that file magistrate had an open mind upon the facts and upon the law up to the very last, and *non constat* that if he had given the plaintiff's attorney an opportunity of addressing him in reply



FIELDSEND CJ

> upon the facts, he would have come to the same conclusion to which he eventually came. And as it was calculated to prejudice the plaintiff, it possible for us to say that it did not prejudice him. This is therefore such an irregularity that the plaintiff is entitled to have the proceedings set aside."

In my view the hearing of the case *in camera* was in itself a gross irregularity which was likely to prejudice the appellant. The English cases to which I have referred make one point: another, which I regard as if anything more important, is that witnesses whose evidence is open to public scrutiny are likely to be more meticulous to give truthful testimony than if what they say is given to and examined by only one or two people in a closed Court. In the particular circumstances of this case where malpractices in the telephone exchange were alleged which

**Copyright Juta & Co Ltd**

affected the pubic, it was important for the proper trial of the issues that the proceedings should have been in public, subject to any legitimate overriding order to the contrary. Further, the conditions in regard to the availability of documents, which the Court had indicated it was bound by were also likely to prejudice the appellant.

The issue is, therefore, whether it has been established that the appellant suffered no prejudice. Here the respondents had a difficult onus to discharge. The appellant withdrew from the proceedings in protest against the trial being held *in camera* which it is now clear it should not have been. It might have been better had he sought leave under section 31 (1) (d) of the High Court Act to bring on appeal the interlocutory judgment denying him an adjournment, but that that was not done cannot affect the view I take of the matter.

Mr *Christie* argued very strongly that the appellant in fact had no case-indeed he argued that the whole action should be dismissed as vexatious-and that therefore the appellant could not have been prejudiced either by the holding of the case *in camera* or by the *ultra vires* paragraph 2 of the certificate. On the facts on record, one has some sympathy with Mr *Christie's* arguments. An examination of the detail of the various reports on the appellant does not show that they were particularly unfair. A large proportion of the very report in which appear the adverse comments relied on in the declaration is favourable to the appellant. Further it seems that the appellant would have had very great difficulty in establishing anything but nominal damages, even if he had succeeded in discharging the onus upon him of establishing express malice on the part of the respondents. On the evidence that was led, it also seems that he would have had considerable difficulty in establishing express malice. But as Mr *Jordaan* rightly emphasized the appellant did not complete his case, nor were the witnesses for the respondents cross



FIELDSEND CJ

examined. these circumstances, whatever doubts one has about the soundness of the appellant's case and however strong these doubts may be, it would be very unwise to form any final view at this stage. Nevertheless, it may be of advantage to the appellant for these doubts to have been expressed. But despite Mr *Christie's* argument I am satisfied that it has not been shown that the appellant suffered no prejudice.

In my view, the appellant has a good case for setting aside the proceedings in the Court below on the basis that it was a grave irregularity for the Court to have insisted that the trial should have continued *in camera* and so holding the triad despite the appellant's protests and requests for a postponement. The blame for this it is difficult to apportion.

The Secretary for Justice must carry some of the responsibility for not having followed the procedure provided by section 11 of the Regulations and in issuing the second paragraph of the certificate in the terms in which it is expressed. The respondents, though on the face of things adopting a passive attitude towards the certificate, actively opposed any postponement which might as things turned out have resolved at least some of the difficulties. And the appellant, though appearing in person, cannot avoid responsibility for not having taken the points which have now been made on his behalf on appeal. It is also unfortunate that the Court

Copyright Juta & Co Ltd

itself, the appellant being unrepresented, did not appreciate the defects in the substance of the certificate, and the fact that it was not properly produced.

In the result, the appellant must succeed in his application that the proceedings below be set aside, but I do not think that this Court should now order a fresh trial. What further proceedings are to be taken must rest with the parties. In view of the factors set out in the preceding paragraph, there should be no order as to costs in the Court below but the appellant is entitled to his costs on appeal.

**Baron JA:** I agree.

**Squires AJA:** I agree.

*John May & Co,* attorneys for the appellant.

*Coghlan, Welsh & Guest,* attorneys for the respondents.



## THE STATE v GUMBO 1980 ZLR 433

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA and Goldin, JA

29th October, 1980

### Flynote

Criminal procedure - suspended sentence - conditions too wide - pre-valence of offence should not outweigh appropriate punishment.

Evidence - demeanour - generally only demeanour as a witness should be taken into account.

### Headnote

In a common assault a suspended sentence, suspended on condition that the accused is not convicted of any offence of which assault is an element, is too wide.

After the appellant had cross-examined the complainant in the Court below, file magistrate had noted on the record "demeanour of accused compared to witness shows up badly".

*Held* that it was not proper to make any finding on demeanour at that stage, nor to base that finding on the manner in which an unrepresented accused framed his questions in cross -examination. In general it is only the accused's demeanour as a witness which should be taken into account.

*Held,* further, that the prevalence of an offence and the need for sentences to deter its future

Copyright Juta & Co Ltd

recurrence should not be allowed to outweigh the appropriate punishment for the crime.

Cases cited:

*Mangaqa v The King,* 1945 SR 24;

*R v Shaba,* 1964 RLR 162

Appellant in person.

*C R Barlow,* for the respondent.

## Judgment

**Fieldsend CJ:** The appellant was convicted of common assault on a woman, it being alleged that he struck her in the face. He was sentenced to 12 months imprisonment with labour of which four months were suspended for five years on condition that he was not convicted of any offence of which assault was an element committed within that period.

The first point that I would make is that the condition of suspension is, in my view, too wide. I think the magistrate should have limited the



FIELDSEND CJ

subsequent offence which would bring in the period of suspended imprisonment to an offence in which the appellant was sentenced to imprisonment without the option of a fine, but that is a minor point.

The appellant noted an appeal against his conviction and sentence and applied for a certificate for leave to prosecute his appeal in person. In fact leave was granted for him to prosecute his appeal in person against sentence only.

There are some criticisms that can be made of the way in which the case was handled in the Court below. My main criticism of the magistrate's handling of the case is that after the appellant, who was unrepresented, had cross-examined the complainant, the magistrate noted on the record "demeanour of accused compared to witness shows up badly. She is positive and shows no sign of uneasiness. Accused does not seem to have any conviction in his questioning". The note in regard to the witness's demeanour was entirely proper and such a note can very often be a great help to the Court on appeal. But I do not think it was right for the magistrate to make any finding on the demeanour of the appellant at that stage or to draw any adverse inference from the manner in which the appellant framed his questions. In any event, great care must always be exercised against any premature finding on demeanour.

The appellant was a first offender and it was almost certainly the first time that he had ever been in Court. To attach any significance to the way in which he framed or put his questions in cross-examination is most dangerous.

As was said by TREDGOLD J, as he then was in *Mangaqa v The King,* 1945 SR 24 at p. 26 in a

Copyright Juta & Co Ltd

remarkably similar context:

> "There is only one point in the magistrate's reasoning which has caused me some misgiving. At one stage he refers to the accused in the following terms: 'His cross-examination of the witnesses was trivial and his statements merely evasive denials. His demeanour during the trial was not prepossessing.' Now, I have already dealt with the statements made by the accused. With regard to his cross-examination, one does not expect a high standard of cross-examination from an uneducated native, and actually the one witness that he cross-examined at any length, Sidandani, was asked questions which were very much in point, although her answers may not have been those which the accused expected, or required. But the point which has caused me the greatest doubt is the reference to the demeanour of the accused during his trial. It is not quite clear what is meant by this expression. The accused did not give evidence; he made very brief statements in which there can have been very little opportunity of observing his demeanour, and I can only conclude that the magistrate is referring to his general attitude during the whole course of the trial. Now, it seems to me to be an extremely dangerous



FIELDSEND CJ

> thing for a magistrate to draw inferences from the attitude of the accused when he is in the dock and not in the witness-box, unless there is some striking "behaviour on his from which some clear conclusion can be drawn."

I am sure that many a young advocate - and even some more experienced ones - may have difficulty in putting their questions with conviction, and I think it should be generally known that it is improper to attach any weight to factors of this sort in the case of an unrepresented accused. In general it is only an accused's demeanour as a witness which should be taken into account. Despite this misdirection on the part of the magistrate, however, I am satisfied on the evidence as a whole that the appellant was properly convicted.

Turning now to the question of sentence, the appellant assaulted the complainant at Dandamera Beerhall, saying as he did so that it was because she belonged to the UANC, the appellant being a member of ZANU (PF). He was, on his evidence, at that time apparently assisting the police both as an informer and in other ways.

It is clear that the complainant exaggerated the assault upon her. She says that she was hit many times with clenched fists. There is, however, no ground for holding that more than one blow was struck with the fist and possibly one or two other light blows with an open hand. None of these other blows left any mark on the complainant, and on the medical evidence even the blow with the fist was inflicted with only slight force.

In my view, this was not a serious offence and it should not have been treated as such.

The aggravating feature is that the appellant as a member of the majority party and as a person who was helping the police abused his position to assault the complainant for a quite unjustified reason. It certainly does not inspire confidence in our new found freedom for a member of the majority party to behave in this way, and it can only serve to antagonise their opponents and cause bitterness. It is also true that there have been a number of politically motivated assaults, but neither of these features can be taken too far. The prevalence of an offence and the need for sentences to deter its future recurrence must not be allowed to outweigh the appropriate punishment for the crime itself. If authority required for that proposition, it can be found in the

**Copyright Juta & Co Ltd**

case of *R v Shaba,* 1964 RLR 162. There is a further misdirection, in my view, in the magistrate's reasons. He says that had the appellant not been interrupted, this girl could have been set on by the mob and been severely beaten. This assault took place in a beerhall where there was certainly no mob



FIELDSEND CJ

assembled, and on the complainant's own evidence, the appellant's companion, who was in the area, in fact stopped the appellant from hitting her.

Had I been trying this case in the first instance, I would have been inclined to have imposed a substantial fine and a suspended sentence of imprisonment. As it is, the appellant has been in prison for just over two months.

In the circumstances, I would allow the appeal against sentence and substitute a sentence of six months' imprisonment with fallout of which four months is suspended for five years on condition that the appellant is not again convicted of any offence of which assault is an element committed within that period and for which he is sentenced to imprisonment without the option of a fine.

As the appellant has been in custody since the 5th August, he is now due for immediate release.

**Baron JA:** I agree.

**Goldin JA:** I agree.



## GUARDIAN ROYAL EXCHANGE ASSURANCE RHODESIA LIMITED v JETI 1980 ZLR 436

**Court** **Appellate Division, Salisbury**

Civil Appeal

Lewis, JP., Baron, JA and Goldin, JA

30th October, 1980

### Flynote

Evidence - function and duty of investigating officer - need for meticulous examination of scene - conclusions from evidence to be drawn by Court, not by investigating officer.

Negligence - pedestrian's failure to face oncoming traffic.

### Headnote

Copyright Juta & Co Ltd

In giving evidence at a trial which took place nearly three and a half years after the accident, the investigating officers had no clear recollection of the details of the accident. A plan drawn at the time of the accident depicted the point of impact without giving any detail as to why that conclusion had been reached. One of the investigating officers was only able to say that since the conclusion had been drawn, there must have been evidence to support it.



BARON JA

*Held* that the function and duty of an investigating officer is to investigate and not to usurp the functions of the Court by drawing conclusions. Any investigation must be carried out with meticulous care in order to place before the court the fullest possible factual information.

*Held,* further, that even where a witness is an expert, the Court is not entitled merely to accept the evidence of an expert without itself examining the material on which his opinion is based.

*Semble,* failure by a pedestrian to walk facing the oncoming traffic does not invariably constitute negligence.

Cases cited:

*R v Dhlumayo and Anor.,* 1948 (2) SA 677 (AD);

*Powell v Streatham Manor Nursing Home,* [1935] All OR. Rep. 58;

*Annama v Chetty and Anor.,* 1946 AD 142.

*A. P de Bourbon,* for the appellant.

*C. C Milton,* for the respondent.

## Judgment

**Baron JA:** At the conclusion of the hearing the Court announced that the appeal was dismissed with costs, and that detailed reasons would be handed down later. [The learned Judge analysed the evidence and continued.]

Mr *de Bourbon* challenges these findings on the basis that the real evidence established that the point of impact was on the tarmac. He concedes that if the point of impact was three feet off the tarred surface the appeal must fail.

An appeal is of course a re-hearing on the record. But there are well settled limitations, set out in detail in *R v Dhlumayo and Another,* 1948 (2) SA 677, on the extent to which an appellate Court may interfere with findings of fact made by a judge sitting alone. In particular, where the findings of fact are based on the credibility of the witnesses the appellate Court, because it has not had the advantage of seeing and hearing the witnesses, will not interfere unless it is clearly shown that the trial Court has fallen into error (*Powell v Streatham Manor Nursing Home* [1935] All ER Rep. 58).

The items of evidence on which Mr *de Bourbon* relied to establish the point of impact were

Copyright Juta & Co Ltd

these: (1) that the perplex cover of the front left indicator was broken, from which it followed that there must have been broken pieces in the vicinity, (2) the position of mud droppings, (3) the position of the bus (to which one should add the position of the skid marks). However, only the last of these is in fact an item of real evidence.

This Court has said repeatedly that it is of the utmost importance for investigating officers to examine the scene of an accident with meticulous



BARON JA

care and to place before the Court the fullest possible factual information, including accurate measurements. In this case the investigating officers certainly made some effort to collect the real evidence, but I am bound to say that not only were their measurements taken in an unsatisfactory manner, namely, by reference to the length of the particular officer's paces, but also the evidence concerning mud droppings and broken perplex was unsatisfactory in the extreme. The trial took place nearly three-and-half years after the accident, and it is plain from a reading of the record that one of the police officers had by then no clear recollection of the position of the mud droppings and the broken perplex, while the other, who had actually prepared the plan, had no recollection at all. It is most unsatisfactory also that there is nothing on the plan even to suggest the existence of mud droppings or broken perspex, far less a depiction of where these crucial items of evidence were found. All that appears on the plan Is a cross with the legend "point of impact". Mr *de Bourbon* conceded that this indication reflected no more than the opinion of the investigating officer as to the point of impact, but he argued that there mere fact that the point was marked meant that there must have been something at the scene to lead to that conclusion.

The effect of Mr *de Bourbon*'s argument is that a police officer is entitled, without being obliged to depict on a plan his observations concerning skid marks, broken glass, mud droppings and other items of real evidence, to draw a conclusion as to the point of impact; and the very fact that he does so entitles the Court to assume that there was evidence to support that conclusion. And the necessary extension of that proposition is that a police officer is not obliged even to give evidence in Court from his memory as to his observations and can merely say, as indeed one of the police officers in this case said when asked what led him to believe that the point of impact was the point marked:

> "I am afraid I don't recall this, but there must have been some form of evidence to indicate that, or else I wouldn't have marked it on the plan."

I cannot express myself too strongly in rejecting Mr *de Bourbon*'s proposition. The function of an investigating officer is to investigate, not to draw conclusions. His interpretation of that evidence is an opinion which, unless for some reason he qualifies as an expert, is inadmissible. To argue that a police officer is impartial and has no reason to distort the evidence misses the point. Even if the witness in question is an expert it is still necessary for him to place before the Court the evidence on the basis of which his conclusions are drawn; although an expert opinion can be of value, at the end of the day the conclusion must be drawn by the Court and the function of the expert is, as Mr *de Bourbon* was at pains to point out in another context, merely to assist the

Copyright Juta & Co Ltd

Court in arriving at its con -



BARON JA

clusions. It is well-established in for instance handwriting or fingerprint cases that the material on which the expert bases his conclusions must be placed before the Court; the Court is not entitled merely to accept the evidence of the expert without itself examining the material on which his opinion was based (see for instance *Annama v Chetty & Ors* 1946 AD 142 at 155.) Equally in traffic cases the evidence on which a conclusion is sought to be drawn must be placed before the Court.

There is a further unhappy aspect of the evidence of the police officers in this case. The cross-examination of one of them contains the following passage:

> "Q. You didn't make any reference on the plan to the fact that there was broken perspex, or mud, or anything else like that to indicate the point of impact? A That is correct.
>
> Q. Why not? A As far as I am concerned, at He stone it is a very minor accident - in my opinion, the position of the vehicle - I think I can go so far as 'in our opinion,' referring to Mr Wheeler and myself - was correct. Again in my opinion, the driver was in no way at fault, and as far as we were concerned the pedestrian had in [act gone in front of the bus. Or the injured party.
>
> Q. Well, that you got, I presume, from what the driver told you, is that right? A *(Pause)* Partially, but you can also see, fin fact, when the accident had occurred, the driver literally stopped there . . .".

It seems to me quite clear that the police officers accepted what they were told by the driver as to the point of impact, which appeared to them to be confirmed by the position of the bus. It is equally clear that their investigation, such as it was, was coloured by this assumption and by the fact that they thought the accident had been a minor one. Once again I stress that it is the function and duty of an investigating officer to investigate and not to usurp the functions of the Court.

We are left therefore with nothing but the position of the bus and the skid marks, which I will assume in the defendant's favour were parallel to the edge of the tarmac and not, as was alleged on behalf of the Plaintiff, at a slight angle from left to right. Mr *de Bourbon* submitted that if the impact had taken place some three feet off the tarmac the bus could not, in the 41 or 42 feet it travelled after the impact, have regained a position wholly and centrally on the tar. His argument was based on the assumption that when a motor vehicle turns to the left and then back to the right the rear wheels follow in the path of the front wheels. This assumption is factually incorrect, and the longer the vehicle in question the more incorrect does it become. It was common cause that the bus was 7 feet 5 inches wide and just over 40 feet in length. When it came to rest the left front wheel was thus approximately a foot and certainly no more than



BARON JA

15 inches on the tarmac, in other words some 4 feet to the right of the point of impact as alleged by the plaintiff. As to the lateral movement of the front wheels, it is self evident that they can

Copyright Juta & Co Ltd

move a distance of 4 feet in 40 feet. As to the lateral movement of the rear wheels, when a vehicle with a fixed chassis strays a distance of 4 feet to its left and then is immediately turned back to the right so that the front regains its original position, the rear wheels move laterally through a shorter distance, and the longer the vehicle the shorter the lateral movement. In the present case, the vehicle being 40 feet long, I would not have expected the rear wheels to have left the tarmac at all; certainly I see nothing improbable, or inconsistent with the plaintiff's evidence, about the fact that the bus came to rest centrally on the tarmac.

Finally, as to the real evidence, Mr *de Bourbon* submitted that the red mud on the plaintiff's clothes is equally consistent with his having been thrown there by the impact. This is so. But that explanation for the presence of the mud is not consistent with the injuries sustained by the plaintiff; these are explicable only on the basis that the accident took place as described by the plaintiff, which means in turn that the point of impact was where he was found and which, according to the plaintiff's cousin and the bus driver himself, was some three feet from the edge of the tar.

I am satisfied therefore that, far from the appellant having shown that the learned judge fell into error, a proper analysis of such real evidence as was before the Court serves only to confirm that the learned judge was right in accepting the evidence of the plaintiff and his cousin as to the point of impact.

In view of this it is unnecessary to consider what would have been the position if the impact had taken place on the tar as suggested by the defendant. But I would not wish my silence on this point to be construed as concurrence with the proposition that to walk with one's back to oncoming traffic is necessarily negligent. I do not overlook that the Highway Code recommends that pedestrians walk on their right hand side of a road so that they face oncoming traffic, but the failure to observe this recommendation does not necessarily constitute negligence in all circumstances. It is trite that each case must be considered on its own evidence, for instance what may be negligent conduct at night is not necessarily negligent in daylight.

**Lewis JP:** I agree.

**Goldin JA:** I agree.

*Honey and Blanckenberg,* attorneys for the appellant.

*Gill, Godlonton and Gerrans,* attorneys for the respondent.



## THE STATE v TEKERE AND OTHERS (1) 1980 ZLR 441

**Court** **Appellate Division, Salisbury**

Criminal Application

Fieldsend CJ, Lewis, JP and Baron, JA

Copyright Juta & Co Ltd

3rd and 4th November, 1980

## Flynote

Appeal - from interlocutory matter in a criminal case - no specific right of appeal given by statute - whether inherent right of appeal contained in section 14 of the High Court Act [Chapter 14] - court will not assume a power to ensure that most convenient course is followed.

## Headnote

The applicants were charged with murder and attempted murder before the General Division. They pleaded to the jurisdiction of the Court, basing their pleas on section 4 (1) of the Indemnity and Compensation Act, 1975. The trial judge ruled that they should plead to the indictment and the question of whether they fell within the terms of the Indemnity and Compensation Act, 1975, would be decided together with all the other issues at the trial. The E decision of the trial judge did not finally decide any issue and was clearly an interlocutory one. Tile Appeal Court was called upon to determine whether there was any right to appeal in an interlocutory matter in a criminal case.

Counsel for the applicants conceded that there was no specific jurisdiction given to the Appeal Court to hear an appeal in the circumstances stated.

Counsel contended, however, that an inherent power to hear the appeal arose out of section 14 of the High Court Act [*Chapter 14*].

*Held* that , where a statute has made full provision as to when an appeal will be from the General Division to the Appellate Division, it is contrary to normal canons of construction to construe a general provision as extending the Court's jurisdiction.

*Held,* further, that section 14 of the High Court Act referred to less fundamental matters of practice and procedure.

*Held,* further, that both in England and South Africa there is, in general, no interlocutory appeal in a criminal matter. *(R v Collins,* [1970] 1 QB 710 and *Lawrance v Assistant Resident Magistrate of Johannesburg,* 1908 TS 525 followed.)

*Held,* further, that the fact that the balance of convenience would best be served by having the Appeal Court determine the jurisdictional matter, did not mean that the Court could assume that power. Jurisdiction cannot be conferred on an appellate Court by agreement.

---



FIELDSEND CJ

Cases cited:

*Connelly v Director of Public Prosecutions,* [1964] AC 1254;

*R v Collins (supra).*

*Lawrance v Assistant Resident Magistrate of Johannesburg (supra)*.

---

**Copyright Juta & Co Ltd**

*L J Blom-Cooper, QC*, with him *N. J McNally,* for the applicants.

*C J Glaum, SC,* with him *M Gillespie,* for the respondent.

## Judgment

**Fieldsend CJ:** The trial of Mr Edgar Tellers and seven others on charges of murder and attempted murder was called in the General Division yesterday morning. Mr *Blom-Cooper*, who appears for the applicants, had given notice in terms of section 162 of the Criminal Procedure and Evidence Act of the intention of the applicants to plead to the jurisdiction of the Court, a plea specified in section 163 (1) (I) of that Act as one which an accused may raise either separately or together with a plea of not guilty.

The accused declined to plead guilty or not guilty, it being contended on their behalf that they were entitled to have the special plea dealt with separately before they pleaded to the general issue.

The proposed special plea was founded on section 4 of the Indemnity and Compensation Act, 1975.

In the case of the first accused, it was indicated that he would rely on section 4 (1) (a) of the Act, which reads:

> "4. No civil or criminal proceedings shall 'be instituted or continued fin any Court of law against -
>
> (a) the President or any Minister or Deputy Minister in respect of any act, matter or thing whatsoever advised, commanded, ordered, directed or done or omitted to be done by him or by a person referred to in paragraph (b) in good faith for the purposes of or in connexion with the suppression of terrorism;".

In the case of the other accused, it was indicated that they would rely on section 4 (1) (b), which precludes proceedings against:

> "(b) any person who, at the relevant time, was-
>
> (i) a member of the Security Forces or employed in any capacity or appointed to any post by the State, whether for remuneration or otherwise; or
>
> (ii) acting under or by the direction or with the approval of the President, any Minister or Deputy Minister or any person referred to in subparagraph (i);
>
> in respect of any act, matter or thing whatsoever advised, commanded, ordered, directed or done or omitted to be done by him in good faith for the purposes of or in connexion with the supression of terrorism."



FIELDSEND CJ

After argument as to the course which the trial should follow, the learned trial judge, PITTMAN J, ruled that the accused should plead to the indictment, and that the question of whether they fell within the terms of section 4 of the Indemnity and Compensation Act would be decided together with all the issues which would arise for decision on a plea of not guilty.

The applicants now seek to appeal against this ruling and seek an order that the jurisdictional

Copyright Juta & Co Ltd

point should be dealt with as a preliminary matter before they are required to plead.

Mr *Glaum*, who appeared for the State, indicated that he was prepared to abide by the decision of this Court and in effect advanced no contentions.

The first point for decision is whether there is an appeal to this Court in what is clearly an interlocutory matter in a criminal case. I say it is an interlocutory matter because the decision of the trial Court does not finally decide any issue between the parties. It decides only the procedure by which one or more of the issues will be presented to the Court for decision. And indeed it was not contended that this was anything but an interlocutory order.

The starting point for ascertaining the jurisdiction of the Court to entertain any appeal must be section 80 (1) of the Constitution. This provides:

> "80. (1) The Appellate Division shall be a superior Court of record and shall have such jurisdiction and powers as may be conferred upon it by or under this Constitution or any Act of Parliament."

No other section of the Constitution deals with the jurisdiction of the Court of Appeal. One must, therefore, look to the High Court Act. This deals separately with civil and criminal appeals from the General Division to the Appellate Division.

Sections 30 and 31 deal with civil appeals. Section 30 reads:

> "30. Subject to the exceptions and restrictions contained in section *thirty one*, an appeal in any civil case or matter shall be to the Appellate Division from any judgment of the General Division or any other Court or tribunal from which by law an appeal lies to the Appellate Division."

Section 31, so far as it is relevant, reads:-

> "31. (1) No appeal shall be -
>
> (d) from an interlocutory order or interlocutory judgments made or given by a judge of the General Division without the leave of that judge or, if that has been refused, without the leave of a judge of the Appellate Division, except in (certain cases thereby specified)."

---



FIELDSEND CJ

Criminal appeals from the General Division are dealt with primarily in section 18 of the Act. This limits the right of appeal to cases where there has been a conviction, although subsection (3) of section 18 provinces for an appeal by the Attorney-General on a point of law decided by the General Division. There is a proviso to the effect that the decision of the Appellate Division on any such appeal shall in no way affect the finality of the judgment of the General Division in the case so brought on appeal. Sections 19 and 20 specify in detail the powers of the Appellate Division on appeal, and sections 21 and 22 are special provisions relating to the powers of the Court when dealing with questions of law reserved by the General Division under either section 42 or section 43.

Mr *Blom-Cooper* conceded that there was no specific jurisdiction given to this Court to hear an appeal in the circumstances now before us. He contended, however, that we had an inherent

---

**Copyright Juta & Co Ltd**

power arising out of section 14 of the High Court Act.

This reads:

> "14. So far as concerns records, practice and procedure, the appellate jurisdiction vested in the Appellate Division shall be exercised in accordance with this Act and rules of court, and where no special provision is contained in this Act or in rules of court, as the case may be, with reference thereto, any such jurisdiction in relation to criminal matters shall be exercise as nearly as may be in conformity with the law and practise for the time being observed in England by the Court of Appeal."

He relied upon a dictum of LORD MORRIS in *Connelly v Director of Public Prosecutions,* [1964] AC 1254 and in particular upon the passage at p. 1301. There LORD MORRIS said:

> "There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process."

It was argued that we had power to entertain this appeal in order to enable us to act effectively within our jurisdiction.

This argument overlooks a number of fundamental considerations. In the first place, where a specific statute, such as the High Court Act, has made very full provision as to when an appeal will be from the General Division to the Appellate Division, and when it will not, it is contrary to the normal canons of construction to construe a general provision such as section 14 as extending the Courts jurisdiction.

---



FIELDSEND CJ

It is important to note that sections 22 and 42 of the High Court Act, to which I have already referred, read together, deal with the question of appeals from decisions on exceptions or objections to indictments, which in some cases may well be interlocutory decisions and that these are the only instances of an appeal being granted against interlocutory decisions in criminal matters.

Secondly it would, I think, be a serious departure both from the provisions of section 80 (1) of the Constitution, to which I have referred, and also from section 3 of the Constitution - this provides that the Constitution is the supreme law of Zimbabwe, and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistencies, be void - to read section 14 as allowing the Court to take jurisdiction not otherwise granted to it by relying on the general words of section 14. What section 14 refers to are the less fundamental matters concerned, to quote the words of the section, with "records, practice and procedure" of the Appellate Division in respect of which no special provision is contained in this Act or in rules of Court. The very reference to rules in the section is indicative of what was contemplated. One may test the meaning perhaps in the following way: If rules purported to give jurisdiction to hear an appeal that was not given by the Act, they could hardly be said to be *intra vires* the rule-making power.

By the same token I would say that this Court cannot now rely on section 14 to assume a

---

**Copyright Juta & Co Ltd**

jurisdiction to hear an appeal which it would not otherwise have been able to hear.

Thirdly it is, of course, recognized both in England and in South Africa that in general there is no interlocutory appeal in a criminal matter.

Mr *Blom-Cooper* very properly referred us to the Court of Appeal decision in *Regina v Collins,* [1970] 1 QB 710. In that case JUDGE GILLIS in the Central Criminal Court, had refused to make an order on an application for further and better particulars of one count of many in an indictment. It was sought to appeal against that refusal relying upon section 9 of the Criminal Appeal Act of 1907, which read:

> "The Court of Criminal Appeal may, if they think it necessary or expedient in the interests of justice, . . . exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters,".

This section also defined the powers of the Criminal Division of the Court of Appeal established under the 1966 Act. It was held that the Court had no jurisdiction to hear the application; that the Court of Appeal

---



FIELDSEND CJ

(Criminal Division), having the same powers as its predecessor, the Court of Criminal Appeal, which was created by the Criminal Appeal Act, 1907, had no statutory jurisdiction to hear an interlocutory appeal, that since the Court was created by statute, it had no powers beyond those conferred on it by Parliament. Accordingly, there was no inherent jurisdiction to hear interlocutory appeals.

The grounds on which it was sought to distinguish this case were that it was not clear whether the point was taken before or after the plea and that *Connelly's* case *(supra)* was not referred to in the course of the judgment.

It is clear from the judgment of LORD JUSTICE SALMON - p. 715E - that the accused in *Collins'* case *(supra)* had not pleaded. He said:

> "Mr Campbell has argued that the count is unintelligible, and merely for the purpose of deciding the point on jurisdiction we have approached the case on the basis that he is right in his submission. If ethics count is unintelligible, no doubt Mr Campbell will apply at the commencement of the trial to have the count struck out. If he succeeds in persuading the trial judge that the count is unintelligible, it will no doubt be struck out . . . (But) suppose . . . the trial judge refuses to strike it out and suppose that the jury were to convict Mr Campbell's client, Mr Campbell would come to this Court and appeal against that conviction, and he would on that occasion, we suspect, have a triumph."

As to the point of there having been no reference to *Connelly*'s case *(supra)*, that is not, in my view, grounds for distinguishing *Collins'* case *(supra)*. It may be a ground for saying it is wrong, but I am not prepared to do that relying solely on the *dictum* in *Connelly*'s case *(supra)*.

In South Africa there is a decision to like effect. In *Lawrance v Assistant Resident Magistrate of Johannesburg,* 1908 TS 525, the accused took objection in the magistrate's Court before plea that the Court had no jurisdiction in respect of certain matters alleged to have occurred outside

---

**Copyright Juta & Co Ltd**

its jurisdiction. The objection was over-ruled, and the accused sought to interdict the magistrate from hearing the case. In a short judgment His Lordship Mr Justice Innes, the CHIEF JUSTICE, said:

> "This is really an appeal from the magistrate's decision upon the objection, and we are not prepared to entertain appeals piecemeal. If the magistrate finds the applicant guilty, then let him appeal, and we shall decide the whole matter. There has been no authority quoted which would justify our summary interference under these circumstances."

Argument was advanced that the balance of convenience would be best served by having this Court determine the matter at this stage, particularly as the parties were in agreement that the issue as to whether

---



FIELDSEND CJ

the applicants fell within section 4 of the Indemnity and Compensation Act should be decided as a preliminary matter. There are three points here.

First, the fact that one course of action might be more convenient than another does not mean that the Court, to fulfil its function, must assume a power in order to ensure that that course is followed. The legislature has taken a different view perhaps for adequate policy reasons. It may have thought it better that criminal cases should not be considered piecemeal by an appellate Court.

Secondly, jurisdiction cannot be conferred on an appellate Court by agreement, and particularly is this so in criminal cases.

Thirdly, as SALMON LJ, said in *Collins*' case *(supra)* at p. 714 B:

> "Even if we agreed with Mr Campbell that it would be desirable that we should have the powers to which he refers, we cannot call them into existence by assuming them."

The decision of the Court below will not preclude consideration of the question which the accused wish to raise of whether they are entitled to the benefit of the Indemnity and Compensation Act, and so cannot irrevocably prejudice the accused. Indeed it was not argued before us that it would do so. It may make the trial judges' task a little more complex in that he will have before him at one and the same time the issue relating to indemnity alone and the general issue. That, however, is no basis for saying that this Court must assume jurisdiction under a general provision which we are not given in the specific provisions of the High Court Act, where one would normally expect the jurisdiction to be definitively covered. It is certainly not necessary to assume power to hear this appeal "to suppress any abuses of the Court's processes or to defeat any attempted thwarting of its process" to adopt the words of LORD MORRIS in *Connelly's* case *(supra,).*

In my view, for the reasons I have given, there is no appeal that can be brought against the decision of the General Division now before us. This makes it unnecessary for us to consider the second issue which was raised before us, namely, whether the learned judge was right or wrong to have made the order he did and to have insisted that the accused should plead to the

---

**Copyright Juta & Co Ltd**

merits. It would, therefore, be inadvisable to express any view on the correctness of that decision. But suffice it to say that the balance of convenience may not necessarily be in having the issues raised by the applicants decided separately from the merits as a whole.



FIELDSEND CJ

In my judgment we have no power to consider an appeal against the learned judge's ruling that the accused must now plead to the indictment, and the application is dismissed.

**Lewis JP:** I agree.

**Baron JA:** I agree.

*Chirunda, Chihambakwe and Partners,* attorneys for the applicants.



## BARROWBY REAL ESTATE (PRIVATE) LIMITED v OLSEN 1980 ZLR 448

**Court** **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Lewis, JP. and Goldin, JA

27th October and 4th November, 1980

### Flynote

Contract - sale of land - provisional agreement - intention to replace with more formal agreement does not relieve parties of obligations agreement on date of occupation not an essential element - where "o time fixed for payment, seller has to put purchaser in more.

Agency - provision of willing and able purchaser entitles agent to commission.

### Headnote

The appellant sued the respondent for its commission, alleging that the respondent had entered into a binding agreement of sale with a purchaser introduced by the appellant. The agreement entered into by the respondent and the purchaser was conditional on the purchaser obtaining a Government guarantee and a bond. The parties agreed to draw up a more formal agreement once the suspensive conditions had been fulfilled.

*Held* that the effect of a prior informal agreement depends on the intention of the parties. In this instance the parties had entered into a binding provisional agreement, intending to replace it with a more formal one, containing matters implied by law and requiring no further negotiations.

*Held,* further, that it was not necessary for the parties to agree on a date of occupation of the property, because delivery is effected by transfer against payment of the purchase price, or a

Copyright Juta & Co Ltd

suitable guarantee thereof, and the date of occupation coincides with the date of transfer.

*Held*, further, that where the contract is silent as to when payment is to be made, the seller is only entitled to claim cancellation by placing the purchaser in mora after the expiry of a reasonable notice given by him to the purchaser.

---



LEWIS JP

*Held,* further, that the appellant, having provided a willing and able purchaser was entitled to commission.

Cases and authorities cited:

*Norman, Purchase and Sale in South Africa,* 4th edition;

*Halsbury's Laws of England,* 4th edition, Volume 9, paragraph 263;

*Branca v Cobarro* [1947] 2 All ER 101;

*Nel v Cloete,* 1972 (2) SA 150 (AD).

*B. H Christie,* for the appellant. The form contains a declaration by both parties that they agree to buy and sell respectively. It contains a description of the property, a price, and a condition as to payment which has been fulfilled. The question that remains is whether the last clause in Exhibit 2 leaves any material feature of the contract to be decided by future agreement. *May v Butcher* [1934] 2 KB 17 (CA) *Scheepers v Vermeulen,* 1948 (4) SA 884 (OPD). The clause does not refer to the possibility of further negotiations; it leaves it to Appellant to draw up the formal agreement of sale in its usual format. *Branca v Cobarro (supra)*. *Brown v Hicks,* 19 SC 314.

*C. L Mercer,* for the respondent. A purchaser who was unable to obtain a mortgage bond until five and a half months after the agreement was not in any sense an able purchaser and appellant accordingly failed to fulfil its mandate and is therefore not entitled to commission. Without a date of occupation, there could be no complete agreement of sale. As it turned out, the date of occupation would have been something like six or six and a half months after the signing of exhibit 2. Had respondent been forewarned of that delay in occupation, it is clear from the evidence as a whole that he would never have agreed to sign exhibit 2.

## Judgment

**Lewis JP:** The appellant, a company carrying on the business of an estate agent (to which I shall refer as the plaintiff), sued the respondent (to whom I shall refer as the defendant) in the Magistrate's Court for payment of the sum of $550 by way of commission alleged to be due and owing by the defendant to the plaintiff on the sale of a property known as 24 Caledon Avenue, Hatfield.

The magistrate gave judgment for the defendant with costs, and against that judgment the plaintiff now appeals to this Court.

---

Copyright Juta & Co Ltd

It is common cause that the defendant gave the plaintiff a mandate to find a buyer for the property in question, which consisted of a stand with a house on it and an adjoining vacant stand, for a total price of $12 000. He had also placed the property in the hands of other estate agents for sale. In the particulars to its summons, the plaintiff pleaded *inter alia* that it was an implied term of its contract with the defendant that in the event



LEWIS JP

of the defendant entering into a binding agreement of sale with a purchaser introduced by the Plaintiff, its entitlement to commission would arise.

One Msengezi, a Court interpreter employed by the Government, was introduced by an employee of the Plaintiff as a prospective purchaser, and on the 8th February, 1979, Mr Msengezi and the defendant signed an agreement in the following form, which was Exhibit 2 at the trial:

> "PROPERTY DESCRIPTION - 24 CALEDON AVE., HATFIELD + ONE ACRE STAND
>
> I, 'MR BERTHINIUS CARL OLSEN, being the registered owner of the above described property, hereby agree to sell the property and I, EDWARD TADERA MSENGEZI do hereby agree to purchase the property for the sum of $12 000,00.
>
> This Sale is conditional on:
>
> (a) The purchaser obtaining a bond of $12 000,00
>
> (b) a Government guarantee of $12 000,00
>
> An agreement of Sale embodying all necessary clauses pertaining to this sale, and such other terms and conditions as are normal and usual in Sale Agreements drawn up by BARROWBY REAL ESTATE (PVT) LTD., will be drawn up ONCE THE AFORESAID GUARANTEE HAS BEEN GRANTED 'IN PRINCIPLE TO THE PURCHASER.
>
> SIGNED: *SELLER:* D C Olsen
> *PURCHASER:* E T Msengezi
> *WITNESS:* (Illegible)
> *DATE:* 8/2/79."

The magistrate, in giving judgment for the defendant, came to the conclusion that Exhibit 2 did not constitute a binding agreement entitling the plaintiff to commission. The defendant in his evidence said that he signed Exhibit when it was completely blank and without reading it, thinking it was merely a document giving the plaintiff permission to sell his property. The magistrate in reaching the conclusion he did appears to have accepted the defendant's evidence in this regard. Not surprisingly, Mr *Mercer,* who appeared for the defendant in this appeal, did not attempt to support this finding. It was never pleaded, it never formed part of the issues at the pre-trial conference, and nowhere had it been suggested to the plaintiff's witnesses in cross-examination that this was the case; moreover, the plaintiff's evidence that Mr Msengezi signed the document first was not Ed challenged. It is inherently improbable that the defendant, when he signed Exhibit 2, could have been under any misapprehension as to what he was signing, and it is almost inconceivable that when he signed in the space for "Seller" he

Copyright Juta & Co Ltd

would have failed to perceive that a mere half an inch



LEWIS JP

below that space there was already a signature of the "purchaser". Mr *Mercer* rightly accepts that the document was completed in its present form when the defendant signed it.

The magistrate quoted from *Norman* on *Purchase and Sale in South Africa,* Fourth Edition, at page 3 for the trite proposition that an agreement of sale is complete as soon as the following elements are present:

(i) The buyer and seller must be parties capable of entering into an agreement of sale;

(ii) The thing or things which are the subject matter of the agreement of sale;

(iii) The price in money or which is readily ascertainable in terms of money; and

(iv) Consensus *ad idem* (the mutual consent of the contracting parties).

The fourth requirement - consensus *ad idem* - refers to the requirement that the parties be *ad idem* on all the elements hi), (ii) and (iii) above.

The magistrate then went on to say in his judgment:

> "4. On page 4 Norman states that for an agreement of sale to be binding there must be agreement on the elements of the contract as well as outstanding 'subsidiary modalities'",

and appears to interpret this passage as if it meant that it is always necessary to have agreement on "subsidiary modalities" in addition to the elements referred to on the previous page before the agreement becomes binding, which is a contradiction in terms. The magistrate has omitted the remaining words in that paragraph which make it clear, as do the authorities cited by the learned author on the same page, that it is only where the parties have agreed that further matters have to be negotiated and settled between them before they will consider themselves bound, that this requirement arises. The position is stated with clarity in *Halsbury's Laws of England,* fourth Edition, Volume 9, page 141, paragraph 263 under the heading "Provisional Agreements", where the learned author says:

> "Where there is an informal agreement which expressly requires or envisages the subsequent execution of a formal contract, the legal effect of that prior informal agreement depends on the intention of the parties; they may have entered into a binding provisional agreement, whilst envisaging its subsequent replacement by a more formal one; or they may evince an intention only to be bound on the execution of the formal contract, the prior informal agreement being of no legal effect.



LEWIS JP

> Where there is a definite acceptance of an offer to enter into a provisional agreement, the fact that it is accompanied by a statement that the acceptor desires that the arrangement should be put into a more formal

Copyright Juta & Co Ltd

> shape does not relieve either party from his liability under the provisional agreement . .

See also *Branca v Cobarro,* [1947] 2 All ER, page 101.

The agreement contained in Exhibit '2 was such a provisional agreement. The only conditions attaching to it were: (a) the obtaining of a bond for $12 000, and (b) the obtaining of a Government guarantee for that amount, which were suspensive conditions. The conditions in Exhibit 2 do not include the requirement that a further formal contract is a condition precedent to the coming into effect of a binding agreement, or that any further negotiations are required to settle other terms. The words at the bottom of the form "all necessary clauses pertaining to this sale" refer to the necessary matters already set out above those words in Exhibit 2, and "such other terms and conditions as are normal and usual in sale agreements" refer to formal matters which are normally implied by law in such contracts and require no further negotiation or agreement, e.g., the fact that transfer will be effected against provision by the purchaser of the purchase price.

The Government guarantee in principle was obtained a fortnight later, i.e. on the 22nd February, 1979, and Mr Msengezi then went ahead with his application for a bond.

Mr *Mercer* only faintly and somewhat obliquely sought to support the magistrate's judgment in this regard by suggesting that the agreement was incomplete and not binding because no date for occupation of the property had been agreed on. This submission is untenable. Norman *loc cit.* page 3 says:

> "Delivery of the thing sold (*res vendita*) and payment of the price *(solvendum pretii)* are obligations which arise, once the contract is complete."

In the context of a sale of land, delivery is effected by transfer in the Deeds Office against payment of or a suitable guarantee for the purchase price, and the date of occupation normally coincides with the date of transfer in the absence of a special stipulation to the contrary. It is not, therefore, necessary to the completion of the contract that a date of occupation be agreed on, unless the parties have stipulated that a special date of occupation other than the date of transfer has to be negotiated between them.

The main basis on which Mr *Mercer* sought to support the judgment in his favour was that Mr Msengezi, although a willing purchaser, was



not an able purchaser. This was a defence which was not pleaded although it was stated to be one of the issues at the pre-trial conference. It was not an issue which was properly canvassed at the trial. As I have said, the defendant's line of defence at the trial was that he signed a blank form thinking that it was merely a form giving the plaintiff permission to sell his property, and having no intention at all of entering into a contract of sale. On the basis, however, that he did knowingly sign the completed document Exhibit 2 and that this was a binding agreement, he thereby accepted the fact that this sale was subject to the suspensive condition that Mr Msengezi had to obtain a Government guarantee and Building Society bond. He therefore

Copyright Juta & Co Ltd

accepted Mr Msengezi as that type of purchaser. Nothing was said about any time limit within which these conditions should be fulfilled. In the circumstances some delay was contemplated by the parties. The Government guarantee in principle was obtained in a matter of two weeks, i.e. on the 22nd February, 1979; but nevertheless about a week later, that is at the end of February, or at the beginning of March, the defendant resold the property to someone else and thereby repudiated the sale. He made no attempt to put Mr Msengezi in *mora* by calling on him to provide a bond within reasonable time. The law is that where, as in this case, the contract is silent as to when payment is to be made, and where, therefore, time is not stated to be of the essence, transfer and payment must occur *pari passu*. Even where a date is fixed for payment, but without the provision of a *lex commissoria* entitling the seller to cancel if payment is not made by that date, the seller has to place the purchaser in *mora* after the expiry of a reasonable notice given by him to the purchaser. See Norman (*loc cit*), pages 254 to 255. The position is an *a fortiori* one where no time is fixed for payment or for the giving of transfer. See *Nel v Cloete,* 1972 (2) SA 150 (AD), and the article dealing with this case in Vol. 89 SALJ at page 395.

Despite the fact that the defendant cancelled the sale before giving Mr Msengezi the chance of fulfilling the condition in regard to the bond, Mr Msengezi pressed on with his application for a bond and it was not his fault that through delay the bond was not forthcoming until July, 1979.

In my opinion, it cannot be said that Mr Msengezi was not a willing and able purchaser, and the refusal to pay the Plaintiff's commission cannot be justified on those grounds.

In the result, the appeal must be allowed with costs. The judgment of the magistrate is set aside, and the following is substituted:

---



LEWIS JP

> "Judgment for the Plaintiff in the sum of $550 with costs of suit."

**Fieldsend CJ:** I agree. I should only like to draw attention to the fact that the respondent's attorney was not in Court during the hearing of the appeal. In fact his absence meant that an omission from the record - the date of the resale of the property by the respondent - could not be accurately remedied. The Court had to deduce an approximate date from the material available.

**Goldin JA:** I agree.

*Coghlan, Welsh and Guest*, attorneys for the appellant.

*D. W Aitken and Company,* attorney for the respondent.

---



## ORNE-GLIEMAN v GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION 1980 ZLR 454

---

Copyright Juta & Co Ltd

**Court** **General Division, Salisbury**

Civil Trial

Beck, J

27th and 28th October, 5th November, 1980

## Flynote

Damages - quantum of damages - physically vigorous 68 year old - injuries rendering him virtual cripple - consideration of advancing years.

## Headnote

The plaintiff, nearly seventy years old, while riding a powerful motor-cycle, collided with a motor vehicle which turned to its right while the plaintiff was overtaking it. The respective degrees of fault were apportioned equally. The plaintiff was unconscious for three weeks. He suffered multiple abrasions to his right leg and face. The removal of his left knee-cap had rendered him a virtual cripple, of unsteady gait and unable to walk without the aid of a stick. The plaintiff could no longer indulge in his favourite pastimes of swimming and golf.

*Held* that , while the plaintiff had obviously been a physically vigorous and energetic man for his age, the toll of advancing years would not have left him with his former vigour and energy for very much longer. In the circumstances $8 000 was an appropriate award for general damages.

*R. R Horn, SC,* for the plaintiff.

*M. T O'Meara*, for the defendant.

---

**1980 ZLR p455**

BECK J

## Judgment

**Beck J:** As long ago as the 10th January, 1977, a collision occurred in King George Road, Salisbury, between a motor-cycle ridden by the plaintiff and a small saloon car driven by Jean Florence Schipper, who was insured for the purposes of Part III of the Road Traffic Act, 1976, by the defendant company. The plaintiff claims damages for the bodily injuries that he sustained in that collision.

The collision occurred shortly before midday on a bright, clear day. It happened when the motor-car turned to its right to enter Cambridge Road, which intersects King George Road, at a time when the plaintiff was about to overtake the car on its right-hand side from behind. The motorcycle struck the driver's side of the car as it turned across his path and the Plaintiff was thrown heavily from his machine.

Mrs. (or Miss) Schipper, said to have been a middle-aged lady, is no longer in the country and has not given evidence. The only witness for the plaintiff concerning the circumstances of the accident has been the plaintiff himself. The only witnesses for the defendant concerning the

---

**Copyright Juta & Co Ltd**

circumstances of the accident have been a Mr Boyd and Superintendent King of the Police, both of whom were in the front of a Police Landrover that was also travelling northwards up King George Road at the time, some distance behind the plaintiff, and they saw the accident happen ahead of them.

The plaintiff, notwithstanding the fact that he was born as long ago as December, 1908, was riding a powerful machine, a 600 cc twin-cylinder BMW motor-cycle that he had bought some three or four years before the accident. He had owned and ridden motor- cycles ever since 1927 and was therefore a very experienced rider.

[The learned Judge analysed the evidence and continued.]

An apportionment of blame is therefore necessary. It seems to me that little distinction can be drawn between the respective degrees of blame and between the causative effects of the negligence of both drivers, and that to attempt an apportionment other than one of equal division of the blame would be to put too fine and unrealistic a point on the overall circumstances of the collision. She turned when she should not have turned; he overtook when he should not have overtaken. Each of them should have been alert to the possibility that the other might do what they in fact did. At the critical stage neither of them had a better opportunity of avoiding the consequence of their own and of each other's actions. I therefore make a 50/50 apportionment and hold that the defendant is liable for half the plaintiff's damages.

---

**1980 ZLR p456**

BECK J

The plaintiffs' special damages have been agreed in the sum of $1 892,80, but I must fix the amount of his general damages for shock, pain and suffering, disablement and loss of amenities of life.

The unchallenged evidence in this regard is as follows: The plaintiff was deeply concussed and was unconscious, as I have already mentioned, for three weeks. He had a severe laceration of his left knee with a compound fracture of the patella which was surgically removed four months after the accident. He sustained multiple abrasions to the right leg and to the face and he had a left periorbital haematoma. During a sojourn of more than four months in hospital he suffered a collapse due to a bladder disturbance that arose from injury and infection and that resulted in urgency and incontinence until it was brought under control. An orthopaedic surgeon considered, in December, 1978, that the removal of the patella had left the plaintiff with a 15 per cent. disability rating. I confess that I think that, in stating this percentage, the surgeon in question must have envisaged an expected measure of improvement in the use of the patient's left leg that has not materialized. The plaintiff is today, on his own evidence and on that of his wife, virtually a cripple. The Court saw for itself the difficulty with which he walks, even with the aid of a stick, and with which he lowers himself into and raises himself from, a chair, and I do not consider that the evidence of the plaintiff and of his wife has been exaggerated. In July of this year his general practitioner wrote that as a result of the loss of his left patella "his gait is difficult and extremely unsteady and he cannot walk without the aid of a stick. He also finds it awkward to get up and out of a chair". He does not, however, experience any residual pain.

---

**Copyright Juta & Co Ltd**

The condition of his leg is such that the plaintiff has been, and will continue to be, house bound. Going out for entertainment is eschewed because of the difficulty presented by steps, and the only mobility that he now enjoys is confined to brief strolls in his own garden. He no longer enjoys, and is in fact somewhat afraid of, swimming, which used to be one of his daily recreations. In particular, he can no longer play golf, which used to be a favourite pastime. Despite his age he was wont to play three rounds a week before the accident and was able to maintain a handicap of 12. The deprivation of this amenity is one that affects him keenly. In speaking of it he was temporarily emotionally overcome. I think his lacrimosity was genuine and I discard as unworthy the fleeting thought that presented itself to me at the time that it might conceivably have been motivated by the hope that in the identity of the Bench he had been blessed with a judge who might be unduly sympathetic to this particular aspect of his misfortunes!



BECK J

The picture gained from all the evidence is that at the time of his accident he was a man who was physically vigorous for his age and who gained no little enjoyment from his ability to be energetic. He is now sadly changed, his vigour is permanently a thing of the past, and even handicraft hobbies in his workshop at home are no longer an attraction for him. One must bear in mind, however, that the toll of advancing years would in any event not have left him with his former vigour and energy for very much longer, and that, unrelated to the accident, he had begun to show symptoms of hypertension.

In the light of these facts, having regard to the decline in the value of money in recent years, and having refreshed my acquaintance with the standard of other awards when there are some broad aspects of similarity with regard to the plaintiff's age and injuries and remembered pain and the extent of loss of amenities of life, it is my view that an appropriate award for general damages would be the sum of $8 000.

It was not disputed that in the event of the plaintiff recovering a substantial amount he would be entitled to costs.

Accordingly judgment with costs is granted to the plaintiff for damages in the total amount of $4 946,40, being half the special damages of $1 892,80 and half the general damages of $8 000.

*G. Seirlis*, attorney for the plaintiff.

*Honey and Blanckenberg,* attorneys for the defendant.



## THE STATE v CHAKANETSA 1980 ZLR 457

**Court** **Appellate Division, Salisbury**

Copyright Juta & Co Ltd

Application for leave to appeal in person

Fieldsend, CJ

5th November, 1980

## Flynote

Criminal procedure - sentence - undue weight not to be given to previous convictions in assessing sentence for less serious offence.

## Headnote

The applicant was convicted on two counts of receiving stolen property. On the first count he had received seven stolen bottles of brandy and, on the second, two skirts and two blouses. The applicant's criminal record dated back to 1969 and he had been awarded a total of just over six years' Imprisonment in that

---



FIELDSEND CJ

time. The magistrate sentenced him;12 months' imprisonment with labour on each count and warned him of the indeterminate sentence.

*Held* that undue weight must not be attached to the previous connections of the accused in assessing penitence for what in itself is not a serious offence. Previous convictions for related offences mill weigh more heavily than those for offences of a different character.

Cases and authorities cited:

*R v Petersen,* 1944 EDL 165;

*R v Adamu,* 1946 SR 103;

*R v McDermott* (unreported);

Halsbury's *Laws of England* 4th Edition;

*R v Thomas Boucher,* (1909) 2 Cr. App. R 177;

*R v John William Fitt,* (1928) 21 Cr. App. R 41.

## Judgment

**Fieldsend CJ** in Chambers in terms of section 68 of the Magistrates Court Act [*Chapter 18*].

The applicant was convicted on his plea of guilty on two counts of receiving stolen property. He was sentenced to 12 months' imprisonment with labour on each count and warned of the indeterminate sentence. He has noted an appeal against sentence only and seeks a certificate enabling him to prosecute his appeal in person.

On the first count the applicant received between the 14th and 19th of July, 7 bottles of stolen

Copyright Juta & Co Ltd

brandy from an acquaintance. He sold these bottles of brandy for $2 a piece on his friend's behalf and was rewarded with a bottle of brandy. The liquor was valued at $30. On the second count he received, between the 7th and 9th August, two second-hand skirts and two blouses from his same friend for sale on his behalf. He sold these garments for $8 and was rewarded with $2. In each case the goods the applicant received for disposal were part of the proceeds of a housebreaking committed shortly before his handling.

The applicant has a bad criminal record dating from the days of his youth in 1969 and has been awarded over the years a total of just over six years' imprisonment, although none but the last conviction for theft in 1978, when a sentence of two years' imprisonment was imposed, seem to have been very serious offences. The magistrate said:

> "To prevent him returning to his old habits, I imposed a fairly severe sentence. In view of his numerous convictions for dishonesty he was also warned of the indeterminate sentence"

There are a number of cases which have drawn attention to the fact that undue weight must not be attached in assessing sentence for what in itself is not a serious offence to the previous criminal record of an accused.

*R v Petersen,* 1944 EDL 165; *R v Adamu,* 1946 SR 103; *R. v*

---



FIELDSEND CJ

*McDermott,* Bulawayo Judgment 72 of 1964 (not reported). The principle cannot be better set out than it is in *Halsbury's Laws of England* 4th Edn. Vol. 11 para. 483. This appeared in the Second Edition and was cited with approval in *Petersen's* case *(supra)*. It reads:

> "It is the practice of criminal Courts generally to punish persistent offenders more severely than those who have not been previously convicted or have not committed other offences, but it is not right to be guided merely by previous convictions, and it is a well- recognized principle that a severe sentence for a trifling offence cannot be justified merely on the ground that the offender has had many previous convictions."

More weight must of course be given previous convictions for offences of the same character as that for which the offender is to be punished than to convictions for offences of a different character; *R v Thomas Boucher,* (1909) 2 Cr. App. R 177; *R v John William Fitt,* (1928) 21 Cr. App. R 41; and here almost all the applicant's previous convictions were for theft or theft related offences.

The applicant has certainly disentitled himself from being treated as a first offender and his persistence in a criminal career is a proper factor to be borne in mind in assessing sentence. Also to be borne in mind is that on the facts he was clearly willing to lend himself to disposing of stolen property, and it has been said that a receiver of stolen property is often as blameworthy as the thief himself. This is not perhaps as significant a factor in this case as in some for the applicant assisted in disposing only of a very small portion of what in fact was stolen. He cannot be treated as a professional "fence".

A first offender who behaved as this applicant behaved should in my view not have been sent prison for the offence involving the handling of the stolen clothes. Even if that offence is taken in

---

**Copyright Juta & Co Ltd**

conjunction with the handling of the stolen brandy, it would not have been out of place for him to have been punished with a fine and a suspended sentence of imprisonment.

As it is and having regard to his record he must expect to serve a term of imprisonment but taking into account all the circumstances I think that a total of two years' imprisonment is very much too great.

I expressed my views to the Attorney-General who agreed in principle with them. He suggested that imprisonment for a total of nine months to a year would be adequate and I agree. The greatest inducement to the applicant to mend his ways will it is hoped be the warning of the indeterminate sentence which will leave him with the thought of being declared an habitual criminal should he offend again.

---



FIELDSEND CJ

The convictions are confirmed, but the sentence is altered to six months' imprisonment with labour on count one and three months' imprisonment with labour on count two. The applicant is warned that if he is convicted again he is likely to be declared an habitual criminal and sentenced to the indeterminate sentence with all that that entails.

A certificate for leave to prosecute the appeal in person is refused.

The JUDGE PRESIDENT agrees with this judgment.

---



## THE STATE v MOYANA AND ANOTHER 1980 ZLR 460

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Lewis, J, Baron, JA and Goldin, JA

11th November, 1980

### Flynote

Criminal Low - assault with intent to do grievous bodily harm - nature of intent - motive irrelevant.

### Headnote

The appellants were charged with assault with intent to do grievous bodily harm.

In finding the appellants guilty the lesser offence of common assault, the magistrate said that although the appellants had Injured the complainant badly, this had not been their prime intention.

*Held* that a man must be presumed to have intended the natural and probable consequences of

---

Copyright Juta & Co Ltd

his acts. 'His motive is irrelevant to conviction.

*Held,* further, that the test for legal or constructive intent is whether the accused when he perpetrated the assault, knew that there was a risk of grievous bodily harm resulting and was reckless whether or not that result ensued. (*Regina v Edwards,* 1957 R & N 107, discussed.)

Cases and authorities cited:

*Regina v Edwards (supra)*;

Burchell and Hunt, *South African Criminal Law and, Procedure,* Vol. I;

*R v Harvey,* 1951 SR 93;

*Nevison Harunavamwe v S,* AD 132/80;

*S v Muyamho and Anor,* 1980 RLR 408 (AD).

*B H Christie,* for the appellants.

*B J Turner*, for the respondent.

## Judgment

**Lewis JP:** The two appellants in this case were jointly charged in the magistrate's Court at Selukwe with the crime of assault with intent to do grievous bodily harm. While admitting the assault, they both pleaded

---



LEWIS JP

not guilty to assault with intent to do grievous bodily harm. The magistrate, having heard the evidence. convicted them of common assault, and in respect of each accused imposed a sentence of twelve-months' imprisonment with labour. They have appealed to this Court against sentence only.

The facts of the matter are briefly as follows: The appellants are both officials of ZANU (PF), who worked at the party offices in Donga Township, Selukwe. The complainant, an elderly man aged 57 is a kraal head and also a member of the same party, but not an official. The appellants had apparently received a report to the effect that on Sunday afternoon the 17th of August last, the complainant was alleged to have said something "denouncing the Government." as they put it. Accordingly, at about 0030 hours on the morning of Monday, the 18th of August, the two of them, together with the next door neighbour of the complainant, came to the house of the complainant and his wife, and ordered them out. They were told to dress, and to accompany the appellants to a meeting at the school in the township. They went there under protest. The fact that the next door neighbour was in the company of the two appellants suggests that it was he who had laid the information concerning the complainant's alleged denunciation of the Government. On arrival at this meeting, they found a number of people assembled, about 30 in all, and presiding was one Thomas Gandiri, who was a senior official of the ZANU (PF) Party.

---

Copyright Juta & Co Ltd

On arrival at the meeting, the complainant was confronted with what he was alleged to have done, and when he said that he did not know what they were talking about he was ordered to be on the ground and he was then very severely beaten by the second appellant, Barnabas, while the first appellant, Partson, was standing on his neck and kicking him about the neck and head. The beating was done first of all with a gum pole which was taken from the fire which was burning at the time. It was a stick about a metre and a half in length and three fingers in width. He was beaten severely with this stick on the buttocks until the stick broke into pieces, whereupon a second stick of similar dimensions was sent for and the beating was resumed. That stick also broke and according to the complainant a third stick was then produced and the beating continued until eventually Thomas Gandiri got up and said: "Icho, Icho, Icho." or words to that effect which was understood to mean: "Stop what you are doing and let's talk" or words to that effect.

Eventually the complainant was allowed to go, but he was so badly beaten that he was unable to walk and had to be assisted in walking away from the scene. His injuries were so serious that they could not be treated at the local clinic and eventually the complainant had to be taken to the hospital at Gwelo where he was detained for treatment for a week and a



half. He was seen by the doctor, who produced a report which was put in at the trial and he came to the conclusion that there was massive bruising of both buttocks with bilateral haemotoma and this was as a result of severe force being used to inflict these injuries.

On these facts, the magistrate said, and I quote from his judgment:

> "In surveying the evidence and admission made, the Court experienced some difficulty in deciding the correct verdict. It was a borderline case. Clearly, the prime intention of the accused was to extract information from the complainant. To encourage him to talk they bleat him but only on the buttocks. Had he told them what they wanted to know, it is more than likely that they would have stopped. It was felt under those circumstances, to do Grievous Bodily Harm, although the complainant was badly injured, was not the accused's prime intention. They were therefore convicted of the lesser charge."

There can be no doubt that the magistrate erred in this respect. This was a clear case of assault with intent to do grievous bodily harm, and the appellants should have been found guilty as charged. The magistrate in the penultimate sentence of the passage quoted above confuses motive with intention. Grievous bodily harm was in fact suffered by the complianant, within the meaning of that phrase as set out in *Regina v Edwards,* 1957, R & N 107 at p. 110. I have already described how serious his injuries were. At the time he gave evidence in Court, which was nearly three weeks after the beating, he was still bleeding from his buttocks, he was still bandaged and was still receiving treatment as an out-patient at the hospital. The grievous bodily harm which the complainant suffered was the natural and probable consequence of the very severe and prolonged beating which he received with the use of these substantial gum poles, and a man is presumed to intend the natural and probable consequences of his acts. There can be no doubt, therefore, that these two had the actual intention to cause grievous bodily harm. The fact that the motive was to extract a confession was irrelevant to their conviction of the offence as charged. The fact that this was what they intended was also borne

Copyright Juta & Co Ltd

out in the following passage of the complainant's evidence, referring to the stage when the beating had been stopped:

> "Accused 2 said to me: Why were you denying to inform us of that?' I said, 'Is that all you wanted?' He said 'Yes, that is why we are killing and seriously injuring you ' "

At the very least, there was a constructive or legal intent. In the case of *Regina v Edwards, (supra)* to which I have referred BEADLE, J as he was then in an *ex tempore* judgment said at page 112:

> "I therefore come to the conclusion that so far as assault with intent to do grievous bodily harm is concerned, it is sufficient to prove that the accused



> committed the crime knowing that his act was likely to "use grievous bodily harm and that he committed it in circumstances which show that he was reck less and careless as to whether or not such harm resulted. If that was his state of mind, then I think the Crown has proved all the intent required to establish this crime."

He was dealing with an argument raised by appellants' counsel that there could only be a conviction if there was an actual or positive intent. I pause here to remark that the headnote of this case does not correctly reflect this passage. The substance of the headnote is to the effect that "it is sufficient to prove that the accused committed the assault either knowing that what he did was likely to cause grievous bodily harm or being reckless and careless as to whether or not such harm resulted". The passage from the judgment which I have quoted makes it clear that the requirements are conjunctive and not in the alternative.

In regard to this passage, however, it would seem, with respect, that BEADLE, J may have over-stated the position in using the phrase "likely to cause grievous bodily harm". If the accused knows that the result is likely from his actions, then he comes very close to having an actual intent, because "natural and probable consequences" and "likely consequences" are very similar in concept.

Burchell & Hunt in their South African Criminal Law and Procedure, Volume I, General Principles at p. 119 define constructive or legal intent, or *dolus eventualis* as it is sometimes called, as follows:

> "Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not."

I would prefer, therefore, with respect, to reformulate the test as being simply whether accused, when he perpetrated the assault, knew that there was a risk of grievous bodily harm resulting and was reckless whether or not that result ensued.

I find it necessary to mention this at some length because the magistrate has so obviously erred, and it is most undesirable in cases of this nature that a proper verdict to fit the seriousness of the crime should not be returned. I trust that he will bear in mind these remarks,

Copyright Juta & Co Ltd

and not fall into the same error in the future.

In regard to sentence, it was undoubtedly an extremely bad case. This elderly person and his wife were removed from their home in the early hours of the morning and he was subjected to the savage and merciless beating which I have described with no apparent justification whatever. It is a shocking state of affairs that this sort of thing can happen. It opens





the door to the grossest form of abuse. Private scores and grievances can be settled by laying false information with the Party that the victim has been guilty of some sort of disloyalty either to the Government or to the Party, and he is then dragged out and summarily dealt with in this shocking manner.

Mr *Christie* had the unenviable task of trying to find something to say on their behalf. It seems to me that the sentence was entirely appropriate for the gravity of their offence. It bears some comparison with the recent case of The *State v Nevison Harunavamwe* Appellate Division Judgment No. 132/80 which came before this Court last month. In that case a senior official of the youth wing of the ZANU (PF) party at Umvuma had taken it upon himself to adjudicate upon a matter and had ordered that the complainants receive a severe beating with sticks. The one received 23 strokes and the other ten strokes before his wrist was shattered by the beating. In that case, the appellant was also a first offender and he received an effective sentence of 15 months' imprisonment with labour, that is to say 24 months with 9 suspended. That sentence was upheld by this Court, consisting of the CHIEF JUSTICE, myself and my Brother GOLDIN. By comparison the sentence of 12 months in the instant case cannot by any stretch of the Imagination be described as manifestly excessive.

Mr *Christie* has suggested that the magistrate misdirected himself in not suspending a portion of the sentence because they were first offenders. I am unable to agree with this submission. There is no rule that every first offender must receive a wholly or partially suspended sentence. In fact, there is authority to the contrary, see *R v Harvey* 1951 SIR. 93. It was also suggested that there should have been a differentiation between the treatment of the two, because Barnabas the second appellant played a much more leading role, was obviously in charge of the operation and was the elder of the two. I would not have quarrelled with the magistrate if he had been able to sentence Barnabas to a more severe sentence than 12 months. But the fact that they both received equal sentences is no reason for reducing that of Partson to one which, in my opinion, would be grossly inadequate for this offence.

It has been suggested by Mr *Christie,* on the authority of *Willie Muyambo and Stella Madziva v The State**(17), Appellate Division Judgment No. 121/80, that consideration must be given to the rehabilitation of guerrillas, but that was a very different sort of case. That was a case of public violence involving inter-party factional strife. The two appellants, one of whom was a woman, were convicted, after having pleaded guilty,



Copyright Juta & Co Ltd

of public violence by going about the township of Mufakose seeking revenge on Patriotic Front supporters who had earlier on assaulted members of the appellants' own party, ZANU (PF). Moreover, the acts perpetrated in revenge were not of a serious nature. That was not a case Of people taking the law into their own hands and purporting to usurp the functions of the police and of the Courts. I feel it would be as well to repeat what was said in the case of *Nevison Harunavamwe (supra)*, particularly as the second appellant at the trial has shown a very wrong headed attitude to what he is and what he is not entitled to do. He said in the course of his evidence in court - I quote from p. 6;

> "I am asking the Court to bear in mind that I am a former guerilla. The Court knows there are dissidents in the country. If any such information comes to my mind, before I report it; to the Police, I have to establish the truth about that. If a person associates himself with dissidents, I will do what is in my power even If it means going to the extent of hitting someone. I do this so I can give the police the correct information."

I can only hope that this is not typical of the attitude of his fellow guerrillas. It is certainly an attitude which must be immediately corrected.

In *Nevison*'s case, *(supra)* the following was said:

> "As far as sentence is concerned, this is a typical example of people taking the law into their own hands with very serious consequences and to the great detriment of the maintenance of law and order in this country. It is not necessary to repeat what has already been said by this Court in recent cases on that subject. I need only refer to the *State v Materera,* Appellate Division Judgment No. 119/80, and the *Attorney-General v Tobiwa and Others,* Appellate Division Judgment No. 78/80 at page 7.
>
> The Courts must stamp out this sort of conduct and ensure that the police, and only the police, are regarded as the legitimate authority for the maintenance of law and order in this country and that only the Courts can try people and punish them if found guilty."

Mr *Christie* has said everything that could be said for the appellants. In my opinion there is no basis whatever for interfering with the sentence. The appeals must be dismissed.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Chirunda, Chihambakwe & Partners,* attorneys for the appellants.



## THE STATE v WILLIAMS 1980 ZLR 466

**Court** **Appellate Division, Salisbury**

Application for bail

Fieldsend, CJ

14th, 17th and 19th November, 1980

Copyright Juta & Co Ltd

## Flynote

Criminal Procedure - bail - pending appeal - approach to be applied.

## Headnote

The applicant was convicted in the magistrates Court on a charge of dealing in uncut emeralds and sentenced to three years' imprisonment with labour of which eighteen months were suspended. He applied, in terms of section 112 (1) (b) (ii) of the Criminal Procedure and Evidence Act [*Chapter 59*], to a judge of the Appellate Division for bail pending the determination of his appeal. The application was postponed because the Attorney-General had had no reasonable notice thereof. On resumption, the judge was prodded with the magistrate's judgment but no notice of appeal or affidavit from the applicant.

*Held* that different considerations arise in granting bail pending appeal and bail pending trial.

*Held,* further, that the proper approach is towards allowing liberty to persons where this can be done without danger to the administration of justice. The likelihood of the person absconding and his prospects of success on appeal should be weighed.

*Held,* further, refusing the application, that in the absence of any notice or grounds of appeal it was not possible to assess the applicant's prospects of success on appeal.

Cases cited:

*S v Kilpin,* 1978 RLR 282;

*R v Milne and Erleigh* (4), 1950 (4) SA 601 (W);

*R v Mthembu,* 1961 (3) SA 468 (D);

*R v Milne and Erleigh* (3), 1950 (4) SA 599 (W).

*A. P de Bourbon,* for the applicant.

*A. M Donagher*, for the respondent.

## Judgment

**Fieldsend CJ** in Chambers in terms of section 112 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The applicant was convicted before lunch on Friday, 14th November, on a charge of dealing in uncut emeralds and after a plea in mitigation the proceedings were adjourned for sentence until 3 p.m. The magistrate



FIELDSEND CJ

asked about continuation of bail after conviction and the prosecution suggested certain tightening of the conditions. The magistrate, however, saying that as there was little likelihood of success on appeal and as an effective prison sentence was probable, refused to allow bail to

Copyright Juta & Co Ltd

stand pending sentence. Shortly before 4 p.m. sentence was passed on the applicant of three years' imprisonment with labour of which 18 months were suspended on certain conditions.

The applicant immediately gave notice of his intention to appeal against conviction and applied to a Judge of the Appellate Division to be admitted to bail pending the decision of the appeal under section 112 (1) (b)(ii) of the Criminal Procedure and Evidence Act [*Chapter 59*]. This provides that a person who has been convicted and sentenced by a magistrate's Court may be admitted to bail by a Judge of the Appellate Division or the General Division or by a magistrate pending determination of his appeal.

There was no time to file any papers before the appearance before me and I was given an *ex parte* outline of the history of the matter by the applicant's counsel with Mr *Donagher* representing the Attorney-General being present. Mr *Donagher* very properly took the point that the Attorney-General had had no reasonable notice of the application as required by the first proviso to section 112 (1) nor any opportunity of considering the merits of the appeal or of the application. He opposed the application and sought a postponement until 2.15 p.m. on Monday the 17th of November. This I granted.

Shortly before lunch on Monday, the 17th November, I was provided with the magistrate's judgment in so far as it dealt with the conviction and sentence of the applicant and with a copy of the record of the first six days of the evidence at the trial. There was, however, no notice of appeal and no affidavit from the applicant.

At the resumed hearing, Mr *Donagher* opposed the grant of bail. He contended, relying on *S v Kilpin,* 1978 RLR 282 at 286, that bail should be granted pending determination of an appeal against conviction only if there was a reasonable prospect of success on appeal and that this had not been shown. He stressed that in view of the likelihood of the applicant absconding before the determination of the appeal to avoid a prison sentence, which it was common cause was inevitable if the appeal were dismissed, it would be undesirable to admit the applicant to bail. Although *Kilpin's* case *(supra)* does support Mr *Donagher's* argument, it was primarily concerned with the granting of bail where there was an



appeal against sentence only, and it was inevitable that however successful the appeal, there was no doubt that the applicant would have to serve a substantial period of imprisonment.

Mr *de Bourbon* contended, without reference to authority, that all the applicant need show was that there was a *bona fide* appeal being prosecuted and that the Appellate Division might take a different view from the magistrate on the merits. He contended that the applicant's background and record since his arrest on 20th January, indicated that there was no likelihood of his now absconding. He had been granted bail on 22nd January, on certain stringent conditions including surrender of his travel documents and an obligation to report twice daily to the police. The trial started on 28th July and was resumed, after a six - day hearing, early in October when the conditions of bail were altered to allow the applicant to travel and to report to the police only once a day by telephone. Between the beginning of October and the resumption of the trial on

**Copyright Juta & Co Ltd**

23rd October, the applicant travelled twice to Zambia. The applicant comes from the United Kingdom and has been a citizen of this country since 1975 where he owns a jewellery business. He is 40 years of age and lives in Salisbury in his own house with his wife and daughter of 14. These facts, though not deposed to on affidavit, were given to me by the applicant's counsel without objection from Mr *Donagher*, and I understand that he accepts them.

Different considerations do, of course, arise in granting bail after conviction from those relevant in the granting of bail pending trial. On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding. Such cases as *Rex v Milne and Erleigh* (4) 1950 (4) SA 601 and *R v Mthembu,* 1961 (3) SA 468 stress the discretion that lies with the judge and indicate that the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter - connected because the less likely are the prospects of success the more inducement there is on an applicant to abscond. In every case where bail after conviction is sought the onus is on the applicant to show why justice requires that he should be granted bail.

---



FIELDSEND CJ

On the facts put before me, the applicant appears to have a settled home and given stringent conditions of bail would probably not abscond unless there were compelling reasons to do so. Such reasons may exist if there is a negligible chance of success on appeal, and it is therefore on the question of the prospects of success that this application turns.

It is here that any Court other than that which heard the case is faced with a difficulty. There are as yet no grounds of appeal and no argument in detail has been addressed to me to show that the magistrate has erred in his assessment of the evidence. The very full and careful judgment fully recognises certain defects in the evidence of the main prosecution witness and some defects in the corroborative evidence of the police. To judge from the judgment alone the applicant's defence appears to be that the main witness and the police conspired to implicate him falsely. The magistrate has carefully examined this suggestion and gone on to consider the overall probabilities.

There is, of course, the difficulty which any judicial officer who has convicted an accused may have in saying that there is a reasonable chance of another Court taking a different view-a difficulty touched on by LUCAS AJ, in a slightly different context in *R v Milne & Erleigh* (3) 1950 (4) SA 599. But despite this, it seems to me that in an urgent application of this nature there is a far better chance of an informed decision from the magistrate who has heard the case than from a judge who has little knowledge of the facts and no notice or grounds of appeal and to whom no detailed criticism of the magistrate's reasons is offered. It is certainly not the judge's task to examine the reasons without assistance. Nevertheless, I must deal with this case now

---

**Copyright Juta & Co Ltd**

as best I can.

I am satisfied, on the assumption that the State accepts the facts I have set out in this judgment, that the applicant is not a person who is likely to abscond without good reason. I am not, however, satisfied-nor do I see how the Attorney-General can be satisfied-in the absence of any notice or grounds of appeal that there is any prospect of success on appeal. This is not to say that there may not be some prospect. The magistrate may have misdirected himself; he may have misconstrued the evidence; he may have drawn wrong inferences from the evidence. All I am saying is that on the papers before me it is impossible to say that the applicant has gone any way towards discharging the onus upon him on this aspect of the case. The application for bail is refused with leave to the applicant should he so desire to renew the application on fuller papers.



## THE STATE v SIBANDA (2) 1980 ZLR 470

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA and Goldin, JA

21st November, 1980

### Flynote

Criminal procedure - Trapping of Animals (Control) Act [Chapter 134] - sentence - prevalence of poaching - weight to be given - consideration of monetary penalty in non-commercial cases.

### Headnote

The appellant was convicted of contravening section 5 of the Trapping of Animals (Control) Act [*Chapter 134*] in that he had trapped one impala and one kudu using 57 snares. Evidence in aggravation of sentence established a noticeable increase in poaching during the year.

*Held* that offenders should not be made to feel that continued poaching is worth the likely penalty. But the prevalence of the offence should not be given too much weight in the assessment of sentence.

*Held,* further, that judicial officers should give consideration to imposing a fine on first offenders, coupled with an alternative of a substantial period of imprisonment and a suspended sentence, provided that there is no evidence of the offence berg a widespread commercial operation.

Cases cited:

*R v Shaba,* 1964 RLR 162;

*S v Siamena,* GB 43-79.

Copyright Juta & Co Ltd

Appellant in person.

*C R Barlow* for the respondent cited *S v Bengesa,* 1979 (4) SA 448 (ZR); *Ndelelo Makaba v S* AD 136/80; *S v Mpofu,* GB 36/76; *S v Chirwa,* GB 76/79, *S v Siamena (supra)*, *S v Jack,* GB 17/80 and *S v Baron Sibanda and Karmen Sibanda,* GB 94/79 in supporting the sentence.

## Judgment

**Fieldsend CJ:** The appellant was convicted of setting 57 wire snares to hunt one impala and one kudu in contravention of section 5 of the Trapping of Animals (Control) Act [*Chapter 134*]. He was sentenced to two years' imprisonment with labour and ordered to pay compensation in the sum of $110 to the appropriate authority, presumably the owner of Dwala Ranch, West Nicholson. He now appeals in person against sentence only.

1980 ZLR p471

FIELDSEND CJ

The appellant is 48 years of age and lives in his own kraal with his wife and five children. Apparently he has no livestock. It was accepted by the prosecution and indeed part of the outline of the case that the appellant set the snares to catch animals for meat for his own consumption. He appears to have been co-operative with the game scouts, as he indicated to them what snares he had set.

Evidence was led for the prosecution in aggravation of sentence which established a noticeable increase in poaching in this and other areas in recent months. Since April this year the Anti-poaching unit has resumed its normal activities and the rate of convictions per month has more than doubled since the corresponding months of last year. It seems that gangs of poachers are moving through the areas collecting game meat in large quantities. Whether they both trap themselves and buy from local residents is not entirely clear, but hundreds of snares are being set and large quantities of meat are being taken. Other aspects of this activity are that fencing wire is being removed in large quantities for the making of snares and that the danger to domestic livestock is great. All this suggests that firm action is required to put a stop to what the law has penalized.

The greatest deterrent, of course, is the effective detection of offenders, but this is inadequate in itself if those caught feel that the continued poaching is worth the penalty they are likely to receive. It is for this reason that the Courts have had to impose and to approve sentences of imprisonment even on first offenders in appropriate cases. But the prevalence of the offence must not be given too much weight in the assessment of sentence. See *R v Shaba,* 1964 RLR, 162. After all, the legislation does contemplate the imposition of a fine as a suitable punishment and for a first offence has prescribed a maximum period of imprisonment of two years.

Although in this case a large number of snares was set, it cannot be said that this was by any means the most serious contravention of the section that one can envisage. *Siamena*'s case (G-B-43-79) to which we were referred is an example of more serious conduct where 238 snares were set and 29 animals caught. In my view, the magistrate has attached far too much importance to the prevalence of this offence and not enough to the facts of this particular case. It is certainly wrong to reason as he does in his reasons for sentence that owing to the

Copyright Juta & Co Ltd

prevalence one is obliged to view the degree of moral blamworthiness of offenders at a high level. The two features are quite unconnected. Nor is it an answer to say, as did the game warder to the appellant when he suggested that



FIELDSEND CJ

the reason for setting the snares was one of hunger, that he should obtain employment and earn money. That overlooks the realities of the situation.

There is, of course, a long line of cases to which we have been referred where prison sentences of even up to two years have been imposed on first offenders, and it can only cause confusion to the Courts if in a single judgment one departs too drastically from that line of cases. Nevertheless, I think the time has come when all judicial officers should give fresh consideration to the appropriate sentences in cases of this nature. It has been said that monetary penalties are one of the more effective deterrents, and save where there is evidence of a widespread commercial operation consideration should be given to imposing on first offenders a fine with an alternative of a substantial period of imprisonment, together with a suspended sentence. This coupled with the compulsory compensation order can amount to an effective deterrent upon an individual offender and one hopes also on like-minded persons.

In the present case there is no evidence of a commercial motive and the appellant appears to be impecunious. The compensation order will therefore bear hardly upon him, if the beneficiary seeks to enforce it, and it would be a vain exercise to seek to impose a fine. But taking all the circumstances into account it is my view that this is not a case which should attract the maximum period of imprisonment. The question of what is an appropriate penalty is more difficult and very much a matter of individual judgment. It is my view that a first offender such as the appellant should not go to prison for this offence for more than six to nine months at the most: that in my view would take account both of the widespread setting of the snares and the mitigating features. Giving the best attention that I can to the circumstances before us, I would reduce the sentence to 18 months' imprisonment with labour of which nine are suspended for five years on condition that during that period the accused does not commit any other offence against this Act for which he is subsequently convicted.

To that extent, I think that the appeal should be allowed.

**Baron JA:** I agree.

**Goldin JA:** I agree.



## THE STATE v RANDEN AND ANOTHER 1980 ZLR 473

**Court** **Appellate Division, Salisbury**

Copyright Juta & Co Ltd

Criminal Appeal

Lewis JP, Baron, JA and Goldin, JA

24th November, 1980

## Flynote

Criminal law - theft by finding - what constitutes valid defence - genuine but mistaken belief of common law elements is defence.

## Headnote

The appellants were found guilty of theft of two bottles of wine and appealed against conviction only. Both appellants were employed by the Railways and a bottle of Chateau wine was discovered in each of their houses on the same night that a quantity of Chateau wine was stolen from a wagon in the shunting yards. At their trial the appellants claimed to have found the two bottles in a road near the railway yards.

*Held* that appropriation of apparently lost property with the intention of keeping it, to the deprivation of the owner, will amount to theft unless the circumstances reasonably indicate that the owner is unascertainable or has abandoned it. Appellants only had a valid defence if they bona fide believed that the wine was abandoned by the owner or lost and the owner unascertainable.

*Held,* further, that a bona fide but mistaken belief that the common law of the land allows the appropriation is not a defence.

Cases and authorities cited:

Gardiner and Lansdown, *South African Criminal Law and Procedure,* Vol. II, 6th Edition;

*Rex v Zuma,* 1942 NPD 18 1;

*S v Banet,* 1973 (4) SA 430 (RAD);

*S v Johnson,* 1977 (4) SA 116 (RAD);

*Annual Survey of South African Law, 1973;*

*S v de Blom,* 1977 (3) SA 513 (AD).

*B. W K Whaley* for the appellants. If the appellants *bona fide* believed that they were entitled under the law of the land to take possession of the wine which they had found in the aforesaid circumstances, then however reasonable or unreasonable such belief was in the circumstances they had a valid claim of right and were entitled to be acquitted. See *S v Banet (supra)*.

*C R Barlow,* for the respondent.



Copyright Juta & Co Ltd

LEWIS JP

## Judgment

**Lewis JP:** The two appellants in this case were jointly charged in the magistrates Court with the theft of 14 bottles of Chateau wine, the property of the National Railways of Zimbabwe on the 16th of July last. They pleaded not guilty. They were both convicted of the theft of two bottles of wine only on the basis of theft by finding. Each was sentenced to a fine of $30 or in default of payment to three weeks' imprisonment with labour. They have appealed to this Court against conviction only.

The two appellants are both employees of the Railways. The first appellant is a shunter and the second appellant an engine driver. On the night of the 16th of July last, both appellants were on duty in the shunting yards at the main railway station in Salisbury. That night one of the rail" way wagons was broken into and a quantity of Chateau wine was stolen. As a result of a report the houses of the two appellants were visited later that night, after they had come off duty, by a Mr Williams, a security inspector, and Sergeant Jumbe of the police. One bottle of Chateau wine was discovered in each of their houses. On being challenged with the possession of the wine the first appellant said that he found the wine in the railway shunting yard and the second appellant said he had bought his, and later amplified this by saying "at a supermarket."

At the trial, each appellant said in evidence that they had found the two bottles of wine in a brown paper bag standing up against the fence in Railway Avenue as they were on their way from the railway yards to a cafe to have a meal that night. Each had taken one bottle. There was no admissible evidence linking the appellants beyond reasonable doubt with the actual theft of the wine from the railway wagon, despite the suspicious circumstance of their possession of two bottles of the same kind of wine that night. The magistrate, as I have said, convicted them, on their own version, of theft by finding.

The law in regard to theft by finding is set out in Gardiner & Lansdown, 6th Ed. Vol. II, p. 1667 under the heading *"Lost or Abandoned Property"* as follows:

> "In the same manner, if a person finds property, not In the possession of anyone, and apparently lost, his appropriation of it intending to keep it;for himself to the deprivation of the owner will amount to theft, whether that intention be arrived at before or after his acquisition of possession, unless the circumstances are such as reasonably to lead him to suppose that the owner is unascertainable."

(Then three cases are referred to in support of that proposition.)

> "Where, however, property is found in circumstances which reasonably indicate that its owner has abandoned it or that it is otherwise *res nullius,* there is no *animus furandi,* for in this case there can be no fraudulent intention on the part of the offender to appropriate it to the prejudice of the owner."



LEWIS JP

It seems to me that this statement correctly reflects the law, notwithstanding the criticism levelled at it by MR JUSTICE BROOME and MR JUSTICE HATHORN JP., in the case of *Rex v Zuma,* 1942 TPD 181, to which Mr *Whaley* has referred us.

Copyright Juta & Co Ltd

On the strength of that passage, it seems to me that the appellants in this case only had a valid defence if they bona fide believed either that the wine was abandoned by the owner or that it had been lost by the owner and the circumstances were such as to reasonably lead them to believe that the owner was unascertainable.

Despite the fact that this was locally-made wine, it could not be said as a matter of inference that there was an abandonment of it. It had some value. Neither of the two appellants said that he believed that it had been abandoned. In the first appellant's evidence the following passage appears:

> "Q. Now what did you think when you found the wine? A When we found the wine, there is a bus stop and a taxi rank, and there is a bottle store across the road, and we thought that probably someone had forgotten it - because it was in an ordinary brown shopping bag.
>
> Q. That is what you thought? A I thought that."

Similarly, the second appellant at p. 45 of the record said this:

> "Well we talked about where they might have come from and that they might have been left there by a person catching a bus across the road - and there is a taxi rank there. So we took one each."

Later on, under cross-examination:

> "I got a surprise to find there were two bottles of wine in the packet. I thought someone might have left it there, someone catching a taxi or a bus. There is a bottle store just across the road. Someone could have waited for a bus and forgotten his parcel. That is all."

Nor, in my view, can it be said that the circumstances were such as to lead them to suppose that the owner was unascertainable. For all they knew, the owner of the wine might have only gone a short distance before discovering his mistake in leaving the wine behind and was on his way back to retrieve the two bottles of wine when they took it. The fact that they were in a parcel standing up against the fence dearly indicates that they were not lost in the ordinary sense of the word. They were put there deliberately. They were not dropped there. If they had been dropped they would have been broken. The inference, therefore, is that they had been left there by mistake and the owner could reasonably have been expected to return to collect the property.

---



LEWIS JP

Mr *Whaley* in the course of his argument placed reliance on *S v Ballet,* 1973 (4) SA 430 (R.A.D.), a decision of BEADLE CJ, and GREENFIELD AJA This case, however, has been disapproved in a judgment of this Court since then in *S v Johnson* 1977 (4) SA 116 at pp. 122 to 124C. It was also criticized in the Annual Survey of South African Law, 1973 at pp. 333-334. The proposition which has been criticized is that if someone bona fide but mistakenly believes the common law of the land allows him to take property, in circumstances where he is in effect saying: "I didn't know it was a crime to use money entrusted to me for a particular purpose for my own private purposes as long as I intended to pay it back", then he has a defence to the crime of theft by conversion. In the case of *S v de Blom,* 1977 (3) SA 513 (AD), the Appellate Division was dealing with an offence created by prohibitory Exchange control Regulations

---

**Copyright Juta & Co Ltd**

requiring *mens rea.* That case did not purport to lay down the proposition that ignorance of the elements of the common law crime of theft can be an excuse. *Banet's* case *(supra)* was not referred to in the judgment.

In any event, however, neither of the appellants in this case laid claim to any such belief that the law of the land allowed him to take the property. It is clear from the evidence they gave that they realized that in the ordinary way they would have had to take property found like this to the police station to be claimed by the owner. Their excuse for not doing so was that it was of such trivial value that they could not be bothered to take it to the police station. I should mention that the Central police station was only about 200 yards or so from where they must have found the wine, on their stories. The following passage in the first appellant's evidence shows his state of mind:

> "Q. Do you know that it is the duty of a civilized person who picks up something, someone property, to hand it in? A Yes, but just a bottle of wine - I didn't think it was worth the trouble of walking all the way to the police station to hand in the bottle of wine."

The second appellant gave evidence to a similar effect:

> "Q. Why did you not take the wine to the police? A Take it to the police?
>
> Q. Yes, and tell them you had found it up against the fence in Railway Avenue? A Well, the circumstances at the time - first of all, we were both on duty, and secondly I didn't see much in a bottle of wine. I mean, if it had been a large amount of money or jewellery or something I probably would have, but I didn't think for a bottle of wine it was worth going all that way to the police station."

If they could not be bothered to take it to the police they should have left it in case the owner returned for it. Moreover, as far as the second appellant is concerned, the magistrate found-and in my view correctly

---



LEWIS JP

on the evidence- that when confronted with the presence of this bottle of wine in his house by Mr Williams and Sergeant Jumbe, he told them at that time that he had bought the wine at a supermarket, not that he had found it in Railway Avenue as eventually alleged. This to my mind militates against the suggestion that he was bona fide in thinking that he could take this wine and use it as his own property.

In the result, therefore, I am satisfied that the appellants were correctly convicted and the appeal must be dismissed.

However, before concluding it would be as well that the nature of the verdict be spelled out for the purposes of the record of the two appellants who are first offenders. The verdict of the magistrate should be formally altered from merely "guilty of theft of two bottles of wine" to "guilty of theft by finding of two bottles of wine".

**Baron JA:** I agree.

**Goldin JA:** I agree.

---

**Copyright Juta & Co Ltd**

*Gill, Godlonton and Gerrans,* attorneys for the appellants.



## THE STATE v MUBAIWA 1980 ZLR 477

Editor's Note:(18)

**Court** **Appellate Division, Salisbury**

**Annotations** **Link to Case Annotations**

Criminal Appeal

Lewis JP, Baron, JA and Golden JA

26th November, 1980

### Flynote

Evidence - accomplice - statutory requirement and cautionary rule - elimination of danger of false incrimination.

Criminal Procedure - duty of prosecutor to prosecute fairly and not to conceal facts favourable to accused - gross misconduct not to draw material discrepancies to Court's attention.

### Headnote

The law regarding accomplice evidence falls into two parts. The statutory provision (section 254 of the Criminal Procedure and Evidence Act [*Chapter 59*] requires the Court to be satisfied that the crime to which the accomplice testifies has in fact been committed. Even if there is no proof *aliunde* of this, the provision can be satisfied if there is corroboration in a material respect which convinces the Court that the accomplice can safely be relied on when he says the crime was committed. Such corroboration need not directly implicate the accused.



LEWIS JP

Secondly, the Court has to apply the cautionary rule and warn itself of the danger of false Incrimination in accomplice evidence. It has to be satisfied beyond reasonable doubt that the danger of false incrimination has been eliminated. (*R v Lembikani and Anor.,* 1964 R & N, cited with approval and further explained.) The mere fact that an accomplice's implication of one accused is satisfactorily corroborated does not mean that his uncorroborated implication of another accused can safely be relied upon.

A prosecutor is an officer of the court and owes a duty to the court to conduct his case with fairness toward the accused and not to conceal facts favourable to the accused. Where the prosecutor knows that his witness is being untruthful on a material point, the proper administration of justice invariably requires that the Court's attention be directed to the untruth. Failure by the prosecutor to do so is a gross dereliction of duty.

Copyright Juta & Co Ltd

Cases cited:

*R v Troskie,* 1920 AD 466;

*R v Thielke,* 1918 AD 373;

*R v Lakatula,* 1919 AD 362;

*R v Ncanana,* 1948 (4) SA 399 (AD);

*R v Lembikani and Anor. (supra)*;

*R v J,* 1966 (1) SA 88 (SRAD);

*R v Norman,* 1956 (3) SA 700 (FC);

*R v Steyn,* 1954 (1) SA 324 (AD);

*R v White (No. 2),* 1962 R & N 485;

*S v Takaendesa,* 1972 (4) SA 72 (RAD)

*A. P de Bourbon*, for the appellant.

*B. J Turner,* for the respondent.

## Judgment

**Lewis JP:** The appellant in this case was charged in the magistrates Court, jointly with one Mutunya (who was accused No. 2), with the crime of robbery. They both pleaded not guilty. Both were convicted of assault and of the theft of $64, and each was sentenced to 12 months' imprisonment with labour, of which six months was suspended for five years on conditions. The appellant appealed to this Court against his conviction and sentence. There has been no appeal by the accused No. 2.

At the hearing of the appeal, Mr *Turner* for the State conceded, rightly in the Court's view, that the conviction could not be supported. Since the appellant had been refused bail pending his appeal and had been in prison serving his sentence since the 19th of September, the Court there and then allowed the appeal, quashed the conviction, set aside the sentence and ordered the appellant's immediate release. At the same time the Court indicated that reasons for judgment would be handed in at a later stage. Here are the reasons.



LEWIS JP

The appellant and accused No. 2 are both police constables in the Zimbabwe Republic Police. State case against them was that on the night of the 27th of May last, the complainant, Tambura and a companion named Tafirenyika were walking along Manica Road when they were stopped by three African constables in uniform near the intersection with Inez Terrace, one of whom accused the complainant of bumping into him. One of these three constables was

Copyright Juta & Co Ltd

the State witness Sakupwanya, who was clearly an accomplice, and it can now be accepted that another of them was the second accused, who has not appealed. The identity of the third policeman is the vital issue in this appeal.

In further reasons in reply to the notice of appeal, the magistrate admitted that he had not warned himself of the dangers of convicting on accomplice evidence, but went on to say:

> "The only corroboration of an accomplice required in law is evidence *aliunde* proving the commission of the offence. This the complainant and Mr Tafirenyika clearly supplied and it is respectfully felt that there is no question of my erring in law."

The magistrate erred in saying he had not erred. His was clearly an erroneous view of the law. The law regarding accomplice evidence has been so often stated and restated in the many decisions of the Appellate Division of South Africa, the Federal Supreme Court and in this Court that it can almost be described as trite. However, since there may be other magistrates who share the erroneous views of the law expressed above, I find it necessary to restate it, in what I hope are simple terms.

It falls into two parts. First, there is the statutory requirement set out in section 254 of the Criminal Procedure and Evidence Act [*Chapter 59*] as follows:

> "Any Court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment, summons or charge under trial on the single evidence of any accomplice:
>
> Provided that the offence has, by competent evidence other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such Court to have been actually committed."

The purpose of this section is that the Court must be satisfied that the crime to which the accomplice testifies has, in fact, been committed. If not, there can be no conviction at all. Even where there is no proof *aliunde* that the crime has been committed, the statutory requirement can still be satisfied if there is corroboration in a material respect which convinces the Court that the accomplice can safely be relied on when he says the crime



LEWIS JP

was committed, though it need not directly implicate the accused. In such a case the requirement is satisfied because, despite the lack of proof *aliunde* of the commission of the offence, the accomplice evidence is no longer "single and unconfirmed evidence " See *R v Troskie,* 1920 AD 466, per INNES CJ, at pp. 468-9 citing *R v Thielke,* 1918 AD 373 at 377 and *R v Lakatula,* 1919 AD 362 at pp. 364/5.

Secondly, once the statutory requirement has been satisfied, either by evidence *aliunde* that the crime was committed or by confirmation in a material respect as set out above, the court then has to apply what is known as "the cautionary rule" and satisfy itself that it can safely rely on the accomplice when he says it was the accused who committed the crime. In other words the Court then has to warn itself of the danger of false incrimination which is inherent in the evidence of an accomplice, and it must be satisfied that such danger has been safely eliminated in the case under consideration. See the leading case of *R v Ncanana,* 1948 (4) SA

Copyright Juta & Co Ltd

399 (AD) per SCHREINER JA, at pp. 405-6.

The requirements in regard to accomplice evidence, extracted from the judgment of CLAYDEN CJ, are conveniently summarised in the headnote of the report of the case of *R v Lembikani and Another,* 1964 R & N 7 as follows:

> "(i) in exercising the caution which was necessary before acting upon the evidence of an accomplice, the Court had to deal separately with the case of each appellant.
>
> (ii) quite apart from the requirements of s. 292 of the Criminal Procedure and Evidence Act [*Chapter 28*], a trial Court had to warn itself of the danger of acting on the evidence of an accomplice.
>
> (iii) the best way to be satisfied that an accomplice was reliable was to find corroboration implicating the accused.
>
> (iv) the risk in accepting accomplice evidence would be reduced if the accused person was found to be a liar, or did not give evidence to contradict that of the accomplice.
>
> (v) but in the absence of the features in the court could convict if, being aware of the danger, it was satisfied that it could rely on the evidence of the accomplice, because the merit of the accomplice, as against the accused as a witness was beyond question.
>
> (vi) in the case of (v) if corroboration was necessary it had to be corroboration implicating the accused person and not merely the corroboration which met the requirement of s. 292, i.e. corroboration in material aspects."

(section 292 is now section 254 of the Criminal Procedure and Evidence Act [*Chapter 59*].)

---



LEWIS JP

Paragraph (v) is one which always causes some difficulty of interpretation, (*See R v J* 1966 (1) SA 88 (S. R, A D.) at pp. 91 B-F and 93 H-95 A ) but it seems to me that it amounts simply to this: First of all the Court has to properly warn itself of the dangers of accomplice evidence, having done so, then by contrasting the evidence of the accomplice with that of the accused and viewing it against all the surrounding circumstances and the general probabilities of the case, it has to be satisfied beyond reasonable doubt that the danger of false incrimination has been eliminated It is not sufficient for the trial Court merely to warn itself of the dangers of false incrimination and then to convict simply on its faith in the honesty of the accomplice based on nothing more then his demeanour in the witness box and the plausibility of his story.

It can be seen from what is set out above that the trial Court seriously misdirected itself as to the law, and failed to apply the cautionary rule at all. In particular, the magistrate failed to appreciate that the mere fact that the implication of accused No. 2 by the accomplice was satisfactorily corroborated did not mean that his uncorroborated implication of the appellant could safely be relied upon. See *Lembikani*'s case *(supra)*. An accomplice may have no reason to falsely incriminate one of the accused, but may have every reason to falsely incriminate the co-accused, either to shield someone else or for some other cogent reason.

In the case of *R v Norman,* 1956 (3) SA 700 (FC) it was held that where as in this case, there has been a failure by the trial Court to apply the cautionary rule, the conviction will be quashed

---

**Copyright Juta & Co Ltd**

unless the Appeal Court can apply the proviso to section 67 (3) of the present Magistrates Court Act [*Chapter 18*], i.e. unless it considers that no substantial miscarriage of justice has actually occured. As I indicated at the commencement of this judgment, Mr *Turner* for the State conceded that this was not a case where the proviso could properly be applied. I need only briefly state why the Court considered that concession to have been properly made.

The evidence implicating the appellant in this case was far from satisfactory, and the conduct of the prosecution on this aspect is deserving of heavy censure. Moreover the accomplice's evidence was highly suspect. As I have already mentioned, neither the complainant nor Tafirenyika was able to pick out the appellant (who was accused No. 1 at the trial) at the identification parade held a fortnight after the offence occurred. The complainant had only picked out accused No. 2. This fact, although known to the prosecutor, was not made known to the Court by him. In fact, he closed his case after allowing a false statement



LEWIS JP

by Tafirenyika to the effect that he had identified both accused at the identification parade to stand uncorrected. One wonders what other facts favourable to the appellant might have been suppressed by the prosecutor in this case.

In the result, therefore, I was of the opinion that this Court could not possibly have applied the proviso in this case. So far from applying the proviso, I was satisfied that the appellant was wrongly convicted on the evidence before the Court below. For these reasons, the appeal was allowed.

Before concluding, I would like to express my grave concern at the way in which the prosecution was conducted by the prosecutor. The prosecutor as an officer of the Court owes a duty to the Court to conduct his case, however vigorously, with fairness towards the accused, especially where, as in this case, the accused is undefended, and not to conceal facts favourable to the accused. In this case the prosecutor knew quite well that the accomplice had been absent from the identification parade, that neither the complainant nor Tafirenyika had been able to pick out the appellant, and that Tafirenyika had, in fact, picked out three different constables altogether. It seems to me it was his duty to inform the Court of this in his outline before leading evidence from those two witnesses to the effect that they could identify the appellant as a member of the trio of policemen who accosted them that night, because this seriously affected their credibility in regard to identification. As soon as he heard Tafirenyika say falsely that he had identified the appellant at the identification parade, despite the appellant's strenuous denial of this in cross-examination, he should have immediately informed the Court that his witness was not telling the truth on this very important point. He again remained silent during cross-examination by the appellant of the accomplice when the following passage occurred:

> "Q. I put fit to you that you are the person who is directly Involved with the commission of this offence, and that at the time that you went to Harare is the time you committed the offence with other people, but now you are laying the blame on us? A If I was the person involved then the complainant and his witness should not have identified you on the identification parade like they did."

The prosecutor then called Superintendent Maughan, who conducted the identification parade,

Copyright Juta & Co Ltd

to produce extracurial statements by the accused which were negative, but asked him nothing about the identification parade and then closed his case without correcting the false evidence of Tafirenyika.

Inquiries into the matter instituted at the request of this Court also re-



LEWIS JP

vealed the following additional information submitted on behalf of the Attorney-General:

> "The Superintendent informs the writer, however, that when Tafirenyika's allegation was made, he personally suggested to the prosecutor that he, Maughan, be recalled to refute it. Apparently this request was declined and the prosecutor adopted the attitude that this was a matter for the defence. Despite a subsequent repeated suggestion to this effect the prosecutor maintained his initial attitude."

This considerably aggravates the misconduct of the prosecutor, which cannot be too strongly condemned.

In *R v Steyn,* 1954 (1) SA 324 (AD) GREENBERG JA, at p. 337 quoted with approval the following passage in the judgment of TREDGOLD CJ, in the Court *a quo* relating to disclosure of statements by informers:

> " 'Disclosure must be left to the discretion of the Attorney-General or his deputy. The prosecutor stands in a special relation to the Court, and, where there is a serious discrepancy between the proof of a Crown witness and what he says on oath at the trial, the Court has the right to expect that the prosecutor will, of his own motion, direct attention to the fact and, unless there is special and cogent reason to the contrary, make the statement available for cross examination. I may say that this is the almost invariable practice of prosecutors in this Colony.' "

GREENBERG, JA then continues:

> "A passage to the same effect appears in the reasons of Beadle, J and my impression is that the same applies in the Courts of the Union. In my opinion, the proper administration of justice requires that this practice should be in variable, and not 'almost invariable' and I say this in the hope that the duty to observe it will be carried out by every prosecutor."

See also *R v White (No. 2)* 1962 R & N 485, where QUENET FJ, said at p. 492D:

> "We wish to draw attention to the opening observations of the learned trial judge in his judgment on remittal" '(who happened to be myself):-
>
> > 'This case has been re-opened by direction of the Federal Supreme Court for the hearing of further evidence in regard to certain statements made by the Crown witness, Elisi, to the police prior to the trial, the contents of which conflicted with the evidence she gave at the trial.
> >
> > 'These statements were not disclosed to the Court at the trial and only came to light after the accused had been convicted of murder and sentenced to death by this Court.
> >
> > 'At the outset I would like to express my grave concern at this non-disclosure and to refer to the judgment of the Appellate Division in *R v Steyn,* 1954 (1) SA 324 AD, in which it was pointed out that it is the duty of the prosecutor to draw the attention of the Court to a previous in consistent statement by a Crown witness which conflicts with his evidence at the trial, on a material point'."

Copyright Juta & Co Ltd

LEWIS JP

Finally, in the *State v Takaendesa,* 1972 (4) SA 72 (RAD), BEADLE CJ, In a judgment in which MACDONALD JP., and I concurred, said at p. 74F:

> "I naturally assume that, when the prosecutor presented his case in the magistrate's Court, he was unaware of what the real position in regard to consultation was and believed that the statement in the order that the Chief of Weya Tribal Trust Land had been consulted was, in fact, true. If the prosecutor had been aware of the true facts and concealed them from the Court, he would have been guilty of a gross dereliction of duty and one that could only be strongly condemned."

Further on, he continued at p. 75A:

> "In a case such as this, if the prosecutor is aware of the true facts, it is his bounder duty to draw the attention of the Court to those facts at the first available opportunity and to direct the Court's attention to any inaccuracy in a document such as the order in the instant case."

The Attorney-General is requested kindly to draw these remarks to the attention of all prosecutors in the magistrates Court, and particularly of newly appointed prosecutors. such as the prosecutor in the instant case appears to have been, in the hope that a repetition of such misconduct will never occur in the future.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Winterton, Holmes & Hill*, attorneys for the appellant.

1980 ZLR p484

## THE STATE v BATANAYI 1980 ZLR 484

**Court** **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA and Goldin, JA

7th and 27th November, 1980

### Flynote

Criminal Law - Miscellaneous Offences Act [Chapter 68], section 6 (e) - hindering a Police officer in the execution of his duty - physical element unnecessary.

### Headnote

The appellant, a junior political commissar with authority over a suspect whom two Police officers wished to take to the Police station for questioning, specifically instructed the suspect not to accompany the Police. The appellant was charged with hindering or disturbing the Police in the execution of their duty in contravention of section 6 (e) of the Miscellaneous Offences Act

Copyright Juta & Co Ltd

[*Chapter 68*].



*Held* that there can be a hindering without any physical element in the conduct relied upon. Any conduct which maces it more difficult for the Police to carry out their duties can amount to hindering.

Cases cited:

*R v Cook,* 1965 RLR 378;

*R v Suping,* 1948 (2) SA 759 (O),

*R v Weyer,* 1958 (3) SA 467 (GW);

*S v Makhathini*, 1975 (2) SA 690 (N);

*Hinchcliffe v Sheldon* [1955] 3 All ER 406;

*Rice v Connolly* [1966] 2 QB 414.

*B. H Christie,* for the appellant. It is submitted that the words "resist . . . hinders or disturbs" connote a physical aspect in the commission of the offence which is lacking in this case. *R v Suping: (supra)*; *R v Weyer (supra)* at 472; Cf. *S v Jeffers,* 1976 (2) SA 636 at 643 (AD); Cf. Smith and Hogan *Criminal Law* (4th edition) p. 365H.

Although *Jeffers'* case and LORD GODDARD CJ, in *Hinchliffe v. Sheldon (supra)* tend towards a different conclusion from that expressed above, it is submitted that the interpretation in *Weyer's* case is recognised in this country by the existence of section 43 of the Criminal Procedure and Evidence Act.

*J H C Friedman,* for the respondent. The literal meanings of resist and obstruct do not necessarily connote that the resistance or obstruction be of a physical nature. Any opposition, impedance, retardation or additional difficulty is sufficient as long as it relates to the object which it is being sought to achieve, in this case, the apprehension and questioning of the suspect.

It is a fundamental principle that the utterance of words may in themselves constitute an act (and therefore resistance or obstruction) for the purposes of the criminal law. (Burchell & Hunt, *South African Criminal Law and Procedure,* Volume I, at p. 103.)

(a) *R v Suping (supra)* was limited to the interpretation of the word "Hinder".

(b) It is submitted that the requirement that obstruction should have a physical aspect as stated in *R v Weyer (supra)* tends to place too narrow a limitation thereon and that the better view is to have regard to the context of the situation, namely, the nature of the object being obstructed and the practical effect of the alleged obstruction. *R v Cule and Ors* 1948 (4) SA 893 (N) at 897, *S v Makathini (supra)*; *S v Jeffers (supra)*.

Copyright Juta & Co Ltd

FIELDSEND CJ

## Judgment

**Fieldsend CJ:** The appellant is appealing against his conviction on a charge of contravenining section 6 (e) of the Miscellaneous Offences Act [*Chapter 68*]. The section penalizes any person who "resists, incites, aids or encourages any person to resist, or hinders or disturbs any police officer . . . in the execution of his duty".

His appeal against sentence was withdrawn before the hearing and the Attorney-Generals' contention that the sentence should be increased falls away: *R v Cook,* 1965 RLR 378.

The charge alleged that the appellant refused to allow a person, hereafter referred to as the suspect, to be questioned or investigated by two sergeants of the Zimbabwe Republic Police from Mrewa Police Station. The trial was conducted throughout on the basis that the conduct of the appellant relied on by the prosecution was that he refused to allow the suspect to accompany the Police to the station to assist them in their enquiries into an ounce committed the previous day. No point was taken about this departure from the particulars in the Court below and there was no prejudice from it to the appellant. The issues on appeal therefore are whether the appellant refused to allow the suspect to accompany the Police and, if so, whether that refusal amounted in the circumstances to a contravention of the section.

Before coming to the facts it is necessary to consider two points on the section itself.

It was contended first for the appellant that for there to be a contravention of the section there had to be some physical aspect to the conduct relied upon. Reliance was placed on *R v Suping,* 1948(2) SA 759 (TPD) and *R v Meyer,* 1958 (3) SA 467 (GWLD) at p. 472. At most these cases establish that mere passivity cannot amount to hindering, they certainly do not establish that the offence cannot be committed unless there is a physical element. But as DIEMONT J, pointed out in *Weyer's* case *(supra)* at p. 470 there may well be circumstances where a failure to move from a position which blocks Police access, for example, to a person or a vehicle can constitute hindering the Police especially where the Police make a lawful request with which there is deliberate non compliance: *S v Makhathini,* 1975 (2) SA 690. The English cases of *Hinchcliffe v Sheldon* [1955] 3 All. E R 406 and *Rice v Connolly,* [1965] 2 QB 414 in dealing with section 51 (3) of the Police Act 1964 - where the word "obstruct" and not "hinder" is used - have decided that any conduct which makes it more difficult for the Police to carry out their duties can amount to obstruction. The latter case indicates how wide is the conduct covered by the English section: the defendant, who the Police



FIELDSEND CJ

thought was acting suspiciously, declined despite repeated requests to give his full name and address or any account of himself and declined to go with the Police to a police call -box. On a case stated the Divisional Court held that the defendants' conduct amounted to obstruction within the section as it made it more difficult for the Police to carry out their duties in keeping the

Copyright Juta & Co Ltd

peace, preventing crime and protecting property. The defendant was, however, acquitted on other grounds.

The reasoning in that case applies with even greater force to the section before us which uses the word "hinder" which in its ordinary meaning covers wider conduct than "obstruct".

There is no substance in the appellant's first contention that before there can be a hindering there has to be some physical element in the conduct relied upon as a contravention of section 6 (e) of the Miscellaneous Offences Act.

Secondly it was contended that the Police were not hindered in the execution of their duty because they had made no attempt to arrest the suspect. There is no substance in this point either. It is within the duties of the Police to detect crime and bring offenders to justice. In the present case it was clearly part of the duties of the Police to investigate the allegations made to them concerning the suspect, to conduct those investigations at the Police Station if they so wished and to invite the suspect to accompany them there.

Prior to 12 June, 1980, there had been friction in the Mrewa area both between members of ZANU (PF) and members of the PF and between members of ZANU (PF) and the Police which had given rise to some concern. To minimise the latter friction the Police considered it expedient not to arrest or take for questioning suspects who were members of ZANU (PF) who were on premises or in an area owned or controlled by that party when to do so might provoke an incident. It had become common for the Police to seek the co -operation of party officials in the investigation of offences concerning members of that party, and this they had been receiving.

The appellant is a young man of 23 years of age. He was a junior political commissar and as such was responsible to the provincial organisation of Z A.N.U (P.F.). He had some authority over party members at least when they were on property controlled by the party. He had had previous dealings with the Police and had on occasions reported offences and offenders them.



FIELDSEND CJ

It had been reported to the Police that on the evening of the 11th June, a number of PF supporters had been assaulted by members of ZANU (PF) On 12 June two Zimbabwe Republic Police sergeants, accompanied by two of those who complained that they had been assaulted the previous day went to the ZANU (PF) office in Mrewa to seek assistance in making investigations into the incident. The appellant had some knowledge of this incident as he himself had made some investigations into it, but he did not know who had been involved. Whilst the Police and the appellant were discussing this matter the complainants pointed out to the Police a person leaving the security fence around the party office as one of those who had been involved in the assault upon them. On the appellant's orders the suspect was called back and joined the group of Police, complainants and the appellant where he denied he had been involved. By this time there was also in the vicinity a group of five or more ZANU (PF) party members taking an interest in the proceedings, and more were moving about in the area. This much was common cause.

The decision in this appeal depends to a very large extent upon the precise facts in relation to

Copyright Juta & Co Ltd

subsequent events that were found by the magistrate and which can be supported by the evidence. Not only were there important conflicts between the Police evidence and that of the appellant, but there were also significant differences of emphasis at different stages in the Police evidence. It does not help therefore to rely on isolated passages in the evidence.

The magistrate's basic findings of fact in his *ex tempore* reasons were that the appellant refused to permit the arrest or questioning of the suspect and that in this he was irresponsible because in his position he could have quite easily assisted the Police. But the matter does not rest there.

In his additional reasons following the filing of the notice of appeal the magistrate clearly indicated that he found that the appellant instructed the suspect not to go with the Police until he was given permission by him. This is denied by the appellant - which is of itself of some significance in showing that the appellant appreciated what his obligation was - but there is evidence on the record to support the magistrate's finding. There is also evidence to support his further finding that the appellant had some authority over the suspect which the latter respected. The appellant himself says that he ordered the suspect to stay in the vicinity of the office until he had been proved innocent, and that he remained there until the following day when, the Police not having returned, he went back to Salisbury.



FIELDSEND CJ

These findings of fact make it unnecessary to consider whether the appellant's refusal to give the Police permission, as they sought, to take the suspect to the Police Station for questioning amounts in the circumstances to a contravention of the section. An answer to that question would involve a more detailed consideration of the section itself-in particular a determination of what, if any, is the mental element required-and a more detailed examination of the precise arrangement between the Police and ZANU (PF) in the area than was undertaken at the trial.

It is sufficient for the purposes of this case that the appellant specifically instructed the suspect not to accompany the Police. The appellant had some authority over the suspect and the effect of his order was that the Police were hindered in their expressed wish to take the suspect with them to investigate the offence against the complainants with them. This was a hindering of the Police in the execution of their duty. Indeed the appellant's answers to some questions in cross-examination indicate that he realised that he should not have given such an instruction.

In my view the evidence established the commission of the offence and the appeal must be dismissed.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Chirunda, Chihambakwe & Partners,* attorneys for the appellant.



Copyright Juta & Co Ltd

## THE STATE v TEKERE AND OTHERS (2) 1980 ZLR 489

Editor's Note:(19)

Editor's Note:(20)

**Court** **General Division, Salisbury**

Criminal Trial

Pittman, J, and assessors

22nd September, 3rd-7th November, 10th-14th November, 17th-20th November and 8th December, 1980

### Flynote

Statutes - Indemnity and Compensation Act, 1975 - section 4 - meaning of "terrorism" - "Minister" not to be restrictively interpreted - burden of proof rests on accused - act is in good faith if predominant motive is suppression of terrorism.

Criminal law - obedience to orders of superior officer - soldiers during state of emergency in no different position to those on active service

---



- illegal order can form basis of defence - defence available to accused unless he personally ought to have realized order was illegal.

### Headnote

On the 3rd August, 1980, accused number one, a Cabinet Minister, attended a party for about two hundred persons on a farm near Salisbury. During the evening a rifleman from a small army unit stationed on the farm, who had been assaulted by party guests in the afternoon, returned to the vicinity of the farmhouse and fired three shots at it with a rifle. Accused number one took cover for half an hour and then returned to Salisbury. On the following day he mustered accused numbers two to eight, all personal bodyguards to accused number one, and advanced on the building occupied by the army unit. Approximately two hundred shots were fired at the building, but the five soldiers within fled without sustaining any injury. The accused, with the exception of number three, then turned their attention to the house occupied by the farm manager. The latter on his arrival ignored an order to stop and, entering his house, commenced to operate the Agric-Alert system. On the order of accused number one to apprehend the farm manager, accused number five entered the house and shot him in the head and chest. All accused were charged with the attempted murder of the five soldiers and the murder of the farm manager.

It was argued that they had committed the acts in question in good faith in connexion with the suppression of terrorism and therefore the Court had no jurisdiction to try them in terms of section 4 of the Indemnity and Compensation Act, 1975. Alternatively it was argued that

---

Copyright Juta & Co Ltd

accused two to eight had acted in pursuance of orders given by a military superior.

*Held,* in considering the meaning of the word "terrorism" in section 4 of the Indemnity and Compensation Act, 1975, that it was intended to be used in the narrow sense of "any act of violence intended to overthrow the Government", It was dangerous to attempt to apply the meaning of a word in one statute when interpreting the language of another statute.

*Held,* further, that the language of the Act was not so restrictive as to protect only 1?

a Minister who acted within the scope of his ministerial portfolio.

*Held,* further, that the burden of proving the existence of the protection offered by the Act rested upon the accused.

*Held,* further, that the test of good faith under the Act should only be whether the predominant motive was the suppression of terrorism. A person with a a secondary motive does not lose the protection of the indemnity.

*Held,* further, that the defence of obedience to orders was available to the accused because of the state of emergency, even though they were not technically on active service.

*Held,* further, that even if the order relied upon was illegal it could still form the basis of the defence (*R v van Vuuren,* 1944 OPD 35 not followed.)

*Held,* further, that the test was not whether a reasonable man would have known of the illegality, but whether the accused person himself ought to have known of the illegality. The test to be applied depended on the Court's assessment of the accused.

---



PITTMAN J

Cases and authorities cited:

*Barron v The Town Management Board of Greendale,* 1957 R & N 290;

*S v Latham,* 1980 (1) SA 723 (ZRAD);

*Verdal-Austin and Duncan v the State* 124/80 AD;

*R v Nyakuwa and Another,* 1980 (2) SA 574 (RAD); 1980 ZLR 19;

*S v Gwevera & Ors* 1978 RLR 466 (GD);

*Express Newspapers v McShane* [1980] AC 672;

*R v Nkomo* (1)*,* 1964 RLR 95;

*R v Mayers,* 1958 R & N 277;

*R v van Vuuren* (*supra)*;

---

**Copyright Juta & Co Ltd**

Burchell and Hunt; *South African Criminal Law and Procedure,* Vol. I, page 297;

*R v Werner and Anor.,* 1947 (2) SA 828 (AD);

Gardiner and Lansdown; *South African Criminal Law and Procedure,* 6th Edition, Vol. I, page 116;

*The Modern Approach to Criminal Law;* Dr. W T S Stallybrass

*R v Nkomo* (4)*,* 1964 (4) SA 452 (SRAD)

*L J Blom-Cooper, QC,* with him *N J McNally* for the accused.

*C J Glaum, SC*, with him *M Gillespie* for the State.

## Judgment

**Pittman J:** The eight accused are charged with the attemped murder of five members of the National Army, and with the murder of one Gerald William Adams. The crimes are alleged to have been committed on the afternoon of Monday, 4th August, 1980, on Stamford Farm. This farm is situated on the northern side of the Old Gatooma Road, about nine kilometres west of Salisbury. It had recently been purchased by a ZANU (PF) Member of Parliament, Mr Murambiwa, who is generally known as Mr Machipisa. He employed the deceased, Mr Adams, as his farm manager.

Mr Machipisa's homestead is about 125 m to the east of the farm workshop. Mr Adams lived in a house about 40 m north of the workshop. Both these houses are surrounded by security fences.

About 80 m south of the workshop is a cluster of out - buildings made of brick and two wooden buildings that had been constructed for military purposes and are known as modules. These modules were guarded by members of the National Army who were housed in two of the outbuildings. These out - buildings were referred to as barracks during the trial and marked as "A" and "B" on the map, Exhibit 1.

It is common cause that on the afternoon of Sunday, 3rd August, Mr Machipisa held a house-warming party at his house for about 200 persons to celebrate his recent acquisition of the farm. Amongst the guests were several Cabinet Ministers and other members of ZANU



PITTMAN J

(PF). The senior Cabinet Minister present was No. 1 accused, the Minister of Manpower, Planning and Development. Like the other Ministers, No. 1 was accompanied by body- guards, his own being No. 2 accused and No. 3 accused. The other five accused were also his bodyguards, but they did not escort him on that day.

During the afternoon the soldier in charge of the Guard Force on the farm, Rfn. Bhebe, visited Mr Machipisa's house on two occasions. On the second occasion a quarrel arose between him

Copyright Juta & Co Ltd

and some of the body-guards there. He then returned to his barracks and was followed by some of the body-guards who dragged him into a motor vehicle, took him back to Mr Machipisa's house and further assaulted him there. Bhebe then returned to his barracks, and in the dark fired three shots with his rifle in the direction of Mr Machipisas' house from a distance of about 150 m.

By that time only about half the guests, including No. 1, were still present in or around the house. They took cover for up to half an hour, and No. l then left the farm with No. 2 and No. 3. On his way home to St. Martin's township in Salisbury, No. I visited his colleague, Dr. Nhiwatiwa.

On the following day, No. 1 attended a reception in honour of President Samora Machel. He then mustered his seven body-guards, accused Nos. 2 to 8, and went with them to Mr Machipisa's house on Stamford Farm. Mr Machipisa was not present when they arrived, and the accused, under No. l's direction, advanced upon building "A" which was then occupied by the five complainants in count 1, all being members of the National Army who had taken over from Bhebe's unit on that morning the task of guarding the modules.

As the eight accused came within about 30 m of building "A", they all fired in its direction, some from the north, some from the east and some from the south. Of the approximately 200 cartridges fired, about 80 bullets struck the building and trees near it. Whilst the firing was continuing, the five occupants left the house and Red from the scene without sustaining any injuries. One of them attempted to surrender, but this was not accepted by No. 1. The accused then collected some military equipment in both buildings "A" and "B" and broke several window panes and caused other damage in a building alongside the building "B".

The accused then all went northwards to the deceased's house, save for No. 3, who remained behind to load the captured equipment into a vehicle. No. 8 was posted on a loading ramp south of the house to observe the approach of any persons. No. 1 noticed two persons moving



inside the house, and he ordered the other accused to fire at the building. They did so, and the two persons came out. They informed No. 1 that the house was occupied by the deceased, and that they were his servants. No. 1 was angered by their failure to come out of the house immediately the firing had started. He slapped each on the cheek, saying they had been putting their lives at risk, and then let them leave the scene.

Shortly afterwards the deceased approached the house in his truck from the west. He ignored No. 8's order to stop, and passing through the gate in the security fence parked his car alongside the back door of his house. He then entered the house and began to operate the Agric - Alert warning system in the study. No. 5 followed him into the house in response to a call by No. 1 that the deceased should be apprehended, and whilst the deceased was stooping over the Agric - Alert, No. 5 killed him by firing three bullets into his head and chest.

As regards count 1, the State contended that in approaching building 'A" and firing their rifles, the accused were all guilty of attempting to murder the occupants of the building, each with an

Copyright Juta & Co Ltd

actual intent to do so, or with a constructive intent, in that they were aware that in firing their rifles there was a possibility that they would kill one or more of the occupants, and they nevertheless persisted in firing as they did.

As regards the death of the deceased, the prosecution contention was that No. 5 entered the house with the intention of killing him, and did not act in self-defence in doing so. He was therefore guilty of murder. The other accused had a common purpose with No. 5 in coming to the farm and shooting at persons there. They therefore must have foreseen that No. 5 might be involved in the sort of encounter which resulted in p the deceased's death and must therefore also be found guilty of murder.

Before the trial started Mr *Blom-Cooper*, for the accused, filed a notice in terms of section 162 of the Criminal Procedure and Evidence Act, stating that the Court had no jurisdiction to try them for the offences charged by virtue of section 4 of the Indemnity and Compensation Act, No. 45 of 1975. It was effect alleged in the notice that the accused had not attempted to murder the five complainants and that the death of the deceased had occurred after the entry of No. 5 into the study as follows:

> "The deceased was holding his pistol in his right hand and facing the Agric Alert as he spoke into it. The deceased turned his head, saw the accused in question and raised his pistol towards him with the apparent intention of shooting him. The accused in question then shot the deceased before he him ,self was shot. Had the deceased not attempted to shoot him, the accused in question would simply have disarmed him and taken him to first accused in accordance with his instructions."



PITTMAN J

It was then stated that each of the accused had done his acts on 4th August "in good faith for the purposes of or in connexion with the suppression of terrorism," and was thus protected by the Indemnity and Compensation Act. That Act has recently been repealed by section 35 of the War Victims Compensation Act, No. 22/1980, but with a saving clause which renders the repeal inapplicable to the present case.

At the start of the trial Mr *Blom-Cooper* submitted that this plea to the jurisdiction should be decided by the Court before each accused was called upon to plead to the indictment. However, Mr *Glaum* informed the Court that the State disputed the defence allegations as to the commission of the alleged crimes, and in my view it would be impossible to decide whether the accused's acts done on 4th August had been done in terms of section 4 without first deciding what those acts were. I therefore ruled that the accused had to plead to the charge, and I stated that the plea to the jurisdiction would be decided only after the Court had determined what acts the accused had done on the day in question. If authority is needed for this ruling. I refer to section 168 of the Code, which reads:

> Upon a plea to the jurisdiction of the Court, the Court shall proceed to satisfy itself in such manner and upon such evidence as it thinks fit whether it has jurisdiction or not."

After an abortive attempt to appeal against my ruling, the trial started with all the accused pleading not guilty to both charges. The notice in terms of section 162 of the Code was then accepted by the prosecution as a notice in terms of section 105 (S) of the Code, and filed as

**Copyright Juta & Co Ltd**

Exhibit 21. At a later stage the court was informed that Nos. 2 to 8 would raise as a further defence the fact that they had acted throughout as soldiers obedience to the lawful orders of their superior officer, No. 1.

Evidence was then led. Much of Exhibit S the State outline of its case in terms of section 105 (3) of the Code, was accepted as common cause, in particular the carefully compiled ballistic evidence intended to establish the fact that each of the eight accused had taken part in the attacks on the farm on 4th August. The agreement on this fact reduced considerably the number of persons that had been listed in Exhibit 5 as witnesses to be called by the State, and resulted in a concentration of the efforts of both parties to prove (1) the nature of the attacks on the barracks and the deceased's house; (2) the nature of the actual killing of the deceased, (3) the defence of obedience to orders by a military superior, and (4) whether the plea to the jurisdiction should be upheld.

In argument counsel on both sides raised several questions of law concerning the plea to the jurisdiction upon which I shall now rule.

---



PITTMAN J

Section 4 of the Indemnity and Compensation Act reads as follows:

"4. (1) No civil or criminal proceedings shall be Instituted or continued in any Court of law against -

(a) the President or any Minister or Deputy Minister in respect of any act, matter or thing whatsoever advised, commanded, ordered, directed or done or omitted to be done by him or by a person referred to In paragraph (b) in good faith for the purposes of or in connexion with the suppression of terrorism; or

(b) any person who, at the relevant time, was -

(i) a member of the Security Forces or employed in any capacity or appointed to any post by the State, whether for remuneration or otherwise; or

(ii) acting under or by the direction or with the approval of the President, any Minister or Deputy Minister, or any person referred to in sub-paragraph (i);

in respect of any act, matter or thing whatsoever advised, commanded, ordered, directed or done or omitted to be done by him in good faith for the purposes of or in connexion with the suppression of terrorism.

(2) A certificate in writing under the hand of the Minister &sating that any act, matter or thing referred to therein was advised, commanded, ordered, directed or done or omitted to be done for the purposes of or in connexion with the suppression of terrorism shall be conclusive proof in any Court of law of the fact that it was so advised, commanded, ordered, directed or done or omitted to be done, as the case may be.

(3) Where any civil or criminal proceedings have been instituted in any Court of law against -

(a) the "President, a Minister or a Deputy Minister; or

(b) any person who is or was -

(i) a member of the 'Security Forces or employed in any capacity or appointed to any

Copyright Juta & Co Ltd

post by the State, whether for remuneration or otherwise; or

(ii) acting under or by the direction or with the approval of the President, a Minister or a Deputy Minister or any person referred to in sub-paragraph (i);

if the President is of the opinion that the proceedings have been instituted in respect of any act, matter or thing whatsoever commanded, ordered, directed or done or omitted to be done by the person concerned in good faith for the purposes of or in connexion with the suppression of terrorism or the maintenance of public order and if he considers it to be in the national interest that such proceedings shall not be continued, he shall authorize the Minister to issue a certificate directing that such proceedings shall not be continued.



PITTMAN J

(4) Where it is recommended that the President should authorize the Minister to issue a certificate in terms of subsection (3) the Minister shall furnish the President with a full report setting out the circumstances in which the act or omission concerned took place and the factors showing that the act was done in good faith and for the purposes of or in connexion with the suppression of terrorism or the maintenance of public order and, in deciding whether to issue such certificate, the President shall have regard to such report.

(5) Where, in any proceedings before Court of law -

(a) the Court is of the opinion that, by virtue of the provisions of subsection (1) such proceedings should not have been instituted; or

(b) a certificate under the hand of the Minister issued in terms of subsection (3) is produced;

the Court shall forthwith terminate the proceedings and -

(i) in the case of civil proceedings, shall absolve the defendant and shall not make any order as to costs unless it considers that the proceedings were instituted frivolously or vexatiously;

(ii) in the case of criminal proceedings, shall discharge or acquit the accused.

(6) No Court of law shall have any jurisdiction to review, quash, reverse or otherwise question the validity of a certificate issued in terms of subsection (2) or (3) and it shall not be necessary for the President or the Minister to give any reasons for the authorization of the issue or the issue, as the case may be, of the certificate."

The first question to be decided is the meaning of the word "terrorism" in this context. It was agreed between counsel that the wool can be used in two senses, one being the wide sense of "any act intended to instil terror", and the other being a narrow sense, such as "any violent act intended to bring about political change by intimidation".

Standard dictionaries indicate that the word and its cognates "terrorist" and "terrorist" can be used in two different senses, apart from certain specific meanings which are clearly irrelevant to this Act and which I shall therefore refrain from quoting. The Shorter Oxford English Dictionary (1974 Edn.) defines terrorism as: "A system of terror policy intended to strike with terror those against whom it is adopted; the fact of terrorizing or condition of being terrorized," and "terrorist" as: "1. As a political term: Anyone who attempts to further his views by a system of coercive intimidation. 2. An alarmist, a scaremonger." "Terrorize" is defined in its transitive sense as: "To

Copyright Juta & Co Ltd

fill or inspire with terror, reduce to a state of terror: Especially to coerce or deter by terror." And in its intransitive sense as: "To rule or maintain power by terrorism: To practice intimidation."



PITTMAN J

The Concise Oxford Dictionary (1963 Edn.) defines "terrorist" as: "One who favours or uses terror-inspiring methods of governing or of coercing government or community." In the light of these definitions, it is clear "terrorism" can be used in a narrow sense such as "The furtherance of political views by a system of coercive intimidation," or in a wide sense, such as "Any act of filling or inspiring with terror." I therefore accept that the word has an ambiguous meaning. However, I consider that the remainder of section 4 suggests that a narrow meaning was intended, first because the persons covered by the indemnity in subsection (1) (a) and '(b) are all persons associated with the machinery and maintenance of the government. Secondly, persons who form part of the Government are entrusted with the issue of the certificates referred to in subsections (2), (3) and `(4), only to the persons referred to in subsection (1). Thirdly, section 3, the only other part of the body of the Act which could be regarded as relevant to the meaning of "terrorism", provides that the Act shall be in force only until the President brings it to an end, or until the then existing state of emergency in terms of section 61 of the Constitution, ceases to be in force. A state of emergency can be declared in terms of section 61 in respect of any kind of emergency, including, for example, drought or flood, but I take judicial notice of the fact that the existing state of emergency referred to in section 3 and still in force on 4th August, had been declared because of the activities of terrorists in a narrow sense. It seems to me, therefore, that the word "terrorism" can be construed without recourse to the preamble of the Act, but if the preamble is considered in this regard, it throws clear light on the question.

> "Preamble:
>
> WHEREAS, for the purpose of overthrowing the Government by the use of violence or other unconstitutional means, many acts of terrorism, including murders, rapes, assaults, mutilations and abduction, arson, sabotage, and other hostile and unlawful actions, have been and are being directed by terrorists and certain other persons against employees of the State and other inhabitants of, and property situated in, certain parts of Rhodesia:
>
> AND WHEREAS such acts of terrorism are still proceeding;
>
> AND WHEREAS it is expedient that the President, Ministers, Deputy Ministers and commanders and members of the military and other Security Forces of Rhodesia and certain other persons should be indemnified and protected from harm in respect of actions associated with the suppression of terrorism or the maintenance of public order;
>
> AND WHEREAS it is expedient that provision should be made for the award of compensation in cases where persons have suffered loss or harm as a result of actions to which such indemnity and protection relates."



PITTMAN J

The reference to "the purpose of overthrowing the Government by the use of violence or other unconstitutional means" puts it beyond any doubt that the word "terrorism" in section 4 (1) is used in the narrow sense of "any act of violence intended to overthrow the Government".

Copyright Juta & Co Ltd

Likewise the second paragraph of the preamble throws clear light on the purpose of the Act.

Mr *Blom-Cooper*, in opposing this meaning, submitted that it would be proper to refer to other statutes in interpreting the word, arid he referred in particular to the definition of "act of terrorism or sabotage" in Statutory Instrument 441 of 1980, which contained regulations issued by the President on 25th July, 1980 when the existing state of emergency was prolonged for a further period of six months from 26th July, 1980. The definition in Statutory Instrument 441 of 1980 provided that the phrase "act of terrorism or sabotage" should bear the meaning given thereto by subsection (6) of section 50 of Chapter 65, the Law and Order (Maintenance) Act.

I reject Mr *Blom-Cooper's* submission, first, because the meaning of the word is made perfectly clear by the Act standing alone, and, secondly, because I bear in mind the headnote to *Barron v The Town Management Board of Greendale,* 1957 R & N 290:

> One must go warily in attempting to interpret the language of one statute by the light of cases interpreting the language of another, for the precise meaning of language, or even of identical words, must of necessity be affected by and must vary in accordance with, the nature and scope of the particular statute concerned. Similarly, it is dangerous to apply the analogy of another statute which is not in *pari materia,* or the analogy of one part or chapter of a statute to another part which deals with a separate and distinct subject."

The next question of law was raised by Mr *Glaum,* who submitted that as the Act deprives persons of their rights against the person protected by the indemnity, it should be restrictively construed, and that accordingly a Minister should only be protected if he acts within the scope of his Ministerial portfolio. In my view, the language of the Act is quite unequivocal and precludes any restrictive implication of the kind submitted.

Section 3 (1) begins:

> "3 (1) The provisions of this Act shall apply in relation to any act, matter or thing advised, commanded, ordered, directed or done or omitted to be done during the period commencing on the 1st December, 1972, and ending on such date as the President may, by notice in the *Gazette,* specify for the purposes of this section or on the date the declaration in terms of section 61 of the Constitution which is presently in force ceases to be in force, whether because it is revoked or because it is not continued in force, whichever is the sooner."



PITTMAN J

The word "any" can only mean "every" and in section 4 (1) (a) the reference to "any Minister in respect of any act, matter or thing what so ever" likewise precludes any such restrictive implication. The same applies to the words "any Minister" and "any act, matter or thing" in section 4 (1) (b) (ii) because it would be absurd if a person could be protected if acting with the approval of a minister who was not himself protected. The same must be said of the words "any act, matter or thing" in section 4 (2) and "any act, matter of thing whatsoever" in section 4 (3). I therefore reject Mr *Glaum's* restrictive interpretation of the word "Minister".

Thirdly, there is the question of whether the burden of proof of the existence or non - existence of the protection rests upon the State or the accused. Mr *Blom-Cooper* cited the case of *S v Latham,* 1980 (1) SA 723 (ZRAD) in which it was held that once the accused has led evidence concerning a defence of claim of right in respect of a charge of theft, it is for the State to

**Copyright Juta & Co Ltd**

disprove such a defence in order to establish that the accused had an intention to steal.

As Mr *Glaum* pointed out in reply, that case is not in point, first be cause it is governed by the presumption of innocence which normally exists in favour of an accused, whereas under the Indemnity and Compensation Act that presumption is irrelevant, and secondly, because if the indemnity is not proved to exist by the accused, there is nothing in the Act to suggest that he can be acquitted on the ground that the State has failed to prove that the indemnity does not exist. As in cases dealing with amnesty ordinances, it is clear that the burden of proving the existence of the protection rests upon the accused. See *Verdal-Austin and Duncan v The State* Judgment No. AD 124/80, and *R v Nyakuwa and Anor,* 1980 (2) SA 574 (RAD)*(21).

In *S v Gwevera and Ors,* 1978 RLR 466, BECK, J, in interpreting the words "in good faith" in section 4, held that they were used there to accentuate the need for honesty and hence for the absence of an ulterior motive. This interpretation was applied by BEADLE, AJ in the General Division in *Nyakuwa's* case when he held that the requirement that the act must have been done "in good faith" in the context of the Amnesty Ordinance No. 39 of 1979, meant that it must have been done solely for the purpose or motive referred to in the ordinance, and for no other ulterior motive. BEADLE A J.'s view was mentioned with apparent approval by LEWIS, JP., in *Verdal-Austin'*s case, and it could therefore be argued on the authority of these dicta that if the accused in this case did their acts not only for the purposes of or in connexion with the suppression of terrorism, but also, say, for personal vengeance, they



PITTMAN J

would lose the protection of the indemnity, because they would not have acted "in good faith."

Nonetheless, both counsel were agreed that the test of good faith under the Indemnity and Compensation Act should only be whether the predominant motive was the suppression of terrorism. With due deference to the distinguished authors of the dicta referred to, I accept this view, because the Legislature could hardly have intended to disqualify from protection a person who honestly intended to suppress terrorism, but who admitted that because, say, his son had recently been killed by the terrorist concerned, he had as a secondary motive the gratification of his desire for revenge.

Persons often perform acts with a variety of motives and it would be very unfair if an accused could only claim protection if he had to deny absolutely the existence of any secondary motive. The Act does not appear to me to imply that the words "the suppression of terrorism" are followed by the word "exclusively." On the contrary, the words "in connexion with" can be said to import the possible existence of other motives secondary to the suppression of terrorism. I therefore think that a person with more than one motive does not lose the protection of the indemnity, provided his predominant motive is a genuine intention to suppress terrorism, in the narrow sense.

Finally, Mr *Blom-Cooper* submitted that the accused did not have to prove that the acts they did were directed against persons who were actually terrorists. It was enough if they genuinely believed that those persons were terrorists. I accept this submission, because the words "in

Copyright Juta & Co Ltd

good faith" indicate that the test to be applied is simply whether the accused genuinely intended to suppress terrorism. Compare *Express Newspapers Ltd., v. McShane,* [1980] AC 672 per Lord Diplock at page 686 F and G But as was pointed out by BEADLE CJ, in *R v Nkomo* (1) 1964 RLR 95, at pp. 101-2, in a somewhat similar matter, an accused may have difficulty in establishing the genuineness of his intention to suppress terrorism if the persons against whom he acted were not in fact terrorists.

In accordance with these rulings, each of the accused, to be protected by the Indemnity and Compensation Act and thus to have his plea to the Court's jurisdiction upheld, had to prove, on the balance of probability, that his state of mind was that any acts done by him constituting the charges laid against him were genuinely done predominantly for the purpose of or in connexion with the suppression of an act or acts of violence intended to bring about the overthrow of the Government.

---



PITTMAN J

However, it is also to be noted that the phrase "suppression of terrorism" refers not only to such acts already performed, but also to , such acts being performed, and also to such acts which will be performed in the future. The phrase is clearly wide enough to bear all such meanings and all are consistent with the general wording and spirit of the Act.

In his evidence No. 1 repeated the assertions made on his behalf in Exhibit 21 that he believed that the attack by Bhebe was directed at him personally and was an attempt on his life as a Minister and thus attempt to overthrow the Government. It is also possible to interpret his evidence as indicating that he considered that the Guard Force, containing a ZIPRA man who had behaved aggressively to ZANU (PF) Ministers, constituted a threat to the stability of the Government.

I therefore ruled that if No. 1 established that his acts were done to suppress a person or persons who had attempted to overthrow the Government on the previous day, or who were considered by him to be contemplating performing acts of violence to bring about the overthrow of the Government, he comes within the protection of the Indemnity and Compensation Act and his plea to the jurisdiction of the Court must be upheld.

The State, in contrast to the defence, alleged that the accused had visited the farm merely so that No. 1 could punish or obtain revenge from the members of the Guard Force there, because Bhebe, one of their number, had fired three shots at Mr Machipisa's house, not for the purpose of overthrowing the Government, but as a reprisal or gesture of defiance for the assaults committed on him by some persons at the house.

At this stage it is necessary to record that a radical difference of opinion upon a crucial issue has arisen between the learned assessors and myself. We have therefore agreed that I shall now proceed to set out my views on the entire case and then the views of the majority will be dealt with. The majority views will be expressed much more shortly than mine, the reason for this being that most of what I have to say on the case as a whole has been agreed to by the learned assessors and it is only our differences that will be dealt with later. We also agree that

**Copyright Juta & Co Ltd**

in the special circumstances prevailing it is fair to the accused and to all persons interested in the outcome of the trial that we should survey all the evidence led.

I shall consider first the evidence concerning No.1's plea to the jurisdiction. [The Learned Judge then analysed the evidence.]



PITTMAN J

In my view, the instructions given by No. 1 were far more consistent with a desire on his part to punish the Guard Force for Bhebe's behaviour than with an attempt to suppress terrorism. I consider that the manner in which the barracks were attacked and the guards allowed to flee without being captured and questioned is also more consistent with the purpose of punishment than with the suppression of terrorism. Indeed it is unthinkable that if No. 1 genuinely believed that one or more of the guards was a terrorist, in the narrow sense of the word, he would have allowed them all to escape, and thus be able resume their terrorist activities, perhaps with stimulated vigour. His statement that it was not his intention to cause any physical harm at all would be improbable if he really believed that the Guard Force had tried to kill him and to overthrow the government.

I find, in accordance with the evidence which generally speaking became common cause, that all eight accused, led by No. 1, came to the barracks and all fired some bullets at building "A" of which about 80 hit its exterior and about 20 struck the trees nearby. This firing was spasmodic on No. l's orders and all five occupants of the building escaped, even after one of them had offered to surrender. The accused then proceeded to damage building "B" and the house west of it and took possession of the three rifles, some magazines and other equipment in the barracks.

It is important to note at this stage that in Exhibit 21 it was said that the damage to the barracks and what were described as `'the other buildings in the immediate vicinity" was done with the main objective of warning those who had fled not to return and of reducing the habitability of the buildings." Such an objective was clearly more consistent with a motive of punishment than with an attempt to suppress terrorism, since a terrorist is still a danger so long as he is at large, even if he has been deprived of his weapons and living quarters.

There can be no doubt that all the accused attempted to murder the five occupants. I do not think the attempt was made with actual intent to kill, because if that had been the case some of the occupants would almost certainly have been injured by the firing. But I am satisfied that there was a constructive intent to kill on the part of each accused because he must have been aware of the possibility that each of the occupants might be killed by the fire of himself and his colleagues, and he nonetheless persisted in firing and in associating himself with the firing of the others.

In the light of these findings, it is necessary for me to decide whether the nature of No. l's act against the deceased provides further evidence



Copyright Juta & Co Ltd

PITTMAN J

for deciding whether he did it predominantly for the suppression of terrorism, or in connexion with punishment or revenge. I am of the opinion that it does not provide such evidence, because the act was consistent with both motives, and it is impossible to say that because of that evidence the possibility of the existence of either motive is made stronger than that of the other. I therefore accepts the joint submission of the State and the defence that No. l's act against the deceased was done in connexion with the same basic purpose which he had during his act in attacking the barracks and thus in attempting to murder the five guards. But the killing of the deceased, the manner of it and the nature of No. l's responsibility in law for it do not assist me in determining what his basic purpose was.

After leaving the farm, No. 1 visited Dr. Nhiwatiwa, whose evidence of that meeting does not assist the Court in its present inquiry. Of greater importance is the meeting later that night between No. 1 and Detective Inspector Keen, Superintendent Lees and DSO Smith. Keen and Lees compiled Exhibit 22, a summary of the information given to them by No. 1 at some unspecified time or date after their three hour conversation with him had ended. The last two sentences in paragraph 6 of Exhibit 22 read:

> "He said that they had proceeded by car to Stamford Farm to carry out a mopping up operation against those who had fired on him the day before. When asked why he did not report the matter to the police for them to investigate, the accused replied that he had deliberately excluded the police as he considered that if people shoot at him personally it was up to him personally to avenge the matter."

The last sentence was discussed in evidence by Keen and Lees, but denied by No. 1. According to Keen, Lees said to No. 1: "Why didn't you report to the police after being shot at?" No. 1 replied: "No, it was a challenge. If I am attacked personally, I must personally avenge". According to Lees, No. 1 said that he regarded the attack as a personal challenge, and he wanted to avenge himself. No. 1 denied making any such remark. He had not reported to the police because he did not trust them.

The police witnesses made good impressions on me as sincere and reliable witnesses who gave no cause for suspicion that they were fabricating evidence against No. 1. No. l's denial was unimpressive, because he did not challenge making several statements recorded in Exhibit 22 which were palpably false, for example, concerning the deceased's behaviour before he entered the house. It is clear to me that whilst No. 1 was talking to the police, he was trying to exculpate him





self from any crime he might have committed and his denial that he said he had been attacked personally and had to avenge himself personally was probably made for such an exculpatory purpose. I find that he did say in effect that his motive was one of personal revenge. Exhibit 22 is also important evidence because it contains no reference to suppression of terrorism by No. 1 and No. 1 did not claim to have actually made any such reference.

Consequently I consider that Exhibit 22 militates strongly against No. l's claim that his purpose

Copyright Juta & Co Ltd

was the suppression of terrorism.

The last evidence to be considered in this regard is No. 1's warned and cautioned statement, Exhibit 19, made on 6th August, which has already been referred to in this judgment. In it No. 1 did not say or imply in any way that he was the particular target of the three shots fired, or that he believed that the firer of the shots or the man who had tried to climb over the fence into Mr Machipisa's house was seeking to kill him and was a terrorist in the narrow sense.

As regards his motive for attacking the farm, he merely said:

> "(I told) Comrade Mugabe that I was going on an inspection operation to see who was occupying that place and who had fired on us."

Like Exhibits 21 and 22, Exhibit 19 contained exculpatory descriptions of the events at the farm which bore no resemblance at all to what was said by the various accused in the witness box, and consequently I can only say that Exhibit 19 does not assist No. 1 in his task of satisfying me that his purpose in attempting to murder the five guards and in assaulting the deceased was the suppression of terrorism.

It will thus be seen that No. 1 has failed to satisfy me on the balance Of probabilities that he is entitled to the protection of the Indemnity and Compensation Act, and consequently I consider that his plea to the jurisdiction should be dismissed.

In my judgment, therefore, No. 1 should accordingly be found guilty on count 1 of attempted murder with constructive intent to kill, and on count 2, guilty of murder with constructive intent to kill.

The other accused's pleas to the jurisdiction were not elaborated by any of them in their evidence because they all adopted the attitude that their pleas would stand or fall with that of No. 1. This attitude



PITTMAN J

was persisted in throughout the trial and was accepted by both counsel. It is clear to me that with one possible qualification this was the right approach to adopt. The possible qualification relates to No. 5's actual killing of the deceased. It could be argued as his act was done independently of the orders of No. 1, he had to prove, and failed to prove, that the killing was done in good faith in connexion with the suppression of terrorism. However, it seems to me that as he was attempting to preserve his own life, albeit in an unlawful manner, in the course of apprehending the deceased, in obedience to No. l's orders, his plea to the jurisdiction stands or falls with No. l's plea.

I therefore consider that as No. 1's plea has to be dismissed, these of Nos. 2 to 8 must also fail.

I must now consider the validity of the defence raised for Nos. 2 to 8, that they were soldiers acting in obedience to orders. That defence is not available to No. 5, as regards the second charge against him, because his killing of the deceased was not in obedience to any order to do so by No. 1. Mr *Glaum* contended that this defence was not available to the other seven

Copyright Juta & Co Ltd

accused in respect of either charge, first because they were not soldiers, and secondly, because the requirements of such a defence had not been met by them. We are unable to accept Mr *Glaum's* equivocal attitude as regards the accused's position as soldiers. He said that they were not soldiers, but even so, if persons in their position met the other requirements of the defence, he would not prosecute them for any act done by them as body-guards.

However, he conceded that by virtue of the Lancaster House Agreement, ZANLA forces had become part of the armed forces of Zimbabwe at least until the election in March, 1980. It was also accepted in the judgment of BECK, J No. GS 177-80, dated 3.9.80, concerning the accused's application for bail, that the ZANLA commander is a member of the Joint High Command, and that the seven accused on 4th August were serving members of ZANLA and as such subject to his discipline and control. It was not contested that the seven accused had been assigned to serve as No. l's body-guard under his orders and consequently the Court considers that it must regard them as soldiers for the purpose of this defence and that No. 1 had been lawfully placed in authority over them.

They were therefore obliged to obey any orders lawfully given to them by No. 1. Mr *Glaum* rightly contended that No. 1 had no lawful right to order them to attack the barracks and the deceased's house, and consequently I have to consider the position of the seven accused in



relation to count 1, and the position of No. 4 in relation to count 2 on the basis that No. l's orders to them were unlawful. As regards count 2 Nos. 2, 3, 6, 7 and 8 were not involved and No. was not acting under No. 1's orders.

So far as I am aware, there is only one authoritative judgment in Zimbabwe law dealing with this defence. In *R v Mayers,* 1958 R & N 277, MURRAY CJ, said:

> "The case of *Queen v Smith* (1900) 17 561, is the leading case on the question of immunity from criminal responsibility of a soldier for acts done in obedience to the orders of a superior officer. It decided that such immunity existed if the orders were not so manifestly illegal that the soldier must or ought to have known them to be so, and if he honestly believed he was doing his duty in obeying them. This question might raise matters of legal interest in regard to considerations as to whether the principle of the case is to be restricted to soldiers on active service or extended to soldiers involved in operations when the military forces of the Federation are called upon to preserve or restore order in a state of emergency, or even extended to all peace-time operations of the army."

I shall deal first with the question whether it is only a soldier on active service who can avail himself of this defence.

In my judgment, it is clear, in the light of the recent history of Zimbabwe, that a soldier must be able to avail himself of this defence if he acted during the state of emergency existing in August, 1980. Basically the defence is based on public policy. Since soldiers act as instruments of the State, the latter can hardly punish them for so acting. See Burchell and Hunt, *SA Criminal Law and Procedure,* Vol. 1, p. 297. The position of the seven accused on the 4th August in the state of emergency was so similar to the position they were in on active service a few months before, that it would be unfair to deny them the defence simply because they were not technically still

Copyright Juta & Co Ltd

on active service on that date.

The next question is whether the defence is available to a soldier only if the order he obeyed was a lawful one.

In *R v van Vuuren,* 1944 OPD 35, a South African judge, DE BEER A J.P., dissenting from SOLOMON J's judgment in *R v Smith,* held that the defence of obedience to the order of a military superior was only available to an accused if the order was legal. With respect, I do not agree with DE BEER AJP He stated that all military orders are obviously and decidedly either lawful or unlawful. I regard this statement as self-evidently incorrect, and it is noteworthy that in the Manual of Military Law, in a passage quoted in DE BEER A J.P.'s, judgment it was actually said:



PITTMAN J

> "But so long as the orders of the superior are not Obviously and decidedly fin opposition to the law of the land, or to the well-known and established customs of the army, so long must they meet prompt, immediate and unhesitating obedience."

Furthermore, the passage in Smith's case referred to by MURRAY CJ, was cited with evident approval by the South African Appellate Division in *R v Werner and Anor.,* 1947 (2) SA 828 (AD) at p. 833. Also, in Gardiner and Lansdown, *SA Criminal Law and Procedure*, 6th Edn., at p. 116 *Smith*'s case was quoted as authority for the proposition: "A soldier is not criminally responsible for acts of violence done under the orders of his officer if such acts are not manifestly illegal", and in *The Modern Approach to Criminal Law,* 1945 Edn., Dr. W T S Stallybrass said at p. 429:

> "Probably the English law was correctly laid down by SOLOMON J in South Africa: Of a soldier honestly believes he is doing his duty in obeying, and if the orders are not so manifestly illegal that he ought to have known they were unlawful, he will be protected by the orders.' The German Supreme Court, in the admirably impartial trials of the German war criminals, applied a very similar rule "

I am therefore satisfied that even although the order relied upon was illegal, it can form the basis of the defence, contrary to the ruling in *R v van Vuuren, supra*,.

The next question of fact to be decided is whether each of the seven accused knew or ought to have known that No. l's order to fire on the barracks was illegal. I have no doubt that each of these accused was honest in his assertion that he did not know of its illegality and believed he had to obey it. What is of more importance is whether he ought to have known of the illegality. This question raises an issue of law in the form that I must decide whether the test is whether the accused himself should have known of the illegality or whether a reasonable man in his position would have known of it.

In my judgment, the test to be applied must depend upon the Court's assessment of the accused himself. The difficulty of applying the test of a reasonable man's reaction in a mixed community like Zimbabwe was stressed by BEADLE CJ, in *R v Nkomo* (1), *supra*, as follows:

Copyright Juta & Co Ltd

"In England, with its relatively homogenous population, the test of 'the reasonable man' in other contexts has caused enough difficulty in attempting to define the standard. In a country such as this, with its diverse, multi - racial community, whose social and educational standards vary over almost the widest possible range, the task is well nigh impossible."



PITTMAN J

The criticisms of these remarks in *R v Nkomo* (4) 1964 (4) SA 452 at p. 456 do not, with respect, appear to me to be relevant to the present problem, and in any case I hold that it is impossible to determine what degree of knowledge, sophistication or social or legal awareness should be attributed to the notional reasonable man in this context. Furthermore, it is significant that in *Smith's* case, SOLOMON, J inquired whether the order given in that case was so manifestly or obviously illegal that "a man of Smith's intelligence" must or ought to have known that he was doing wrong in obeying that order. That approach seems to me to be the only practical and common-sense test to apply in such circumstances. It was not differed from in *Mayer*'s case, and is consistent with the reference to *Smith*'s case in lair. Stallybrass's essay.

Consequently I rule that the defence will be available to each of the seven accused unless he personally ought to have realized that No. 1 was acting illegally in ordering him to fire at the barracks and to capture the occupants and equipment in it.

[The remainder of the judgment is not material to this report - Editor.]



## ROBINSON v FITZGERALD 1980 ZLR 508

**Court** **General Division, Salisbury**

Civil Trial

Beck, J

3rd and 10th December, 1980

### Flynote

Damages - assault - aspects of contumelia and physical pain and suffering equal.

### Headnote

The Plaintiff was subjected to a serious and prolonged assault in his own house and in the presence of his newly married wife, his servant and a total stranger who had accompanied the defendant. In formulating his claim for general damages the Plaintiff specifically included the aspect of *contumelia*.

*Held* that this was a most important aspect of the claim, virtually equal, for the purposes of compensation, to the aspect of pain and suffering.

Copyright Juta & Co Ltd

The Plaintiff was awarded $1800 in general damages.

*R. Jagger,* for the Plaintiff.

Defendant in default of plea.

## Judgment

**Beck J:** The defendant is sued lay the Plaintiff for the following amounts:

---



BECK J

1. Fifty-two dollars, being an amount expended by Plaintiff on defendant's behalf under an agreement between the parties A relating to the repair of the defendant's motor vehicle.

2. Two thousand seven hundred and sixty-nine dollars, being damages suffered by Plaintiff in consequence of an assault on him by the defendant in November, 1979, in the course of which assault bodily injuries were done to the Plaintiff and damage was done to his property. The for $2 769 is made up as follows:

| | | $ |
|---|---|---|
| (a) | Pain, suffering, *contumelia* | 2 000 |
| (b) | Medical expenses | 74 |
| (c) | Cost of replacing lounge suite | 475 |
| (d) | Cost of replacing dentures | 190 |
| (e) | Cost of replacing door handle and lock | 30 |

Having entered an appearance to defend, and having requested and been given further particulars of the Plaintiff's claims, the defendant is in default of plea and has been barred. The trial has therefore been uncontested and the following evidence to liquidate the claim for damages was given.

On the day in question the defendant, under the erroneous impression that the Plaintiff had assaulted his (the defendant's) wife, went in a rage to the Plaintiffs house, accompanied by a friend. The defendant burst open the locked front door and rushed into the lounge where the Plaintiff and his newly-married wife were. Without a word of prior inquiry or explanation, and in the presence of the Plaintiff's wife, his house servant, and of the person who had come with the defendant, the latter flew at the Plaintiff and commenced a serious, sustained and painful assault upon him. He bit him 10 times, each time drawing blood, and partly severing, by one of his bites, the Plaintiff's right ear lobe which had to be sutured back in place. Pie drove his knee into the Plaintiff's testicles, throttled him until he was blue in the face, banged his head a number of times against the wall until he knocked him senseless, and fractured a rib. He ignored the cries of protest of the Plaintiff's wife and was impervious to blows that she delivered to his head with her husband's crash helmet that lay to hand in the lounge. In the course of the

Copyright Juta & Co Ltd

assault he broke a chrome denture worn by the Plaintiff, and with mud-caked shoes he soiled the plaintiffs new lounge suite. The material of the suite was further soiled by blood stains and the woodwork of it was damaged in the turmoil of the affray. The mud and blood stains have been impossible to remove, and the Plaintiff therefore claims from the defendant the cost of the suite against delivery to the defendant of it.



BECK J

In consequence of the assault the Plaintiff was off work for several days. He still experiences occasional headaches and stiffness and sore" ness of the neck. He is a dealer in motor spares and he seemed to me to be a mature young man of normal sensitivity and sophistication who is accustomed to a comfortable standard of living. He says he felt greatly humiliated and insulted by this degrading and violent invasion of his home and attack on his person before the eyes of his bride, his servant and a stranger who had the impertinence to accompany the defendant on this gross escapade of trespass.

In formulating his claim for general damages the Plaintiff has specifically included the aspect of *contumelia*. There can be no doubt in my view that this is a most important aspect of his claim. I regard it as virtually the equal, for purposes of compensation, of the aspect of his physical pain and suffering, and I consider that under the heading of general damages he should be awarded an amount of $1 800.

With the exception of the cost of replacing the front door handle and lock, which was proved in the slightly lower amount of $28,73, all the other amounts of special damages claimed as rejected above for medical expenses, for replacing the broken denture, and for the irreparably spoilt lounge suite, have been supported by documentary proof.

The claim for reimbursement of expenses incurred in the agreed repairs to the defendant's motor vehicle was reduced by the Plaintiff to the sum of $43,61, for which documentary proof was available.

Accordingly, there will be judgment, with costs, in the Plaintiff's favour for the abovementioned sum of $43,61 and for damages in the total amount of $2567,73 against payment of which the defendant is declared entitled to delivery of the spoiled lounge suite.

*Morris, Beale & Collins,* attorneys for the Plaintiff.

*D W Aitken & Co.,* attorneys for the defendant.



## THE STATE v MANDORO THE STATE v BROUGHTON 1980 ZLR 511

**Court** **General Division, Salisbury**

Copyright Juta & Co Ltd

Criminal Review

Waddington, J

17th December, 1980

## Flynote

Criminal Procedure - sentence - possession of dagga by adults - whipping not competent - appropriate sentence where accused already serving indeterminate sentence.

## Headnote

The two accused, each adult prisoners serving the indeterminate sentence, were convicted of the possession of dagga in contravention of section 9 (b) as read with section 19 of the Dangerous Drugs Act [*Chapter 319*]. Each was sentenced to receive four strokes with a light cane.

*Held* that , since neither subsections (2) and (3) of section 19 the Dangerous Drugs Act [*Chapter 319*], nor any provision of the Magistrates Court Act [*Chapter 18*] or the Criminal Procedure and Evidence Act [*Chapter 59*], permitted a whipping for the simple offence of possessing dagga, the sentence was incompetent.

*Held,* further, that a dietary punishment was appropriate even though the accused Mandoro had suffered that penalty twice the past. It is an aggravating feature of the offence for a convicted prisoner to possess dagga.

Cases cited:

*S v Ndhlovu,* 1975 (1) RLR 168,

*S v Langton,* 1972 (4) SA 279 (RAD);

*R v Jimmy,* 1967 RLR 194.

## Judgment

**Waddington J:** These two cases concern the same point and it is consequently convenient to deal with them in a single judgment.

The two accused were each convicted in the same Magistrate's Court in separate trials of the possession of small quantities of dagga in contravention of section 9 (b) as read with section 19 of the Dangerous Drugs Act [*Chapter 319*] and each was sentenced to receive four strokes with a light cane. At the time of the commission of the offences each accused was an adult prisoner in Salisbury Central Prison serving an indeterminate sentence. As I was not satisfied that the sentences imposed on the two accused were competent, I sought the views of the Attorney-General who has confirmed my views.



WADDINGTON J

Copyright Juta & Co Ltd

Subsections (2) and (3) of section 19 of the Dangerous Drugs Act [*Chapter 319*] set out the circumstances in which strokes may be imposed for certain offences committed in contravention of the pro visions of the Act. Those provisions read:

"(2) Any person who is over the age of eighteen years and who is convicted of an offence in terms of subsection (1) which involves-

(a) the unlawful supplying of a drug to or procuring of a drug for or offering to supply a drug to or procure a drug for a person under the age of eighteen years; or

(b) the unlawful inciting or influencing of a person under the age of eighteen years to smoke or use any drug in contravention of the provisions of Part II;

shall be liable to imprisonment for a period not exceeding ten years or to such imprisonment and a whipping not exceeding ten strokes.

(3) Any person who is convicted of an offence in terms of subsection (1), other than an offence referred to in subsection (2), which involves-

(a) the unlawful supplying of a drug to or procuring of a drug for or offering to supply a drug to or to procure a drug a for any other person; or

(b) the unlawful manufacture or carrying on of any process of manufacture of a drug; or

(c) the unlawful cultivation of a plant from which a drug is derived; or

(d) the inciting or influencing of any other person to smoke any drug in contravention of the provisions of Part II;

shall be liable, in addition to the penalties specified in subsection (1), to a whipping not exceeding ten strokes."

Neither of these subsections mentions the simple offence of possessing dagga in contravention of section 9 fib) of the Act. Accordingly, the sentences in these two cases cannot be justified by virtue of section 19 of Chapter 319. *Expressio unius est exclusio alterius.*

In terms of section 54 '(8) of the Magistrates Court Act [*Chapter 18*], a magistrate exercising his ordinary statutory jurisdiction may only impose the punishment of whipping in the case of a conviction for-

"(a) culpable homicide, criminal *injuria,* attempted murder or assault of an aggravated or indecent nature or with intent to do grievous bodily harm or with intent to commit any other offence; or

(b) arson, rape, bestiality, any act of gross indecency committed by one male person with another, robbery, malicious injury to property or any attempt or incitement to commit any such offence; or

(c) any statutory offence for which whipping is prescribed as a penalty; or



WADDINGTON J

(d) theft of-

(i) a bicycle; or

(ii) a motor vehicle; or

**Copyright Juta & Co Ltd**

(iii) maize on the cob, whether green or dry; or

(e) any common law offence committed within a period of three years after conviction for a common law offence or a statutory offence referred to in paragraph (c);

and every whipping shall be carried out privately in prison."

The only other provision on the statute book which in general terms permits a Court to impose a sentence of a whipping is section 330 of the Criminal Procedure and Evidence Act [*Chapter 59*] the effect of which is to confer a discretion on Courts to impose on convicted male offenders under the age of 19 years a whipping in lieu of any other punishment or in addition to a suspended sentence of a fine or imprisonment. In these two cases neither accused was under the age of nineteen and section was consequently inapplicable.

In the absence of any other authority sanctioning the imposition of strokes, it follows that the sentences imposed by the magistrate in these cases were incompetent and cannot be allowed to stand.

There is authority for the proposition that it is an aggravating feature of the offence of possessing dagga if that offence is committed by a convicted prisoner because such persons are, when serving a sentence, expected to behave themselves and not commit any breaches of the law (per LEWIS A J.P., as he then was, in *S v Ndhlovu,* 1975 (1) RLR 168 at 170G-H). This consideration justifies the imposition of a heavier sentence in such cases which in other circumstances would attract a small fine as a punishment (*Ndhlovu*'s case, *supra*, at 169) especially as prisoners smoking dagga while serving sentences would be subversive of prison discipline. The appeal against sentence in *Ndhlovu's* case was accordingly dismissed, it being held that the sentence of three months' imprisonment with labour which had been ordered to run consecutively with a four-year prison sentence was appropriate.

In the present cases the sentences of whipping have not yet been carried out.

As the two accused are serving the indeterminate sentence, the question which now arises is what is an appropriate sentence in each of these two cases. Because I entertained some doubt in the matter I referred the two cases to the Attorney-General for his views. He has replied as follows:

"It would appear that the only effective manner in which the two accused can be punished is by means of the imposition of solitary confinement and reduced flirt as provided for in section 54 of the Magistrates Court Act



WADDINGTON J

*[Chapter 18].* To impose this form of punishment it becomes necessary to conjoin it to a determinate period of imprisonment of sufficient length to cover the periods of solitary confinement and reduced diet but in view of the indeterminate sentences which the accused are serving, the determinate period of imprisonment should be ordered to run concurrently with the indeterminate sentence in terms of section 319 (2) of the Criminal Procedure and Evidence Act, [*Chapter 59*], as the Honourable Judge has suggested. This is a competent sentence; see, *S v Langton,* 1972 (4) SA 279 (R.A.D.).

**Copyright Juta & Co Ltd**

> It is noticed that Amos Mandoro has already twice been sentenced to solitary confinement and reduced diet but while reservations may well be entertained at the propriety of again imposing this form of punishment on him it would be manifestly unjust to absolve him from punishment altogether if Broughton is to be so punished when the two offences were of the same magnitude and committed within a week of each other."

The effective possible punishments open to any Court in these two cases are limited in scope. The imposition of a consecutive period of imprisonment would be inappropriate as the accused are serving the indeterminate sentence. In Broughton's case he has never been sentenced to undergo any form of dietary punishment. In Mandoro's case he has suffered this form of penalty twice but as long ago as 1972. No lasting benefits flowed from the imposition of this extraordinary penalty, however, because the accused soon after his release found himself before the criminal Courts again. Notwithstanding the principle that dietary punishments should not be reimposed in circumstances where they have demonstrably failed in the past, in the peculiar circumstances of Mandoro's case it seems that only Hobson's choice is left to the Courts. Despite that, however, I consider that some form of dietary punishment is called for without running the risk of the penalty taking on the character of vindictiveness in Mandoro's case. (See the judgment of FIELDSEND J, (as he then was) in *R v Jimmy,* 1967 RLR 194 at 195H.) In reaching this conclusion I bear in mind that it is an aggravating feature of the offence for a convicted prisoner to possess dagga which calls for a more severe penalty than usual. *(Ndlovu's* case, *supra.)* At the same time I will take into account the fact that the amounts of dagga concerned were only 1 gram in Mandoro's case and 420 milligrams in Broughton's case.

The sentence in each case is set aside and the following is substituted:

> "6 weeks' imprisonment with labour, of which the first and third fort nights will be in solitary confinement and on reduced diet. The sentence is to run concurrently with the sentence now being sewed by the accused"

The proceedings are otherwise confirmed.

This was a case which in my view ought to have been dealt with as a contravention of section 89 of the Prisons Act [*Chapter 21*].

**Smith J:** agrees.

---



## STATE v MBABVU AND ANOTHER 1980 ZLR 515

**Court** **General Division, Salisbury**

Criminal Review

Waddington, J

17th December, 1980

### Flynote

Criminal Procedure - section 312 (5) of the Criminal Procedure and Evidence Act [Chapter 59] - proper

---

**Copyright Juta & Co Ltd**

procedure to adopt when sentencing in the absence of the trial magistrate.

Criminal law - robbery - whether section 8A of the Stock Theft Act [Chapter 72] includes robbery.

## Headnote

The two accused were charged with robbery. Amongst property alleged to have been taken from the complainant were $20 in cash and two head of cattle. The first accused was convicted of robbery only in respect of $16 in cash. The second accused was convicted as charged. The trial magistrate left the Bench before passing sentence. A second magistrate read the trial magistrate's notes and sentenced the first accused to two years' imprisonment with labour and the second accused to the mandatory nine years' imprisonment with labour in terms of section 8A of the Stock Theft Act [*Chapter 72*], being of the view that the section was intended to include robbery.

*Held* that when utilising the provisions of section 312 (5) of the Code, the sentencing magistrate must (1) note on the record the reasons for the absence of the trial magistrate, (2) allow the accused the opportunity to address in mitigation, p(3) consider the evidence recorded and on which verdict is returned.

*Held,* further, that section 8A of the Stock Theft Act [*Chapter 72*] is clear and unambiguous and the references, *eo nomine* to the offences of theft and attempted theft preclude a Court from extending its effect to other offences.

Cases cited:

*R v Kumese,* 1953 (3) SA 797 (EDLD);

*R v Karonga,* 1960 (4) SA 64 (SR);

*R v Zvimba and Anor.,* 1968 (2) RLR 278.

## Judgment

**Waddington J:** The two accused were charged before a magistrate with robbery. The State alleged that the property taken from the complainant included $20 in cash, a large number of miscellaneous domestic articles, a bag of maize, a scotchcart and two head of cattle. The magistrate's notes of the evidence covered 50 pages of manuscript. The trial magistrate eventually convicted the first accused of "robbery of $16" and the second of "robbery", presumably as charged. Having done so,





without leaving any judgment or judgment notes or having passed sentence, the trial magistrate resigned. A second magistrate, purporting to act in terms of section 312 , (5) of the Code, having read the trial magistrate's notes of the evidence, then passed sentence on each of the two accused. The first accused was sentenced to two years' imprisonment with labour in respect of the "robbery of $16" while the second accused was sentenced to nine years'

Copyright Juta & Co Ltd

imprisonment with labour, being the mandatory sentence provided for the theft of stock in terms of the Stock Theft Act [*Chapter 72*]. In a covering memorandum the second magistrate explained that the sentence of nine years' imprisonment with labour was passed because he was of the view that although Chapter 72 does not expressly extend its provisions relating to the imposition of the minimum sentences to cases of robbery, "theft being an essential element of the crime of robbery the offence of which the second accused stands convicted is the crime of theft of bovine stock for which the penalty is not less than nine years' imprisonment with labour." There are therefore a number of questions which need to be considered arising out of this recital.

The proper procedure to adopt when acting under section 312 (5) of the Code has been explained in the case of *R v Kumese,* 1953 (3) SA 797 (ED). This case has been approved in these Courts by the decision in *R v Karonga* 1960 (4) SA (SR) 64 and *R v Zvimba & Anor.* 1968 (2) RLR 278. The requirements are, firstly, that the sentencing 13 magistrate must note on the record the absence of the trial magistrate and the reasons for such absence. This was not done in the present case; however, the second magistrate has in his covering memorandum elucidated these points. In my view there has been sufficient compliance with this duty.

Secondly, the accused must be given the opportunity of addressing in mitigation. From the record, it seems that the accused were permitted to exercise their right in this regard although their remarks related solely to the merits of the conviction.

Finally, it was incumbent on the second magistrate to consider the evidence recorded and upon which the verdict is returned. It appears from his memorandum that the second magistrate in this case has read the record but has nevertheless experienced difficulty in ascertaining the evidence on which the conviction is based because of the trial magistrate's failure to leave any written judgment. This difficulty is readily understandable. The evidence in this case is relatively complicated and the credibility of the complainant was dubious. The trial magistrate



WADDINGTON J

certainly appears to have rejected large portions of the evidence. It is, however, difficult, if not impossible, to discern which evidence has been rejected and which accepted. This difficulty is emphasized by the fact that the sentence passed on the first accused is, on my understanding of what evidence was relied upon, and with respect to the second magistrate, manifestly excessive. It is apparent from this case that in any but the simplest of trials it will be difficult for a second magistrate to satisfy this final requirement if he has not had the benefit of the trial magistrate's assessment of the witnesses' credibility and his adjudication on the evidence.

While attractive arguments may be advanced in support of the second magistrate's views regarding the imposition of the minimum sentence on any conviction for robbery involving the theft of bovines, I regret that I do not share those views. Nor does the Attorney-General to whom I referred this case for his views generally and to whom I am indebted for his assistance. On this subject the Attorney-General has stated that-

> "At first sight there seems to be much to be said for the viewpoint of the magistrate. Theft is an essential element of robbery; in terms of section 197 (1) of the Code it is competent on a charge of robbery to convict the accused of

Copyright Juta & Co Ltd

theft. Moreover, under section 3 (2) of the Stock Theft Act, the special jurisdiction is conferred whether or not the Act is referred to in the indictment, summary or charge. What is more it would be patently absurd to hold that the mandatory sentence applies only to cattle thieves and not to armed rustlers who are charged with robbery rather than theft. Section 8A of Chapter 72 is, however, plain and unambiguous; its language can admit of but one meaning. There is therefore no room to rely on any presumption against absurdity being intended by the law-giver. The Court is bound by the plain meaning of the words however absurd the result may be (see Copies on Statute Law 7th edition page 86). The lack of any provision for the offence of robbery in the Act is therefore a 'casus omissus'. According to the same 'opus' cited above at pages 69-70, the Court cannot, while purporting to interpret, amend an Act even to avoid an obvious mischief. To do so would be to usurp the functions of the legislature. It is even more important to apply these canons strictly in a statute such as the present which is penal in nature and where the penalty is so drastic. It is respectfully submitted therefore that the sentence of 9 years passed on the second accused is not competent."

Section 8A of the Stock Theft Act reads:

"Any person who is convicted of theft or attempted theft of any horse or bovine or receiving, knowing it to have been stolen, any stolen horse or bovine, or inciting any other person to commit any of the foregoing offences shall be sentenced to imprisonment for a period of not less than nine years."

While it is not necessarily correct that the failure of the legislature to mention robbery in this provision is a *casus omissus,* I agree that the provision is clear and unambiguous and that the reference to the *eo*



WADDINGTON J

*nomine* offences of theft or attempted theft, for the reasons advanced by the Attorney-General, preclude a Court from extending its effect to other offences. The sentence of nine years' imprisonment with labour was therefore incompetent.

As it is not possible in this case to determine with any confidence what facts were found proved by the trial magistrate, there is a real possibility that the first accused was prejudiced in the assessment of a proper sentence. In view of my conclusion concerning the impropriety of imposing the minimum sentence of nine years' imprisonment with labour on the second accused, the exact circumstances in which the offence was committed by him also become essential to appreciate in the assessment of an appropriate punishment.

In these circumstances, the convictions and sentences are quashed and the case is remitted for trial de novo on the same charge before a different judicial officer.

**Horn AJ:** agrees.



## H v THE COMMISSIONER OF TAXES 1980 ZLR 518

**Court** **Appellate Division, Salisbury**

Income Tax Appeal

Copyright Juta & Co Ltd

Fieldsend, CJ, Baron, JA and Goldin, JA

25th November and 23rd December, 1980

## Flynote

Income Tax Act [Chapter 181] - section 15 (2) (c) and (bb) - meaning of "farmer" - excludes person indulging in country pursuits as an exercise in self sufficiency - intended to cover persons carrying on the trade of farmer.

## Headnote

The appellant, a mechanical engineer in government employment, lived 27 miles out of Salisbury on a piece of land 100 acres in extent, where he and his wife kept and bred German Shepherd dogs. Additionally, they kept some dairy cattle and poultry, selling surplus dairy produce and eggs to friends in Me area and to colleagues at work, retaining sufficient for their domestic requirements. In the two years under consideration, the greatest number of cattle possessed by the appellant was eight and of chickens 113.

The appellant claimed the benefit of allowances and deductions granted to farmers in terms of section 15 (2) (c) and (bb) as read with the fourth and Seventh Schedules to the Income Tax Act [*Chapter 181*], in respect of improvements,



FIELDSEND CJ

maintenance and production costs. The appellant contended that he carried on the trade of a farmer which entitled him to the allowances and deductions claimed.

*Held* that the term "farmer" in the Act was not intended to include persons who indulge in country pursuits merely as an interest or to give themselves a more enjoyable way of life or to enable them to live a little more economically. The appellant's venture was no more than an exercise in self-sufficiency with the intention of disposing of any produce surplus to domestic requirements.

*Held,* further, that the term "farming activity" did not mean each and every activity on whatever scale which a farmer might undertake. It is only persons carrying on the trade of farmer who are intended to be covered by the definition.

*F G Smith* for the appellant.

*J C Andersen SC* for the respondent.

## Judgment

**Fieldsend CJ:** This appeal concerns a problem which has arisen on a number of occasions before in the Special Courts both here and in South Africa. It turns upon when a person can be said to be a farmer for the purposes of the special allowances granted to farmers under paragraphs (c) and (bb) of subsection (2) of section 15 of the Income Tax Act [*Chapter 181*].

The appellant is a mechanical engineer in government employment. In 1971, soon after his

Copyright Juta & Co Ltd

arrival in this country, he bought 100 acres of land, known as Omeo Farm, with a homestead on it, about 27 miles from Salisbury. This he acquired as a home for his wife and himself because they liked living out of town in a country setting and because they owned a number of dogs which needed space. Indeed one of the couple's main interests was the breeding and keeping of German Shepherds. In September, 1972, the appellant answered a query from the respondent in the following terms:

> "I believe you are drawing a red herring for yourself in attempting to track any income or anything else from my *residence* at Omeo Farm . . . *Not carrying out farming.* (his emphasis)...
>
> Four your information the place was purchased *so that my 12 Alsations could have a bit of room to run around."* (again his emphasis).

If this statement is accepted the purchase of two in-calf Jersey heifers in October, 1972, must have been solely for the purpose of providing dairy products for the household. The sale of the two calves born in March, 1973, is consistent with this purpose. The purchase of four further calves in June, 1973, is unexplained and the evidence of the change in the numbers of cattle kept up to 1st April, 1975, is very vague and unsatisfactory. Nor is the evidence very satisfactory as to what, if any,



FIELDSEND CJ

butter or milk were sold over these years. Apparently most of the milk was separated and butter was made from the cream for domestic use, with the sale of the odd pound or so to friends. It does appear, however, that butter to the value of $241 was sold in the tax year ended 31st March, 1976. During that year there were added four calves to the opening stock of four cows at the start of the year.

So far as poultry are concerned some chicken wire was bought at the end of 1973, the object being to keep hens for eggs for domestic use. Again there is little or no evidence of what development there was between 1973 and 1975 in this regard. By 1st April, 1975, 24 hens were being kept. These had increased to 33 by 31st March, 1976, and during the year eggs to the value of $267 are shown as having been sold. For this same year produce to the value of $250 is shown as having been used in the household, made up of butter, $70, eggs, $30 and milk, $150 - on rough figures about 155 lbs. of butter and 75 dozen eggs for the year, which seems an odd proportion. The total value of the produce - $758 - exceeded the cost of feedstuffs by only $75, leaving the $1000 odd for African wages and rations virtually uncovered.

For the tax year ended 31st March, 1976, the appellant claimed to be entitled to the cost of producing the butter, eggs and milk sold and used and to the allowances granted to farmers by the Income Tax Act. The allowances claimed totalled some $1800, the major items being African housing built, other improvements and wear and tear on machinery. These claims the respondent allowed.

It should also be mentioned that during these and subsequent years the appellant and his wife received fees from the boarding of dogs and also the price of those puppies which they bred and sold. These receipts were not declared and no expenses were claimed in respect of that

Copyright Juta & Co Ltd

activity It seems clear that over the years the number of dogs increased until by mid-1980 there were 22 or so on the property.

This brings the story up to the opening of the first tax year in question - 1st April, 1976. The appellant started with four cows, four calves and 33 hens. By the end of the year he had seven cows and 98 "chickens". For that year he declared sales of produce to the value of $687 and produce used in the household to the value of $250. There is, however, no indication as to how this is broken down between butter, eggs and milk. The direct cost of producing this total quantity of produce taking feedstuffs and stock dips alone was $1038, or more than the value of the produce, without taking into account any of the $1296 recorded



FIELDSEND CJ

as the cost of wages and rations. Allowances claimed amounted to about $2 300 on such items as repairs and maintenance, buildings and roads and wear and tear.

At the start of the second tax year in question - 1st April, 1977 - the appellant had seven cows and 98 chickens. During the year he purchased 50 point-of-lay pullets and 100 day-old chicks, ending the year with 113 "chickens", although there is no evidence why this final figure was so low. An explanation may be that during the year day-old cockerels were bought for rearing as table birds and these had been disposed of in about December, 1977, as the appellant's wife said. There is, however, in the return for that year no bringing to account of these table birds. For the year the appellant declared sales of butter and eggs to the value of $995, and produce used in the household to the value of $120. The reason for the decrease in the latter figure was said to be because there were casualties from disease among the cattle. Calves and one cow died during the year, leaving the appellant with a closing stock of six cows. The total value of the produce sold and used domestically was $1115, $450 less than the cost of foodstuffs and stock dips alone. Wages and rations cost a further $1446. Allowances claimed totalled about $3 300, the greater proportion being on repairs and maintenance, farm improvements and motor-vehicle expenses.

In January, 1977, the appellant and his wife took over a few rabbits from a departing neighbour and a small start was made in producing ration meat for them, but there were no sales.

The appellant claimed to be entitled for the two tax years ended March, 1977, and March, 1978, to the expenses of producing everything sold and used and to the allowances granted to farmers under the Act. These claims the respondent disallowed. He treated the amounts received as being offset by the notional cost of their production and so not taxable.

The issue before the Special Court and before us was solely whether in general terms the appellant was entitled to the allowances granted to farmers under section 15 (2) (c) and (bb) of the Income Tax Act. This the Special Court (SQUIRES J), decided against the appellant on the basis that he had not discharged the onus upon him of showing that he carried on the trade of a farmer during the years in question. That is the issue we are now called upon to decide. The parties did not ask us to decide what expenses or allowances the appellant was entitled to whichever way our decision went.

Copyright Juta & Co Ltd

FIELDSEND CJ

"Farmer" is defined in section 2 as meaning-

> "any person who derives income from pastoral, agricultural or other farming activities, including any person who derives income from the letting of a farm used for such purposes."

Pastoral and agricultural activities clearly signify something more than grazing a couple of goats or digging up a small patch of ground to grow vegetables. Pastoral activity in its ordinary sense involves the keeping of a flock or a herd (Oxford English Dictionary, I 1. "relating to or occupied in, the care of flocks or herds") and agriculture involves at least the working or tilling of the land. There are other words such as horticulture or market gardening Used s. 526 (5) of the United King dom Income and Corporation Taxes Act 1970) that could have been used if activity on a lesser scale had been intended. The use of the words "farming activity" in the context cannot therefore mean each and every activity on whatever scale which a farmer might undertake. A farmer might grow acres of peas on contract for a canning factory, but a person who grows a bed of peas in his garden all of which he intends to sell is not a farmer.

The nature of the allowances given, particularly those in the Seventh Schedule-for example for expenditure on the stumping and clearing of lands, works for the prevention of soil erosion, the sinking of bore" holes and wells, and aerial and geophysical surveys - are indicative of the fact that it is only persons carrying on the trade of farming who are intended to be covered by the definition. I do not mean to say that the activities said to be farming activities must be on any particular scale, nor of course that they need produce a profit-whether gross or nett. These are relevant factors to be taken into account but are not in any way conclusive. I am, however, clear that it is not intended that within the term "farmer" are to be included persons who indulge in certain country pursuits merely as an interest, or to give themselves a more enjoyable way of life, or even to enable them to live a little more economically than otherwise. The purpose particularly of section 15 (2) (bb) and the Seventh Schedule is to given incentives to persons engaged in the trade of primary production as farmers to effect substantial improvements to land occupied by them.

Turning to the facts, I find it impossible to fault the learned President's finding that on the evidence it was inescapable that the activities were "started for the benefit of the appellant, his wife and his household, as part of the development of their home-bearing in mind, and to keep matters in perspective, that a substantial amount of their time, interest and energies were taken up with their Alsatian dogs. The cows and



FIELDSEND CJ

chickens were first acquired for their produce, and to be enjoyed by the household, and possibly for the inherent attraction of doing so in a rural setting; and the rabbits were acquired simply to feed their employees or possibly their dogs."

The only record of sales of production over the whole period was a series of entries in diaries

Copyright Juta & Co Ltd

showing quantity and price. It was common cause that sales were either to friends who called or to colleagues of the appellant at work. There were no regular contracts and no truly commercial sales until after the end of the second tax year in question. Nor were there any records of milk or butter produced, or any record of eggs dealt with in the evidence. All this militates against the contention that this was a farming venture or indeed anything else than an exercise in self-sufficiency, with the intention of disposing of anything surplus to domestic requirements.

It was argued that it could be inferred from the facts that over the tax years 1975/6 to 1979/80 there were regular increases in the numbers of cattle, poultry and rabbits kept and an increase in the total value of produce sold, that there was an intention to increase production for the purpose of earning an income. This it was argued established that the appellant was carrying on a trade which in the circumstances could only be the trade of farming. This contention falls down in two respects.

In the first place the appellant's evidence does not bear it out, at any rate for the two years ended 31st March, 1978. Mr Andersen referred us to many passages of the evidence of the appellant and his wife which showed it to be unsatisfactory. It was vague and inconsistent and certainly evasive in regard to the income derived from the kennels and dogs, and the scale of those operations. This leaves me with the uneasy feeling that there has been a corresponding tendency to exaggerate the scale and scope of the operation relied upon to support the contention that the appellant was farming.

Secondly, while obviously one can take into account the facts of subsequent years to establish the nature and purpose of operations in the years under review, it cannot, I think, be said that progression towards commercial exploitation after the tax years in question necessarily indicates what was in mind during the years in question. There may well have been a change of direction and emphasis in those subsequent years. One of the difficulties I experienced in analysing the evidence was the tendency of both the appellant and his wife to revert to their more recent activities when questioned about the years in question. Indeed I feel that perhaps the learned President, with his favourable assessment of the



demeanour of the appellant and his wife, tended to overlook some of the defects and evasiveness of the substance of their evidence in his overall assessment of their credibility.

However that may be, in a very full and careful judgment by no means unfavourable to the appellant the learned President has reached a conclusion with which I cannot disagree. In my view the appellant did not discharge the onus upon him and the appeal must be dismissed.

**Baron JA:** I agree.

**Goldin JA:** I agree.

*Winterton, Holmes and Hill*, attorneys for the appellant.

*State Attorney,* attorney for the respondent.

Copyright Juta & Co Ltd

## THE COMMISSIONER OF TAXES v C LTD 1980 ZLR 524

**Court** **Appellate Division, Salisbury**

Income Tax Appeal

Fieldsend, CJ, Baron, JA and Goldin, JA

27th November and 23rd December, 1980

### Flynote

Income Tax Act [Chapter 181] - section 15 (2) (c) (ii) - meaning of "articles" - whether demountable partitions are.

Section 55 - gives no power to order costs - allowed" as a deduction under section 15 (2) (gg).

### Headnote

The taxpayer owned a seven-storey building in Salisbury, on certain floors of which it carried on the business of an insurer, while letting the remaining accommodation to tenants. The building was so constructed as to provide an open area of useable accommodation without any dividing walls. Internal divisions known as demountable partitions were provided once an occupant decided on the internal arrangement he required. The taxpayer claimed the benefit of allowances in terms of section 15 (2) (c) (ii) as read with the fourth Schedule to the Income Tax Act [*Chapter 181*] in respect of the demountable partitions belonging to and used by it for the purposes of its trade. The President of the Special Court found for the taxpayer and the Commissioner of Taxes appealed against that decision.

*Held* per Fieldsend CJ, that in considering the meaning of "articles" in section 15 (2) (c) (ii) there was no justification for limiting its meaning by reference to the words "implements, machinery and utensils" which followed it.



"Articles" has a wide meaning and connotes any identifiable material thing which is not so merged with other things as to lose its separate identity.

*Held,* further, per Fieldsend CJ and Baron JA, that the demountable partitions did not lose their identity as articles upon installation in the building. They could be moved with case within the building. The taxpayer's intention was to provide the flexibility which resulted from the ability to move the partitions to suit its own and its tenants' needs. The partitions did not merely turn an empty shell of a building into an office brook, but fulfilled the purpose of providing floor space which could be divided as required. (Secretary for Inland *Revenue v Charkay Properties (Pty.) Ltd.,* 1976 (4) SA 872 (AD) cited with approval.)

*Held,* further, that the partitions, where used by the taxpayer for its own offices, were used for the purposes its trade as they met the exigencies and varying needs of its business.

Copyright Juta & Co Ltd

*Held,* further, that section 55 of the Income Tax Act [*Chapter 181*] gives no power to the Appellate Division to make any order as to costs on appeal. Costs are, however, allowed as a deduction in the assessment of taxable income In terms of section 15 (2) (gg).

*Held,* further, per Baron, JA, that the test formulated by Pearson LJ, in *Jarrold (Inspector of Taxes) v John Good and Sons,* Ltd [1963] 1 All ER 141 at 149 to determine the meaning of "plant" was inappropriate to determine the meaning of "articles" in terms of the Income Tax Act [*Chapter 181*].

*Held* per Goldin, JA dissenting, that any part of the accommodation or premises within which business activities are carried on are not "articles". Demount able partitions have the advantage of being movable, but they remain the setting or the premises in which business is carried on. When prefabricated components are assembled to create office accommodation they are not articles, being no more a distinct entity than the windows, doors or floors. The allowance given by the Income Tax Act [*Chapter 181*] relates to the commercial building and not to the items and components used to create it.

Cases cited:

*Secretary for Inland Revenue v Charkay Properties (Pty.) Ltd. (supra);*

*Jarrold (Inspector of Taxes) v John Good and Sons, Ltd (supra);*

*Commissioner of Inland Revenue v LeSeur,* 1960 (2) SA 70 8 (AD);

*Imperial Chemical Industries of Australia and New Zealand Ltd v Federal Commissioner of Taxation,* 1 ATR 450;

*Yarmouth v France* (1887) 19 QBD 647;

*Inland Revenue Commissioner v Barclays Curie and Co.,* [1969] 1 All EA 732;

*J. Lyons & Co. Ltd. v Attorney-General,* [1944] 1 All ER 477;

*M'Intyre v M'Intee,* 1915 SC (8) 28;

*Quarries Ltd v Federal Commissioner of Taxation,* 8 AITR 383;

*Pettersen and Others v Sorvaag,* 1955 (3) SA 624 (AD);

*Kazangula Irrigation Co. and Others v Minister of Lands,* 1974 (4) SA 482 (RAD).

*J C Andersen SC* for the appellant.

*A J Swersky SC* with him *C L Mercer,* for the respondent.



FIELDSEND CJ

**Judgment**

Copyright Juta & Co Ltd

**Fieldsend CJ:** The taxpayer is an insurance company owning a seven - storey building in Salisbury. It carries on its business as an insurer on certain floors of the building and lets the remaining accommodation to tenants. The building is so constructed as to provide an open area of usable accommodation on each floor without any internal dividing walls. Once it is decided who will be occupying any particular area and what internal arrangement is required for whatever business is to be carried on In it, the internal divisions are provided by using what are known as demountable partitions.

The taxpayer claimed to be entitled to certain allowances in terms of the fourth Schedule of the Income Tax Act [*Chapter 181*]. The basis of the claim is that the demountable partitions are in terms of section 15 (2) (c) (ii) articles belonging to and used by it for the purposes of its trade. The Commissioner of Taxes disallowed this claim. On appeal to the Special Court (SQUIRES, J) the taxpayer's appeal was allowed and the Commissioner now appeals against that decision.

The first and most important question is whether the partitions are articles which attract the allowances granted by the provisions of the Act.

The learned President (SQUIRES, J) has set out the facts relating to the nature of the partitions with great clarity, his findings being based on evidence which was not challenged before us and on an inspection of the building. His findings are as follows:

> "Although such partitions are about 30 per cent. more expensive initially than the brick and mortar equivalent, they are lighter in weight and can be moved and reconstructed usually without damage, more cleanly and considerably more quickly and cheaply. We partitions themselves are made in modules or sections of a standard width; and if a door is needed in any particular place, a panel which includes a door-frame can be inserted where required, and the door hung once the panel is in place. They can be erected directly on to the concrete screed, or, if a carpet has already been laid over the screed, they can be erected on this carpet.
>
> The actual mode of erection is as follows: A length of timber is screwed horizontally to the ceiling which has special battens designed to accommodate such fixtures. On this timber strip is fixed by screws, or pop-rivetting, a length of aluminium ceiling rail; which is a 'U' -shaped section. A similar section of aluminium is attached to the inside of any outer wall onto which a partition will abut. Vertical aluminium sections, which are 'H'-shaped, are then fixed at the foot thereof to the floor, and at the top thereof to the ceiling. These strips are then ready to receive the panels which are slipped into the receptive part of the aluminium sections. At the bottom, an aluminium strip is also laid along the panels horizontally as a skirting-board.

---

**1980 ZLR p527**

FIELDSEND CJ

> The form of the partitioning and the mechanics of erection have improved gradually over the years, although basically the procedure is the same; and there are now three different sorts of such panel in this building which mark this progress in facility of erection-each development being some improvement on what was previously used.
>
> To dismantle and remove the partitions, this procedure is simply reversed.
>
> In such an event, holes which housed the screws would be left in the ceiling, wall, Door or carpet. These can either be made good-if so desired-with a little filler and a lick of paint or, in the case of a carpet, darned or stitched over if the holes are at all noticeable. If the carpet was laid after the partitions were erected, a strip can be added to make good the 2 "-3" gap where the partion would have been standing.

---

**Copyright Juta & Co Ltd**

Although the partition panels can be erected and dismantled relatively quickly, it is a task which requires skill and care, otherwise the panels can become damaged in the process. Such work would be undertaken by a joiner and two or three assistants.

Panels are available which can incorporate glass sections at the top, either in sheet or louvre form, for lighting or ventilation. The panel selected for such glass will have an aluminium section known as a glazing bead, inserted into it, in both vertical and horizontal planes The glass is then fitted against one of these sections, and held in place by another screwed in on the opposite side.

Supplies for heavier electrical uses, such as plug points and telephones, all come off one trunk duct which runs along the inside of the outer wall of the building, but which is not affected any more than cosmetically by the partitions. But so far as illumination lighting is concerned, the wiring for this is taken off from bunking specially designed in buildings of this sort, to run above the ceiling. This can be taken off at any appropriate point by a copper cable which is laid by a route inside the panelling to a switch-box of the conventional kind, which can be inserted Hush in the panel at the usual place immediately adjacent to a point of entry or egress. If the lighting is not activated by such a conventional switch, then a dropper-cord at almost any point in the ceiling can be let down and used.

The panelling itself is made of a compressed timber frame covered by a vinyl or a treated cloth material, which usually needs cleaning from time to time. It can also sustain damage from impact by furniture, office equipment or people, and will, do so more readily than a brick wall. It can also be discoloured by tobacco smoke. It is, furthermore, susceptible to damage in the process of installing, dismantling and re-erecting. If it is the aluminium section which is damaged, this can generally be repaired and made good; but the panels themselves will invariably need to be refurbished after dismantling and before re-use elsewhere.

In the more prestigious offices like executive suites or company board-rooms, the facing of the panelling may be sheets of veneered wood, or even wooden panels. The former are held on by some adhesive and may occasionally come off in a bulge, or split here and there; whereas the latter are simply held on by battens, one fixed to the panel and one to the wood cover, which then rest on each other and hold the panel In position by force of gravity.

---



FIELDSEND CJ

The acceptable evidence established that these partitions can be dismantled, moved and re -erected, or stored, or even used in another building. There was also evidence that there had been, since the completion of the building, and over the years of its existence, such erecting, dismantling and re-erecting of these demountable partitions to a fairly considerable degree. This had been done not only by the appellant but also by its tenants, to suit their respective requirements of the moment; and it was, moreover, anticipated that further such changes would be required in the future."

On these facts he found that the demountable partitions were articles and that, both in respect of the partitions in the taxpayer's own offices and in the premises let to tenants, they were used for the purposes of its trade. It is against these findings that the Commissioner of Taxes now appeals.

The nature of the partitions such as these has been considered in other cases, notably *Secretary for Inland Revenue v Charkay Properties (Pty.) Ltd.,* 1976 (4) SA 872 and *Jarrold (Inspector of Taxes) v John Good and Sons Ltd* [1963] 1 WLR 214 (CA).

These cases are not, of course, binding and I prefer in the first instance to consider the issues arising on the wording of the statute and on the facts of the particular case before us, and then

---

**Copyright Juta & Co Ltd**

to test my conclusions against the reasoning in those and any other relevant authorities.

Section 15 (2) (c) (ii) refers to:

> "articles, implements, machinery and utensils belonging to and used by the taxpayer for the purposes of his trade."

There is no warrant for limiting the meaning of the word "articles" by reference to the words which follow it. This is not an instance of general words following particular and specific words where the *euisdem generis* is more usually applied. It would do violence to the language of the section to read it as "articles such as implements, machinery and utensils". Moreover, as was pointed out in the *Charkay* case *(supra)* at p. 879A in regard to a section where the word "articles" followed the words "implements, machinery or utensils", there was no sufficiently clear *genus* common to the latter three words by which to limit the word "articles".

One is therefore thrown back to the ordinary meaning of the word "article". The relevant meanings of the word given by the *Oxford English Dictionary* are:

> "12. one of the distinct parts or portions of any subject;
>
> 13. a material thing forming part of, or coming under the head of, any class";

---



FIELDSEND CJ

and in *Webster's Third New International Dictionary:*

> "5a. one of a class of material things; b. a piece of goods;
>
> 6a. a thing of a particular class or kind as distinct from a thing of another class or kind."

The word must bear a very wide meaning and connote any identifiable material thing which is not so merged with other things as to lose its separate identity as an article. To take an example away from buildings, the shaft of a screw-driver on the production line of a screw driver factory is an article, as is the handle into which it is to be fixed, but once the two have been fixed together there is only one article, namely a screw-driver.

It follows in my view that these partitions when purchased, and before their installation, are articles within the meaning of that word in section] 5 (2) (c) (ii).

The next question is whether they lost their identity as articles when they were installed in the building. This may well amount to much the same thing as asking the question: "Are the demountable partitions movables or immovables?" I prefer, however, to put the question in the way I have as this avoids having to decide upon the interpretation of paragraph 10 of the fourth Schedule and its effect upon the allowances available in terms of paragraphs 2 and 3, issues which are not before us and which were not argued. The answer to the question will nevertheless depend on virtually the same factors. These are two-fold and possibly three-fold: the method by which they were installed, the intention of the taxpayer, and perhaps whether once they have been installed something new has come into existence by reason of the combination of the partitions and the shell of the building.

---

**Copyright Juta & Co Ltd**

On the facts found by the learned President and which cannot be disputed, the method of installation of the partitions is such that it cannot by itself be said that they must have lost their identity as separate articles and become part of the building. An important factor here is that the whole reason for their use is that they can be arranged and rearranged in a variety of ways and positions depending on varying requirements. They are not designed to fill a particular measured space, and they can be moved with case from one position to another, from one floor to another, and even from one building to another if need be.

I would stress that this is only one of the factors to be considered. A door mounted on a built-in door-frame is no more structurally integrated or physically incorporated into a building than are these partitions. Yet,

---



FIELDSEND CJ

in my view, it has on being mounted on its frame become a part of the building and has lost its separate identity as an article. I think that an article can lose its separate identity by incorporation in a building despite the fact that it can be detached without doing substantial injury to the article or the building.

The second factor is the intention of the taxpayer in installing the partitions. Its intention was that the partitions were not to remain in fixed positions in the building. The whole object of having this type of structure was to give the flexibility which resulted from being able to move the partitions as required to suit the taxpayer's or the tenants' needs. The partitions are not in the same category as for example the doors on the toilet and other facilities in the building: those were part of the building and designed and intended to remain there indefinitely, and in the true sense lost their identity as separate articles.

Finally on the question of whether the partitions lost their identity on installation, the Commissioner contended that before the partitions were installed there was merely a shell of a building, whereas after their installation there was an office block, and that the partitions could not therefore be regarded as separate articles, but were part of a new whole which had come into existence. In my view this overlooks the evidence that the whole purpose of this type of structure is to provide floor space which can be divided up as required. One floor might be let as a banking hall and might not require any dividing walls. It was not a question of turning a shell of a building into an office block, but of having a building in which dividable floor space could be let. It is on this aspect that I would respectfully disagree with the stress laid by HOLMES, JA, in his separate judgment in the *Charkay* case, *(supra,)* upon there being no complete building until internal partitions have been installed.

It was argued in *Commissioner of Inland Revenue v LE Sueur,* 1960 (2) SA 708 (AD) that as the building there was erected as a battery house, it did not become a battery house until the batteries had been erected and that therefore the batteries were part of the building. This argument was rejected as fallacious by RAMSBOTTOM JA, at p. 714F. Without wishing to draw too close an analogy between the cages in which hens lay their eggs and the offices in which executives and typists do their work I would with respect adopt the same approach.

---

**Copyright Juta & Co Ltd**

For all these reasons I am of the view that the demountable partitions are clearly articles and that after mounting they retain their identity as articles. This was the conclusion reached in the *Charkay* case *(supra)* which I regard as a strong persuasive authority. I respectfully agree with



FIELDSEND CJ

the reasoning of TROLLIP JA, at pages 882-883 as well as with his reasons for distinguishing the Australian cases - 10 CTBR (NS) 151, concerning a shop front, and *Imperial Chemical Industries of Australia and New Zealand Ltd v Federal Commissioner of Taxation,* 1 ATR 450 concerning special sound-absorbing ceilings.

The next point is whether the articles were used for the purposes of the taxpayer's trade. In the event of the conclusion being that which I have reached, namely, that the partitions are articles, it was not contended that those partitions which were used in the leased portions of the building were used for the purposes of the taxpayer's trade as a lessor. It was, however, argued by the Commissioner that the same was not true in regard to the partitions used in the part of the building in which the taxpayer carried on its business as an insurer. It was said that the partitions were no more than the setting in which the business of insurer was carried on. The *Charkay* case *(supra)* is of no assistance on this question as the taxpayer in that case was a property-letting company and did not occupy offices in the building there under consideration.

*Jarrold*'s case *(supra)* is more nearly in point on the facts. That concerned similar partitions in a building used by a taxpayer as a warehouse and offices in the carrying on of business as shipping agents. The point in issue was whether the partitions were "plant" which qualified for certain allowances granted in respect of "machinery or plant". The facts were somewhat different in that it was found to be a commercial necessity for the office accommodation to be highly flexible so that the area devoted to any particular department could be varied as occasion required, though in the 20-month period under consideration there had only been two alterations of the partitioning.

An important feature of that case is lacking here, namely the commercial necessity for the flexibility which the partitions gave. This feature was stressed in each of the judgments and seems to have been decisive in each case. The facts on this aspect as found by the learned President are as follows:

> "The evidence led by the appellant was to the effect that as its needs, or those of its predecessors, had expanded, so it had used the partitions to accommodate the increased requirements of space and staff.
>
> "It seems to me to be clear that staff employed in the business of insuring no less than others, would need office accommodation to perform their work at an optimum of efficiency and effectiveness, and that for a variety of reasons, seclusion here, and open space there, or a partition in between, would be necessary for the better discharge of business. Equally, there is a need to expand on one or more floors, and shrink on another or others;



FIELDSEND CJ

Copyright Juta & Co Ltd

> and the partitions used to increase or decrease not only the size but the number of offices. The causal link between the use of the partitions and the generation of income from the trade of insurance seems to me to be clear and definite."

I must confess that I find some difficulty with the conclusion in the last sentence, but, of course, the taxpayer did not have to establish a causal link between the use of the partitions and the generation of income. It had to show only that it used the partitions for the purposes of its trade.

In the light of the acceptable evidence that the exigencies of the tax" payer's business and of its varying needs which can be and are met by these demountable partitions, I do not [eel sufficiently convinced that they were not used for the purposes of trade to disagree with the learned President. The partitions, particularly those in the prestige offices on the seventh floor, are not in a very different category from fitted carpets or fixed decorative blinds and I would have no difficulty in holding that such items were used for the purposes of trade. In common with DONOVAN LJ, - *Jarrold's* case *(supra)* at p. 222 - I do not find the distinction between plant and setting very helpful though I would have some doubt as to whether it could be said that the evidence goes so far as to establish that the partitions in this case would qualify as plant. But that is not the test under our legislation. It is easier in my view for a taxpayer to show that he uses articles for the purposes of his trade than it is for him to establish that they are plant, which is the English test. On the question whether the taxpayer uses the partitions in its own offices for the purposes of its trade I would not alter the finding of fact of the Special Court in its favour.

In my view the appeal should be dismissed.

The respondent taxpayer asks for its costs on appeal. I do not think we have any power to order costs. Neither the General Division nor the Special Court can make any order as to costs save where the claim of the Commissioner is held to be unreasonable or the grounds of appeal therefrom to be frivolous-section 54 (12 . Prior to the passing of Act 27 of 1977 section 55 (3) empowered this Court on appeal from the General Division to make such order as to costs as it deemed fit, but appeals were confined to questions of law. Since the amendment of section 55 by Act 27 of 1977 an appeal now lies with leave on fact or mixed fact and law, as well as on law alone without leave. The substituted section, however, gives no power to this Division to make any order as to costs on any appeal. This is not, in my view, an oversight. Appeals being limited to appeals on law, and to appeals on fact with leave, there is no real possibility of the claim of either party being unreasonable or frivolous.



BARON JA

The Appellate Division is therefore put in effect in the same position as the General Division and the Special Court in regard to ordering costs. Moreover section 15 (2) (gg) gives the Appellate Division power to direct on a substantially successful appeal by a taxpayer that his costs shall be allowed as a deduction in the assessment of his taxable income. That is the order I would make in this case.

**Baron JA:** I agree that this appeal must be dismissed. Demount able partitions of the kind with which we are here concerned were the subject of *Secretary for Inland Revenue v Charkay Properties (Pty.) Ltd.,* 1976 (4) SA 872 and *Jarrold (Inspector of Taxes) v John Good and Sons*

**Copyright Juta & Co Ltd**

*Ltd.,* [1963] 1 All ER 141. In the former case TROLLIP JA, said at p. 882:

> ". . . their mounting and attachment in a particular position could not be regarded . . . as being permanent; moreover, . . . it can be said that, while in position, they did not lose their identity or character as movable inner walls. Consequently, I do not think that they were structurally integrated or other wise physically incorporated into the building permanently in such a way that they lost their own, separate identity and character, or, in the words used by RAMSBOTTOM JA, (in *Commissioner for Inland Revenue v Le Sueur,* 1960 (2) SA 708) 'that they were built into the fabric of respondent's building'."

These comments reflect my views in the present case, and I would not find it necessary to say more save that much argument was directed to *Jarrold's* case *(supra)* and other English cases.

The English cases were concerned with provisions which gave allowances for capital expenditure on "machinery or plant". Plant had been described by LINDLEY LJ, in *Yarmouth v France,* (1887) 19 QBDP 647 at 658 as including:

> ". . . whatever apparatus is used by a businessman for carrying on his business,-not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business".

In *Jarrold*'s case *(supra)*, ORMEROD, LJ, and DONOVAN LJ, were both satisfied that this definition of plant embraced the partitions the subject of that case; PEARSON LJ, in a passage at p. 149 formulated a test which has been adopted in later cases, namely, "whether the partitioning is part of the premises in which the business is carried on or part of the plant with which the business is carried on". He said, without expressing his own view, that either view could be taken.

I am by no means satisfied that this test is appropriate to the provision in our Act. The cases seem to me to show that "plant" and "articles"



BARON JA

are of a different order of being, I would be very surprised to hear a dry dock, which was held in *Inland Revenue Commissioner v Barclay Curle Co. Ltd.,* [1969] 1 All ER 732 to be plant, described as an article, and I would be even more surprised to learn that the lamps which in *J Lyons & Co. Ltd. v Attorney-General,* [1944] 1 All ER 477 were held not to be plant were not articles. I have considerable difficulty in accepting that something is not an article merely because it is part of the setting in which the taxpayer's business is carried on. Whether or not the article is used by the taxpayer for the purpose of his trade is a different point; but a lampshade or a picture or a carpet in the taxpayer's office seem to me clearly to be articles. Equally, I would have little doubt that a free- standing partition, performing precisely the same function as a demountable partition, is nonetheless an article it could hardly be described as having been integrated into the building. We thus return to the test formulated by TROLLIP JA, in *Charkay*'s case *(supra)*.

It was conceded that if the partitions were articles then to the extent that the floor space was let to its tenants they were used for the purposes of the respondent's trade. I am satisfied that they were so used also in the floor space occupied by the respondent itself; it seems to me that where, as here, a person commissions a building with the intention of occupying part of it, and

Copyright Juta & Co Ltd

applies the open plan concept to that part as well as the remainder, the inference is that he does so because in his own business also he intends to take advantage of the flexibility provided by the demountable partitions.

I agree also, for the reasons givers by the learned CHIEF JUSTICE, with his proposed order concerning costs.

**Goldin JA:** This appeal concerns the question whether demountable partitions used as the inner walls of the building owned by the respondent and partly let as offices and the remainder used for the carrying on of its own business constitute "articles" in terms of section 15 i(2) (c) (ii) of the Income Tax Act [*Chapter 181*]. This section provides "allowances in respect of articles, implements, machinery and utensils belonging to and used by the taxpayer for the purposes of his trade" as provided in the fourth Schedule. This schedule permits deductions of a special initial allowance in respect of "articles" etcetera used by the taxpayer for the purpose of his trade. Section to of the fourth Schedule reads:

> "10. In no case shall any allowance be deductable in respect of any buildings, structures or works of a permanent nature other than such allowances as are deductable in terms of paragraphs 1A, 2, 3, 4, 5, and 12."

---



GOLDIN JA

It will be observed that sections 2 and 3 are referred to in section 10 quoted above. Section 2 of the fourth Schedule reads:

> "2. If the taxpayer so elects (which election shall be binding) an allowance (hereinafter called a special initial allowance) in respect of capital expenditure incurred by the taxpayer during the year of assessment on-
>
> (a) the construction of new farm improvements, industrial buildings or railway lines; or
>
> (b) additions or alterations to existing farm improvements, industrial buildings or railway lines; or
>
> (c) the purchase of articles, implements, machinery or utensils; used by the taxpayer during such year for the purposes of his trade subject to the conditions mentioned in, and calculated in accordance with the provisions of, paragraphs 8 and 9:
>
> Provided that-
>
> (i) if farm improvements, industrial buildings or railway lines are constructed or articles, implements, machinery or utensils are purchased in one year of assessment and first put into use in a later year of assessment, then the special initial allowance shall be allowed in the year of assessment in which such asset is first used;
>
> (ii) in the case of articles, implements, machinery or utensils, the special initial allowance shall only be allowed if the Commissioner decides, having regard to the use to which such articles, implements, machinery or utensils were put by the taxpayer in the year of assessment in which E they were first put into use or the next following year of assessment, that the articles, implements, machinery or utensils were purchased by the taxpayer wholly or almost wholly for the purposes of his trade."

Section 3 reads:

---

**Copyright Juta & Co Ltd**

"3. An allowance in respect of-

(a) commercial buildings, farm improvements, industrial buildings and railway lines acquired or constructed and in 'both cases used by the taxpayer for the purposes of his trade;

(b) articles, implements, machinery and utensils belonging to and used 'by the taxpayer for the purposes of his trade;

the value of which, in either case, has been diminished by reason of wear and tear during the year of assessment, and such allowance shall be subject to, and calculated in accordance with, the provisions of paragraphs 6 and 9 in the case of commercial buildings, farm improvements, industrial buildings and railway lines, and of paragraphs 7 and 9 in the case of articles, implements, machinery and utensils."

The respondent erected a building for the provision of office accommodation and, instead of using internal brick walls or other immovable structures as walls, resorted to the use of movable walls because they are lighter in weight, easily moved and reconstructed without any or very



GOLDIN JA

little damage and, as the President of the Income Tax Appeals Special Court said: "following trends in Europe and South Africa, . . . leaving interior space open, so that once a lease was agreed with tenants, it or they are able to select their own layout accommodation; and once this layout was determined the internal divisions would be erected by using the demountable partitioning . . ." There is no dispute that by using movable walls the owners enjoy the advantages and convenience of flexibility and these were considered so desirable that, in fact, these walls are about 30 per cent more expensive initially than brick and mortar walls.

The object of the legislation was to provide taxpayers with tax relief in respect of certain items or things (to use "neutral" words) which are liable to wear and tear or deterioration (as in the case of industrial buildings) and generally to encourage industrial, agricultural and economic development. Similarly section 4 provides for a scrapping allowance for the same reason in respect of the same buildings, articles, implements, machinery and utensils belonging to and used by the c payer for the purpose of his trade.

It does not follow that anything which is liable to wear or tear or deterioration qualifies for a wear or tear allowance or the deduction for scrapping allowances. The Legislation has enumerated and specified the things that do so qualify. A thing may be an article but not a utensil or it could be a utensil but not an implement. Examples do not readily come to mind but that the legislature distinguished and envisaged a distinction between such words is clear. It is therefore necessary to decide in the first place whether a thing is one of those specified which qualify for these allowances. Thereafter and only then the question of whether or to the extent to which an allowance is to be granted is determined in terms of sections 7, 8 and 9 of the Act. It is interesting to note that in terms of section 8 there is a fixed rate permitted as a special initial allowance without regard to the nature of the thing.

The word "article" is of wide connotation, as reference to the Oxford English Dictionary and Webster's Third New International Dictionary clearly demonstrate. In fact, it would embrace so many items that it is almost puzzling why the separate provision was added in respect of

Copyright Juta & Co Ltd

implements or utensils.

It is a very comprehensive word (*M'Intyre v M'Intee,* 1915 SC (8) 28, Burrows, Words and Phrases Vol 1 at 235 and *Quarries Ltd v Federal Commissioner of Taxation,* 8 AITR 383). Neverthless not all items that are "plant" are "articles". But some items can be both plant and



GOLDIN JA

articles. A partition is an example of an item which may be both an "article", of "plant". In England it has been held to be plant. *(Jarrold (inspector of Taxes) v. John Good and Sons Ltd.,* [1963] 1 All BR 141.) In South Africa it has been held to be an article *(Secretary for Inland Revenue v Charkay Properties (Pty.) Ltd.,* 1976 (4) SA 872 (AD)). The reasons for it being one or the other or neither are determined by the relevant legislation.

In my view, the correct and proper approach is that any part of the accommodation or premises within which business activities are carried on are not "articles" within the meaning of the relevant sections referred to above. This is what has been described in several English cases as the functional test. On this approach, the fact that these walls are movables and are designed and intended, and when the occasion requires are used, to provide accommodation to suit particular requirements as to size and area does not affect their existence as part of the place in which business activities are carried on. Accommodation or business premises consist of a ceiling, doors, windows and walls irrespective of whether any of these items can be described as movables or not. When they are demountable so as to render them easily removed or replaced or adjusted they provide the owner with convenient advantages of speed and flexibility but this does not alter their character as part of the premises in which a trade or occupation is carried on.

In the case of *Jarrold (Inspector of taxes) v John Good and Sons Ltd.,* [1963] 1 All ER 141, DONOVAN LJ, summed up the question in this type of case as being whether the partitioning is part of the premises in which the business is carried on or part of the plant with which the business is carried on. While he holds that either view could have been taken, I am in respectful agreement with the view that the movable walls "when erected constituted the internal walls of the building which have the advantage of being movable, but until they are moved will stand fired and solid fully performing the function of internal walls."

The respondent does not claim an allowance for commercial buildings for which similar provision is made. If a commercial building consisted of demountable walls, movable doors and windows and a roof resting on its own weight, all these parts would be integral parts which constitute such building. The fact that even a building itself is a movable does not deprive it of constituting a building. (*Pettersen and Others v Sorvaag* 1955 (3) SA 624 (AD).

Everything which goes into the erection of a building is originally only an article as for example windows and doors. *(Commissioner for Inland Revenue v Le Sueur,* 1960 (2) SA 708 (AD).)



Copyright Juta & Co Ltd

GOLDIN JA

In South Africa, the binding case on the subject which came on appeal on a question of law is Secretly for *Inland Revenue v Charkay Properties (Pty.) Ltd.,* 1976 (4) SA 876 (AD). TROLLIP, JA, in what may be described as the majority decision because while the other judges adopted a different test they could not be persuaded that the decision of the Court *a quo* "is one which could not reasonably have been reached," was of the opinion that walls of this nature were articles. With respect, I do not agree with this conclusion or its application to our provision. Whether or not an article is movable is not conclusive. I do not think that section 10 as read with sections 3 and 4 of the fourth Schedule is confined or only relates to movable articles. I assume for the purposes of this case, however, that only movables can qualify as articles. On this basis I am of the view that if a user or occupier decides to use movables such as those involved in this case, merely because he prefers that type of wall or prefers a structure consisting of movable walls, ceilings, et cetera, he would not become entitled to claim them as "articles". Similarly, if an owner installed walls which were immovable or of a permanent nature by virtue of their mode of annexation and thereafter removed these walls with all the "trouble that such a task would entail in order to adjust the size and capacity of business premises as required by him or tenants, such walls would not become "articles".

The question also arises whether by virtue of an intention to install demountable walls of this nature in order to provide flexibility to adjust the size of premises to suit the owner's or a tenant's requirements is a relevant factor rendering such walls "articles" within the meaning of the Income Tax Act. As I have said above the use or provision of movable or demountable walls is resorted to or adopted as a convenient and at times inexpensive manner by which to provide or create accommodation or premises within which business activities are carried on. But such an advantage or procedure does not alter the character of the wall. They have the advantage of being movable; but they remain the setting or the premises in which business is carried on. They are no different in character from the floor or the ceiling or the doors which constitute part of the accommodation within which business activities are carried on. I appreciate how unhelpful examples are usually because they only pose additional problems the solution of which are unnecessary while the problem which is in hand remains unsolved. Nevertheless, I will resort to one or two examples. Owners of a hotel may desire to enjoy the convenience of demountable bedroom walls because it enables them to provide single, double or family accommodation dependent on fluctuations of demand for particular accommodation. For the same reasons, I would



GOLDIN JA

not hold that such walls constitute "articles". Each bedroom consists of the floor, ceiling, walls and windows so that without walls there could not be bedrooms which provide accommodation.

The position can be restated as follows. When prefabricated components including demountable walls are assembled to provide or create once or business accommodation they are not articles. Such walls are no more a distinct entity than the windows, doors or boors which are produced to provide the objective and purpose of their creation namely as business premises. The Act is concerned with an office or shop or other business premises and not the

**Copyright Juta & Co Ltd**

walls, doors or Doors which constitute such premises. Until such a wall is in use in such a manner or while not required for such a purpose it assumes the same character as a door or window before installation or even individual bricks before being used to erect a wall. Whether the owner of such items is a builder or the owner of the building is irrelevant.

Items or building material acquired or required for the creation or provision of premises or accommodation are not articles within the meaning of the Act. It may be said that within a dictionary meaning of the word that each and every item used for the manufacture of windows, floors or demountable or immovable walls are articles. This is however irrelevant to the meaning of the term in the Act. Obviously wear and tear and other allowances relate to articles, implements, machines or commercial buildings and not to the components and items which are used to create them.

We are concerned with the article created and used and not with the articles which produce the finished article. The manner producing these walls illustrates this.

The President describes the mode of erection of these walls as follows:

> "A length of timber is screwed horizontally to the ceiling which has special battens designed to accommodate such fixtures. On this timber strip is fixed by screws, or pop-rivetting, a length of aluminium ceiling rail, which Is a 'U' shaped section. A similar section of aluminium is attached to the inside of any outer wall onto which a partition will abut. Vertical aluminium sections, which are ' shaped, are then fixed at the foot thereof to the floor, and at the top thereof to the ceiling. These strips are then ready to receive the panels which are slipped into the receptive part of the aluminium sections. At the bottom, an aluminium strip is also laid along the panels horizontally as a skirting-board."

There are partitions which may be classified as walls concerning which there would be little argument that they constitute "articles". Examples can be found in hospitals, at theatre performances on the stage and in

---



GOLDIN JA

Other activities' But such walls or partitions are used with n business premises or the accommodation within which the trade is carried on.

If this were an appeal on law, I would have come to the same conclusion as in the above English decisions and in the South African case because it cannot be said that the decision of the special Court could At reasonably have been reached. This being, however, an appeal on fact, I have to substitute my own opinion for that of the Court *a quo* even if, as I do, T consider the decision of that Court to be a possible or reasonable one. *(Kazangula Irrigation Co. and Others v Minister of Lands,* 1974 (4) SA 482 (RAD).

For these reasons I would allow the appeal. I agree with the judgment of the learned CHIEF JUSTICE concerning the correct position on the question of costs in appeals of this nature.

**Fieldsend CJ:** In the result the appeal is dismissed. It is directed that the respondent's costs be allowed as a deduction in terms of section 15 (2) (go of the Act.

---

**Copyright Juta & Co Ltd**

*State Attorney,* attorney for the appellant.

*Winterton, Holmes and Hill*, attorneys for the respondent.



## REID-DALY v HICKMAN AND OTHERS (2) 1980 ZLR 540

**Court** **Appellate Division, Salisbury**

Civil Appeal

Fieldsend CJ, Lewis JP, and Goldin JA

4th and 23rd December, 1980

### Flynote

Statutes - Defence Act [Chapter 94] - Defence Forces (Disciplined Regulations, 1978 - whether jurisdiction of civil Courts ousted by regulations - provision, of extra judicial remedies - differential treatment between officers - absence of provision for award of pecuniary damages - exclusion criminal jurisdiction - no necessary implication that regulations bar recourse to civil Courts.

Consideration of English decisions - officers liable civilly for common law wrongs committed in excess of military jurisdiction - invasion of plaintiff's privacy by use of listening device and copying personal documents - conduct prima facie in excess of jurisdiction of military officer.



### Headnote

The appellant (hereinafter called the Plaintiff) instituted actions against eight other Army officers and in each case joined the Minister of Combined Operations and Defence as co- defendant. The Plaintiff alleged that the secret installation of an electronic listening device in his office, the surreptitious perusal of both his military and personal documents and the constant surveillance of him, unbeknown to him, constituted an invasion of his dignity and privacy *animo injuriandi*. To the Plaintiff's declaration the defendants filed a plea in bar, contending that the Plaintiff was precluded from seeking relief in the civil Courts because of the existence of the redress procedure laid down in the Defence Forces (Discipline) Regulations, 1978. The Court *a quo* (Waddington, J) upheld this plea.

In an appeal it was not argued for the defendants that the regulations prevented one officer from suing another where his grievances were entirely divorced from the military context. However, it was argued that the acts complained of by the Plaintiff were part of a purely military investigation. The Plaintiff claimed that the conduct of the defendants injured him in his dignity and reputation, both personally and as a soldier. The point in issue was whether the regulations prevented the Plaintiff from having his claim heard by the civil Courts. Neither the Defence Act [*Chapter 94*], nor the regulations contained any express statement ousting the Court's jurisdiction and any such ouster had to be found by necessary implication.

Copyright Juta & Co Ltd

*Held* that legislation is not lightly to be construed as taking away the jurisdiction of the Court. An extra-judicial remedy such as that contained in section 28 of the Defence Forces Discipline) Regulations, 1978, does not in itself bar recourse to the Courts. *Held,* further, that the regulations did not deal with the question of a superior officer who considered himself wronged by a junior officer. It could not have been intended to allow one a delictual action and not the other.

*Held,* further, that the regulations did not provide for any pecuniary damages. There is a strong presumption against taking away substantive legal rights.

*Held,* further, that the saving of the powers of the ordinary criminal Courts by section 55 (1) of the Defence Act [*Chapter 94*] did not lead to the implication that the powers of the ordinary civil Courts had been abrogated.

*Held,* further, that to allow one officer to sue another for delict would not destroy the purpose of the legislation as a whole.

For the above reasons the Court concluded that it could not be said that by necessary implication the jurisdiction of the Courts was ousted by the regulations,

*Held,* further, considering the case of *Dawkins v Lord Paulet* (1869) LR 5 QB 94, that that part of the decision which held that military officers were precluded from approaching the ordinary Courts by the Articles of War and the Mutiny Act was clearly *obiter* and bated on an approach no longer adopted viz. that because the Mutiny Act did not give the Courts jurisdiction one had to infer that there could be no recourse to the Civil law.

---



FIELDSEND CJ

*Held,* further, applying the English law as stated in *Heddon v Evans* (1919) 35 TLR 642, that a civil action would be at the instance of one officer against another for damages if he committed an act in excess of his military jurisdiction which amounted to a common law wrong.

*Held,* further, that the use of a secret listening device in itself amounts to invasion of a person's dignity (*S v A and Another,* 1971 (2) SA 293 (T) followed). Taking and copying of private documents amounts to an *injuria*. These two wrongs constituted, *prima facie*, conduct in excess of the jurisdiction of a military officer.

The appeal was accordingly allowed and the defendants' special plea set aside.

Cases and authorities cited:

*Pyx Granite Co. Ltd v Ministry of Housing and Local Government and others* [1960] AC 260;

*Welkom Village Management Board v Lenteno,* 1958 (1) SA 490 (AD);

*Dawkins v Paulet (supra)*;

*Halsbury's Laws of England,* 4th Edition, Vol. 28, para. 106;

---

**Copyright Juta & Co Ltd**

*Sutton v Johnstone,* 1 TR 544;

*Dawkins v Lord Rokeby* (1872) LR 8 QB 255;

*Fraser v Balfour* (1918) 34 TLR 502;

*Heddon v Evans* (1919) 35 TLR 642;

*Jenkins v Shelley* [1939] 1 All ER 786;

*Halsbury's Laws of England,* 3rd Edition, Vol. 33, para. 1433;

*S v A and Another (supra)*.

*A P de Bourbon* for the appellant.

*R Jagger* for the respondents.

## Judgment

**Fieldsend CJ:** The appellant'(hereafter referred to as the plaintiff's was until 31st January, 1980, an Army officer, a lieutenant-colonel in command of the Selous Scouts. In August, 1979, he instituted actions against Lieutenant - General Hickman, who had been retired a short while before that from his post as commander of the Army, and seven other Army officers and NCO's. In each case he joined as a co defendant the Minister of Combined Operations and Defence.

It is important to appreciate the precise basis of the nature of his claim. The declaration in the case against Lieutenant - General Hickman can be taken as representative of all the actions. The relevant paragraphs am as follows:

> "4(a) In or about August, 1978, a certain electronic transmitting device and receiving system were secretly installed in Plaintiff's office at Inkomo Camp for the purpose of intercepting and monitoring Plaintiff's personal and official telephone conversations, which apparatus remained *in situ* until or about the end of January, 1979;



FIELDSEND CJ

> (b) During the aforesaid period, August, 1978, to January, 1979, military and personal documents belonging to Plaintiff and under his control were surreptitiously removed from his office safe and copied;
>
> (c) During the period aforesaid, Plaintiff's movements and activities were kept under surveillance, unbeknown to him." (Paragraph 5 sets out the part alleged to have been played by each of the defendants.)

(Paragraph 5 sets out the part alleged to have been played by each of the defendants.)

> 7. The activities of the persons specified in paragraph 5 above and of First Defendant were carried out wrongfully and *animo injuriandi*, and consituated an attack on Plaintiff's *dignitas* and an invasion of his privacy which have injured him in his dignity and reputation both personally and as a professional soldier.
>
> 8. In consequence of the injurious acts of First Defendant as aforesaid Plaintiff has suffered damages in the sum of $20 000,00.

Copyright Juta & Co Ltd

9. At all material times First Defendant and the persons mentioned in para graph 5 above were acting within the scope of their authority and in the course of their employment with Second Defendant." -

In reply to a request for particulars as to the basis upon which it was alleged that the defendants' acts had injured the Plaintiff in his reputation as alleged in paragraph 7, the Plaintiff said:

"The fact that a secret investigation was considered necessary into the plain tiff's activities has lowered him in the esteem of others."

To this declaration the defendants filed a plea in bar which so far as relevant to this appeal (paragraphs 4 and 5 do not concern us) reads:

"1. At all relevant and material times, Plaintiff and First Defendant were serving officers in the Zimbabwe Rhodesia Army.

2. As such, Plaintiff and First Defendant were both subject to regulations made under the Defence Act [*Chapter 94*] providing for the conditions of engagement and service of members of the Defence Forces and generally to the provisions of the Defence Act [*Chapter 94*], including standing orders and procedures laid down for the disciplining or court martialling of members of the Army alleged to be guilty of breaches of discipline or military offences.

3. In terms of the aforesaid regulations and or standing orders and/or procedures, it was the right and duty of the Plaintiff to seek from the President, whose decision in that event would have been final, a redress of wrongs in terms of the Defence Forces (Discipline) Regulations 1978 (RGN 259/1978) in respect of First Defendant's alleged unlawful conduct set out in Plaintiff's Declaration.

. . . . . .

6. As is apparent from the allegations in "Plaintiff's Declaration, Second Defendant's alleged liability arises solely by virtue of the allegation that at all material times First Defendant was acting within the scope of his



FIELDSEND CJ

authority and within the course of his employment with Second Defendant, who is cited as such and is alleged be liable to Plaintiff by reason only of the provisions of the State Liabilities Act [*Chapter 54*].

7. In the premises Defendants aver that Plaintiff is barred from approaching this Honourable Court for the relief sought by him in his summons against either Defendant."

Thereafter the Plaintiff gave notice of his intention to apply to amend his declaration by substituting for paragraphs 8, 9 and 10 the following:

"8. In consequence of the injurious acts of First Defendant as aforesaid, which acts were unconnected with his duties as an army officer and which he was not lawfully permitted to perform, Plaintiff has suffered damages at the hands of First Defendant in the sum of $20 000,00.

9. ALTERNATIVELY should this Honourable Court find that the acts of First Defendant were carried out within the course and scope of his employment with Second Defendant, Plaintiff claims that Pint and Second Defendants have caused him damages in the said sum of $20 000,00 and are jointly and severally liable therefor."

It was made clear that the allegation in paragraph 8 was based upon an alleged instruction to the first defendants that they were not permitted to investigate the activities of the Plaintiff or of

Copyright Juta & Co Ltd

the Selous Scouts. But it is not only on the breach of these instructions that the allegation of wrongfulness in paragraph 7 is based. This amendment was agreed to at the pre-trail conference and the parties proceeded to trial on the issues raised only in the special plea on the basis of the declaration as amended and amplified. The learned trial judge (WADDINGTON J) accurately set out the issue with which we are now concerned as follows:

> "Is the effect of the Discipline Regulations to her the Plaintiff from bringing an action in this Court for the recovery of damages arising from defendants' alleged wrongful actions;"*(22)

It was common cause that the alleged unlawful conduct of the first defendants in each case could have been the subject Inditer of complaint which could have been dealt with under the procedure laid down in the Defence Forces (Discipline) Regulations, 1978 (RUIN 259/1978).

It was not contended that the regulations prevented one officer from suing another in the civil Courts where his grievances arose out of circumstances entirely divorced from a military context. It was argued however; that an the evidence as it emerged at the hearing of the special plea this was not such a case. The evidence established that the acts complained of by the Plaintiff were done as part of an investigation into allegations that the Selous Scouts had been and were engaged in illegal dealings in ivory, arms and ammunition, and that the Plaintiff knew that this was why the acts were done.

---



FIELDSEND CJ

The cause of action set out in the declaration is not entirely clear. It is difficult to discern what is actionable about keeping the Plaintiffs move meets and activities under surveillance unbeknown to him, whatever the motive of the defendants may have been. Equally, the surreptitious removal and copying of military documents from the safe in the Plaintiff's office does not seem to be actionable at the Plaintiff's instance, even if it was, this is something purely within the military sphere. The same may be true of the intercepting and monitoring of official telephone conversations on the Plaintiffs office telephone. It is these activities about which the Plaintiff seems to have been most concerned, if one is to judge by his reply to the request for particulars of paragraph 7 of the declaration.

But the allegations in the declaration as amended go further than this.

It is said that the defendants wrongfully and unlawfully installed a secret device to intercept and monitor the Plaintiff's personal (as well as official) telephone conversations and that they surreptitiously removed and copied personal (as well as military) documents that were kept in his office safe. It is said that this conduct constituted an attack on his *dignitas* and an invasion of his privacy which has injured him in his dignity and reputation, both personally and as a soldier.

This is not the stage at which to consider which of these allegations disclose a cause of action, or if they do whether they are likely to be established or what damages would flow from them. We are concerned only with whether these are matters which the civil Courts should be able to consider.

---

**Copyright Juta & Co Ltd**

The point before us is whether the Discipline Regulations, and in par particular section 28, prevent the Plaintiff from having his claim heard by the civil Courts.

Neither the Defence Act [*Chapter 94*] nor the Regulations made under it contain any express statement ousting the jurisdiction of the Court to entertain a claim such as the Plaintiff's. The question is therefore whether such an ouster of jurisdiction arises by necessary implication. There are many cases which state the proposition that legislation will not lightly be construed as taking away the jurisdiction of the Court. Perhaps the most authoritative recent statement of this canon of construction is that of the House of Lords in *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government and Others,* [1960] AC 260. VISCOUNT SIMONDS at p. 286 put it thus:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words."

---



FIELDSEND CJ

This does not mean that there must necessarily be express words, but where there are no express words the inference that the Court's jurisdiction is ousted must be clear and unequivocal, *Welkom Village Management Board v Lenteno,* 1958 (1) SA 490 (AD) at p. 503.

The learned trial judge set out the provisions of the Defence Act and the Regulations fully and accurately in the following passage of his judgment*(23):

> "Section 15 of Chapter 94 reads:
>
> '15. Subject to the provisions of this Act, the Minister may, in terms of subsection (1) of section *one hundred and twenty-one,* make regulations providing for the conditions of engagement and service of members.'.

Section 121 (1) of the Act reads:

> '(1) The Minister may make such regulations as, in his opinion, are necessary or convenient for securing the discipline and good government of the Defence Forces and generally for the better carrying out of the objects and purposes of this Act.'.

In providing for the conditions of engagement and service of members therefore, the Minister may make regulations which, in his opinion, are calculated to promote discipline and the good government of the Defence Forces. The Discipline Regulations were made in terms of sections 15 and 121 (1) of the Act and it was to these regulations and their precursors that Plaintiff subjected himself when he originally attested into the Army.

Part III of the Discipline Regulations sets out the procedure by which the military offences specified in the First Schedule to Chapter 94 may be summarily disposed of after the prescribed investigation. The nature of military offences covers a wide spectrum of conduct ranging from aiding the enemy (pare. 2 of the First Schedule) to the general offence created by para. 38, i.e., that of causing by any act, conduct or omission, prejudice to good order and military discipline.

Part IV of the Discipline 'Regulations is entitled 'Redress Wrongs and Petitions on Preview' and contains, *inter alia,* a procedure which enables an 'aggrieved member' (de&cd in section 28 as meaning a member 'who considers himself wronged in any matter by a superior officer) to address a complaint in writing to his 'redressing officer' (defined in section 28 in effect as the aggrieved member's superior officer over than the superior officer about whom the complaint is made) setting out the grounds of his complaint and the redress sought. Section 28 (4) provides that where the redressing officer does not grant the redress sought or resolve the complaint to the satisfaction of the aggrieved member, he shall forward the complaint with his comments thereon to one of a

---

**Copyright Juta & Co Ltd**

number of superior officers. Similarly, if such superior officer does 'not grant the redress sought' or if he fails to 'resolve the matter to the satisfaction of the aggrieved member', he in turn is required to refer the complaint to a superior authority or if the complaint is that of a superior authority, to the Commander. (See section 28 (5) and (6).) Where the



FIELDSEND CJ

aggrieved member is an officer, if the Commander does not resolve the matter to the satisfaction of the aggrieved member, he is required to refer the matter to the President (in the case of Plaintiff, the Governor) 'whose decision shall be final.' (See section 28 (8).) . . .

The Discipline Regulations nowhere confer on any of the abovementioned authorities the jurisdiction to make orders or award financial compensation or damages in respect of soundly based complaints. Doubtless, if the redress sought were capable of being granted administratively the aggrieved member might obtain satisfaction in this way. An aggrieved member might also be able to enjoy the satisfaction of witnessing retribution being visited upon the offender in the form of disciplinary proceedings instituted in respect of a military offence in the ordinary way under the provisions of Chapter 94 or the Discipline Regulations. He might also be satisfied with an apology exacted from the offender by traditional military methods."

Looking at these provisions without reference to authority I would not conclude that by necessary implication the provisions of section 28 of the Regulations take away the jurisdiction of the Court to hear an action based on delict alleged to have been committed by one officer against another even in the military sphere.

In the first place, there is clear authority both in England and in South Africa that the provision of an extra-judicial remedy is insufficient in itself to bar recourse to the ordinary Courts: *Pyx Granite* case *(supra)* at p. 206 and the *Welkom* case *(supra)* at p. 503.

Secondly, section 28 of the Regulations provides a procedure only for complaints by an officer "who considers himself wronged in any matter by a superior officer". It does not deal with a superior who considers himself wronged by a more junior officer, nor is there any similar procedure laid down in respect of a wrongful action against one officer by his superior, which could be said to bar a civil remedy. It cannot have been intended to allow the one to bring a delictual action in the Courts and not the other: there is a strong presumption against such differential treatment.

Thirdly, there is no provision in the Regulations for the award to a wronged-and possibly physically injured-party of any pecuniary damages. If there is no recourse to the civil Courts the right to all relief will have been taken away. There is a strong presumption against the taking away of substantive legal rights by implication.

Fourthly-and this is perhaps a negative point-the saving of the powers of ordinary criminal Courts by section 55 (1) of the Defence Act is not a factor in favour of the implication that the powers of the ordinary civil Courts have been abrogated. The Act provides in the First Schedule



Copyright Juta & Co Ltd

for a number of offences which are triable militarily which it might be thought, but for section 55 (1), would exclude the criminal jurisdiction of the ordinary Courts: it does not provide any civil remedies triable militarily which it might be thought would exclude the civil jurisdiction of the ordinary Courts. The absence of an equivalent provision to section 55 (1) in regard to civil proceedings is therefore of no significance.

Fifthly, one must not pay too great a regard to what might seem to be an undesirable result to which the interpretation of the legislation by the proper canons of construction might lead. If the conclusion to which such construction might lead would destroy the purpose of the legislation as a whole, then of course one must veer away from that conclusion. I think it is an exaggeration to say that the effect of allowing one officer to sue another for delict would be disastrous to the maintenance of discipline, or would undermine the efficiency the service. I share the view of COCKBURN CJ, in *Dawkins v Lord Paulet,* (1869) LR 5 QB 94 at p. 108 where he said:

> "I cannot bring myself to believe that officers in command would hesitate to give orders which a sense of duty required, or to enforce obedience and discipline in the due exercise of authority from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty, as Eyre, B, expresses it, 'fearless of consequences', and would trust to the firmness of judges, and the honesty and good sense of juries to protect them in respect of acts honestly, though possibly erroneously, done under a sense of duty."

As I said, the conclusion above is the one I would reach without reference to authority. There is no authority in this country or in South Africa on this question, but with reference to a number of English cases Mr *Jagger* has advanced a powerful argument for the defendants. The most important of these cases in *Dawkins v Lord Paulet (supra)* in which many of the earlier decisions were collected.

*Dawkins v Lord Paulet (supra)* was a libel case. The Plaintiff's superior officer had submitted to higher authority a written report on the Plaintiff which the Plaintiff alleged was libellous of him. This report was sent in the course of and as an act of military duty by the defendant. It commented upon the contents of certain letters from the Plaintiff complaining about orders given to him by the defendant and which the defendant was obliged to send to higher authority with his comments upon them. The defendant set out the circumstances of the making of the report and pleaded that it was made in the course of his duty as a commanding officer and in fulfilment of that duty and not for any other reason. The





replication alleged actual malice on the part of the defendant and denied that the words were published in the *bona fide* discharge of the defendant's duty.

The majority of the Court (three of the four judges) held that no action would be against a commanding officer for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause. COCKBURN CJ, dissenting, held that an action would be if the reports, though made under the circumstances alleged in the plea, were made of actual malice and without reasonable or probable cause.

**Copyright Juta & Co Ltd**

The short point upon which the case was decided was that the motives with which a commanding officer acts in doing a duty which it is incumbent upon him to do cannot make the doing of that duty actionable at the instance of a junior officer however malicious those motives may be - per MELLOR J, at p. 114.

This case is cited in *Halsbury's Laws of England,* 4th Ed. Vol. 28, para. 106 as support for the proposition that there is absolute privilege in respect of a report published or any act done in the course of the duty of a military officer, even if the report is made or the act done maliciously and without reasonable or probable cause. It is not cited as authority for any wider proposition.

The majority of the Court went on to consider whether in any circumstances an action by one military man against his commanding officer for something done in the military sphere was cognizable by the civil Courts. It was held by these three judges that the Mutiny Act and section 12 of the Articles of War provided the sole remedy in respect of a complaint by an officer that he had been wronged by his commanding officer in the exercise of ordinary military authority or duty. This part of the decision was clearly *obiter* and indeed it is not referred to in the headnote of the case. In reaching their conclusion the majority judges placed great reliance on the decision in *Sutton v Johnstone,* 1 TR 544, 96 ER 1215. This was a very different case based upon an allegation of malicious prosecution in respect of the bringing of unsuccessful Court martial proceedings against the Plaintiff for disobedience in the face of the enemy during a naval engagement in 1781; and in its progress through the Courts there were varying views expressed by the judges concerned. It is also significant that in *Dawkins v Lord Paulet (supra)* LUSH, J approached the question on the basis that having regard to the history of the rights of soldiers in the British Army, it was on the Mutiny Act alone that the Plaintiff could rely in claiming that the Court had juris-



FIELDSEND CJ

diction and that from the fact that the Court was not given jurisdiction one had to infer that there could be no recourse to the civil law. This is not the approach now adopted either in our Courts or in England as I have already indicated.

The second case relied on is *Dawkin v Lord Rokeby,* (1872) LR 8 QB 255. This concerned reports alleged to be libellous made by the defendant of the Plaintiff to a Court of inquiry set up by the commander in-chief under the Articles of War. In the judgment of the Court which consisted of ten judges, KELLY CB, referred to a number of authorities including *Hawkins v Lord Paulet, (supra)* which he said showed that a case involving a question of military discipline and military duty alone are cognizable only by a military tribunal and not a Court of law. *Dawkins v Lord Rokeby (supra)* was affirmed in the House of Lords but solely on the basis of the privilege of witnesses. The House did not affirm the wider proposition that such questions were never cognizable in a Court of law: see *Fraser v Balfour,* (1918) 34 TLR 502 at 503.

More recently the question came before the Courts in *Heddon v. Evans* (1919) 35 TLR 642. In a compendious and closely reasoned judgment, McCARDIE J, found that he was bound by the *ratio decidendi* of the majority of *Dawkins v Lord Paulet (supra)* to hold that a military officer was not liable for a wrong committed against another officer if that act was within his jurisdiction and

Copyright Juta & Co Ltd

was done in the course of military discipline even where that act was done maliciously or without reasonable and probable cause. He held, however, that a military officer would be liable to an action for damages if in excess of his jurisdiction he committed an act which amounted to a false imprisonment or other common law wrong, even though he purported to act in the course of military discipline.

In *Jenkins v Shelley,* [1939] 1 All ER 786 it was conceded that at first instance *Heddon v Evans (supra)* was binding upon the Court and the latter case is referred to in *Halsbury's Statutes*, 2nd ed. as authority for the proposition that the complaints procedures laid down in the Navy Discipline Act, 1957, the Army Act, 1955, and the Air Force Act, 1955, do not exclude a civil right of action (Vol. 29, pp. 126, 293 and 457). Thus it seems that the modern English law in regard to civil liabilities of service authorities, whether to service personnel or to others, is as set out in *Halsbury's Laws of England,* 3rd ed. Vol. 33, p. 849, para. 1433 as follows:

> "1433. *Civil liabilities of service authorities.*
>
> Members of Courts-martial and naval, military and air force authorities generally are responsible as individuals to any person injured by reason of



> their having acted either without, or in excess of, their jurisdiction. Officers acting within their jurisdiction will be liable for injury from abuse of their authority, done from motives of cruelty, malice or oppression; but where the act complained of is done within the limits of naval, military or air force authority or jurisdiction, it would seem that no action will be, merely because it is done maliciously and without probable cause and the same principle applies to defamatory statements made by naval, military and air force officers in discharge of their duty. Complaints made to the proper authorities for the purpose of obtaining redress would seem to be absolutely privileged if made *bona fide*. The evidence of witnesses given before a naval, military or air force Court cannot be made the subject matter of an action. It is, however, in general no defence to an action for negligence that the act complained of was done in obedience to the orders of some superior naval, military or air force authority."

In my view, the English law is, at best for the defendants, correctly stated in *Heddon v. Evans (supra)* and a civil action will be at the instance of one officer against another for damages if in excess of his jurisdiction he commits an act which amounts to a common law wrong, even though he purports to act in the course of military discipline.

If I am wrong in my conclusion that the Regulations do not oust the jurisdiction of the civil Courts to consider claims such as those now brought by the Plaintiff, and that they do place some restriction upon such actions it is necessary to consider the extent of that restriction. I see no reason for thinking that our law should be any more favourable to the defendants than is the English law and I approach the facts on this basis.

Applying these propositions to the facts of this case I return to the earlier analysis of the cause of action pleaded by the Plaintiff. He alleges an *injuria* based upon a wrongful invasion of his privacy stemming from the secret planting of a listening device on his telephone to listen, *inter alia,* to his personal calls and from the surreptitious removal and copying of his personal documents. It seems to be clear from *S v A and Another* 1971 (2) SA 293 (T) that the planting

**Copyright Juta & Co Ltd**

of a listening device in an apart merit does of itself amount to an impairment of the occupier's *dignitas.* It is true that in that case there was also evidence that conversations picked up by this device were listened to, but BOTHA AJ, at p. 299D said that both the planting of the device and the listening to the private conversations constituted separate wrongful acts. In any event, although paragraph 4 (a) of the declaration alleges only the planting of the device, the point is not taken that this without listening discloses no cause of action. It should be noted too that the use of a device such as that used by the defendants is penalised by s. 58 of the Postal and Telecommunication Services Act [*Chapter 250*] and is punish-



FIELDSEND CJ

able with up to seven years' imprisonment, in the absence of any direction by the President in terms of s. 73 (c). It may be that the defendants can plead some such direction though this has not yet been raised.

The taking and copying of private documents alleged in paragraph 4 (b) also amounts to an *injuria.* Our decision as to whether the Court has jurisdiction to hear the *Plaintiff*'s case must be based on the assumption that these wrongs were committed.

On the Plaintiff's allegations the defendants have committed wrongful acts against the Plaintiff. It is true that these acts were done primarily in order to investigate suspicions communicated to the defendants about the Plaintiff's misconduct connected with his military duties, but they were not done pursuant to an imperative duty such as the acts done by Lord Paulet in *Dawkins v Lord Paulet (supra).* They were acts done in the military sphere and could have formed the subject of the complaints procedure under section 28 of the Regulations, but they were also acts which constituted what BOTHA AJ, in *S v A and Another (supra)* characterized as "a serious impairment of a person's dignity" and there is no ostensible military obligation to do either of these acts. They are in no different category from a trespass upon the Plaintiff's house in which damage is done, committed in order to examine the Plaintiff's papers which it might be thought would assist in the inquiry Mr *Jagger* was not able to advance any argument as to why such conduct would not be cognizable by the civil Courts, and I have not been able to think of any. The reason for this is, I think, that such conduct as a common law wrong would be in excess of the jurisdiction of a military officer.

The conduct of the defendants now relied on is just such a common law wrong amounting to a trespass upon or an invasion !of the Plaintiff's privacy. *Prima facie* it is conduct in excess of the jurisdiction of a military officer, and in reaching this conclusion I place no reliance on the allegation that the defendants were in breach of some internal directive that the force of the Selous Scouts were immune from investigation. That directive is not relevant to the issue now before us.

These conclusions bring the case within the first proposition enunciated in *Heddan v Evans (supra)* which have already found is the most favourable view of the law to the defendants which can be taken.

In the result on either approach with which I have dealt the defendants' special plea must fail.

Copyright Juta & Co Ltd

The appeal must be allowed with costs and the order allowing the defendants' special pleas is set aside as is the order that the Plaintiff below pay the costs of the proceedings. Should the



FIELDSEND CJ

proceedings not be continued there will be no order as to the costs below; should the case proceed to trial the costs below will be for determination by the trial Court.

**Lewis JP:** I agree.

**Goldin J:** I agree.

*Coghlan, Welsh and Guest*, attorneys for the appellant.

*Gill, Godlonton and Gerrans,* attorneys for the first respondent.

*Surgey, Pittman and Kerswell,* attorneys for the other respondents.

1980 ZLR p553

## PETERS v JANDA NO 1980 ZLR 553

**Court** **General Division, Salisbury**

Application for summary Judgment

Waddington, J

27th November and 24th December, 1980

### Flynote

Contract - no waiver where Plaintiffs conduct consistent With agreement Plaintiff cannot be estopped where no right of his is being infringed - variation of contract by conduct - no other reason able interpretation - defence of [aches not part of common law.

Practice and procedure - bona fide defence in terms of Conventional Penalties Act [Chapter 42] usually incapable of determination in summary judgment proceedings.

### Headnote

The Plaintiff applied for summary judgment, seeking, *inter alia,* the cancellation of an agreement of sale. Cancellation of the agreement entitled the Plaintiff to retain as *rouwkoop*, the deposit and all Instalments paid to date. The application was based on the defendant's failure to pay the monthly instalment on the first of the month or within the subsequent period of grace of 21 days allowed by the agreement. Of the 27 instalments paid to the time of the application, five had been paid after the 21 day period of grace had expired, 21 after the first day of the month but before the twenty-first and only one by the first of the month. Counsel for the defendant raised a number of defences to the application based on the acceptance by the Plaintiff of late

Copyright Juta & Co Ltd

payments.

*Held* that by accepting payments after the first day of the month but within the period of grace allowed by the agreement, the plaintiff could not be said to have waived his right to be paid on the first day. The agreement expressly



WADDINGTON J

dealt with just such a situation and the Plaintiff's conduct was not inconsistent with his rights under the agreement.

*Held,* further, that since the Plaintiff had not acquiesced in the infringement of any right which he possessed, he could clothe estopped from asserting that right.

*Held,* further, that where tacit variation of a contract is alleged it must be clear that the conduct relied upon is consistent with the making a new contract and inconsistent with any other reasonable interpretation.

*Held,* further, that the English doctrine of *laches* does not form part of our common law *(Zuurbekom v Union Corporation,* 1947 (1) SA 514 (AD) followed).

*Held,* further, that in an application for summary judgment, where a *bona fide* defence is raised in terms of section 6 of the Conventional Penalties Act [*Chapter 42*] it will not usually be possible or practicable for a Court to determine the questions raised by that section. (*Parker v Gibson,* GS 34-80 distinguished.) Defendant was accordingly granted leave to defend.

Cases and authorities cited:

*Lindsay Petroleum Co. v Hard* (1874) LR 5 PC 221;

*New York Mutual v Ingle,* 1910 TPD 540;

*Festus v Worcester Municipality,* 1945 CPD 186;

*Wille and Millin's Mercantile Law of South Africa,* 17th edition, page 250;

*Whittaker v Kiessling,* 1979 (2) SA 578 (SWA);

*Zuurbekom v Union Corporation (supra)*;

*Premier Finance Corporation (Pty.) Ltd v Steenkamp,* 1974 (3) SA 141 (DCLD);

*Commonwealth Shippers Ltd v Jankelow,* 1960 (3) SA 669 (W);

*Parker v Gibson (supra).*

*M T O'Meara* for the Plaintiff.

*A P de Bourbon* for the defendant.

Copyright Juta & Co Ltd

## Judgment

**Waddington J:** The Plaintiff has applied for summary judgment in an action-

(a) for an order declaring an agreement with defendant cancelled;

(b) for judgment in the sum of $66, being an arrear monthly instalments;

(c) for interest thereon at the rate of 73 % *per annum* calculated from the 1st October, 1980, to date of payment;

(d) for an order that defendant and/or all other persons occupying Lot 1 of Block KK1, Ilford Road, Ardbennie, Salisbury, be ejected; and

(e) costs of suit.

---

**1980 ZLR p555**

WADDINGTON J

Plaintiff and one Jeremiah Edward Janda (now deceased) in May, 1978, entered into an agreement of sale in respect of the property mentioned in paragraph (d) above. According to that agreement the purchase price of the property was $18 000, payable by a deposit of $5 000 followed by monthly instalments of $66. On the death of Jeremiah Edward Janda, the defendant (respondent in the notice of motion proceedings) became the executor dative of the deceased's estate and it is in that capacity that he is now sued.

The basis of the application is that defendant failed to pay the monthly instalment due on the 1st October, 1980, on that date or within the subsequent period of grace of 21 days allowed by the agreement. Clause 1 (d) of the agreement provides *inter alia* that the second and each subsequent instalment would become due on the first day of each succeeding month. Clause 9 provides *inter alia:*

> "Notwithstanding anything aforesaid or any extension of time or other indulgence or concession given by the Seller to the Purchaser:
>
> (a) Should the Purchaser fail to pay any instalments or sum due by him within twenty-one (21) days of due date... the Seller shall be entitled EITHER to treat the full balance of the purchase price and interest as immediately due and payable or summarily to cancel this agreement in which event: . . "

The agreement then proceeds to itemize the respective consequential rights and obligations of the parties which in the case of the Plaintiff are to regain possession of the premises, to retain previously paid amounts as rouwkoop, to recover unpaid instalments and retain them as rouwkoop, to recover certain pre-estimated and liquidated damages in the event of the defendant failing to vacate the premises and to retain improvements without compensation.

It was common cause that annexure "D" to the defendant's replying affidavit contains an accurate record of the dates on which the instalments have been paid since July, 1978. This record discloses that the instalment for October, 1980, was paid on the 24th day of that month, i.e. three days after the expiration of the period of grace of 21 days. Other instances where similarly late payments were effected were those paid on 28th March, 23rd May, 24th June and

---

**Copyright Juta & Co Ltd**

27th September, 1980. All other instalments were paid within the period of 21 days to which I have referred above. Plaintiff contends that defendant has no *bona fide* defence to the application for summary judgment in the terms prayed. Mr *de Bourbon*, who appeared for the defendant, however, argued that there are a variety of such defences open to the defendant in resisting the application.



WADDINGTON J

It was firstly contended that, except for the instalment which was due on 1st January, 1979, and which was actually paid on the 30th December, 1978, not a single payment was effected on the first day of any month between July, 1978, and October, 1980. This is a correct statement of the factual position. That Ming case, Mr *de Bourbon* submitted, the right Plaintiff enjoyed to payment on the 1st day of each month must, by Plaintiff's consistent acceptance without demur of the late payments, be taken to have been waived. It would follow that clause 9 which provided for the period of grace of 21 days has, he continued, no meaning and Plaintiff would only be entitled to take action for the recovery of instalments In cases where there had been no payment at all. Plaintiff would not be entitled to institute any action in terms of clause 9 in respect of late payments because no period of grace would be calculable. In my view, however, this is not a tenable argument. To determine what was in the parties' minds when the contract was entered into, regard must be had to all the provisions of the written agreement. Clause 1 (d) plainly conferred on the Plaintiff the right to expect payment on the 1st day of each month. But clause 9 (a) cannot, in construing the meaning of the contract, be ignored. That provision quite clearly envisages that the parties contemplated that it might not be convenient for the defendant to have to make the instalment payments on one day of the month only. The purpose of sub-clause (a) was obviously intended to introduce a measure of flexibility into the arrangements "hereunder defendant was 13 obliged to make the actual payments and the effect was to confer on defendant the right to make those payments within a period of 21 days following the 1 st day of each month. The provision is express and unambiguous and effectively prevents the Plaintiff from exercising any of the rights specified therein as *sequelae* to defendant's failure to pay any instalment within the period of grace until after the effluxion of that period. By not objecting to the continued payment of instalments after the 1st day of each month but before the 21st day, the Plaintiff was doing nothing inconsistent with his rights and obligations under the agreement. Nor by that conduct could he be said to have tacitly accepted any breach of the terms of the agreement because the purchaser was plainly acting within his rights whenever he effected payment before the 21st day of each month. On this basis it is difficult to see how any question of waiver could arise at all. In my view there is no substance in this defence.

Mr *de Bourbon* also argued that Plaintiff's conduct, if not amounting to waiver, amounts to estoppel. It is quite true that neglect to enforce a right timeously may either have the same effect as a waiver of it or may come very near the line of estoppel. As pointed out by the Privy Council



Copyright Juta & Co Ltd

WADDINGTON J

in *Lindsay Petroleum Co. v Hurd* (1874) LR 5 PC 221 at 240 where a man has by his conduct and neglect, " though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted", then lapse of time becomes of great importance. When a person entitled to a right knows that it is being infringed and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it. *(New York Mutual v Ingle,* 1910 TPD 540 at 551 per Innes CJ). In this case Plaintiff could not have had any reason to believe that any right he possessed was being infringed by the purchaser and therefore could not by his own conduct have led the purchaser to believe that he was abandoning any such right. I consider therefore that there is no substance in this defence either.

Defendant also contended that the conduct of the parties referred to above constituted a variation of the contract. Before tacit agreement to vary the original provisions of the contract can be held to have been reached, it must be clear that the conduct relied upon is not only consistent with the making of the new contract but is consistent with no other reasonable interpretation. *(Festus v Worcester Municipality,* 1945 CPD 186 at 194 . Neither of these requirements is present in the instant case in my view because the conduct of defendant in effecting payment during the period of grace was consistent with the implementation of the express provisions of the contract while Plaintiff's conduct was also no less consistent with the contract. There can be no substance in this defence.

Mr *de Bourbon* did not rely on the argument that Plaintiffs conduct of the late payments on the 28th March, 23rd May, 24th June and 27th September, 1980, constituted waiver, estoppel or variation of the original contract. He would have been in some difficulty had he done so because the Plaintiff's acceptance of only four truly late payments out of a total of 27 payments could hardly be said to constitute a sufficient course of conduct as justifying the assertion of any of these three defences. Furthermore, the contract expressly provides in clause 9 that no extension of time or other indulgence or concession given by the Seller to the Purchaser would inhibit the right of the Plaintiff to exercise his rights under clause 9, which is a forfeiture clause. Such clauses are strictly enforced by the Courts. (See the passage in Wille & Millin's *Mercantile Law of South Africa* (17th edn.) at 250 approved in *Whittaker v Kiessling,* 1979 (2) SA 578 at 583B.).



WADDINGTON J

Mr *de Bourbon* also sought to argue that the English doctrine of laches (viz. long abstention from the assertion of a right coupled with the alteration of the condition of other parties, may render it unconscionable to enforce it) operates as a *bona fide* defence in this case. He cited a number of authorities in support of his argument but apparently overlooked the decision of TINDALL JA, GREENBERG JA and SCHREINER JA, in *Zuurbekom v Union Corporation* 1947 (1) SA 514 (AD). At 533 B-C and at 543 TINDALL JA and SCHREINER JA, respectively stated that this doctrine as elaborated In the English decisions forms no part of the common law though some thing falling short of conduct constituting an estoppel against a Plaintiff may be embraced by the defence known as the *exceptio doli*. But in the instant case it was not

**Copyright Juta & Co Ltd**

contended by Mr *de Bourbon* that there was any act of bad faith or unconscionable conduct on Plaintiff's part which would be necessary to establish that defence. In the circumstances I am satisfied that there is no substance in this defence.

Finally, Mr *de Bourbon*, echoing the prayer contained in paragraph 9 of defendant's replying affidavit, argued that the remedy relied on by Plaintiff amounts to a penalty which is out of proportion to the prejudice suffered by the Plaintiff by reason of the omission in respect of which the penalty was stipulated. Therefore, he continued, it would be incumbent on the Court to exercise its discretion in teens of section 6 of the Conventional Penalties Act [*Chapter 42*] to reduce the penalty to an equitable level. On the papers it appears that defendant has paid, in respect of the purchase price of the property, a deposit of $S 000 and 27 instalments of $66, the total of which is $6 782, and it is in this sum, it would seem, which Plaintiff in paragraph 6 of his particulars of claim, states he has elected to retain as rouwkoop terms of the agreement.

The definition of "penalty stipulation" contained in Chapter 42 reads:

> "'penalty stipulation' means a stipulation whereby it is provided that-
>
> (a) any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform any thing for the benefit of any other person; or
>
> (b) upon withdrawal from an agreement by a party thereto under circumstances specified therein any other party shall forfeit the right to claim restitution of any thing performed by him in terms of the agreement or shall, notwithstanding the withdrawal, remain liable to perform any thing under the agreement;
>
> whether by way of a penalty, liquidated damages or otherwise."



WADDINGTON J

The stipulation in question, providing as it does for the retention of moneys paid in terms of the contract, is one which is enforceable as a penalty stipulation as defined in terms of paragraph (b) of the definition, subject to section 6 of the Act which reads:

> "6. Where it appears to any competent Court that a penalty is out of pro portion to the prejudice suffered by the creditor by reason of the act, omission or circumstances in respect of which the penalty was stipulated, the Court may reduce the penalty to such extent as it may consider equitable in the circumstances:
>
> Provided that, in determining the extent of such prejudice, the Court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or circumstances in question."

The attitude of the Courts hitherto has been that summary judgment proceedings are wholly inappropriate to determine whether a penalty claimed is out of proportion to the prejudice suffered or the extent to which the penalty should be reduced (per HOWARD J, in *Premier Finance Corporation Ltd v Steenkamp* 1974(3) SA 141 at 144A; and see *Commonwealth Shippers Ltd v Jankelow* 1960 (3) SA 669 (W)). In the *Premier Finance Corporation* case HOWARD J, concluded that in summary judgment proceedings it is not possible nor practicable for a Court to decide the questions mentioned in section 6 of Chapter 42 and that in that case accordingly, once the question of penalty was raised the application was bound to fail. I would not be prepared to go so far as to say that this would be the inevitable result in every such case

**Copyright Juta & Co Ltd**

but in this case I would hesitate to find that the defence now under consideration is not *bona fide* although on the merits a Court may find no justification for reducing the penalty. It may be that the forfeiture of $6 782 for nothing more than the occupancy of the premises in question since 1st July, 1978, is unreasonably high and so inequitable as to justify a reduction in the penalty in terms of section 6 of Chapter 42. On the other hand it may not. But this is not a question that is possible to determine at this stage because there are obviously insufficient facts before me which would enable me to assess the reasonable value of the occupancy and any other relevant factors.

Mr *O'Meara,* who appeared for the Plaintiff, argued that Plaintiff in his prayer did not seek the enforcement of a penalty. His argument did not persuasively canvas, however, the question whether the retention as rouwkoop of defendant's payment, including the deposit, constitutes a disproportionate penalty in itself. Mr *O'Meara* referred me to the decision of SQUIRE, J in *Parker v Gibson* G-S-34-80 in support of



his submissions, but the basis of that decision which concerned a situation similar to that in the instant case was that, unlike the present case, the defendant purchaser did not raise the question of penalty on her affidavit, that there was nothing on the papers that gave the slightest idea as to whether the penalty was disproportionate to the prejudice suffered by the creditor and consequently the defendant had not satisfied the Court that the defence represented a triable issue. In the case now under consideration the defendant has expressly raised the issue of penalty *inter alia* in his replying affidavit and prays that the deposit of $5 000 should be refunded to him pursuant to the Court's assessed reduction of the penalty. In summary judgment proceedings, it is not necessary for the Court to determine whether the defence raised is good or the extent to which it may be so, if the defence raised by respondent is shown to be *bona fide*, that is sufficient. There is in my view a *bona fide* dispute as to whether the penalty should be reduced and I am satisfied that there is a triable issue which justifies granting defendant leave to defend.

The application is refused and the defendant is given leave to defend. Costs will be costs in the cause.

*Gollop and Blank* attorneys for the Plaintiff.

*N H Franco and Co* attorneys for the defendant.

Copyright Juta & Co Ltd

## Endnotes

**1 (Popup - Popup)**

Also reported in 1952 SR 45; the page reference cited is page 47.- *Editor*.

**2 (Popup - Popup)**

Also reported in 1973 (1) RL. 356, the passage cited is at page 363.- *Editor*.

**3 (Popup - Popup)**

The judgment is reported in 1979 RLR at 481. - Editor.

**4 (Popup - Popup)**

Before its amendment by section 16 of Act No. 32 of 1979. - *Editor*.

**5 (Popup - Popup)**

Reported in (1976) 63 Cr. App. R  295. -*Editor*.

**6 (Popup - Popup)**

Also reported in 1979 RLR at 374.-*Editor*.

**7 (Popup - Popup)**

The Act was amended by section 10 of Act of 31 of 1978, which inserted subsection (4a) into section 163. - Editor.

**8 (Popup - Popup)**

Van der walt v Van der Walt, 1961 (4) SA 854 (O.). - Editor.

**9 (Popup - Popup)**

The judgment is now reported at page 61 of this volume.-Editor.

**10 (Popup - Popup)**

The passage also appears at pages 63G-65C of this volume.- Editor.

**11 (Popup - Popup)**

Also report in 1975 (1) RLR 69 (AD)-Editor.

**12 (Popup - Popup)**

Facts not material to this report have been omitted.

Copyright Juta & Co Ltd

**13 (Popup - Popup)**

Also report as S v Sambo, 1979 RLR 137.

**14 (Popup - Popup)**

Parts of the judgment not material to this report have been omitted.

**15 (Popup - Popup)**

The names of the children have been deleted.

**16 (Popup - Popup)**

The judgment of which is reported at page 150 of this volume.-Editor.

**17 (Popup - Popup)**

Editors' note: Now reported at page 408 of this volume.

**18 (Popup - Popup)**

facts not material to this report have been omitted.

**19 (Popup - Popup)**

Facts not material to this report have been omitted.

**20 (Popup - Popup)**

*The learned Judge's Ending was overruled by the assessors acting in terms of section* 178 (2) *of the Criminal Procedure and Evidence Act* [*Chapter 59*].

**21 (Popup - Popup)**

Now reported at page 19 of this volume - Editor

**22 (Popup - Popup)**

The judgment of the trial court is reported at page 201 of this volume - Editor.

**23 (Popup - Popup)**

At pages 208E to 209H of this volume - Editor.

**Copyright Juta & Co Ltd**